NORTH CAROLINA REPORTS

VOLUME 212

This book is an exact photo-reproduction of the original Volume 212 of North Carolina Reports that was published in 1938.

Published by
THE STATE OF NORTH CAROLINA
RALEIGH
1973

Reprinted by
COMMERCIAL PRINTING COMPANY
RALEIGH, NORTH CAROLINA

NORTH CAROLINA REPORTS

VOL. 212

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1937

REPORTED BY

ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1938

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:

1 and 2 Martin, Taylor & Conf.	as	1	N. C.
1 Haywood	"	2	"
2 "	"	3	"
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1 Murphey	"	5	"
2 "	"	6	"
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1 " Eq.	"	16	"
2 " "	"	17	"
1 Dev. & Bat. Law	"	18	"
2 " "	"	19	"
3 & 4 " "	"	20	"
1 Dev. & Bat. Eq.	"	21	"
2 " "	"	22	"
1 Iredell Law	"	23	"
2 " "	"	24	"
3 " "	"	25	"
4 " "	"	26	"
5 " "	"	27	"
6 " "	"	28	"
7 " "	"	29	"
8 " "	"	30	"
9 Iredell Law	as	31	N. C.
10 " "	"	32	"
11 " "	"	33	"
12 " "	"	34	"
13 " "	"	35	"
1 " Eq.	"	36	"
2 " "	"	37	"
3 " "	"	38	"
4 " "	"	39	"
5 " "	"	40	"
6 " "	"	41	"
7 " "	"	42	"
8 " "	"	43	"
Busbee Law	"	44	"
" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
6 " "	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
" Eq.	"	62	"

☞ In quoting from the *reprinted* Reports, counsel will cite always the marginal (*i. e.*, the original) paging, 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, 1937.

CHIEF JUSTICE:

W. P. STACY.

ASSOCIATE JUSTICES:

HERIOT CLARKSON,
GEORGE W. CONNOR,
MICHAEL SCHENCK,
WILLIAM A. DEVIN,
M. V. BARNHILL,*
J. WALLACE WINBORNE.*

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:

DILLARD S. GARDNER.†

*Appointed 1 July, 1937, under Ch. 16, Public Laws of 1937.
†Appointed 30 June, 1937, to succeed John A. Livingstone, deceased.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

Name	*District*	*Address*
C. E. Thompson‖	First	Elizabeth City.
Walter J. Bone*	Second	Nashville.
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.
W. H. S. Burgwyn†	Woodland.
Luther Hamilton†	Morehead City.

WESTERN DIVISION

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.
A. Hall Johnston	Nineteenth	Asheville.
Felix E. Alley, Sr.	Twentieth	Waynesville.
E. C. Bivens‡	Twenty-first	Mount Airy.

SPECIAL JUDGES

Frank S. Hill	Murphy.
Sam J. Ervin, Jr.	Morganton.
Hubert E. Olive†	Lexington.

EMERGENCY JUDGES

Thos. J. Shaw¶	Greensboro.
F. A. Daniels	Goldsboro.
T. B. Finley	North Wilkesboro.
P. A. McElroy	Marshall.
Walter L. Small	Elizabeth City.

‖Appointed 1 February, 1937, to succeed Walter L. Small, resigned.
*Appointed 1 July, 1937, to succeed M. V. Barnhill upon his appointment to the Superior Court.
†Appointed 1 July, 1937, under Ch. 72, Public Laws of 1937.
‡Appointed 1 July, 1937, under Ch. 413, Public Laws of 1937.
¶Deceased.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
HERBERT R. LEARY	First	Edenton.
DONNELL GILLIAM	Second	Tarboro.
E. R. TYLER*	Third	Roxobel.
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

J. ERLE MCMICHAEL†	Eleventh	Winston-Salem.
H. L. KOONTZ	Twelfth	Greensboro.
ROWLAND S. PRUETTE	Thirteenth	Wadesboro.
JOHN G. CARPENTER	Fourteenth	Gastonia.
CHARLES L. COGGIN	Fifteenth	Salisbury.
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.
ALLEN H. GWYN	Twenty-first	Reidsville.

*Succeeded W. H. S. Burgwyn upon his appointment to the Superior Court.
†Appointed 1 July, 1937, under Ch. 413, Public Laws of 1937.

LICENSED ATTORNEYS

FALL TERM, 1937.

List of applicants granted law license by the North Carolina Board of Law Examiners at Raleigh, N. C., 27 August, 1937:

ALEXANDER, HUGH QUINCEY.....Kannapolis.
ANDERSON, OMAR LEE.....Hayesville.
AVANT, EDWARD RICHARD.....Durham.
BADGETT, JOHN EDWARD.....Pilot Mountain.
BEAMAN, JOHN WILLIAM.....Tarboro.
BLYTHE, JOSEPH DUDLEY.....Harrellsville.
BRANCH, JOSEPH.....Enfield.
BRITT, DAVID MAXWELL.....McDonald.
BRITT, WALTER THOMSON.....Turkey.
BROWN, ELBERT AUTIWAY.....Wilmington.
BULLARD, VON CLINE, JR.....Fayetteville.
BUNN, JAMES PHILIPS, JR.....Rocky Mount.
BURKE, MELVIN HUDSON.....Spencer.
CARTER, WILLIAM BAKER.....Washington.
CHEARS, VACHEL THOMAS, JR.....Edenton.
COBB, OWEN FENNELL.....Asheville.
COBURN, RUFUS THEODORE, JR.....Raleigh.
COOKE, VICTOR RAYMOND.....Asheville.
CRUTCHFIELD, EDWARD ELLIOTT.....Albemarle.
DAVIS, RALPH.....Purlear.
DUNN, MARK STEVENSON.....New Bern.
ELLIS, ALBERT JOSEPH.....New Bern.
FARTHING, JAMES COLLY.....Lenoir.
FRANKLIN, JULIAN CLYDE.....High Point.
FREEMAN, FRANKLIN EDWARD.....Dobson.
GEORGE, MARVIN TRYON.....Four Oaks.
GLIDEWELL, POWELL WATKINS, JR.....Reidsville.
GODWIN, ADOLPHUS PILSTON, JR.....Gatesville.
GOLD, CHARLES FORTUNE, JR.....Rutherfordton.
GRADY, PAUL DAVIS, JR.....Kenly.
GRIFFIN, CLARENCE WALTON.....Williamston.
HARRIS, WILLIAM CLINTON, JR.....Raleigh.
HAYNES, EDWIN MCCRACKEN.....Canton.
HEAD, JAY PAUL.....Caroleen.
HENDERSON, DAVID HENRY.....Charlotte.
HIGBY, JOHN BALDWIN.....Chapel Hill.
HINES, HORACE.....Black Mountain.
HOLT, WINFIELD CLARY.....Greensboro.
HOLTON, WALTER CLINTON.....Winston-Salem.
HUDSON, HENRY PITTS.....Salisbury.
HULSE, HERBERT BRUCE.....Carthage.
HUTCHISON, LAURA JOSEPHINE.....Charlotte.
HUX, GEORGE AUSTIN.....Halifax.
IVEY, CHARLES MARSHALL, JR.....Concord.
JACOBSON, ISRAEL HARRY.....Winston-Salem.
JARRELL, HARRISS HASSELL.....High Point.

JEFFRESS, ALONZO HASSELL.....Kinston.
JENKINS, FLOYD GAITHER.....Winston-Salem.
JOHNSON, DON ELPHONSA.....Williamston.
JOHNSON, IRA EDWARD.....Thomasville.
JONES, WOODROW WILSON.....Union Mills.
JUSTICE, ROBERT BURTON.....Charlotte.
KEEL, JAMES WALTER, JR.....Rocky Mount.
KELL, DAVID FRANKLIN.....Clinton.
KILLIAN, JOSEPH HOWARD.....Charlotte.
LADU, ARTHUR IRISH.....Raleigh.
LEVINSON, MARTIN.....Waterbury, Conn.
LINER, DE BRAYDA FISHER (MRS.).....Waynesville.
LUMPKIN, JAMES PARKER.....Raleigh.
LYBROOK, WILLIAM REYNOLDS.....Advance.
MALLONEE, JAMES DAVID, JR.....Murphy.
MANNING, HOWARD EDWARDS.....Chapel Hill.
MARKHAM, DONALD WILLIAM.....Chapel Hill.
MARTIN, ROBERT MCKINNEY, JR.....Conway.
MASON, JAMES IRVING.....Asheville.
MATTHEWS, JOHN FREDERICK.....Louisburg.
MERCER, GRADY.....Beulaville.
MICKEY, PAUL FOGLE.....Winston-Salem.
MOORE, EDWARD CLAYTON, JR.....Wilmington.
MORGAN, EDWARD ALFORD.....Marion.
MULLISS, WILLIAM FREDERICK.....Charlotte.
MACDIARMID, HUGH STUART.....Detroit, Michigan.
MACDOWELL, MCNEELY DUBOSE.....Gaffney, S. C.
MCCLELLAND, GLENN JAMES.....Wilmington.
MCCONNELL, JOHN DANIEL.....Durham.
MCGUIRE, WALTER RALEIGH.....Asheville.
MCNEILL, JAMES KINARD.....West Asheville.
NEVILLE, BEN HOLLAND.....Whitakers.
OSBORNE, JAMES WILLIAM.....Shelby.
PARKS, HERBERT.....Greensboro.
PASCHALL, FRANCIS CALTON.....Middleburg.
PAYNE, NORMAN HANZRELL.....West Asheville.
PEARCE, OSCAR ALLAN.....Charlotte.
PHILLIPS, CAROLINE MARY.....Lexington.
PICKLESIMER, EDISON ARCHIBALD.....Highlands.
PIERCE, LUTHER TALMAGE.....Black Mountain.
PITTMAN, JOE BRYAN.....Whitakers.
POWELL, WILLIE GRAY.....Henderson.
QUEEN, JAMES SHOOK.....Waynesville.
RAMSEY, SAMUEL GILMORE, JR.....Wake Forest.
RANCKE, HENRY CHARLES, JR.....Rockingham.
REGAN, JOHN B.....St. Paul.
RIDDLE, HARRY LEE, JR.....Morganton.
RODMAN, WILLIAM BLOUNT.....Washington.
RUFTY, ARCHIBALD CALDWELL.....Salisbury.
SANDERSON, KARLIE CLIFFORD.....Wallace.
SCALES, ARCHIBALD HENDERSON, II.....Chapel Hill.
SLUDER, CLARENCE TALMADGE.....Asheville.
SMITH, EMMA LEE.....Durham.
SMITH, HERMAN CONWAY.....Asheville.
SMITHWICK, ROBERT EARL.....Blount's Creek.

SNYDER, JAMES EUGENE.....Lexington.
STILLWELL, DAVID SILER.....Cullowhee.
THOMAS, J. MAX.....Marshville.
TROXLER, THERMAN JOSEPH.....Elon College.
UNDERWOOD, SAMUEL BOBBITT, JR.....Greenville.
VAN LANDINGHAM, RUSSELL FAISON.....Scotland Neck.
VAN NOPPEN, LEONARD HAMPTON.....Madison.
VERNER, JAMES MELTON.....Asheville.
WATSON, FRANK HAMPTON.....Burnsville.
WEAVER, JOHN BUXTON.....Rich Square.
WELLONS, JAMES ANDREW, JR.....Smithfield.
WELLS, REEVES HERMAN.....Leicester.
WHICKER, JOSEPH HUBERT, JR.....North Wilkesboro.
WHITE, ROBERT BRUCE, JR.....Wake Forest.
WHITENER, BASIL LEE.....Gastonia.
WHITSETT, WILLIAM THORNTON.....Whitsett.
WILHELM, CHARLES LEO.....Salisbury.
WILSON, GEORGE WOOD, JR.....Charlotte.

COMITY LICENSEES.

BOONE, DANIEL F.....Winston-Salem from Texas.
GWATHMEY, RICHARD B.....Wilmington from Virginia.
MCCASLIN, WALTER W.....Charlotte from District of Columbia.
POTEAT, JAMES DOUGLASS.....Durham from South Carolina.
BROWN, THOMAS E.....Tryon from District of Columbia.
HANFT, FRANK W.....Chapel Hill from Minnesota.
WRIGHT, DEWITT.....Durham from Illinois.

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 27, 1937.

Witness my hand and seal, this the 31st day of August, 1937.

[SEAL] H. M. LONDON, *Secretary.*

SUPERIOR COURTS, FALL TERM, 1937

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

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Fall Term, 1937—Judge Parker.

Beaufort—Sept. 20* (A); Sept. 27†; Oct. 11†; Nov. 8* (A); Dec. 6†.
Camden—Oct. 4.
Chowan—Sept. 13; Dec. 13.
Currituck—Sept. 6.
Dare—Oct. 25.
Gates—Nov. 22.
Hyde—Aug. 16†; Oct. 18.
Pasquotank—Sept. 20†; Oct. 11† (A) (2); Nov. 8†; Nov. 15*.
Perquimans—Nov. 1.
Tyrrell—Oct. 4 (A).

SECOND JUDICIAL DISTRICT

Fall Term, 1937—Judge Williams.

Edgecombe—Sept. 13; Oct. 18†; Nov. 15† (2).
Martin—Sept. 20 (2); Nov. 22† (A) (2); Dec. 13.
Nash—Aug. 30; Sept. 20† (A) (2); Oct. 11†; Nov. 29*; Dec. 6†.
Washington—July 12; Oct. 25†.
Wilson—Sept. 6; Oct. 4†; Nov. 1† (2); Dec. 6 (A).

THIRD JUDICIAL DISTRICT

Fall Term, 1937—Judge Frizzelle.

Bertie—Aug. 30; Nov. 15 (2).
Halifax—Aug. 16 (2); Oct. 4† (A) (2); Oct. 25* (A); Nov. 29 (2).
Hertford—July 26; Oct. 18*; Oct. 25†.
Northampton—Aug. 2; Nov. 1 (2).
Vance—Oct. 4*; Oct. 11†.
Warren—Sept. 20 (2).

FOURTH JUDICIAL DISTRICT

Fall Term, 1937—Judge Grady.

Chatham—Aug. 2† (2); Oct. 25.
Harnett—Sept. 6*; Sept. 20†; Oct. 4† (A) (2); Nov. 15* (2).
Johnston—Aug. 16*; Sept. 27† (2); Oct. 18 (A); Nov. 8† (A) (2); Dec. 13 (2).
Lee—July 19 (2); Nov. 1† (2).
Wayne—Aug. 23; Aug. 30†; Sept. 6† (A); Oct. 11† (2); Nov. 29 (2).

FIFTH JUDICIAL DISTRICT

Fall Term, 1937—Judge Harris.

Carteret—Oct. 18; Dec. 6†.
Craven—Sept. 6*; Oct. 4† (2); Nov. 22† (2).
Greene—Dec. 6 (A); Dec. 13 (2).
Jones—Sept. 20; Dec. 6 (A).
Pamlico—Nov. 8 (2).
Pitt—Aug. 23†; Aug. 30; Sept. 13†; Sept. 27†; Oct. 25†; Nov. 1; Nov 22† (A).

SIXTH JUDICIAL DISTRICT

Fall Term, 1937—Judge Cranmer.

Duplin—July 26*; Aug. 30† (2); Oct. 4*; Dec. 6† (2).
Lenoir—Aug. 23; Sept. 27†; Oct. 18; Nov. 8† (2); Dec. 13 (A).
Onslow—July 19‡; Oct. 11; Nov. 22† (2).
Sampson—Aug. 9 (2); Sept. 13† (2); Oct. 25† (2).

SEVENTH JUDICIAL DISTRICT

Fall Term, 1937—Judge Sinclair.

Franklin—Sept. 6†; Sept. 13† (A); Oct. 18*; Nov. 15† (2).
Wake—July 12*; Aug. 30†; Aug. 30 (A) (2); Sept. 6† (A); Sept. 13*; Sept. 20 (2); Sept. 27 (A); Oct. 4†; Oct. 11† (A) (2); Oct. 11*; Oct. 25† (2); Nov. 1 (A); Nov. 8† (A) (3); Nov. 8*; Nov. 15 (A) (2); Nov. 29† (2); Dec. 13† (A) (2); Dec. 13* (2).

EIGHTH JUDICIAL DISTRICT

Fall Term, 1937—Judge Spears.

Brunswick—Sept. 6†; Oct. 4.
Columbus—Aug 23 (2); Oct. 11*; Nov. 22† (2).
New Hanover—July 26*; Sept. 13*; Sept. 20†; Oct. 18† (2); Nov. 15*; Dec. 6† (2).
Pender—July 19; Nov. 1 (2).

NINTH JUDICIAL DISTRICT

Fall Term, 1937—Judge Small.

Bladen—Aug. 9†; Sept. 20*.
Cumberland—Aug. 30*; Sept. 27† (2); Oct. 25† (2); Nov. 22* (2).
Hoke—Aug. 23; Nov. 15.
Robeson—July 12†; Aug. 16*; Sept. 6* (2); Sept. 27* (A); Oct. 11† (2); Oct. 25* (A); Nov. 8*; Dec. 6† (2); Dec. 20*.

TENTH JUDICIAL DISTRICT

Fall Term, 1937—Judge Bone.

Alamance—Aug. 2†; Aug. 16*; Sept. 6† (2); Nov. 15† (A) (2); Nov. 29*.
Durham—July 19*; Sept. 6* (A); Sept. 13† (A); Sept. 20† (2); Oct. 11*; Oct. 25† (A); Nov. 1† (2); Dec. 6*.
Granville—July 26; Oct. 25†; Nov. 15 (2).
Orange—Aug. 23; Aug. 30†; Oct. 4†; Dec. 13.
Person—Aug. 9; Oct. 18.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Fall Term, 1937—Judge Bivens.

Ashe—July 26† (2); Oct. 25*.
Alleghany—Sept. 27.
Forsyth—July 12 (2); Sept. 6 (2); Sept. 20†; Sept. 27† (A); Oct. 11 (2); Oct. 25† (A); Nov. 1†; Nov. 8 (2); Nov. 22† (2); Dec. 6 (2).

TWELFTH JUDICIAL DISTRICT

Fall Term, 1937—Judge Harding.

Davidson—Aug. 23*; Sept. 13†; Sept. 20† (A); Oct. 4† (A) (2); Nov. 22 (2).
Guilford—July 12*; Aug. 2*; Aug. 9† (2); Aug. 30† (2); Sept. 20* (2); Sept. 20† (A) (2); Oct. 4† (2); Oct. 25*; Nov. 1† (2); Nov. 15*; Nov. 22† (A) (2); Dec. 20*.

THIRTEENTH JUDICIAL DISTRICT

Fall Term, 1937—Judge Armstrong.

Anson—Sept. 13†; Sept. 27*; Nov. 15†.
Moore—Aug. 16*; Sept. 20†; Sept. 27† (A); Dec. 13†.
Richmond—July 19†; July 26*; Sept. 6†; Oct. 4*; Nov. 8†.
Scotland—Aug. 9; Nov. 1†; Nov. 29 (2).
Stanly—July 12; Sept. 6† (A) (2); Oct. 11†; Nov. 22.
Union—Aug. 2*; Aug. 23† (2); Oct. 18† (2).

FOURTEENTH JUDICIAL DISTRICT

Fall Term, 1937—Judge Warlick.

Gaston—July 26*; Aug. 2† (2); Sept. 13* (A); Sept. 20† (2); Oct. 25*; Nov. 29* (A); Dec. 6† (2).
Mecklenburg—July 12* (2); July 12* (A) (2); July 26* (A) (2); Aug. 9* (A) (2); Aug. 30† (A) (2); Aug. 30*; Sept. 6† (2); Sept. 13† (A) (2); Sept. 27† (A) (2); Oct. 4*; Oct. 11† (A) (2); Oct. 11† (2); Oct. 25† (A) (2); Nov. 1† (2); Nov. 8† (A) (2); Nov. 15*; Nov. 22† (A) (2); Nov. 22† (2); Dec. 6* (A) (2); Dec. 6† (A) (2).

FIFTEENTH JUDICIAL DISTRICT

Fall Term, 1937—Judge Rousseau.

Alexander—Aug. 30 (A) (2).
Cabarrus—Aug. 23*; Aug. 30†; Oct. 18 (2).
Iredell—Aug. 2 (2); Nov. 8 (2).
Montgomery—July 12; Sept. 27†; Oct. 4; Nov. 1†.
Randolph—July 19† (2); Sept. 6*; Dec. 6 (2).
Rowan—Sept. 13 (2); Oct. 11†; Oct. 18† (A); Nov. 22 (2).

SIXTEENTH JUDICIAL DISTRICT

Fall Term, 1937—Judge Pless.

Burke—Aug. 9 (2); Sept. 27† (3); Dec. 13 (2).
Caldwell—Aug. 23 (2); Nov. 29 (2).
Catawba—July 5 (2); Sept. 6† (2); Nov. 15*; Nov. 22†; Dec. 6† (A).
Cleveland—July 26 (2); Sept. 13† (A) (2); Nov. 1 (2).
Lincoln—July 19; Oct. 18† (2).
Watauga—Sept. 20.

SEVENTEENTH JUDICIAL DISTRICT

Fall Term, 1937—Judge Johnston.

Avery—July 5*; July 12† (2); Oct. 18*; Oct. 25†.
Davie—Aug. 30; Dec. 6†.
Mitchell—July 26† (2); Sept. 20 (2).
Wilkes—Aug. 9 (2); Oct. 4† (2); Nov. 1† (2).
Yadkin—Aug. 23*; Dec. 13† (2).

EIGHTEENTH JUDICIAL DISTRICT

Fall Term, 1937—Judge Alley.

Henderson—Oct. 11 (2); Nov. 22† (2).
McDowell—July 12† (2); Sept. 6 (2).
Polk—Aug. 23 (2).
Rutherford—Sept. 27† (2); Nov. 8 (2).
Transylvania—July 26 (2); Dec. 6 (2).
Yancey—Aug. 9 (2); Oct. 25† (2).

NINETEENTH JUDICIAL DISTRICT

Fall Term, 1937—Judge Clement.

Buncombe—July 12† (2); July 26; Aug. 2† (2); Aug. 16; Aug. 30; Sept. 6† (2); Sept. 20; Oct. 4† (2); Oct. 18; Nov. 1† (2); Nov. 15; Nov. 29; Dec. 6† (2); Dec. 20.
Madison—Aug. 23; Sept. 27; Oct. 25; Nov. 22.

TWENTIETH JUDICIAL DISTRICT

Fall Term, 1937—Judge Sink.

Cherokee—Aug. 9 (2); Nov. 8 (2).
Clay—Nov. 1 (A).
Graham—Sept. 6 (2).
Haywood—July 12 (2); Sept. 20† (2); Nov. 22 (2).
Jackson—Oct. 11 (2).
Macon—Aug. 23 (2); Dec. 6 (2).
Swain—July 26 (2); Oct. 25 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Fall Term, 1937—Judge Phillips.

Caswell—July 5; Nov. 15 (2).
Rockingham—Aug. 9 (2); Sept. 6 (2); Oct. 25; Nov. 1 (2); Nov. 29† (2); Dec. 13*.
Stokes—Aug. 23; Oct. 11*; Oct. 18†.
Surry—July 12† (2); Sept. 20*; Sept. 27† (2); Dec. 20*.

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*For criminal cases.
†For civil cases.
‡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, first Monday after the fourth Monday in April and October; civil term, second Monday in March and September. THOMAS DIXON, Clerk.

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

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

Washington, fourth Monday after the first Monday in March and September. J. B. RESPASS, Deputy Clerk, Washington.

New Bern, fifth Monday after the first Monday in March and September. GEORGE GREEN, Deputy Clerk, New Bern.

Wilson, sixth Monday after the first Monday in March and September. G. L. PARKER, Deputy Clerk.

Wilmington, seventh Monday after the first Monday in March and September. PORTER HUFHAM, Deputy Clerk, Wilmington.

OFFICERS

J. O. CARR, United States District Attorney, Wilmington.
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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1937

RUFUS D. ROBERTS v. AMERICAN ALLIANCE INSURANCE COMPANY.

(Filed 22 September, 1937.)

1. **Insurance § 22d—**

The requirement of "unconditional and sole ownership" in a policy of fire insurance in the standard form as required by C. S., 6437, is statutory as well as contractual.

2. **Partition § 9—Parol partition by tenants in common is conclusive as to strangers.**

Where tenants in common have the land surveyed pursuant to a parol partition, and a plat made thereof, and divided, and each goes into possession of the part allotted to him, claiming same in severalty, the partition is good as among the tenants unless the statute of frauds be invoked and relied on as a defense, and as strangers may not take advantage of the statute, as to them each tenant is the sole and unconditional owner of his part.

3. **Insurance § 22d—**

Where tenants in common divide the land by parol partition and each goes into possession of his share, claiming same in severalty, each has sole and unconditional ownership of his share within the meaning of the provision in the standard form fire insurance policy.

4. **Same—Condition in fire policy that insured have sole and unconditional ownership will be construed rationally.**

The provision in a policy of fire insurance that insured have sole and unconditional ownership of the property will not be construed technically to the prejudice of the policyholder, but rationally to protect insurer

from extraordinary risks, and the provision of the policy is satisfied if insured is in exclusive possession of the entire estate under claim of right, without assertion of adverse title by another, and insurer has not been misled and its rights in no way adversely affected.

5. Insurance § 13—

An insurance policy, having been written by insurer, will be liberally construed in favor of insured, but its plain, unambiguous terms must be given effect.

APPEAL by defendant from *Williams, J.*, at April Term, 1937, of CURRITUCK.

Civil action to recover on a policy of fire insurance.

The policy in suit was issued by defendant to plaintiff, 8 August, 1936, on dwelling, tenant house, barn and contents, situate on plaintiff's farm in Currituck County. The insured property was destroyed by fire 24 August, 1936.

Defendant denies liability under a clause in the policy which provides: "This entire policy shall be void, unless otherwise provided by agreement in writing added thereto, (a) if the interest of the insured be other than unconditional and sole ownership."

The facts relative to plaintiff's ownership of the property are that on 22 March, 1924, plaintiff and his brother, Oscar F. Roberts, purchased 37 acres of land in Currituck County and took title to the same as tenants in common. On 8 July, 1932, pursuant to parol partition, the property was surveyed, plat made thereof, and divided, the plaintiff being allotted the southern part, upon which he had erected, at his own expense, the houses and barn in question, and his brother being allotted the northern part. Thereafter, each occupied and claimed his respective share in severalty.

From directed verdict and judgment for plaintiff, the defendant appeals, assigning errors.

M. B. Simpson and R. Clarence Dozier for plaintiff, appellee.
J. M. Broughton and Chester R. Morris for defendant, appellant.

STACY, C. J. The policy in suit is in the standard form as prescribed by C. S., 6437. The requirement of "unconditional and sole ownership" is statutory, *Black v. Ins. Co.*, 148 N. C., 169, 61 S. E., 672, 21 L. R. A. (N. S.), 578, as well as contractual. *Weddington v. Ins. Co.*, 141 N. C., 234, 54 S. E., 271. Its validity is not mooted on the present record. *Johnson v. Ins. Co.*, 201 N. C., 362, 160 S. E., 454; *Hardin v. Ins. Co.*, 189 N. C., 423, 127 S. E., 353; *Roper v. Ins. Co.*, 161 N. C., 151, 76 S. E., 869; *Bank v. Ins. Co.*, 187 N. C., 97, 121 S. E., 37; *McIntosh v. Ins. Co.*, 152 N. C., 50, 67 S. E., 45; *Hayes v. Ins. Co.*, 132 N. C., 702, 44 S. E., 404.

Is plaintiff's interest or ownership in the property sole and unconditional within the meaning of the policy? We think the trial court correctly answered the question in the affirmative. *Kenton Ins. Co. v. Wigginton,* 89 Ky., 330, 7 L. R. A., 81.

Plaintiff is in the exclusive use and enjoyment of the property under claim of right. *Modlin v. Ins. Co.,* 151 N. C., 35, 65 S. E., 605. His title to the part allotted to him in partition is good as against his brother (*Collier v. Paper Corp.,* 172 N. C., 74, 89 S. E., 1006), unless the statute of frauds be invoked or relied upon as a defense, and a stranger to the transaction, such as the defendant, can take no advantage of the statute. *Cowell v. Ins. Co.,* 126 N. C., 684, 36 S. E., 184; 26 C. J., 173. Hence, in the present action, as against the defendant, it is proper to say he is the sole and unconditional owner thereof. Such was the plaintiff's understanding when he took out the insurance, and he alone has suffered loss by the destruction of the property. *Valenti v. Imperial Assur. Co.,* 176 Atl., 413. It is not thought that he must show title absolutely good against the world. *Crider v. Simmons,* 96 S. W. (2d), 471. It is enough if his interest be sole and unconditional in the generally accepted sense. *Bardwell v. Com. Union Assur. Co.,* 105 Vt., 106, 163 Atl., 633. The plaintiff had no misgivings as to his complete ownership in the property when applying for the insurance, and his failure to express a doubt when none existed in his own mind ought not to be held against him. The defendant assumed the risk which it intended. It has not been misled, and its rights have in no way been affected by the matter now presented. *Atlas Fire Ins. Co. v. Malone,* 99 Ark., 428.

It is held by courts of recognized authority, and our own decisions point in the same direction, that where one is in the exclusive use and enjoyment of the entire estate, under claim of right, without assertion of adverse title by another, his interest is properly described as sole and unconditional ownership, within the meaning of a policy of insurance containing such provision, although his title may be defective in some particular. *Modlin v. Ins. Co., supra; Jordan v. Ins. Co.,* 151 N. C., 341, 66 S. E., 206; *Lancaster v. Ins. Co.,* 153 N. C., 285, 69 S. E., 214; *Western Assur. Co. v. Hughes,* 179 Okla., 254, 66 Pac. (2d), 1056; 14 R. C. L., 1052, *et seq.* See annotation, L. R. A., 1918 E, 375.

In *Hankins v. Williamsburg City Fire Ins. Co.,* 96 Kan., 706, 153 Pac., 491, L. R. A., 1918 E, 373, Ann. Cas., 1918 C, 135, it was held (as stated in syllabus, which accurately digests opinion): "A fire insurance policy upon a building, containing a stipulation that the policy 'shall be void . . . if the interest of the insured be other than unconditional and sole ownership,' is not invalidated because of an outstanding naked legal title in another where the insured has the equitable title, the entire beneficial ownership of the property, and is in undisputed possession of the same."

Again, in *American Basket Co. v. Farmville Ins. Co.,* 1 Fed. Cas. No. 290, p. 618, it appeared that the beneficial title was in the insured, a foreign corporation, but that the legal title was carried in the name of one of its officers because of a statute forbidding the ownership of realty by a foreign corporation: *Held,* the requirement of "entire, unqualified, and sole" ownership for insured's "own use and benefit" satisfied, notwithstanding naked legal title in another.

In disposing of the case, the following pertinent animadversions were made on the subject: "Policies of insurance, like all other written contracts, must be construed and enforced according to their terms. If they convey a plain, practical meaning, that meaning must be carried into effect. Policies of insurance differ somewhat from other contracts, however, in respect to the rules of construction to be applied to them. They are unipartite. They are in the form of receipts from insurers to the insured, embodying covenants to compensate for losses described. They are signed by the insurer only. In general, the insured never sees the policy until after he contracts and pays his premium, and he then most frequently receives it from a distance, when it is too late for him to obtain explanations or modifications of the policy sent him. The policy, too, is generally filled with conditions inserted by persons skilled in the learning of the insurance law and acting in the exclusive interest of the insurance company. Out of these circumstances the principle has grown up in the courts that these policies must be construed liberally in respect to the persons insured, and strictly with respect to the insurance company. See *Insurance Co. v. Wilkinson,* 13 Wall. (80 U. S.), 232.

"Another rule of the law in regard to fire insurance is to discourage wager policies; that is to say, policies taken by persons who have no interest in the property insured, and in which such persons merely bet that the property will not be burned. Such insurances are contrary to public policy and promote fires. The law will, therefore, give force to all provisions in policies of fire insurance which require that the person who takes out the policy shall have an interest in the property, and shall disclose that interest with precision in his 'application' for insurance. That is the purpose of the law, and is the object sought to be subserved by the insertion of clauses voiding them in cases where deception is practiced in regard to the real ownership of the property insured; and terminating them whenever, during the period of insurance, the person holding a policy ceases to own the property, and it becomes thereby a wager policy. Therefore, clauses in policies requiring a truthful statement of the interest of the applicant for insurance, and forbidding changes of ownership during the period of insurance, are to be construed not technically to the prejudice of the policyholder, but

rationally and fairly to protect the insurance company from the extraordinary risks, and from the certain and numerous losses which would fall upon them from insurance of property not actually owned by the persons insured.

"In the case under trial there are two questions, which have formed the subject of contention between counsel, and upon which instructions are asked of the court.

"1. The first is, whether plaintiffs' right to recover is defeated by the fact that the record-title could not be held by the plaintiffs under the laws of Delaware, and was therefore vested in Mr. Orrin E. North, if not made known to the defendant or its agent at the time of the insurance (issuance) of the policy, considered in connection with the statement in the application for insurance that the title was 'in the name of' the plaintiffs. I am of opinion that it is not defeated by that fact if the plaintiffs were the 'entire, unqualified, and sole owners' of the property insured 'for their own use and benefit.' I do not think that the fact of the record-title being in Mr. North of itself defeats their right to recover, unless their statement in the application was made to deceive and mislead the insurance company. The evil sought to be avoided by those provisions of the policy requiring a correct statement of the plaintiffs' interest in the property was the insurance of property not owned by the holder of the policy, the destruction of which would not cause a loss to that holder equal to the value of the property destroyed. If the plaintiffs in the case at bar were the owners of the entire beneficial interest in the property at the taking out of the policy, and would have been losers to the full extent of its value if it had been destroyed, then this ownership fulfilled every purpose which the provisions of the policy in regard to a disclosure of interest were designed to secure, and, in the absence of fraud or fraudulent misrepresentation, a merely technical difference in the title, set out in the application, ought not in equity and good conscience to defeat the plaintiffs, if they are otherwise entitled to recover."

To like effect is the decision in *McCoy v. Iowa State Ins. Co.*, 107 Ia., 80, 77 N. W., 529, where it was held that since the condition referred to the interest of the insured and not to his title, the fact that the naked legal title was in another would not invalidate the policy, the insured being the beneficial owner at the time of the issuance of the policy.

On the whole, it is concluded that the correct result was reached in the court below. The verdict and judgment will be upheld.

No error.

SYBAL BRYANT, MARTHA BRYANT, FANNIE BRYANT, AND PERRY BRYANT, JR., BY THEIR NEXT FRIEND, C. H. LEGGETT, *v.* PERRY BRYANT AND ARTHUR J. BRYANT.

(Filed 22 September, 1937.)

1. **Parent and Child § 5—Minor children may not maintain action against father for past support furnished by another.**

Where the personal estate of minor children has not been invaded for their support, but such support has been furnished by their mother and her family, the children may not maintain an action by their next friend against their father for such past support, such right of action being in those who furnished the support, and since they are not his creditors for the support furnished them, they may not attack his conveyance of his property as being in fraud of their rights.

2. **Fraudulent Conveyances § 10—Presumption under C. S., 1005, arises only in favor of creditors of grantor at time of conveyance.**

Minor children are not creditors of their father for their past support furnished them by another, and for which their personal estate was not invaded, and a conveyance executed by him prior to the institution of their action may not be set aside by them under C. S., 1005.

3. **Fraudulent Conveyances § 12—Evidence of fraud in execution of deed held insufficient to be submitted to the jury.**

In this action by minor children against their father for support and to set aside a conveyance executed by him prior to the institution of the action, the evidence *is held* insufficient to be submitted to the jury on the issue of actual fraud in the execution of the instrument, or that the grantee knew and participated in the alleged fraud.

4. **Parent and Child § 5—Minor children may maintain action against their father to compel him to provide for their future support.**

Abandoned minor children may maintain an action by their next friend to compel their father to provide for their future support, and where their complaint prays such relief, but the case is tried solely on the question of their right to past support, and the judgment in their favor on this issue is not sustained on appeal for that the evidence shows that their past support was furnished by another and was not paid for from their personal estate, the cause should be retained for trial upon their right to recover future support.

THIS is a civil action, tried before *Frizzelle, J.*, and a jury, at the March-April Term, 1937, of EDGECOMBE.

The plaintiffs, aged 16, 15, 12 and 9 years of age, respectively, are the infant children of the defendant Perry Bryant and his former wife, Myrtle Bryant, now Mrs. W. B. Knox, and this action is instituted to recover for the support of said infants prior to the institution of the action and for future support. The plaintiffs likewise seek to annul

a deed from the defendant Perry Bryant to the defendant Arthur J. Bryant upon the allegation that said deed was executed in fraud of the plaintiffs' rights.

Issues were submitted to the jury and answered as follows:

"1. Did the defendant Perry Bryant willfully abandon and desert his minor children, as alleged in the complaint? Answer: 'Yes.'

"2. Did the defendant Perry Bryant convey his interest in the land described in the complaint with intent to defraud his minor children and wrongfully escape his obligation to support them? Answer: 'Yes.'

"3. If so, did the defendant Arthur J. Bryant participate in said fraudulent scheme by accepting the conveyance of said premises from his codefendant, Perry Bryant, with knowledge of the purpose and intent of said Perry Bryant to defraud his minor children and to escape his obligation to support them? Answer: 'Yes.'

"4. What amount, if any, are the plaintiffs entitled to recover of the defendant Perry Bryant? Answer: '$800.00.' "

From judgment upon the verdict in favor of the plaintiffs, the defendants appealed.

George M. Fountain & Son and Herbert H. Taylor, Jr., for plaintiffs, appellees.

H. H. Philips for defendants, appellants.

BARNHILL, J. The evidence in this cause, considered in the light most favorable to the plaintiffs, tends to show: That the defendant Perry Bryant and his wife, Myrtle Bryant, separated in 1927; that in April, 1929, the defendant Perry Bryant was convicted under a warrant charging him with abandonment and nonsupport of his wife and children; that judgment was entered requiring said defendant to pay to the use of his wife and children $25.00 per month until the sum of $500.00 was paid; that since the year 1930 Perry Bryant has not made any contribution towards the support of his said children except that the plaintiff Madeline Bryant has been living with him for a short period; and that the mother of said children and members of her family have supported the plaintiffs during said period, except for the time Madeline Bryant has lived with her father and Sybal Bryant, now married, has lived with her husband; that in the spring of 1936 the plaintiffs, through their next friend, instituted a similar suit against Perry Bryant, now a resident of California; that in said suit constructive service of process was attempted without attachment; that while this former suit was pending Perry Bryant returned to North Carolina and executed a deed for the premises in controversy to his brother, the defendant Arthur J. Bryant, for a recited consideration of $100.00 and other valuable con-

siderations; that the grantors in said paper writing did not go before the clerk of the court, or a notary public, or a justice of the peace, who were convenient to the office of the lawyer who wrote the deed, but instead went before a notary public some distance away and acknowledged the execution of same; that while said former action was pending and before the execution of said deed, counsel for the plaintiff had a conversation with the defendant Arthur J. Bryant, in which he advised the said Bryant that he was seeking to have the lands of the defendant Perry Bryant in Edgecombe County subjected to the payment of reasonable support for the plaintiffs, and further advised him that an action was pending for that purpose; that when Perry Bryant returned to North Carolina he did not make any effort to see his children and made no contribution to their support; that the consideration for the execution of said deed was $100.00 cash, the cancellation of a $300.00 debt, which was barred by the statute of limitations, and the assumption by Arthur J. Bryant of the balance due on a testamentary charge against the interest of Perry Bryant in said land after first crediting said charge with the proceeds of Perry Bryant's interest in the personal estate of his father.

The former suit was dismissed for defective service of summons and this action was instituted.

While the plaintiffs, in their complaint, seek to recover for future support, as well as for past support, an examination of the record discloses that the jury attempted to award compensation for support up to the date of the trial only. The court, in its charge, called the attention of the jury to the fact that the plaintiffs were seeking to recover $750.00 compensation for support up to the date of the institution of the action, and in that connection instructed them that a computation upon the basis of the evidence would exceed $750.00, but that the jury was restricted to the amount plaintiffs prayed for in their complaint. He further instructed the jury that the plaintiffs were seeking to recover $5.00 per month each for the two then living with their mother, since the filing of the complaint. This would make $10.00 per month, and the cause was tried approximately five months after the institution of the action. Thus, it is apparent the jury allowed $750.00 for support to the date of the institution of the action and $50.00 for support from the date of the institution of the action to the date of trial, making the total of $800.00, which was the answer to the fourth issue.

The complaint as filed was not sufficient to bring the action within the terms of C. S., 1005. During the trial plaintiffs were permitted to amend the complaint so as to incorporate sufficient allegations to bring the action within the terms of that statute. During the progress of the

trial, in his charge to the jury, the trial judge instructed the jury, in effect, that the plaintiffs had failed to bring their cause of action within the terms of C. S., 1005, and the issues were submitted to the jury upon the theory that the plaintiffs were required to show actual fraud as contemplated by the original complaint.

Treating this cause as if it was, or should have been, submitted to the jury under the terms of C. S., 1005, giving the plaintiffs the benefit of such presumption of fraud as might arise upon the evidence that the defendant Perry Bryant had conveyed the land in controversy to a near relative, plaintiffs' action must fail for the reason that they have not established the fact that they were creditors of the defendant Perry Bryant at the time of the institution of the action. Such support as they had received had come from their mother and members of her family. Their personal estates had not been invaded to pay any part of the cost of their maintenance. The cause of action, if any, arising upon these facts, rested in the mother and not in the children.

The one determinative question presented to us upon the appeal of Arthur J. Bryant is: Was there sufficient evidence of fraud in the execution of the deed from Perry Bryant to Arthur J. Bryant to be submitted to the jury? We are constrained to answer this question in the negative. Under no view of the testimony is a finding that said conveyance was fraudulent, or that the defendant Arthur J. Bryant knew and participated therein, warranted.

This Court has heretofore held that children abandoned by their father may institute an action to compel future support. *Green v. Green,* 210 N. C., 147; *Pickelsimer v. Critcher,* 210 N. C., 779. These cases are not in point and are not authoritative in this action. In neither of those cases was past support furnished by another the subject matter of the action.

While the defendant Perry Bryant was served with summons by publication, he filed an answer and is now in court. In their complaint the plaintiffs prayed that the said defendant be compelled to provide them with future support under the authority of *Green v. Green, supra,* and *Pickelsimer v. Critcher, supra.* The judgment below, entered in accordance with this opinion, should provide that the cause be retained upon the docket to determine the rights of the plaintiffs under said prayer for relief upon proper issues to be submitted to a jury.

The motion of A. J. Bryant for judgment as of nonsuit should have been allowed.

Reversed as to A. J. Bryant.

New trial as to Perry Bryant.

STATE v. EDGAR PALMER, HOWARD TRULL, JACK MULKEY, DAVE MEDLIN, BUREN BOWERS, AND ERNEST BOWERS.

(Filed 22 September, 1937.)

1. Criminal Law § 53e—

Where the court below sufficiently and correctly defines reasonable doubt and self-defense involved in the prosecution, defendant's exceptions to the charge on these points cannot be sustained in the absence of a request for more specific instructions.

2. Assault § 11—Where jury returns verdict of simple assault, court may not impose imprisonment for more than thirty days.

In this prosecution for assault with a deadly weapon, appealing defendant relied upon and introduced evidence of self-defense and of matters in justification. The trial court instructed the jury that under the indictment and evidence the appealing defendant might be convicted of assault with a deadly weapon or of a simple assault. The jury convicted appealing defendant of simple assault, but in imposing judgment the court found as a fact that said simple assault inflicted serious injury, and imposed a sentence of four months on the roads. *Held:* The jury alone were the triers of fact, and the verdict of simple assault was permissible under the indictment and evidence, N. C. Code, 4640, and the court was without power to sentence the appealing defendant to more than thirty days imprisonment, N. C. Code, 4215, and the case is remanded for proper judgment.

APPEAL by defendant Edgar Palmer from *Phillips, J.*, and a jury, at March-April Term, 1937, of CHEROKEE. No error in the trial. Error in the judgment. Remanded for judgment.

The following bill of indictment was returned a true bill by the grand jury:

"STATE OF NORTH CAROLINA—CHEROKEE COUNTY.

SUPERIOR COURT, MARCH-APRIL TERM, 1937.

"The jurors for the State upon their oath present, That Jack Mulkey, Edgar Palmer, Buren Bowers and Ernest Bowers, Dave Medlin, and Howard Trull, on the 15th day of November, in the year of our Lord one thousand nine hundred and thirty-six, in the county of Cherokee, did unlawfully and willfully mutually assault and beat each other, with deadly weapons, to wit, rocks, sticks, clubs, knives, guns, and pistols, and to, with, and against each other, in a public place did unlawfully and willfully fight and make an affray, to the terror and disturbance of divers of citizens of the State, then and there being contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State. JNO. M. QUEEN, *Solicitor.*"

"True Bill, W. R. Dockery, Foreman Grand Jury."

The defendants were duly put on trial and the verdict of the jury was as follows: "Verdict: As to Edgar Palmer and Jack Mulkey, guilty of simple assault; as to Buren Bowers and Ernest Bowers, guilty as charged in the bill of indictment." Upon the coming in of the verdict, the defendant Edgar Palmer moved to set aside the verdict. Motion overruled and the defendant Edgar Palmer excepted.

The judgment of the court below as to Edgar Palmer is as follows: "As to the defendant Edgar Palmer, the jury having returned a verdict of simple assault against the defendant Edgar Palmer, the court finds as a fact from the evidence in the case that said simple assault on the part of Edgar Palmer inflicted serious injury to the person of Ernest Bowers, the court finds as a fact that the injuries sustained by the defendant Ernest Bowers, at the hand of Edgar Palmer, to wit, a broken jaw, serious cuts and lacerations and bruises on the head and face, were serious injuries within the meaning of the law: Therefore the judgment of the court is that the defendant be confined in the common jail, assigned to work under the supervision of the State Highway and Public Works Commission for a period of four (4) months."

The defendant Edgar Palmer excepted and assigned errors, and also as to the judgment rendered against him, and appealed to the Supreme Court.

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

Gray & Christopher and J. D. Mallonee for defendant Edgar Palmer.

CLARKSON, J. From a careful reading of the charge of the court below, the defendant's exceptions and assignments of error to the charge (1) as to what constituted reasonable doubt, and (2) the failure to fully instruct the jury as to what it takes to constitute self-defense, under the law, cannot be sustained.

We think the charge as to reasonable doubt is, beyond question, correct. *S. v. Schoolfield,* 184 N. C., 721; Black's Law Dictionary, at p. 617. The court below defined self-defense fully under the law, and later in the charge pointed out that the defendant Palmer relied upon the plea of self-defense. It is well settled that if the defendant wanted more specific instructions, he should have made a special request therefor. *S. v. Fleming,* 202 N. C., 512 (514). As to the judgment pronounced against the defendant Edgar Palmer, we think the court below in error. The jury were the sole and only triers of the facts. *S. v. Fogleman,* 204 N. C., 401 (404-5). The verdict was permissible on the facts appearing in the record. It may be the jury concluded that defendant was acting in self-defense and justified in the occurrence with a

drunken man and his brother, one of whom came in the house where Palmer was and terrified a sick woman. When the affair was over, the defendant Edgar Palmer, without weapon, went behind one of the brothers (the other had left the scene) and made him go into the house and apologize to the woman. Thus, the jury no doubt concluded that Palmer was guilty only of a simple assault. The evidence discloses that the general reputation of these two brothers, Buren and Ernest Bowers, was bad. Palmer was cut five times on the head and seven times on the back. In fact, the court below, in the charge, said: "Now, as to the other four defendants, that is, Ernest Bowers, *Edgar Palmer,* Dave Medlin, and Jack Mulkey, the court charges you that you may convict either of them or all of them as charged in the bill of indictment, that is, of an affray in which deadly weapons were used, or you may convict either one or all of them of an affray in which no deadly weapons were used, if you find that neither one of them who were engaged in the affray were using any deadly weapons in the affray, and if you find the ones engaged in the affray used no deadly weapons, and that they did not assist, aid, and encourage those who did; in other words, you may convict any one of the other four defendants of an assault with a deadly weapon, *or you may convict them of a simple assault in the affray.*" A lesser degree of the same crime. N. C. Code, 1935 (Michie), sec. 4640.

The charge on this aspect was repeated several times: "But if you find some of the defendants guilty of an assault or an affray in which deadly weapons were used, or others not guilty of the use of a deadly weapon, but guilty of a simple assault, or guilty of an affray in which no deadly weapons were used, then you will designate such defendants as you find guilty of an assault, and designate such defendants as you find guilty of an assault with a deadly weapon, and designate such defendants as you find guilty of an affray in which no deadly weapons were used, and designate such defendants as you find guilty of an affray in which deadly weapons were used." The jury returned a verdict against Edgar Palmer, "Guilty of simple assault."

N. C. Code, 1935 (Michie), sec. 4215, is as follows: "In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: *Provided,* that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill, or with intent to commit rape, or to cases of assault or assault and battery by any man or boy over eighteen years old on any female person: *Provided,* that in all cases of assault and battery, and affrays, wherein deadly weapons are used and serious injury is inflicted,

and the plea of the defendant is self-defense, evidence of former threats against the defendant by the person alleged to have been assaulted by him, if such threats shall have been communicated to the defendant before the altercation, shall be competent as bearing upon the reasonableness of the claim of apprehension by the defendant of death or serious bodily harm, and also as bearing upon the amount of force which reasonably appeared necessary to the defendant, under the circumstances, to repel his assailant." The case at bar is not an assault on a female by a man or boy over eighteen years of age, and does not come under the proviso of the above statute.

In *S. v. Battle,* 130 N. C., 655 (656), we find: "Had the court the authority to impose such a sentence—to impose a sentence for more than thirty days imprisonment or a fine of fifty dollars? That is the only question in this appeal, and the answer is, the court did not have that power. In cases where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars or imprisonment for thirty days. In Code, sec. 987 (sec. 4215, *supra*); *S. v. Nash,* 109 N. C., 824; *S. v. Johnson,* 94 N. C., 863; *S. v. Albertson,* 113 N. C., 633. The Superior Court, in a case like this one, could not impose a sentence beyond the limit for a simple assault or affray where no deadly weapon had been used and no serious damage done, when tried before a justice of the peace. *S. v. Albertson, supra.* The Superior Courts and courts of justices of the peace have concurrent jurisdiction of such offenses as the one charged in the bill of indictment. Code, sec. 892; *S. v. Bowers,* 94 N. C., 910." *S. v. Lefler,* 202 N. C., 700.

For the reasons given, we find

No error in the trial.

Error in the judgment. Remanded for judgment.

CLINTON B. CLEVENGER, ADMINISTRATOR OF ESTATE OF HELEN IRENE CLEVENGER, v. JAMES H. GROVER AND ST. LOUIS UNION TRUST COMPANY, TRUSTEE UNDER THE WILL OF E. W. GROVE, DECEASED; KNOTT HOTEL COMPANY, A CORPORATION, AND P. H. BRANCH.

(Filed 22 September, 1937.)

1. Pleadings § 22—

The trial court has broad power to allow amendments to pleadings and process, C. S., 547, but such power does not extend to amendments which substantially change the cause of action.

2. Same—Amendment of process and pleading by inserting correct name of defendant held properly allowed under facts of this case.

The findings of fact of the trial court, fully supported by affidavits and pleadings filed, and to which findings no exception was taken, were that summons and complaint were served on "Knott Hotel Company" by service on P. H. Branch, that said corporation was not engaged in business in North Carolina, that it clearly appeared from the complaint that plaintiff was seeking recovery against the corporation engaged in the management of a certain hotel in Asheville, N. C., that such corporation was the "Knott Management Corporation," and that P. H. Branch was its managing agent at the time of service of process, and that the process and pleading were sufficient to advise the Knott Management Corporation that it was the corporation sued and intended to be sued, and that the Knott Management Corporation was not misled or prejudiced by the mistake in its corporate name. Upon such findings the court allowed plaintiff to amend by substituting the name of the "Knott Management Corporation" for "Knott Hotel Company," and granted the substituted defendant time for filing answer. *Held:* The trial court properly allowed the amendment in the exercise of its judicial power and discretion, C. S., 547.

APPEAL by Knott Management Corporation from an order entered by *Clement, J.*, at July Term, 1937, of BUNCOMBE. Affirmed.

Weaver & Miller, Brooks, McLendon & Holderness, and Jones & Ward for plaintiff, appellee.

Adams & Adams and Junius M. Horner, Jr., for defendant, appellant.

DEVIN, J. This case was here at Spring Term, 1937, on appeal from an order of the Superior Court denying the petition of defendants Grover and the St. Louis Union Trust Company for the removal of the cause to the United States District Court, and is reported in 211 N. C., 240, where the material allegations of the complaint are stated.

The case comes now upon appeal by the Knott Management Corporation from an order of the Superior Court amending summons and complaint by substituting the name Knott Management Corporation for that of the Knott Hotel Company as a party defendant.

The action, instituted 16 October, 1936, is for wrongful death of plaintiff's intestate on 16 July, 1936, alleged to have been caused by the negligence of those responsible for the management of the Battery Park Hotel in Asheville, North Carolina. The original summons and complaint named as one of the defendants the Knott Hotel Company, and were duly served on P. H. Branch as agent of the Knott Hotel Company, Incorporated.

The court below found the following facts:

"1. That in the process and pleadings in this cause the corporate name Knott Hotel Company was erroneously used.

"2. That the Knott Hotel Company is a New York corporation, but if it does business in this State it had nothing whatsoever to do with the Battery Park Hotel; that P. H. Branch was, and is, not an officer, agent, or employee of said Knott Hotel Company, and said Knott Hotel Company was not the corporation sued, or intended to be sued, in this cause of action, and said corporation has been dismissed from the action by order signed July 22, 1937.

"3. That the corporation intended to be sued was the corporation managing and in charge of the operation of the said Battery Park Hotel, which the court finds was the Knott Management Corporation.

"4. That service of process was had on said Knott Management Corporation by service on its local managing agent, P. H. Branch, and said corporation was so identified in the summons and copy of the complaint attached served upon said corporation so as to fairly advise it that it was the party sued, and intended to be sued, and that said corporation was in nowise misled or prejudiced by the mistake in its corporate name."

Thereupon, the court made the following order: "Now, therefore, in the discretion vested in this court by the laws and statutes of this State, it is hereby ordered and adjudged that the process and pleadings in this cause be and they are hereby amended by striking out the words, 'Knott Hotel Company,' wherever they may appear, and inserting the words, 'Knott Management Corporation.'"

The Knott Management Corporation was allowed thirty days within which to answer. The order was dated 23 July, 1937.

The single question presented by this appeal is whether the Superior Court has the power, in its discretion, to permit an amendment of the summons and complaint by substituting the name of the appellant, Knott Management Corporation, for that of the Knott Hotel Company, under the facts found by the trial judge. There was no exception to any particular finding of fact set out in the order. The facts were not controverted. The appellant's assignments of error are to the court's making findings of fact and entering the order complained of, based thereon.

Section 547 of the Consolidated Statutes authorizes the courts to pursue a liberal policy of amendments in the interest of justice and for the prompt determination of causes on their merits, and makes the following provisions: "The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party; by correcting a mistake in the name of a party, or a mistake in any other respect; 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. When a proceeding taken by a party fails to conform to law in any respect, the trial judge may permit an amendment of the proceeding so as to make it conformable thereto."

It was said in *Rushing v. Ashcraft,* 211 N. C., 627: "The power of the court to amend process and pleading, both by statute and under the decisions of this Court, is ample." Indeed, to *Chief Justice Pearson* it seemed that the statute allowed amendments on a scale so liberal that he thought it might be well said, "Anything may be amended at any time." *Garrett v. Trotter,* 65 N. C., 430; *Hicks v. Nivens,* 210 N. C., 44.

In *Gordon v. Gas Co.,* 178 N. C., 435, the summons, complaint, and default judgment showed the name of the defendant as the Pintsch Gas Company. More than a year after judgment plaintiff made a motion to amend the process, pleading, and judgment so as to correctly name the defendant as the Pintsch Compressing Company. The amendment was allowed in the discretion of the court, and upon appeal the order was affirmed by this Court. There the findings of fact established, among other things, that the Pintsch Compressing Company was the party charged with committing the tort sued on; that the general manager of that corporation was served with summons; that the Compressing Company had notice of the suit and employed counsel, and that it suffered no prejudices by reason of the misnomer. The opinion of the Court in that case, written by *Chief Justice Clark,* further declared that defendant had "waived any objection by not giving its true name by plea in abatement." The dissenting opinions in that case by *Justices Walker* and *Allen* were not addressed to the point of the power of the court to permit the amendment, but to the denial of defendant's right to answer.

In *Dunn v. Aid Society,* 151 N. C., 133, where the defendant was styled in the summons as "The Knights of Gideon Mutual Aid Society," whereas the true name was "The Supreme Lodge Knights of Gideon Mutual Society," it was held that the correct name being given, the summons and pleadings would be amended to conform.

In *Fountain v. Pitt County,* 171 N. C., 113, the summons was issued against "The Board of Commissioners of the County of Pitt." Amendment was allowed substituting "County of Pitt" as defendant. There the Court said: "The object of our present system of procedure is to try cases on their merits, regardless of those technicalities which do not promote but defeat justice, at the same time preserving the substantial rights of the parties."

The broad powers of amendment, in the furtherance of justice, conferred upon the courts by the statutes regulating our system of procedure, have been sustained in numerous decisions of this Court. *Reynolds v. Smathers,* 87 N. C., 24; *Campbell v. Power Co.,* 166 N. C.,

488; *Lefler v. Lane,* 170 N. C., 181; *McLaughlin v. R. R.,* 174 N. C., 182; *Barnhardt v. Drug Co.,* 180 N. C., 436; *Hill v. R. R.,* 195 N. C., 605; *Gibbs v. Mills,* 198 N. C., 417; McIntosh Prac. & Proc., p. 512.

However, the liberal policy of permitting amendments to process and pleadings will not be extended to include those which substantially change the cause of action, as was pointed out in *Jones v. Vanstory,* 200 N. C., 582. In that case, where certain individuals were sued as trustees and it was sought to amend the process to make the corporation a party, it was said, quoting from *Hester v. Mullen,* 107 N. C., 724: "Only such amendments as to parties or the cause of the action may be made as its nature and scope warranted. Amendments in this respect must be such, and only such, as are necessary to promote the completion of the action begun."

In *Plemmons v. Improvement Co.,* 108 N. C., 615, the summons commanded the sheriff to summon "A. H. Bronson, president of the Southern Improvement Company," and was served on A. H. Bronson individually. It was held that while the summons might have been amended, it would not bring in the corporation without service on it. To the same effect is the holding in *Bray v. Creekmore,* 109 N. C., 49.

In the instant case the findings of Judge Clement are fully supported by the affidavits and pleadings filed. From these it is made to appear that while there is a New York corporation styled the Knott Hotel Company, there is no evidence it was engaged in business in North Carolina, and it is admitted it had no connection with the Battery Park Hotel in Asheville, North Carolina. On the other hand, it appears that the Knott Management Corporation, a New York corporation, was the corporation engaged in the management and operation of said hotel, and that P. H. Branch, the agent on whom the process was served, was its managing agent in charge of its business at the time of the tort complained of and at the time of the institution of this action; that the summons and complaint were served on P. H. Branch, the agent of the Knott Management Corporation, and that the purpose and scope of the action were therein fully set forth, and that the process and pleadings were sufficient to advise the Knott Management Corporation that it was the corporation sued and intended to be sued, and that the manifest purpose of the action was to sue those who as owners, proprietors, and managers were concerned with or responsible for the wrongful death of plaintiff's intestate while a guest in said hotel. The court further found that appellant was not misled or prejudiced by the mistake in its corporate name.

A correct analysis of the determinative facts involved, in view of the provisions of the statute and the authoritative decisions of this Court, leads us to the conclusion that the ruling of the learned judge in allowing

the amendment of the summons and complaint so as to substitute the name of the Knott Management Corporation for that of the Knott Hotel Company as a party defendant was made in the proper exercise of his judicial power and discretion, and that his order must be

Affirmed.

AUBREY G. McCABE, ADMINISTRATOR OF THE ESTATE OF J. T. McCABE, DECEASED, v. THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, OF LONDON, ENGLAND.

(Filed 22 September, 1937.)

Insurance § 49—Insurer defending action and paying its counsel and the judgments may not be held liable for fees of additional counsel.

Plaintiff's intestate was the driver of his daughter's car at the time of an accident resulting in his death and injuries to passengers therein. The passengers sued the daughter and plaintiff in his representative capacity to recover for said injuries, the amount of damages demanded exceeding the amount of liability insurance on the car. Plaintiff employed counsel, who made suggestions regarding the pleadings and conduct of the trial and participated in the selection of the jury. Insurer accepted plaintiff's suggestions regarding the pleadings, including the deletion of the allegation that intestate was driving without the permission of the owner of the car, which allegation, if established, would have relieved insurer of liability under the policy, defended the suits, paid its counsel, and satisfied the judgments rendered. *Held:* Insurer fully discharged its liability under the policy, and plaintiff may not hold it liable for counsel fees for the attorney employed by plaintiff to protect his intestate's estate.

APPEAL by the plaintiff from *Williams, J.*, at March Term, 1937, of PASQUOTANK. Affirmed.

This is a civil action instituted by the plaintiff against the defendant to recover counsel fees paid additional counsel employed by the plaintiff to assist him and observe the conduct of the defense of certain actions instituted against plaintiff and Margaret McCabe, the assured. The necessary facts will be stated in the opinion.

From judgment of nonsuit, plaintiff appealed.

J. Henry LeRoy and Thompson & Wilson for plaintiff, appellant.
L. T. Seawell and Worth & Horner for defendant, appellee.

BARNHILL, J. The defendant corporation, on 26 April, 1933, issued its automobile liability policy to Margaret McCabe. This policy obligated the defendant to investigate and defend any suits for damages

against the assured, or any other person, while riding in or operating the Pontiac sedan described therein when such other person was operating the same with the consent of the assured. The plaintiff's intestate, father of Margaret McCabe, while operating said automobile by and with the consent of the assured, was involved in an accident which resulted in his death. At the same time, J. H. White and others, passengers in said automobile, received serious personal injuries. Suit was instituted against Margaret McCabe and the plaintiff herein by J. H. White, J. B. Ferebee and R. R. Wallis, passengers in said automobile, and by R. J. Morse, the owner of the automobile with which the automobile of the assured collided.

This defendant promptly investigated the collision and, after suit was instituted, prepared answers to the complaints filed by the respective plaintiffs in said suits. In said answers the allegation of the plaintiffs, in their respective complaints, that the automobile of the assured was at the time of the accident being operated by plaintiff's intestate with the permission and consent of the assured was denied. Said answers contained other affirmative suggestions, to which plaintiff objected. The plaintiff declined to sign or verify the answers and consulted counsel already employed by him. Before time for answering expired the defendant made the corrections requested and suggested by the plaintiff and his counsel, and thereafter conducted the defense in each of said cases. Upon judgments being rendered, the defendant discharged same with the costs accrued. During the course of the trial of said actions counsel employed by the plaintiff sat near counsel employed by the defendant, made suggestions, and at least on one occasion participated in the selection of the jury.

At the time plaintiff employed an attorney, in addition to those furnished by defendant, he notified defendant's employed attorneys that he was employing said attorney for plaintiff's protection, and that all pleadings and other papers to be signed by plaintiff must be first approved by said additional counsel. Plaintiff likewise informed defendant's employed attorneys that he would consult his additional attorney regularly throughout these suits for protection against what plaintiff understood to be obvious attempts by the defendant to remove the protection of the insurance policy from defendant.

This suit is instituted to recover the sum of $1,000 for attorneys' fees charged the plaintiff by counsel employed by him in the defense of said actions. The court rendered judgment of nonsuit at the conclusion of plaintiff's evidence, and the plaintiff appealed.

The only instance in which the defendant might be said to have failed to properly conduct the defense of said suit was when it prepared an answer denying that plaintiff's intestate was operating the automobile

with the permission and consent of the owner. This was in effect a denial that the defendant was liable under its policy. However, upon the request and at the suggestion of plaintiff the answer was redrafted in a manner which met the approval of the plaintiff.

It would seem to be a clear case in which the plaintiff, being somewhat suspicious of the good faith of the defendant, employed counsel to stand by and observe the trial of said causes in order to assure himself that at all stages of the trial of said suits for damages the defendant fully complied with its contract to defend in behalf of the plaintiff and the assured. This the defendant did, and thus fully discharged its liability under this bond. It is in nowise liable for attorneys' fees incurred by the plaintiff. It has defended the suits, paid the counsel employed by it, and satisfied the judgments rendered. No further liability attaches to the defendant.

It might be well to note that the total amounts demanded in the several suits for damages exceeded the liability of the defendant under its bond, and for that reason the plaintiff was sufficiently interested therein to employ counsel to protect the estate.

In the judgment of the court below there was no error, and the judgment is

Affirmed.

STATE v. WILLIAM (PETE) BELL AND SAM RODMAN, JR.

(Filed 22 September, 1937.)

1. Homicide § 25—Evidence of premeditation and deliberation held sufficient to be submitted to jury on charge of first degree murder.

Evidence that on the evening of the homicide one of defendants had an altercation with deceased about some furniture which deceased had taken from the defendant's home, that the defendant left and returned two hours later with the other defendant, that in the affray shortly thereafter both defendants were holding deceased in a corner of the room trying to make him pay some money, and that one of defendants stabbed deceased with a knife, inflicting the wound resulting in death a few hours later, that after stabbing deceased, defendants dragged him outside the house, kicked and beat him with an iron pipe, and were heard to say after leaving deceased, "Let's go back and finish killing him," *is held* sufficient evidence of premeditation and predeliberation to be submitted to the jury on the question of defendants' guilt of murder in the first degree, although defendants introduce evidence tending to establish a less degree of the crime.

2. Homicide § 18—

Declarant's statement, "I am bleeding inside and I am going to die," made a few hours before death ensued, *is held* a sufficient predicate for the admission of testimony of his dying declarations.

3. **Same: Criminal Law §§ 41e, 81c—Testimony of subsequent declarations may be competent as corroborative of dying declaration.**

Where testimony of dying declarations of deceased are properly admitted, testimony of other witnesses of subsequent declarations by deceased are competent for the purpose of corroborating the dying declaration, and defendants have no cause for complaint on the ground that part of the subsequent testimony amplified the dying declaration when the amplification is favorable to their contentions rather than to those of the State.

4. **Criminal Law § 56: Constitutional Law § 33—Findings held to support refusal of motion in arrest for that only white men sat on jury.**

Defendants' motion in arrest of judgment on the ground that only persons of the white race sat in the trial jury, *is held* properly denied upon the trial court's findings that names of those qualified of the white and Negro races were in the jury box, that there was no racial discrimination, and that the trial jurors were all accepted by defendants and the jury duly sworn and impaneled without objection or challenge by defendants.

5. **Criminal Law § 81a: Constitutional Law § 33—**

The trial court's findings on the question of racial discrimination in selecting the trial jury are conclusive upon defendants' motions in arrest of judgment, made after verdict, when the findings are supported by evidence.

APPEAL by defendants from *Williams, J.*, at June Term, 1937, of BEAUFORT. No error.

The defendants were charged in the bills of indictment with the murder of one Heber Roberson. The jury returned verdict of guilty of murder in the first degree as to both defendants, and from judgment pronouncing sentence of death the defendants appealed.

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

S. M. Blount for defendant Bell.

LeRoy Scott for defendant Rodman.

DEVIN, J. I. The appellants assign as error the refusal of the trial judge to charge the jury that the defendants were not guilty of murder in the first degree, on the ground that there was no evidence of deliberation and premeditation. This requires an examination of the testimony adduced at the trial to determine whether there was evidence sufficient to be submitted to the jury upon the question of first degree murder.

That the deceased came to his death by reason of a stab wound inflicted by one of the defendants was admitted on all sides, and there was ample evidence that both defendants were present at the time and acting in concert. Deceased died a few hours after having been stabbed.

The State's evidence tended to show that the homicide occurred at the home of the deceased, and that the fatal wound was given following an altercation and difficulty between the deceased and the defendants. There was some evidence that the quarrel arose in consequence of a dispute over a gambling game, or from a difficulty about the possession of a coin.

There was also evidence for the State that on the evening of the homicide defendant Bell came to the home of the deceased and after an altercation about the return of some furniture which deceased had taken from the home of defendant Bell, Bell left and came back two hours later with defendant Rodman, and that the difficulty shortly ensued; that the two defendants had deceased hemmed in a corner of the room, and both had hold of him at the time the fatal cutting was done. "They were holding him and trying to make him pay them some money;" that three other occupants of the room ran out, and a witness in the alley heard deceased "hollering and saying, 'Don't cut me no more.'" The State also offered evidence tending to show that shortly after the cutting defendants pulled deceased out on the porch and on the ground, and dragged and kicked and beat him with a piece of iron in spite of his cries and groans, and that after the defendants had gone out under the street light defendant Rodman was heard to say to defendant Bell, "Let's go back and finish killing him."

While there was evidence on behalf of the defendants, and permissible inferences from the testimony of other witnesses, that the homicide occurred under such circumstances as to constitute murder in the second degree, or manslaughter, or excusable homicide (all of which phases of the case were submitted to the jury in a charge free from error), we conclude there was evidence sufficient to be submitted to the jury that the killing was willful, deliberate, and premeditated, under the rule laid down in many authoritative decisions of this Court. *S. v. McCormac,* 116 N. C., 1033; *S. v. Lipscomb,* 134 N. C., 689; *S. v. Roberson,* 150 N. C., 837; *S. v. Daniels,* 164 N. C., 464; *S. v. Walker,* 173 N. C., 780; *S. v. Benson,* 183 N. C., 795; *S. v. Miller,* 197 N. C., 445; *S. v. Evans,* 198 N. C., 82; *S. v. Buffkin,* 209 N. C., 117.

It was said in *S. v. Johnson,* 199 N. C., 429: "The general rule is that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." And in *S. v. Buffkin, supra,* it was said: "In determining the question of premeditation and deliberation, it is proper for the jury to take into consideration the conduct of the defendant, before and after, and all attendant circumstances, and it is immaterial how soon after resolving to kill the defendant carried his purpose into execution."

II. There was no error in admitting in evidence the dying declaration of the deceased as testified by the witness Alligood. This declaration was preceded by the specific statement by deceased, "I am bleeding inside and I am going to die," and was made a few hours before his death.

The testimony of the State's witness Singleton as to declarations of the deceased, made shortly after that related by witness Alligood, was only admitted for the purpose of corroborating the declaration to which Alligood testified in so far as it did so. While this somewhat amplified the former declaration, the additional circumstance related tended to strengthen the contentions of the defendants rather than those of the State, and in no event have the defendants ground of complaint. *S. v. Williams,* 168 N. C., 191; *S. v. Blackburn,* 80 N. C., 474; *S. v. Thomason,* 46 N. C., 274.

III. The defendants' motion in arrest of judgment on the ground that the defendants, as well as the deceased, being colored persons, their cause was prejudiced by reason of having been tried by a jury composed entirely of white men, cannot be sustained. The trial judge found the facts to be that the names of those qualified for jury service under the statute, which were in the jury box, embraced both white and colored jurors; that no discrimination was made between persons belonging to the white or Negro race, and that of the total number of jurors summoned in the case, the trial jurors were all accepted by the defendants and the jury duly sworn and impaneled without objection or challenge by the defendants. These findings of fact were supported by evidence and are conclusive upon defendants' motion, made for the first time after verdict. *S. v. Walls,* 211 N. C., 487; *S. v. Cooper,* 205 N. C., 657; *Thomas v. State of Texas,* 212 U. S., 278.

The other exceptions entered at the trial were not brought forward in appellants' briefs or debated on the oral argument. However, we have examined them and find that none of them can be sustained.

In the record, we find

No error.

A. B. WALSTON, P. F. WALSTON, AND GUY M. WOOD v. R. C. LOWRY, SR.

(Filed 22 September, 1937.)

1. Evidence § 32—

The fact that a witness is the father of one of the parties does not constitute such witness an interested party within the meaning of C. S., 1795, relating to communications or transactions with a decedent.

2. Frauds, Statute of, § 9—

A contract of the owner of land to sell at a stipulated price all logs which the owner should cut from the tract is not a contract affecting realty within the meaning of C. S., 988, since the cutting and delivery of the logs would constitute a conversion of the standing timber from real property into personalty.

CIVIL ACTION before *Cowper, Special Judge,* at May Term, 1937, of PASQUOTANK. Reversed.

R. Clarence Dozier and M. B. Simpson for plaintiffs, appellants.
R. B. Lowry and John H. Hall for defendant, appellee.

SCHENCK, J. Subsequent to the institution of this action and before the trial thereof A. B. Walston took a voluntary nonsuit, and the defendant R. C. Lowry, Sr., died and his executrix, Mrs. Polly Lowry, was made a defendant and filed answer.

The plaintiffs alleged that R. C. Lowry, Sr., by parol, "agreed to sell to said partnership (composed of the plaintiffs P. F. Walston and Guy M. Wood) all of the pine logs to be cut by him from said tract at the price of eleven dollars per thousand feet f. o. b. trucks on the county road, defendant stating that he was going to cut and sell the logs therefrom," and that the defendant's testator cut and delivered a part of the pine logs on his said tract of land, but failed and refused to cut and deliver all thereof, and that the plaintiffs paid to the defendant's testator the contract price for all such logs as were cut and delivered to them. The defendant denied these allegations and pleaded the statute of frauds.

The plaintiffs offered A. B. Walston as a witness, who, but for the court's sustaining objection to his testimony, would have testified to facts tending to sustain the aforesaid allegations. Upon the court's sustaining the objection to the testimony of A. B. Walston, the plaintiffs stated that since they were unable to make out a *prima facie* case without said testimony, they would, in deference to his honor's ruling, submit to a nonsuit and appeal. Whereupon judgment of nonsuit was entered and the plaintiffs appealed, assigning errors.

This appeal raises two questions: (1) Was the testimony of A. B. Walston incompetent under C. S., 1795, and (2) did the alleged contract relate to the sale of real estate, or any interest in or concerning real estate, and was therefore void under the provisions of the statute of frauds, C. S., 988, since no memorandum or note thereof was put in writing.

The witness A. B. Walston testified that he had no interest in the result of this action, and it does not appear in the record that he had

any such interest. True, he was the father of the plaintiff P. F. Walston, but this does not constitute him such an interested party as to bring him under the inhibitions of the statute, C. S., 1795.

The alleged contract did not relate to real estate or an interest in or concerning real estate, since it contemplated that the defendant's testator was to cut the pine timber into logs and deliver such logs f. o. b. plaintiffs' trucks on the county road. The cutting of the timber into logs and the delivery of the logs to the trucks by the defendant's testator would constitute a conversion of the standing timber from real property into personalty.

"It was held in the case of *Smith v. Surman,* 9 B. & C., 561, that where the owner of land agreed with another to cut timber from his own land and deliver the trees, when cut down or severed from the freehold, to the latter for a stipulated price, the statute did not apply; and the particular agreement, in that case, being construed to have the said effect in law, was therefore held not to be within the statute. And the converse of the proposition is equally true, that where one contracts with another to cut timber from his own land and deliver it to him when cut or severed, the statute has no application. It has been so expressly decided. *Killmore v. Howlett,* 48 N. Y., 569; *Forbes v. Hamilton,* 2 Tyler, 356; *Scales v. Wiley,* 68 Vt., 39; *Green v. Armstrong,* 1 Denio, 550; *Boyce v. Washburn,* 4 Hun., 792; 2 Reed on Statute of Frauds, sec. 711." *Sumner v. Lumber Co.,* 175 N. C., 654.

The statute of frauds in our opinion has no application to this case.

The judgment below is

Reversed.

C. A. FLYNN AND PHILLIPS FERTILIZER COMPANY v. WILLIAM RUMLEY, SHERIFF OF BEAUFORT COUNTY.

(Filed 22 September, 1937.)

1. Executors and Administrators § 20—Execution may not issue after death of judgment debtor.

After the docketing of the judgment the judgment debtor conveyed the property. After the death of the judgment debtor, execution was issued, and the judgment creditor instituted this action to compel the sheriff to sell the land under the execution, the judgment debtor having left no estate, real or personal, and therefore no administrator having been appointed. *Held:* The execution issued after the death of the judgment debtor was not warranted by law, and a sale thereunder would be void. C. S., 74-77.

2. Judgments § 39—

Where the judgment debtor conveys realty after the docketing of the judgment and thereafter dies without assets, real or personal, requiring the appointment of an administrator, the judgment creditor may maintain an action in the Superior Court against the grantee of the judgment debtor to foreclose his statutory lien.

APPEAL by plaintiffs from *Williams, J.*, at May Term, 1937, of BEAUFORT. Affirmed.

This is an action for a writ of *mandamus* commanding the defendant, sheriff of Beaufort County, to levy on and sell, under an execution now in his hands, which was issued to him by the clerk of the Superior Court of Beaufort County on a judgment which is duly docketed in his office, a tract of land situate in Beaufort County, which was owned by the judgment debtor in fee simple at the date of the docketing of the judgment.

The facts alleged in the complaint and admitted in the answer are as follows:

1. The plaintiff C. A. Flynn is now the owner of a judgment which was rendered by the Superior Court of Beaufort County, at its May Term, 1928, in favor of his coplaintiff, Phillips Fertilizer Company, and against W. T. Latham for the sum of $289.87, with interest and costs. The said judgment was duly docketed in the office of the Superior Court of Beaufort County on 28 May, 1928. At the date of the docketing of said judgment, the judgment debtor, W. T. Latham, was seized in fee and was in possession of a tract of land situate in Beaufort County, containing 79 acres, more or less, and known as his Home Place. An execution issued on said judgment during the year 1929 was returned unsatisfied. No homestead was allotted to the judgment debtor in said tract of land.

2. After the docketing of said judgment, to wit: On 17 March, 1934, the judgment debtor, W. T. Latham, sold and conveyed the said tract of land to his sons, Bryan Latham and Brownley Latham, by deed which is duly recorded in the office of the register of deeds of Beaufort County, in Book No. 298, at page 631, reserving to himself, in said deed, an estate in said tract of land for his life.

3. W. T. Latham, the judgment debtor, died intestate in Beaufort County, on 25 January, 1937. At his death he owned no property, real or personal. No administrator of W. T. Latham, deceased, has been appointed for the reason that he had no estate at his death.

4. On 20 April, 1937, the plaintiffs in this action caused an execution to be issued by the clerk of the Superior Court of Beaufort County on said judgment to the defendant sheriff of said county, and paid or tendered to him his fees for serving said execution.

5. Plaintiffs have requested the defendant to levy on and sell under said execution the tract of land in Beaufort County, which was owned by the judgment debtor at the date of the docketing of said judgment, and which he subsequently conveyed prior to his death.

Defendant, being advised that he has no right or authority to levy on and sell said tract of land under said execution for the reason that the judgment debtor had died prior to the issuance of said execution, declined and still declines to levy on and sell said tract of land under said execution.

On these facts the court was of opinion that the plaintiffs are not entitled to judgment commanding the defendant to levy on and sell the tract of land described in the complaint, under the execution in his hands, and accordingly adjudged that the action be and the same was dismissed.

The plaintiffs excepted to the judgment and appealed to the Supreme Court.

McLean & Rodman for plaintiffs.
Grimes & Grimes for defendant.

CONNOR, J. The judgment in this action is affirmed on the authority of *Tuck v. Walker,* 106 N. C., 285, 11 S. E., 183. In the opinion in that case it is said:

"It is well settled that though there may be unsatisfied judgments constituting liens upon the land of the debtor, when he dies the judgment creditor is not allowed to sell it under execution, but the administration of the whole estate is placed in the hands of the personal representative, who is required first to apply the personal assets in payment of the debts, and if they prove insufficient, then the statute prescribes how the lands may be subjected and sold, so as to avoid a needless sacrifice by selling for cash, or a greater quantity at all than is required to discharge the indebtedness. The Code, secs. 1436-1446 (now C. S., 74-77); *Sawyers v. Sawyers,* 93 N. C., 325; *Mauney v. Holmes,* 87 N. C., 428; *Lee v. Eure,* 82 N. C., 428; *Williams v. Weaver,* 94 N. C., 134."

The plaintiffs contend that this principle is not applicable to the facts in the instant case, because the judgment debtor having conveyed the land after the docketing of the judgment, and prior to his death, left no estate, real or personal, to be administered. This contention cannot be sustained. The execution, having been issued after the death of the judgment debtor, was not warranted by law. A sale of the land made under the execution would be void. See *Sawyers v. Sawyers, supra.*

It would seem that where, as in the instant case, a judgment debtor has died since the docketing of the judgment, and had no estate, real or

personal, at his death requiring the appointment of an administrator, and after the docketing of the judgment, the judgment debtor conveyed, by a good and sufficient deed, land owned by him at the date of the docketing of the judgment, the judgment creditor can maintain an action in the Superior Court of the county in which the land is situate, against the grantee of the judgment debtor, to foreclose his statutory lien. Only the judgment creditor and the grantee of the judgment debtor would be necessary parties to such action.

The judgment in this action is

Affirmed.

HOMER HUNT v. MARYLAND CASUALTY COMPANY.

(Filed 22 September, 1937.)

1. Insurance § 44—Evidence held to show that driver was proprietor of repair shop within noncoverage provision of liability policy.

The clause extending liability to others than the named assured expressly excluded therefrom proprietors or employees of any garage or repair shop. Plaintiff, injured in a collision between the car insured and plaintiff's motorcycle, recovered judgment against the driver of the car, and upon return of execution unsatisfied, instituted this action against insurer. Plaintiff's evidence tending to show that the driver of the car was the proprietor of a repair shop and at the time of the accident was driving, with assured's permission, from his shop to another garage to get a spring for a repair job. *Held:* Insurer's motion to nonsuit should have been allowed, plaintiff's evidence establishing that the driver of the car was the proprietor of a repair shop and was engaged in his duties as such proprietor at the time of the accident.

2. Evidence § 43a—

Testimony of a bailor as to declarations of the bailee at the time which tend to show the purpose and terms of the bailment is not incompetent as hearsay.

CIVIL ACTION before *Sink, J.*, at May Term, 1937, of BUNCOMBE. Affirmed.

Oscar Stanton and J. M. Horner, Jr., for plaintiff, appellant.
Adams & Adams for defendant, appellee.

SCHENCK, J. This was a civil action originally instituted in the general county court of Buncombe County by the plaintiff against R. H. Richardson and the Maryland Casualty Company, but the said Richardson was never brought into court by service of process. The action was

instituted upon a policy of liability insurance issued by the Maryland Casualty Company to the Biltmore Wheat Hearts Corporation and/or Frank Coxe, upon a Ford Tudor sedan 1932 automobile, containing an extension coverage clause as follows: "II. The insurance provided by this policy is hereby made available, in the same manner and under the same conditions as it is available to the named assured, to any person operating, and/or to any other person while riding in, and/or to any other person, firm, or corporation legally responsible for the operation of, any of the automobiles described in the statements, provided the use and operation thereof are with the permission of the named assured, or, if the named assured be an individual, with the permission of an adult member of the named assured's household, other than a chauffeur or a domestic servant, except that this extension of coverage shall not be operative if this policy be issued to any public automobile garage, automobile repair shop, or automobile sales agency; nor shall insurance under this insuring agreement be available to any such garage, repair shop, or sales agency, nor to the proprietors, employees, or agents thereof; . . ."

It appeared by evidence or admission that the plaintiff was injured by the automobile mentioned in the policy when operated by R. H. Richardson, with permission of Frank Coxe, the named assured, and that plaintiff had recovered judgment for $1,500 for his injuries in another action against Richardson, and that Richardson had failed to pay said judgment, and that demand had been made upon the Maryland Casualty Company to pay said judgment and it had refused so to do.

Judgment in favor of the plaintiff against the Maryland Casualty Company was obtained in the general county court for $1,500, and both plaintiff and defendant appealed to the Superior Court, and in the Superior Court the judgment of the county court was reversed, and a judgment of nonsuit entered, and from this judgment the plaintiff appealed to the Supreme Court, assigning errors.

This appeal raises two questions: (1) Was R. H. Richardson included in the coverage of the policy, and (2) did the court err in the admission of certain testimony of the plaintiff's witness Frank Coxe?

The testimony of the plaintiff's witness Frank Coxe established that Richardson was the proprietor of an automobile repair shop and was engaged in the performance of his duties as such proprietor, in that he was going from his repair shop to another garage to get a spring to put into a truck upon which he was working, at the time of the collision between the automobile described in the policy and driven by Richardson, with permission of Frank Coxe, and the motorcycle of the plaintiff, in which collision the plaintiff was injured and for which injury he recovered judgment for damages against Richardson. Such being the

facts, it is clear that Richardson was not covered by the policy in that he came within the exception to the extension coverage clause thereof, and that the action should, therefore, have been nonsuited.

The objection and exception to the testimony of the plaintiff's witness Frank Coxe, as to what Richardson said to him at the time Coxe gave Richardson permission to use the automobile, upon the ground that such testimony was hearsay, cannot be sustained, since such testimony was competent to show the purpose for which Coxe permitted Richardson to use the automobile, and the terms of the bailment.

The judgment of the Superior Court is

Affirmed.

LOUDICIA BARCO v. Z. D. OWENS ET AL.

(Filed 22 September, 1937.)

Wills § 33c—Absolute devise will not be divested by subsequent clause expressing desire for disposition after death of devisee.

Testator devised the real property in question in fee to his wife, with the conditions, stated in a later item, that if the property devised to her in fee should be left at her death, it was testator's desire that their five children should have same, share and share alike, but that the later item was not intended to limit, control, or in any way interfere with the use and disposition of the property left his wife in fee. *Held:* The conditions subsequent, in so far as they are repugnant to the fee originally devised, are void as unwarranted restrictions on the *jus disponendi* or the *jus dividendi*, such result being in aid of and not at variance with the rule that a will should be construed from its four corners to effectuate the testator's intent, and being in conformity with the provisions of C. S., 4162, that a devise will be construed in fee unless a contrary intention plainly appears from the language of the will.

APPEAL by plaintiff from *Cowper, Special Judge,* at May Term, 1937, of PASQUOTANK.

Petition for partition.

On the hearing, the controversy was made to depend on the construction of the will of W. L. Owens, the pertinent provisions of which follow:

"ITEM II. . . . I give, bequeath, and devise to my beloved wife, Annie W. Owens, our home on Church Street, in Elizabeth City, house number 311, together with all of my personal property of whatever kind and description, and wherever located, including all stocks, bonds, insurance, money, notes, or other choses in action, in fee simple forever with the conditions hereinafter stipulated."

"ITEM VIII. It is my further will and desire, that should there be property left, real, personal, or mixed, which I have left my beloved wife, in fee simple, at her death, and not used by her, that she shall will same to our said five children; and if she should fail to make said will, that said property shall descend to our said five children, at the death of my said wife. I do not mean by this clause to limit, control, or in any way to interfere with the use or disposition of said property, left to her in fee, while she is living, but if she does not consume, or use all of said property during her life, and there should be any remaining at her death, it is my desire that our said five children shall have same, share and share alike. My said wife is to collect all insurance, notes, stocks or bonds, or other securities and use and enjoy same as she may please, the same being hers in fee simple, and also the home on Church Street aforesaid; but the limitation above in this Item VIII only applies to whatever of said property may be still in her possession at the time of her death."

The plaintiff and defendants are the five children of W. L. Owens and Annie W. Owens, mentioned in Item VIII above.

Annie W. Owens died leaving the "Home place," mentioned in Item II above, to only two of the children, Z. D. Owens and Neva E. Owens.

It is the contention of the plaintiff that, under the will of W. L. Owens, she and the defendants take the "Home place" as tenants in common, Annie W. Owens not having devised the same in accordance with the provisions of Item VIII of her husband's will.

The court being of opinion that, under the will of W. L. Owens, his widow, Annie W. Owens, "acquired an absolute fee simple estate in and to the 'Home place' and said personal property, with full and unrestricted power of disposition," dismissed the action with costs.

Plaintiff appeals, assigning error.

C. R. Morris and M. B. Simpson for plaintiff, appellant.
McMullan & McMullan for defendants, appellees.

STACY, C. J. We agree with the trial court that as the property in question was devised to Annie W. Owens "in fee simple forever" in item two of the will, the conditions subsequent, in so far as they are repugnant to the fee originally devised, must be regarded as unwarranted restrictions on the *jus disponendi* or the *jus dividendi*, and, therefore, void. *Williams v. Sealy*, 201 N. C., 372, 160 S. E., 452; *Schwren v. Falls*, 170 N. C., 251, 87 S. E., 49; *Hambright v. Carroll*, 204 N. C., 496, 168 S. E., 817; *Combs v. Paul*, 191 N. C., 789, 133 S. E., 93; *Barbee v. Thompson*, 194 N. C., 411, 139 S. E., 838; *Carroll v. Herring*, 180 N. C., 369, 104 S. E., 892; *Wool v. Fleetwood*, 136 N. C., 460,

48 S. E., 785; *Latimer v. Waddell,* 119 N. C., 370, 26 S. E., 122. Compare *Greene v. Stadiem,* 198 N. C., 445, 152 S. E., 398.

The general rule is, that where real estate is devised in fee, or personalty bequeathed unconditionally, a subsequent clause in the will expressing a wish, desire, or direction for its disposition after the death of the devisee or legatee will not defeat the devise or bequest, nor limit it to a life estate. *Griffin v. Commander,* 163 N. C., 230, 79 S. E., 499; *Daniel v. Bass,* 193 N. C., 294, 136 S. E., 733; *Lineberger v. Phillips,* 198 N. C., 661, 153 S. E., 118; *Roane v. Robinson,* 189 N. C., 628, 127 S. E., 626; *McDaniel v. McDaniel,* 58 N. C., 353. Conditions subsequent, in the absence of compelling language to the contrary, are usually construed against divestment. *Cook v. Sink,* 190 N. C., 620, 130 S. E., 714. Compare *Jolley v. Humphries,* 204 N. C., 672, 167 S. E., 417. The absolute devise is permitted to stand, while the subsequent clause is generally regarded as precatory only. *Brown v. Lewis,* 197 N. C., 704, 150 S. E., 328; *Weaver v. Kirby,* 186 N. C., 387, 119 S. E., 564; *Brooks v. Griffin,* 177 N. C., 7, 97 S. E., 730; *Bills v. Bills,* 80 Ia., 269, 20 A. S. R., 418; 11 R. C. L., 476; 28 R. C. L., 243.

This rule is not at variance with the cardinal principle in the interpretation of wills, which is to discover and effectuate the intent of the testator, looking at the instrument from its four corners, but is in fact in aid of such discovery and effectuation. *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356. Moreover, it is provided by C. S., 4162, that when real estate is devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express language show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity. *Jolley v. Humphries, supra.*

In the will before us, the testator carefully refrained from limiting the first devise or bequest to a life estate, or from interfering "in any way . . . with the use or disposition of said property." Three times in Item VIII of the will he speaks of the property left to his wife (1) "in fee simple," (2) "in fee," (3) "same being hers in fee simple." Nothing having been retained by the testator, his attempted disposition of his wife's property at her death must be regarded as inoperative. *Griffin v. Commander, supra; Carroll v. Herring, supra.*

The judgment dismissing the petition will be upheld.

Affirmed.

SAM TEAGUE v. LOUISVILLE & NASHVILLE RAILROAD COMPANY, AND SCOTT LANEY AND FRANK LANEY.

(Filed 22 September, 1937.)

Master and Servant § 13—Contract in this case held to constitute person agreeing to perform the work an independent contractor.

One who contracts to construct certain railroad grading, furnishing all requisite labor, tools and machinery, and to complete same in accordance with stakes set and instructions given by the railroad company's engineer, the excavated material to be used in making certain fills, payment for quantities excavated to constitute complete payment for work done in executing the contract, *is held* to be an independent contractor, and the railroad company is not liable for injuries received by an employee of the independent contractor while engaged in the work.

APPEAL by plaintiff from *Phillips, J.*, at January Term, 1937, of CHEROKEE. Affirmed.

Action for damages for personal injury alleged to have been suffered by the plaintiff while employed by defendants Laney in certain grading and excavating work for defendant Railroad Company. The defendant Railroad Company pleaded that its codefendants, Scott Laney and Frank Laney, were independent contractors, under a written contract entered into between them for doing this work.

Before the introduction of evidence, by consent of all parties, the written contract was submitted to the court for construction, and upon intimation by the court that it would hold that the written contract constituted defendants Laney independent contractors, plaintiff, in deference to the opinion of the court, submitted to a voluntary nonsuit and appealed.

Moody & Moody for plaintiff, appellant.

Gray & Christopher for defendant Louisville & Nashville Railroad Company.

DEVIN, J. The only question presented by this appeal is whether the written contract between the defendants was such as to constitute Scott and Frank Laney independent contractors, and thus relieve the defendant Railroad Company of liability for injury to one of Laneys' employees while engaged in the work contemplated by the contract.

The pertinent portions of the contract are as follows:

"1. The contractor is to construct and furnish in a good, skillful, substantial, and workmanlike manner, and with all the requisite labor, teams, tools, machinery, equipment, and materials sufficient and proper

of their several kinds and complete all the grading as may be required on the revision of alignment on the wye tracks at Murphy, North Carolina, on the Murphy Branch of the Railroad Company in accordance with the stakes set and the instructions given by the engineer of the Railroad Company.

"2. All material excavated shall be classified as 'common' excavation and paid for at the unit price as hereinafter set forth. The excavated material shall be used in making the fill on the south leg of the wye and in widening and shifting the approach and street crossing located at the west wye switch. All excess material excavated after making the necessary fills shall be wasted on the right of way of the Railroad Company as directed by the Railroad Company's engineer, using particular care to provide for drainage.

"3. The quantities for which the contractor is to be paid shall be measured and figured by the Railroad Company's engineer. Only excavated quantities shall be paid for. It being distinctly understood that these excavated quantities shall be used in making the necessary fills, etc., without additional expense to the Railroad Company. The payment for quantities excavated shall constitute complete payment for work done and materials, etc., furnished in executing this contract."

The contract contained the further provision, that it was "understood that the contractor has investigated the conditions and all other pertinent matters for himself and is acting upon his own judgment."

In *Greer v. Construction Co.*, 190 N. C., 632, the term "independent contractor" is defined as follows: "An independent contractor has been defined as one who exercises an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer except as to the results of the work, and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what the laborers shall do as it progresses. *Craft v. Timber Co.*, 132 N. C., 151; *Young v. Lumber Co.*, 147 N. C., 26; *Gay v. R. R.*, 148 N. C., 336; *Denny v. Burlington*, 155 N. C., 33; *Johnson v. R. R.*, 157 N. C., 382; *Hopper v. Ordway*, 157 N. C., 125; *Harmon v. Contracting Co.*, 159 N. C., 22; *Embler v. Lumber Co.*, 167 N. C., 457; *Vogh v. Geer*, 171 N. C., 672; *Gadsden v. Craft*, 173 N. C., 418; *Simmons v. Lumber Co.*, 174 N. C., 220; *Cole v. Durham*, 176 N. C., 289; *Aderholt v. Condon*, 189 N. C., 748; *Paderick v. Lumber Co.*, 190 N. C., 308."

In *Drake v. Asheville*, 194 N. C., 6, other and similar definitions are quoted.

In *Lumber Co. v. Motor Co.*, 192 N. C., 378, and in *Gadsden v. Craft, supra*, where the doctrine of independent contractor was held inap-

plicable, the distinction is clearly drawn. In the former case it was said: "The Spear Motor Company reserved the right not only to direct the manner in which the work should be done, but also to specify what material should be used. The right to control the work in every detail, and at every stage, was retained by Spear Motor Company." And in *Gadsden v. Craft, supra,* the contract stated: "The work is to be done and finished agreeably to the directions of the chief engineer of one of the defendants or his assistants."

Applying the principles set forth in the cases cited, we conclude that the court below correctly interpreted the contract in the case at bar, and that the judgment of nonsuit must be

Affirmed.

TAYLOR ROGERS ET AL. v. JOE DAVIS AND VIOLET DAVIS.

(Filed 22 September, 1937.)

1. Highways § 13—In Haywood County, proceeding to establish cartway should be instituted before board of county commissioners.

A proceeding to establish cartways over the lands of others in Haywood County should be instituted before the board of county commissioners, Public-Local Laws 1923, sec. 12, ch. 119, and not before the clerk, Public Laws 1931, sec. 1, ch. 448 (N. C. Code, 3835), and the clerk of the Superior Court of that county has no jurisdiction of a proceeding for this relief instituted before him.

2. Statutes § 9—

A public-local law applicable to a particular county or municipality is not repealed by a subsequently enacted public law, State-wide in its application, on the same subject matter, unless repeal is expressly provided for or arises by necessary implication.

3. Judgments § 26—

A judgment rendered by the clerk on a petition filed before him over which he has no jurisdiction, is void, and the proceeding will be dismissed on appeal.

THIS is an appeal by the respondents from the judgment of *Phillips, J.,* at the May Term, 1937, of HAYWOOD, dismissing an appeal from the clerk to the judge at term time and confirming the judgment of the clerk granting a petition for a cartway over the lands of the respondents. Reversed and proceeding dismissed.

Grover C. Davis, M. G. Stamey, and Morgan & Ward for Joe Davis and Violet Davis, respondents, appellants.

No counsel for Taylor Rogers et al., petitioners, appellees.

SCHENCK, J. In the Supreme Court the appellants demurred *ore tenus* and moved to dismiss the proceeding for want of jurisdiction, for that the proceeding was instituted before the clerk of the Superior Court, whereas such proceeding should have been instituted before the board of county commissioners. We are constrained to sustain the demurrer and grant the motion.

This proceeding was instituted in accord with section 1, chapter 448, Public Laws 1931, amending Article 13, chapter 70, of the Consolidated Statutes (being 3835 N. C. Code of 1935), which provides that proceedings to establish cartways over the lands of others shall be commenced before the clerk, whereas it should have been instituted in accord with section 12, chapter 119, Public-Local Laws 1923, which provides that such proceedings in Haywood County shall be commenced before the board of county commissioners.

While it is true that the public law is State-wide in its application, and was enacted subsequent to the public-local law, it has no repealing clause. Under these circumstances the public-local law remains in full force and effect, and must be treated as an exception to the public law.

"When two acts covering the same subject matter are inconsistent or in conflict, the following is laid down as the general rule in 36 Cyc., 1090: 'When the provisions of a general law, applicable to an entire state, are repugnant to the provisions of a previously enacted special law, applicable in a particular locality only, the passage of such general law does not operate to modify or repeal the special law, either in whole or in part, unless such modification or repeal is provided for by express words, or arises by necessary implication.'

"A local statute enacted for a particular municipality is intended to be exceptional and for the benefit of such municipality, and is not repealed by the enactment of a subsequent general law. *Rogers v. U. S.*, 185 U. S., 83; *Wilson v. Comrs.*, 183 N. C., 638; *Alexander v. Lowrance*, 182 N. C., 642; *Bramham v. Durham*, 171 N. C., 196; *S. v. Johnson*, 170 N. C., 688; *Cecil v. High Point*, 165 N. C., 431; *School Comrs. v. Aldermen*, 158 N. C., 197." *Felmet v. Comrs.*, 186 N. C., 251. See, also, *Hammond v. Charlotte*, 205 N. C., 469, and *Monteith v. Comrs. of Jackson*, 195 N. C., 71.

The clerk being without jurisdiction to receive and act upon the petition, his judgment entered thereon, as well as all subsequent actions thereon, were void, and the proceeding should be dismissed.

The demurrer is sustained and the proceeding is

Dismissed.

STATE v. REID REYNOLDS.

(Filed 22 September, 1937.)

1. **Homicide § 25—Evidence held sufficient to be submitted to jury on question of defendant's guilt of manslaughter.**

The State's evidence tended to show that in a three-cornered dispute over money, deceased went outside defendant's house to search the third person, that someone buttoned the screen door from the inside, and that when deceased tried to reënter the house defendant fired a shot up in the air and ordered deceased, who was unarmed, to go away, that deceased went out into the yard about fifteen feet from the porch, said something which was not understood by witness, when defendant fired the fatal shot. *Held:* The State's own evidence does not rebut the presumptions arising from the intentional killing with a deadly weapon, and the question of self-defense is for the jury under the evidence, and defendant's motion to nonsuit was properly denied.

2. **Homicide § 11—**

The right to kill in self-defense rests upon necessity, real or apparent, and ordinarily it is for the jury to determine, from the evidence, the existence or absence of such necessity.

3. **Indictment § 10—**

The indictment charged defendant with killing one "Oakes Clement" while the correct spelling should have been "Okes Clement." *Held:* The variance is immaterial, as it is a plain case of *idem sonans*.

APPEAL by defendant from *Ervin, Special Judge,* at April Term, 1937, of SURRY.

Criminal prosecution, tried upon indictment charging the defendant with the murder of one Oakes Clement.

The record discloses that on 7 December, 1936, Okes Clement and Reid Reynolds each sold some tobacco in Mount Airy and both were seen drinking during the day. That night when the defendant reached his home, he found Okes Clement and Henry Scales there waiting for him. Clement accused Reynolds of taking $46 of his money. Reynolds suggested that perhaps Scales had his money, as they came to town together. Scales replied: "If you think I have your $46 you can come out of doors and search me." Clement and Scales then went out on the porch and someone buttoned the door from the inside. After searching Scales, Clement tried to go back into the house, "caught hold of the door and was shaking it," cursing and making threats against the defendant, when Reynolds "shot practically straight up from the corner of the house" and ordered Clement to go away. Clement left the house, so Scales testifies, "went out into the yard about fifteen feet from the porch, said something back to Reynolds—never heard it good enough to

understand, though I was nearer to him than Reynolds"—when the second and fatal shot was fired.

The case was submitted to the jury on the State's evidence; the defendant offered none.

Verdict: Guilty of manslaughter.

Judgment: Four months in jail.

Defendant appeals, assigning as error the court's refusal to sustain demurrer to the evidence or to grant motion of nonsuit under the Mason Act, C. S., 4643.

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

Folger & Folger for defendant.

STACY, C. J. It is the position of the defendant that the presumptions arising from an intentional killing with a deadly weapon, to wit, the unlawfulness of the killing and malice (*S. v. Keaton,* 206 N. C., 682, 175 S. E., 296), are rebutted by the State's own evidence, and that upon the whole case he is entitled to an acquittal. *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387; *S. v. Carter,* 204 N. C., 304, 168 S. E., 204. We agree with the trial court that the evidence is such as to require its submission to the jury. While one is permitted to kill in defense of himself, his family or habitation, under certain conditions, *S. v. Marshall,* 208 N. C., 127, 179 S. E., 427; *S. v. Glenn,* 198 N. C., 79, 150 S. E., 663, nevertheless it is a permissible inference from the record that the deceased, unarmed and apparently without immediate threat of violence, was standing at a distance of about fifteen feet from the defendant's porch when the fatal shot was fired. This precludes a disturbance of the ruling on the demurrer to the evidence or the motion to nonsuit. *S. v. Cagle,* 209 N. C., 114, 182 S. E., 697; *S. v. Johnson,* 184 N. C., 637, 113 S. E., 617; *S. v. Cox,* 153 N. C., 638, 69 S. E., 419.

The right to kill in self-defense rests upon necessity, real or apparent, and ordinarily it is for the jury to determine, from the evidence, the existence or absence of such necessity. *S. v. Bland,* 97 N. C., 438, 2 S. E., 460; *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617; *S. v. Bryson,* 200 N. C., 50, 156 S. E., 143; *S. v. Eubanks,* 209 N. C., 758, 184 S. E., 839; *S. v. Koutro,* 210 N. C., 144, 185 S. E., 682.

In the indictment, the defendant is charged with the murder of one "Oakes Clement." It is conceded that the proper spelling of his name is "Okes Clement." The variance is not material, as it is a plain case of *idem sonans. S. v. Donnell,* 202 N. C., 782, 164 S. E., 352; *S. v. Dingle,* 209 N. C., 293, 183 S. E., 376.

The verdict and judgment will be upheld.

No error.

W. ROBERT GRANT v. J. W. BROWN ET AL.

(Filed 22 September, 1937.)

1. Vendor and Purchaser § 25—

Evidence *held* insufficient to support action for damages claimed by purchaser as result of ejectment by vendor's grantee.

2. Vendor and Purchaser § 24: Money Received § 1—

Where a vendor denies any extension of the option sued on, and pleads the statute of frauds, he will not be permitted to retain moneys paid on the purchase price after the expiration of the option.

DEVIN and BARNHILL, JJ., took no part in the consideration or decision of this case.

APPEAL by defendant from *Frizzelle, J.*, at March Term, 1937, and from *Devin, J.*, at November Term, 1934, of EDGECOMBE.

Civil action to recover for money had and received, and for expenses incurred in defending suit in ejectment.

On 15 December, 1932, plaintiff took option from defendant to purchase certain lands in Edgecombe County at the price of $4,000, said option to expire 1 January, 1933. The option was not exercised according to its terms, though $445.00 was paid on the purchase price under an alleged parol extension, and on 5 April, 1933, the defendant conveyed said lands to Allie J. Long.

It is alleged in the complaint that plaintiff was thereafter ejected from the premises, by summary proceeding, resulting in injury and damage, counsel fees, etc.

Upon denial of liability and issues joined, the jury awarded the plaintiff $445.00 on his first cause of action and $269.00 on his second.

The presiding judge intimated that he would set the verdict aside unless the plaintiff would agree to eliminate the recovery on the second cause of action. Counsel asked for time to consult his client, and the matter thus remained *in fieri* for quite a while. Finally, at the March Term, 1937, judgment was entered on the verdict.

Defendant appeals, assigning errors.

T. T. Thorne for plaintiff, appellee.

Henry C. Bourne and Herbert H. Taylor, Jr., for defendant, appellant.

STACY, C. J. The record, as it appears here, is barren of any evidence to support the verdict on the second cause of action. This will be stricken out, and as thus modified, judgment will be entered for the plaintiff on the first cause of action.

The defendant having denied any extension of the option, and pleaded the statute of frauds, will not be permitted to retain moneys paid on the purchase price after the expiration of the option. *Warren v. Dail,* 170 N. C., 406, 87 S. E., 126. To hold otherwise would be to allow the defendant "to have his cake and eat it too." *Young v. Hood, Comr.,* 209 N. C., 801, 184 S. E., 823. This is not after the manner of fair dealing. *Whitmire v. Ins. Co.,* 205 N. C., 101, 170 S. E., 118.

The cause will be remanded for judgment accordant herewith.

Modified and affirmed.

DEVIN and BARNHILL, JJ., took no part in the consideration or decision of this case.

THE LIFE INSURANCE COMPANY OF VIRGINIA v. FRED I. SMATHERS ET AL.

(Filed 22 September, 1937.)

Usury § 2—

A sum paid an independent broker by the borrower to cover costs, commission, and expenses in securing the loan, does not perforce render the loan usurious.

APPEAL by defendants Fred I. Smathers and Rosamond L. Smathers from *Clement, J.,* at July Term, 1937, of BUNCOMBE.

Civil action to determine amount due on promissory note and to foreclose deed of trust given as security for payment thereof.

Defendants admit the execution of their $15,000 note to Bankers Trust & Title Insurance Company on 17 January, 1931. They contend, however, that same should be stripped of its interest-bearing quality (*Waters v. Garris,* 188 N. C., 305, 124 S. E., 334), and all interest paid thereon credited on the principal because of an alleged charge of usury amounting to $417.04 exacted at the time of the making of said loan.

In a letter addressed to the Bankers Trust & Title Insurance Company under date of 15 January, 1931, and signed by the defendant Fred I. Smathers, it is stated: "I agree to furnish you fire insurance in an amount not less than $15,000 in a reliable fire insurance company acceptable to you and pay you the sum of $450.00, which I understand is to cover all costs, commission, and expense in securing said loan, and . . . if for any reason on your part this loan cannot be closed, you are not to charge me a fee for the preparation of the loan papers."

At the close of all the evidence, the court directed a verdict against the defendants on their plea of usury, thereby fixing the amount of the debt, and entered judgment of foreclosure.

Defendants Fred I. Smathers and Rosamond L. Smathers appeal, assigning errors.

Harkins, Van Winkle & Walton for plaintiff, appellee.
Alfred S. Barnard for defendants, appellants.

STACY, C. J. A careful perusal of the record leaves us with the impression that no reversible error was committed in the trial of the cause, or, at least, that none has been made to appear.

The case of *Loan Co. v. Yokley,* 174 N. C., 573, 94 S. E., 102, cited and relied upon by defendants, is distinguishable, in that, in the *Yokley case, supra,* as stated in the opinion, it was "not a reasonable inference from the evidence . . . that the trust company was doing no more than charging a reasonable commission for negotiating a loan made by the annuity company." Here, the defendant's own letter is to the effect: I agree to pay the Bankers Trust the sum of $450.00, "which I understand is to cover all costs, commission, and expense in securing said loan." See *Ray v. Ins. Co.,* 207 N. C., 654, 178 S. E., 89; *Hunter v. Realty Co.,* 210 N. C., 91, 185 S. E., 461.

The result will not be disturbed.

No error.

W. J. MIDGETT v. JOHN A. NELSON, FISH COMMISSIONER; THOMAS A. BASNIGHT, ASSISTANT FISH COMMISSIONER; WAYLAND BAUM; NATIONAL SURETY COMPANY, AND GREAT AMERICAN INDEMNITY COMPANY.

(Filed 22 September, 1937.)

1. **Evidence § 33—Certificate authenticating public record may not be used to prove facts not appearing upon face of the record.**

The certificate of the Insurance Commissioner, authenticating copy of bond of Assistant Fish Commissioner, contained statements relative to coverage and amount of the bond not appearing in the bond, which upon this certificate was offered in evidence. *Held:* The certificate was incompetent to prove the facts and conclusions stated in the certificate not appearing in the bond.

2. **Appeal and Error § 40e—**

Even though the evidence relied on by the trial court in refusing defendant's motion to nonsuit is held incompetent on appeal, the motion will not be allowed, since, if the evidence had been excluded upon the trial, defendant might then have sustained his case with other evidence.

3. Pleadings § 20—

Upon demurrer, the allegations of the pleading will be taken in the light most favorable to the pleader, and the demurrer will not be sustained unless the pleading is wholly insufficient.

APPEAL by defendant Great American Indemnity Company from *Williams, J.*, at March Term, 1937, of CURRITUCK. New trial.

Action by plaintiff for damages for tort alleged to have been committed under color of their offices by Jno. Nelson, State Fish Commissioner, and Thomas A. Basnight, Assistant Fish Commissioner, and to impose liability therefor upon the Great American Indemnity Company, surety on the bond of its codefendants.

Judgment of nonsuit was entered as to defendants Jno. A. Nelson and Wayland Baum.

There was verdict for plaintiff as against defendants Basnight and the said Indemnity Company, and from judgment on the verdict the defendant Indemnity Company appealed.

D. L. Russell and George J. Spence for plaintiff.

J. Henry LeRoy for defendant Indemnity Company, appellant.

DEVIN, J. The appellant assigns as error the admission in evidence, over its objection, of the certificate of the State Commissioner of Insurance authenticating the bond of defendant Basnight. C. S., 1779, renders competent copies of all official bonds filed or recorded in any public office when certified by the keeper of such records under the seal of his office. The certificate, which was here offered in evidence with the bond, was as follows:

"I, Dan C. Boney, Insurance Commissioner in and for the State of North Carolina, do hereby certify that the attached is a true and correct copy of the Schedule Bond covering all State officers and employees, and which bond includes coverage upon John A. Nelson, as Fisheries Commissioner, in the sum of $5,000 from 9 June, 1931, through the present date, and which is still in force; and also includes Thomas A. Basnight, Assistant Fisheries Commissioner, in the sum of $1,000, covering from 1 October, 1935, which bond is still in force.

"In testimony thereof, I have hereunto set my hand and affixed my official seal at the city of Raleigh, this the seventeenth day of September, A.D. 1936.

DAN C. BONEY,
Insurance Commissioner."

The copy of the bond, which appears in the record, does not contain a schedule of the names of officials or employees bonded, nor the amounts thereof, nor the duration of the bond, and the only reference to the

defendants in connection therewith is that contained in the certificate of the Insurance Commissioner. This manifestly goes beyond the office of the certificate of genuineness which is authorized to be attached to a copy of a public record or official bond, and contains statements of material matters which do not appear in the paper certified. The certificate was, therefore, incompetent to prove the facts and conclusions therein stated in addition to and apart from the writing itself. *Wiggins v. Rogers,* 175 N. C., 67; *S. v. Champion,* 116 N. C., 987.

For this there must be a new trial. The appellant's motion for judgment of nonsuit cannot be allowed. Though the court below, in denying the motion, acted upon evidence which we now hold to be incompetent, yet, if this evidence had not been admitted, the plaintiff might have followed a different course. *Morgan v. Benefit Society,* 167 N. C., 262 (top p. 267).

The demurrer was properly overruled. The allegations of the complaint, admitted by the demurrer and taken in the light most favorable to the pleader, could not be overthrown unless wholly insufficient. *Leach v. Page,* 211 N. C., 622.

The other questions presented by the record and debated on the argument with reference to the construction and legal effect of the paper writing upon which liability was sought to be imposed upon the appellant, cannot be determined until all the provisions of the bond are properly before the court.

New trial.

J. A. LIVERMAN v. F. D. CLINE.

(Filed 23 September, 1937.)

1. Automobiles § 24c—Plaintiff must show that alleged employee was employed by defendant and was acting in scope of employment at the time.

Evidence failing to show the ownership of the truck involved in the collision, and failing to show that at the time the driver of the truck was engaged in the performance of his duties and was employed in the particular transaction by the defendant sought to be held upon the principle of *respondeat superior,* is insufficient to overrule such defendant's motion to nonsuit.

2. Master and Servant § 21a—Respondeat superior applies only when relation of master and servant is shown to exist as to the specific transaction.

The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged, at the time of and in respect to the very transaction out of which the injury arose, and proof merely that the former was in the general employment and pay of the latter is insufficient.

LIVERMAN *v.* CLINE.

APPEAL by plaintiff from *Cowper, Special Judge,* at May Term, 1937, of PASQUOTANK.

Civil action to recover damages for personal injuries alleged to have been caused by the wrongful act, neglect, or default of the defendant.

The defendant is a road contractor, and in July, 1936, was engaged in building an asphalt road from Camden to Shiloh in Camden County. This road connects with State Highway No. 30, a much traveled highway.

On the night of 13 July, 1936, while traveling on said highway, plaintiff ran his automobile into the rear of a truck operated at the time by Ralph Gibbs. Gibbs was hauling sand at the time. He testifies without contradiction: "I was working for Mr. J. Brown Evans. He was the man who hired me. On the night in question I was hauling sand. . . . I had not done any night hauling before this particular time and I did not haul any after that night." It is in evidence that Ralph Gibbs, a truck driver, was on the defendant's pay roll as asphalt hauler, being paid by the hour, but was not paid by the defendant for hauling sand. As asphalt hauler he worked only in the daytime and not at night. It seems that the work of hauling sand from a nearby pit to defendant's asphalt plant was separate and distinct from that of hauling asphalt from the plant to the road construction project.

It is not in evidence as to who owned the truck Gibbs was driving. Clyde Mungo, who was likewise hauling sand that night, testifies: "I had my own personal truck down there hauling sand. . . . I was working under Mr. LeRoy Chandler. He was the truck foreman for Mr. R. E. Fuller. R. E. Fuller paid me. . . . This was the only occasion that Gibbs and his truck worked at night. It was the only occasion that I worked at night."

LeRoy Chandler testifies: "On 13 July, 1936, I was truck foreman for R. E. Fuller, who is a contractor. . . . Mr. Gibbs on that particular night was hauling sand for Mr. Fuller."

The only evidence of negligence in the operation of the truck driven by Gibbs is, that its rear light was not lighted at the time plaintiff ran into it. This evidence is strongly contradicted, and defendant elicited from plaintiff, on cross-examination, testimony tending to show that he was contributorily negligent.

From judgment of nonsuit entered at the close of all the evidence, plaintiff appeals, assigning errors.

J. Henry LeRoy and Thompson & Wilson for plaintiff, appellant.
Charles Whedbee and John H. Hall for defendant, appellee.

STACY, C. J. Without debating the question of plaintiff's alleged contributory negligence, we think the judgment of nonsuit must be upheld

on the ground that the record fails to disclose any relation of employer and employee between the defendant and Ralph Gibbs, the driver of the truck at the time of plaintiff's injury.

"Where one person is sought to be charged with the negligence or wrongdoing of another, the doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person so sought to be charged, at the time of and in respect to the very transaction out of which the injury arose. The fact that the former was at the time in the general employment and pay of the latter, does not necessarily make the latter chargeable." *Wyllie v. Palmer,* 137 N. Y., 248.

The foregoing was quoted with approval in *Linville v. Nissen,* 162 N. C., 95, 77 S. E., 1096, and *Van Landingham v. Sewing Machine Co.,* 207 N. C., 355, 177 S. E., 126, and is universally held for law. *Doran v. Thomsen,* 76 N. J. L., 754. See, also, *Cole v. Funeral Home,* 207 N. C., 271, 176 S. E., 553, and *Martin v. Bus Line,* 197 N. C., 720, 150 S. E., 501; *Wilkie v. Stancil,* 196 N. C., 794, 147 S. E., 296; *Grier v. Grier,* 192 N. C., 760, 135 S. E., 852.

On the record, the judgment of nonsuit is correct.

Affirmed.

GENERAL REALTY COMPANY v. LEONARD LEWIS.

(Filed 22 September, 1937.)

1. Mortgages §§ 8, 32a—Where instrument does not empower trustee to sell, such power may not be implied from its other provisions.

The instrument in question empowered the holder or holders of the notes to enter upon the land conveyed as security and sell same upon default, but the granting clause and *habendum* were in the correct form of a deed of trust, and the instrument provided for the payment of the trustee's commissions and costs in case of foreclosure. *Held:* The instrument did not empower the trustee named therein to sell the land upon default, and such power may not be implied from its other provisions under the rule that an instrument will be construed to effectuate the intent of the parties as gathered from the instrument as a whole.

2. Mortgages § 32a—

The power of sale contained in a mortgage or deed of trust will be strictly construed, and the power of sale must be clearly set forth and the contract as written must prevail.

APPEAL by plaintiff from *Clement, J.,* at Chambers, 15 May, 1937, Winston-Salem, N. C. From HENDERSON. Affirmed.

This is a submission of controversy without action, accompanied with proper affidavits. N. C. Code, 1935 (Michie), sec. 626.

The agreed statement of facts is as follows:

"1. That the General Realty Company is a corporation, duly created, organized, and existing under and by virtue of the laws of the State of North Carolina, and the said Leonard Lewis is a citizen and resident of the county of Henderson in said State.

"2. That on 5 April, 1937, the said parties entered into a valid written agreement whereby the General Realty Company agreed to sell and convey in fee simple, and the said Leonard Lewis agreed to purchase, the following described lot, situate in the city of Hendersonville, county of Henderson, and State of North Carolina, and known and described as follows: Being Lot No. 9 of Fassifern Court Subdivision, as shown on a plat of said Fassifern Court Subdivision, registered in the office of the register of deeds for Henderson County, in Plat Book 2, page 157.

"3. That the General Realty Company derived its title to said property by, through, and under that deed of trust from H. O. Buzzaird and wife, Ida L. Buzzaird, to Ernest F. Smith, trustee, of date 1 September, 1927, and duly registered on 22 September, 1927, in Book 124, at page 113, of the Records of Mortgages and Deeds of Trust for Henderson County, a copy of said deed of trust being hereto annexed, marked Exhibit A, and made a part hereof.

"4. That the trustors in said deed of trust at the time of its execution were the owners of a valid, unencumbered fee simple title to said property, and upon its execution and registration said deed of trust became a valid first lien thereon.

"5. That default was made in the payment of the indebtedness secured by said deed of trust, and thereupon one of the alternate trustees, after having advertised said property once a week for four consecutive weeks in a newspaper published in Henderson County, and also after having posted notice of said sale at the courthouse door of Henderson County for thirty days, sold said property to the highest bidder for cash, at the courthouse door in Henderson County, and said bid not having been raised, the said trustee executed a deed to the purchaser, and under which purchaser the said General Realty Company claims title to said property.

"6. It is admitted that the alternate trustee had all the powers under said deed of trust possessed by the original trustee, and no point is made as to the sale having been made by the alternate trustee any more than would or could have been made as to the original trustee.

"7. It is admitted that if said deed of trust conferred the power of sale upon either the original trustee or the alternate trustee, that the purchaser at the foreclosure sale obtained a valid, fee simple title thereto, and it is also admitted that General Realty Company has duly

acquired whatever title the said original purchaser at the foreclosure sale obtained, and is now in position to convey such title to the said Leonard Lewis.

"8. That by virtue of and pursuant to the agreement hereinbefore alleged, the said General Realty Company at the time provided for in said contract of purchase made, executed, and tendered to the said Leonard Lewis a deed, regular in form, and sufficient in every respect to vest in said Leonard Lewis a valid, unencumbered fee simple title to said property, provided the said General Realty Company is the owner of such title thereto, and which said deed the said Leonard Lewis refused to accept on the ground that the said General Realty Company is not the owner of such title for the reason that the said trustee was not vested with the power of sale to foreclose said deed of trust and convey said property to the purchaser.

"9. It is agreed that if the deed of trust, of which 'Exhibit A' is a copy, confers the power upon the original trustee to sell the property hereinbefore mentioned at foreclosure sale, and execute title to the purchaser, then the said Leonard Lewis shall accept the deed tendered him by the said General Realty Company and thereby specifically perform the contract hereinbefore mentioned, but if no such power of sale is conferred upon said trustee by said deed of trust, then the said General Realty Company is not in position to convey a valid title to the said Leonard Lewis, and he shall not be required to accept the same.

"10. It is further agreed that this matter shall be submitted for determination and decision to Hon. J. H. Clement, judge holding the courts of the 18th Judicial District, of which Henderson County is a part, at his chambers at Winston-Salem, North Carolina, and that said judgment shall be in all respects as valid and binding upon the parties hereto as if rendered at term time, in Henderson County.

"We therefore present to the court the question arising upon the foregoing statement of facts for its determination as provided by section 626 of the Consolidated Statutes of North Carolina.

Respectfully submitted,

W. G. MORDECAI,
J. E. SHIPMAN,
Attorneys for General Realty Company.
By J. E. SHIPMAN.

G. H. VALENTINE,
Attorney for Leonard Lewis."

The court below rendered the following judgment: "This cause coming on to be heard by consent of counsel for both parties before his Honor, J. H. Clement, judge holding the courts of the Eighteenth

Judicial District, at chambers in Winston-Salem, North Carolina, on this 15 May, 1937, and being heard, and the court being of the opinion from the agreed statement of facts that the plaintiff General Realty Company is not the owner of a valid, fee simple title to the property therein described, and is not therefore in position to convey a valid title thereto to the defendant Leonard Lewis: It is therefore, on motion of counsel for said defendant Leonard Lewis, ordered, adjudged, and decreed that the plaintiff take nothing, and that the defendant Leonard Lewis go without day and recover his costs of the plaintiff General Realty Company, to be taxed by the clerk of the Superior Court of Henderson County. J. H. CLEMENT,

Judge Holding the Courts of the 18th Judicial District, at Chambers at Winston-Salem, North Carolina."

The plaintiff excepted and assigned error as follows: "That the court erred in signing the judgment set out in the record."

J. E. Shipman and W. G. Mordecai for plaintiff.
G. H. Valentine for defendant.

CLARKSON, J. The question involved: Is the defendant's objection to plaintiff's title sufficiently grounded to avoid a decree of specific performance? We think so.

The deed of trust from H. O. Buzzaird and wife, Ida L. Buzzaird, to Ernest F. Smith, trustee, dated 1 September, 1927, is to secure certain gold notes for money loaned, in the sum of $4,500. The same was duly recorded in Henderson County, N. C., Book 124, page 113, registry of deeds. It is set forth in the record, "Exhibit A," as a part of the agreed statement of facts. The alternate trustee in the deed of trust sold the land after due advertisement, and plaintiff claims under the sale.

The language of the deed of trust in controversy relating to the provision for sale in case of default is as follows: "In the event of a breach of any one of the aforesaid covenants and agreements, or in case of default in the payment of any note secured hereby or any installment of interest thereon, according to the terms thereof, . . . And said holder or holders (of any or all of the first lien notes) may immediately enter into and upon the above described premises and sell and dispose of the same, and also all benefit and equity and redemption of the said grantor, unless such equity and benefit of redemption is reserved by law, and out of the proceeds of such sale to retain the principal and interest which shall then be due on said first lien gold note or notes and junior lien notes hereby secured, and such other debts that may be due and against said premises, together with the cost and charges of foreclosure, or may sell said premises at public auction, after complying with the

statutes of the State wherein the property described herein is located, in reference to foreclosure and sale of real property; and the purchaser thereof shall not be required to see to the application of the purchase money and of the proceeds of said sale."

The plaintiff calls attention to other provisions in the deed of trust: "The granting clause reads: 'Does by these presents grant, bargain, convey, and warrant in fee simple unto the said trustee, his successors and assigns, forever, the following described real estate.' The *habendum* clause reads: 'To have and to hold the above described premises, with all appurtenances and fixtures, unto the said party of the second part, his successors and assigns, forever, for the purpose, uses, and trusts set forth.' It is provided in the acceleration clause that the indebtedness shall, 'at the option of the legal holder or holders of any or all of said first lien gold note or notes, or by the guarantor or guarantors, if any, or the trustee, become immediately due and payable. . . .' The trustee shall conduct the actual sale is also shown by subsequent provisions of the trust deed, wherein it is provided that in case of sale, the proceeds shall be applied: '(a) To the payment of reasonable compensation of the trustee, its agents, attorneys, and counsel, and all costs of advertisement, notices, sale, and conveyance, and other necessary expenses in case of sale, under the power of sale herein conferred.' All proper expenses of the trustee incurred as herein provided, including attorneys' and agents' fees and the expenses of litigation, shall be paid out of the proceeds of the sale of the property described herein should a sale be had. 'And in case of foreclosure of this trust deed, in any court of law or equity, or by action or advertisement, there shall be allowed the trustee in such proceedings all costs and charges of such foreclosure, together with the maximum attorneys' fees for foreclosure of mortgages allowed under the laws of the state wherein this instrument is recorded.' "

The plaintiff contends: "Applying the rule that an instrument is to be construed from its four corners and the intent of the parties gathered from the instrument in its entirety, . . . that the trustee had a right to both advertise, sell, and make deed to the purchaser, and that the defendant is without sufficient grounds to avoid a decree of specific performance," citing *Benton v. Lumber Co.*, 195 N. C., 363, at p. 365, as follows: "In the construction of deeds these principles seem to be settled: (1) The entire deed must be considered and such construction of particular clauses must be adopted as will effectuate the intention of the parties; (2) such construction will be adopted as, if possible, will give effect to every part," etc.

We cannot hold as plaintiff contends we should. The deed of trust seems, in its various provisions, to be drawn by a draughtsman not

familiar with our North Carolina forms and laws on the subject. It seems to have been drawn in Ohio. If a power of sale is given, it appears to be to the "holder or holders" of any or all of the first lien notes.

In *Eubanks v. Becton,* 158 N. C., 230 (233), it is written: "Powers of sale in a mortgage are contractual, and as there are many opportunities for oppression in their enforcement, courts of equity are disposed to scrutinize them, and to hold the mortgagee to the letter of the contract. If a different view should prevail and we could dispense with some stipulation in the power because we could not see that injury had ensued from failure to observe it, we could practically destroy the contract of the parties."

"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); *Mitchell v. Shuford,* 200 N. C., 321; *Ins. Co. v. Lassiter,* 209 N. C., 156; *Woodley v. Combs,* 210 N. C., 482 (486).

By a long unbroken line of decisions, mortgages and deeds of trust with power of sale must be strictly construed. Courts look with jealousy on the power of sale in these instruments and require the power of sale to be clearly set forth. The contract as written must prevail. The implied provisions cited by plaintiff are contrary to the language that in case of default the sale shall be made by "said holder or holders" (of any or all of the first lien notes). Under the peculiar provisions of the deed of trust perhaps the only safe method is by foreclosure by suit in court and all interested made parties.

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

Affirmed.

H. G. BERRY v. MRS. ATTIE COPPERSMITH AND M. H. JONES, TRADING AS COPPERSMITH & COMPANY, AND M. S. HAWKINS, TRUSTEE (ORIGINAL PARTIES DEFENDANT), AND FANNIE G. JONES AND HUSBAND, J. G. JONES (ADDITIONAL PARTIES DEFENDANT).

(Filed 22 September, 1937.)

1. Adverse Possession § 18—Witnesses may testify that certain persons were in possession as matter of fact.

Where plaintiff claims by adverse possession under color of title, it is competent for his witnesses to testify that predecessors in plaintiff's chain of title were respectively in possession, "possession" being used in the layman's sense of actual possession as a matter of fact, and the witnesses testifying on direct and cross-examination of the acts of possession tending to substantiate the fact of possession.

2. Adverse Possession § 2—

Where the State is not a party, title is conclusively presumed to be out of the State, C. S., 426.

3. Adverse Possession § 8—

Where the descriptions in plaintiff's and defendants' respective chains of title embrace in part the same land, and the defendants, claiming under the elder title, have no actual possession of the lappage, title to the entire lappage is perfected in plaintiff if he establishes adverse possession of a part of the lappage for seven years under color.

4. Adverse Possession § 5—

Adverse possession must be under known and visible lines and boundaries.

5. Adverse Possession § 3—

Possession, to be adverse, must be evidenced by acts of dominion in making the ordinary use and taking the ordinary profits of which the land is susceptible in its present state, and so repeated as to show they are done in the character of owner and not merely of an occasional trespasser.

6. Adverse Possession § 6—

Adverse possession need not be unceasing, but claimant must show that he has, from time to time, continuously subjected the land for the required period to the use of which it is naturally susceptible.

7. Adverse Possession § 19—

Where it is established that the land in controversy is swamp land, valuable only for timber, evidence that plaintiff, claiming under known and visible lines and boundaries under color, from time to time cut and sold timber from the tract for over seven years, is sufficient to take the case to the jury.

8. Adverse Possession § 17—

The burden is on the party claiming by adverse possession to show the required possession for the statutory period by the preponderance of the evidence.

9. Adverse Possession § 13f—

Where a person claiming under color establishes adverse possession for seven years by himself or by those under whom he claims, seizin follows the title, and nothing else appearing, he thereafter has constructive possession sufficient to satisfy the statute, and is not required to show actual possession within twenty years before the institution of the action. C. S., 429.

APPEAL by defendants from *Williams, J.*, at January Term, 1937, of PASQUOTANK.

Action on alleged trespass and to recover damages instituted in Camden and removed to Pasquotank.

Plaintiff claims title by adverse possession under color of title to 206 acres of land under the following deeds, all of which were introduced in evidence: (1) From William C. Mercer and wife, Lou Mercer, to B. F.

Mercer, dated 29 June, 1891, registered 13 February, 1894. (2) From B. F. Mercer to Peter H. Williams and C. C. Needham, dated 5 September, 1906, registered 10 September, 1906. (3) From Peter H. Williams and wife and C. C. Needham and wife to C. J. Duke, dated 26 June, 1917, registered 7 July, 1917. (4) From C. J. Duke to H. G. Berry, dated 5 December, 1935, registered 28 December, 1935.

The defendants claim under and introduced as evidence Grant No. 31 from State of North Carolina to Amos Weeks and Jacob Valentine, 23 September, 1785, registered 24 February, 1786, and *mesne* conveyances by connected chain of title down to the defendants, and disclaim title to all the land so claimed by the plaintiff outside the boundaries of said grant.

It appears of record that the deeds under which plaintiff claims and the grant under which defendants claim cover the same land, except about 14 acres, leaving a lappage of 192 acres.

Plaintiff introduced testimony tending to support his claim of adverse possession, which sufficiently appears in the opinion. Defendants offered testimony tending to controvert the evidence offered by the plaintiff as to acts of possession.

Three issues were submitted to the jury:

"1. Is the plaintiff the owner of the tract of land described in the complaint, or any part thereof?

"2. If so, did the defendant Coppersmith & Company wrongfully trespass thereon?

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

The jury answered the first and second issues in the affirmative, and assessed damages in answer to the third.

At the close of plaintiff's evidence defendants moved for judgment as of nonsuit, and renewed the motion at the close of all the evidence. To the denial of each, the defendants excepted. From judgment on the verdict, the defendants appealed to the Supreme Court and assigned error.

R. Clarence Dozier, M. B. Simpson, W. I. Halstead, and J. H. LeRoy, Jr., for plaintiff, appellee.

W. B. Rodman, Whedbee & Whedbee, and Thompson & Wilson for defendants, appellants.

WINBORNE, J. This appeal challenges the judgment below mainly with respect to: (1) The competency of certain testimony admitted as evidence relating to possession. (2) The sufficiency of all the evidence to constitute adverse possession. (3) The absence of seizin or possession

within twenty years next before the institution of the action. The challenge is not sustained.

1. Witnesses were permitted to testify, over defendants' objection, that Mercer was in possession of the land in question fifty years ago, and stayed in possession until Williams and Needham bought it, that they stayed in possession ten or eleven years, and that when they sold to C. J. Duke, he went into possession. This testimony was competent. *Bryan v. Spivey,* 109 N. C., 57, 13 S. E., 766; *Thornton v. R. R.,* 150 N. C., 691, 64 S. E., 776; *Berry v. McPherson,* 153 N. C., 4, 68 S. E., 892.

In *Bryan v. Spivey, supra,* speaking to the competency of like testimony, the Court said: "Where, however, a witness testifies that a certain person is in possession of land, and where, as in the present case, there is nothing in his or any other testimony to indicate that the possession was a conflicting one, or that the witness intended that his language should be understood in any other than its ordinary sense among laymen, to wit, actual possession or occupation, we cannot but treat it as the statement of a simple fact, and as such a proper subject for the consideration of a jury, or the court when a jury trial has been waived." And, again, p. 69: "Our conclusion, therefore, is that the testimony of the witness Marshall was evidence of actual possession and occupation, and, as such, was proper to be considered by the court." Jury was there waived.

In *Thornton v. R. R., supra,* the Court said: "That such testimony is some evidence of possession, although subject to cross-examination as to what constitutes possession, is held in *Bryan v. Spivey,* 109 N. C., 68."

In *Berry v. McPherson, supra,* it is said: "This language of the witness, unexplained and uncontradicted by cross-examination, must be taken in the ordinary sense, as understood by laymen, to mean an actual and not a mere constructive possession. It is to be treated as the statement of a fact, which, however, upon cross-examination, may be shown to be without substantial basis, in which event it will be disregarded. 'A witness may testify directly in the first instance to the fact of possession, if he can do so positively, subject, of course, to cross-examination.' Abbott Trial Ev., 622; 590; *Rand v. Freeman,* 1 Allen, 517; *Bryan v. Spivey,* 109 N. C., 68, where this question is learnedly discussed by *Mr. Justice Shepherd.*"

Each witness in the case at bar, on direct and cross-examination, testified to acts of possession tending to substantiate the fact of possession. The further testimony elicited from these witnesses tended to show that B. F. Mercer cut some timber on the land for shingles, for fences, and to take to the mill; that he sold some cypress; that he sold the pine to his son, who sold it to the Roanoke Railroad & Lumber Company, and

that the company built a road on and over the land and maintained it about five years while operating in the immediate section. One witness testified that he lived with Mercer nine years in the ten years next after 1894, and that Mercer had logs, sills, and shingles cut, and that "he worked on the land off and on the whole time I stayed with him." The testimony tended further to show that after Williams and Needham bought from Mercer they cut shingles as they wished, cut firewood every fall and spring, sold some piling, few shingles, logs for sills and building material, built bridged walkways to get shingles, and cut sills from time to time as long as they owned it.

2. In determining the question as to the sufficiency of the testimony to establish adverse possession it is well to note settled principles for guidance.

Title is conclusively presumed to be out of the State, it not being a party to the action. C. S., 426. In setting up claim under a grant from the State the defendants admitted the title to be out of the State.

The deed under which plaintiff claims and the grant under which the defendants claim cover in large part the same land, thereby presenting what is commonly termed a lappage. The relative rights of the parties are clearly settled. In the case of *Currie v. Gilchrist,* 147 N. C., 648, the subject is fully discussed and summed up in part as follows: "We may therefore take it to be settled by this Court by a long and unvarying line of decisions that if the person who claims under the elder title have no actual possession on the lappage, such possession, although of a part only, by him who has the junior title, if adverse and continued for seven years, will confer a valid title for the whole of the interference, the title being out of the State. *Kerr v. Elliott,* 61 N. C., 601; *Howell v. McCracken,* 87 N. C., 399; *Asbury v. Fair,* 111 N. C., 251; *Boomer v.* Gibbs, 114 N. C., 76." *Simmons v. Box Co.,* 153 N. C., 258; *Pheeny v. Hughes,* 158 N. C., 463, 74 S. E., 321; *Ray v. Anders,* 164 N. C., 311, 80 S. E., 403; *Hayes v. Lumber Co.,* 180 N. C., 252, 104 S. E., 527.

Adverse possession must be possession under known and visible lines and boundaries, and under colorable title. C. S., 428. In the instant case the lands claimed by the plaintiff are well known as the "Mercer Tract" or the "Frank's Point Tract." The lines and boundaries are well defined, visible, and known. It is not denied that the deeds under which plaintiff claims are sufficient to constitute color of title.

What is adverse possession within the meaning of the law has been settled by our decisions. In *Currie v. Gilchrist,* 147 N. C., 648, at p. 655, it is said: "The possession, to be adverse, should, of course, be denoted by the exercise of acts of dominion over it 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 and not merely of an occasional trespasser."

In *Locklear v. Savage,* 159 N. C., 237, it is stated: "It (possession) 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." *Shelly v. Grainger,* 204 N. C., 488, 168 S. E., 736; *Owens v. Lumber Co.,* 210 N. C., 504, 187 S. E., 504.

Again, in *Locklear v. Savage, supra,* at p. 239, it is stated: "In proving continuous possession under color of title nothing must be left to mere conjecture. The testimony must tend to prove the continuity of possession for the statutory period, either in plain terms or by 'necessary implication.' *Ruffin v. Overby,* 105 N. C., 83. Possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has, from time to time, continuously subjected the disputed land to the only use of which it was susceptible." *Coxe v. Carpenter,* 157 N. C., 557, 73 S. E., 113; *Alexander v. Cedar Works,* 177 N. C., 137, 98 S. E., 312.

In *Alexander v. Cedar Works, supra,* we find this statement: "Cutting timber from land kept up with such frequency and regularity as to give notice to the public that the party cutting or having it cut is claiming the land as his own, and that it is done in such a way as to constantly expose the party to a suit by the true owner is sufficient if done for the time required by law to ripen the color into a good title." Again: "Entering upon, ditching, and making roads in a cypress swamp, and working timber into shingles, was sufficient possession, if continued for the requisite time, to ripen a defective title into a perfect one." *Tredwell v. Reddick,* 23 N. C., 56.

The land in controversy appears to be deep swamp land, unenclosed, wet, miry, and unsuitable for cultivation, and valuable only for the timber and trees growing thereon. The evidence offered, we think, is sufficient to take the case to the jury under appropriate instructions. The burden was upon the plaintiff to establish the fact of possession for the statutory period by a preponderance of the evidence. In the charge the court correctly and clearly explained the established principles of law bearing upon the issue. The case has been fairly submitted to the jury.

3. Defendants contend that plaintiff cannot maintain this action in the absence of showing that he and his predecessors were seized or possessed of the premises in question within twenty years before the institution of the action. They rely upon C. S., 429 (Rev., 383).

The plaintiff had acquired title by adverse possession for seven years under color of title, as the jury has found. Seizin follows the title.

Plaintiff, therefore, had at least constructive seizin or possession, nothing else appearing. This satisfies the requirement of the statute. *Bland v. Beasley,* 145 N. C., 168, 58 S. E., 993; *Stewart v. McCormick,* 161 N. C., 625, 77 S. E., 761; *Alexander v. Cedar Works, supra.*

Full consideration has been given to all the exceptions presented. We are of opinion that the trial was free from error.

No error.

STATE v. THOMAS MADDEN.

(Filed 22 September, 1937.)

1. Burglary § 1—

Burglary in the first degree is an unlawful and intentional breaking and entry into a dwelling house presently occupied, in the nighttime, with intent to commit the felony charged in the bill of indictment, and proof of each of these essential elements is required for a conviction.

2. Criminal Law § 32a—Circumstantial evidence is insufficient as matter of law if it fails to exclude to moral certainty hypothesis of innocence.

While circumstantial evidence is an accepted instrumentality in establishing the commission of a crime or any essential element thereof, the circumstances proved must be consistent with each other and with the hypothesis that accused is guilty, and must exclude to a moral certainty the hypothesis that accused is innocent, and circumstantial evidence which supports a reasonable hypothesis of innocence is insufficient as a matter of law to sustain a conviction.

3. Burglary § 9—Circumstantial evidence in this case held insufficient to establish unlawful breaking and entry.

The evidence in this case tended to show that prosecutrix was standing at her front door in the nighttime after being aroused by noise of someone attempting to enter the house, that she was there knocked unconscious, and that accused assaulted her, that thereafter blood was found in the front room where she was standing, a larger quantity of blood was found in the kitchen and back porch, and that the back door, which had been locked and the key left in the lock on the inside, was open, and that the back screen door, which had been latched, was unlatched, and that parts of two boards were torn out of the floor of the back porch, leaving a hole about six inches wide, and that some two weeks later a small hole was found in the screen door near the latch. There was no evidence that the lock of the back door was broken or sprung or the key expelled from the lock, or that the woodwork of the back door was damaged. *Held:* The evidence does not exclude to a moral certainty the possibility that accused entered the house through the open front door, and is insufficient as a matter of law to establish an unlawful breaking and entry essential to establish the count of burglary in the first degree.

STATE *v.* MADDEN.

INDICTMENT for burglary in the first degree, tried at the February Term, 1937, of SURRY, before *Hill, Special Judge.* New trial.

On the night of 1 November, 1936, the prosecutrix, Sarah Wood, after giving medicine to her husband, who was sick and in bed, retired between nine and ten o'clock. About 11:45 she heard a noise at her window and, upon looking, discovered a man crawling away from the window toward the rear of the house. After dressing she took the lamp and went to the back porch and there had a conversation with a man she identified as the defendant. This man went to the back screen door and began shaking it as if trying to enter. The prosecutrix went back in the house and locked the back door, leaving the key in the lock. She informed her husband about the presence of the man and, after he had dressed, both of them went to the front door, called for assistance, or to get a neighbor to telephone the officers. Prosecutrix opened the front door and stepped out on the porch a sufficient distance to look each way and saw no one. She still heard the noise at the back screen door, which terminated in a noise which sounded like the slamming of a screen door. While the prosecutrix and her husband were standing at the front door looking out the prosecutrix received a lick in the face, which rendered her unconscious. The husband at the same time was stricken and became unconscious.

Some time thereafter the prosecutrix sufficiently recovered to attract the attention of neighbors. When the neighbors arrived they discovered a small quantity of blood in the front room, large quantities in the kitchen, and considerable blood on the back porch, which had the appearance of having been wallowed in. Both the prosecutrix and her husband were seriously injured. At that time the back door was standing open and the back screen door was unlatched. Just inside of the back screen door two boards, each three inches wide, had been pushed down toward the ground, leaving an opening about six inches wide. About two or three weeks later a hole about the size of a small nail was discovered in the screen door near the latch. At the time prosecutrix retired all of the windows of the house were closed, the back screen door was latched, and the back door was locked. None of the windows were disturbed and no physical injury was done to the building except as indicated. Detailed evidence as to the offense committed and that tending to show the identity of the defendant is omitted.

There was a verdict of guilty and a judgment of death, from which the prisoner appealed.

Attorney-General Seawell and Assistant Attorney-General McMullan for the State, appellee.

A. E. Tilley and Wilson Barber for defendant, appellant.

BARNHILL, J. The court below, in its charge to the jury, properly defined the crime of burglary in the first degree as being constituted of the following essential elements: (1) An unlawful and intentional breaking, and (2) an unlawful and intentional entry; (3) into a dwelling house presently occupied; (4) in the nighttime; (5) with intent to commit the felony charged in the bill. Each of these essential elements, constituting the crime of burglary in the first degree, was clearly defined with commendable accuracy.

There was sufficient evidence tending to show the identity of the defendant, and that the dwelling house of the prosecutrix and her husband, then occupied by them, was entered during the nighttime, and that a felonious assault was actually committed. The only feature of the testimony we need to discuss is the sufficiency of the evidence to show an unlawful and intentional breaking and entry. To establish this essential element of the crime charged, the State relied upon circumstantial evidence, which is a well recognized and accepted instrumentality of truth in the proof of the commission of a crime, or in establishing the existence of any essential element thereof. Each essential element must be established beyond a reasonable doubt and failure upon the part of the State to so establish any essential element of the crime requires a verdict of acquittal.

Circumstantial evidence is not sufficient to justify conviction if the circumstances are consistent with either the hypothesis of innocence or the hypothesis of guilt. To justify inference of guilt the circumstantial evidence must exclude to a moral certainty every other reasonable hypothesis.

In order to sustain a conviction on circumstantial evidence all the circumstances proved must be consistent with each other, consistent with the hypothesis that accused is guilty and at the same time inconsistent with the hypothesis that he is innocent and with every other rational hypothesis except that of guilt. In short, if all the material circumstances in evidence point to guilt and exclude any reasonable hypothesis except that of guilt—in other words, if they are inexplicable on the theory of innocence—a conviction is warranted. *S. v. Plyler,* 153 N. C., 630; *S. v. West,* 152 N. C., 832; *S. v. Wilcox,* 132 N. C., 1120; *S. v. Austin,* 129 N. C., 534; 16 C. J., sec. 1568. If all the circumstances proved, taken together, are as compatible with innocence as with guilt, there arises a reasonable doubt, requiring an acquittal. *U. S. v. Hart,* 78 Fed., 868. Of two reasonable hypotheses supported by the evidence in a criminal case, it is the jury's duty to adopt the hypothesis of innocence, *Johnson v. State* (Ga.), 79 S. E., 524, even though that of guilt is the more probable. *Thompson v. State* (Miss.), 35 S., 689.

To establish an unlawful breaking and entry the State relied upon the testimony of the prosecutrix and her husband. This testimony tends

to show that the screen door to the back porch was hooked and the back door to the house was locked; that the windows were locked, and that the front door was the only other normal means of entry to the house; that the windows were not disturbed; that the screen door to the back porch had a hole about the size of a small nail in it near the latch, which was not there before the night in question; that after the occurrences detailed by the prosecutrix, neighbors found the back door open and the screen door unlatched. Parts of two boards were torn out of the floor of the back porch, leaving a hole about six inches wide. There was blood in the front room, in the kitchen, and on the back porch. The blood on the back porch "looked as if someone had wallowed in it." The defendant was seen by the prosecutrix at the back screen door, shaking it as if trying to enter. After she left the rear of the house she still heard the shaking of the door and, just before she was assaulted heard something which sounded like the slamming of a screen door. The State contends that this evidence is sufficient to establish an entry through the screen door to the back porch and the back door to the house.

If no other facts and circumstances appeared, it might be said that the only reasonable hypothesis to be drawn from this testimony is that the defendant entered the dwelling house of the prosecutrix through the rear of the house, as contended by the State.

The State's evidence further discloses, however, that when the prosecutrix left the rear of the house she and her husband went to the front door, opened same, and the prosecutrix stepped out on the front porch; that while the prosecutrix and her husband were looking out toward the front she was struck in the face; that she heard no assailant approach, either from the front or the rear; that when the prosecutrix locked the back door she left the key in the lock; that there was no evidence that this lock had been tampered with; the woodwork was not disturbed and the lock was not sprung or broken and the hole in the screen wire was not found until two or three weeks after the occurrence. It likewise appears that the prosecutrix and her husband were stricken in the front room at the front door; that there was a small quantity of blood in that room and a greater quantity in the kitchen and on the back porch.

If this evidence, considered in the light most favorable to the State, justifies an inference reasonable and logical in its conclusions, which is consistent with the innocence of the defendant of the crime charged, the defendant is entitled to the benefit of that hypothesis. If the circumstances relied upon, considered in connection with the other testimony offered by the State, do not tend to exclude the hypothesis of innocence, but is merely subject to an interpretation which would establish the guilt of the defendant, the defendant is entitled as a matter of law to

have that conclusion which is consistent with his innocence applied in his favor, for circumstantial evidence, when relied on to convict, should be clear, convincing, and conclusive in its connections and combinations, excluding all rational doubt as to the prisoner's guilt. To justify the inference of guilt the circumstantial evidence must exclude to a moral certainty every other reasonable hypothesis.

The circumstances relied upon by the State to establish an unlawful breaking and entry, when considered as a whole, would tend to show that the entry was made through the front door, where the prosecutrix and her husband were assaulted, and that after the assault the defendant unlocked the back door and made his exit through the rear of the house. Certainly, this inference is as reasonable and logical—if not more so—as the one the State seeks to have drawn from the testimony. There was very little evidence, if any, which would exclude this hypothesis, which is consistent with the defendant's innocence. Certainly the testimony does not exclude this inference to a moral certainty. If, as the State contends, the defendant made his entry through the back door, just how he did so without damaging the woodwork, breaking or springing the lock, or disturbing the key, which was on the inside of the lock, is shrouded in mystery and a subject merely of conjecture.

"Evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it is so, is an insufficient foundation for a verdict and should not be left to the jury." *S. v. Vinson,* 63 N. C., 335.

The evidence discloses that a vicious, felonious assault has been committed, but we must not permit the gravity of the crime committed to withdraw our attention from the controlling principles of law involved in this action.

We conclude that there was no sufficient evidence of a felonious breaking and entry to justify the submission of this cause to the jury upon the principal or initial charge contained in the bill of indictment, and that to that extent the motion of the defendant to dismiss as of nonsuit should have been allowed. The case should have been submitted to the jury only as to such of the lesser offenses embraced in the bill as are supported by the testimony.

We have refrained, as far as possible, from detailing or discussing any of the evidence other than that which had a bearing upon the charge of unlawful breaking and entry for the reason that the defendant will again be tried for lesser offenses embraced within the present bill of indictment, or upon another and a different bill of indictment, as the solicitor may elect.

For the reasons assigned, this cause is remanded for a

New trial.

CORA EDWARDS, ADMINISTRATRIX OF THE ESTATE OF MARION EDWARDS, DECEASED, v. SOUTHERN RAILWAY COMPANY, L. H. WHITE, E. E. ENSLEY, AND A. D. MURRAY.

(Filed 22 September, 1937.)

1. Removal of Causes § 4a—

Whether an action is separable is to be determined by the allegations of the complaint, and where the complaint states a joint cause, the action is not removable even though it may be later determined upon the trial that plaintiff is not entitled to recover from the parties jointly.

2. Same—Complaint in this case held to state joint cause, and nonresident defendant's motion to remove was properly denied.

A complaint alleging that defendant agents and servants of the defendant railroad company had knowledge that plaintiff's intestate, in an intoxicated or crazed condition, was standing in a position between the tender of the engine and the baggage car, and negligently and willfully failed to perform their duty to have intestate removed from his perilous position, but permitted him to remain therein while the train was moving until he fell therefrom to his injury resulting in death, *is held* to state a joint cause of action against the railroad company and the individual defendants, and the railroad company's motion to remove on the ground of separable controversy was properly denied.

APPEAL by petitioner, defendant Southern Railway Company, from *Phillips, J.*, 31 May, 1937. From SWAIN. Affirmed.

The plaintiff in the complaint, of some length and in detail, set forth facts charging all the defendants with actionable negligence in reference to the death of plaintiff's intestate. That L. H. White was the engineer of the train, E. E. Ensley, conductor of the train, and A. D. Murray the ticket agent, and all joint tort-feasors.

The allegations, in part: "That on 6 November, 1936, plaintiff's intestate resided in Swain County, North Carolina, some miles from Bryson City, and on the morning of said date left his said home with the purpose and intention of going to Asheville, North Carolina, on business, and intended to travel to Asheville as a passenger on a train of the defendant company which left Bryson City about 11:30 o'clock a.m.; that plaintiff's intestate came to Bryson City, as plaintiff is informed and believes, and went to the station owned and maintained by the defendant Southern Railway Company for the purpose of purchasing a ticket over defendant company's line of railway to Asheville. That while plaintiff's intestate was in and around the defendant company's said station at Bryson City he lost possession of his mental faculties and became crazed and disordered in his mind, so that he did not know or realize where he was, and was so crazed and disordered in

mind that he was unable to care for himself, or realize and understand where he was going or what he was doing; that said condition of his mind was due, as plaintiff is informed and believes, to intoxication or sudden illness, and plaintiff avers that the condition of her intestate was plain and apparent to all while he was in and around the station of the defendant railway company; that while plaintiff's intestate was in this condition at and around said station of the defendant company, a passenger train, owned and operated by the defendant company, known as Train No. 17, arrived at said station en route to Murphy, North Carolina, and stopped for approximately ten minutes at said station, about 12:30 o'clock p.m. That while said Train No. 17 was standing at said station, plaintiff's intestate being crazed and mentally deranged, as aforesaid, and being without mind or power to care for himself, climbed on the baggage car of said passenger train No. 17, and stood in a position between the tender of the engine and said baggage car, in plain view of the servants and employees of the defendant company, including the defendants A. D. Murray, E. E. Ensley, and L. H. White. That before said train pulled out of said station the plaintiff's intestate hollered and made other demonstrations, indicating that he was out of his head and mentally deranged and entirely incapable of taking care of himself. That he was seen while standing in said position before said train pulled out by employees of the defendant railway company who saw plaintiff's intestate's helpless condition and knew and realized that he would be killed unless removed from said dangerous and perilous position. . . . That the defendants E. E. Ensley, L. H. White, and A. D. Murray were notified and had actual knowledge that plaintiff's intestate was on said Train No. 17, in said dangerous and perilous place and situation as aforesaid, in a crazed and mentally deranged condition, in imminent danger of being thrown under said train and killed; and thereupon it became and was the duty of said defendants, and each of them, to have plaintiff removed from said place of danger on said train; but the defendants, and each of them, knowingly, willfully, and recklessly and wantonly allowed plaintiff's intestate to remain in said place of danger and peril on said train for more than an hour while same was proceeding toward Murphy, and failed and neglected to make any effort to have plaintiff's intestate removed from said train, and plaintiff's intestate was thereby caused, permitted, and allowed to be thrown under the wheels of said train and killed, all to plaintiff's great damage, as hereinafter stated. That at the time Train No. 17 left Bryson City until plaintiff's intestate was thrown under the wheels thereof and killed, as aforesaid, said intestate was in plain view, standing between the tender and baggage car of said train and hollering in a manner to attract attention, and plaintiff alleges that the defendants, and each of

them, knew that plaintiff was on said train in said dangerous and hazardous place and position, or by the exercise of ordinary care the defendants, and each of them, could have learned of plaintiff's presence, and that he was mentally deranged, not able to care for himself, and was liable at any moment to be hurled beneath the wheels of said train; but said defendants negligently and recklessly failed to remove plaintiff's intestate from said train and from said dangerous place and situation, and as the proximate result of said carelessness and negligence on the part of the said defendants, and each of them, plaintiff's intestate was thrown from his position, as aforesaid, under the wheels of said train and killed, all to plaintiff's great damage, as hereinafter stated. That the aforesaid careless, tortious, negligent, and reckless acts, conduct, and omissions of the said defendants, and each of them, directly, materially, concurrently, jointly, and proximately contributed, to and were the direct, joint, concurrent, and proximate cause of the injury and death of plaintiff's intestate, and plaintiff avers that by reason thereof her said intestate was crushed, torn, mangled, and killed in the manner aforesaid, all to her great damage in the sum of $30,000."

The Southern Railway Company filed petition and complied with the requirements to remove the action to the United States District Court for the Western District of North Carolina, and set forth in detail the reasons therefor.

The clerk of the Superior Court of Swain County, N. C., rendered the following judgment: "It is thereupon considered and ordered by the court that the motion and petition of the defendant Southern Railway Company to remove the above entitled action from the Superior Court of Swain County, North Carolina, to the United States District Court for the Western District of North Carolina, for trial be and the same is hereby denied and overruled. Frank Hyatt, C. S. C., Swain County."

The Southern Railway Company appealed to the Superior Court from the judgment of the clerk of the Superior Court, and Phillips, J., rendered the following judgment: "It is therefore considered and ordered by the court that the motion and petition of the defendant Southern Railway Company to remove the above entitled action from the Superior Court of Swain County, N. C., to the United States District Court for the Western District of North Carolina for trial be and the same is hereby denied and overruled, and the order of the clerk overruling said motion is hereby affirmed."

To the making and signing of the foregoing order denying and overruling defendant Southern Railway Company's motion and petition to remove the above case to the United States District Court for trial, the petitioner, Southern Railway Company, excepted, assigned error, and appealed to the Supreme Court.

The defendant excepted and assigned error: "That his honor erred in entering judgment overruling defendant's petition to remove this case to the U. S. District Court for the Western District of North Carolina, and in entering order retaining said case in the State Court, as appears of record."

Edwards & Leatherwood for plaintiff.
W. T. Joyner and Jones & Ward for Southern Railway Company.

CLARKSON, J. We see no error in the judgment of the court below.

In *Trust Co. v. R. R.*, 209 N. C., 304 (311), speaking to the subject, is the following: "This matter was settled beyond question long ago in *Morganton v. Hutton, supra* (187 N. C., 736 [739]), and in *Alabama Southern Ry. v. Thompson*, 200 U. S., 206. In that case an action was brought by the administrator of Florence Jones against the railroad and Wm. H. Mills, as conductor, and Edgar Fullar, as engineer, for actionable negligence. The defendant corporation was organized under the laws of Alabama and the conductor and engineer and plaintiff were citizens of Tennessee, where the action was brought. The opinion (a long one), covering every phase of the law and citing a wealth of authorities, at p. 217, says: 'In other words, the right to remove depended upon the case made in the complaint against both defendants jointly, and that right, in the absence of a showing of fraudulent joinder, did not arise from the failure of the complainant to establish a joint cause of action.' At pp. 218-19, speaking to the subject, it is said: 'Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action and had no right to prosecute the defendants jointly? We think, in the light of the adjudications above cited from this Court, it does not. Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the state court will hold it not to be so. It may be, which we are not called upon to decide now, that this Court would so determine if the matter shall be presented on a case of which it has jurisdiction. But this does not change the character of the action, which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal. The case cannot be removed unless it is one which presents a separable controversy wholly between citizens of different states. In determining this question the law looks to the case made in the pleadings, and determines whether the state courts shall be required to surrender its jurisdiction to the Federal courts.' *Southern Railway Co. v. Lloyd*, 239 U. S., 496."

In *Clevenger v. Grover*, 211 N. C., 240 (243), it is said: "As was said in *Hughes v. Railroad*, 210 N. C., 730, the last case wherein this Court considered the question of removal of cases 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. Republic Iron & Steel 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.' 'In order to warrant the removal on the ground of alleged fraudulent joinder, the petition must contain statements of the relevant facts and circumstances, with sufficient minuteness of detail, and be of such kind as rightly to engender or compel the conclusion that the joinder has been made in bad faith and without right.' *Crisp v. Fibre Co.,* 193 N. C., 77; *Fore v. Tanning Co.,* 175 N. C., 583; *Cogdill v. Clayton,* 170 N. C., 527; *Smith v. Quarries Co.,* 164 N. C., 338; *R. R. v. Lloyd,* 239 U. S., 496. The omission of an employee, while acting in the scope of his employment, to perform a legal duty owed to a third person ordinarily imposes liability on both employee and employer. *Trust Co. v. R. R.,* 209 N. C., 304; *Hollifield v. Telephone Co.,* 172 N. C., 714; *Hough v. R. R.,* 144 N. C., 692. When the facts set forth in the petition in the instant case as the basis for the allegation of fraudulent joinder are considered and analyzed in their relation to the cause of action alleged in the complaint, it is apparent that they are insufficient for that purpose under the rule laid down in *Crisp v. Fibre Co., supra,* and *Trust Co. v. R. R., supra.*"

For the reasons given, the judgment is

Affirmed.

LOUISE W. CAMPBELL v. AMERICAN FIDELITY & CASUALTY COMPANY.

(Filed 22 September, 1937.)

1. Insurance § 44—Employee riding pass held not within clause excluding employees while operating, maintaining, or using vehicle.

The policy of liability insurance procured by a bus company excluded liability for injury to any employee of assured while operating, maintaining, repairing, or using any vehicle covered by the policy. Plaintiff was injured while riding on a pass given her as compensation for answering the phone at her hotel used as a bus terminal, and for giving information about the fares, baggage, and schedules. *Held:* Construing the policy

in accordance with the rights of assured and the intent of the parties, plaintiff, conceding she was an employee, was a passenger for hire at the time of the injury, and was not injured while operating, maintaining, repairing, or using the vehicle within the meaning of the noncoverage clause.

2. Same—Employee riding pass held not within clause excluding liability to employees in course of trade or business of assured.

The policy of liability insurance procured by a bus company excluded liability to any employee of assured arising out of and in the course of the trade, business, profession, or occupation of assured. Plaintiff was riding a pass given her for services rendered by her at assured's bus station in giving information to prospective passengers. *Held:* Construing the policy in accordance with the intention of the parties, the noncoverage clause excluded liability to employees injured while acting within the scope of their employment, and plaintiff's injuries were not sustained in the scope of her employment and insurer may not escape liability therefor under the noncoverage clause.

3. Judgments § 29—

An insurer having entire control of the defense of an action against insured is bound by the judgment, even though it is not a party to the suit, and may not assert in a subsequent action that the injured person was not a passenger for hire when this issue is adversely determined against it in the former action.

4. Carriers § 15—

An employee riding a pass given as compensation for services rendered is a passenger for hire.

5. Carriers § 21—

A carrier owes the same degree of care to a gratuitous passenger as it owes to a passenger for hire.

6. Insurance § 43—Under facts, insurer held estopped to deny liability on ground that assured had no franchise to operate buses in the State.

Assured operated buses largely in another State and had no franchise in this State, but its buses were used in North Carolina on routes assigned another company, controlled by the same interests, which did have a franchise in this State. The policy taken out by assured had an endorsement attached thereto expressly providing insurance on its buses covered by the policy while engaged in the transportation of passengers for compensation in North Carolina. Plaintiff was injured while riding on a bus of assured in North Carolina. *Held:* Insurer will not be heard to deny liability on the ground that assured had no franchise to operate buses in North Carolina.

APPEAL by the defendant from *Williams, J.*, at April Term, 1937, of CURRITUCK. No error.

On 22 April, 1930, the defendant issued to the assured, Virginia Beach Bus Line, Inc., and/or Coastal Coach Lines, Inc., its Policy No. PT-6491, indemnifying the assured "against any loss arising or resulting from claims on account of bodily injury or death suffered by any person

or persons other than the assured and his employees excluded herein as a result of accident occurring while the policy is in force." The policy carried the usual requirement that the defendant should defend actions for the recovery of damages.

There was a clause in said policy excluding certain employees of the assured from the coverage of said policy.

Bus No. 15 of Mack make, with Motor No. BA 703-79, was specifically included in the policy by endorsement. The liability to anyone individually was likewise limited to $5,000.

As required by resolution adopted by the Corporation Commission of North Carolina in 1927, endorsement (d) was likewise attached to said policy. This endorsement provides:

"The insurance granted under this policy is hereby extended to cover any motor vehicle, . . . specifically named, numbered, or otherwise designated, or described in the policy sufficiently for identification, operated by the assured while actually engaged in the transportation of passengers for compensation upon any of the public highways in the State of North Carolina."

The Virginia Beach Bus Line, Inc., will hereafter be referred to as Bus Line, and the Coastal Coach Lines, Inc., will be referred to as Coach Lines.

Plaintiff, while riding on one of the buses of the assured Bus Line named in said policy, to wit: Bus BA 703-79, on 11 September, 1930, suffered certain personal injury. Suit was instituted against the Bus Line and judgment was recovered in the sum of $8,645. Upon notice to this defendant, it appeared, assumed control, and directed the defense of the Bus Line in said suit.

The Bus Line having become insolvent, this suit was instituted by the plaintiff to recover of the insurer the amount of her recovery, subject to the limitations in the policy.

The defendant denied liability (a) for that the plaintiff, being an employee of the Bus Line, did not come within the coverage of the policy; (b) for that the policy limited the use of the motor vehicle in question to transportation of passengers for compensation purposes on schedule over routes authorized by the North Carolina Corporation Commission, and that the assured Bus Line had no franchise to operate buses within the State of North Carolina.

The Bus Line and the Coach Lines were controlled by the same interests and the two lines interchanged buses, the Bus Line buses being used at times on the scheduled runs of the Coach Lines under its franchise in North Carolina.

Judgment was rendered in the court below in favor of the plaintiff and against the defendant in the sum of $5,000, and the defendant appealed.

W. H. Oakey and McMullan & McMullan for plaintiff, appellee.
Thompson & Wilson for defendant, appellant.

BARNHILL, J. The hotel of the plaintiff at Hertford, N. C., was used by the Bus Line as a passenger station, or a bus stop. She rendered service to the Bus Company by answering the telephone, giving information about the arrival and departure of buses and about the schedule, fares, and baggage. In return she received a pass entitling her to ride free of charge on the buses of the Bus Line. When injured she was riding on the bus by virtue of the pass, going from Hertford to Norfolk.

It may then be conceded that the plaintiff was an employee of the Bus Line at the time of her injuries. Her duties as such employee were confined to her hotel and her sole compensation was the pass she received.

Was the plaintiff excluded from the coverage of the policy cited by reasons of the provisions therein, excluding certain employees from the protection of the policy?

Subsection A of the noncoverage clause excluded any employee of the assured while operating, maintaining, repairing, or using any automobile covered therein. The word "using" as contained in this clause would not embrace use as a passenger. Plaintiff's duties did not require her to operate, maintain, repair, or use any of the automobiles of the Bus Line. A reasonable interpretation of this language, bearing in mind the rights of the assured and the intent of the parties to the contract, leads to the conclusion that plaintiff does not come within this section of the noncoverage clause.

Subsection B excludes liability to any employee of the assured arising out of and in the course of the trade, business, profession, or occupation of the assured. It seems to be clear that the intent of this section was to exclude those employees suffering injury which occurred in the course, and which grew out of their employment in the trade, business, profession, or occupation of the assured; that is, those employees injured while acting within the scope of their employment.

Broadly speaking, the noncoverage clause excludes only those employees who were injured while about their master's business. The plaintiff falls within neither of these classes.

Although she was an employee of the Bus Lines she was not acting within the scope of her employment at the time of her injury. Although riding upon a pass given her in return for her services, she was a passenger for hire. The plaintiff's status as a passenger for hire at the time of her injury has heretofore been judicially determined in plaintiff's former action against the insured Bus Line, which the instant defendant exclusively defended at all stages. The jury found, in re-

sponse to issues submitted, that the plaintiff was injured by the negligence of the Bus Line while traveling as a passenger for hire on one of its buses.

The defendant insurer, having assumed full control of the defense in that cause, cannot now be heard to question the legal status of the plaintiff as a passenger at the time of her injury. *Hynding v. Home Accident Insurance Company,* 85 A. L. R., 41 (Note); *Fullerton v. U. S. Casualty Company,* 6 A. L. R., 383 (Note).

"Where the insurer, although not being a party to an injured person's suit against the insured, conducts the defense of that suit, although in the name and behalf of the insured, with full opportunity to intervene therein and set up such defense as it deems proper, it is bound by the result thereof when sued later by the injured person." 6 Blashfield's Cyc. on Automobile Law and Practice, sec. 4076, page 442.

This defendant insurer having undertaken the defense in the case of this plaintiff against the insured, being responsible under its policy over to the assured on account of any judgment this plaintiff recovered against the assured for damages caused by the negligence of the assured, is bound by the judgment therein.

Even though this question had not been judicially determined in a manner binding upon the defendant, we would hold that the plaintiff was a passenger for hire.

Passes issued for a valuable consideration, whether money or services, are in no sense gratuitous, and an employee riding on such a pass is a passenger for hire. *N. S. R. R. Co. v. Chapman,* 244 U. S., 276; *Grand Trunk Ry. Co. v. Stephens,* 24 U. S. Law Edition, 535.

In 10 C. J., 635-6, it is said: "A person riding on a pass is as much a passenger as if he were paying full fare, unless he refuses to comply with the conditions thereof, and, if the pass is given for a valuable consideration, he is a passenger for hire."

In 10 C. J., 637, it is said, to like effect: "The consideration for the passes for such person is the service he renders."

To the same effect it is said in *Powell v. Union Pacific R. R. Co.,* 255 Mo., 420: "Where a railroad company engages an attorney to act as its local counsel, and gives him an annual pass in consideration of his agreement not to accept any cases against the company, the attorney, although using the pass on his own business, is a passenger."

Even though the plaintiff had been a gratuitous passenger, the assured would have owed her the same degree of due care. To this effect see *Cates v. Hall,* 171 N. C., 360.

We hold, then, that the plaintiff was not excluded from the coverage of said policy by reason of her employment by the Bus Lines.

Is plaintiff barred from recovery in this action by reason of the fact that the policy limited the use of the motor vehicle in question to transportation of passengers for compensation purposes on schedule over routes authorized by the North Carolina Corporation Commission and the Bus Line had no franchise to operate buses within the State of North Carolina?

The Bus Line, operating largely in the State of Virginia, but whose buses were used in North Carolina on routes assigned the Coach Lines, and the Coach Lines were equally insured by defendant's policy. This policy, by endorsement attached thereto, expressly provides that: "The insurance granted is extended to cover any motor vehicle . . . specifically named, numbered, or otherwise designated, or described, in the policy sufficiently for identification, operated by the assured while actually engaged in the transportation of passengers for compensation upon any of the public highways of the State of North Carolina." The bus upon which plaintiff was riding at the time of her injury was specifically included in the policy and was being actually operated for the transportation of passengers for hire upon the public roads of North Carolina at the time plaintiff was injured. This defendant cannot now be heard to deny its liability under its policy by reason of the fact that at the time of the accident, resulting in injury to the plaintiff, it held no franchise from the Corporation Commission of North Carolina, authorizing it to operate its buses upon the public roads of North Carolina. The plaintiff is not excluded from the protection of the policy by reason of that fact. There was no error in the judgment below.

No error.

LEILA M. GLASS, THOS. A. MITCHELL AND WIFE, MARY L. MITCHELL, v. LYNCHBURG SHOE COMPANY, L. M. SHEFFIELD, SHERIFF, AND W. R. DALTON, TRUSTEE.

(Filed 22 September, 1937.)

1. Deeds § 10b—

While an unregistered deed is good as between the parties, it does not convey the complete title and is ineffectual as against subsequent grantees under registered deeds and creditors of the grantor, C. S., 3309.

2. Same: Adverse Possession § 9a—Where grantee in unregistered deed conveys by registered deed, registered deed is color of title.

While an unregistered deed is not color of title as against subsequent grantees under registered deeds and creditors of the grantor, C. S., 3309, where the grantee in the unregistered deed conveys by registered deed, and *mesne* conveyances from him are duly registered, such registered deeds are color of title, C. S., 428, and where the land is held by actual

possession successively by the grantees in such chain of title continuously for over seven years prior to the filing of a judgment against the grantor in the unregistered deed, the grantor in the unregistered deed is divested of title by adverse possession prior to the filing of the judgment, and the judgment does not constitute a lien against the land.

APPEAL by defendants from *Ervin, J.*, at May Term, 1937, of ROCKINGHAM.

An action brought by the plaintiffs to restrain the sale under execution of the lands described in the complaint and to remove as cloud upon title the judgments under which the execution issued.

The parties waived jury trial and agreed that the court should find the facts without a jury, and on hearing all the facts were admitted of record.

R. L. Borland, widower, who had title in fee simple, conveyed the land in question to W. B. Wray by deed dated 14 June, 1912. W. B. Wray entered into possession immediately but did not register his deed. He claimed only under it. Wray conveyed to J. D. Glass by deed dated 27 July, 1912, registered 22 August, 1912. J. D. Glass and wife, Leila M. Glass, executed deed of trust to W. R. Dalton, trustee, to secure indebtedness to a third party. This deed of trust was dated 25 September, 1912, registered 5 October, 1912. W. R. Dalton, trustee, foreclosed under the deed of trust and conveyed to Leila M. Glass by deed dated 20 October, 1917, registered 31 October, 1917. J. D. Glass having died 11 March, 1917, Leila M. Glass, widow, conveyed a portion of the land to Thos. A. Mitchell and wife, Mary L. Mitchell, by deed dated 22 February, 1924, registered 23 February, 1924.

Plaintiffs claim title by adverse possession under the registered deeds as color of title.

The deed from W. B. Wray to J. D. Glass, the deed of trust from J. D. Glass and wife to W. R. Dalton, trustee, the deed from W. R. Dalton, trustee, to Leila M. Glass, and the deed from Leila M. Glass to Thos. A. Mitchell and wife were based upon valuable consideration, were duly executed, delivered, and registered, were sufficient in form to convey and purported to convey the land in fee simple by specific description.

Immediately upon obtaining deed from W. B. Wray, 27 July, 1912, J. D. Glass entered into actual possession of the land under said deed, "claiming the same as his own," and he and the plaintiffs, claiming under him and under said subsequent conveyances, continued such actual, open, and notorious possession under known and visible lines and boundaries, and were in such possession on 16 November, 1925.

Defendant Lynchburg Shoe Company obtained judgments against R. L. Borland, which were duly docketed as provided by law on 16

November, 1925. In January and February, 1935, executions were issued to defendant L. M. Sheffield, as sheriff, who, under authority thereof, levied upon and advertised for sale all the land in controversy, both that claimed by plaintiff Leila M. Glass and that by Thos. A. Mitchell and wife, in the manner and in accordance with law. The sale was enjoined in this action. R. L. Borland is insolvent and without property sufficient to satisfy the execution.

Upon these facts the court below concluded as matters of law, in substance, the following: (1) The deed from R. L. Borland to W. B. Wray, not having been registered in compliance with the Connor Act, C. S., 3309, that plaintiffs do not derive any title under said R. L. Borland. (2) That the deed from W. B. Wray to J. D. Glass, the deed of trust from J. D. Glass and wife to W. R. Dalton, trustee, the deed from W. R. Dalton, trustee, to Leila M. Glass, constitute color of title to the land claimed by Leila M. Glass; and that the said deed, the deed of trust, and the deed from Leila M. Glass to Thos. A. Mitchell and wife constitute color of title to the land claimed by Thos. A. Mitchell and wife. (3) That the acts of Leila M. Glass and J. D. Glass in possessing the land claimed by Leila M. Glass, and the acts of Thos. A. Mitchell and wife, Leila M. Glass, and J. D. Glass in possessing the portion of the land claimed by Thos. A. Mitchell and wife, under the said deeds, from 25 September, 1912, to 16 November, 1925, as to each portion of land, constituted in law adverse possession for more than seven years, to wit, for a period of thirteen years. (4) That title had been ripened in Leila M. Glass and in Thos. A. Mitchell and wife, respectively, to the land claimed by each by such adverse possession under color of title prior to the docketing of the judgments of defendant Lynchburg Shoe Company against R. L. Borland, 16 November, 1925, and hence R. L. Borland had no title to said lands upon which the liens of said judgments could attach.

From an adverse judgment in accordance with such rulings, the defendants appealed to the Supreme Court, and assigned error.

Allen H. Gwyn for plaintiffs, appellees.
W. R. Dalton and P. W. Glidewell for defendants, appellants.

WINBORNE, J. The court below was correct in holding: (1) That plaintiffs derived no title from R. L. Borland, and (2) that the unregistered deed appearing in the chain of title to the property in question did not prevent subsequent deeds in the chain, which are duly registered, being color of title under which title may be ripened by adverse possession as against creditors and purchasers for value of the grantor in such unregistered deed. This conclusion is not in conflict with the Connor

Act, C. S., 3309, and gives effect to the statute relating to adverse possession under color of title, C. S., 428.

Considering these two statutes together, and giving effect to each, as applied to the fact situation in the present case, title remained in R. L. Borland until he was either divested of it by the registration of his deed to W. B. Wray, or divested of it by adverse possession for seven years under color of title, C. S., 428.

The unregistered deed from R. L. Borland to W. B. Wray was good as between them; *Warren v. Williford,* 148 N. C., 474; *Weston v. Lumber Co.,* 160 N. C., 263-266, 75 S. E., 800; but until it was registered W. B. Wray did not acquire a completed title—the real title. C. S., 3309. Hence, the deed from W. B. Wray to J. D. Glass purported to convey, and was sufficient in form to convey, but failed to convey the real title. The registration of that deed in 1912 put the world on notice that it purported to convey the title to Glass. Subsequent *mesne* conveyances, when registered, had like effect.

A deed of that character is color of title in accordance with a long line of decisions of this Court. In *Tate v. Southard,* 10 N. C., 119, *Justice Henderson* wrote: "Color of title may be defined to be a writing upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or the defective mode of conveyance that is used." This definition has been accepted through the years and cited with approval in numerous cases, among which are: *Smith v. Proctor,* 139 N. C., 314, 51 S. E., 889; *Greenleaf v. Bartlett,* 146 N. C., 495, 60 S. E., 419; *Burns v. Stewart,* 162 N. C., 360, 78 S. E., 321; *Seals v. Seals,* 165 N. C., 409, 81 S. E., 613; *Crocker v. Vann,* 192 N. C., 422, 135 S. E., 127.

The case of *Johnson v. Fry,* 195 N. C., 832, 143 S. E., 857, is in point in the present case. The pertinent facts there are: Alex Evans executed deed to Evander McIver on 14 May, 1892, for the land in question. This deed was not registered until 30 November, 1923. McIver had possession of the land six years prior to the date of the deed, and he and those claiming under him remained in continuous possession from the date of the deed, claiming to be the owners thereof. The defendant K. R. Hoyle obtained and docketed a judgment against Alex Evans on 12 December, 1921. The Court states, p. 839: "Evander McIver and those in privity, including plaintiffs, held the possession under known and visible lines and boundaries at least twenty-eight years, it goes without saying adverse to Alex Evans, as he parted with the title and possession and the possession was under known and visible lines and boundaries, necessarily adverse to Alex Evans and all other persons. The law, C. S., 430, steps in and says such adverse possession for twenty years so held gives a title in fee to the possessor of such property, the plaintiff, those in privity."

There the unregistered deed did not prevent the grantees setting up adverse possession for twenty years.

In like manner, the unregistered deed from R. L. Borland did not prevent and preclude the plaintiffs setting up title by adverse possession for seven years under the color of title of subsequent registered deeds in the chain of title.

The defendants contend that R. L. Borland is the common source of title and that under the Connor Act plaintiffs cannot ignore the unregistered deed from R. L. Borland to W. B. Wray. Defendants rely upon the cases, *Austin v. Staten,* 126 N. C., 783, 36 S. E., 338; *Collins v. Davis,* 132 N. C., 106, 43 S. E., 579; *Eaton v. Doub,* 190 N. C., 14, 128 S. E., 494; *McClure v. Crow,* 196 N. C., 657, 146 S. E., 713.

The cases are distinguishable from the instant case in fact situation in that in each of them an unregistered or defectively registered deed from a common grantor was sought to be used as color of title. Two deeds from a common grantor were involved in all except *Eaton v. Doub, supra,* in which lien of judgment was set up against an unregistered deed. The Connor Act, C. S., 3309, applied. It is noted that the possession relied upon in these cases was of less duration than twenty years. *Johnson v. Fry, supra.*

In speaking of the doctrine set forth in *Austin v. Staten, supra,* it is said in *Collins v. Davis, supra,* at p. 111: "We therefore hold that where one makes a deed for a valuable consideration, and the grantee fails to register it, but enters into possession thereunder and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee in a subsequent deed for valuable consideration who has duly registered his deed. . . . Except in cases coming within this rule, the rights acquired by adverse possession for seven years under color of title are not disturbed or affected by the act of 1885 (Connor Act). To this extent we affirm the law as laid down in *Austin v. Staten, supra.*" The instant case does not come within the rule so affirmed.

The plaintiffs and those under whom they claim had been in actual possession of the property in question under known and visible lines and boundaries, claiming as their own from 22 August, 1912, to 16 November, 1925, more than thirteen years under deed from W. B. Wray to J. D. Glass, and more than eight years under the deed from W. R. Dalton, trustee, to Leila M. Glass prior to the date of the docketing of the judgments which defendants contend became a lien on the land in question. At that time R. L. Borland had been divested of all title to the land in question.

We concur in the ruling of the court below. The judgment is therefore

Affirmed.

THE FLORSHEIM SHOE COMPANY v. THE LEADER DEPARTMENT STORE, INC.

(Filed 22 September, 1937.)

1. Actions § 4—

The courts of a state will not lend their aid to the enforcement of a contract which violates its positive legislation.

2. Monopolies § 2—Agreement that retailer should sell products upon condition that he not sell like products of competitors is unlawful.

An agreement that a retailer should handle the product of a certain manufacturer upon condition that the retailer should not sell like products of other manufacturers within the same price range *is held* prohibited by C. S., 2563 (2), and unenforceable in our courts, and does not fall within C. S., 2563 (6), permitting, in the absence of an intent to stifle competition, a contract granting the seller an exclusive agency for a product within a certain territory.

3. Monopolies § 3b: Actions § 4—Party may not recover when it must make out its case by showing illegal contract.

Plaintiff sued on an open account, and defendant admitted the account and set up a counterclaim, alleging that plaintiff had breached its contract granting defendant exclusive agency for the sale of plaintiff's product, but defendant's evidence established an unlawful agreement under which defendant was to sell plaintiff's product upon condition that defendant was not to sell the products of plaintiff's competitors, C. S., 2563 (2). Defendant contended that such unlawful agreement was unenforceable by the plaintiff only, for that the statute placed a penalty upon the seller and not upon the buyer. *Held:* In order for defendant to establish its counterclaim it had to make out its case by showing the illegal contract, and the courts will not hear it in establishing such case.

4. Appeal and Error § 41—

Where the rights of the parties are determined by the decision on one question of law, other questions discussed in the briefs need not be decided.

THIS is a civil action, tried before *Clement, J.*, BUNCOMBE Superior Court, on appeal from the general county court of Buncombe County, heard by consent at Chambers at North Wilkesboro, N. C., 17 August, 1937. Reversed.

The plaintiff instituted the action in the general county court of Buncombe County to recover upon an open account for merchandise and for the value of an electric sign. The defendant admits the plaintiff's account and the value of the electric sign was agreed upon. In its answer the defendant set up a cross action and counterclaim, alleging damages arising from the breach of a contract, under the terms of which the plaintiff granted the defendant an exclusive agency in Asheville to sell plaintiff's nationally known and advertised "Florsheim Shoes."

Verdict and judgment in favor of the defendant and the plaintiff, assigning errors, appealed to the Superior Court.

The court below, overruling the plaintiff's exceptive assignments of error, affirmed the judgment of the general county court, and the plaintiff appealed.

Hedrick & Hall, J. G. Merrimon, and Chas. G. Lee, Jr., for plaintiff, appellant.

Williams & Cocke for defendant, appellee.

BARNHILL, J. The evidence discloses that from 1921 until the spring of 1935 plaintiff sold its shoes in Asheville exclusively to S. I. Blomberg and his successor, The Leader Department Store, Inc. In the spring of 1935 plaintiff procured another dealer in the town of Asheville and discontinued sales to the defendant. The defendant contends, and the jury found, that the sales to The Leader Department Store, Inc., and its predecessor were made under a contract of exclusive agency. The plaintiff denied the contract, and contended that it discontinued sales to the defendant for the reason that the defendant did not pay its bills promptly, and at times became heavily indebted to the plaintiff.

The contract relied upon by the defendant was testified to by S. I. Blomberg as follows: "We gave you exclusive sole agency for those shoes when Mr. Harper was here, and he gave it to you because I told him to do so, and as long as you will pay your bills and advertise those shoes and not carry a competitive line, that is, a line that don't conflict in price with the Florsheim shoe, which were retailing at that time for $10.00, $12.00, and $14.00, he says you can have the shoes. You don't have to worry about how many shoes you are going to carry, because we are going to carry your account the same as we do hundreds of others, you can take your time and you can pay when convenient; don't pay any attention about paying the bills exactly on time, but you must advertise them and you must not carry any other line of shoes except Florsheim shoes. Mr. Harper told me he would give me exclusive sole agency for the Florsheim shoes, providing as long as I pay my bills, with the provision that I don't handle any other kind of shoes, that is, competitive, that is a competitive price, to the Florsheim shoe, and that I could pay my bills when convenient. I agreed to take on the shoes and advertise them, not handle any other line, and he agreed to furnish me with shoes from time to time just when we needed them and that I would pay my bills. My best recollection is that Mr. Schaaf came down either 1922 or 1923. He certainly did tell me that I had the exclusive agency to sell these shoes. He said one of the conditions was that I had to advertise them. He said one of the conditions to allow me to

sell these shoes under this agreement was I should not carry or sell any other shoes of competitive price range. The agreement was that I was not allowed to sell any shoes at prices reasonably competitive with the Florsheim shoe. I wasn't under any obligation to buy a certain number, but to handle their line and nobody's else. According to our agreement I was supposed to buy their shoes and nobody's else. We stuck to it and didn't buy anybody's else shoes. At no time during the whole period did I carry or buy any other shoes within the price range of Florsheim shoes. That is the only shoe we carried and advertised, because we had an agreement with Mr. Schaaf and the Florsheim people that we did not put in any other line except the $5.00 shoes 'that Friendly Five.' I was supposed to buy from him all of the Florsheim shoes the trade demanded. Whatever our trade demanded, needed, I was supposed to buy Florsheim shoes and no other kind of shoes."

Is the contract, which the evidence of the defendant tends to establish, void for that it violates subsection 2 of C. S., sec. 2563, or does subsection 6 thereof apply? If it is a contract prohibited by subsection 2, it is unlawful and unenforceable. If subsection 6 is the pertinent provision of the statute, an intent to stifle competition must appear in order to defeat a recovery by defendant. Upon the question as to whether the defendant's counterclaim should have been dismissed as of nonsuit, these subsections constitute the battleground between the parties. The rights of the parties in this particular are to be determined by an interpretation and application of the evidence in relation to these two subsections in the light of the decisions of this Court in *Fashion Company v. Grant,* 165 N. C., 453, and in *Mar-Hof Company v. Rosenbacker,* 176 N. C., 330.

C. S., 2563, is the codification of chapter 41, section 5, Public Laws 1933, and provides: "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." Subsection 2 thereof, which is the same as subsection (b) in the original law, reads: "To make a sale of any goods, wares, merchandise, articles, or things of value whatsoever in North Carolina, whether directly or indirectly, or through any agent or employee, upon the condition that the purchaser thereof shall not deal in goods, wares, merchandise, articles, or things of value of a competitor, or rival in the business of the person, firm, corporation, or association making such sale."

We are called upon to determine whether the contract, as established by the defendant's evidence, comes within the terms of this subsection.

If the contract violates the provisions of the quoted statute it is unenforceable. It is well settled that the courts of a state will not lend

their aid to the enforcement of a contract when the contract violates the positive legislation of the state of the forum. *Fashion Company v. Grant, supra.*

Under the contract testified to by the defendant's witness, the plaintiff was to make sale of goods, wares, and merchandise to the defendant upon the condition that the defendant should not handle any similar merchandise of a competitor, that is, that he should not handle or sell any other shoe which sold within the price range of the Florsheim shoe. The sale of merchandise which this subsection condemns is a sale made on the condition that the purchaser thereof shall not deal in goods, wares, merchandise, articles, or things of value of a competitor or rival in the business of the person, firm, corporation, or association making such sale. The witness on more than one occasion testified in effect that one of the conditions upon which the defendant was allowed to handle the shoes of the plaintiff under this agreement was that the defendant should not carry or sell any other shoes of a competitive price range. It was expressly held in *Fashion Company v. Grant, supra,* that a contract of this nature was prohibited by the cited statute and was unenforceable in the courts of North Carolina.

The defendant alleges a contract of exclusive agency and insists that subsection 6 of C. S., 2563, is apposite, and that its contract is enforceable unless an intent to stifle competition appears. It relies upon *Mar-Hof v. Rosenbacker Company, supra.* If we were considering the allegations of the counterclaim rather than the evidence of the defendant, we would be prone to concede that the position of the defendant is well taken. The demurrer interposed by plaintiff was properly overruled. However, the defendant's evidence does not fit the shoe prepared for it in defendant's further answer. It is a case where the defendant alleged itself into court on its counterclaim, and then proved itself out of court by its evidence.

An examination of *Mar-Hof Company v. Rosenbacker, supra,* discloses that the decision in this case turned upon an interpretation of subsection 6, C. S., 2563, under which an intent to stifle competition must appear. It does not expressly or impliedly overrule *Grant's case, supra.* To the contrary, the Court cited and distinguished the *Grant case, supra,* in its opinion in the following language: "We were cited by counsel to the case of *Fashion Company v. Grant,* 165 N. C., 453, as an authority against our present decision, but in that case the contract came under another section of the statute and contained a stipulation that rendered it void by express and unequivocal terms of the portion of the law directly applicable."

The defendant contends, however, that even if the contract established by it comes within the provisions of subsection 2, C. S., 2563, it is un-

enforceable by the plaintiff only. It calls the attention of the Court to the fact that the statute places a penalty only upon the seller and not upon the buyer. This contention is answered in the language of section 348 of Story's Agency, as follows: "The distinction between the cases where a recovery can be had and the cases where a recovery cannot be had of money connected with illegal transactions which seems now best supported is this: That wherever the party seeking to recover is obliged to make out his case by showing the illegal contract or transaction, or where it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him connected with that contract." *Fashion Company v. Grant, supra; Culp v. Love,* 127 N. C., 461; *Bluthenthal v. Kennedy,* 165 N. C., 372.

If the defendant's contract was strictly as alleged in his cross action, we would be prone to hold that it was enforceable. However, the testimony offered has in it vital provisions not alleged and brings it squarely within the terms of subsection 2, C. S., 2563. *Fashion Company v. Grant, supra,* is controlling. The contract relied upon violates the positive legislation of the State, and in order to recover the defendant is obliged to make out his case by showing the illegal contract or transaction.

The plaintiff further attacks the validity of defendant's alleged contract for want of mutuality and by reason of the indefiniteness of its terms of duration. These interesting questions are debated in the briefs at some length. As our conclusion on the first point is determinative of the action, it is unnecessary for us to discuss or decide them.

The exception of the plaintiff to the refusal of the general county court to grant its motion to dismiss the defendant's cross action as of nonsuit should have been sustained.

Reversed.

WARREN A. SMITH v. ATLANTIC JOINT STOCK LAND BANK OF RALEIGH.

(Filed 22 September, 1937.)

1. **Appeal and Error § 37e—**

Findings of fact by a referee approved by the judge are conclusive on appeal when supported by any competent evidence.

2. **Appeal and Error § 40a—**

Upon appeal from judgment supported by findings of fact of the referee approved by the judge, the Supreme Court must determine only whether there was any evidence to support the findings.

3. Contracts § 22: Master and Servant § 9—Evidence held sufficient to support finding that plaintiff was to receive commissions on all sales of real estate made in his district.

Plaintiff introduced in evidence a letter from defendant employer, 30 March, 1932, stating he was to receive a certain salary plus commissions on approved real estate sales, and testified in explanation thereof that he was assigned a definite territory, and that it was agreed he should receive commissions on all real estate sales within the territory. Plaintiff also introduced a letter written by defendant about a year later stating that defendant had decided that no more commissions should be paid its district employees except on sales actually made by them or their assistants. Defendant introduced in evidence a statement signed by plaintiff 24 February, 1933, stating that he was to receive commissions only on sales actually made by him. *Held:* Plaintiff introduced some evidence sufficient to sustain the finding of the referee that it was agreed he should receive commissions on all real estate sales made in his district, and his inconsistent statement introduced by defendant does not preclude such finding, the conflicting evidence being for the trier of fact.

STACY, C. J., dissenting.

BARNHILL and WINBORNE, JJ., concur in dissent.

APPEAL by defendant from *Frizzelle, J.*, at June Term, 1937, of WILSON. Affirmed.

Action to recover commissions alleged to be due plaintiff on certain real estate sales under contract of employment by defendant.

The cause was heard by a referee. The plaintiff offered evidence tending to show that prior to 30 March, 1932, he had been employed by the defendant as field manager and collector, and that on that date he received the following letter from the defendant: "Beginning April 1st, your salary will be $175.00 per month and expenses, together with two and one-half per cent commission on approved real estate sales. Irving F. Hall, Executive Vice President." He testified that the territory assigned him consisted of the counties of Bladen, Cumberland, Hoke, Lee, Montgomery, and Moore, and that it was agreed he should receive commissions on all sales of real estate within said territory whether made by him and his assistants or by other representatives of the defendant; that this arrangement and understanding continued up to 7 April, 1933, when he received the following communication: "In the past, it has been the practice for the fieldman in charge of each district to receive 2½% commission on the sale of farms in his district. Because of the large expense of the sales division and the small amount of sales we are receiving, the executive committee ruled that no more commissions will be paid to a district man unless he is directly responsible for the sale either by his own efforts or through the efforts of a 'bird dog' (assistant) that he has worked with."

Plaintiff continued in the employment of defendant until his services were terminated 15 August, 1933. Defendant paid plaintiff for all

salary and commissions due, except for sales in plaintiff's territory which were made by other representatives of defendant during the period prior to 7 April, 1933.

The defendant contended, and offered evidence tending to show, that the agreement for commissions embraced only those sales made by the plaintiff and his assistants, and did not include commissions on sales by other representatives of defendant. Defendant placed in evidence a memorandum signed by plaintiff, dated 24 February, 1933: "Statement of employment of Warren A. Smith, by the Atlantic Joint Stock Land Bank of Raleigh. I understand that I am employed by the Atlantic Joint Stock Land Bank of Raleigh on a monthly salary of $175.00, plus subsistence while I am on duty away from my post of duty. This salary and subsistence is payable semimonthly. I furthermore understand and agree that I am to receive 2½% commissions on gross sales price on all land sales which I turn in to the bank and which are accepted by it. . . . I will submit with each and every contract which I submit to the bank a 'Salesman's Commission Report' showing the amount of commission and to whom to be paid. I also agree that in the event that after a contract has been approved by the bank it develops that the bank is liable for commissions to some party, or parties, other than those named in the 'Salesman's Commission Report,' the additional commission for which the bank is liable is to be charged to my commission account with the bank. I also understand that the above terms will apply to all sales which I have made during the time I have been employed by the bank. Warren A. Smith."

Defendant offered evidence showing that commissions had been paid and accepted by plaintiff only for those sales made by him and his assistants, and that no additional claim was made by him until he was discharged, shortly before this suit was begun, and that the language used in the memorandum of 7 April, 1933, was due to an error on the part of the writer.

The referee found that the contract between the parties was as contended by plaintiff, to wit: $175.00 per month and expenses, together with 2½% commission on all approved real estate sales in plaintiff's territory during the period from 1 April, 1932, to 7 April, 1933, and that defendant was indebted to plaintiff for unpaid commissions in the sum of $987.75 and interest.

Upon exceptions filed, the cause was heard by the judge of the Superior Court, who adopted the findings of fact and conclusions of law of the referee, and entered judgment for the amount so ascertained. Defendant appealed.

W. A. Lucas for plaintiff.

Arch T. Allen and McLean & Stacy for defendant.

DEVIN, J. The rule is established in this jurisdiction that findings of fact by a referee, concurred in by the judge, are conclusive when there is competent evidence to sustain them. *Cotton Mills v. Yarn Co.*, 192 N. C., 713; *Story v. Truitt*, 193 N. C., 851.

Hence, the only question presented by this appeal is whether there was any evidence to support the finding of the referee, approved by the court below, that the plaintiff was entitled to commissions on all approved real estate sales in his territory during the period from 1 April, 1932, to 7 April, 1933. It is obvious that the testimony of plaintiff, the letter of 30 March, 1932, and the memorandum of 7 April, 1933, constitute some evidence supporting this finding.

But the defendant insists that the statement signed by plaintiff on 24 February, 1933, shows a different understanding and is inconsistent with plaintiff's claim, at least after that date.

It will be noted, however, that plaintiff testified in explanation and amplification of the letter of 30 March, 1932, that certain definite territory was assigned to him, and that the agreement for compensation included payment of commissions on all approved real estate sales within that territory, and that this evidence, together with the language of the memorandum of 7 April, 1933, which purported to change the previous rule and to limit commissions thereafter to those directly responsible for sales, sustains plaintiff's claim, and it cannot be held as a matter of law that an inconsistent statement made by him on 24 February, 1933, would have the effect of overthrowing all of plaintiff's evidence. Judgment of nonsuit could not be sustained upon that statement alone (*Hadley v. Tinnin*, 170 N. C., 84), and hence, however persuasive the language of the statement, the trier of the facts was not thereby necessarily precluded from finding for the plaintiff on other competent evidence.

The judgment of the court below must be

Affirmed.

STACY, C. J., dissenting: The letter of 30 March, 1932, as amplified by the "Statement of Employment" signed by plaintiff on 24 February, 1933, definitely fixes the plaintiff's salary and commissions on all sales made by him during the time he was employed by the defendant. To this extent, then, the contract is in writing. Its provisions are clear and unambiguous. Parol testimony is not admissible to vary or to contradict its terms. *Ins. Co. v. Morehead*, 209 N. C., 174, 183 S. E., 606; *Dawson v. Wright*, 208 N. C., 418, 181 S. E., 264. As against the recollections of the parties, whose memories may fail them, the written word abides. *Walker v. Venters*, 148 N. C., 388, 62 S. E., 510. It is conceded that according to plaintiff's own written "Statement" he has no cause of action.

Nor is this all. The parties themselves, during the peaceful life of the contract, indeed, during the whole life of the contract, interpreted it according to the written word, and so applied it in its practical operation. *Markham v. Improvement Co.*, 201 N. C., 117, 158 S. E., 852; *Hood, Comr., v. Davidson*, 207 N. C., 329, 177 S. E., 5.

In its essential features, the case of *Cole v. Fibre Co.*, 200 N. C., 484, 157 S. E., 857, is very much like the one at bar. There the practical interpretation of the contract by the parties during its peaceful performance was held to be binding on the plaintiff, the Court remarking: "Finally, we may safely say that in the construction of contracts, which presents some of the most difficult problems known to the law, no court can go far wrong by adopting the *ante litem motam* practical interpretation of the parties, for they are presumed to know best what was meant by the terms used in their engagements. Anson on Contracts, p. 436." See, also, *Holland v. Dulin*, 206 N. C., 211, 173 S. E., 310.

When parties enter into a doubtful contract and later interpret their agreement in writing, such interpretation becomes a part of the undertaking. *Cole v. Fibre Co., supra.* This interpretation or written understanding is not simply evidence, contradictable at will, as plaintiff contends, but it is a part of the contract. 6 R. C. L., 851.

In the present action, plaintiff sues to recover commissions on sales which he never made, and this in the face of his written agreement to the contrary. The position which he now takes was never suggested while he was in the employ of the defendant, and not until after his discharge and he had been paid in full for his services. It is obviously an afterthought. The law as heretofore declared is against his recovery.

BARNHILL and WINBORNE, JJ., concur in dissent.

MAUDE O'NEAL, MINERVA O'NEAL, AND NAOMI O'NEAL v. MRS. W. H. ROLLINSON AND M. L. BURRUS.

(Filed 22 September, 1937.)

1. Waters and Water Courses § 1—

Where the shore line is substantially straight, the riparian rights of adjoining landowners along a navigable stream are to be determined, not by extending the side property lines in a straight line to the channel, but by drawing lines from the end of the side property lines perpendicular to the shore line to the channel.

2. Same: Injunction § 6—Injunction will lie to compel removal of part of structure which constitutes continuing trespass.

Where a riparian owner of land along a navigable stream erects a wharf which extends several feet beyond his riparian ownership, and to that extent interferes with the adjoining owner's right of access to navigable water, the wharf constitutes a continuing trespass and the adjoining landowner is entitled to a mandatory injunction for the removal of the part which interferes with his riparian rights.

APPEAL by defendants from *Williams, J.*, at May Term, 1937, of DARE.

This is an action brought by the plaintiffs to obtain a mandatory injunction against the defendants to require them to remove that portion of a wharf which plaintiffs alleged trespasses upon their riparian ownership, and to recover damages for erection of same. All parties expressly waived a jury trial and agreed that the court hear the evidence and find the facts.

The court found as facts, in substance, that the plaintiffs, as against the defendants, are the owners of a certain tract of land, south of and adjacent to a tract of land owned by the defendants, of which the defendants are in peaceable possession, abutting on a portion of the Albemarle Sound in Dare County, known as Stowe's Ditch, a navigable stream; that the shore line along the front of each parcel of land is a retaining wall on a course south 53 degrees west; that Stowe's Ditch follows generally the course of the retaining wall throughout its length; that the dividing line between the two parcels of land approaches the shore line on a course north 52 degrees west; that in December, 1935, the defendants constructed a "T" shaped wharf from their shore line to the edge of deep water, or the channel, thus forming a dock three feet wide and 23.8 feet long; that if the riparian rights of the plaintiffs are determined by extending the property line dividing the two pieces of property in a straight line to the channel, the said dock or wharf would lack 1.6 feet of extending into the riparian ownership of the plaintiffs; but if the said riparian ownership is determined by drawing parallel lines from each property line, at right angles with the shore line, and direct to the edge of the channel or deep water mark, said wharf extends 3.8 feet beyond the riparian ownership of defendants and trespasses upon the riparian rights of plaintiffs to that extent; that neither party hereto has procured a grant for any of the property extending between the shore line and the channel and their ownership depends exclusively upon the rights afforded abutting owners to a stream of that kind and character.

Upon such finding the court adjudged "that the riparian ownership of plaintiffs and defendants is determined by drawing parallel lines from the property lines of each owner, at right angles or perpendicular to the shore line, and extending directly to the edge of the channel or deep

water, and that defendants' wharf extends into plaintiffs' riparian ownership a distance of 3.8 feet, and plaintiffs' motion for a mandatory injunction should be and is hereby, to the extent of 3.8 feet, allowed, and defendants are forthwith ordered to remove said portion of said wharf so extending beyond their own and into plaintiffs' riparian ownership."

The defendants moved for judgment as of nonsuit at the close of plaintiffs' testimony, and again at the close of all the testimony. The motions were denied and defendants excepted. The defendants also excepted to the signing of the judgment, assigned error, and appealed to the Supreme Court.

McMullan & McMullan for plaintiffs, appellees.
M. B. Simpson for defendants, appellants.

WINBORNE, J. Two questions of law arise on the fact situation of this case: (1) Was the court correct in holding that the riparian ownership of plaintiffs and defendants is determined by drawing parallel lines from the property lines of each owner at right angles or perpendicular to the shore line, and extending directly to the edge of deep water, or the channel? (2) If so, are the plaintiffs entitled to mandatory injunction? Both questions are answered in the affirmative. The authorities support the judgment below.

In *Bond v. Wool,* 107 N. C., 139, a controversy between two riparian owners, neither having a grant for any of the property extending between the shore line and the channel, and each relying upon his rights as riparian owner, it is said by the Court: "In the absence of any special legislation on the subject, a littoral proprietor and a riparian owner, as is universally conceded, have a qualified property in the water frontage belonging, by nature, to their land, the chief advantage growing out of the appurtenant estate in the submerged land being the right of access over an extension of their water fronts to navigable water, and the right to construct wharves, piers, or landings, subject to such general rules and regulations as the Legislature, in the exercise of its powers, may prescribe for the protection of the public rights in rivers and navigable waters."

Again in the same case, at page 149: "This qualified property, that, according to well settled principles, as interpreted in nearly all the highest courts in the United States, is necessarily incident to riparian ownership, extends to the submerged land bounded by the water front of a particular proprietor, the navigable water and two parallel lines projected from each side of his front to navigable water."

The appellant contends, however, that the decision in *Bond v. Wool, supra,* is inapplicable to the instant case for that there the abutting

lands were of rectangular shape and the property lines approached the shore lines at right angle and of necessity an extension of straight parallel lines in such case would be at right angles to the shore line. However, a protraction of the side lines of an abutting tract of land in the same course in which they run to the shore line might, and could, entirely deprive the owner of access to deep water or the channel.

In 45 C. J., 495, we find this appropriate statement: "The apportionment of riparian rights as between adjoining riparian owners is made by extending lines from the ends of the side lines at right angles to the line of the water front, if the latter be straight or substantially so, subject to variation where the line of navigation is not parallel with the shore line, without regard to the direction of the dividing lines of the upland parcels."

The Supreme Court of New Jersey, in the case of *Delaware, etc., R. R. Co. v. Hannon,* 37 N. J. L., 276, speaks to a similar question, and says: "At the trial, the rule applied was, that line of extension was 'to be got by ascertaining what the original high water mark on the shore was, and then extending the lines at right angles from that line.' In its application to the facts of the case on trial, it seems to me the rule thus propounded was clearly correct. Along that part of the shore embracing the premises in question, the high water line was practically straight, and wherever this is the case, the side lines of the land reclaimed must be at right angles to such base line."

In the case of *Manufacturers' Land & Improvement Co. v. Board of Commerce & Navigation,* 121 Atl., 337, it is said: "In conveying to the water, the prosecutor was entitled to rely on, and its grantees were charged with knowledge of, the established rule that in wharfing out, the right angle principle was applicable. As was said by *Chief Justice Beasley* in the *Hannon case, supra,* 'It is not of the least importance in what direction the owner of the upland has seen fit to run the lines of his property to the shore. Whether such lines approach the water courses rectangular to the shore line, or run obliquely to such base, the right of riparian extension is unaffected by the difference.' "

The "right angle" principle applied to the facts in the instant case appears to be reasonable.

The wharf or dock, as constructed by the defendants, trespasses upon the riparian property rights of the plaintiffs. The trespass is continuous in character. The plaintiffs are entitled to mandatory injunction as granted. *Kingsland v. Kingsland,* 188 N. C., 810.

The judgment of the court below is

Affirmed.

WILLIS S. WRIGHT v. COMMERCIAL CREDIT COMPANY, INC.

(Filed 22 September, 1937.)

Libel and Slander § 3—Where words are susceptible of two meanings, only one of which is defamatory, plaintiff must allege and prove defamation.

Under an agreement between the parties, plaintiff auto dealer would have cars shipped to him and drafts for the purchase price with bills of lading and bills of sale sent to a bank, and defendant Credit Company would pay the drafts and hold the bills of sale as security for plaintiff's notes for the amount advanced, and plaintiff would sell the cars under defendant's direction, the arrangement being known as the "floor-plan." After a course of dealing between the parties, defendant wired plaintiff that it would not lift a draft on a shipment of cars "due to your previously having converted floor planned cars." *Held:* The words are susceptible of more than one meaning, and may be meaningless to a person unfamiliar with such transactions, and in the absence of allegation and proof that the employees of the telegraph company, to whom alone the words were published, understood that they conveyed a defamatory meaning, defendant's motion for judgment as of nonsuit should have been allowed.

STACY, C. J., dissenting.

THIS was a civil action for alleged libelous defamation before *Williams, J.*, at February Term, 1937, of PASQUOTANK. Reversed.

The plaintiff alleges that he was engaged in the automobile sales business, and that he had a contract with the defendant to assist him in the financing of the purchase of automobiles, that this contract provided that when automobiles were shipped to the plaintiff by the manufacturers, they were to send drafts for the amount of the purchase price thereof, with bills of lading and bills of sale to the plaintiff attached, to the First & Citizens National Bank of Elizabeth City, and that when the automobiles arrived the defendant Commercial Credit Company would pay 90 per cent of the purchase price, and the plaintiff would pay 10 per cent thereof and the freight; that the defendant would hold the bills of sale as security for notes of the plaintiff in the amount of the 90 per cent paid by it and the automobiles would be delivered to the plaintiff to be held at his place of business and sold by the plaintiff under the direction of the defendant, the proceeds of such sales to be applied first to the notes for the 90 per cent of the purchase price paid by the defendant; that this was known as the "floor-plan." The plaintiff further alleges that he had placed an order for certain Dodge automobiles, and that the automobiles had arrived in Elizabeth City, and that he received from the defendant a telegram reading:

"10-22-A RICHMOND, VA., April 25, 1933.

"WILLIS S. WRIGHT, Elizabeth City, N. C.

"Due to your previously having converted floor planned cars will not be able to lift draft number D-3105 stop necessary to make other arrangements at once. COMMERCIAL CREDIT—Henderson."

The plaintiff further alleges that the sending of this telegram was a publication of defamatory matter concerning him, and that he had been damaged thereby in the sum of $25,000.

The defendant admits that it had sent the telegram set forth in the complaint, but denies the other allegations.

From judgment for plaintiff the defendant appealed, assigning errors.

M. B. Simpson and McMullan & McMullan for plaintiff, appellee.
Thompson & Wilson and George C. Green for defendant, appellant.

SCHENCK, J. The defendant in its brief abandons all assignments of error except those to the refusal of the court to grant its motion for judgment as of nonsuit, and to the judgment as signed.

The alleged libelous words are "your previously having converted floor planned cars." These words are susceptible to more than one meaning, and may have no meaning at all to a person not familiar with "floor planned cars," and this ambiguity renders necessary an allegation that the telegram was published to a third party who understood that it conveyed a defamatory meaning, as well also as proof of such allegation.

"Since, in order to constitute a publication, it is necessary that some third person understood the defamatory matter, where the words are capable of conveying the defamatory meaning claimed for them, and also equally capable of conveying some other and innocent meaning, there must be averments that third persons understood the language as conveying the alleged defamatory meaning." 37 C. J., p. 34, par. 355.

"So, if the offense consists in words of themselves unmeaning, there must be an averment of some fact to support the innuendo and give them a meaning. The jury must not only be satisfied that the defendant's meaning was as charged, but that he was so understood by the persons who heard him, which latter part can only be established by their oath. *Woolworth v. Meadows,* 5 East., 46. It is the same as if the charge was made in the Chinese or any other foreign tongue (which the hearers are not presumed to understand), and in such case there must be an averment, not only that the defendant meant to make the charge, but that he was so understood by those who heard him." *Briggs v. Byrd,* 33 N. C., 353.

"On the other hand, if it (the alleged defamatory declaration) be capable of two meanings, one actionable and one not, it is for the jury to determine which of the two was intended and so understood by those to whom it was addressed or by whom it was heard." *Oates v. Trust Company,* 205 N. C., 14.

The complaint contains no allegation, and there is no proof to the effect that the telegram upon which the action was predicated was understood by the agents and employees of the telegraph company, to whom alone the publication was made, as conveying a defamatory meaning. The motion for judgment as of nonsuit should, therefore, have been allowed.

The judgment of the Superior Court is

Reversed.

STACY, C. J., dissenting: The telegram in question is rendered actionable by the factual situation, fully set out in the complaint, and the innuendo, "the defendant by said writing charging the plaintiff and intending to charge the plaintiff, with a crime punishable in the State's Prison, to wit, . . . embezzlement, . . . larceny, . . . fraud, or other immoral conduct, tending to disgrace or degrade the plaintiff." *Wozelka v. Hettrick,* 93 N. C., 10; *Lay v. Publishing Co.,* 209 N. C., 134, 183 S. E., 416; *Broadway v. Cope,* 208 N. C., 85, 179 S. E., 452; *Hamilton v. Nance,* 159 N. C., 56, 74 S. E., 627; *Gudger v. Penland,* 108 N. C., 593, 13 S. E., 168; *Watts v. Greenlee,* 13 N. C., 115; McIntosh, N. C. Prac. & Proc., 363; 17 R. C. L., 394. The *colloquium* is no longer necessary in pleading. C. S., 542.

The publication is alleged to be libelous *per se,* and the language used is susceptible of such construction. 36 C. J., 1229. This saves the complaint from the charge of defectiveness, and the jury was justified in drawing the inference it did. *Oates v. Trust Co.,* 205 N. C., 14, 169 S. E., 869; *McCurry v. McCurry,* 82 N. C., 296.

There is a distinction between language susceptible of two interpretations, one libelous the other not, and a colloquialism or code expression which is without meaning except to those who understand it. *Sowers v. Sowers,* 87 N. C., 303. This difference was pointed out in *Sasser v. Rouse,* 35 N. C., 143, where it was held (as stated in the syllabus, which accurately digests the opinion):

"In an action of slander a plaintiff has no right to ask a witness what he considers to be the meaning of the words spoken, except in the cases:

"First. Where the words in the ordinary meaning do not import a slanderous charge, *if they are susceptible of such a meaning,* and the plaintiff *avers* a fact, from which it may be inferred that they were used for the purpose of making the charge, he may prove such averment, and

then the jury must decide whether the defendant used the words in the sense implied or not.

"Secondly. The exception is, where a charge is made by using a cant phrase, or words having a local meaning, or a nickname, when advantage is taken of a fact known to the person spoken to, in order to convey a meaning which they understood by connecting the words (of themselves unmeaning) with such fact, then the plaintiff must make an averment to that effect, and may prove not only the truth of the averment, but also that *the words were so understood by the person to whom they were addressed;* for otherwise they are without point, and harmless."

It is well established that "when the words spoken are ambiguous and fairly admit of a slanderous interpretation, it is then a question for the jury to determine on the sense in which the words were used and whether they amounted to the slanderous charge to the reasonable apprehension of the hearers." *Reeves v. Bowden,* 97 N. C., 29, 1 S. E., 549; *Lucas v. Nichols,* 52 N. C., 32; *Simmons v. Morse,* 51 N. C., 6; *McBrayer v. Hill,* 26 N. C., 136; *Emmerson v. Marvell,* 55 Ind., 265. And it is not competent to show by parol testimony that the hearers understood the "speaker to mean differently from the common import of the words." *Pitts v. Pace,* 52 N. C., 558; *S. v. Howard,* 169 N. C., 312, 84 S. E., 807; *Minton v. Ferguson,* 208 N. C., 541, 181 S. E., 553.

In the case at bar, the language used, if not actionable *per se* as a matter of law, is susceptible of a libelous construction. The result of the trial is supported by the record.

M. L. DANIELS, O. J. JONES, TRADING AS JONES WHOLESALE COMPANY, AND H. A. CREEF, TRADING AS MANTEO MACHINE SHOP, v. DUCK ISLAND, INCORPORATED, THEODORE S. MEEKINS, ERNEST E. MEEKINS, LOUISE M. MEEKINS, AND D. E. EVANS, TRUSTEE.

(Filed 22 September, 1937.)

1. Pleadings §§ 3a, 16—Demurrer for misjoinder of parties and causes held properly overruled in this case.

This action was instituted by creditors of a corporation to set aside a deed of the corporation to a third person and a deed of trust executed by such third person, upon allegations that the corporation's deed was void as to creditors, and against another individual, a kinsman of the grantee in the deed, upon allegation that he agreed to pay the indebtedness of the corporation upon consideration of the cancellation and delivery to him of notes held by the stockholders, which notes were secured by the real estate owned by the corporation. *Held:* The causes of action alleged

arise out of the same transaction, or series of transactions, forming one course of dealing, and a connected story can be told of the whole, and defendants' demurrers for misjoinder of parties and causes, C. S., 511 (5), were properly overruled.

2. Frauds, Statute of, § 5—

Where the party promising to pay a debt receives a new and original consideration from the debtor for his promise, the statute of frauds, C. S., 987, does not apply.

APPEAL by defendants from *Williams, J.*, at May Term, 1937, of DARE. Affirmed.

This was an action instituted by plaintiffs, who are judgment creditors of defendant Duck Island, Incorporated, against it, Theodore S. Meekins, Ernest E. Meekins, Louise M. Meekins, and D. E. Evans, trustee. The prayer of complaint is as follows: "Wherefore, plaintiffs pray that the said purported deed from Duck Island, Incorporated, to E. E. Meekins, and the purported deed of trust from E. E. Meekins and wife to D. E. Evans, trustee, be vacated, set aside, and declared void as to these plaintiffs; that plaintiffs' judgment be declared a lien against the property described in said deed and deed of trust, and that a commissioner be appointed to advertise and sell the same and apply the proceeds in satisfaction of the amount due upon plaintiffs' judgment, plus costs; that plaintiffs recover of the defendant Theodore S. Meekins the amount due on their respective judgments hereinbefore described, to wit, $1,577.77, plus interest and costs; that this complaint be used as an affidavit and that an order be issued restraining the sale under said deed of trust until a hearing of this controversy on its merits; that plaintiffs recover their costs and have such other and further relief as the nature and circumstances of the case require."

It is alleged in the complaint, but set forth with particularity in the affidavit of Eric Fisher Wood, Secretary-Treasurer of Duck Island, Inc., on hearing of the case, as follows: "That, in May, 1935, it was suggested that all property owned by Duck Island, Incorporated, be turned over to T. S. Meekins for the sole and only consideration that said Meekins assume and pay the outstanding local obligations, said obligations being set out in a letter hereto attached, directed to Theo. S. Meekins, signed by Eric Fisher Wood, dated 31 May, 1935. That the copy of the letter of Theo. S. Meekins, directed to Mr. H. B. Spencer, Munsey Building, Washington, D. C., dated 25 May, 1935, was received by the undersigned from said Meekins, in connection with said transaction, and the understanding referred to therein was that said Meekins was to assume the local indebtedness, including that owed to Manteo Machine Shop, M. L. Daniels, and Jones Wholesale Company. In consideration of this assumption of indebtedness the undersigned, and

Messrs. Woodard, Spencer, and Patterson, stockholders in said corporation, canceled and delivered to the said T. S. Meekins certain notes held by them against the property of said corporation."

The defendants demurred to the complaint, as follows: "*First:* That it appears from an inspection of the complaint that there is a misjoinder of parties plaintiff. *Second:* For that it appears upon the face of the complaint that there is a misjoinder of parties defendant. *Third:* For that the complaint itself shows that there is a misjoinder of both parties and causes of action. *Fourth:* The complaint shows that there is a misjoinder of both parties and causes of action," and sets forth same with particularity. Further, "That the complaint does not show that the said Meekins ever agreed in writing to assume or pay the said claims or judgments, and that said promise made by said Meekins, which is herein expressly denied, falls within the provision of the statute of frauds, section 987, of the Consolidated Statutes of North Carolina. That the complaint shows that Theodore S. Meekins was not responsible for the accounts upon which the plaintiffs obtained their several and respective judgments, that no credit was extended to him, that he was not responsible for any of said accounts, but that credit was furnished only to Duck Island, Incorporated, and the said Duck Island, Incorporated, was solely responsible to the plaintiffs, and the complaint shows that there was no assumption by said Meekins of the debts or of the judgments."

The judgment of the court is as follows: "This cause coming on now to be heard, and being heard on defendants' demurrer, and it appearing to and being found by the court that the causes of action set out in the complaint arose out of one transaction or series of transactions, and that said complaint is not, therefore, multifarious, and that all plaintiffs and defendants are necessary and proper parties to this proceeding, and that defendants' demurrer ought to be overruled: It is therefore ordered and adjudged that defendants' demurrer be and the same is hereby overruled. It is further ordered that the defendants be allowed thirty days in which to answer. Clawson L. Williams, Judge Presiding."

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

J. Henry LeRoy and Martin Kellogg, Jr., for plaintiffs.
M. B. Simpson for defendants.

PER CURIAM. We think the court below correct in its judgment in overruling defendants' demurrer. We think the case of *Barkley v. Realty Co.*, 211 N. C., 540 (542), is controlling. It is there written: "It is provided by statute in this State that 'the plaintiff may unite in the same complaint several causes of action, of legal or equitable nature,

or both, when they all arise out of the same transaction, or transaction connected with the subject of the action.' C. S., 507. Construing the provisions of this statute, it has been uniformly held by this Court that if the causes of action united in the same complaint be not entirely distinct and unconnected, if they arise out of one and the same transaction, or a series of transactions forming one course of dealing, and all tending to one end, if one connected story can be told of the whole, the objection that there is a misjoinder of causes of action in the same complaint, although aptly made by demurrer to the complaint (C. S., 511 [5]), will not be sustained. In such case, the demurrer will be overruled," citing numerous authorities. *Leach v. Page,* 211 N. C., 622; *Bank v. Jones,* 211 N. C., 317.

In *Whitehurst v. Hyman,* 90 N. C., 487 (489), we find: "It is settled by many judicial decisions in construing this statute (C. S., 987), and others substantially like it, that where there is some new and original consideration of benefit or harm moving between the party to whom the debt to be paid is due, and the party making the promise to pay the same, such case is not within the statute; as where a promise to pay an existing debt is made in consideration of property placed by the debtor in the hands of the party promising, . . . such promises are not within the statute, because they are not made 'to answer the debt, default, or miscarriage of another person.'" *Jennings v. Keel,* 196 N. C., 675 (680-681).

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

Affirmed.

LOUISA WARREN CROOK v. L. B. WARREN, BY HIS GUARDIAN AD LITEM, PAUL WARREN, AND INTERNATIONAL HARVESTER COMPANY OF AMERICA, A CORPORATION.

(Filed 22 September, 1937.)

1. Mortgages § 30b—

An outstanding indebtedness is essential to support a trustee's deed, and where the note is paid in full prior to foreclosure, the trustee's deed conveys no title to the purchaser.

2. Mortgages § 39e—Admission that purchaser obtained title precludes action for damages on ground that note was fully paid at time of sale.

Where the trustor seeks to recover damages from the trustee and *cestui que trust* on the ground of wrongful foreclosure for that the note was fully paid at the time of the sale, but admits that the purchaser at the sale, who was the transferee of the note after maturity, obtained good title, the admission constitutes an admission that there was a balance due upon the note, and that therefore the foreclosure was not wrongful, and the claim for damages for wrongful foreclosure must fail.

CROOK *v.* WARREN.

THIS is a civil action, tried before *Clements, J.*, at the July Term, 1936, of BUNCOMBE. Affirmed.

This action was instituted by the plaintiff against the individual defendants in the general county court of Buncombe County to recover possession of a certain tract of land described in the complaint. The plaintiff claimed title to said lands through a deed of foreclosure executed by the trustee under the power of sale contained in the deed of trust from the defendant L. B. Warren, executed in December, 1927, securing an indebtedness of $3,007.80, payable to the International Harvester Company of America. The note secured by this deed of trust was transferred and assigned by the International Harvester Company of America to Gilbert B. Crook on 16 January, 1936, and on 2 March, 1936, Gilbert B. Crook assigned same to the plaintiff herein, long after the maturity date of said note. The land was sold by the trustee at the request of the plaintiff and the plaintiff became the purchaser at the sale.

On motion of defendant L. B. Warren, the defendant International Harvester Company of America was made a party defendant, and the said L. B. Warren in his answer to the complaint set up a cross action, or counterclaim, against the corporate defendant, alleging that the indebtedness secured by said deed of trust had been paid and satisfied in full prior to the transfer of said note to the plaintiff; and that the sale under said deed of trust was void. In his prayer for relief the said defendant seeks to have the sale under said deed of trust declared null and void; or, if same is not adjudged to be void, that he recover of the corporate defendant $2,500 damages. In the general county court the motion of the defendant International Harvester Company of America to dismiss the cross action of the defendant Warren as of nonsuit was denied. Issues were submitted to the jury and answered as follows:

"1. Is the plaintiff the owner of and entitled to the possession of the lands described in the complaint? Answer: 'Yes.'

"2. Did the defendant L. B. Warren pay in full and satisfy the note secured by the deed of trust executed on 7 December, 1927, as alleged in the answer of said defendant? Answer: 'Yes.'

"3. If so, what amount of damages, if any, is the said defendant L. B. Warren entitled to recover of the defendant International Harvester Company? Answer: '$800.00.'"

On appeal to the Superior Court the trial judge sustained the exception of the Harvester Company to the refusal of the judge of the general county court to grant his motion to dismiss as of nonsuit and the defendant L. B. Warren appealed.

M. Earle Donnahoe for defendant Warren, appellant.
Don C. Young for defendant Harvester Company, appellee.

PER CURIAM. The defendant Warren's cross action against the defendant International Harvester Company of America is bottomed upon the allegation that the Harvester Company transferred and assigned said note to the plaintiff several years after the maturity date of the note with the knowledge that the said indebtedness at the time of said transfer had been paid and satisfied in full.

Upon this feature of the case the record disclosed the following pertinent entry: "At the close of the plaintiff's testimony all of the parties agreed that the first issue might be answered 'Yes,' and the court so instructed the jury and wrote in the answer 'Yes' for the jury."

It is immaterial whether we consider this as a finding of fact by the jury or as an admission by the defendant Warren. In either event it is thereby determined that at the time of the transfer of said note to the plaintiff there was still a balance due and unpaid thereon. Otherwise the foreclosure deed of the trustee would have conveyed no title to the plaintiff.

The evidence tends to show, and the defendant Warren alleges in his answer: "That the note described in the pleadings was transferred and assigned by the defendant Harvester Company to the plaintiff herein long after the maturity date of the note." When the land was sold by the trustee it was purchased by the then holder of the note, the plaintiff in this cause. Under these circumstances the plaintiff obtained only such title as the trustee was authorized to convey. *Walker v. Mebane,* 90 N. C., 259; *Saleeby v. Brown,* 190 N. C., 138. If the note was paid and satisfied in full, the trustee's deed was null and void and conveyed no right, title, or interest to the plaintiff. An outstanding indebtedness was essential to support the trustee's deed. An admission of valid title was an admission that the note was not fully satisfied. The Harvester Company, having transferred and assigned said note to the plaintiff at a time when there was a balance still due and unpaid, has committed no wrong and the defendant Warren has failed to establish any right of action against it.

There was no error in the judgment of the court below, reversing the ruling of the general county court on defendant Harvester Company's motion to dismiss defendant Warren's cross action as of nonsuit, nor in the judgment entered by the court below in accordance with its ruling.

The judgment below is

Affirmed.

THEODORE S. MEEKINS v. COASTAL GAME PRESERVES, CAROLINA DEVELOPMENT COMPANY, LOUVAL REALTY COMPANY, INC., HAROLD C. LEWIS, AND ALBERT A. LEWIS.

(Filed 22 September, 1937.)

1. Pleadings § 21—

Upon appeal from the clerk's order denying a motion to vacate plaintiff's attachment, the Superior Court, in denying defendants' motion, has ample power to allow plaintiff to amend the complaint and affidavits.

2. Appeal and Error § 2—

An appeal from an order denying defendants' motion to vacate an attachment is premature where the trial court allows plaintiff to amend his complaint and affidavits, since what amendments, if any, will be made and their effect upon defendants' motion cannot be determined.

APPEAL from an order of *Williams, J.*, at May Term, 1937, of DARE. Remanded.

Action by plaintiff creditor to set aside certain alleged fraudulent conveyances executed by and between the defendants, who are nonresidents. At the time of issuance of summons, attachment was issued and levied by the sheriff on the interests of the defendants in described lands. Service of summons and warrant of attachment was had by publication. Defendants entered special appearance and moved to vacate the attachment. This was denied by the clerk and upon appeal the judge of the Superior Court made an order that the motion be denied and that the plaintiff be allowed thirty days within which to file amendment to complaint and affidavits.

From this order defendants appealed to the Supreme Court.

M. B. Simpson and John H. Hall for plaintiff, appellee.
Worth & Horner for defendants, appellants.

PER CURIAM. The order appealed from granted the plaintiff thirty days within which to amend the complaint and affidavits upon which the attachment was based. The power of the court to permit amendments of pleadings and process is ample (*Rushing v. Ashcraft*, 211 N. C., 627). Hence, the appeal before the time within which amendments were permitted to be filed was premature. What amendments, if any, will be made and their effect upon defendants' motion cannot now be properly determined. The cause is remanded to the Superior Court for further proceedings, the defendants' exception being preserved. *Thomas v. Carteret County*, 180 N. C., 109; *Farr v. Lumber Co.*, 182 N. C., 725.

Remanded.

NOAH WHITEHURST, ADMINISTRATOR OF DAVID WHITEHURST, DECEASED, v. F. A. ELKS, RAYMOND ELKS, J. H. DUNBAR, AND EARL GALLOWAY.

(Filed 22 September, 1937.)

Master and Servant § 23—

Where a nonsuit is entered as to one defendant for that the evidence failed to show negligence on his part, the other defendant, sought to be held on the principle of *respondeat superior*, is also entitled to dismissal, and plaintiff may not contend that the dismissal was erroneous solely as to the alleged employer.

APPEAL by plaintiff from *Williams, J.*, at April Term, 1937, of CURRITUCK. Affirmed.

This is an action to recover damages for the death of plaintiff's intestate.

The action was begun in the Superior Court of Currituck County on 17 October, 1936.

In his complaint plaintiff alleges that his intestate died in Currituck County, North Carolina, on 18 December, 1935; that the death of his intestate was the result of injuries which he suffered while he was engaged in the performance of his duties as an employee of the defendants; and that said fatal injuries were caused by the negligence of the defendants, as specifically alleged in the complaint.

He demands judgment that he recover of the defendants damages for the death of his intestate in the sum of $50,000.

The material allegations of the complaint are denied in the several answers of the defendants.

At the close of the evidence for the plaintiff, each of the defendants moved for judgment as of nonsuit. The motions were allowed, and the action was dismissed as to each defendant. C. S., 567.

From judgment dismissing the action as to the defendant F. A. Elks plaintiff appealed to the Supreme Court, assigning error in the judgment.

C. R. Morris, M. B. Simpson, and R. Clarence Dozier for plaintiff.
Blount & James and McMullan & McMullan for defendant F. A. Elks.

PER CURIAM. It may be conceded, without deciding, that there was evidence at the trial of this action tending to show a relationship between the defendant F. A. Elks and the defendant J. H. Dunbar, such that negligence on the part of the defendant J. H. Dunbar, resulting in the death of plaintiff's intestate, would have been imputed to the defendant F. A. Elks on the principle of *respondeat superior*. On the

facts shown by all the evidence, the defendant F. A. Elks was liable to the plaintiff in this action only on this principle.

The trial court, being of opinion that there was no evidence tending to show liability on the part of the defendant J. H. Dunbar to the plaintiff, dismissed the action by judgment as of nonsuit as to the defendant J. H. Dunbar, and also as to the defendant F. A. Elks.

On his appeal to this Court, the plaintiff does not contend that there was error in the judgment dismissing the action as to the defendant J. H. Dunbar. It follows that the contention of the plaintiff that there was error in the judgment dismissing the action as to the defendant F. A. Elks cannot be sustained.

Where the relation between two parties is analogous to that of principal and agent, or master and servant, or employer and employee, the rule is that a judgment in favor of either, in an action brought by a third party, rendered upon a ground equally applicable to both, should be accepted as conclusive against plaintiff's right of action against the other. 15 R. C. L., 1027.

In accordance with this rule, the judgment dismissing the action as against the defendant F. A. Elks is

Affirmed.

MACK WILEY v. NANCY E. OLMSTED AND VICTOR OLMSTED.

(Filed 22 September, 1937.)

Master and Servant § 11—Evidence held to show that injuries resulted from unavoidable accident and not from negligence.

Evidence tending to show that the alleged employer suggested to plaintiff, as he was being lowered into a well he was employed in digging with block and tackle, that he take his foot out of a hook and place it on a block, and that as plaintiff did so his hand slipped on the rope he was holding and his foot slipped from the block, resulting in his fall to his injury, *is held* to show that the injuries were the result of an unavoidable accident and not caused by negligence.

APPEAL by plaintiff from *Phillips, J.*, at January Term, 1937, of CHEROKEE. Affirmed.

This is an action to recover damages for personal injuries which the plaintiff suffered while he was digging a well for the defendants in the performance of his contract with them, and which he alleged in his complaint were caused by the negligence of the defendants in failing to furnish him reasonably safe appliances for going down into the well.

In their answer the defendants denied that plaintiff's injuries were

caused by their negligence, as alleged in the complaint; they alleged that said injuries were the result of an unavoidable accident, or, at most, of the negligence of the plaintiff in failing to exercise reasonable care for his own safety, while engaged in the performance of his contract with the defendants. They further allege that at the time he was injured, as alleged in the complaint, the plaintiff was at work as an independent contractor, and that for that reason the defendants are not liable to him for damages resulting from his injuries.

At the close of the evidence for the plaintiff the defendants moved for judgment as of nonsuit. The motion was allowed, and plaintiff excepted.

From judgment dismissing the action the plaintiff appealed to the Supreme Court, assigning error in the judgment.

Moody & Moody and J. D. Malonee for plaintiff.
Gray & Christopher for defendants.

PER CURIAM. Conceding without deciding that at the trial of this action there was evidence tending to show that at the time he was injured plaintiff was at work as an employee of the defendants, as contended by the plaintiff, and not as an independent contractor, as contended by the defendants (see *Embler v. Lumber Co.*, 167 N. C., 457, 83 S. E., 740), we are of the opinion that there was no evidence tending to show that plaintiff was injured by the negligence of the defendants, or of either of them, as contended by the plaintiff. All the evidence shows that plaintiff's injuries were the result of an unavoidable accident, for which neither of the defendants was responsible.

At the time he was injured the plaintiff was about 64 years of age. He was an experienced well-digger. He requested his helpers to lower him into the well which he was digging for the defendant by means of a block and tackle, in order that he might adjust a section of terra cotta piping which he had caused to be placed in the bottom of the well to prevent the walls of the well from falling in. While he was being lowered into the well, at the suggestion of the defendant Victor Olmsted, he took his foot out of a hook and placed it on a block. As he did this his hand, by which he was holding a rope, slipped. His foot slipped from the block, with the result that he fell to the bottom of the well, striking the terra cotta pipe. His injuries were painful, and probably permanent, but were not caused by the negligence of the defendants, or of either of them.

The judgment dismissing the action is

Affirmed.

S. B. HILDEBRAND, ADMINISTRATOR OF WESLEY WILLIAMS, DECEASED, AND GROVER WILLIAMS, NEXT OF KIN OF WESLEY WILLIAMS, DECEASED, *v.* McDOWELL FURNITURE COMPANY, A CORPORATION, EMPLOYER, AND CONSOLIDATED UNDERWRITERS, CARRIER.

(Filed 13 October, 1937.)

1. Master and Servant § 40a—Injuries compensable under Compensation Act.

An accidental injury is compensable under the Workmen's Compensation Act only if the accident arises out of and in the course of the employment, which is one resulting from a risk involved in the employment or incident to it, and which occurs while the employee is engaged in a duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business.

2. Master and Servant § 52—

In determining whether an injury is compensable, the Industrial Commission should consider the evidence before it in the light most favorable to claimant, and claimant is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

3. Master and Servant § 55d—

The findings of fact of the Industrial Commission are conclusive on appeal only when supported by evidence, and the Superior Court has jurisdiction on appeal to review the evidence to determine as a matter of law whether there was any evidence tending to support the findings.

4. Principal and Agent § 7—

Declarations of an alleged agent are incompetent to prove the fact of agency.

5. Master and Servant § 40f—Evidence held insufficient to support finding that accident arose in course of employment.

The evidence tended to show that defendant furniture manufacturer entered an exhibit in an exposition of finished furniture, that the exposition was solely to sell furniture to retailers and could in no way help defendant's employees as to methods of manufacture or improve their usefulness to defendant, that the foreman of the glue room, along with other foremen of the plant, was asked to go, that employees who elected to go were not paid for time and were given no orders while on the trip, but that part of their expenses was paid by defendant, and defendant's superintendent testified that the foremen were asked to go after the end of the work week as a matter of courtesy as an "outing" or pleasure trip. The foreman of the glue room, who saw the superintendent only for a short time while at the exposition and paid the superintendent some money for his expenses, was killed in an automobile accident while he was driving the car of his fellow employee back to the town in which the defendant's plant was located. *Held:* The evidence is insufficient to support a finding of the Industrial Commission that the accident arose out of and in the course of the employment.

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

HILDEBRAND *v.* FURNITURE CO.

APPEAL by defendants from *Clement, J.,* at June Term, 1937, of MCDOWELL. Reversed.

This is a proceeding under the North Carolina Workmen's Compensation Act. The plaintiffs filed claim against the defendants for compensation on account of the death of Wesley Williams, alleged to have occurred as result of injury, alleged to have been received by accident, and alleged to have arisen out of and in the course of his employment by the McDowell Furniture Company of Marion. This defendants denied.

After notice to the parties, said proceeding was heard before Commissioner T. A. Wilson, at Marion, on 3 December, 1936, and thereupon said Commissioner made certain findings of fact upon the evidence presented before him on said hearing and entered an award in said proceeding in favor of the defendants and against the plaintiffs as claimants.

The plaintiffs appealed from said findings of fact and award so made by Commissioner Wilson and said appeal was heard by the Full Comsion, sitting in Raleigh, North Carolina, on 23 March, 1937, and said Full Commission, pursuant to such hearing on appeal, rendered decision reversing the decision of Commissioner Wilson and rendering an award in favor of the plaintiffs. The defendants gave due notice in apt time of appeal from said decision and award, and appealed from the Full Commission to the Superior Court of McDowell County. The proceeding was certified to the Superior Court of McDowell County and the record so certified was docketed in apt time in the Superior Court of said county. The appeal so taken was heard by his Honor, John H. Clement, Judge presiding, at the June Term, 1937, of the Superior Court of McDowell County, who rendered judgment thereon affirming the decision and award of the Full Commission, from which judgment so entered by the judge presiding at said term the defendants excepted and assigned error and appealed to the Supreme Court.

Admissions: The defendants admit that Wesley Williams died on 19 July, 1936; that at the time of his death he was foreman of the glue room of the McDowell Furniture Company, but deny that he was on duty at the time of the accident which resulted in his death. It is further admitted that said Williams received injury in an automobile wreck in Catawba County on No. 10 Highway; and that he died as result of the injury. It is admitted that the McDowell Furniture Company was bound by the Workmen's Compensation Act, and that the Consolidated Underwriters is the carrier. It is further admitted that the average wage exceeded the maximum and was, in fact, $31.88 a week. It is further admitted that S. B. Hildebrand was duly appointed administrator in August, 1936, and is duly qualified.

There are certain facts not disputed on the record. That the Southern Furniture Exposition Building, at High Point, N. C., on 18 July, 1936, was preparing to open for its annual display on Monday, 20 July, 1936. The primary purpose in having these expositions was for wholesale only to furniture dealers over the United States. It invited the buyers to come in and see what it offered and get their orders. The furniture exhibit that came from McDowell Furniture Company was finished product. It went there crated. There were about 175 exhibitors. The finished product from the respective furniture factories only were displayed. This display was on the 7th floor.

C. E. Bolick since 1928 has been superintendent of McDowell Furniture Company. E. C. Terry was foreman of the finishing room, Wesley Williams, the deceased, was foreman of the glue room, B. T. Ragan was foreman of the machine room. Bolick left the McDowell Furniture Company factory about 11:00 o'clock with one Foster, the lumber inspector, for High Point. He testified, in part, that he took some tools. In assembling the exhibit it is necessary to have tools. He got a couple of men from the exhibition organization office to go up and help him assemble the furniture for display. He was in the exhibition building about an hour Saturday evening and 30 or 40 minutes next morning, and left High Point about 4:00 o'clock that afternoon. Bolick further testified, in part: "A glue room man, by looking at other exhibits of furniture, cannot get ideas which might help him in properly matching boards or veneer for the samples, for the simple reason that the designs are designed by our own designers and factory. We have our own specifications and looking at another suit wouldn't help. It wouldn't help him in the construction of a piece of furniture." On his way to the exhibit space on the 7th floor, Bolick met Terry, Horton, Ragan, and Williams, who stayed about 35 to 40 minutes. He made reservations in the hotel for these men. "I didn't have a reason for asking him (Williams) to go to High Point. I paid his expenses. I couldn't see why it would be of some benefit to the company to have him go, because we buy the details for him to work by entirely. . . . In answer to your question, 'Why did you offer to pay the expenses?' I say, giving the boys a little outing. When I first asked Williams to go, he said he didn't know whether he could go or not. I told him I would like for him to go. This was the last time I saw him until I got down there. . . . Wes Williams was the foreman in the glue room. He was working by the hour. His work week began Monday morning and ended at 12:00 o'clock on Saturday—45 hours a week. When the time for the furniture show approached, Ed Terry told me that he and Vince Horton wanted to go down there to High Point. I said, 'All right, if you go I'll go with you. I've got to go down there. I'll go with you.'

After I told Terry this I thought about the other foremen and invited them to go, if they wanted to. I felt like if I was to go down there with Horton and Terry, the rest of them would feel like I hadn't been fair and given them the opportunity to go, so I invited them to go. I didn't take any of them to do work. . . . I did not allow Williams any pay for the time he was off down there. I did not give Williams any order from the time he left Marion until the time he got back. I invited Williams that morning to go. . . . I was extending a courtesy to the folks at the plant; that is the idea exactly. When I left here I didn't know that Williams was going at all. When I went to the hotel there I asked the man to hold two rooms until the other automobile came, because I didn't know whether two or three or four were coming. I didn't know Bill Ragan was coming, nor did I know that Wes Williams was coming. . . . I had sent our samples down there by freight motor express. The samples were crated up at the factory. When I got down there these samples were in our space. All that I took in the automobile were two or three side bed rails. I took them up to the space myself. Foster and I. Then I got two men to come in there and set up the furniture for me. . . . I told these two men whom I got from the exposition building how I wanted it arranged and set about there. I did not give any directions to Williams, Ragan, Ed Terry, or Vince Horton as to how it should be set up. Foster drove his car. I went with him. I didn't pay him anything for driving his car. I paid the hotel bill. Before Williams left there he paid me back. He came into my room and throwed $5.00 down on the table and said, 'There's my hotel expenses.' . . . Mr. Crisp of McDowell Furniture Company always gives me an expense check when I go off on trips. I used that. I paid all the hotel expenses. I bought some gas with my own money. Of the $5.00 which I told Mr. Winborne, Williams put down in the hotel room, I did not give him any change. I told him to go ahead and keep that, I'll pay the expenses, and he says, 'No, that will pay for me,' and he would not have it back. None of the other men repaid me for the expenses. The $5.00 was $2.50 too much. That was not repaid. . . . I know I didn't pay for all the meals. I paid for a few of them. . . . It was not any part of Williams' employment that he should attend the furniture show. I employed him. I hired him and when I hired him there wasn't a word said about him going to the furniture show. I never did tell him that as a part of his work there he was to go to the furniture show. The only reason he went this time was merely for his own personal pleasure. . . . The first time he went was back when we first started operations, and at that time, about 1930, business got a little dull and we weren't running the week-ends.

My wife wanted to go and I invited him to go with us. I took him along to help drive. He went as my guest."

E. C. Terry testified, in part: "I was not employed by the McDowell Furniture Company on 18 July, 1936. I was employed until noon on 18 July, 1936. I was employed as foreman of the finishing room. . . . I asked him (Bolick)—told him I wanted to go to the show. . . . I left for High Point about 12:30 on Saturday, 18 July, in my own car. Q. Had you been told by the superintendent, Mr. Bolick, before you started, what would be done about paying the expenses to High Point? Ans.: Mr. Bolick told me if I wanted to go, to take my car, some of the other boys were going, to get some gas up at the company's store, and they'd make arrangements with me to go, so I didn't know how many were going; it would be perfectly all right with them. Q. Did he say he would pay the expenses of the trip? Ans.: Yes, sir. Q. Did the McDowell Furniture Company pay the expenses of the trip? Ans.: Well, they paid part of it. They paid for the gas down there and the hotel bill. I paid for the oil. I went in an Essex Terraplane. Q. Give us the names of all the employees of the McDowell Furniture Company you transported to High Point? Ans.: Bill Ragan, Vince Horton, and Wesley Williams. Bill Ragan was machine room foreman; Wesley Williams was the glue room foreman. We traveled U. S. Highway No. 70, going to High Point. It used to be Highway No. 10. We reached High Point about 5:30. After we got to High Point we went up to the Southern Furniture Exhibit Building and stayed, I guess, thirty minutes. We did not do anything when we got there. Wesley Williams went up into the exhibit building. I left the building and did not return until Sunday morning about ten o'clock. Wes Williams was with me when I returned. We stayed in the building about 20 or 30 minutes Sunday morning. Looked around at some of the samples of the furniture of other people as well as our own. Wes Williams was with me. Q. What were you observing the samples for? Ans.: Looking over them to see the different finishes was what I was looking for. I did not again return to the building. The show was to commence Monday, 20 July. Mr. Ragan, Mr. Horton, Mr. Williams, and I left High Point about 2 o'clock on Sunday, 19 July, 1936, in my car. Williams was driving. We traveled No. 70 Highway coming to Marion. We had an accident that afternoon about a quarter of a mile east of Conover. Williams was driving at the time. The tire bursted and the car got to going across the road and turned over. The rear tire blew out. . . . When we went down to High Point we didn't expect to find any glue room in connection with the exposition. . . . All I expected to see when I went down there was the finished product. . . . There was nothing down there that would help a man operate

a glue room. It would not be any advantage to a man operating a glue room to see the finished product. . . . The work week at the factory began on Monday and ended Saturday at noon. When I left the factory that day I left after the work week was over. I do not know how Wesley Williams was paid; whether by the week or by the hour. Wesley Williams left there with me after the work week was over. I was paid by the week. I did not receive any extra pay for the time that I was away from Marion going on that trip. In High Point I stopped at the hotel. Mr. Bolick paid for my meals; that is what I ate while I was down there. He paid my hotel bill. I was present up in Bolick's room before we left High Point. Wes Williams went up there with me. While up there in the room, Wes Williams laid down five dollars and said, 'That will pay for my hotel bill.' . . . In other words, this was, so far as I was concerned, an outing. I understood that this is what we were all going on, merely an outing. I didn't go down there to do any work. All of us put on our Sunday-going-to-meeting clothes, what we had—in other words, we were all dressed up and weren't in working clothes. . . . I told you a while ago that I could go wherever I pleased, and was not under the direction of anybody. I didn't understand when I told him that Mr. Bolick was directing me while in High Point. I was not under orders from Mr. Bolick while I was down there. I was my own boss, could go wherever I pleased and come whenever I pleased. I was not under the direction of anybody."

B. T. Ragan testified, in part: "I went to High Point for the pleasure of the trip. Nobody asked me to go. In answer to your question, 'Well, how come you to start?' I say, Mr. Bolick told me some of the boys were going and said all of us that wanted to go, they'd be glad for us to go along. He told me this about 9 o'clock on the 18th. He said that Terry and Horton were going and taking Terry's car and would be glad to take all that wanted to go. Q. Did he not state expenses would be paid? Ans.: Yes, sir. I saw Wesley Williams on Saturday morning before we left for High Point. Saw him at different parts of the plant. He said he didn't think he'd go—said it was hot down there and he had a date with his girl—didn't think he'd go. He did not tell me who asked him to go; said some of the boys were going but he didn't believe he would go. I don't know the exact time of the morning he said that. It was 9 or 10 o'clock. We left for High Point about 12:30 or 1 o'clock, somewhere along there. I went with Mr. Terry. Williams also went. I went into the Furniture Exhibit Building while I was there. Terry, Horton, Bolick, and Williams were with me. This was around 5:30. I did not do anything after I got to the building. I went up into the space occupied by the McDowell Furniture Company. Found the samples in the space. They had not been set up. While in the building I

did not look at any other exhibits. I stayed in the building 35 or 40 minutes. I consumed the time while in there just talking and walking around. I went on only one floor, the seventh. I did not go back to the building Sunday morning. I was one of the men in the car when it turned over. . . . It was not part of my employment to go down there to see the furniture. There wasn't any machine room on exhibit down there to show me how the machine room was operated in other factories. There was not anything in connection with the finished goods down there that would better enable me to run my machine room in the McDowell Furniture Company. When I got down there I went up to the building and stayed around there 35 minutes and then went on out. I just went where I pleased and when I pleased. I was not under any orders from anybody as to what I should do, where I should go, and when I should come in. I roomed with Wes Williams down there. I know that Wes Williams wasn't under any orders to go and come at any particular time or place. . . . I was going merely on a pleasure trip and not to do any work. The purpose of the trip was merely for pleasure. That was the purpose of all of us in going. I wasn't in the room in High Point when Wes Williams put down the five dollars to pay his expenses. When I ate down there I paid my bill and his part of the time and he paid for mine and his both part of the time. He and I ran around together most of the time. . . . I had gone with Mr. Bolick twice before this. I did not go down there to work on the other occasions. I got no extra pay for the trip. . . . I didn't take my working clothes with me. He didn't take any with him. There wasn't anything down there in the furniture exposition that would help me in the operation of my machine room. There wasn't anything in connection with it to help a man operate the glue room. There wasn't anything in connection with it that would better help a man in the packing room as to how to pack up stuff. There wasn't an exhibit of that kind down there. There wasn't an exhibit of a cabinet room nor a finishing room. The only thing there was finished goods. I, too, got hurt on that trip in the same accident. I was paid by the week, 45 hours a week. I did not get any extra pay for overtime. If I worked overtime I got pay for a week of 45 hours. Sometimes I did work overtime and I didn't get any pay for that. Those in our group left High Point before Mr. Bolick. We checked out first. I did not pay any hotel bill. Mr. Bolick paid it. I was not under the direction of anybody while I was down there. Nobody gave me any orders. I went just for the trip. As to your request that I state to the court some kind of pleasure I went down there for, well, that is my home town. I was raised down there, for one reason. Know a lot of folks down there, and like to be with these boys going down and coming back. That's about all. Over at

the factory Wes Williams worked by the hour. His work week was 45 hours, beginning on Monday morning and ending Saturday noon—12 o'clock."

Clifton Byrd testified, in part: "I have been employed by the McDowell Furniture Company about 8 years, in the glue room under Wes Williams. I remember his leaving the plant that day, about 11:30, the last time I saw him, when I saw him go out of the shop. He came back into the shop. After he went out it was about fifteen minutes before he came back. I don't know how long he stayed. I don't know when he left the glue room the last time to go to High Point. I had a conversation with Wes Williams that morning. He told me he was going to High Point. He told me about 11 o'clock he was going to High Point. Q. You know who he left in charge of the glue room? Ans.: He left me. I worked that day until 3 o'clock. I worked after dinner. Me and one other fellow that works in the glue room worked that afternoon. Some eight or ten, I don't know exactly how many, of Wes Williams' men worked that afternoon on chair backs. Got a special order and I was not in charge of all these men; only me and that fellow. He told me to look after that end of it while he was gone. . . . We quit at 3:00 or 3:30. I got paid for work that afternoon. Wes Williams didn't tell me what he was going to High Point for. Nobody marked up the time that afternoon. I punched my card. Each man is supposed to punch his own card. Q. Well, do you or not, in the glue room there, often work overtime? Ans.: Yes, sir, we do. Every night or two some of them work overtime. Q. And whenever men work overtime, prior to the death of Wes Williams, would he be there or not? Ans.: He was when he was there. He was there when I worked overtime. Q. Performing his duties as foreman? Ans.: Yes, sir, he was. Q. Williams delegated all his duties to you, did he not? Ans.: Yes, sir. Wesley Williams did not keep the time of the men when he worked overtime. I do not know whether he received pay. I have never been to the furniture show. My work week began Monday morning and ended at 12 o'clock Saturday. I was paid by the hour. If I worked overtime I was paid by the hour. That was the rule there in the factory."

Fred Mathis testified, in part: "I was working for the McDowell Furniture Company in July, 1936, in the veneering and glue room department. Wes Williams was my foreman. The last time I had been working in that department for about 7 years under him. On Saturday, 18 July, I quit work at around 3:30. There were two men who worked in the glue room after dinner. In the veneer there were sometimes seven or eight, maybe more. Wes Williams had charge of them that morning before noon. He left for High Point at 12:25 to be prepared

to go. He left some few minutes after 11 o'clock. I had a conversation with him before he left. He told me he was going to dress to get ready to go to High Point. Had me to look after the veneering department while he was gone to dress. He didn't say what he was going to High Point for. He didn't say how he was going. Q. Who did he say asked him to go to High Point? Ans.: Said Mr. Bolick asked him to go. He said he didn't much want to go because he had a date with his girl. He came back in a few minutes and told me he was going. We very often worked overtime. As to how much, that all depends on what we had to do. We worked sometimes at night. Wesley Williams was not there all the time when we worked overtime. As a general rule, he was in and out. He generally told us what he wanted us to do. As a general rule he would not be there when we checked the clock. He told me he had a date Saturday afternoon. I was at the funeral. The furniture company closed down for the funeral. I talked with Wes Williams a few minutes after 11 o'clock and then about 11:30 that morning. A little after 11:00 he told me he didn't know whether he was going or not; that he had a date with his girl that afternoon. I was paid by the hour."

Paul W. Casey testified, in part: "On 18 July, 1936, I was the secretary and general manager of the Southern Furniture Exposition Building at High Point. . . . In July, 1936, the McDowell Furniture Company of Marion had rented space in the exposition building, under contract which began 1 December, 1935, and expired 1 December, 1936, and at $600.00 per year. The space was on the seventh floor. The McDowell Furniture Company used this space to display merchandise in. We have a show twice a year—January and July. The show started on 20 July. It takes two to four weeks to get ready for it. The merchandise is shipped in for a month in advance of the market. The McDowell Furniture Company put on an exhibit in our building at the time, commencing 20 July, 1936. By exhibit, I mean furniture, whatever they manufacture, samples of the manufactured furniture. They exhibit for wholesale purposes. Buyers attend the show, and observe the furniture. . . I know that Bolick was with the company. I saw the men in the McDowell space Sunday morning somewhere around 10 or 11 o'clock. I saw Mr. Bolick. I think it was around 11 o'clock when he left our building. Q. I believe, Mr. Casey, that these gentlemen from the McDowell Furniture Company had you to employ a couple of men to assist them there, is that so? Ans.: Yes, sir, his representatives. Mr. Bolick asked for men and they were sent to the space. . . . In other words, the processes through which the furniture moves in manufacture are not exhibited, but only the finished product after it has gone through all these departments in the respective furniture factories."

W. R. Chambers and W. C. Chambers for claimant, plaintiff.
Robert W. Proctor for defendant.

CLARKSON, J. The question involved: Is there any sufficient competent evidence to support the finding of the Industrial Commission that the death of claimant's deceased, Wesley Williams, was caused by accident arising out of and in the course of his employment? We think not.

In *Conrad v. Foundry Co.*, 198 N. C., 723, it is written (at p. 725): "The Workmen's Compensation Law prescribes conditions under which an employee may receive compensation for personal injury. Section 2 (f) declares that 'injury and personal injury shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except when it results naturally and unavoidably from accident.' The condition antecedent to compensation is the occurrence of an (1) injury by accident (2) arising out of and (3) in the course of the employment. . . . (p. 727): An accident arising 'in the course of' the employment is one which occurs while 'the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing;' or one which 'occurs in the course of the employment and as the result of a risk involved in the employment, or incident to it, or to conditions under which it is required to be performed.' *Bryant v. Fissell*, 84 N. J. L., 72, Anno. Cas., 1918 B, 764; *Marchiatello v. Lynch Realty Company*, 94 Conn., 260, 108 Atl., 799. One of the risks involved in the employment is the liability of injury inflicted by fellow servants. *Anderson v. Security Bldg. Co., supra* (40 A. L. R., 1119). So it has been stated as a general proposition that the phrase 'out of and in the course of the employment' embraces only those accidents which happen to a servant while he is engaged in the discharge of some function or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the master's business. Annotation—Workmen's Compensation, 1916 A, 41; *Darleth v. Roach & Seeber Co.*, 36 A. L. R., 472." The principles set forth in the above case have been approved by this Court in numerous decisions.

It is said in *Bellamy v. Mfg. Co.*, 200 N. C., 676 (678): (Under the Workmen's Compensation Act) "It is the well settled rule of practice in this jurisdiction, in cases of nonsuit and cases of this kind, that the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom."

In *Southern v. Cotton Mills Co.*, 200 N. C., 165 (169), we find: "In *Johnson v. Hosiery Co.*, 199 N. C., at p. 40, it is said: 'Sec. 2 (b) undertakes to define the word employment and specifically excludes from the operation of the act "persons whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer," etc. . . . It is further provided in section 60 that the award of the Commission "shall be conclusive and binding as to all questions of fact." However, errors of law are reviewable. It is generally held by the courts that the various compensation acts of the Union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow, and strict interpretation.' *Rice v. Panel Co.*, 199 N. C., at p. 157."

In *Dependents of Poole v. Sigmon*, 202 N. C., 172 (173), we find: "The findings of fact made by the North Carolina Industrial Commission, in a proceeding pending before the said Commission, are conclusive, on an appeal from said Commission to the Superior Court, only when there was evidence before the Commission tending to show that the facts are as found by the Commission. Otherwise, the findings are not conclusive, and the Superior Court, on an appeal from the award of the Commission, has jurisdiction to review all the evidence for the purpose of determining whether as a matter of law there was any evidence tending to support the finding by the Commission. *West v. Fertilizer Co.*, 201 N. C., 556."

The following question and answer were excepted to and assigned as error: "I know that Bolick was with the company. I saw the men in the McDowell space Sunday morning somewhere around 10 or 11 o'clock. I saw Mr. Bolick. I think it was around 11 o'clock when he left the building. Q. I believe, Mr. Casey, that these gentlemen from the McDowell Furniture Company had you to employ a couple of men to assist them there, is that so? Objection; overruled; exception. Ans.: Yes, sir, his representatives. Mr. Bolick asked for men and they were sent to the space." This objection was assigned as error on appeal and overruled. We think this evidence incompetent, and it should have been excluded.

It is said in *Hunsucker v. Corbitt*, 187 N. C., 496 (503), citing a wealth of authorities: "'Admissions by agents, made while doing acts within the scope of the agency, and relating to the business in hand, are admissible against the principal when such admissions may be deemed a part of the *res gestæ*, but such admissions are not admissible to prove the agency; the agency must be shown *aliunde* before the agent's admissions will be received.' Lockhart's Handbook on Evidence, sec. 154." *Jackson v. Tel. Co.*, 139 N. C., 347 (351).

Of course the answer exculpated all but Bolick, so the matter became immaterial. Much of the evidence objected to by defendant and for which assignments of error are made, we think not germane and immaterial.

On the whole evidence, we do not think that the death of Wesley Williams was such as set forth in the statute "arising out of and in the course of the employment."

In *Smith v. Sink,* 211 N. C., 725 (727), *Stacy, C. J.,* speaking to the subject for the Court, says: "When all the evidence, taken in its most favorable light for the plaintiff, fails to show any actionable negligence on the part of the defendant (citing numerous authorities). 'It all comes to this, that there must be legal evidence of the fact in issue and not merely such as raises a suspicion or conjecture in regard to it.' *Walker, J.,* in *S. v. Prince,* 182 N. C., 788."

In *Ridout v. Rose's Stores, Inc.,* 205 N. C., 423 (425), it is said: "It is obvious that from Saturday night until Monday morning the relation of employer and employee was suspended, and that there was no causal relation between the employment and the accident. *Canter v. Board of Education,* 201 N. C., 836; *Dependents of Phifer v. Dairy,* 200 N. C., 65. It follows that the death of the employees did not arise out of and in the course of their employment."

In *Jones v. Trust Co.,* 206 N. C., 214 (219), we find: "The facts found by the hearing Commissioner and approved by the Full Commission: 'The plaintiff, on 29 October, 1931, while regularly employed by the defendant Planters National Bank and Trust Company, sustained an injury by accident as a result of an automobile wreck which occurred while he was en route to attend a meeting of the cotton committee for the purpose of procuring financial information for the use of the bank. The accident arose out of and in the course of the plaintiff's employment.' . . . (p. 220): We think the evidence was sufficient to sustain the finding of fact by the Industrial Commission and approved by the court below, that plaintiff on the trip when he sustained the injury 'while he was en route to attend a meeting of the cotton committee for the purpose of procuring financial information *for the use of the bank.*' "

The facts here indicate, from all the evidence, that Wesley Williams was not about his employer's business when he was killed in an automobile accident. His regular work ceased at 12 o'clock on Saturday, 18 July, 1936. He could work overtime, for which he received extra pay. At first he declined the invitation to visit the furniture exhibition at High Point, as he had a date with his girl. He changed his mind, put on his Sunday clothes and went. He did not work for his employer on the trip and he was not compelled to go.

Pertinent facts: Wesley Williams was a foreman of the glue room. Looking at other exhibits of furniture at High Point could gain him no ideas to further his employer's business. In fact, Bolick did not call upon Wesley Williams, but obtained two men from the exhibition organization to help him assemble the McDowell Furniture Company's exhibit. Bolick paid the "boys'" expenses to give them "a little outing." Williams was doubtful about going when Bolick "told him I would like for him to go," and Bolick did not know he was going until he saw him in High Point. Williams worked by the hour, his week began Monday morning and ended at 12 o'clock on Saturday—45 hours a week. He was not taken to High Point to work and no pay was allowed. No order was given him. Only "a courtesy to the folks at the plant." Bolick paid the hotel bill, but Williams returned it before he left by giving Bolick $5.00. He said, "There is my hotel expenses." The McDowell Furniture Company always gave Bolick an expense check when he went off on trips, and he used that to pay the hotel expenses, but did not pay for all the meals. It was not a part of Williams' employment that he should attend the furniture show. "The only reason he went this time was merely for his personal pleasure." Williams left with those he came with, at 2 o'clock Sunday afternoon, before Bolick left. E. C. Terry's testimony was to the effect: "I did not receive any extra pay for the time that I was away from Marion going on that trip." We were going on "merely an outing." "Didn't go there to do any work. All of us put on our Sunday-go-to-meeting clothes and weren't in working clothes. I was not under the direction of anybody."

B. T. Ragan's testimony was to the effect: That Bolick said "all of us who wanted to go they'd be glad for us to go along," that expenses would be paid. Williams said he didn't believe he would go, he "had a date with his girl." Left about 12:30 for High Point and Williams went. "I know that Wesley Williams wasn't under any orders to go and come at any particular time." "Was going merely on a pleasure trip and not to do any work, and that was the purpose of all." No working clothes taken.

The testimony of Clifton Byrd, left in charge of the glue room, that he and others worked overtime on "special order" and got paid for the work, is immaterial and of no probative force.

Fred Mathis' testimony was to the effect that he worked overtime in the glue room and Wesley Williams left for High Point at 12:25 and Bolick asked him to go. "Said he did not know whether he would go as he had a date with his girl that afternoon."

We have set forth the evidence fully and with care, and we cannot say that there was any sufficient competent evidence to sustain plaintiff's claim. The trip was an "outing," not to further directly or indirectly

the employer's business. The evidence in the case indicated that Wesley Williams was a volunteer in making the trip and that the trip was for pleasure and not for business. We think this case distinguishable from the case of *Foster v. Culpepper Sales & Service Co., Inc.,* Opinions Industrial Commission of Virginia (February, 1937), Vol. 18, No. 12, p. 364.

It was an unfortunate and deplorable accident. The party on the return trip to Marion was being driven by Wesley Williams. The rear tire blew out, the car turned over, and Williams was killed. The car belonged to E. C. Terry and not to defendant company.

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

Reversed.

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

DAVID BULLOCK v. M. K. (BUD) WILLIAMS.

(Filed 13 October, 1937.)

1. Automobiles § 22: Negligence § 20—Charge, construed as whole, held not objectionable as putting burden on issue of negligence on defendant.

Plaintiff was a passenger in an automobile involved in a head-on collision with another car. The trial court, after fully charging the law and repeatedly instructing the jury that the burden was on plaintiff to show by the greater weight of the evidence that defendant was negligent, and that such negligence was the proximate cause of the injury, instructed the jury on defendant's contention that the negligence of the driver of the car in which plaintiff was riding was the sole proximate cause of the accident, that if they found from the evidence that both drivers were negligent, and that the negligence of both proximately caused the accident, plaintiff would be entitled to recover, and that plaintiff could not recover only if the jury were satisfied "that this defendant was not guilty of any negligence whatsoever, or if you are satisfied from the evidence that the negligence" of the driver of the car in which plaintiff was riding was the sole proximate cause of the injury. *Held:* The instruction, taken in connection with the evidence and considered with prior portions of the charge, could not have misled the jury as placing the burden on defendant to satisfy the jury that he was not guilty of negligence, and defendant's objection thereto will not be sustained.

2. Trials § 36—

A charge will be sustained when, considered as a whole, it embodies the law applicable to the essential features of the case.

3. Negligence § 2—

An instruction that the law does not require a person to exercise the same degree of judgment in a sudden emergency as in ordinary condi-

tions, but only that he exercise that degree of care which an ordinary prudent man, confronted by similar circumstances, would exercise, *is held* without error.

4. Negligence § 20—

In this action to recover for permanent personal negligent injury, an instruction that the jury should not consider the statutory mortuary table as conclusive as to plaintiff's life expectancy, but should take it into consideration and find from the evidence plaintiff's natural expectancy, *is held* without error.

APPEAL by defendant from *Harris, J.*, at February Term, 1937, of HARNETT. No error.

This was an action for damages for a personal injury alleged to have been caused the plaintiff by the negligence of the defendant in the operation of a motor vehicle on the highway. The automobile in which plaintiff was riding as a passenger collided with an automobile driven by the defendant proceeding in the opposite direction.

Plaintiff alleged as the cause of the collision that defendant was driving his car on the defendant's left side of the road in violation of the statute. Defendant denied this, and alleged that the car in which plaintiff was riding was being driven on plaintiff's left side of the road, and that the negligence of the driver of the automobile in which plaintiff was riding was the sole proximate cause of the injury. The defendant did not allege contributory negligence.

There was evidence tending to support the allegations of both plaintiff and defendant. The usual issues of negligence and damage were submitted to the jury.

The court, after stating fully the contentions of the parties and recapitulating the testimony in support of each, charged the jury, among other things, as follows:

"Now, the plaintiff cannot recover unless you are satisfied from the evidence, by its greater weight, that Williams, the defendant, was guilty of negligence. I shall now give the definition of what negligence is, and I ask your attention to that, where the plaintiff has been injured by the negligence of the defendant.

"Negligence is a failure to perform some duty imposed by law. It is doing other than, or failing to do, what a reasonably prudent man would have done under the same or similar circumstances. In short, negligence is a want of due care; and, in determining whether due care has been exercised in any given situation, of the party alleged to have been negligent, reference must be had to the facts and circumstances of the case, and to the surroundings of the party at the time, and he must be judged by the influence which those facts, and his surroundings, would have had upon a man of ordinary prudence in shaping his conduct, if he had been similarly situated.

"But every negligent act does not of itself involve liability. The conduct of the party sought to be charged, or his failure to exercise proper care, must amount to what is known in law as actionable negligence. And in order to establish actionable negligence, the plaintiff is required to show, by the greater weight of the evidence, first, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, under the circumstances in which they were placed, proper care being that degree of care which a prudent man should use under like circumstances when charged with a like duty; and, second, that such negligent breach of duty was the proximate cause of the injury, a cause that produced the result in continuous sequence, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed.

"Now, there are three elements that go to make up negligence, first, a duty to perform which the defendant owes the plaintiff. That is an element of negligence. And, second, a failure on the part of the defendant to perform that duty; and third, injury resulting proximately from the failure of the defendant to perform that duty which the law imposes upon him. Those are the three elements of negligence.

"But then, if you were to be satisfied, from the evidence and by its greater weight, that this defendant was negligent, that would not entitle the plaintiff to recover until you went further than that and said that that negligence was the proximate cause of the injury which this plaintiff contends that he received.

"Now, the definition of proximate cause is this: An act is said to be the proximate cause of an injury when, in a natural and continuous sequence, unbroken by any new and independent cause, it produced the result complained of, and without which the injury would not have occurred. The test is: Was there an unbroken connection, a continuous operation, between the wrongful act and the injury? Do the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? Was there any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury? If so, this intermediate cause, and not the original wrong, would be the proximate cause of the injury.

"It is generally held that, in order to warrant the jury in finding that the negligence of the defendant was the proximate cause of the plaintiff's injury, it must appear that the injury was the natural and probable consequence of the defendant's negligent act, and that it ought to have been foreseen in the light of attending circumstances.

"Now, gentlemen, as I have said, the burden of the first issue is on the plaintiff. Issues are questions of fact that the jury have to answer.

and when the jury has answered these issues, judgment is drawn from the way that the jury answers the issues.

"The first issue is: 'Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?' The burden of that issue is upon the plaintiff, Mr. Bullock, and before you can answer that issue 'Yes,' it means that you say that he was injured by the negligence of Mr. Williams. The plaintiff must offer evidence which satisfies you, by its greater weight, not beyond a reasonable doubt—that is, in criminal cases—but the plaintiff must offer evidence which satisfies you, by its greater weight, that Williams was negligent, and that Bullock was injured by his negligence. If you are so satisfied, it would be your duty to answer the first issue 'Yes.' If not so satisfied, it would be your duty to answer the issue 'No.'

"By greater weight it does not mean the greater number of witnesses. It is like a pendulum. If it has more weight on the plaintiff's side, just a little bit, then he has carried the burden of satisfying you by the greater weight of the evidence; but, if the pendulum is even, he has not carried the burden of satisfying you by the greater weight of the evidence. If the greater weight is on the side of the defendant, of course, the plaintiff cannot recover because he has not satisfied you from the evidence, by its greater weight.

"Now, the plaintiff contends that Williams violated the traffic law, and the defendant contends that the driver of the plaintiff's car, Randolph Bullock, violated the traffic laws which we have in this State. I charge you this is the law:

"Any person who drives any vehicle upon a highway carelessly and heedlessly and in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving.

"Then I charge you, if you are satisfied from this evidence, and by its greater weight, if the plaintiff has satisfied you that Williams was guilty of careless and reckless driving on this occasion, that would be negligence on the part of Williams, but it would not entitle the plaintiff to recover unless you go further than that and say that the negligence which you find him guilty of was the proximate cause of the injury which the plaintiff contends he sustained.

"There is another rule of law which I call your attention to: Upon all highways of sufficient width, except upon one way streets, the driver of a vehicle shall drive the same upon the right half of the highway. I charge you this is the law: Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible. I charge you that is the law.

"I charge you that 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 on-coming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety. I charge you that is the law.

"The driver of a vehicle shall not overtake and pass another vehicle proceeding in the same direction upon the crest of a grade, or upon a curve in the highway where the driver's view along the highway is obstructed within a distance of five hundred feet.

"I charge you gentlemen that if you find that this defendant has violated any of these statutes, or all of them, and you go further and find because of that violation of this statute he would be guilty of negligence *per se,* that is, negligence in itself, if he violated the traffic laws, then he is guilty of negligence *per se,* which is negligence in itself, but, as I have charged you before, that would not be sufficient for you to say that the plaintiff ought to recover from the defendant on account of that negligence unless you find that negligence was the proximate cause of the injury, which the plaintiff contends he sustained.

"Now, gentlemen, I charge you that if you are satisfied from the evidence that both the plaintiff's driver, Randolph Bullock, and the defendant Williams were both negligent, and that both of their negligence was the proximate cause of this accident, that both were negligent, and that the negligence of both was the proximate cause of the accident, then the plaintiff would be entitled to recover in this case, for the reason that the only way the plaintiff could not recover is that you must be satisfied that this defendant was not guilty of any negligence whatsoever, or, if you are satisfied from the evidence that the negligence of Randolph Bullock was the sole cause of this accident. Since David Bullock was not driving, you cannot impute negligence of the driver to him, but, I charge you, that if you are satisfied from this evidence that the negligence of Randolph Bullock was the sole proximate cause of this injury which the plaintiff sustained, then the plaintiff cannot recover in this case.

"Now, gentlemen, I charge you this is the law, also: An automobile driver, who by the negligence of another, and not by his own negligence, is suddenly confronted with an emergency and is compelled to act instantly to avoid an accident or injury, is not guilty of negligence if he makes such a choice as a person of ordinary prudence placed in such a position might make; even though he didn't make a wise choice, and whether he used reasonable care under the circumstances is ordinarily a question for the jury. I so charge you that is the law.

"The court charges you that if the jury shall find from the evidence that the defendant Williams was operating his automobile to the right of

the center of the highway, and that the automobile occupied by the plaintiff Bullock was meeting him, being driven in or near the middle of the highway, then the court charges you that it would not be the duty of the defendant Williams to turn his automobile further to the right, even though he may have had room to do so and avoid the accident, for the defendant had the right to assume, up to the point of collision, that the automobile occupied by the plaintiff would assume its proper and rightful position in passing. That applies to both the plaintiff's car and the defendant's car.

"The court charges you that one cannot escape liability for the negligent operation of an automobile on the ground that he acted in an emergency, when it appears that the emergency was created by his own negligence; or, if, by the exercise of reasonable care, he might have avoided the injury, notwithstanding the emergency."

The jury for their verdict answered the issues in favor of the plaintiff, and from judgment in accord therewith defendant appealed.

Neill McK. Salmon for plaintiff, appellee.
J. R. Young and J. A. Jones for defendant, appellant.

DEVIN, J. The appellant noted numerous exceptions to the judge's charge to the jury, and contends that, particularly, the following should be held for error entitling him to a new trial: "Now, gentlemen, I charge you that if you are satisfied from the evidence that both the plaintiff's driver, Randolph Bullock, and the defendant Williams were both negligent, and that both of their negligence was the proximate cause of this accident, that both were negligent, and that the negligence of both was the proximate cause of the accident, then the plaintiff would be entitled to recover in this case, for the reason that the only way the plaintiff could not recover is that you must be satisfied that this defendant was not guilty of any negligence whatsoever, or if you are satisfied from the evidence that the negligence of Randolph Bullock (driver of car in which plaintiff was riding) was the sole proximate cause of the accident."

While a portion of the above quotation from the charge, standing alone, would be erroneous, in that it apparently placed the burden on the defendant to satisfy the jury that he was not guilty of negligence, yet considering the charge as a whole and the connection in which the language was used, in the light of all the evidence, we cannot hold that the jury was misled by this excerpt from a lengthy charge in other respects free from material error. The clause complained of had reference to the defendant's contention that the sole proximate cause of the injury was the negligence of plaintiff's driver, and the jury was instructed, if

they found both defendant and plaintiff's driver were negligent, and that the negligence of each was a proximate cause of the injury, that would not relieve the defendant; and that under these circumstances the negligence of plaintiff's driver would not absolve defendant from liability for his own negligence (since the negligence of the driver was not imputable to plaintiff), unless the negligence of the driver of plaintiff's car was the sole proximate cause of the injury. To this correct statement of the law, the judge inadvertently added language which, standing alone, was erroneous, but he had repeatedly charged the jury that the burden of proof on the first issue was on the plaintiff, and that the plaintiff was not entitled to an affirmative answer to that issue unless the jury found by the greater weight of the evidence that the defendant was negligent and that his negligence was a proximate cause of the injury.

Considering the charge as a whole, we conclude that the vice in that portion of the instruction complained of, in the connection in which it was given and in the light of the evidence, resulted in no harm to the defendant, and was insufficient to necessitate the overthrow of the verdict and the award of a new trial.

In *Plyler v. R. R.,* 185 N. C., 358, the salutary rule is laid down that if the charge considered as a whole embodies the law applicable to the essential features of the case, it should be sustained. To the same effect is the holding in *Ledford v. Lumber Co.,* 183 N. C., 614; *In re Hardee,* 187 N. C., 381; *Brown v. Tel. Co.,* 198 N. C., 771; *Campbell v. R. R.,* 201 N. C., 102; *Mewborn v. Rudisill,* 211 N. C., 544.

The statement of the general rule of law relating to emergencies, as contained in the charge, was in accord with the authorities. Huddy Cyclopedia Auto. Law (9th Ed.), Vol. 3-4, p. 57; *Jernigan v. Jernigan,* 207 N. C., 831.

The exception to the reference in the charge to the mortuary tables cannot be sustained. The judge, after stating what the mortuary table showed as to the plaintiff's expectancy, instructed the jury, "That doesn't mean you ought to say he is going to live 23.8 years, but you may take that into consideration, and then it is for you to say, taking that into consideration, from the evidence, what you find, what you are satisfied, would be the natural expectancy of the plaintiff, in making up your answer to the issue of damages." This does not fall within the condemnation of *Trust Co. v. Greyhound Lines,* 210 N. C., 293, and *Taylor v. Construction Co.,* 193 N. C., 775.

We have examined the other exceptions noted and find them without substantial merit.

The issues of fact have been determined against the defendant, and in the trial we find

No error.

JOE A. SNOW v. SYDNOR DEBUTTS AND ATLANTIC AND YADKIN RAILWAY COMPANY.

(Filed 13 October, 1937.)

1. Principal and Agent § 10—

A principal is liable for the torts of his agent when expressly authorized, or when committed within the scope of his employment and in furtherance of his master's business, and therefore within his implied authority, or when ratified by the principal.

2. Same—Scope of implied authority of agent.

The test to determine whether a wrongful act of an agent comes within his implied authority is whether the agent is acting within the scope of his employment and is about his master's business, attempting to do what he was employed to do, and the intent or motive of the agent to secure a benefit for his employer or to protect his property is not controlling.

3. Same—

Acts done by the agent outside the scope of his employment, irrespective of intent, or which are done for the agent's own purpose and in consummation of his personal desire, are not within his implied authority, and the principal may not be held liable therefor in the absence of ratification.

4. Same—

In determining whether an act is within the implied authority of an agent, there is a marked distinction between an act done for the purpose of protecting the principal's property, or recovering it back, and an act done for the purpose of punishing an offender for an offense already committed.

5. Corporations §§ 20, 25—Implied authority of general manager of corporation.

The term "general manager" implies general authority to conduct and control the business of the corporation within his charge as its principal officer, and to act for the corporation in emergencies, but does not include implied authority to punish for past offenses or to commit an assault from personal ill will or malice outside the scope of the employment.

6. Principal and Agent § 10—Evidence held insufficient to show that general manager had implied authority to assault plaintiff.

The evidence disclosed that plaintiff testified before the Corporation Commission in opposition to a railroad company's petition to be allowed to discontinue certain train service, and before a legislative committee in opposition to a bill to give the Corporation Commission power to allow such discontinuances of service, that thereafter the railroad company's general manager assaulted plaintiff after an altercation in regard to plaintiff's activities. *Held:* Even conceding that the general manager had authority to supervise and direct the hearings before the Corporation Commission and the legislative committee, the general manager had no implied authority to assault plaintiff for testimony already given, even though he was prompted by his belief that such testimony was false and detrimental to the interest of the company.

7. Corporations § 25—

The fact that the general manager of a corporation assaulted plaintiff on property of the corporation does not alone impose liability therefor on the corporation when plaintiff was present not as an employee or prospective customer, but for his own convenience.

THIS is a civil action, tried before *Phillips, J.*, at the July Term, 1937, of SURRY. Reversed.

Plaintiff was a mail carrier on the line of the corporate defendant and defendant DeButts was its general manager.

In May, 1931, the corporate defendant petitioned the Corporation Commission of North Carolina to be allowed to discontinue certain passenger trains, then being operated by it. There were a number of hearings before the Commission and the plaintiff, as a citizen of Mount Airy, appeared and opposed the petition and gave testimony in behalf of the respondents.

At the time of the hearings the Corporation Commission was not vested with authority to authorize the discontinuance of passenger trains when the convenience and necessity of the public did not require the operation of such trains. At the 1933 session of the Legislature a bill expressly conferring this jurisdiction on the Commission was introduced. There were hearings had on this bill before the committee and plaintiff appeared and opposed it. The bill was enacted and ratified prior to the occurrences which are the subject matter of this action. So far as the record discloses, there were no other hearings before the Corporation Commission.

On the evening of 16 May, 1933, plaintiff went to the station of the corporate defendant to meet a friend and while waiting for the arrival of the train a controversy arose between him and the defendant DeButts and the plaintiff was abused, insulted and assaulted by said defendant. There was ample evidence to sustain the verdict against the defendant DeButts and he did not appeal.

The jury having found by its verdict that the defendant DeButts at the time of said assault was acting within the scope of his employment as general manager of the Atlantic and Yadkin Railway Company, judgment was entered against said defendant and the Atlantic and Yadkin Railway Company appealed.

Robert A. Freeman and A. E. Tilley for plaintiff, appellee.

Carter & Carter and Hobgood & Ward for defendant Atlantic and Yadkin Railway Company, appellant.

BARNHILL, J. The one question we need to discuss on this appeal is the liability of the appealing defendant on the judgment rendered

against the individual defendant. If DeButts was not acting within the scope of his employment and in furtherance of his master's business at the time of his assault upon the plaintiff, this question must be answered in the negative and the other exceptive assignments of error become immaterial.

The plaintiff described the setting of the assault in substance as follows:

"I was standing right near the mail wagon; others were present; I was waiting there for Mr. Brower. Someone said, in a humorous way, that perhaps the train had been discontinued. The defendant DeButts was present. Someone asked the question: 'Do you think the trains will be taken off?' I replied that I did not think they would, because it was too important to the public from the standpoint of mail, express, and passenger service. About that time DeButts approached me and said: 'Mr. Snow, when are you going to get your promotion?' I said: I am not going to get it. He said: 'You said you were going to be made chief clerk; you said it, didn't you?' I said: Yes, I thought I was going to get it, but another man got it. He said: 'Why didn't you get it?' I said: Another man got it. He says: 'I know why you didn't get it; you lied to the Corporation Commission; you lied to the Legislature.' I said: Mr. DeButts, there is no reason why we should have any personal ill will towards each other. I have nothing against you. I did what I did simply because I thought it was my duty and I presume you did the same. He replied: 'You are a G—— d—— liar. You are interfering with my business. I am trying to save money for the company and it is none of your business. . . .'" The plaintiff then outlined the abusive language and conduct of the defendant DeButts, which amounted to an assault.

There is no hard and fast rule governing the application of the doctrine of *respondeat superior*. The application of the doctrine depends upon the facts in the case under consideration. There are, however, certain general rules established by the decisions of this and other courts which govern its application.

A principal is liable for the torts of his agent (1) when expressly authorized; (2) when committed within the scope of his employment and in furtherance of his master's business—when the act comes within his implied authority; (3) when ratified by the principal.

There is no contention in this case that the conduct of DeButts was expressly authorized, or that it was thereafter ratified by his employer. If the corporate defendant is liable at all, it is by reason of the fact that DeButts was acting within the line of his duty and exercising functions necessarily implied by the general nature of his employment—that is, he was acting within the range of his employment.

The principles requiring the application of the doctrine are variously expressed.

It is elementary that the principal is liable for the acts of his agent, whether malicious or negligent, and the master for similar acts of his servant, which result in injury to third persons, when the agent or servant is acting within the line of his duty and exercising the functions of his employment. *Roberts v. R. R.*, 143 N. C., 176.

If the wrongdoer, while acting in the range of his authority, does an act which injures another, the principal or master is liable therefor without reference to whether the intent of the agent or servant was good or bad, innocent or malicious.

Liability exists as against the master for wrongful or negligent acts of his servant only when the agent is acting within the scope of his employment and is about his master's business, attempting to do what he was employed to do.

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

A principal is liable for assaults committed by its agent or servant only when the assault is committed while the agent or servant is about his master's business and acting within the range of his employment, unless his conduct was thereafter ratified by the principal.

On the other hand, there are pertinent decisions holding that the principal under certain conditions is not liable.

The principal is not liable when the agent is about his own business, or is acting beyond the scope and range of his employment. This is true irrespective of the intent of the agent.

A master is not responsible for the torts of his servant committed wholly for the servant's own purpose and in consummation of his personal desire. *Linville v. Nissen*, 162 N. C., 95; *Roberts v. R. R., supra.*

A master cannot be held liable for the unauthorized act of a servant on the ground that the servant did the act with the intent to benefit or serve the master. *Daniel v. R. R.*, 136 N. C., 517; *Marlowe v. Bland*, 154 N. C., 140.

Nor is a master liable when his servant steps aside from the master's business to commit a wrong not connected with his employment. *Marlowe v. Bland, supra; Dover v. Mfg. Co.*, 157 N. C., 324; *Bucken v. R. R.*, 157 N. C., 443.

If an assault is committed by the servant, not as a means or for the purpose of performing the work he was employed to do, but in a spirit of vindictiveness, or to gratify his personal animosity, or to carry out an independent purpose of his own, then the master is not liable. 39 C. J., page 1307; L. R. A., 1918 F, 534; 10 A. L. R., 1079; *Jackson v. Scheiber,* 209 N. C., 441.

It is a well established rule that the master is not responsible for the tort of his servant when done without his authority and not for the purpose of executing his orders or doing his work, but wholly for the servant's own purpose and in pursuit of his private and personal ends. *Bucken v. R. R., supra; Linville v. Nissen, supra.*

Ordinarily, the intent of the agent, or his purpose to promote the interest or protect the property of his principal, is not a determining factor.

It is immaterial that the employee intended by such act to secure a benefit for the employer. *Lamb v. Charles Stores Co.,* 201 N. C., 134. Liability of the principal, or the master, depends not upon the motive of the agent, or the servant, such as his intent to benefit his employer or to protect his property, but upon the question whether in the performance of the act which gave rise to the injury the agent or the servant was at the time engaged in the service of his employer. *Dickerson v. Refining Co.,* 201 N. C., 90. It is not sufficient that the act shows that he did it with the intent to benefit or serve the master. It must be something done in attempting to do what the master has employed the servant to do. Nor does the question of liability depend on the quality of the act, but rather upon the question whether it has been performed in the line of duty and within the scope of authority conferred by the master. *Daniel v. R. R., supra.* There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony, or recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. *Daniel v. R. R., supra.* This view is expressed in *Kelly v. Shoe Co.,* 190 N. C., 406, by *Varser, J.,* as follows: "Liability does not flow from the employee's intent to benefit or serve the master, but it does flow from the acts of the servant, or employee, in attempting to do what he was employed to do, that is, the acts complained of must have been done in the line of his duty, and within the scope of his authority." *Butler v. Mfg. Co.,* 182 N. C., 547; *Munick v. Durham,* 181 N. C., 188; *Clark v. Bland,* 181 N. C., 112, and the line of cases cited in these authorities.

The general scope of the authority of the defendant DeButts was very broad. The term "general manager" implies the right to exercise judgment and skill, and the idea that the management of the affairs of the company has been committed to him with respect to the property and

business of the corporation. It implies general power and permits a reasonable inference that he was invested with the general conduct and control of the defendant's business committed to his charge. The term carries with it the implied authority to act in emergencies, or generally, as the principal officer of the corporation in reference to the ordinary business and purposes of the corporation in the conduct of its affairs within his charge. *Whipple v. Insurance Co.*, 222 N. Y., 39; *Gas Light Co. v. Lansden*, 172 U. S., 534; *Kelly v. Shoe Co., supra.* It does not, however, include the implied authority to punish for past offenses or to assaults committed outside the scope of employment and not in the range of the servant's duties, prompted by the personal ill will or malice of the employee.

We must then examine into the implied powers and duties of DeButts to determine whether the act complained of could reasonably be interpreted as coming within the implied powers conferred upon him and whether he was at the time engaged in the discharge of his duties to his employer, so as to determine the liability of the corporate defendant upon the verdict rendered.

While it is a matter of common knowledge that the trial of legal actions and the conduct of judicial hearings of the type indicated is ordinarily committed by public service corporations to its legal staff, we may concede that it was within the implied authority of DeButts, as general manager, to supervise and direct the hearings before the Corporation Commission and the committee of the Legislature. The possession of such a broad range of authority could not reasonably be interpreted to embrace the direction, control, intimidation, or coercion of witnesses of the adversary. *A fortiori,* an agent of the corporation, however broad his authority may be, cannot be said to be acting within the scope of his employment or about his master's business when he undertakes to take to task, abuse, and assault a witness of the adversary who has already testified, when prompted by his resentment generated by his conception that the testimony of such witness was false and detrimental to the interest of his principal.

Applying the principles enumerated in these decisions to the testimony in the instant case, we are constrained to hold that the evidence fails to show that DeButts was acting within the range of his employment and was about his master's business in assaulting the plaintiff, but rather that he was acting in a spirit of vindictiveness to gratify his personal animosity. The wrong was not committed under such conditions as would invoke the doctrine of *respondeat superior,* and no liability attaches to his principal for the resulting injury.

The conduct on the part of DeButts was reprehensible and inexcusable. To hold, however, that the corporate defendant had impliedly

authorized its agent to pursue the course he did and that such conduct was within the range of his employment without any evidence of authority, ratification, or approval, would be to imply that this defendant had embarked on a course of dealings in direct conflict with accepted proprieties in judicial proceedings, and that it imposed upon its agent duties which give evidence that it is devoid of any sense of responsible citizenship.

It does not clearly appear from the evidence that the assault occurred on the premises of the defendant. Even so, the plaintiff was present, not as an employee or prospective passenger, but for his own convenience to meet a fellow mail carrier. Under these circumstances, if the assault was committed on the premises of the defendant, that fact alone would not impose liability on the defendant. *Strickland v. Kress*, 183 N. C., 534; *Sawyer v. R. R.*, 142 N. C., 1.

The exception of the defendant railroad company to the refusal of the general county court to dismiss plaintiff's action as against it as of nonsuit should have been sustained. The judgment as against the appealing defendant is

Reversed.

MRS. POLLY MILLER, ADMINISTRATRIX OF CLAYTON MILLER, DECEASED, v. TOM ROBERTS AND WIFE, ELIZABETH ROBERTS, AND OSCAR TOWNSEND.

(Filed 13 October, 1937.)

1. **Courts § 1c—**

Failure to take objection by answer to the jurisdiction of the court does not waive the right to object to the jurisdiction, since there can be no waiver of jurisdiction, and objection thereto may be made at any time.

2. **Evidence § 2—**

Our courts will take judicial notice of a public statute of the State, which therefore need not be pleaded, and the North Carolina Workmen's Compensation Act is a public statute.

3. **Statutes § 5c—**

A statute which relates to persons and things as a class is a general law, and the North Carolina Workmen's Compensation Act is a general law.

4. **Master and Servant § 37—**

The North Carolina Workmen's Compensation Act is a general statute.

5. **Courts § 1c—Evidence is competent on trial in Superior Court to show that parties are subject to Workmen's Compensation Act.**

The Superior Court has the duty and power to find a jurisdictional fact, and therefore, in an action for wrongful death in which plaintiff alleges that the relation of master and servant existed between his intes-

tate and defendants, and that they were engaged in lumber operations in this State, evidence is competent on the trial to prove facts which show the parties to be subject to the provisions of the Workmen's Compensation Act.

6. Master and Servant § 49—Nonsuit held proper upon finding, supported by evidence that action was governed by Compensation Act.

In this action for wrongful death, instituted in the Superior Court, plaintiff alleged that the relationship of master and servant existed between intestate and defendants, and that intestate was killed while engaged in his duties in the operation of defendants' lumber plant. Upon cross-examination of plaintiff's witness, defendant elicited testimony, which was uncontradicted, that at all times defendants regularly employed twenty-five employees in operating the plant, and that witness, a fellow employee of intestate, had seen no notice and had received no letter to the effect that defendants were not operating under the Compensation Act. *Held:* The evidence, considered in the light most favorable to plaintiff, raises the presumption that the parties are subject to the Compensation Act, C. S., 8081 (i), (a), (m), (k), and tends to show absence of notice of nonacceptance by the employer, C. S., 8081 (l), and supports the court's judgment granting defendants' motion to nonsuit for that the Industrial Commission has exclusive jurisdiction, C. S., 8081 (r).

7. Same—Where cause alleged is governed by Compensation Act, joinder of transferee of property of employer does not prevent nonsuit.

Where, in an action instituted in the Superior Court to recover for wrongful death, plaintiff alleges that one of defendants was intestate's employer, and another defendant, a fellow employee, was driving the employer's truck at the time of the accident, and joins the employer's wife upon allegation that the employer had transferred all his property to her subsequent to the accident, the joinder of the wife, in the absence of evidence that she was intestate's employer or that the driver of the truck was her agent, will not prevent the dismissal of the action for that the plaintiff's exclusive remedy was under the Compensation Act.

APPEAL by plaintiff from *Alley, J.,* at March Term, 1937, of MITCHELL.

Action to recover damages for alleged wrongful death.

Plaintiff alleges actionable negligence and damage.

In their answer the defendants deny these allegations, but do not plead the Workmen's Compensation Act in bar of the action.

It is not controverted that the intestate, Clayton Miller, died 22 March, 1935, as result of injuries received in the wreck of an auto truck; that on 29 July, 1935, his widow, the plaintiff, Mrs. Polly Miller, was duly appointed by the clerk of the Superior Court of Mitchell County as administratrix of the estate of said intestate, and that this action was instituted the same day.

Plaintiff testified: "I am widow of Clayton Miller, deceased. He died 22 March, 1935. On the day he died, my husband was working for Tom Roberts. He was helping on a truck. He was helping Oscar

Townsend. . . . He was being paid $1.00 a day and board. Tom Roberts furnished his board, I suppose. He was paid in the store mostly, Tom Roberts' store, located at Forbes. I mean he was paid in goods out of the store mostly."

Plaintiff offered further evidence tending to show that Tom Roberts was engaged in sawmill and lumber operations in Mitchell County in March, 1935; that the defendant Oscar Townsend was employed there as the driver of a truck used for hauling lumber from mill to market; that plaintiff's intestate worked in the woods most of the time, but sometimes he helped on the truck operated by said Townsend; that on 22 March, 1935, Townsend, pursuant to his employment, with the intestate as helper, took a load of lumber on said truck to Hickory, N. C., that on the return trip and at about 8 o'clock that night, while traveling west on State Highway No. 10, in Burke County, and approaching a series of sharp curves east of Bridgewater, the said truck in which intestate was riding, while being operated by said Townsend at a rapid rate of speed, fifty miles per hour, and on the left-hand side of the road, collided with a car traveling east on its right side of the road, and then continued on, leaving the highway and wrecking at the foot of a steep cliff; that it was then raining, and the night was dark and very foggy; and that in the wreck of the truck, plaintiff's intestate received injuries from which he died in a short time.

Plaintiff introduced in evidence a bill of sale from the defendant Tom Roberts to the defendant Elizabeth Roberts, dated 11 May, 1934, filed for registration the same day and registered 16 May, 1934, in which he sold and delivered, among other things, a stock of goods at Forbes, all manufactured lumber on the Tom Roberts lumber yards in Buncombe, Madison, and Mitchell counties, two sawmills in Buncombe County, and four teams of mules and horses, known as the Tom Roberts teams. No evidence was introduced tending to connect the items sold with the operations in March, 1935.

Defendant, on the cross-examination of Chet Burleson, witness for plaintiff, and over plaintiff's objection, elicited testimony that the defendant, "Mr. Roberts," in his lumber operations had on an average regularly employed twenty-five employees, including defendant Oscar Townsend and the intestate; that the witness worked as fireman of the sawmill boiler, and was around the buildings a good deal; that at no place about the premises did he ever see a notice tacked up in the building, or office, or any place by Tom Roberts that he was not working under the Compensation Act; that the witness was furnished no notice, and did not receive any letter about it, and that if defendant Tom Roberts ever gave or filed a notice with the Industrial Commission, he knew nothing about it.

At the close of plaintiff's testimony, defendants entered motion for judgment as of nonsuit. The court below made the following record: "It appearing to the court from the uncontradicted evidence of the plaintiff's witnesses that at the time of the injury and death of the plaintiff's intestate, Roberts had in his employment an average of some 25 hands, the court being of the opinion from the foregoing evidence that the defendant was operating under the provisions of the Workmen's Compensation Act, the motion of the defendants for judgment as of nonsuit is allowed."

From adverse judgment, plaintiff appealed to the Supreme Court, and assigned error.

Anglin & Randolph for plaintiff, appellant.
Charles Hutchins and W. C. Berry for defendant, appellee.

WINBORNE, J. Two questions are presented on this appeal: (1) When the defendants in their answer failed to plead the North Carolina Workmen's Compensation Act as a bar to the jurisdiction of the Superior Court, is evidence competent on trial in the Superior Court to prove facts which show the parties to be subject to the provisions of the act? (2) Is the judgment of nonsuit valid? We answer both in the affirmative.

1. Failure to take objection by answer to the jurisdiction of the court does not waive the right to object to the jurisdiction. C. S., 518. There can be no waiver of jurisdiction, and objection may be made at any time. *Johnson v. Finch,* 93 N. C., 205, 208; *Hunter v. Yarborough,* 92 N. C., 68; *Tucker v. Baker,* 86 N. C., 1; *Clements v. Rogers,* 91 N. C., 63; *Knowles v. R. R.,* 102 N. C., 59, 9 S. E., 7; *Cherry v. R. R.,* 185 N. C., 90, 116 S. E., 192.

The court will take judicial notice of a public statute of the State, and such statute need not be pleaded. *Wikel v. Comrs.,* 120 N. C., 451, 27 S. E., 117; *Hancock v. R. R.,* 124 N. C., 222, 32 S. E., 769; *Carson v. Bunting,* 154 N. C., 530, 70 S. E., 923; *Mangum v. R. R.,* 188 N. C., 689, 125 S. E., 549.

A statute which relates to persons and things as a class is a general law. *R. R. v. Cherokee,* 177 N. C., 86, 97 S. E., 758.

The purpose of the North Carolina Workmen's Compensation Act, as disclosed by its language, shows it to be a public statute. *Hancock v. R. R., supra; Webb v. Port Commission,* 205 N. C., 663.

In the *Hancock case, supra,* it is held that it was not incumbent upon the plaintiff to plead the Fellow Servant Act, a public statute, in order to derive the benefit of the provisions of that act on trial in Superior Court. In the *Mangum case, supra,* it was held that the Federal Em-

ployers' Liability Act, a public statute, enacted by Congress, did not have to be pleaded.

The Superior Court has the duty and power to find a jurisdictional fact. *Aycock v. Cooper,* 202 N. C., 500, 163 S. E., 569; *Young v. Mica Co., post,* 243.

In *Aycock v. Cooper, supra,* speaking to the question as to whether findings of fact by the North Carolina Industrial Commission on jurisdiction are conclusive and binding upon the Superior Court, *Mr. Justice Connor* writes: "The question has not heretofore been presented to this Court, and we, therefore, have no decision which may be cited as an authority, but both a proper construction of the language of the statute, and well settled principles of law lead us to the conclusion that where the jurisdiction of the North Carolina Industrial Commission to hear and consider a claim for compensation under the provisions of the North Carolina Workmen's Compensation Act, is challenged by an employer, on the ground that he is not subject to the provisions of the act, the findings of fact made by the Commission, on which its jurisdiction is dependent, are not conclusive on the Superior Court, and that said court has both the power and the duty, on the appeal of either party to the proceeding, to consider all the evidence in the record, and find therefrom the jurisdictional facts, without regard to the finding of such facts by the Commission."

The plaintiff alleges that the relationship of master and servant existed between the defendants and her intestate, and that the defendants were engaged in sawmill and lumber operations in North Carolina. It was, therefore, proper and competent to receive evidence upon which to determine the jurisdictional fact.

2. The parties, under the fact situation of the instant case, are presumed to have accepted the North Carolina Workmen's Compensation Act, and, nothing else appearing, are bound by its terms. *Pilley v. Cotton Mills,* 201 N. C., 426, 160 S. E., 479; *Hanks v. Utilities Co.,* 204 N. C., 155, 167 S. E., 560.

We have in the instant case the existence of the relationship of employer and employee in a sawmill operation in North Carolina in which there were fifteen or more employees regularly employed. In considering challenge to judgment as of nonsuit, on facts as they appear, it is well to refer to pertinent sections of the Workmen's Compensation Act. C. S., 8081 (i) (a), provides: "The term 'employment' includes employment by . . . all private employments in which five or more employees are regularly employed in the same business or establishment, except . . . sawmills and logging operators in which less than fifteen employees are regularly employed."

Sec. 8081 (m) provides: "Every contract of service between any employer and employee covered by this article, written or implied, now in operation or made or implied prior to the taking effect of this article, shall, after the act has taken effect, be presumed to continue, subject to the provisions of this article; and every such contract made subsequent to the taking effect of this act shall be presumed to have been made subject to the provisions of this article, unless either party shall give notice, as provided in sec. 8081 (l), to the other party to such contract that the provisions of this act . . . are not intended to apply."

Sec. 8081 (k) provides: ". . . *Every employer* and *employee, except as herein stated, shall be presumed to have accepted the provisions of this article* respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and *shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, notice to the contrary in the manner herein provided.*" (Italics ours.)

Sec. 8081 (l) provides: ". . . Notice of nonacceptance of the provisions of this article and notice of waiver of exemption heretofore referred to shall be given thirty days prior to any accident resulting in injury or death. . . . The notice shall be in writing or print, in substantially the form prescribed by the Industrial Commission, and shall be given by the employer by posting same in a conspicuous place in the shop, plant, office, room, or place where the employee is employed, or by serving it personally upon him; and shall be given by the employee by sending the same in registered letter, addressed to the employer at his last known residence or place of business, or by giving it personally to the employer or any of his agents upon whom a summons in civil action may be served under the laws of the State. A copy of the notice in prescribed form shall also be filed with the Industrial Commission."

Sec. 8081 (r) provides: "The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this act, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, as against his employer at common law, or otherwise, on account of such injury, loss of service, or death."

In *Pilley v. Cotton Mills, supra,* it is said: "Under the Workmen's Compensation Act every employer and employee, except as therein stated, is presumed to have accepted the provisions of the act and to pay and accept compensation for personal injury or death as therein set forth. The plaintiff, not being in the excepted class, is bound by the

presumption. Public Laws 1929, ch. 120, sec. 4 (C. S., 8081 [k]). It follows by the express terms of the statute (sec. 11), C. S., 8081 (r), that the rights and remedies thus granted to an employee exclude all other rights and remedies of such employee as against his employer at common law, or otherwise, on account of injury, loss of service, or death."

In *McNeely v. Asbestos Co.*, 206 N. C., 568, it is stated: "Both parties to the controversy are presumed to have accepted the North Carolina Workmen's Compensation Act, and consequently bound by its terms. Moreover, the evidence disclosed that at all times the defendant had in its employ more than five employees, so that the jurisdictional question is not involved."

The Georgia Court goes further than we find it necessary. It holds that in an action in the Superior Court for damages for personal injury, where the relationship of employer and employee exists, the burden is upon the employee to prove that the employer had rejected the act. *McCoy v. Lbr. Co.*, Ga. App., 251, 143 S. E., 611.

In the instant case there is no evidence tending to contradict the evidence as to facts upon which the Workmen's Compensation Act creates the presumption that the parties have accepted the provisions of the act, or rebut that presumption. On the other hand, there is uncontradicted testimony tending to show absence of notice of nonacceptance by the employer as required by the act. (C. S., 8081 [l]). There is no evidence that the employee gave to employer any notice of nonacceptance.

Taking all the evidence in the light most favorable to plaintiff, the relationship of employer and employee existed between defendant Tom Roberts and plaintiff's intestate, and the accident resulting in the death of plaintiff's intestate arose out of and in the course of his employment. The said parties are within the jurisdiction of the North Carolina Industrial Commission.

Upon all the evidence in the light most favorable to the plaintiff, the plaintiff has failed to carry the burden either of showing the relationship of employer and employee between the defendant Elizabeth Roberts and plaintiff's intestate, or in establishing that defendant Oscar Townsend was agent of defendant Elizabeth Roberts, and for whose negligent acts, in the operation of the truck, she would be liable.

The judgment below is

Affirmed.

SHERMAN OWENS AND WIFE, G. L. OWENS, ET AL., v. BLACKWOOD LUMBER COMPANY AND CANEY FORK LOGGING RAILWAY COMPANY.

(Filed 13 October, 1937.)

1. Evidence § 46—

A nonexpert witness who has knowledge, acquired in some approved manner, of the handwriting of the person in question is competent to testify as to the genuineness or falsity of the handwriting in dispute.

2. Appeal and Error § 39d—Where plaintiffs establish twenty years adverse possession, error in admitting evidence of color of title is immaterial.

Plaintiffs claimed the *locus in quo* under seven years adverse possession under color and under twenty years adverse possession. Defendants objected to certain deeds in plaintiffs' chain of color of title on the ground that they were improperly registered and did not comply with N. C. Code, 997, 3305, 3308. *Held:* The deeds, having been on record for some thirty years, were competent under the ancient document rule to be submitted to the jury on the claim of adverse possession for twenty years, and error, if any, in admitting the deeds as color of title was not prejudicial under the facts.

3. Boundaries § 3—Testimony of general reputation of corner held competent.

Testimony of plaintiffs' witnesses to the effect that they knew the general reputation of the beginning corner of the tract of land in dispute as "a double chestnut in the Rocky Knob Gap," and that they had known of such general reputation 25 to 50 years prior to the institution of the action, *held* competent and properly admitted in evidence to establish the corner as contended for by plaintiffs, the testimony meeting all the requirements of the rule.

4. Boundaries § 4: Appeal and Error § 39d—Admission of testimony held harmless in view of other competent evidence and contentions.

Testimony of declarations of plaintiff tending to establish his corner as contended by him was admitted at the trial. Defendants objected on the ground that plaintiff was interested when the declarations were made, and that they were not against his interest. *Held:* Conceding the testimony was incompetent, under the facts of this case its admission was not prejudicial, since the corner was abundantly proven by other competent testimony and its location was not seriously disputed by defendants, and other testimony of like declarations by plaintiff was admitted without objection.

5. Trespass § 7—

The measure of damages for wrongful trespass upon realty in cutting and removing timber is the difference in the value of the land immediately before and after the trespass.

6. Evidence §§ 46, 47—

Nonexpert witnesses with knowledge, and a witness found by the court to be an expert may testify, on question of damages, as to the value of the land immediately before and after the trespass complained of.

7. Trial § 32—

A party desiring more specific instructions on subordinate features of the charge must aptly tender request therefor.

APPEAL by Blackwood Lumber Company from *Phillips, J.*, and a jury, at May Term, 1937, of JACKSON. No error.

This action was instituted by Sherman Owens and wife, G. L. Owens, against the defendants for the recovery of the lands described in the complaint, and for damages alleged to have been caused by the cutting and removal of timber therefrom, the construction of a logging railroad over said lands, and other acts of trespass thereon. Pending the action and before trial, the plaintiff Sherman Owens died, and his children and heirs at law were made parties plaintiff and adopted the complaint theretofore filed in the cause.

The plaintiffs allege that the tract of land in controversy is covered by State Grant No. 1155, issued to Sylvester Galloway on 18 February, 1878, and that they and those under whom they claim title have been in the adverse possession of said lands for more than 50 years, under color of title connected with said grant; 7 years possession under colorable title, and 20 years adverse possession.

The defendant Blackwood Lumber Company alleges that it is the owner in fee of the lands in controversy and had a lawful right to cut and remove the timber from and construct said railroad over said lands, the source of defendant's title being State Grant No. 251, issued in 1796, to David Allison, assignee of John Gray Blount and William Cathcart, said grant being dated 29 November, 1796, and registered in the office of the register of deeds of Jackson County on 16 October, 1882, in Book H-8, page 346. It was admitted and agreed by the plaintiffs and defendants that Grant No. 251 embraces the lands described in the complaint and claimed by plaintiffs, and that defendants have a chain of title connecting them with said grant, and that the chain of title need not be introduced in evidence except the deed from the Highland Forest Company to the Jackson Lumber Company and the deed from the Jackson Lumber Company to the Blackwood Lumber Company.

The defendant Blackwood Lumber Company also claims title to 13/14ths of such title as Sylvester Galloway may have acquired under Grant No. 1155, by deeds executed on 20 July, 1908, by all the heirs of said Sylvester Galloway, except R. J. Galloway.

At the close of plaintiffs' evidence, the court sustained the motion of the defendant Caney Fork Logging Railway Company for judgment as of nonsuit.

The issues submitted to the jury, and their answers thereto, are as follows:

"1. Are the plaintiffs the owners in fee, and entitled to the immediate possession of, the lands described in the complaint, as alleged? Answer: 'Yes.'

"2. Did the defendant wrongfully and unlawfully cut and remove the timber from the lands described in the complaint, and otherwise injure and damage said lands, as alleged in the complaint? Answer: 'Yes.'

"3. If so, what damages, if any, are the plaintiffs entitled to recover against the defendant? Answer: '$650.00.'"

The court below rendered judgment on the verdict. The defendant Blackwood Lumber Company made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

W. R. Sherrill and E. P. Stillwell for plaintiffs.

R. L. Phillips and F. E. Alley, Jr., for defendant.

CLARKSON, J. This action was here before—*Owens v. Lumber Co.*, 210 N. C., 504. On the former trial a judgment of nonsuit (C. S., 567) was granted in the court below at the close of all the evidence. Upon appeal to this Court the judgment was reversed. Upon trial in the court below there was a verdict in favor of plaintiffs and judgment rendered thereon, from which defendant Blackwood Lumber Company appealed to this Court. The facts are so thoroughly set forth in the former opinion that we will only consider those relating to the material exceptions and assignments of error.

Plaintiffs introduced the original State Grant No. 1155, with plat attached thereto, dated 18 February, 1878, duly registered 15 February, 1879, in Jackson County, N. C., to Sylvester Galloway.

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, to whom said grant was issued) to Rhoda E. Fisher, giving her full and complete power and authority to sell and convey lands and real estate, which was recorded in both Transylvania and Jackson counties.

2. Deeds dated 14 December, 1903, from Sue E. Booker, née Sue E. Galloway, and her husband, William Booker, and Rhoda E. Fisher, attorney in fact, to A. S. (Sherman) Owens, with full covenants and warranty and in proper form, conveying him in fee simple the lands embraced in said Grant No. 1155, for a consideration of $200.00, and with full description by metes and bounds as the same appears in said grant, which said deed was filed on 12 October, 1905, and duly registered in Jackson County on 14 October, 1905, in Book JJ, at page 31.

3. Deed dated 30 September, 1907, from Sylvanus Galloway and others, heirs at law of Sylvester Galloway, deceased, 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 calls 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, which conveyance is now recorded in the register's office of Jackson County, State of North Carolina, in Book JJ, page 31," which said deed was recorded in Jackson County on 26 October, 1907, in Book NN, at page 489, *et seq.*"

The signatures were, we think, substantially proven under the well settled law. "The genuineness or falsity of disputed handwriting may be proven by testimony of a witness, not an expert, who is acquainted with the handwriting of the person supposed to have written it, either because he had often seen him write, or who had acquired competent knowledge of his handwriting in some other approved manner. Abbott's Proof of Facts (4 Ed.), p. 579, par. 4, and cases cited." *Brown v. Hillsboro,* 185 N. C., 368 (372).

The defendant contends that the deeds are improperly registered and do not comply with N. C. Code, 1935 (Michie), secs. 997, 3305, and 3308.

The plaintiffs claim title (1) 7 years possession under colorable title, sec. 428, *supra;* (2) 20 years adverse possession, sec. 430, *supra.*

Taking the record evidence in its entirety, we cannot so hold; but, if error, it was not prejudicial. *Bivings v. Gosnell,* 141 N. C., 341. The deeds complained of had been on record for about thirty years. When this case was here before we said: "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." *Owens v. Lumber Co., supra,* 504 (513); *Nicholson v. Lumber Co.,* 156 N. C., 59.

The defendant contends that the beginning corner, viz.: "Beginning on a chestnut in Rocky Knob Gap on Wolf Mountain," etc., was in dispute, and that some of the evidence was competent and some incompetent. That it ought to be awarded a new trial on account of the incompetent evidence. We think not on this record.

Let us analyze: H. R. Queen, 68 years old, testified: "My business is surveying, abstracting, and cruising. I have been surveying about 50 years, and abstracting and cruising about 30 years. I was reared about 8 or 10 miles from Grant No. 1155, issued to Sylvester Galloway, in Canada Township. . . . In company with S. M. Parker, I made

a survey of the property described in the complaint, and from that actual survey I prepared some maps. These are the maps. (Plaintiffs desire the jury to be given the maps and the witness be allowed to use them to illustrate his testimony.) Mr. Parker and I made the survey in May, 1935. The first call in Grant No. 1155, to Sylvester Galloway, says, 'Beginning on a chestnut in Rocky Knob Gap on Wolf Mountain.' I know where Rocky Knob Gap is; I have been familiar with it 30 or 40 years, and have been there quite a number of times. . . . I have seen that chestnut tree standing; the first time I saw it was about 25 or 30 years ago. . . . I saw it standing there, 20 or 30 years ago, it was marked as a corner on the northeast and east sides. The custom in this State, with reference to marks of a corner tree, is to blaze three marks on a tree on the side the line leaves it and three on the side the closing line comes back to it. This tree was marked in that way. . . . I wouldn't like to say a definite number of years old those marks on the tree were 25 or 30 years ago."

S. M. Parker, admittedly an expert surveyor, gave substantially the same testimony as Queen.

In *Hemphill v. Hemphill,* 138 N. C., 504 (506), is the following: "The declarations of John R. Hemphill in this deed to the heirs of John Brigman, as to the location of his own line, are hearsay. They are incompetent for the reason that he was interested when the same were made, and the judge below ruled correctly in excluding them. On the second point: The evidence offered from the witness John G. Chambers on the general reputation as to the location of the divisional line: Such evidence has been uniformly received in this State, and the restriction put upon it by our decisions seems to be that the reputation, whether by parol or otherwise, should have its origin at a time comparatively remote, and always *ante litem motam.* Second, that it should attach itself to some monument of boundary, or natural object, or be fortified and supported by evidence of occupation and acquiescence tending to give the land in question some fixed or definite location. *Tate v. Southard,* 8 N. C., 45; *Mendenhall v. Cassells,* 20 N. C., 43; *Dobson v. Finley,* 53 N. C., 496; *Shaffer v. Gaynor,* 117 N. C., 15; *Westfelt v. Adams,* 131 N. C., 379-384." *Lamb v. Copeland,* 158 N. C., 136; *Randolph v. Roberts,* 186 N. C., 621; *Pace v. McAden,* 191 N. C., 137; *Brown v. Buchanan,* 194 N. C., 675.

Walker McCall, a witness for plaintiffs, 85 years old, testified, in part: "Q. Now, Mr. McCall, do you know the common and general reputation in the community up there as to what was the beginning corner of Grant 1155? Ans.: Yes, sir. I guess I have known of that common and general reputation for 50 years. Q. What is that common and general reputation as to what the corner was, and where? Ans.: A

double chestnut in the Rocky Knob Gap, it was at the foot of the trail where everybody passed along, a public place going from Transylvania County to Haywood County."

There was like evidence coming under the well settled rule of law in this jurisdiction, as above set forth.

The defendant contends that the declarations of Sherman Owens to establish the corner were incompetent, that he was interested when the same were made, and were not against his interest. *Sasser v. Herring,* 14 N. C., 342; *Hoge v. Lee,* 184 N. C., 44.

There was practically no dispute about the double chestnut in Rocky Knob Gap being the beginning corner of Grant No. 1155. Many of the plaintiffs' witnesses testified that they had seen the double chestnut standing in Rocky Knob Gap marked as a corner tree on many occasions extending over a period beginning fifty years ago. This corner was definitely proven by abundant evidence of witnesses who had seen the corner, and the defendants hardly disputed its location, as the record discloses. The evidence of T. S. Fortner, a patrolman of the defendant and its predecessors in title, testified that Sherman Owens pointed the lines out to him, showed him the chestnut in Rocky Knob Gap, and said it was the corner. Conceding that this testimony was incompetent, it is harmless error and not prejudicial to the defendant for the reason that there was hardly any dispute as to what and where the beginning corner was and is. It was abundantly proven by the plaintiffs' witnesses. In view of the overwhelming evidence in the record proving the beginning corner and in the absence of a dispute of its location, the admission of this evidence, if error at all, is only technical.

Then again, Leonard Owens, a son of Sherman Owens, testified, unobjected to: "My father couldn't read. He had this deed to the land he bought, and he asked me when I got out there to read over this deed, that he wanted to trace the lines, and I did the best I could. That has been quite a bit ago and I was not very old, but we started down a call in the deed, *that he told me is what they call Rocky Knob Gap; we started on a couple of chestnuts and I read the deed over and he traced the line and we went some distance around Wolf Mountain side,"* etc.

In *Shelton v. R. R.,* 193 N. C., 670 (674), it is written: "It is thoroughly established in this State that if incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination without objection, the benfit of the exception is ordinarily lost. *Smith v. R. R.,* 163 N. C., 143; *Tillett v. R. R.,* 166 N. C., 515; *Beaver v. Fetter,* 176 N. C., 334; *Marshall v. Tel. Co.,* 181 N. C., 410." *Gray v. High Point,* 203 N. C., 756 (764); *Teseneer v. Mills Co.,* 209 N. C., 615 (623).

In *Bryant v. Construction Co.*, 197 N. C., 639 (642), speaking to the subject, is the following: "In any event, the evidence excepted to was cumulative. After Barkley had concluded, T. L. Starling testified on behalf of the plaintiff, without objection, to the identical fact mentioned by Barkley. In these circumstances the exceptions addressed to the admission of Barkley's testimony must be overruled. *Tilghman v. Hancock*, 196 N. C., 780; *Holeman v. Shipbuilding Co.*, 192 N. C., 236; *Gentry v. Utilities Co.*, 185 N. C., 285." On this aspect the contentions of the defendant cannot be sustained.

In *West Construction Co. v. A. C. L. Railway Co.*, 185 N. C., 43 (45-46), citing numerous authorities, the law is stated as follows on the measure of damages: "When a trespass committed upon personal property results in an injury less than the destruction or deprivation of the property, or in an action for a negligent injury to real property, the measure of damage is the reduced market value of the property proximately caused by the negligent act, and the rule generally adopted is to allow the plaintiff the difference between the market value of the property immediately before the injury occurred and the like value immediately after the injury is complete. . . . The decreased value of the property, which was the measure of the plaintiff's actual loss."

The opinion evidence of witnesses who had knowledge and that of H. R. Queen, whom the court found was an expert, was competent on the question of the measure of damages. We see no error in the charge illustrating the measure of damages. If defendant wanted more specific instructions on different aspects of the subordinate features of the case, it should have asked for same under proper prayers for instruction. *School District v. Alamance County*, 211 N. C., 213 (226). There was ample evidence of plaintiff's acts of ownership and continuity of possession. Many of the principles of law in this case are discussed in an able and well written opinion by *Winborne, J.*, in *Berry v. Coppersmith, ante*, 50.

The charge of the court below comprises some 26 pages and the only exception to it is to the measure of damage. It fully complies with C. S., 564. Although not tendered in time, the court below gave certain prayers and long contentions made by defendant. The charge is an able one, full and complete, and gives the law applicable to the facts. On the whole record we find no prejudicial or reversible error. In the judgment of the court below there is

No error.

COLONIAL OIL COMPANY v. CHARLES H. JENKINS, TRADING AS CHAS. H. JENKINS BUICK COMPANY.

(Filed 13 October, 1937.)

Estoppel § 6c—Evidence held to require submission to jury of question of estoppel by silence.

The uncontradicted evidence tended to show that plaintiff's agent for the sale of gasoline products was to account to plaintiff for the proceeds of sale, that defendant purchased gasoline products from the agent from time to time under an agreement with the agent that the purchase price should be applied to a debt owed defendant by the agent. The jury found from conflicting evidence that defendant had knowledge of the fact of agency at the time he bought the gasoline products. Defendant also offered evidence, contradicted by plaintiff, that when plaintiff rendered an account for gasoline products sold to defendant, defendant informed it of the agreement with the agent, and, at plaintiff's request, furnished it with an affidavit setting forth the agreement, and that plaintiff then stated it would collect the account from the agent or his bondsman, that defendant, in reliance on the statement, did not attempt to collect from the agent, and that plaintiff made no further demand on defendant until the institution of this action some three years thereafter, at which time defendant's claim against the agent was barred by the statute of limitations. *Held:* Defendant is entitled to have the conflicting evidence submitted to the jury under appropriate issues on the question of estoppel.

APPEAL by defendant from *Grady, J.*, at May Term, 1937, of BERTIE. New trial.

This is an action to recover of the defendant the sum of $455.52, with interest from 5 August, 1932, for gasoline and petroleum products which were sold and delivered by the plaintiff to the defendant, at various dates, from 18 April, 1932, to 5 August, 1932.

The action was begun on 3 May, 1935.

It was admitted by the plaintiff, in its reply to defendant's answer, that the gasoline and petroleum products shown on the itemized verified statement of account attached to the complaint, were sold and delivered to the defendant, at Elizabeth City, N. C., by George C. Dodge, trading as Dodge Oil Company, and operating, at the dates of said sales and deliveries, filling stations in Elizabeth City, N. C.

The plaintiff alleged that in making said sales and deliveries, the said George C. Dodge, trading as Dodge Oil Company, was acting as the agent of the plaintiff, under a contract in writing, and that the gasoline and petroleum products which the said George C. Dodge sold and delivered to the defendant were delivered to him by the plaintiff for sale in accordance with the terms and provisions of said contract, a copy of which was attached to plaintiff's reply.

The defendant denied the allegation of the plaintiff that at the dates of the sales and deliveries to him of the said gasoline and petroleum products the said George C. Dodge was the agent of the plaintiff, and that he sold and delivered the said gasoline and petroleum products to the defendant as the agent of the plaintiff. He alleged that if in fact the said George C. Dodge was the agent of the plaintiff, and as such agent sold and delivered to the defendant the said gasoline and petroleum products, the defendant had no notice of such agency, and was ignorant of such fact.

The defendant further alleged that the gasoline and petroleum products which were sold and delivered to him by the said George C. Dodge, from 18 April, 1932, to 5 August, 1932, were sold and delivered under and pursuant to an agreement between the defendant and the said George C. Dodge, made and entered into prior to such sales and deliveries, that the amounts due by the defendant from said gasoline and petroleum products from time to time should be applied as payments on the indebtedness of the said George C. Dodge to the defendant which was incurred in part by the said George C. Dodge by the purchase from the defendant of a truck, which was used by the said George C. Dodge in handling gasoline and petroleum products which the plaintiff had delivered to him, for sale and delivery to his customers; and that the amount of such indebtedness is now $512.65.

The defendant further alleged that when he was informed by the plaintiff, to wit: On or about 1 November, 1932, that the said George C. Dodge was the agent of the plaintiff at the dates of the sales and deliveries of the said gasoline and petroleum products to the defendant, and that the said George C. Dodge had sold and delivered said gasoline and petroleum products to the defendant as such agent, the defendant immediately informed the plaintiff of his ignorance of such agency and of his agreement with the said George C. Dodge with respect to the application of the amounts due by defendant for such gasoline and petroleum products as payments on the indebtedness of the said George C. Dodge to the defendant; that, at the request of the plaintiff, the defendant furnished the plaintiff an affidavit setting out said agreement, and the amount of said indebtedness; that plaintiff thereupon stated to the defendant that it would collect the account for the said gasoline and petroleum products from the said George C. Dodge, or the surety on his bond to the plaintiff; and that thereafter the defendant had no notice from the plaintiff or otherwise that plaintiff had not collected said account from the said George C. Dodge, if such be the fact, until the commencement of this action on 3 May, 1935.

At the trial, after the pleadings had been read, the court announced that the following issues would be submitted to the jury:

"1. Was the defendant Chas. H. Jenkins ignorant of the fact that George C. Dodge was selling the gasoline and petroleum products referred to in the complaint as agent of the plaintiff, as alleged in the answer? Answer: .....

"2. If not, what amount is the plaintiff entitled to recover of the defendant? Answer: .....

"3. If yes, has there been a ratification of the contract made by and between George C. Dodge and the defendant, as alleged by the defendant? Answer: .....

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

"5. Is the defendant's claim barred by the statute of limitations? Answer: ....."

At the close of the evidence, the court ruled that there was no evidence tending to show that the plaintiff had ratified the contract between its agent, George C. Dodge, and the defendant, and was thereby estopped from maintaining this action, and accordingly withdrew from the jury the 3d, 4th, and 5th issues, and submitted to the jury only the 1st and 2d issues.

The first issue was answered by the jury "No," and the second issue, "$455.52, with interest from 5 August, 1932."

From judgment that plaintiff recover of the defendant the sum of $455.52, with interest from 3 August, 1932, until paid, and the costs of the action, the defendant appealed to the Supreme Court, assigning errors in the trial.

W. D. Boone for plaintiff.
J. H. Matthews for defendant.

CONNOR, J. At the trial of this action, the evidence for the plaintiff tended to show that during the years 1931 and 1932, George C. Dodge was the agent of the plaintiff, and that as such agent he sold and delivered at his filling stations in Elizabeth City, N. C., gasoline and petroleum products which were delivered to him by the plaintiff for that purpose. The said George C. Dodge agreed to account to the plaintiff for all gasoline and petroleum products which were delivered to him as agent of the plaintiff and for the proceeds of all sales made by him of such gasoline and petroleum products.

There was no evidence for the defendant to the contrary.

The evidence for the defendant tended to show that during the years 1931 and 1932 the defendant Chas. H. Jenkins was engaged in business at Elizabeth City, N. C., under the name and style of Chas. H. Jenkins Buick Company, and that during said years George C. Dodge was

engaged in the business of selling and delivering gasoline and petroleum products at filling stations in Elizabeth City, N. C., which were owned and operated by him; that on or about 30 May, 1931, the defendant sold to the said George C. Dodge an oil tank truck, which the said George C. Dodge purchased and used in conducting his business.

The purchase price of said truck was $1,025. In part payment of said purchase price, the said George C. Dodge executed and delivered to the defendant his note for the sum of $220.00. The remainder of said purchase price was financed by a Finance Corporation. George C. Dodge failed to make a payment of $78.62 to said Finance Corporation when the same became due, and the defendant was required to make and did make said payment for him. During the fall of 1932, the truck which the defendant had sold to the said George C. Dodge was badly damaged in a wreck. At his request, the defendant repaired said truck at a cost of $318.22.

The evidence for the defendant tended to show further that at the time the defendant sold the truck to the said George C. Dodge, at the time the defendant made the payment to the Finance Corporation for him, and at the time the defendant repaired the truck after it was damaged in the wreck, it was agreed by and between the defendant and the said George C. Dodge that the amounts due by defendant to the said George C. Dodge for gasoline and petroleum products which were sold and delivered to the defendant, from time to time, by the said George C. Dodge at his filling stations in Elizabeth City, N. C., should be applied as payments on the indebtedness of George C. Dodge to the defendant; that pursuant to such agreement the defendant purchased gasoline and petroleum products, from time to time, from the said George C. Dodge, and the amounts due by reason of such purchases were applied to said indebtedness, leaving a balance due now on said indebtedness of $512.98.

There was no evidence for the plaintiff to the contrary.

The evidence for the defendant tended to show further that if in fact the said George C. Dodge was the agent of the plaintiff, as alleged in the complaint, and as such agent sold and delivered to the defendant the gasoline and petroleum products shown on the statement of account attached to the complaint, the defendant had no notice of such agency and was ignorant of such fact.

There was evidence for the plaintiff to the contrary.

The evidence for the defendant tended to show further that on or about 1 November, 1932, the plaintiff for the first time presented the statement of account attached to the complaint to the defendant at his place of business in Elizabeth City, N. C., and demanded payment by the defendant of said account; that the defendant had no notice prior to said date that plaintiff contended that George C. Dodge was its agent

during the years 1931 and 1932, and as such sold and delivered gasoline and petroleum products of the defendant at his filling stations in Elizabeth City, N. C.; that defendant immediately informed the plaintiff of his agreement with the said George C. Dodge with respect to the application of the amounts due by him for gasoline and petroleum products which he had purchased from the said George C. Dodge as payment on the indebtedness of the said George C. Dodge to the defendant; that at the request of the plaintiff, the defendant furnished it an affidavit setting out his agreement with the said George C. Dodge, and the amount of his indebtedness at that time to the defendant; and that plaintiff thereupon stated to the defendant that it would collect the amount of the account from George C. Dodge, or from the surety on his bond to the plaintiff.

There was evidence for the plaintiff to the contrary.

The evidence for the defendant tended to show further that from 1 November, 1932, to 3 May, 1935, when this action was begun, the defendant had no notice, from the plaintiff or otherwise, that plaintiff had failed to collect said account from George C. Dodge, or from the surety on his bond to the plaintiff, and that in the meantime the defendant relied upon the assurance of the plaintiff that it would collect the account from the said George C. Dodge, or the surety on his bond to the plaintiff, and made no effort, because of such reliance, to collect the indebtedness due him by the said George C. Dodge. An action by the defendant to collect said indebtedness would now be barred by the statute of limitations.

There was evidence for the plaintiff to the contrary.

At the close of the evidence, the trial court was of opinion that there was no evidence tending to show that the plaintiff had ratified the agreement of its agent, George C. Dodge, with the defendant with respect to the application of the amounts due or to become due by the defendant for gasoline and petroleum products sold and delivered to him by the said George C. Dodge, at his filling stations in Elizabeth City, N. C., as payments on the indebtedness which the said George C. Dodge had incurred to the defendant, and was thereby estopped from maintaining this action against the defendant, and accordingly withdrew the 3d, the 4th, and the 5th issues from the consideration of the jury. In this there was error, for which the defendant is entitled to a new trial. If the jury shall find from the evidence the facts to be as the defendant contends, and shall answer the 3d, or a similar issue, in the affirmative, the plaintiff will not be entitled to recover of the defendant in this action. The principle applicable in that event has been stated by *Walker, J.*, in *Wells v. Crumpler,* 182 N. C., 351 (page 358), 109 S. E., 49, as follows:

"Where a party who has, or claims a right, either openly and un-

equivocally abandons it, or does not assert it when he should do so, and induces another by his silence or conduct to believe that the right does not exist, or that he makes no claim to it, if he has it, and abandons and surrenders it, and the other party, acting upon such conduct as it was intended that he should do, and is induced thereby to do something by which he will be prejudiced, if the party who so acted is permitted to recall what he has done, equity steps in and protects 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 and even demands that he should be silent."

The defendant is entitled to a new trial. It is so ordered.

New trial.

STATE v. TED TERRELL.

(Filed 13 October, 1937.)

1. **Homicide § 5—**

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation.

2. **Homicide § 7—**

Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

3. **Homicide § 16—**

Where an intentional killing of a human being with a deadly weapon is admitted or proven, the law implies malice, and nothing else appearing, the crime is murder in the second degree, with the burden on defendant to show to the satisfaction of the jury matters in mitigation or excuse.

4. **Homicide § 11—Right to kill in self-defense.**

The right to kill in self-defense rests upon necessity, real or apparent, and one may kill in self-defense when he reasonably believes that such action is necessary to save himself from death or great bodily harm, the reasonableness of his belief to be determined by the jury upon the facts and circumstances as they appeared to him at the time, but language alone, however abusive, is not sufficient, it being required that defendant be the subject of an actual or threatened assault.

5. **Same: Homicide § 7—**

If a person uses excessive force or unnecessary violence in defending himself, he is guilty of manslaughter at least.

6. **Homicide § 27h—Evidence held sufficient to be submitted to the jury on defendant's plea of self-defense.**

The State contended on its evidence that defendant was cut several times with a knife in an affray with his brother-in-law at a filling station, that defendant then went to a house some distance away, broke in and

secured a shotgun, returned, and shot his brother-in-law, killing him instantly. Defendant offered evidence tending to show that his brother-in-law was a much larger man than he, that after the affray he went to a house where he had stayed, that no one was there, and that he then went in and secured the gun, fearing that his brother-in-law would resume the fight and kill him, as he had threatened to do, that after getting the gun, he returned to the filling station, where he had his sleeping quarters, because he "had nowhere else to go," that as he was standing near the station his brother-in-law started out the door and down the steps from the kitchen, whereupon defendant told him if he continued to advance he would shoot, and that defendant fired the fatal shot as his brother-in-law continued to advance upon him. The court instructed the jury that the prior affray could not be considered on the plea of self-defense, and that defendant was guilty of murder in the second degree upon his own evidence. *Held:* Defendant's plea of self-defense should have been submitted to the jury on the evidence under appropriate instructions of the court.

APPEAL by defendant from *Grady, J.*, at May Term, 1937, of WARREN.

Criminal prosecution, tried upon indictment charging the defendant with the murder of one Andrew Knight.

The defendant pleaded not guilty and relied upon a plea of self-defense.

Verdict: Guilty of murder in the second degree.

Judgment: Twenty years at hard labor in State's Prison.

The defendant appeals to the Supreme Court, and assigns error.

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

John Kerr, Jr., Julius Banzet, and W. H. Yarborough for defendant, appellant.

WINBORNE, J. A careful consideration of the record on this appeal reveals substantial error, which entitles defendant to a new trial.

The evidence for the State tends to show that: At about 8:30 p.m., on 7 March, 1937, the defendant shot and killed Andrew Knight with a shotgun at a filling station known as "Friendly Inn," operated by Kennon "Bad Eye" Whitt, in Warren County, about a mile north of Norlina, and five miles from Warrenton. The defendant and Knight were brothers-in-law, defendant having married a sister of Knight. The defendant and his wife were estranged, she living in Henderson, Vance County, and he in one of two cabins at said filling station. Knight lived in Henderson. On the afternoon of 7 March, Knight, accompanied by Jeff (Chicken) Davis, went by automobile from Henderson to the Friendly Inn. When they arrived there the defendant was absent, but came in about an hour, around 4:30. Defendant and Knight drank whiskey together, then took an automobile ride to Henderson, came back

to the filling station and drank more whiskey. A fight ensued between them in which defendant was cut in three places, twice with a knife on his throat and on his arm, and once on his head with some blunt instrument. After some efforts had been made to get the defendant to go to a hospital, he went to the home of Ed Goodman, five miles away, broke into the house, secured a shotgun, and came back to the filling station, threatening and looking for Knight and shot him through the back door of the kitchen or shed room to the filling station, killing him instantly. The shot entered the left breast and ranged diagonally to the right. The wound was between the size of a quarter and of a half dollar. Powder burns were on the clothes.

On the other hand, defendant offered testimony tending to show that: Knight had no reason to come to the filling station. He and his family were not on friendly terms with defendant. When Knight learned that defendant was going to Henderson, he asked to go with him. On this trip, and after returning to the filling station, Knight talked about the estrangement of defendant and his wife, and at the filling station became so loud in his talk that the operator asked him to be quiet. Thereupon Knight and defendant went in the filling station. While in there Knight said: "Ted, I am going to tell you something, and if you cut up they will all know I told you, and if you cut up I will kill you." Later defendant asked Knight for a drink out of his bottle, and soon thereafter for another, and as defendant reached for the bottle Knight made a murderous assault on him, threw him to the floor, sat upon him, said: "I will kill him," and cut him with a penknife, once on the neck from behind the ear to the throat, and also on the arm, and again on the back of his head with something blunt, and desisted only when pulled off by those standing around, who begged him to quit cutting defendant and took the knife away from him. The cut on the neck and throat barely missed the jugular vein, and the cuts bled profusely. As defendant was walking and being helped to a car to go to a doctor, Knight struck him twice with his fist, then got in the car with defendant and made him drive. They went to Norlina, where defendant inquired of a Negro boy as to the doctor's residence. Knight said: "I don't think you are trying to find no doctor, but trying to get a warrant; if you don't carry me back to the service station I will finish cutting your damned head off." They went back to the station and Knight made defendant get out of the car. He then asked someone to take defendant to a hospital. Defendant replied: "Dick, I don't want to go to a hospital, I want to get a doctor to come here." Finally, Knight got "Chicken" Davis to drive the car and told him to carry defendant to a hospital "before he finished cutting the s. o. b." Defendant again protested going to the hospital. Davis drove the car and at defendant's direction stopped at the home of a

Negro named Alston, about one-tenth of a mile away, where defendant tried to borrow a shotgun, telling Alston he had "a little row down at the service station and was afraid they might come back." Failing to get a gun there, defendant directed Davis to drive to the home of Ed Goodman, where he formerly lived, and, finding no one at home, defendant went in and secured a gun and "for fear they might be arrested if they went to a hospital," drove back to the filling station because, as defendant said: "I had nowhere else to go." On arriving at the filling station, defendant asked as to the whereabouts of Knight, and, upon being told he had gone, defendant started to his cabin in which he lived. On the way he met Whitt and stopped to talk with him about getting a doctor. He was then in a very weakened condition from the loss of blood and his clothes were saturated with blood. He stepped aside for private purposes. While he was standing near, the back door to the kitchen, or shed to the filling station, "flew open" and Joe Brown, who was in the station, said to Knight: "Dick, don't go out there. Ted is out there with a shotgun," and Knight replied: "Damn the s. o. b., I am not scared of him." Whereupon, defendant said to Knight, who was coming out of the door and down the steps: "Dick, don't you come out here! Don't come out here! If you do I will shoot you." As Knight made the next step, about five and one-half yards away, defendant shot him. Defendant testified: "I shot him because he was advancing on me, had cut me with a knife, and threatened to kill me, and a man advancing on me like that." "I did not deliberately assassinate him because he cut me. I did not shoot him when he did not know I was there because I told him not to come out there. I did not know they had taken the knife away from him." Knight was about 29 years old, and weighed about 200 pounds, and was nearly 6 feet tall. The defendant was 34 years old, and weighed around 140 or 150 pounds.

At the close of all the evidence, and in the presence of the jury, the court, at the request of the solicitor for the State, stated: "I shall tell the jury if they believe the defendant's own evidence they will convict him of murder in the second degree, and whether he killed the deceased with premeditation and deliberation will be a matter for the jury to pass on, and of which I can have no opinion." Defendant excepted. Thereupon, the solicitor, through the court, announced that the State would not ask for a verdict of murder in the first degree.

Then counsel for defendant, after preserving exceptions, declined to argue the case. Exception is taken by defendant to several portions of the charge, the principal one of which is as follows: "And I charge you, gentlemen, positively, that what occurred in the early part of the night cannot be used here by him on his plea of self-defense; it has nothing to do with the case, and I charge you, gentlemen, that upon his own

evidence, that if the killing occurred as he himself swears it did, that he is guilty of murder in the second degree, and it would be your duty to return a verdict accordingly."

This instruction deprived the defendant of a substantial right to which he was entitled on his plea of self-defense.

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation.

Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *S. v. Baldwin,* 152 N. C., 822, 68 S. E., 148.

The intentional killing of a human being with a deadly weapon implies malice and, if nothing else appears, constitutes murder in the second degree. When this implication is raised by an admission or proof of the fact of the killing, the burden is on the defendant to show to the satisfaction of the jury facts and circumstances sufficient to excuse the homicide or to reduce it to manslaughter. *S. v. Capps,* 134 N. C., 622, 46 S. E., 730; *S. v. Quick,* 150 N. C., 820, 64 S. E., 168; *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387.

The plea of self-defense or excusable homicide rests upon necessity, real or apparent. In *S. v. Marshall,* 208 N. C., 127, 179 S. E., 427, the principle is clearly stated: "The decisions are to this effect:

"1. That one may kill in defense of himself . . . when necessary to prevent death or great bodily harm. *S. v. Gray,* 162 N. C., 608, 77 S. E., 833.

"2. That one may kill in defense of himself . . . when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. *S. v. Barrett,* 132 N. C., 1007, 43 S. E., 832.

"3. That the reasonableness of this belief or apprehension must be judged by the facts and circumstances as they appeared to the party charged at the time of the killing. *S. v. Blackwell,* 162 N. C., 683, 78 S. E., 316.

"4. That the jury and not the party charged is to determine the reasonableness of the belief or apprehension upon which he acted. *S. v. Nash,* 88 N. C., 618."

In *S. v. Barrett, supra,* it is stated: "The defendant's conduct must be judged by the facts and circumstances as they appeared to him at the time he committed the act, and it should be ascertained by the jury, under evidence and proper instructions of the court, whether he had a reasonable apprehension that he was about to lose his life or to receive enormous bodily harm. The reasonableness of his apprehension must always be for the jury, and not the defendant, to pass upon, but the jury must form its conclusion from the facts and circumstances as they

appeared to the defendant at the time he committed the alleged criminal act. If his adversary does anything which is calculated to excite in his mind, while in the exercise of ordinary firmness, a reasonable apprehension that he is about to assault him and to take his life or to inflict great bodily harm, it would seem that the law should permit him to act in obedience to the natural impulse of self-preservation and to defend himself against what he supposes to be a threatened attack, even though it turns out afterwards that he was mistaken; provided, always, the jury finds that his apprehension was a reasonable one, and that he acted with ordinary firmness."

In *S. v. Blevins,* 138 N. C., 668, 50 S. E., 763, it is said: "It has been established in this State by several well considered decisions that where a man is without fault, and a murderous assault is made upon him, an assault with intent to kill, he is not required to retreat, but may stand his ground, and if he kills his assailant and it is necessary to do so to save his life or protect his person from great bodily harm, it is excusable homicide, and will be so held, the necessity, real or apparent, to be determined by the jury on the facts as they reasonably appeared to them." *S. v. Thornton,* 211 N. C., 413.

In *S. v. Cox,* 153 N. C., 638, 69 S. E., 419, it was said: "In order to make good the plea of self-defense, the force used must be exerted in good faith to prevent the threatened injury, and must not be excessive or disproportionate to the force it is intended to repel, but the question of excessive force was to be determined by the jury." *S. v. Robinson.* 188 N. C., 785, 125 S. E., 617.

If excessive force or unnecessary violence is used, the defendant would be guilty of manslaughter at least. *S. v. Glenn,* 198 N. C., 80, 150 S. E., 663; *S. v. Cox, supra.*

"The legal provocation which will reduce murder in the second degree must be more than words; as language, however abusive, neither excuses nor mitigates the killing, and the law does not recognize circumstances as a legal provocation which in themselves do not amount to an actual or threatened assault." *S. v. Benson,* 183 N. C., 795, 111 S. E., 869.

In *S. v. Hough,* 138 N. C., 663, 50 S. E., 709, the Court said: "It is contended by the State that the fact that the defendant procured a pistol on the morning of the homicide is to be taken as conclusive evidence on the part of the defendant to unlawfully use the pistol if an emergency arose, and that he was in fault in entering into a combat with a deadly weapon. This would probably be a legitimate argument but for the fact that the testimony disclosed that the deceased threatened to kill the defendant; that he told the defendant's wife to tell him so, and in view of the fact that there was a great disparity in the size and strength of the two men, it does not follow necessarily that the defendant's purpose was to do more than defend himself."

Applying these principles, there is sufficient evidence to be submitted to the jury on defendant's plea of self-defense. The questions as to whether the defendant, under the facts and circumstances as they existed and appeared to him at the time of the killing, acted in good faith and with reasonable firmness, had reasonable ground to believe, and did believe, that the deceased intended to take his life or to do him great bodily harm, and as to whether the defendant used no more force than was necessary, were for the consideration of and determination by the jury, under appropriate instructions of the court.

The failure of the court to submit the questions of justification and mitigation to the jury under appropriate instructions is error for which the defendant is entitled to a new trial, and it is so ordered.

New trial.

CHARLIE LEE LEONARD v. THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA.

(Filed 13 October, 1937.)

1. Trial § 22b—

Upon motion to nonsuit, all the evidence tending to support plaintiff's cause of action is to be considered in the light most favorable to him, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

2. Insurance § 34a—Definition of total disability.

Total disability, within the meaning of a disability clause in a life insurance policy, is such disability as prevents insured from performing with reasonable continuity the reasonable and essential duties of his usual employment, or of any other occupation which he is reasonably qualified physically and mentally to pursue, under all the circumstances, and the ability to do odd jobs of a comparatively trifling nature does not preclude recovery.

3. Evidence § 46—

Nonexpert witnesses with knowledge of insured may give opinion testimony as to insured's ability to engage in work, in an action on a disability clause in a life insurance policy.

4. Evidence § 49—

Under the facts and circumstances of this case, nonexpert opinion evidence as to insured's ability to engage in work *held* not to impinge rule that witnesses may not give opinion on the exact question presented for the jury's determination.

5. Appeal and Error § 39d—

The admission of certain testimony over objection cannot be held prejudicial when other testimony of like effect is admitted without objection.

6. Insurance § 34a—Evidence that insured was near-sighted held competent to show inability to pursue other occupations.

Insured, a farmer, instituted this action on a disability clause in a policy of insurance on his life. *Held:* Evidence that insured was near-sighted is competent for the purpose of showing that he could not within a reasonable time equip himself to pursue any other occupation requiring good eyesight, and such evidence need not be supported by allegation in the pleading or proof of claim, since such fact is not relied on as a cause of disability.

7. Insurance § 37—Statement of court, when taken with subsequent correct instructions, held not prejudicial to insurer.

In this action on a disability clause in a life insurance policy, a juror, in response to an inquiry from the court, stated he understood from the instructions that insured would be disabled if he could not perform the work of his usual occupation. The court stated that this was substantially correct, but the court then charged the jury correctly on this aspect of the case. *Held:* Not error.

APPEAL by defendant from *Frizzelle, J.*, and a jury, at April Term, 1937, of NASH. No error.

This is an action brought by plaintiff to recover of the defendant a certain sum of money alleged to be due him from defendant in violation of its contract with plaintiff. The defendant denied liability.

The plaintiff was the holder of a life and disability policy of insurance, No. 557714, in the defendant company, dated 23 October, 1924. This insurance policy contained total and permanent disability benefits, which said total and permanent disability benefits were substantially in the usual form, and provided that, should the insured, before the anniversary of the policy nearest the date on which the insured should attain the age of 60 years, and while policy is in full force and no premium thereon in default, become permanently and totally disabled as defined by the policy, the company, subject to the conditions set forth in said policy, will waive the payment of all future premiums and pay the insured a monthly income of $30.00, etc.

The provisions in controversy are as follows: "Permanent total disability, as used herein, is defined to mean: (1) Disability caused by accidental bodily injury or disease which totally and permanently prevented the insured from performing any work or engaging in any occupation or profession for wages, compensation, or profit; or (2) disability caused by accidental bodily injury or disease which totally prevents the insured from performing any work or engaging in any occupation or profession for wages, compensation, or profit, and which shall have totally and continuously so prevented the insured for not less than ninety (90) days immediately preceding the date of receipt of due written proof thereof."

The plaintiff made demand and filed proofs on or about 12 June, 1934, upon forms furnished by defendant for total and permanent disability, in accordance with the terms of the policy. This the defendant admitted, but denied liability on the ground that plaintiff had not suffered total and permanent disability, according to the provisions of the policy. It was admitted by the defendant that the premiums had been paid on the policy for about 10 years prior to this action. The plaintiff offered in evidence the policy.

The testimony of plaintiff was to the effect that he was reared on a farm and engaged in farming, and did nothing else, and had no other kind of business. In January, 1934, he suffered a soreness in his shoulder, thigh, and hands. This soreness was coming on two years before January, 1934. He got so, about 18 January, 1934, that he could not work at all. He was nervous, could not eat well, and had an inflammation of the genital organs. He could not sleep at night and his hands were affected. His heart ran too fast on exertion. He went to Park View Hospital in Rocky Mount, N. C., about 21 January, 1934. He was there examined by Dr. C. T. Smith, who prescribed medicine. At that time he was in a very distressing condition and suffering very much. His weight in 1933 and 1934 was 156 to 164 pounds. When he went to Dr. Smith he weighed 150 pounds. At the time of the trial of this cause he weighed 137 pounds. Dr. Smith pronounced his disease as neurasthenia. He suffered from indigestion. He has not been able to do any work since about the middle of January, 1934. Along after January, 1934, and as he felt a little better, he tried from time to time to work, but found that he had to, on account of his condition, give up all work. He had charge of his mother's farm prior to 1934. After his disability on 18 January, 1934, he had to turn the farm over to his brother, Clyde Leonard, and he has been unable to do any work except the little things he had tried to do and failed since that time. The plaintiff has not been able to earn any amount of money from his own labor since January, 1934, and he has no income from any source except what comes from his mother's farm.

Dr. C. T. Smith, a witness for the plaintiff and who is admitted to be an expert, testified and gave the history of his examination of the plaintiff, and stated that in his opinion Mr. Charlie Lee Leonard, when examined by him in 1934, was not able to carry on with reasonable continuity the essential duties of a farmer.

Dr. A. L. Daughtridge, who was also admitted to be a medical expert, gave as his opinion that the plaintiff could not follow with reasonable continuity the essential duties of a farmer.

The plaintiff was corroborated as to his condition by many witnesses.

The preliminary particulars of total disability to defendant, filed 9 July, 1934, was introduced by plaintiff and was not objected to by

defendant. The material question and answer were: "Have you been totally disabled and continuously prevented from performing any work or engaging in any occupation or profession for wages, compensation, or profit? If so, on what date did such disability begin? 18 January, 1934. Are you still so disabled? Yes."

The statement of plaintiff's attending physician, Dr. C. T. Smith, to defendant, filed 11 July, 1934, was introduced in evidence by the plaintiff. This was not objected to by defendant. The questions and answers were: "Has he been totally disabled and continuously prevented from performing any work or engaging in any occupation or profession for wages, compensation, or profit? Unable to farm. If so, on what date did such disability begin? 21 January, 1934. Is he still so disabled? Yes. If he is now continuously totally disabled, will such disability, in your opinion, be permanent? . . ."

The issues submitted to the jury, and their answers thereto, were as follows:

"1. Did the plaintiff, on or about 18 January, 1934, become totally and permanently disabled, and has he since that time remained so, so that he was and is totally and permanently prevented from performing any work or engaging in any occupation or profession for wages, compensation, or profit, as alleged in the complaint? Ans.: 'Yes.'

"2. What amount, if any, is the plaintiff entitled to recover of the defendant? Ans.: '$1,275.23.'"

The court below rendered judgment on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

I. T. Valentine for plaintiff.

J. M. Broughton and Wm. H. Yarborough, Jr., for defendant.

CLARKSON, J. The defendant introduced no evidence and at the close of plaintiff's evidence made a motion in the court below for judgment as in case of nonsuit. The court below overruled the motion, and in this we can see no error. The evidence which makes for plaintiff's claim, or tends to support his cause of action, is to be taken in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendent upon the evidence, and every reasonable inference to be drawn therefrom.

In *Bulluck v. Ins. Co.*, 200 N. C., 642, *Brogden, J.*, after citing many authorities, says, at p. 646: "The reasoning of the opinions seems to indicate that engaging in a gainful occupation is the ability of the insured to work with reasonable continuity in his usual occupation, or in such an occupation as he is qualified physically and mentally, under

all the circumstances, to perform substantially the reasonable and essential duties incident thereto. Hence, the ability to do odd jobs of comparatively trifling nature does not preclude recovery. Furthermore, our decisions, and the decisions of courts generally, have established the principle that the jury, under proper instructions from the trial judge, must determine whether the insured has suffered such total disability as to render it 'impossible to follow a gainful occupation.' "

The court below, in its charge, quoted the above excerpt from the *Bulluck case, supra,* which has been many times approved by this Court. *Misskelley v. Ins. Co.,* 205 N. C., 496 (506-7); *Smith v. Assurance Society,* 205 N. C., 387; *Fore v. Assurance Society,* 209 N. C., 548; *Blankenship v. Assurance Society,* 210 N. C., 471.

This case was before this Court—*Leonard v. Ins. Co.,* 209 N. C., 523. *Schenck, J.,* writing the opinion for the Court, said, at p. 524: "The plaintiff introduced his evidence and at the conclusion thereof the defendant moved to dismiss the action and for judgment as of nonsuit, which motion was allowed, and from judgment entered accordingly the plaintiff appealed, assigning errors. . . . The sole question presented by this appeal is whether the plaintiff's evidence was sufficient to be submitted to the jury upon the question of his permanent total disability as defined in the policy."

The facts are therein set forth similar to those in the present case. This Court reversed the judgment of nonsuit, citing the *Bulluck case, supra,* and other cases.

We think it was competent to admit opinion evidence of nonexpert witnesses to testify as to the ability of plaintiff to engage in work.

In *Keller v. Furniture Co.,* 199 N. C., 413 (417), it is said: "The testimony of these witnesses did not involve a question of science or a conclusion to be drawn from a hypothetical statement of facts; it was elicited as a matter within their personal knowledge, experience, and observation. The exception to the general rule that witnesses cannot express an opinion is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill, or learning; it includes the evidence of common observers testifying to the results of their observation. *Britt v. R. R.,* 148 N. C., 37; *Marshall v. Telephone Co.,* 181 N. C., 292." *Bulluck v. Ins. Co., supra,* pp. 646-7.

On the facts and circumstances of this case, we do not think the evidence complained of by defendant is of such a nature that impinged the rule that it was the exact question for the jury to determine, at least it was not prejudicial, as there was other evidence of like effect to which no objection was made by defendant.

The evidence of plaintiff which defendant objected to, as to the nearsightedness of plaintiff, we think was competent under the facts and

circumstances of the case. This was admitted by the court, for the purpose of showing that the plaintiff could not within a reasonable time equip himself to be a bookkeeper, conduct a store, or do anything else that required good eyesight; that the fact that the plaintiff was near-sighted was undoubtedly in the contemplation of the parties at the time the policy sued on was executed and delivered. It was wholly unnecessary to refer to the near-sightedness of the plaintiff in his proof of claim, in his specifications of disability, or anywhere else except in his evidence. He was not required to allege this, since his near-sightedness was not relied upon as the cause of his disability, but merely to show that he could not equip himself to follow some other suitable occupation. The near-sightedness of the plaintiff did not tend to excite sympathy or awaken prejudice. A casual look at the plaintiff, no doubt, at the time the policy was issued, or at the time of the trial, would disclose the fact that he was near-sighted.

The court charged with care the law applicable to the facts, and fully complied with C. S., 564. There appears in the record the following: "(By the court) Is there any further instruction that you gentlemen desire on any aspect of the case? Mr. Marvin Robbins, one of the jurors, replied as follows: 'We understood in your charge that if in our opinion the plaintiff was not able to carry on the farm duties which he had been accustomed to carry on that he would be considered disabled, but that in the last analysis we were to interpret this contract as we saw it. Is that correct?' (By the court) 'Well, substantially.'" The defendant contends that this was error, but the court below went further, and charged the jury correctly as follows: "I instructed you, I think, that if you should be satisfied from the evidence, and by its greater weight, that the plaintiff had become disabled to such an extent that he could not carry on his farming pursuit with reasonable continuity, performing the usual and ordinary duties incident thereto, or if you should not so find, but should find that the plaintiff is disabled so that he could not engage in some similar work, or some work for which he was physically and mentally qualified under all the circumstances, and pursue it with reasonable continuity, earning for himself wages, profit, or compensation bearing some reasonable proportion to the earnings he earned in his former occupation, that would constitute a total disability within the meaning of the policy and within the meaning of the law of the State; that the mere fact that the plaintiff could perform some odd jobs of a trifling or inconsequential nature, either in the occupation of farming or some other occupation for which he was qualified mentally and physically, would not preclude a recovery. Does that make any clearer the statements of law applicable? . . . The only question involved in this action is whether or not the plaintiff was totally disabled, perma-

nently and totally disabled, within the period from 25 June, 1934, to the trial of this action, in the amount involved, which I told you yesterday under the stipulation between the parties is the benefit provided for, or $30.00 per month, and the premiums which have been paid by the plaintiff on the policy from the period beginning on 25 June, 1934, to the present time."

On the whole trial, we see no prejudicial or reversible error.

No error.

MRS. NANNIE DRAPER PETTY v. THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA.

(Filed 13 October, 1937.)

1. Insurance § 31b—Statements of fact in application are material as matter of law.

A statement in an application for reinstatement of an insurance policy that applicant, in the year previous, had not had any injury, sickness, or ailment of any kind, and had not required the services of a physician, being a statement of fact within the knowledge of applicant, is a material representation as a matter of law. C. S., 6289.

2. Insurance § 31a—C. S., 6460, does not apply to reinstatement without medical examination of policy issued after medical examination.

The policy in suit was issued for less than $5,000 after medical examination of insured. After it had lapsed for nonpayment of premiums, it was reinstated on written application of insured without a medical examination. *Held:* Although the policy was reinstated without a medical examination, the original policy was issued after medical examination, and C. S., 6460, has no application, and insurer is not required to show fraud, but is entitled to cancellation of the policy upon a showing of material misrepresentations in the application for reinstatement.

3. Insurance § 33—

The reinstatement of a policy of insurance in accordance with its terms has the effect of continuing in force the original contract, and does not constitute a new contract.

4. Same—

Where a policy of insurance requires a written application as a condition precedent to reinstatement, a false statement therein, which is material as a matter of law, prevents the reinstatement issued in reliance on the application from being effective in law.

CLARKSON, SCHENCK, and DEVIN, JJ., dissent.

APPEAL by plaintiff from *Grady, J.*, at March Term, 1937, of VANCE.

An action to recover on policy of insurance.

This cause came to this Court on former appeal by defendant from judgment on the pleadings, and is reported in 210 N. C., 500. The pertinent allegations of the answer are there set forth. The judgment was reversed and the case was sent back for submission to the jury on issues raised.

The parties agree that on 21 December, 1932, the defendant issued to Ira Moody Petty, husband of the plaintiff, a certain policy of insurance for $2,000, in which the plaintiff is named as beneficiary; that the insured died 19 October, 1935; and that premiums had been paid up to and including the period in which the death of the insured occurred.

The defendant, however, pleads as a defense and offered evidence tending to show that the insured failed to pay the premium due on 21 June, 1935, or within thirty days thereafter, and that in accordance with the provisions of the policy same lapsed for nonpayment of premiums; that following the lapsing of the policy the insured applied to the defendant for reinstatement of said policy under the provisions thereof, with reference to reinstatement or restoration; that in connection with such request, and in accordance with the provisions of said policy, and for the purpose of procuring a reinstatement of said lapsed policy, the insured signed and delivered to the defendant a certificate of health, upon the basis of which, and relying thereon, the defendant, on 29 July, 1935, reinstated the policy and accepted from the insured annual premium payment; and that in the certificate of health the insured, in response to the question: "Are you now in good health?" answered: "Yes"; and 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 any other practitioner? (If so, give full particulars)," answered "No." The certificate contained, among other things, this further statement: "I hereby declare that the foregoing statements and certifications are made by me as a consideration for the acceptance by the company of the premiums now in default and for the reinstatement of the above numbered policy as of the due date of this 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."

Defendant further alleged and offered evidence tending to show that the answer to the first question was untrue in that the insured was not at such time in good health, but, on the contrary, had an ulcer of the stomach and other ailments, of which condition the insured had previously been informed; that the answer to the second question was untrue in that the insured had consulted Dr. Ruffin at Duke Hospital in the month of October, 1934, eight months prior to the date of the health certificate; that the doctor had diagnosed his case as duodenal ulcer and had told the insured that he had such ulcer and gave him instructions as

to diet and prescriptions for the ulcer; that the insured was taken to Duke Hospital in September, 1935, just sixty days after the health certificate had been signed and policy reinstated, for treatment and operation for duodenal ulcer; that insured was there operated on for ulcer, and that he died following this operation. It is not controverted that the original policy was issued after medical examination, nor that the reinstatement was made without further medical examination.

The plaintiff tendered the following issue: "Did the insured, Ira M. Petty, procure the reinstatement of the policy upon his life by false and fraudulent statements, as alleged in the answer?" The court refused to submit the issue, and plaintiff excepted. Thereupon, the court submitted the following issues:

"1. Did the insured, Ira M. Petty, in the certificate of health signed by him in connection with his application for reinstatement of his policy under date of 26 July, 1935, represent that he was at the time of making such certificate in good health?

"2. If so, was such representation untrue?

"3. Did the said insured, in said certificate of health, represent that during the year previous thereto he had not had any injury, sickness, or ailment of any kind, or required the services of a physician or any other practitioner?

"4. If so, was such representation untrue?

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

By consent, the court answered the first and third issues "Yes," and the jury answered the second "No," and the fourth "Yes."

From judgment on the verdict, the plaintiff appealed to the Supreme Court, and assigned error.

J. P. & J. H. Zollicoffer for plaintiff, appellant.

J. M. Broughton and W. H. Yarborough for defendant, appellee.

WINBORNE, J. The question is: Where an insurance policy for less than $5,000, issued after medical examination, has lapsed and has been reinstated upon false written representation of insured, and without medical examination, can the policy, as reinstated, be canceled without allegation and proof of fraud in the making of such representation? We think so.

All contracts of insurance on lives in this State shall be deemed to be made therein and subject to the laws of the State. C. S., 6287-6288. It is provided in C. S., 6289: "All statements or descriptions in any application for a policy of insurance, or in the policy, shall be deemed repre-

sentations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy."

In the instant case the decision turns upon the written answer to the second question in the certificate of health which the insured signed and delivered to the defendant for the purpose of procuring and as a condition precedent to a reinstatement of the lapsed policy in accordance with the provisions therein set forth. The jury has found that the answer is untrue. Under the fact situation, is it material, and if so, is it a bar to reinstatement of the policy?

It is settled law in North Carolina that answers to specific questions like the one asked in the instant case, where there had been medical examination, are material as a matter of law. *Bryant v. Ins. Co.*, 147 N. C., 181, 60 S. E., 983; *Alexander v. Ins. Co.*, 150 N. C., 536, 64 S. E., 432; *Schas v. Ins. Co.*, 166 N. C., 55, 81 S. E., 1014; *Hardy v. Ins. Co.*, 167 N. C., 22, 83 S. E., 5; *Ins. Co. v. Woolen Mills*, 172 N. C., 534, 90 S. E., 574; *Ins. Co. v. Box Co.*, 185 N. C., 543, 117 S. E., 785.

Speaking to the question in the case of *Ins. Co. v. Woolen Mills, supra*, *Mr. Justice Brown* writes: "The materiality of the representations is not open to dispute. It does not depend upon inferences drawn from facts and circumstances to be proved, in which event the question is one for the jury. A different rule prevails where the representations are in the form of written answers made to written questions. In such case the questions and answers are deemed to be material by the acts of the parties to the contract. *McEwen v. Life Ins. Co.*, 139 Pac., 242. It is not necessary that the misrepresentation should be intentional." Again, in the same case, at p. 539, it is said: "Nothing herein contravenes the well settled doctrine that where a question is asked which must be necessarily answered by *an opinion*, the mistake of the applicant in answering such question, made honestly and in good faith, will not avoid the policy. This is not so, however, where the questions asked relate to facts within the knowledge of the applicant and not within the knowledge of the company, and where the questions and answers are material. In such case the applicant must answer truthfully. The purpose of such questions is twofold: First, to elicit information, which the company regards important; second, to give the sources from which the company may obtain further information. The parties themselves have made these questions and answers material. Their materiality depends not only upon their own purport, but upon the fact that the contracting parties have agreed that the written application containing these questions and answers is the basis upon which the contract of insurance shall be made or refused."

In *Alexander v. Ins. Co., supra*, it is stated: "The company was imposed upon (whether fraudulently or not is immaterial) by such repre-

sentation, and induced to enter into the contract. In such cases, it has been said by the highest Court that 'assuming that both parties acted in good faith, justice would require that the contract be canceled and premiums returned.' *Ins. Co. v. Fletcher,* 117 U. S., 519."

In *Ins. Co. v. Box Co., supra,* it is stated: "The statute itself and the general principles applicable are to the effect that fraud is not always essential, and that the contract will be avoided if statements are made and accepted as inducements to the contract which are false and material."

However, it is contended by the plaintiff that, in view of the fact that the policy was reinstated without requiring a medical examination, "the policy shall not be rendered void nor shall the payment be resisted on account of any misrepresentation as to the physical condition of the applicant, except in cases of fraud." C. S., 6460. This section of the statute is inapplicable here for that same relates to the making of the contract on which policy is issued, and not to reinstatement of policy, without medical examination. In the instant case there was medical examination prior to the issuance of the policy. The reinstatement of the policy under the provisions thereof with reference thereto had the effect only of continuing in force the original contract of insurance. The authorities seem to support this view.

We find in 32 C. J., p. 1357, sec. 646, "A reinstatement of the policy, after default in the payment of the premiums, by performance of conditions specified in the policy continues in force the original policy and does not create a new one."

In *Mutual Life Ins. Co. v. Lorejoy,* 253 Ala., 452, 83 S. E., 591, it is said: "The reinstatement of the policy or contract of insurance did not have the effect of creating a new contract of insurance, dating from the time of the renewal. It had the effect only of continuing in force the original contract of insurance which would, under its terms, have terminated and become void if it had not been reinstated in the manner and within the time provided in the original contract."

In the case of *Clark v. Ins. Co.,* 146 N. E., 43, a Massachusetts case, speaking to the question of misrepresentation in application for reinstatement of policy after lapse because of failure to pay premium, the Court pertinently says: "In an application for reinstatement such as the one before us the parties are bound by the terms of the contract. They agreed that all the answers were material to the risk, and were true. If the insured consulted a physician, or was treated by one or had been prescribed for by a physician since the date of the policy and before the date of the application, . . . his answers were not true. . . . Having failed to comply with the conditions precedent mentioned in the application the policy was not revived, and the plaintiff

cannot recover," citing *Reidy v. John Hancock Mut. Life Ins. Co.*, 245 Mass., 373, 139 N. E., 538.

The right to reinstate was a part of the original contract. The representation in the certificate of health was required as a condition precedent to reinstatement. It was material as a matter of law. A truthful answer was required. The jury, upon competent evidence and under correct instruction, having found the representation untrue, the policy was not in law reinstated.

In the trial we find

No error.

CLARKSON, SCHENCK, and DEVIN, JJ., dissent.

CLIFTON B. CREECH, LOLA BALLARD, POWELL CREECH, LOISE CREECH, IVAN JUNIOR CREECH, AND CECIL CREECH, THE LAST FOUR BEING MINORS AND APPEARING BY D. E. O'NEAL, THE NEXT FRIEND, *v.* W. J. WILDER.

(Filed 13 October, 1937.)

1. Executors and Administrators §§ 13a, 26—Estate is not settled until all debts are paid or all assets exhausted.

Where the personalty is insufficient to pay all debts of the estate, it is the duty of the administrator to make application, without undue delay, for sale of the real estate to make assets, C. S., 74, and a report showing all debts paid except a mortgage indebtedness cannot constitute a final account, since the duties and obligations of administration continue until all debts are paid or all assets exhausted. C. S., 105.

2. Descent and Distribution § 13: Trusts § 15—Widow assuming to pay mortgage indebtedness in her report as administratrix is in position of trust for heirs.

Where a widow, qualifying as administratrix of her husband, files report denominated "final account," showing payment of all debts except a mortgage indebtedness, which she therein assumes to pay, she continues in a position of trust in relation to the heirs, the estate not having been finally settled, and her dower interest being a life estate, she could acquire no title adverse to the heirs as remaindermen, and if she should buy in the property at the foreclosure sale of the mortgage, she would hold title in trust for herself and children as heirs, and the records of administration and her report would be notice to the world of her position.

3. Mortgages § 33—

While the last and highest bidder at a sale under a mortgage acquires no title until the expiration of the ten-day period, C. S., 2591, he is a preferred bidder and may assign his bid, but his assignee takes only such interest as he had.

4. Mortgages § 39b—

Where the last and highest bidder at a mortgage sale is in a position of trust in relation to the owners of the equity, so that if deed were made to her she would hold for their benefit, the assignee of her bid takes in the same relationship and holds the title in trust.

5. Mortgages § 39f—

Where a foreclosure is attacked for fraud for that the last and highest bidder was in a position of trust in relation to the owners of the equity, evidence of gross inadequacy of purchase price is competent on the issue of fraud, and evidence of the rental value is also competent on and relevant to equitable adjustment between the parties.

APPEAL by plaintiffs from *Spears, J.,* at February Term, 1937, of JOHNSTON.

Action to have defendant adjudged to hold title to land described in the complaint as trustee for the plaintiffs.

It is admitted of record that on 7 February, 1921, J. Ivan Creech was the owner of the land in question; and that on that date the said J. Ivan Creech and his wife, Lillie Creech, executed to the Bank of Kenly a mortgage deed, duly registered in the office of the register of deeds of Johnston County, conveying the said land as security for an indebtedness of $2,500, evidenced by note due 1 January, 1922, and in which the usual power of sale was given.

Plaintiffs allege, and offer evidence tending to show, that J. Ivan Creech died intestate on 4 January, 1927, leaving surviving Lillie Creech, his widow, and the plaintiffs, his children, as his only heirs at law; that on 29 January, 1927, Lillie Creech, his widow, was duly appointed and qualified as administratrix of the estate of said J. Ivan Creech, record of which was duly made, and as such, on 19 March, 1930, she filed verified report in the office of the clerk of Superior Court of Johnston County, marked "Final Account." In this report she sets forth in effect that all personalty of the estate has been exhausted, that all debts except on real estate have been paid, and that "she has assumed the payment of the land debt," upon which she asks acceptance of the account and discharge of herself and her sureties. The clerk of Superior Court on the same day made an order accepting the account and releasing the administratrix and her sureties. Both the account and the order were duly recorded in the Book of Final Accounts in office of said clerk, and are the last entries in the clerk's office concerning said estate.

Plaintiffs offered for the purpose of attack only record of registration on 7 December, 1933, of what purports to be a deed, dated 1 December, 1933, from and in the names of R. H. Stevens, liquidating agent for and on behalf of the Bank of Kenly, original mortgagee, and Oscar Creech, executor of the last will and testament of R. R. Creech, deceased, trans-

feree of the Bank of Kenly, to defendant W. J. Wilder, in which the following recital appears: "That whereas, by a certain mortgage deed made by J. I. Creech and wife, Lillie Creech, to the said Bank of Kenly, on 7 February, 1933, to secure payment of a debt of $2,500, and interest, due to said Bank of Kenly, as will fully appear by reference being had to said deed (see register's office of Johnston County, Book 92, page 283), the conditions of which not being complied with, the said Oscar Creech, executor of R. R. Creech, deceased, transferee of the Bank of Kenly, original mortgagee, did, according to said conditions, expose to public sale; on 14 November, 1933, the property therein mentioned, and thereby conveyed, that is to say, the tract of land described in said mortgage deed, and the said Mrs. Lillie Creech, being the last and highest bidder at the price of $390.00, and the said Lillie Creech, having transferred and assigned her bid for value to W. J. Wilder, the said W. J. Wilder became the lawful purchaser, and the said bid not having been raised within 10 days, the said W. J. Wilder became the lawful purchaser." The land therein described is the land in question, containing 39⅝ acres, more or less.

Plaintiffs allege that at the time of the sale the land was reasonably worth the sum of $2,000, that the reasonable rental value for 1934 and subsequent years was $200.00 per year, and "that the said Lillie Creech, the mother of the plaintiffs and the administratrix of the estate of their father, J. Ivan Creech, after she had assumed the payment of said debt, if there was any due thereon, in her final account as administratrix for the purpose of wrongfully and fraudulently depriving the plaintiffs of their interest therein as heirs at law of their father, J. Ivan Creech, procured said lands to be sold under the old mortgage, above described, executed to the Bank of Kenly and became the purchaser therefor at the sum of $390.00, which is only a small percentage of its real value, and that on account of said fraud, and her relation to the said property, and her duty to protect the interest of the plaintiffs, heirs at law of the estate for which she was administratrix, any title that she acquired by virtue of said sale, and her said purchase at said sale, she held as trustee for herself as the widow and the plaintiffs as heirs at law in said estate."

Plaintiffs further allege that, by the records of administration and of final accounts, the defendant was fixed with notice of the relation of Lillie Creech to the estate, and that she had assumed the payment of the mortgage debt, and that by taking assignment of her bid, he acquired no better right than she had, that is, in event bid should not be raised, to take title to the land in trust for the widow and heirs of J. Ivan Creech, and pray decree.

Plaintiffs further offered testimony tending to show that of the land in question 17 or 18 acres are cleared land. Plaintiffs then proposed to

offer evidence to show the value of the land and its rental value, to which objections were sustained, and plaintiffs excepted.

From judgment as of nonsuit at the close of plaintiffs' evidence, plaintiffs appealed to the Supreme Court, and assigned error.

Parker & Lee for plaintiffs, appellants.

A. M. Noble and Wellons & Wellons for defendant, appellee.

WINBORNE, J. The principal questions on this appeal are: (1) Where bidder at mortgage sale, who occupies a position of trust with relation to the holders of equitable title, assigns her bid, does assignee take in same relationship? (2) Is evidence of the value and rental value at the time of mortgage sale competent on the issue of fraud? (3) Is judgment as of nonsuit erroneous? On the fact situation of the case, each question is answered "Yes."

1. The record discloses that Mrs. Lillie Creech, widow of J. Ivan Creech, was appointed administratrix of his estate and her recorded report shows that after exhausting the personal assets of the estate, she personally assumed the payment of a debt of the intestate secured by mortgage on the land in question.

When personal estate of the decedent is insufficient to pay the debts and charges of administration, the administrator may, at any time after the granting of letters, apply to the Superior Court for authority to sell the real estate to create assets with which to pay the debts. C. S., 74. It becomes the duty of the administrator to make such application. *Parker v. Porter,* 208 N. C., 31, and to do so without undue delay, *Pelletier v. Saunders,* 67 N. C., 261; *Clement v. Cozart,* 109 N. C., 173, 13 S. E., 86. Until the debts have been paid, or the assets of the estate exhausted, the estate is not settled, and the duties and the obligations of the administrator continue. C. S., 105. The records of administration and of report termed "Final Account" were constructive notice to the world.

In the instant case the administratrix filed what she designated as her "Final Account," and having therein taken upon herself the obligation to pay the unsettled debt secured by the mortgage deed, she continued in a position of trust with relation to the heirs of the intestate. If she had taken title to the land pursuant to the mortgage sale, she would have held that title in trust for the benefit of herself, as widow, and the heirs subject to reimbursement.

While the last and highest bidder at a sale under mortgage acquires no right or title of possession during the 10-day period required by law for raising the bid, he becomes a preferred bidder. C. S., 2591. *Harrell v. Blythe,* 140 N. C., 415, 53 S. E., 232; *Upchurch v. Upchurch,* 173 N. C., 88, 91 S. E., 702; *In re Sermon's Land,* 182 N. C., 122, 108 S. E.,

497; *Cherry v. Gilliam,* 195 N. C., 233, 141 S. E., 594; *Davis v. Ins. Co.,* 197 N. C., 617, 150 S. E., 120.

In *Sermon's case, supra,* it is stated that the bidder at a mortgage sale "acquires a position similar to a bidder at a judicial sale and before confirmation."

In this State it has been repeatedly held that the purchaser at judicial or sheriff's sales might assign his bid, and the commissioner or sheriff charged to make the title, could make the same to the assignee. *Smith v. Kelly,* 7 N. C., 507; *Testerman v. Poe,* 19 N. C., 103; *Campbell v. Baker,* 51 N. C., 256; *Ward v. Lowndes,* 96 N. C., 375; 35 C. J., 93, sec. 147.

Whether the assignee takes with notice, we think the rule stated in 35 C. J., 94, sec. 149, is reasonable in principle: "The assignee of a bid takes the same interest that his assignor had, and stands in his shoes and is subject to whatever may be ordered against the original bidder and whatever defenses may be interposed against the latter."

Again, in 21 C. J., 942, sec. 74, it is stated: "If the life tenant purchases . . . the property at a sale to satisfy an encumbrance, he cannot hold such . . . property to his exclusive benefit, but will be deemed to have made the purchase for the benefit of himself and the remainderman or reversioner. . . . If the life tenant pays more than his proportionate share, he simply becomes a creditor of the estate for that amount." Again, on the same page, it is stated: "Neither a life tenant, nor one claiming under him, who allows property to be sold for taxes, or the satisfaction of an encumbrance, . . . can acquire a title adverse to the remainderman or reversioner by purchasing at the sale."

Dower is a life estate. *Holt v. Lynch,* 201 N. C., 404, 160 S. E., 469; *Chemical Co. v. Walston,* 187 N. C., 817, 123 S. E., 196.

2. If the value of the land were greatly in excess of the bid, it would be a circumstance for the consideration of the jury on the issue of fraud. 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; *Roberson v. Matthews,* 200 N. C., 241, 156 S. E., 496.

Evidence as to rental value is also competent on and relevant to equitable adjustment.

3. For the reasons stated above, the judgment as of nonsuit was erroneously granted.

The judgment below is

Reversed.

CLIFTON WINDLEY AND STATE OF NORTH CAROLINA EX REL. CLIFTON WINDLEY v. D. W. LUPTON AND AMERICAN SURETY COMPANY OF NEW YORK, AND GURNEY P. HOOD, COMMISSIONER OF BANKS, AND THAD EURE, ESCHEAT OFFICER.

(Filed 13 October, 1937.)

1. Banks and Banking §§ 18, 19—After filing final report, Commissioner of Banks may not be held liable on claims against the bank.

A check was delivered to defendant deputy sheriff as appearance bond in a criminal action. The check was paid by the drawee bank and the funds credited to the deputy's account in the bank collecting the check, which bank later became insolvent and closed its doors, and the deputy's claim for the amount of the check was allowed as an unsecured claim and dividends thereon paid. Judgment was entered in the criminal action that the amount of the bond should be returned to the bondsman, and the deputy paid the bondsman the dividends paid by the Commissioner of Banks. The Commissioner of Banks completed liquidation and filed his final report, C. S., 218 (18), as amended by ch. 113, Public Laws of 1927. This action was instituted by the bondsman against the deputy and the surety on the sheriff's bond to recover the unpaid balance on the appearance bond, and the Commissioner of Banks was joined as a defendant upon the original defendants' cross action against him, upon allegations that the claim should have been paid as a preferred claim. *Held:* The action was properly dismissed as to the Commissioner of Banks, since the completion of the liquidation of the bank and the filing of the statutory report relieved him of all liability to the deputy on the claim against the bank.

2. Banks and Banking § 19: Escheat § 1—Funds apportioned to unproven claims are held in escheat subject solely to rights of those claimants.

Funds representing amounts apportioned to claimants of an insolvent bank who failed to prove their claims, C. S., 218 (22), which are turned over to the Secretary of State as escheat officer, C. S., 5786, are not assets of the liquidated bank, but are to be held by the University, subject solely to the rights of those who failed to prove their claims, and a depositor who proved his claim and received dividends thereon as a common claim may not hold the escheat officer liable for the balance unpaid on his claim upon his contention that the claim should have been paid in full as a preferred claim.

APPEAL by Thad Eure, Escheat Officer, from *Frizzelle, J.*, at October Term, 1937, of BEAUFORT. Reversed.

This action was begun in the Superior Court of Beaufort County on 7 November, 1935.

On the facts alleged in the complaint, the plaintiff Clifton Windley prays judgment that he recover of the defendants D. W. Lupton, deputy sheriff of Beaufort County, and American Surety Company of New York, surety on the official bonds of the sheriffs of said county, by whom

the said D. W. Lupton was appointed deputy sheriff, the sum of $224.00, and interest on the sum of $260.00 from 26 January, 1932, until 1 December, 1934, at the rate of 12 per cent, and interest on the sum of $224.00 from 1 December, 1934, until paid, at the rate of 12 per cent, and the costs of the action.

After the complaint was filed, on motion of the defendants D. W. Lupton and American Surety Company of New York, Gurney P. Hood, Commissioner of Banks, and Thad Eure, Escheat Officer, were made parties defendant to the action on 13 December, 1935.

In their answer the defendants D. W. Lupton and American Surety Company of New York admitted the material allegations of the complaint, and on the facts alleged in their cross action against their codefendants, Gurney P. Hood, Commissioner of Banks, and Thad Eure, Escheat Officer, prayed judgment that they recover of their said codefendants such sum or sums as the plaintiff should recover of them, or of either of them, in this action.

After he had filed an answer to the cross action alleged against him in the answer of his codefendants D. W. Lupton and American Surety Company of New York, the defendant Gurney P. Hood, Commissioner of Banks, moved that the action of the plaintiff and the cross action of his codefendants be dismissed as to him. The motion was allowed, and both the action of the plaintiffs and the cross action of the defendants D. W. Lupton and American Surety Company of New York was dismissed as to the defendant Gurney P. Hood, Commissioner of Banks.

After he had filed an answer to the cross action alleged against him in the answer of his codefendants D. W. Lupton and American Surety Company of New York, the defendant Thad Eure, Escheat Officer, moved that the action of the plaintiff and the cross action of his codefendant be dismissed as to him. The motion was denied and the defendant Thad Eure, Escheat Officer, duly excepted.

When the action was called for trial, a trial by jury of the issues raised by the pleadings was waived by the parties. It was agreed by them that the court should hear the evidence and find the facts. In accordance with this agreement, the court heard the evidence and found the facts to be substantially as follows:

1. On or about 1 April, 1931, the defendant D. W. Lupton, a deputy sheriff of Beaufort County, under a criminal warrant in his hands, arrested one Willie Daw, and held him in custody under said criminal warrant pending the trial of the action in which the warrant was issued.

2. While the said Willie Daw was in the custody of said defendant D. W. Lupton, the plaintiff Clifton Windley drew his check on the Bank of Washington for the sum of $400.00. The said check was payable to the order of the said D. W. Lupton and was accepted by him in

lieu of bond for the appearance of Willie Daw at the trial of the criminal action in which the warrant had been issued. Upon his acceptance of said check, the defendant D. W. Lupton released the said Willie Daw from custody.

3. The defendant D. W. Lupton endorsed the check delivered to him by the plaintiff and deposited it with the Farmers Bank of Belhaven, on 29 April, 1931, for collection. The check was duly forwarded by the Farmers Bank of Belhaven to the Bank of Washington, and was paid by the Bank of Washington on 4 May, 1931. The amount of said check was charged by the Bank of Washington to the account of the plaintiff Clifton Windley, and was duly remitted to the Farmers Bank of Belhaven, and by said Farmers Bank credited to the account of the defendant D. W. Lupton. No notice was given by said Farmers Bank to the said D. W. Lupton that the check had been paid by the Bank of Washington, or that its amount had been credited to his account with the Farmers Bank of Belhaven.

4. On or about 20 May, 1931, the Farmers Bank of Belhaven closed because of its insolvency, and Gurney P. Hood, Commissioner of Banks, took possession of said Farmers Bank for the purpose of liquidating its assets, as required by statute, and at once entered upon such liquidation.

5. After the said Gurney P. Hood, Commissioner of Banks, had taken possession of the Farmers Bank of Belhaven, the defendant D. W. Lupton was informed that plaintiff's check for $400.00, payable to his order, had been paid by the Bank of Washington, and that the amount of said check had been credited to his account. Immediately upon learning that the amount of said check had been credited to his account by the Farmers Bank of Belhaven, prior to its insolvency, the defendant D. W. Lupton informed the liquidating agent of Gurney P. Hood, Commissioner of Banks, of all the facts with reference to his deposit of said check with the said Farmers Bank of Belhaven. He was advised by said liquidating agent to file a claim for the amount due him by the said Farmers Bank, as a depositor, including the sum of $400.00, the proceeds of the check which he had deposited with said bank for collection. In accordance with said advice, and pursuant to the instructions of said liquidating agent, the defendant D. W. Lupton, on 13 June, 1931, filed with Gurney P. Hood, Commissioner of Banks, his claim against the Farmers Bank of Belhaven, for the sum of $907.83. This claim was duly allowed by the said Gurney P. Hood, Commissioner of Banks, as a common claim against the Farmers Bank of Belhaven, and a certificate to that effect was duly issued to the defendant D. W. Lupton by the liquidating agent of the said Gurney P. Hood, Commissioner of Banks.

6. At January Term, 1932, of the Superior Court of Beaufort County, an order was entered in the action entitled "State *v.* Willie Daw," then

pending in said court, that the defendant D. W. Lupton return to the plaintiff Clifton Windley the sum of $400.00, paid to him by the said Windley in lieu of an appearance bond for the said Willie Daw.

7. On or before 1 December, 1934, Gurney P. Hood, Commissioner of Banks, paid to the defendant D. W. Lupton, as dividends on his claim against the Farmers Bank of Belhaven, the sums of $140.00, and $36.00, which were promptly paid by the defendant D. W. Lupton to the plaintiff Clifton Windley, on account of the amount deposited with him by the plaintiff in lieu of an appearance bond for Willie Daw.

8. The defendant American Surety Company of New York was the surety on the official bond of the sheriff of Beaufort County, at the date of the receipt by the defendant D. W. Lupton from the plaintiff of the sum of $400.00, and also at the date of the order of the judge of the Superior Court of Beaufort County that said defendant return said sum to the plaintiff. At both dates, the defendant D. W. Lupton was a duly appointed deputy sheriff of Beaufort County.

9. The liquidation of the Farmers Bank of Belhaven was completed by Gurney P. Hood, Commissioner of Banks, prior to 27 May, 1935, and the sum of $1,170.40, then in his hands as the aggregate amount of dividends due to persons who had failed to file their claims, was paid by him into the office of the clerk of the Superior Court of Beaufort County, as required by statute.

On 27 May, 1935, the clerk of the Superior Court of Beaufort County delivered to the defendant Thad Eure, as agent of the University of North Carolina, his check on the Bank of Washington for the sum of $1,170.40. This check was payable to the University of North Carolina. The amount of the check is held by the University of North Carolina as provided by section 5786 of the Consolidated Statutes of North Carolina.

On the foregoing facts, the court was of opinion that the defendant D. W. Lupton was entitled to the payment of his claim for $400.00 against the Farmers Bank of Belhaven as a preferred claim, and so adjudged.

On the foregoing facts, the court was further of the opinion that under the provisions of section 357 of the Consolidated Statutes of North Carolina the plaintiff is entitled to recover of the defendant D. W. Lupton and of the defendant American Surety Company of New York, interest at the rate of 12 per cent on the sum received from the plaintiff by the said D. W. Lupton as deputy sheriff.

Accordingly, it was ordered and adjudged by the court:

(1) That the plaintiff recover of the defendant D. W. Lupton, as principal, and of the defendant American Surety Company of New York, as surety, the sum of $224.00, and interest on the sum of $260.00

from 26 January, 1932, until 1 December, 1934, at the rate of 12 per cent per annum, and interest on the sum of $224.00 from 1 December, 1934, until paid, at the rate of 12 per cent per annum, together with the costs of his action, to be taxed by the clerk.

(2) That the defendants D. W. Lupton and American Surety Company of New York recover of the defendant Thad Eure as Escheat Officer of the State of North Carolina, the sum of $224.00, with interest on said sum from 27 May, 1935, until paid, at the rate of 6 per cent per annum, together with the costs of their cross action, to be taxed by the clerk.

The defendant Thad Eure, Escheat Officer, appealed from the judgment to the Supreme Court, assigning errors in the trial and in the judgment.

M. C. Paul for plaintiff.

Grimes & Grimes for defendants D. W. Lupton and American Surety Company of New York.

Attorney-General Seawell and Assistant Attorney-General Bruton for defendant Thad Eure, Escheat Officer.

CONNOR, J. Subsection 18 of section 218 of the Consolidated Statutes of North Carolina, as amended by chapter 113, Public Laws of North Carolina, 1927, now reads as follows:

"If the assets of any bank, when fully collected by the Commissioner of Banks, are not sufficient to pay the depositors and creditors of said bank, the Commissioner of Banks, after he shall have fully distributed as herein provided the sums so collected, then he shall cause to be filed in the office of the clerk of the Superior Court in the pending action a full and complete report of all his transactions in said liquidation; and the filing of such report shall act as a full and complete discharge of the Commissioner of Banks from all liabilities by reason of the liquidation of the bank."

In the instant case, Gurney P. Hood, Commissioner of Banks, had fully completed the liquidation of the Farmers Bank of Belhaven, and had finally distributed all its assets in his hands among the depositors and creditors of said Farmers Bank, by dividends apportioned to each claim, prior to the commencement of this action. He had filed his report as required by statute, and was therefore discharged of any further liability to the defendant D. W. Lupton on account of his claim against the Farmers Bank of Belhaven. For this reason, the cross action of the defendants D. W. Lupton and American Surety Company of New York was properly dismissed as to Gurney P. Hood, Commissioner of Banks.

After the said cross action had been dismissed as to Gurney P. Hood, Commissioner of Banks, the court had no jurisdiction of the cross action against the defendant Thad Eure, Escheat Officer. C. S., 218, subsection 22. There was error in the refusal of the court to allow the motion of the defendant Thad Eure, Escheat Officer, that the cross action be dismissed as to him.

In no event were the defendants D. W. Lupton and American Surety Company of New York entitled to judgment against the defendant Thad Eure, Escheat Officer, on the facts found by the court. The money paid to Thad Eure as Escheat Officer and agent of the University of North Carolina, was not an asset of the Farmers Bank of Belhaven, subject to the claim of the defendant D. W. Lupton. It was the aggregate amount of dividends apportioned to claimants against said Farmers Bank and is held by the University of North Carolina, subject to the payment of their claims. C. S., 5786. *In re Bank of Ayden*, 206 N. C., 821, 175 S. E., 177.

The judgment in this action against the defendant Thad Eure, Escheat Officer, is

Reversed.

OTHO GRAHAM GOWER v. DR. V. A. DAVIDIAN.

(Filed 13 October, 1937.)

1. Physicians and Surgeons § 15c—Evidence held sufficient to overrule nonsuit on question of negligence of physician.

The evidence tending to support plaintiff's cause of action tended to show that plaintiff was taken to a hospital after a serious injury, that defendant physician attended him, stated he was suffering from shock, and discharged him from the hospital some 36 hours later without making any clinical or X-ray examination, that thereafter plaintiff went to another hospital, where X-ray pictures disclosed dislocation of the fifth cervical vertebra, and other serious internal injuries. *Held:* The evidence is sufficient to be submitted to the jury on the question of defendant's negligence, since if plaintiff's condition was too serious for an immediate examination, defendant allowed him to be removed in such serious condition without an examination, while if such examination could have been made at once without risk, defendant failed to make the examination and discharged plaintiff while he was in a serious condition requiring immediate medical attention.

2. Trial § 22b—

On defendant's motion to nonsuit, only the evidence favorable to plaintiff will be considered.

3. Physicians and Surgeons § 15e—Evidence held insufficient to show causal connection between injury and negligence of physician.

Plaintiff's evidence was sufficient for the jury on the question of defendant physician's negligence in discharging plaintiff from a hospital with serious internal injuries requiring medical attention. Plaintiff's evidence tended to show that when his condition failed to improve, he went, in less than two weeks, to another hospital, where competent physicians attempted to set the fracture in the vertebra of his neck, that complete recovery was not had because the position of the fracture made it impossible to apply sufficient traction to reset the bone, that callus would develop after a period of over two weeks which would interfere with resetting the fracture, but there was no evidence that the delay of less than two weeks interfered with resetting the bone, or that ill effects resulted from such delay, although there was expert opinion evidence that plaintiff's chances for recovery would have been greater. *Held:* The rights of the parties cannot be determined upon chance, and plaintiff's evidence failed to show a causal connection between defendant's negligence and plaintiff's injury, and defendant's motion to nonsuit was properly granted.

APPEAL by plaintiff from *Spears, J.*, at February Term, 1937, of JOHNSTON. Affirmed.

This is a civil action instituted by plaintiff to recover damages caused by the negligent and wrongful conduct of defendant as his attending physician and surgeon. From a judgment of nonsuit entered at the conclusion of all of the evidence plaintiff appealed.

Wellons & Wellons and Wellons & Pool for plaintiff, appellant.

Ehringhaus, Royall, Gosney & Smith, G. A. Martin, and Abell & Shepard for defendant, appellee.

BARNHILL, J. On the night of 30 March, 1935, plaintiff, while operating a motor vehicle, drove off the road and wrecked his car. He received certain physical injuries and was carried to the hospital at Smithfield and was there attended by the defendant. He entered the hospital about 10:30 p.m., 30 March, and was discharged from the hospital about 11 o'clock the following Monday, approximately 36 hours after his admission. The evidence, considered in the light most favorable to the plaintiff, tends to show that at the time he was admitted to the hospital he was suffering from shock and concussion, and that there had been a dislocation of his fifth cervical vertebra, resulting in a compression friction of the sixth cervical vertebra and a fracture of the pedical lamina arches; that he was in a semiconscious condition at times; that he was partially paralyzed and that the defendant made only a casual examination as to his condition, stating that he was merely shaken up and shocked and would soon be all right; that during his stay

at the hospital the defendant never made any thorough clinical or X-ray examination of the plaintiff; that his condition was such as to give notice that he was suffering either from a fracture of the skull or of the spine; that on Monday morning the defendant permitted plaintiff's father to take the plaintiff from the hospital by mutual consent; that the defendant then gave the plaintiff's father instructions to take him home and put him to bed for eight or ten days and then try to get him up, and that if the whites of his eyes began to darken to let him know; that the relationship of physician and patient ended when the plaintiff was removed from the hospital. Thereafter, on 12 April, the plaintiff was taken to Duke Hospital and examination at this hospital disclosed the condition of plaintiff's neck. At that time his attending physician undertook by traction to reset the bone and later immobilized his neck. Due to the condition and location of his injury, it was impossible to apply sufficient traction to reset the bone, and plaintiff is now suffering from a permanent injury.

To entitle the plaintiff to have his cause submitted to a jury, he must offer evidence tending to show that he was injured, that the defendant was negligent in the manner in which he examined and treated the plaintiff, or in his failure to render proper treatment, and that the negligent conduct of the defendant was the proximate cause of injury sustained by him. There is no evidence that defendant did not possess the necessary skill and ability.

The medical experts who testified seemed to be in accord in their opinion that it is risky to subject a patient to a clinical and X-ray examination when he is under severe shock, and that the attending physician must exercise his best judgment in determining when it is safe to make such examination. If the plaintiff was in such condition when he was admitted to defendant's hospital as to cause the defendant to conclude in the exercise of his judgment that it was risky to proceed with a thorough clinical and X-ray examination of the plaintiff, then it appears that notwithstanding plaintiff's serious condition he permitted the plaintiff to be removed from the hospital without ever having made any examination, which would disclose the serious injuries existing. If the plaintiff was not in such a state of shock as would make it risky for the defendant to proceed with a proper examination, then it appears from plaintiff's testimony that he carelessly and negligently failed to proceed with the examination, but, on the contrary, permitted the plaintiff to be removed from the hospital without having first discovered his condition and without taking any steps to immobilize his neck or to reset the fracture. It would seem, then, that the conclusion that the plaintiff offered sufficient evidence to be submitted to the jury on the question of defendant's negligence is inescapable, and that the judgment of nonsuit

cannot be sustained on that ground. In this connection it may be well to say that the defendant offered evidence sharply contradicting the testimony of the plaintiff and tending to show that he exercised reasonable care and diligence, but we now view the evidence only in the aspect most favorable to the plaintiff.

But the burden rested upon the plaintiff to offer evidence tending to show a causal connection between his injury and the negligent conduct of the defendant.

Thereafter, on 12 April, 1935, the plaintiff, not having shown any evidence of improvement, was taken to Duke Hospital, and the condition of his neck was discovered and efforts were made to reset the fracture. All the evidence tends to show that callus does not develop to an extent that would interfere with the resetting of a fracture within a minimum of two weeks, and that there was no evidence of callus around the fracture of plaintiff's neck which would impede or interfere with the resetting of the bone. While Dr. William Spicer testified that he examined X-rays and discovered callus formation, the record discloses that he was referring to X-rays made at his instance approximately 22 months after plaintiff's injury was sustained. No witness testified that plaintiff's condition was aggravated by the delay in efforts to reset the bone, or that the inability of the surgeons to reset the bone was due to any condition arising from the delay. The evidence most nearly approximating a statement to this effect is the testimony of Dr. Spicer, when he said: "I think his chances at recovery would have been much greater because it would have been much easier to reduce dislocation and fracture at the time of the accident than it would *now* this callus formation or new bone has formed, because that holds them tight, fixed like a brace. . . . I stated that had that fracture and dislocation been replaced, put in proper position immediately, it would have been much easier, but to wait until after two weeks it would be almost impossible to replace it, owing to callus which had been thrown out. . . . It is my opinion that had this case received immediate attention and had that fracture and dislocation reduced, his chances for further recovery, or for perfect recovery, would have been much greater." Analyzing this statement, it is found to be entirely conditional. Dr. Spicer states that chances at recovery would have been much greater because it would have been much easier to reduce the location and fracture at the time of the accident than it would *now this callus formation or new bone has formed.* In referring to the callus formation he was speaking of a period 22 months subsequent to the injury. He further states that had that fracture and dislocation been replaced, put in proper position immediately, it would have been much easier, but to wait until after two weeks

it would be almost impossible to replace it owing to callus, which had been thrown out. He does not state that the fracture could have been replaced, and the evidence shows that they did not wait *until after two weeks, or until callus had been thrown out.* He further gave as his opinion that had this case received immediate attention *and had that fracture and dislocation reduced,* his chances for recovery, or for perfect recovery, would have been much greater. His opinion in this respect is based entirely upon an actual reduction of the fracture, which the evidence discloses could not be reduced, and he merely says that the chances for further recovery would have been much greater. The rights of the parties cannot be determined upon chance.

This evidence must likewise be viewed in the light of the fact that this witness further testified that an effort to reset should be made within two weeks, and that all the testimony shows that an effort was actually made by competent physicians to reset the fracture within the two weeks, and that the witness merely says that the chances would have been greater, but does not testify as to any ill effects which resulted, and the efforts to reset the fracture were made within the time he specifies as essential.

The evidence discloses that the use of modern equipment and methods by trained and skillful surgeons at a time when callus had not developed sufficiently to interfere with proper setting of the bone has availed nothing. The character and location of the fracture is such that proper traction cannot be successfully used. Unfortunately, upon this record as it now appears, the plaintiff has suffered an injury that could not then and cannot now be relieved by the medical profession, except by performing a most dangerous operation. There is no evidence of any injury which the plaintiff sustained by reason of the delay of less than two weeks caused by the alleged conduct of the defendant. In so far as plaintiff's right to recover is concerned, what boots it that the defendant did not make a thorough clinical and X-ray examination? Plaintiff's unfortunate condition results from his own act and not from any negligent conduct of the defendant.

Plaintiff having failed to offer evidence tending to show that he suffered any injury which was proximately caused by the alleged negligent and wrongful conduct of the defendant, the judgment as of nonsuit must be

Affirmed.

WILLIAM G. LIVERMAN, JR., VIOLA MYERS, ELIA CHAMBLEE, AND BELLE M. ANDREWS, v. J. N. VANN AND HIS WIFE, AGNES VANN, W. T. FORBES AND HIS WIFE, ADA FORBES, AND W. T. WHEDBEE AND HIS WIFE, LUCILLE J. WHEDBEE.

(Filed 13 October, 1937.)

Appeal and Error § 47a—Motion in Supreme Court for new trial for newly discovered evidence allowed in this case.

Plaintiffs' evidence tended to show that upon the maturity of a note secured by mortgage, the maker agreed to convey the land to defendants, reserving a life estate, if defendants would satisfy the note, that defendants paid a sum in cash to the payee, who transferred the note to them, and that thereafter the maker executed deed to them under the agreement. The maker of the note died, and plaintiffs, devisees in a will executed by the maker of the note prior to the execution of the deed, instituted this action to set aside the deed for mental incapacity and for fraud and duress. Upon plaintiffs' appeal from an adverse verdict, no error was made to appear, but plaintiffs move for a new trial for newly discovered evidence and filed affidavits showing that since the trial a letter from one of defendants had been discovered indicating that the parties understood and agreed that the relationship of mortgagor and mortgagee should continue notwithstanding the deed. *Held:* Although the letter probably is incompetent on the theory of trial, a new trial is awarded, since plaintiff may make a motion to amend, addressed to the discretion of the court, so as to set up a new cause of action giving them the right to redeem the land from the deed of trust by paying the note.

APPEAL by plaintiffs from *Grady, J.*, at April Term, 1937, of HERTFORD. New trial.

This is an action to have a deed, executed by Mrs. Viola G. Jenkins on 15 August, 1932, and conveying to the male defendants in fee, subject to a life estate reserved in the deed to the grantor, the tract of land described therein, adjudged void, on the ground (1) that at the date of the execution of said deed the grantor, Mrs. Viola G. Jenkins, was of such weak mind and memory that she was incapable of entering into a valid and binding contract; and (2) that the execution of said deed was procured by fraud and duress on the part of the grantees, as alleged in the complaint.

The evidence for the plaintiffs tended to show that on and prior to 27 July, 1931, Mrs. Viola G. Jenkins was seized in fee and in possession of a tract of land situate in St. John's Township, Hertford County, North Carolina, containing 144.7 acres, more or less; that on 27 July, 1931, for the purpose of securing the payment of her note for $1,000, as recited therein, the said Mrs. Viola G. Jenkins conveyed the said tract of land, by a deed of trust, to R. C. Cole, trustee; that the note secured by said deed of trust became due and payable according to its terms on

27 July, 1932, and that soon thereafter the holder of said note demanded its payment by the said Mrs. Viola G. Jenkins, as maker thereof; that the said Mrs. Viola G. Jenkins admitted her liability on said note, but was unable to pay the amount due thereon; and that after repeated efforts, which were unsuccessful, to borrow money with which to pay said amount, the said Mrs. Viola G. Jenkins went to the place of business of the defendants in the town of Ahoskie, N. C., and there proposed to the defendant J. N. Vann that if he would pay the amount due on said note she would convey to him and his codefendants in fee the tract of land described in the deed of trust, reserving to herself a life estate in said tract of land; that the defendants, after some negotiations with the holder of the note, accepted the proposition of Mrs. Viola G. Jenkins and accordingly, on 11 August, 1932, paid the sum of $475.00, in cash, to the holder of the note, who thereupon transferred and assigned the note to the male defendants.

The evidence for the plaintiffs tended to show further that pursuant to her contract and agreement with the defendants, on 15 August, 1932, at her home in Hertford County, the said Mrs. Viola G. Jenkins executed a deed by which she conveyed the tract of land described in the deed of trust to the male defendants in fee, reserving to herself an estate for her life in said tract of land; that said deed was prepared by the defendant J. N. Vann, and was duly probated, and recorded in the office of the register of deeds of Hertford County, in Book 103, at page 460; that after the execution and registration of said deed, to wit, some time during the month of December, 1932, with the consent of the defendants, the said Mrs. Viola G. Jenkins sold the timber on said tract of land for the sum of $403.50; and that said sum of $403.50 was paid by the purchaser of said timber to the defendants, who entered said sum on their books as a credit on their account with the said Mrs. Viola G. Jenkins.

The evidence for the plaintiffs tended to show further that at the date of the execution of said deeds, Mrs. Viola G. Jenkins was about 75 years of age; that she had suffered from pellagra for about 17 years, during which time she was almost constantly under treatment by her physician; that in consequence of said disease, she was weak in mind and in body and at times not in her right mind; and that she was easily depressed, especially by business worries.

The evidence for the plaintiffs tended to show further that at the date of the execution of said deed the tract of land which was conveyed thereby to the male defendants was worth from $4,000 to $6,000, and at the date of the trial was worth $7,000.

Mrs. Viola G. Jenkins died during 1934, having first made and published her last will and testament, by which she devised the tract of land

described in her deed to the defendants, to the plaintiffs, who are her nephew and nieces. The said last will and testament was executed by her prior to the date of the said deed, and has been duly probated and recorded.

At the close of the evidence for the plaintiffs, the defendants moved the court for judgment as of nonsuit on plaintiffs' cause of action founded upon the allegations of the complaint that the execution of the deed from Mrs. Viola G. Jenkins to the male defendants was procured by fraud and duress on the part of the grantees therein. This motion was allowed by the court, and plaintiffs excepted.

Evidence was then offered by the defendants tending to contradict the evidence for the plaintiffs with respect to the mental incapacity of Mrs. Viola G. Jenkins at the date of the execution of the deed from her to the male defendants, and further tending to show that the said Mrs. Viola G. Jenkins at said date had sufficient mental capacity to enter into a valid and binding contract and to execute said deed.

The issues submitted to the jury were answered as follows:

"1. At the time of the alleged contract between J. N. Vann and Mrs. Viola G. Jenkins for the purchase of the note and mortgage deed from R. C. Cole, and the execution of the deed from the said Viola G. Jenkins to J. N. Vann and others, defendants in this action, was the said Mrs. Viola G. Jenkins of such weak mind and memory that she could not enter into a valid and binding contract, as alleged in the complaint? Answer: 'No.'

"2. What amount of money was expended by J. N. Vann and others, defendants in this action, in the purchase of said note and mortgage from R. C. Cole? Answer: '$475.00.'

"3. What amount of money was received by J. N. Vann and others, defendants in this action, from the sale of timber from the Jenkins tract of land? Answer: '$403.50.'

"4. What part of said money, if any, belongs to the estate of Mrs. Viola G. Jenkins, deceased? Answer: '$120.55,' by consent."

From judgment in accordance with the verdict, and directing that the defendants pay into the office of the clerk of the court the sum of $120.55, to be held by said clerk for the administrator or executor of Mrs. Viola G. Jenkins, deceased, the plaintiffs appealed to the Supreme Court, assigning errors in the trial.

D. C. Barnes, E. R. Tyler, and W. D. Boone for plaintiffs.

E. L. Travis and J. Carlton Cherry for defendants.

CONNOR, J. An examination of the record in this appeal does not disclose any error for which the plaintiffs are entitled to a new trial.

None of their assignments of error can be sustained. On the record, the defendants are entitled to have the judgment of the Superior Court in this action affirmed.

The plaintiffs contend, however, that if they are not entitled to a new trial for errors in the trial in the Superior Court, they are entitled to a new trial for newly discovered evidence in accordance with their motion which was duly made in this Court. See McIntosh, N. C. Prac. and Proc., page 806; *Johnson v. R. R.*, 163 N. C., 431, 79 S. E., 690; *Stilley v. Planing Mills*, 161 N. C., 517, 77 S. E., 760; *Chrisco v. Yow*, 153 N. C., 434, 69 S. E., 422; *Smith v. Moore*, 150 N. C., 158, 63 S. E., 735; *Black v. Black*, 111 N. C., 300, 16 S. E., 412.

It appears from affidavits filed in this Court by the plaintiffs, and not controverted by the defendants, that after the expiration of the term of the Superior Court of Hertford County at which the action was tried, the plaintiffs discovered a letter which the defendant J. N. Vann wrote to Mrs. Viola G. Jenkins, who had died before the trial, which is as follows:

"AHOSKIE, N. C., Dec. 17th, 1932.

"MRS. VIOLA JENKINS,
Aulander, N. C.

"DEAR COUSIN VIOLA: Replying to your letter of the 15th, which I received yesterday, I told Cola Sumner several days ago, that we had no objection to the sale of your timber, provided the sale was made to some responsible party, or the money was paid for the timber before it was cut, and the proceeds applied on the note.

"I do not know when it will be possible to get to see you, as I have my hands full trying to shape my personal affairs before leaving the first of the year.

"With kind, good wishes, I am

Sincerely yours,

JOE."

This letter, while probably not competent, relevant, or material as evidence pertinent to any of the issues submitted to the jury at the trial, would be competent, relevant, and material as evidence pertinent to an issue involving the relationship of Mrs. Viola G. Jenkins and the defendants with respect to the tract of land conveyed by her to them by deed dated 15 August, 1932. It tends to show that it was understood and agreed by and between Mrs. Viola G. Jenkins and the defendants, at the time his deed to them was executed, that the relationship between them of mortgagor and mortgagee should continue, notwithstanding said deed, and that Mrs. Viola G. Jenkins should have the right to redeem the land from the deed of trust, by paying to the defendants the amount

due on his note. Before the new trial the plaintiffs may and probably will move for leave to amend their complaint and set up therein a new cause of action. Such motion will, of course, be addressed to the discretion of the court.

The motion for a new trial for newly discovered evidence is allowed. It is so ordered.

New trial.

ORBREY RAYNOR, AARON RAYNOR, AND JOHN O. RAYNOR v. K. B. RAYNOR AND HIS WIFE, MINNIE RAYNOR.

and

ORBREY RAYNOR, AARON RAYNOR, AND JOHN O. RAYNOR v. ALICE TART AND HER HUSBAND, RAYMOND TART.

(Filed 13 October, 1937.)

1. Deeds § 14b: Mortgages § 2—Grantee accepting deed directing payment of debt becomes personally liable, and charge constitutes equitable lien.

The owner of land divided it into nine tracts and deeded one tract to each of his nine children, reserving a life estate. Only the tracts conveyed to two of the children were encumbered, but the deed to each of the children provided that the grantee therein should pay one-ninth of the mortgage indebtedness remaining unpaid upon the death of the grantor. Each child accepted his deed and went into possession. *Held:* By accepting the deed each grantee became personally liable for one-ninth part of the mortgage indebtedness remaining unpaid upon the death of the grantor, even though the tract conveyed to him was not included in the mortgage, and such liability constitutes a specific charge against the land in the nature of an equitable lien thereon, in accordance with the intent of the grantor as disclosed by the language used, construed in the light of the attendant facts.

2. Contribution § 2—Plaintiffs in this action held entitled to recover of defendant under doctrine of equitable contribution.

Each of the nine children of the grantor accepted deeds specifying that the grantee should pay one-ninth of the amount of a debt of the grantor remaining unpaid at his death, which debt was secured by a mortgage on only two of the nine tracts. The mortgage was foreclosed and the land sold, and this action was instituted by the children who were deeded the mortgaged tracts against other of the children whose land was unencumbered. *Held:* Plaintiffs, who had lost their lands by foreclosure, are entitled to recover of each of defendants who failed to pay his part of the debt made a charge on his land one-ninth of the amount of the mortgage indebtedness under the doctrine of equitable contribution.

APPEAL by defendants from *Spears, J.*, at February Term, 1937, of JOHNSTON. Affirmed.

By consent of the parties thereto, the above entitled actions, pending in the Superior Court of Johnston County, were consolidated for trial.

The facts admitted in the pleadings, and agreed at the trial, are as follows:

1. On 25 June, 1927, John I. Raynor was seized in fee and in possession of several tracts of land situate in Johnston and Harnett counties, North Carolina; all said tracts of land, except two, containing 39 and 16.50 acres, respectively, were free and clear of encumbrances; the said two tracts of land had been conveyed by the said John I. Raynor, by a mortgage, to the Greensboro Joint Stock Land Bank of Greensboro, N. C., to secure the payment of his indebtedness to the said bank, in the sum of $1,500; the said indebtedness was payable in equal installments of $52.50, which were due semiannually.

2. At said date, the said John I. Raynor had nine living children, including the plaintiffs Orbrey Raynor, Aaron Raynor, and John O. Raynor, and the defendants K. B. Raynor and Alice Tart.

3. Prior to said date, the said John I. Raynor had caused his lands to be divided into nine shares, of practically equal acreage; three of said shares include the two tracts of land containing 39 and 16.50 acres, respectively, which had been conveyed by the said John I. Raynor, by a mortgage, to the Greensboro Joint Stock Land Bank. These three shares of his land were conveyed by the said John I. Raynor to the plaintiffs, respectively, by deeds dated 25 June, 1927; the remaining six shares of his land were conveyed by the said John I. Raynor to his remaining six children, respectively, by deeds dated 25 June, 1927.

4. In each of the deeds executed by him, conveying the nine shares of his land to his nine children, respectively, the said John I. Raynor reserved to himself a life estate in the share conveyed by said deed. Each of said deeds was duly probated and recorded, and thereafter delivered by the said John I. Raynor to the child named therein as grantee. Each child accepted the deed delivered to him by the said John I. Raynor, and entered into possession of the land described therein.

5. The deed executed by the said John I. Raynor on 25 June, 1927, and thereafter delivered by him to the defendant K. B. Raynor, contains a clause in words as follows:

"It is understood between the parties to this deed that there is a claim due by said John I. Raynor to the Greensboro Joint Stock Land Bank, the semiannual payment on which is $52.50, and that such payments as may be due at the death of the said John I. Raynor, the said K. B. Raynor shall pay his one-ninth part of said payments as they shall become due."

6. The deed executed by the said John I. Raynor on 25 June, 1927, and thereafter delivered by him to the defendant Alice Tart, contains a clause in words as follows:

"It is understood between the parties to this deed that there is a claim due by said John I. Raynor to the Greensboro Joint Stock Land Bank, the semiannual payment on which is $52.50, and that such payments as may be due at the death of the said John I. Raynor, the said Alice Tart shall pay her one-ninth part of said payments as they become due."

7. The deeds executed by the said John I. Raynor, on 25 June, 1927, and thereafter delivered by him to his other children, respectively, contain a clause in the identical words as those appearing in the clauses contained in the deeds to the defendants K. B. Raynor and Alice Tart.

8. John I. Raynor died prior to the commencement of these actions. He had paid all the installments on his indebtedness to the Greensboro Joint Stock Land Bank, which became due prior to his death.

9. After the death of the said John I. Raynor the defendants K. B. Raynor and Alice Tart each tendered to the Greensboro Joint Stock Land Bank a sum of money equal to a one-ninth of the installments which thereafter became due on the indebtedness of John I. Raynor to said bank, which was secured by the mortgage on the lands conveyed by the said John I. Raynor to the plaintiffs. The bank declined to accept partial payments on said installments, and thereafter, in accordance with the terms and provisions of its mortgage, foreclosed the same and sold the lands which the said John I. Raynor had conveyed to the plaintiffs as their shares of his land.

10. At the date of the foreclosure of its mortgage by the Greensboro Joint Stock Land Bank, one-ninth of the amount due on the indebtedness of John I. Raynor to said bank was $174.38, with interest from 1 January, 1935.

On the foregoing facts, it was ordered, considered, and adjudged by the court:

1. That plaintiffs recover of the defendant K. B. Raynor the sum of $174.38, with interest from 1 January, 1935, until paid.

2. That plaintiffs recover of the defendant Alice Tart the sum of $174.38, with interest from 1 January, 1935.

3. That plaintiffs recover of the defendants K. B. Raynor and Alice Tart the costs of this action, to be taxed by the clerk of the court.

4. That the amount of the judgment recovered by the plaintiffs of each of the defendants in this action is a specific charge or equitable lien on the land conveyed by John I. Raynor to said defendants.

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

Otis L. Duncan and Leon E. Stevens for plaintiffs.

L. L. Levinson for defendants.

CONNOR, J. Three questions are presented by this appeal. If these questions are answered, each, in the affirmative, the judgment of the Superior Court must be affirmed; otherwise, the judgment must be reversed. The questions are:

1. Was it the intention of John I. Raynor, as disclosed by the language used by him in the clause contained in his deeds to the defendants, respectively, construed in the light of all the facts shown in the record, to impose upon the grantee in each of said deeds personal liability for the payment of one-ninth of the amount of his indebtedness to the Greensboro Joint Stock Land Bank at his death?

2. If so, was it his intention also that such amount should be a specific charge in the nature of an equitable lien on the land conveyed by said deed to the grantee named therein?

3. Are the plaintiffs, as grantees in the deeds executed by John I. Raynor and conveying to them shares of his lands which were encumbered by his mortgage to the Greensboro Joint Stock Land Bank to secure the payment of his indebtedness to said bank, in consequence of the foreclosure of said mortgage and the sale of the said shares under the power of sale contained in the mortgage, entitled to recover of each of the defendants a sum of money equal to one-ninth of said indebtedness at the date of said foreclosure and sale, and to have said sum adjudged a specific charge in the nature of an equitable lien on the land conveyed by the said John I. Raynor to each of the defendants?

In the briefs filed in this Court on behalf of the defendants as appellants, it is conceded that the first question must be answered in the affirmative on the principle that when the grantee in a deed has accepted the deed and claims under it, he assumes all liabilities imposed upon him by the deed. See *Tripp v. Nobles*, 136 N. C., 99, 48 S. E., 675.

The second question must also be answered in the affirmative, on the authority of *Marsh v. Marsh*, 200 N. C., 746, 158 S. E., 400. In that case it was held that where a father and mother conveyed their lands to their son, to effect a family settlement, and provided in their deed that the son should pay a certain sum of money to his sister, the son, having accepted the deed, and claiming under it, became personally liable for the payment of the money to his sister, and that his sister was entitled to an equitable lien on the land conveyed by the deed to the son for the amount of money which he was directed by the grantors in the deed to pay to her.

The third question must also be answered in the affirmative. The defendants having failed to pay to the Greensboro Joint Stock Land Bank the sums of money which were specifically charged on the lands conveyed to them by John I. Raynor, with the result that the plaintiffs have lost the lands conveyed to them by the said John I. Raynor, the

plaintiffs are entitled to recover of each of the defendants the sum of money which the defendants were required to pay to the Greensboro Joint Stock Land Bank in partial discharge of the indebtedness of John I. Raynor, which was secured by his mortgage on the lands of the plaintiffs, on the principle of equitable contribution. *Lancaster v. Stanfield*, 191 N. C., 340, 132 S. E., 21; *Taylor v. Everett*, 188 N. C., 247, 124 S. E., 316.

It follows that there is no error in the judgment of the Superior Court. The judgment is

Affirmed.

C. S. HEMPHILL v. THE BOARD OF ALDERMEN OF THE TOWN OF FOREST CITY, R. L. REINHARDT, MAYOR, AND F. T. DAVIS, J. WORTH MORGAN, G. C. McDANIEL, DR. C. H. VERNER, AND W. L. HORN, MEMBERS OF THE BOARD OF ALDERMEN OF THE TOWN OF FOREST CITY, NORTH CAROLINA.

(Filed 13 October, 1937.)

1. Estoppel § 4—

A party admitting in his pleadings the existence of a certain public alleyway cannot deny the existence of such alleyway upon the trial or appeal.

2. Dedication § 2—

Provision in a deed for an alleyway along the side of the property conveyed does not constitute a dedication of such alleyway across other property of the grantor in the same block which other property does not touch the property conveyed, although the alleyway is later extended to such other property by deed of the owner of the intermediate property.

3. Easements § 3—

To establish an easement by prescription, there must be a continuous and uninterrupted use or enjoyment of a defined easement for twenty years adverse to, and not by permission of, the owner of the soil, of which the owner has knowledge and acquiesces in.

4. Same—

In order for the public to acquire an easement for a road or alley by prescription, the right of way must be substantially defined, and in addition to adverse user for the required period, the right of way must be worked and kept in order by public authority.

5. Same—Evidence held insufficient to establish public right to alleyway by prescription.

The evidence disclosed that there was a public alleyway across the back of plaintiff's land running to a street to the east of the property, and that there was an alleyway running from the side of plaintiff's property to a street to the west, and that the public crossed over the back of plaintiff's property in going from one alley to the other so as to make a through

alley from one street to the other. The evidence did not disclose that the course taken from one alley to the other across the back of plaintiff's land was defined, and the only evidence of control exercised by the town were its acts in working the alleys, constructing water and sewer and power lines, all of which acts were done within fifteen years prior to the institution of the action and without evidence showing that said acts were done on land of plaintiff between the two alleys. *Held:* The evidence is insufficient to show adverse user for the required period, or that said use has been along a defined course across plaintiff's land between the alleys, and a directed verdict for plaintiff on issues dependent upon the acquisition by the town of a prescriptive right across plaintiff's land is without error.

PETITION for writ of *mandamus,* heard before *Clement, J.,* and a jury, at April Term, 1937, of RUTHERFORD. No error.

The plaintiff seeks a writ of *mandamus* to require the governing authorities of Forest City to issue to him a permit for the construction of an annex or additional building at the rear of plaintiff's present building, extending from the rear of said building to the edge of a ten-foot alley.

The plaintiff's property faces on the public square in Forest City and is located near the center of a block bound on the east by Factory Street and on the west by Depot Street. There is a ten-foot alley opening into Factory Street and extending back westwardly to and across the rear of plaintiff's lot and ending at the plaintiff's western boundary line, near the hotel wall. There is also a twelve-foot alley opening into Depot Street and extending back eastwardly to the westerly property line of plaintiff's lot. The northern line of the ten-foot alley is slightly south of the southern line of the twelve-foot alley. These two alleys are reserved in deeds offered in evidence, and as to them there is no dispute.

The plaintiff contends that these alleys are separate and distinct, and that as they do not connect they do not furnish a through passage from Depot Street to Factory Street, and *vice versa.* The defendants contend that the public has acquired by prescription a right of way across the rear of plaintiff's property so as to connect the two alleys, and thus form one continuous passageway.

Defendants admit that they refused to issue a building permit solely for the reason that the proposed building would block the said passageway.

At the close of all of the evidence, the court instructed the jury as to each issue separately, that if they believed the testimony of the witnesses and the record evidence in the case that they would answer the issues submitted to them, as follows:

"1. Is the plaintiff the owner of the land described in the complaint? Answer: 'Yes.'

"2. Is the plaintiff estopped from erection of his proposed building by his deed to George W. Jones, dated 11 June, 1920, as alleged in the answer? Answer: 'No.'

"3. Has plaintiff dedicated an alleyway across his lot, as alleged in the answer? Answer: 'No.'

"4. Has the town of Forest City, by adverse user for twenty years, acquired title to an alleyway across plaintiff's land, as alleged in the answer? Answer: 'No.'"

The jury answered the issues in accord with the instructions of the court, and from judgment entered thereon the defendants appealed.

Edwards & Edwards and Morgan & Story for plaintiff, appellee.
R. R. Blanton and B. T. Jones, Jr., for defendants, appellants.

BARNHILL, J. Plaintiff became the owner of the lot described in the pleadings 27 January, 1925, under deed which contains the following provision: "It is hereby stipulated and set forth that a 10-foot alley is to be reserved at all times for general purposes across the south end of this lot, which is to be kept open 10 feet wide, S. 74¼ E. until it opens into Factory Street." While there does not seem to be any other record evidence referring to this alley, the existence thereof cannot now be denied by plaintiff. Its existence is admitted in his pleadings.

On 11 July, 1920, the plaintiff conveyed to George W. Jones a tract of land facing on Depot Street, which contains in the description the following: "Being bound on the north by a 12-foot alley (which is to be a permanent alley)." The line described runs along the edge of said alley 63½ feet easterly from Depot Street. As referred to in said deed, said alley does not touch the property presently owned by the plaintiff. The easterly end thereof, as described in said deed, lacked 21 or more feet reaching the westerly line of the lot described in the complaint. Nothing contained in said deed could be construed as a dedication of an alley extending beyond the property line of the property then being conveyed. The grantee did not so understand. The purchaser of the hotel lot thereafter acquired easement rights for an alley from the eastern end of the alley as therein described to the westerly property line of plaintiff's property. Deed from C. M. Biggerstaff *et al.* to George Jones, dated 16 July, 1923. It could not be held that the terms of said deeds constitute a dedication of an alley beyond the limits of the property therein described, and the plaintiff is not estopped by the language used in said instruments to deny the existence of an alleyway over and across his property. There is, therefore, no evidence of a dedication by the plaintiff of an alleyway over and across the property in controversy.

The defendants contend that in any event the public has acquired by prescription a right of way across the rear of plaintiff's property, so as to connect the two alleys and thus form one continuous passageway, and the existence of this connecting link as a passageway is the real subject of controversy.

To establish an easement by prescription there must be (1) continued and uninterrupted use or enjoyment for 20 years; (2) a claim of right adverse to the owner of the soil, known to and acquiesced in by him, and (3) identity of the thing enjoyed. 9 R. C. L., page 772; *Draper v. Conner,* 187 N. C., 18; *Durham v. Wright,* 190 N. C., 568.

A mere permissive user is not sufficient. *S. v. McDaniel,* 53 N. C., 284; *S. v. Gross,* 119 N. C., 868; *Kennedy v. Williams,* 87 N. C., 6; *S. v. Johnson,* 33 N. C., 647.

The use must be adverse. *S. v. Norris,* 174 N. C., 808; *Weaver v. Pitts,* 191 N. C., 747.

Before a highway can be established by prescription it must appear that the general public used the same under a claim of right adverse to the owner and the travel must be confined to a definite and specific line, although slight deviations in the line of travel, leaving the road substantially the same, may not destroy the rights of the public. 18 C. J., page 107; Elliott on Roads and Streets, section 194; *S. v. Haynie,* 169 N. C., 277; *Milliken v. Denny,* 141 N. C., 227; *Bailliere v. Shingle Co.,* 150 N. C., 633; *Snowden v. Bell,* 159 N. C., 500; 9 R. C. L., page 776.

To establish the existence of a road or alley as a public way, in the absence of the laying out by public authority or actual dedication, it is essential not only that there must be twenty years user under claim of right adverse to the owner, but the road must have been worked and kept in order by public authority. *Boyden v. Achenbach,* 79 N. C., 539; *S. v. McDaniel, supra; S. v. Lucas,* 124 N. C., 804; *Stewart v. Frink,* 94 N. C., 487; *Kennedy v. Williams, supra.*

The only testimony in the record tending to show that the town has attempted to exercise control over either of said alleys is the evidence that about eight years ago a town official requested the plaintiff to move some coal from the rear end of his lot; that the town constructed water and sewer lines along the alley about fifteen years ago; that the town has worked the alleys, filling up holes, etc.; and that there has been a power line along the alley since 1922 or 1923. All of these acts took place since 1920, and it is not clear as to what part of the plaintiff's land is used for the water and sewer line, nor does it appear that any work was done on plaintiff's property. All of the evidence tends to show that there was no marked or defined alley on this block until the hotel building was constructed about 1921. Prior to that time the southern end of this block was open and was used by the general public for camp-

ing, hitching horses, trading ground, bone yard, and as an entry to the rear of the stores facing on the public block. Subsequent to the construction of the hotel building, traffic going from one alley to another "spills out" over and across plaintiff's back lot and the adjoining lot.

There is a total absence of evidence in the record tending to show either that there has been an adverse user of plaintiff's property for the required period, or that said use has been along a defined or marked way forming a connecting link between the two alleys. The public has used the rear of plaintiff's lot and the other vacant portion of this block at will by permission of the plaintiff and the other owners thereof. The law should, and does, encourage acts of neighborly courtesy. The plaintiff's acquiescence in the use of his property for the convenience of his neighbors and friends, resulting in no injury to him, should not, and does not, deprive him of the property, or estop him from asserting his rights. The defendants' exceptive assignments of error cannot be sustained.

If the defendants consider it essential that the two alleys should be connected so as to form a through passageway, they have an adequate remedy.

In the trial below, there was

No error.

IN RE DISBARMENT OF EDGAR C. WEST.

(Filed 13 October, 1937.)

1. Attorney and Client § 12—

An attorney may be disbarred by judicial or statutory procedure.

2. Same: Constitutional Law § 17—

In disbarment proceedings had in conformity with the legislative method, ch. 210, Public Laws of 1933, respondent's exception on the ground that the proceedings deprived him of his right to trial by jury is untenable when the matters in issue are determined by a jury upon his appeal to the Superior Court.

3. Same—Respondent may not contend in Superior Court that prior proceedings were void when he participated therein without objection.

A respondent in disbarment proceedings had in conformity with the legislative method cannot successfully contend upon appeal to the Superior Court that all proceedings prior to the time of trial in the Superior Court were void as being without warrant of law when he participated therein, without objection, since the proceedings are civil in nature rather than criminal, and the objection being based upon a constitutional right which may be waived by express consent, failure to assert same in apt time, or by conduct inconsistent with a purpose to insist upon it.

4. Same: Pleadings § 29—

In a legislative disbarment proceeding, a motion to strike from the complaint allegations relating to matters occurring prior to the effective date of ch. 210, Public Laws of 1933, is too late when not made until after the jury has been impaneled. C. S., 537.

5. Appeal and Error § 40b—

The refusal of a motion to strike out certain allegations will not be held prejudicial when all evidence relating to such allegations is excluded at the trial.

6. Attorney and Client § 13—

A demurrer to the evidence bearing upon certain charges in disbarment is correctly overruled when there is more than a scintilla of evidence supporting the charges even though the evidence relating thereto is conflicting.

7. Trial § 22b—

If diverse inferences may reasonably be drawn from the evidence, some favorable to plaintiffs and others favorable to defendant, the cause should be submitted to the jury for final determination.

8. Appeal and Error § 49—

A decision of the Supreme Court is authority only as to matters therein decided. The *Parker case*, 209 N. C., 693, is not authority for eliminating offenses committed prior to 1 July, 1933, the effective date of the act incorporating the State Bar.

9. Attorney and Client § 11: Constitutional Law § 15b—

This State requires as high a standard of conduct for attorneys as is elsewhere required, but the right to practice may not be revoked without due process of law.

APPEAL by respondent, Edgar C. West, from *Harris, J.*, at June Term, 1937, of HARNETT.

Disbarment proceeding, instituted 19 November, 1934, by the North Carolina State Bar, under authority of ch. 210, Public Laws 1933, on allegations of fraud, deceit, retention of funds without *bona fide* claim of right thereto, soliciting professional business, and general unfitness for the practice of law.

The charges fall into two classes in respect of the time of their commission: First, those occurring prior to 1 July, 1933, the effective date of the act incorporating the North Carolina State Bar, while respondent was acting as counsel for J. B. Colt Company; and, second, those occurring after said date, while respondent was acting as counsel for Stacy Couser, individually, and as administrator of his wife.

The Trial Committee of the State Bar found the respondent guilty on all the charges as preferred, and recommended his disbarment. Upon exceptions, the report of the Trial Committee was heard by the Council of the North Carolina State Bar at its quarterly meeting on 17 July, 1936, and resulted in adoption of resolution disbarring the respondent on account of the matters and things set out in the second class of charges,

or those occurring since 1 July, 1933, the Council holding, "in deference to the opinion of the Supreme Court of North Carolina in *In re Parker,* 209 N. C., 693, . . . it is without jurisdiction of the offenses committed prior to 1 July, 1933."

The respondent duly filed objection and exception to the judgment of the Council and appealed to the Superior Court of Harnett County.

It is admitted that the procedure before the Trial Committee and the Council of the State Bar was in conformity to the provisions of the act incorporating the State Bar, ch. 210, Public Laws 1933.

When the matter was called for trial in the Superior Court, and after the jury had been sworn and impaneled, but before any evidence was introduced, the respondent moved to dismiss the proceeding for want of jurisdiction, in that (1) the matter was not originally instituted in any court of competent jurisdiction, and no valid order of reference was made therein; (2) respondent had been deprived of his right of trial by jury, and all prior steps taken in the matter were without warrant of law. Overruled; exception.

The respondent then moved the court to strike from the statement of complaint all allegations pertaining to matters occurring prior to 1 July, 1933. Overruled; exception. The court did, however, later exclude all evidence pertaining to these matters, and they were not submitted to the jury.

The jury returned the following verdict:

"1. Did respondent, Edgar C. West, in his capacity as attorney at law, collect money for his client, Stacy Couser, individually and as administrator of his wife, from Atlantic Coast Line Railroad Company and retain part of the same without a *bona fide* claim thereto, as alleged in the complaint? Answer: 'Yes.'

"2. Did respondent, Edgar C. West, in his capacity as attorney at law, willfully deceive his said client, Stacy Couser, individually and as administrator of his wife, and was he guilty of other unprofessional conduct in connection with collections from Atlantic Coast Line Railroad Company, as alleged in the complaint? Answer: 'Yes.'"

Judgment on the verdict disbarring the respondent, from which he appeals, assigning errors.

J. L. Emanuel for North Carolina State Bar.

I. R. Williams for respondent.

STACY, C. J. There are two methods by which an attorney may be disbarred:

1. The one judicial. *Attorney-General v. Gorson,* 209 N. C., 320, 183 S. E., 392; *Attorney-General v. Winburn,* 206 N. C., 923, 175 S. E., 498; *In re Stiers,* 204 N. C., 48, 167 S. E., 382.

2. The other legislative. *In re Parker,* 209 N. C., 693, 184 S. E., 532; *Committee on Grievances v. Strickland,* 200 N. C., 630, 158 S. E., 110.

In the instant case, the legislative method alone has been pursued, and the regularity of the proceeding under the statute is admitted.

It is not perceived how the respondent can contend, with any hope of success, that his right of trial by jury has been taken away when the controverted matter has been tried by a jury. At the time of his motion, the jury had been sworn and impaneled, and was then ready to try the case. *In re Applicants for License,* 143 N. C., 1, 55 S. E., 635.

Nor is it perceived upon what ground the respondent can successfully contend that all prior proceedings were void after he had participated therein, without objection, up to the time of trial in the Superior Court. Compare *Board of Medical Examiners v. Gardner,* 201 N. C., 123, 159 S. E., 8; *S. v. Carroll,* 194 N. C., 37, 138 S. E., 339; *Mann v. Board of Optometry Examiners,* 206 N. C., 853, 175 S. E., 281. The proceeding partakes of the nature of a civil action, rather than that of a criminal prosecution. *In re Ebbs,* 150 N. C., 44, 63 S. E., 190; 2 R. C. L., 1088. A constitutional right, as well as a statutory one, may be waived by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629; *S. v. Mitchell,* 119 N. C., 784, 25 S. E., 783. Compare *S. v. Camby,* 209 N. C., 50, 182 S. E., 715.

The respondent's second exception is equally untenable. His motion to strike from the complaint all allegations pertaining to matters occurring prior to 1 July, 1933, even if meritorious, which is neither conceded nor decided, comes too late, C. S., 537, and no prejudice has been shown to have resulted from the court's action thereon. *Hosiery Mill v. Hosiery Mills,* 198 N. C., 596, 152 S. E., 794; *Pemberton v. Greensboro,* 203 N. C., 514, 166 S. E., 396; *Rucker v. Snider Bros.,* 211 N. C., 566. All the evidence pertaining to these matters was excluded and withheld from the consideration of the jury. The respondent has no just cause to complain at the court's action in this respect. *Roller v. McKinney,* 159 N. C., 319, 74 S. E., 966.

The respondent demurred to the evidence bearing upon the charges in the second class, or those relating to the Stacy Couser matters, which occurred after the incorporation of the State Bar, and moved for judgment of nonsuit under the Hinsdale Act, C. S., 567. To the overruling of this motion, the respondent excepted and assigns same as error. The ruling is correct. True, the evidence is not all one way. It is conflicting. There is more than a scintilla to support the charges. This required its submission to the jury. *Diamond v. Service Stores,* 211 N. C., 632; *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E., 601. The rule

is, that if diverse inferences may reasonably be drawn from the evidence, some favorable to the plaintiff and others favorable to the defendant, the cause should be submitted to the jury for final determination. *Hobbs v. Mann,* 199 N. C., 532, 155 S. E., 163.

Doubtless in recognition of the correctness of the court's ruling on the motion to nonsuit, the respondent has omitted any discussion of the exception in his brief. This renders it unnecessary to recapitulate the evidence or to set it out in detail. Its delineation would serve no useful purpose. The exception to its sufficiency is not well taken.

It will be noted that the charges falling in the first class, or those relating to the J. B. Colt Company matters, all of which occurred prior to 1 July, 1933, were eliminated "in deference to the opinion of the Supreme Court of North Carolina *In re Parker,* 209 N. C., 693." While the matter may even now be more or less academic, and certainly will in time become entirely so, as the probability of the question again arising will become increasingly remote, still it may not be amiss to observe that the opinion in the *Parker case, supra,* is scarcely authority for the deference suggested. That case, like this one, is authority only for what it decides. There, we were interpreting a record. The case was made to turn on the insufficiency of the evidence to show that the act complained of was done by the respondent in his capacity as an attorney. Only one issue was submitted to the jury. "Not on this record" was the answer to the inquiry: "Shall the respondent be disbarred by the statutory method?" This was the only question determined. All other matters were either continued in the trial court or not decided on appeal. Likewise, in the present case, we are principally concerned with the interpretation of the record.

Neither the *Parker case, supra,* nor this one, is predicated upon any lowering of the high standard of conduct required of attorneys. This standard is as high in North Carolina as it is elsewhere. *In re Applicants for License, Farmer and Duke,* 191 N. C., 235, 131 S. E., 661; *In re Dillingham,* 188 N. C., 162, 124 S. E., 130. It is not after the manner of our courts, however, to deprive a lawyer, any more than anyone else, of his constitutional guaranties or to revoke his license without due process of law. *In re Stiers, supra; Committee on Grievances v. Strickland, supra.* In other words, to borrow an expression from the field of sports, before any citizen, lawyer or layman, can be called out on strikes, the ball must be put over the plate. *Abernethy v. Burns,* 210 N. C., 636, 188 S. E., 97; *S. c.,* 206 N. C., 370, 173 S. E., 899. This was the holding in *Strickland's case, supra,* in *Stiers' case, supra,* in *Abernethy's case, supra,* and in *Parker's case, supra.* It is the just rule applicable alike to all and to which all may repair. It also has the merit of being easily understood. He may run that readeth it. Habakkuk 2:2.

The application of the rule to facts properly presented resulted in disbarment in each of the following cases: *Attorney-General v. Gorson, supra* (fraud in the procurement of license, consisting of false statement and *suppressio veri*); *Attorney-General v. Winburn, supra* (conduct unbecoming member of the bar, consisting of false statements and *suppressio veri*); *S. v. Harwood,* 206 N. C., 87, 173 S. E., 24 (confession in open court to commission of felony); *S. v. Hollingsworth, ibid.,* 739, 175 S. E., 99 (plea of *nolo contendere* to charge of false pretense and license voluntarily surrendered; reinstatement denied); *McLean v. Johnson,* 174 N. C., 345, 93 S. E., 847 (criminal convictions); *S. v. Pace,* 210 N. C., 255, 186 S. E., 366 (conviction of embezzlement; question of disbarment not debated, hence not adverted to in report of case).

In the absence of any reversible error, which respondent has failed to show, the verdict and judgment will be upheld.

No error.

E. F. YOUNG AND J. R. YOUNG v. H. W. LUCAS AND WIFE, CALLIE LUCAS.

(Filed 13 October, 1937.)

Attorney and Client § 9—Evidence held insufficient to hold wife liable for attorney fees in action against husband in which she was not a party.

In this action by attorneys against husband and wife to recover fees for professional services, the evidence favorable to plaintiffs tended to show that the husband had deeded land to the wife subject to a mortgage, that plaintiffs' services were rendered in an action against the husband alone to foreclose the mortgage, and that the wife knew of the action and that it had been advantageously settled by compromise, and that there was no contract made directly between the wife and plaintiffs. *Held:* The evidence is insufficient to be submitted to the jury on the question of the wife's authorization of the employment of plaintiffs for her or on an implied contract by her to pay plaintiffs, and the wife's motion to nonsuit should have been allowed.

CONNOR, J., concurring.

BARNHILL, J., dissenting.

CLARKSON and DEVIN, JJ., concur in dissenting opinion.

CIVIL ACTION for professional services rendered before *Harris, J.,* at June Term, 1937, of HARNETT. Reversed.

Godwin & Guy for plaintiffs, appellees.

J. R. Hood for feme defendant, appellant.

SCHENCK, J. This action was instituted in recorder's court of Dunn to recover attorneys' fee for professional services alleged to have been rendered in an action in the Federal Court by the Virginia Trust Company against H. W. Lucas. The plaintiffs obtained judgment and the defendants appealed to the Superior Court, where plaintiffs again obtained judgment and the *feme* defendant, Callie Lucas, appealed to the Supreme Court, assigning as error the court's refusal to allow her motion for judgment as in case of nonsuit made when the plaintiffs had introduced their evidence and rested their case and renewed after all the evidence was in. C. S., 567.

We are of the opinion, and so hold, that the trial judge erred in refusing to allow the appellant's motion. The evidence was to the effect that the action in the Federal Court, wherein the alleged services were rendered, was against the male defendant; that the *feme* defendant, the appellant, was not a party thereto. The plaintiff E. F. Young testified: "I do not recall that his wife (the appellant) ever went to my office prior to the settlement (of the case in the Federal Court). I never had any conversation or contract with her about it." All that the evidence, taken in the light most favorable to the plaintiffs, tends to prove is that the appellant was the wife of her codefendant, that the land, the foreclosure of a deed of trust on which was the subject of the action in the Federal Court, had, prior to the action of foreclosure, been deeded by her codefendant to her, and that she knew of the action in the Federal Court, and that said action had been advantageously settled by compromise. This was not sufficient to carry the case to the jury upon the theory that the *feme* defendant, appellant, authorized the employment for her of the plaintiffs, or that there was an implied contract by her to pay the plaintiffs.

For the error assigned, the judgment against the appellant is

Reversed.

CONNOR, J. I concur in the judgment of this Court, reversing the judgment of the Superior Court, on the ground that there was no evidence at the trial tending to show that the appealing defendant is liable to the plaintiffs for their fee for services rendered to her husband in an action to which she was not a party.

The question as to whether the appealing defendant is under a moral obligation to pay plaintiffs' fee is not presented to this Court. I therefore refrain from expressing any opinion as to the answer to that question. It is true that the defendant H. W. Lucas had conveyed to the defendant Callie Lucas the land which he had theretofore conveyed by the mortgage which the Virginia Trust Company had sought to foreclose by the action in the Federal Court. She was not liable for the

indebtedness secured by the mortgage, and had a right to look to her grantor to protect her interest in the land. This he undertook to do, by employing the plaintiffs to defend the action. Her grantor did not call upon her to defend the action, nor did the plaintiffs, who knew that she was the owner of the land subject to the mortgage, notify her that they looked to her for their fee for services in defending the action against her husband. I do not think that she owed plaintiffs any legal duty to pay their fee.

BARNHILL, J., dissenting: In addition to the facts cited in the opinion of the Court, the record discloses that H. W. Lucas conveyed to his wife, Callie Lucas, the *feme* defendant, a tract of land subject to a mortgage in the sum of $4,785.72; that thereafter, on 31 March, 1930, the Virginia Trust Company, holder of the mortgage, instituted a foreclosure suit against H. W. Lucas; that H. W. Lucas employed the plaintiffs to defend said suit; that after considerable effort the plaintiffs arrived at a compromise settlement in said suit, under the terms of which, by the payment of $1,500 cash, a reduction of $2,000 in the amount claimed was allowed by the Virginia Trust Company and an extension of time was granted for the payment of the balance. It does not appear that the Virginia Trust Company was seeking a personal judgment. Therefore, the only issue involved was the foreclosure of the property of the *feme* defendant. H. W. Lucas had no interest therein except to protect the property of his wife. She was the only one who stood to lose or gain by the suit.

The appealing defendant testified: "I heard them talking of the big suit brought by the Virginia Trust Company. My husband has always attended to things of this kind. He attends to things like the lawsuits and the larger things. At the time the suit was brought I had a deed to me for this land. . . . I heard my husband talking about having Mr. Young in the case at Raleigh. I heard talk about the settlement of the suit. I don't remember how much the cash payment was. I knew it took some cash." She further testified that she advanced part of the money the Virginia Trust Company required to be paid in cash in order to effect the settlement, and that she knew her husband was executing a chattel mortgage upon the crops raised on her land to secure the payment for the fertilizers advanced by the plaintiff. "He told me that Mr. Young was going to let him have $268.00, provided he would make him a note for his fee and all. I gave him the cash before he made the note. The note was paid." The plaintiff testified, referring to the $1,500 advanced, that "They paid me back." This is not denied by the defendant.

It would appear from this evidence not only that the *feme* defendant's husband usually looked after the suits and larger things in which the

defendant was interested, thus creating in him an implied agency to represent her, but that this defendant, with full knowledge that her husband was acting for and in her behalf in seeking to prevent a foreclosure of her land, acquiesced therein, conversed with him about it, furnished money to effect the settlement, took the full benefits of the settlement, and now refuses to pay.

Slight evidence of the agency of the husband for the wife is sufficient to charge her where she receives, retains and enjoys the benefit of the contract. 30 C. J., page 622.

Payments made by the principal on account of benefit received *may* amount to a ratification of the agent's unauthorized act in procuring the benefits, where at the time of the payments the principal has full knowledge of the transaction. *Williams v. Crosby Lumber Co.,* 118 N. C., 928.

On the facts appearing in this record, I am of the opinion that this defendant is charged with the moral obligation and the legal duty to pay plaintiff for his services.

I am authorized to say that MR. JUSTICE CLARKSON and MR. JUSTICE DEVIN concur in this dissent.

TOWN OF WILKESBORO, A MUNICIPAL CORPORATION, THROUGH ITS MAYOR, W. E. HARRIS; R. R. REINS, JOE R. BARBER, C. E. LENDERMAN, AND L. B. DULA, COMMISSIONERS; W. E. HARRIS, MAYOR OF THE TOWN OF WILKESBORO; P. L. LENDERMAN, TAX COLLECTOR AND CHIEF OF POLICE OF THE TOWN OF WILKESBORO; MRS. O. F. BLEVINS, WIDOW OF O. F. BLEVINS, TOWN CLERK AND TREASURER OF THE TOWN OF WILKESBORO, AND RUSSELL HENDREN, SUPERINTENDENT OF WATER FOR THE TOWN OF WILKESBORO, v. J. F. JORDAN, WILLIAM A. STROUD, J. R. HENDERSON, W. E. SMITHEY, C. A. LOWE, C. T. DOUGHTON, J. M. BUMGARNER, AND J. T. PREVETTE.

(Filed 13 October, 1937.)

Pleadings §§ 2, 16—Separate and distinct causes of action by different plaintiffs against different defendants may not be joined.

This action was instituted by a municipality and the officers thereof against defendants who had held the offices as the result of an illegal election. Plaintiffs sought to recover in their individual capacity for their salaries prior to their obtaining possession of their respective offices, and against the sureties on a bond filed by some of defendants in an action attacking the validity of the election, which bond was conditioned upon payment to plaintiffs of salaries received by defendants if plaintiffs should be successful in the action, and against defendants for fraudulent disbursement of town funds. *Held:* Defendants' demurrer for misjoinder of

parties and causes should have been allowed, since the town had no interest in the recovery by the officers in their individual capacity of the amounts alleged to be due them for salary, and since the individual plaintiffs had no right to maintain an action to recover for alleged fraudulent disbursement of town funds, nor were the sureties on the bond alleged to be liable either on that cause of action, or the action against the defendants not named in the bond. C. S., 507.

APPEAL by defendants from *Clement, J.*, at August Term, 1937, of WILKES. Judgment reversed and action dismissed.

The defendants demurred to the complaint on the ground of misjoinder of parties and causes of action.

These are the material allegations of the complaint: That the town of Wilkesboro is a municipal corporation, and plaintiffs Harris, Lenderman, Barber, Reins, and Dula were mayor and commissioners of said town, P. L. Lenderman, tax collector and chief of police, and Mrs. O. F. Blevins is the widow of O. F. Blevins, deceased, and claims as part of her year's allowance the balance of salary due O. F. Blevins as secretary and treasurer of the town.

That the defendants Jordan, Doughton, Henderson, and Lowe, by the use of illegal ballots at the election on 7 May, 1935, caused themselves to be wrongfully declared elected mayor and commissioners of said town, and unlawfully held said offices during the period from 16 August, 1935, to 11 December, 1935, when the individual plaintiffs came lawfully to the the exercise of said offices, in accordance with the decisions of the Supreme Court of North Carolina in the actions entitled *Wilkesboro v. Harris* (reported in 208 N. C., 749) and *Harris v. Miller* (reported in 208 N. C., 746).

That in the action entitled *Wilkesboro v. Harris, supra,* the defendants Jordan, Henderson, Doughton, and Lowe executed a bond to these individual plaintiffs (other than Russell Hendren) in the penal sum of $1,500, with defendants Bumgarner and Prevette as sureties, said bond conditioned that in case the named individual plaintiffs were successful in the action the defendants should pay said plaintiffs the salaries, fees, emoluments, and moneys received by the defendants during their occupancy of said offices.

That during the litigation over these offices, plaintiffs were required to and did turn over to defendants all the money, books, and property of said town, including cash, tax books, and tax sales certificates, and that defendants wrongfully and unlawfully collected from taxes, tax sales certificates, and water rents more than $6,000, and that from said funds of the town defendants made unlawful and fraudulent expenditures, and unlawfully and corruptly used a part of said funds to purchase bonds of said town, not in the order of issue (as provided by the agreement of the

town with the bondholders), from a bank in which two of the defendants were officers, which said bonds the bank had purchased at fifty cents on the dollar.

That the defendants withheld the salaries of plaintiff Harris in the sum of $50.00, that of P. L. Lenderman in the sum of $251.35, and that of O. F. Blevins in the sum of $77.00.

That the defendants, other than Bumgarner and Prevette, wrongfully withheld from plaintiff Russell Hendren, superintendent of water, salary amounting to $39.00.

"That plaintiffs are entitled to recover of defendants Bumgarner and Prevette the sums set out to the extent of $1,500, the amount named in their bond, which is hereto attached and made a part hereof."

"That the plaintiffs are entitled to recover of defendants, other than Bumgarner and Prevette, the total sums above set out, amounting to $6,296.32."

From judgment overruling the demurrer, defendants appealed.

Eugene Trivette and Chas. H. Gilreath for plaintiffs, appellees.

A. H. Casey, W. H. McElwee, and J. M. Brown for defendants, appellants.

DEVIN, J. An examination of the allegations of the complaint leads us to the conclusion that the demurrer on the ground of misjoinder of parties, and causes of action should have been sustained. The complaint joins (1) an action on contract by the plaintiffs Harris, Lenderman, and Blevins for the recovery from defendants Jordan, Henderson, Doughton, and Love, as principals, and Bumgarner and Prevette sureties, the different items of salary due the named plaintiffs, according to the condition of the bond attached to the complaint; (2) with an action by plaintiff Russell Hendren, superintendent of water, to recover of defendants, other than Bumgarner and Prevette, $39.00, being part of his salary wrongfully withheld by defendant (not included in the bond); and (3) an action, sounding in tort, by the town against the defendants other than defendants Bumgarner and Prevette, for six thousand dollars of town funds alleged to have been wrongfully collected and unlawfully and fraudulently expended by the defendants.

It is obvious that the individual plaintiffs, as such, under the allegations of the complaint, could not maintain an action to recover town funds wrongfully collected and fraudulently misapplied. Ordinarily, the town alone could be heard to make that claim. Equally, the town of Wilkesboro has no interest in the cause of action by the individual plaintiffs to recover of the defendants on the bond the different amounts alleged to be due them; and the defendants Bumgarner and Prevette,

the sureties on the bond, are not alleged to be in any way liable on the cause of action by the town against the other defendants for alleged fraudulent collection and disbursement of the funds of the town; nor are they alleged to be liable to plaintiff Hendren on his claim. Illustrating the mix-up in parties and causes of action, it appears that the town of Wilkesboro, party plaintiff in this action, was one of the signers of the bond upon which the action of its coplaintiffs is based, thus being placed in the unusual position of being joined as a party plaintiff in a suit for the breach of a bond which it executed.

The several causes of action united in the complaint do not affect all the parties to the action, as required by C. S., 507. *Sasser v. Bullard,* 199 N. C., 562. It is well settled in this jurisdiction that separate and distinct causes of action set up by different plaintiffs and against different defendants may not be incorporated in the same pleading. *Williams v. Gooch,* 206 N. C., 330; *Weaver v. Kirby,* 186 N. C., 387; *Rose v. Warehouse Co.,* 182 N. C., 107; *Roberts v. Mfg. Co.,* 181 N. C., 204.

In *Rose v. Warehouse Co., supra,* it was said: "The several causes of action which may be united or joined in the same complaint are classified and enumerated in C. S., 507; and, in addition, the following limitation is expressly incorporated therein: 'But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated.'"

It was said in *Land Co. v. Beatty,* 69 N. C., 329, that the plaintiff could not in the same complaint join a cause of action on contract against one defendant with a cause of action on the fraud of both. To the same effect is the holding in *R. R. v. Hardware Co.,* 135 N. C., 73, where the general principle is stated that all the parties must be affected by each cause of action to warrant their joinder.

The situation here set forth in the complaint differs from that upon which was predicated the rule that, where the facts alleged show a connected series of transactions, all tending to one end, in order to a conclusion of the whole matter in one suit, the complaint would be upheld, as was decided in *Trust Co. v. Peirce,* 195 N. C., 717; *Shaffer v. Bank,* 201 N. C., 415; *Young v. Young,* 81 N. C., 92; *Barkley v. Realty Co.,* 211 N. C., 540; *Leach v. Page,* 211 N. C., 622.

We are of opinion, and so decide, that the judgment overruling the demurrer must be reversed, and the action dismissed. *Bank v. Angelo,* 193 N. C., 576; *Shuford v. Yarborough,* 197 N. C., 150.

This disposition of the case renders it unnecessary to decide whether the complaint sufficiently states a cause of action against the defendants for alleged fraudulent disbursement of town funds.

Judgment reversed and action dismissed.

A. W. HOWARD v. QUEEN CITY COACH COMPANY, A CORPORATION.

(Filed 13 October, 1937.)

1. **Venue § 1—Evidence held sufficient to support finding that plaintiff's residence was in county in which action was instituted.**

The trial court found, upon supporting affidavits, that prior to the institution of the action plaintiff sold his residence in another county and moved his family and household effects from said county to a town in the county in which the action was instituted, and rented an apartment therein for a period of five months when he moved to another county, but that during that time plaintiff resided in the county in which the action was instituted, although plaintiff was away a considerable portion of the time on business and for medical attention. The court held on the facts found that at the time of the institution of the action plaintiff was a resident of the county, and refused defendant's motion to remove, N. C. Code, 469, 470. *Held:* The finding was supported by sufficient evidence, and defendant's motion was properly denied.

2. **Appeal and Error § 40a—**

The findings of fact in regard to residence of plaintiff upon defendant's motion to remove are conclusive on appeal when supported by competent evidence.

3. **Domicile § 1—**

Domicile or legal residence is made up of the fact of residence and the intent to make it a permanent home, without present intent to remove and with intent to return when absent from it.

4. **Venue § 8b: Appeal and Error § 37b—**

A motion for change of venue for convenience of witnesses and to promote the ends of justice is addressed to the sound discretion of the trial judge, and his action thereon is not reviewable upon appeal except upon abuse of discretion.

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

APPEAL by defendant from *Clement, J.*, at June Term, 1937, of McDOWELL. Affirmed.

This is a civil action for actionable negligence, instituted by plaintiff against defendant in McDowell County, N. C. The defendant moved to have the case removed to Buncombe County for trial: (1) On the ground that at the time of the institution of the action the plaintiff was a resident of Buncombe County; for "the convenience of witnesses and the ends of justice would be promoted by the change." The clerk of the Superior Court declined to remove the case, and the defendant appealed to the judge of the Superior Court. The judge presiding declined to remove the case, and the defendant excepted and assigned error to the order made and appealed to the Supreme Court. The only exception and assignment of error is to the order denying the motion to remove.

Morgan & Story for plaintiff.
Williams & Cocke for defendant.

CLARKSON, J. N. C. Code, 1935 (Michie), sec. 469, is as follows: "In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement; or, if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in his summons and complaint, subject to the power of the court to change the place of trial, in the case provided by statute."

Section 470: "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," etc.

The defendant in apt time filed a petition before the clerk of the Superior Court of McDowell County, N. C., alleging: "(1) The plaintiff at the time of the institution of this action was a citizen and resident of Buncombe County, North Carolina. (2) The ends of justice as well as the convenience of witnesses will be promoted by the change."

The clerk declined to remove the action, and, on appeal, the court below did likewise. The court below heard affidavits on the matters in controversy and found certain facts and rendered judgment as follows:

"1. The court finds as a fact that plaintiff alleges he was injured by collision between his automobile and the defendant's bus, and that said collision occurred in McDowell County; that it would be as convenient for witnesses to attend in McDowell County as in Buncombe County.

"2. The court finds as a fact that prior to 20 July, 1936, that the plaintiff was a resident of Buncombe County, living in the town of Black Mountain, and that on 26 July, 1936, the plaintiff sold his residence in Black Mountain and on 22 July, 1936, rented apartment or rooms in a home in the town of Marion and removed his household effects and family from Black Mountain in Buncombe County to Marion in McDowell County.

"3. The court further finds as a fact that the plaintiff is a traveling man; that he paid rent on his rooms in McDowell County in the town of Marion until January, 1937, at which time he left said county and moved to Siler City with his family. That during the time the plaintiff resided in Marion with his family he was away from home a considerable portion of the time in the transaction of his business, and in having a doctor in Charlotte treat himself and his wife.

"4. The court is of the opinion, and so holds, that at the time of the institution of this action in July, 1936, plaintiff was a *bona fide* resident of McDowell County, and as such resident is entitled to maintain his action in the Superior Court of said county.

"5. The court finds as a fact that the collision occurred near Marion, in McDowell County, and the court finds that it would be as convenient for the witnesses to attend court in McDowell County as it would be in Buncombe County, and that the ends of justice would not be promoted by removal of the cause to Buncombe County from McDowell County.

"Upon the findings, the court is of the opinion, and so holds, that the motion of the defendant for the removal of said cause is denied and the cause is retained for trial in McDowell County Superior Court."

In *Horne v. Horne,* 31 N. C., 99 (107), speaking to the subject, it is said: "The term domicile, in its ordinary and familiar use, means the place where a person lives, or has his home; in a large sense, it is where he has his true, fixed, and permanent home, to which, when absent from it, he intends to return, and from which he has no present purpose to remove. Two things, then, must occur to constitute a domicile—first, residence, and second, the intention to make it a home—the fact and the intent." *S. v. Carter,* 194 N. C., 293; *S. c.,* 195 N. C., 697.

In *Watson v. R. R.,* 152 N. C., 215 (217), it is written: "Probably the clearest definition is that in *Barney v. Oelrichs,* 138 U. S., 529: 'Residence is dwelling in a place for some continuance of time, and is not synonymous with domicile, but means a fixed and permanent abode or dwelling, as distinguished from a mere temporary locality of existence; and to entitle one to the character of a "resident," there must be a settled, fixed abode, and an intention to remain permanently, or at least for some time, for business or other purpose.' To same effect, *Coleman v. Territory,* 5 Okla., 201: 'Residence indicates permanency of occupation as distinct from lodging or boarding or temporary occupation. "Residence" indicates the place where a man has his fixed and permanent abode and to which, whenever he is absent, he has the intention of returning.' In *Wright v. Genesee,* 117 Mich., 244, it is said: 'Residence means the place where one resides; an abode, a dwelling or habitation. Residence is made up of fact and intention. There must be the fact of abode and the intention of remaining.' And in *Silvey v. Lindsay,* 42 Hun. (N. Y.), 120: 'A place of residence in the common-law acceptation of the term means a fixed and permanent abode, a dwelling place for the time being, as contradistinguished from a mere temporary local residence.' " *In re Ellis,* 187 N. C., 840 (842).

Under the well settled law, as above set forth, the court below found the facts upon sufficient and competent evidence—this is binding on us.

In *Watson's case, supra,* it is said (p. 217): "The facts found by the judge are conclusive upon us. He found that plaintiff was living at Spencer from March to May, when the injury occurred, as a car repairer, in the defendant's service, under a contract teminable at the will of either party, and that he had never intended to change his residence from Wayne County. Upon these facts, he properly held that the plaintiff retained his residence in Wayne, and refused the motion to remove. It was competent for the plaintiff to testify to his intent. *Hannon v. Grizzard,* 89 N. C., 116."

In *Bigham v. Foor,* 201 N. C., 14 (15), is the following: "Upon the facts found by the trial court, which are conclusive on appeal, as they are supported by competent evidence (*Hennis v. Hennis,* 180 N. C., 606), there was no error in holding that the defendant was a nonresident of the State within the meaning of chapter 75, Public Laws 1929, at the time of the collision between her automobile and the truck driven by the plaintiff. *Brann v. Hanes,* 194 N. C., 571; *Gower v. Carter,* 195 N. C., 687; *S. v. Carter,* 194 N. C., 293; *Roanoke Rapids v. Patterson,* 184 N. C., 135; *Hannon v. Grizzard,* 89 N. C., 116."

In the briefs of the litigants the law on the subject is practically admitted. The application of the law to the facts is the bone of contention. The court below found the facts upon sufficient competent evidence against defendant's contention, and we must be governed by this.

The removal of a case from one county to another for the convenience of witnesses is discretionary with the trial judge. *Belding v. Archer,* 131 N. C., 287; *Eames v. Armstrong,* 136 N. C., 392; *Oettinger v. Live Stock Co.,* 170 N. C., 152. In *Craven v. Munger,* 170 N. C., 424 (426), it is said: "The statute is explicit that the judge 'may' remove the cause to another county when it appears that the convenience of witnesses or the ends of justice may be served thereby. The language of itself makes it a matter of discretion in the court, and in the only four cases in which the matter has ever been contested by appeal, this Court has sustained the plain meaning of the words as giving the judge a discretionary power." A motion for the removal of a cause from one county to another for convenience of witnesses and to promote the ends of justice under this section is addressed to the sound discretion of the trial judge, and is not subject to review in the Supreme Court. *Western Carolina Power Co. v. Klutz,* 196 N. C., 358; *Causey v. Morris,* 195 N. C., 532. Except upon abuse of this discretion. *Grimes v. Fulton,* 197 N. C., 84.

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

Affirmed.

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

W. M. TALLEY v. BETSY ANN MURCHISON, SANDY MURCHISON AND WIFE, MARTHA MURCHISON, GEORGE MURCHISON, MAGGALINE MURCHISON, BEULAH MURCHISON, MOLLIE SMITH AND HUSBAND, IVERY SMITH, AND PLUMMER MURCHISON (ORIGINAL PARTIES DEFENDANT), AND SALLIE ANN SHYNE (ADDITIONAL PARTY DEFENDANT).

(Filed 13 October, 1937.)

1. **Partition § 5—In absence of plea of sole seizin, petitioner for partition is not required to prove title as in ejectment.**

Where defendant in partition proceedings denies the allegations in the petition that petitioner is a tenant in common with defendants and seized of an undivided fee simple interest in the land, but does not plead sole seizin, petitioner is not required to prove title as in an action in ejectment, and petitioner's record evidence, C. S., 1763, *is held* sufficient to be submitted to the jury upon the sole issue of whether petitioner is a tenant in common with defendants in the land.

2. **Partition § 6—**

The court found that a partition of the land could not be made without injury to the parties, and that sale of the land would be more advantageous to them than division, and ordered the lands sold for partition, C. S., 3233. *Held:* The findings supported by competent evidence sustained the order of sale for partition.

APPEAL by defendant Plummer Murchison from *Harris, J.*, and a jury, at June Term, 1937, of HARNETT. Affirmed.

This is a civil action, commenced before the clerk on petition for the partition of land, filed 22 February, 1937. Plaintiff alleged he was a tenant in common with defendants and seized in fee simple and in possession of one-seventh interest in 37½ acres of land, less 3 acres, describing same. That the other defendants, including Plummer Murchison, owned one-seventh interest, and prayed: "That the court will appoint some competent person to sell said lands, after due advertisement, to the highest bidder, for cash, and report his proceedings in regard to said sale within ten days after sale into the office of the court."

Upon answer being filed by the defendant Plummer Murchison, denying the material allegations of the petition, the case was transferred under the statute to the civil issue docket of the Superior Court for trial by the court and a jury at term. The case was tried at June Term, 1937, before Harris, J., and a jury, and from a verdict and judgment thereon in favor of the plaintiff, the defendant Plummer Murchison excepted, assigned errors, and appealed to the Supreme Court.

The issue submitted to the jury, and their answer thereto, were as follows: "Is the plaintiff W. M. Talley a tenant in common with the defendants in the land described in the complaint? Answer: 'Yes.'"

J. R. Hood for plaintiff.
Godwin & Guy for defendant Plummer Murchison.

CLARKSON, J. This is an action for partition. In *Barber v. Barber,* 195 N. C., 711 (712-13), it is said: "A tenant in common is entitled as a matter of right to partition of the land held in common, to the end that he may have and enjoy his share therein in severalty. *Foster v. Williams,* 182 N. C., 632; *Haddock v. Stocks,* 167 N. C., 70; *Holmes v. Holmes,* 55 N. C., 334. Whether or not, in a proceeding instituted under C. S., 3215, for partition of land, held by two or more persons as tenants in common, between or among such persons, there shall be an actual partition, or a sale for partition, as authorized by statute, involves a question of fact to be determined by the court. The statute provides that 'if it shall appear by satisfactory proof that an actual partition of the lands cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof.' C. S., 3233. When one tenant in common prays in his petition that the land be sold for partition, upon an allegation that an actual partition cannot be made without injury to some or all of the parties interested in the land, and the allegation is denied, no issue of fact is raised thereby, to be submitted to and passed upon by a jury, *Vanderbilt v. Roberts,* 162 N. C., 273; *Taylor v. Carrow,* 156 N. C., 8; *Ledbetter v. Pinner,* 120 N. C., 455."

None of the defendants filed answer except Plummer Murchison, who denied the material allegations of the petition. Plummer Murchison's statement of the question involved is: "Can a petitioner alleging ownership of an undivided one-seventh interest in 37½ acres of land for sale for division, on one of the tenants in common filing answer denying title and tenancy in common in the petitioner, make out a case sufficient to be submitted to the jury, without first proving title, possession, and joint tenancy, as in case of ejectment?" In a partition proceeding, unless sole seizin is pleaded, the petitioner is not required to prove title out of the State or adverse possession for 20 years or 7 years colorable title or title from common source by estoppel. Murchison did not plead sole seizin and the very question is decided against him in *Graves v. Barrett,* 126 N. C., 267. At pp. 269-270 it is said: "But in a petition for partition, title is not in issue, unless the defendants put it in issue by pleading 'sole seizin.' That was not done in this case. The Code, sec. 1892 (C. S., 3215), does not require averment of title as in ejectment, but simply an allegation of seizin and possession as tenants in common, and the seizin and possession of one are that of all. The allegations in the complaint and the denials in the answer raised only the ordinary issues in partition, (1) whether plaintiff and defendants were cotenants, and

(2) what interest the plaintiff possessed in said land. These issues were properly framed upon the pleadings, were submitted without exception, and upon the evidence the court could not charge otherwise than it did. If the defendants Charles and Bertha, by reason of their birth since the date of the deed, have no interest thereunder, they had no reason to oppose partition, and if they have an independent title, it was trifling with the court not to plead *sole seizin*, and put it in issue. If the defendants had pleaded *sole seizin*, the plaintiff would have been put on notice that the title to the land was in issue, and an issue should have been framed in accordance therewith. *Alexander v. Gibbon*, 118 N. C., 796; *Huneycutt v. Brooks*, 116 N. C., 788. But they have treated this as a petition in partition, denied merely the cotenancy of plaintiff, submitted to issues which raise that question only, and the case having been tried upon that view, they cannot now contend that the rules applicable to an action of ejectment should be applied. When the plea of *sole seizin* is not set up, the parties for the purpose of the proceeding are to be taken as tenants in common. *Pearson, C. J.*, in *Wright v. McCormick*, 69 N. C., 14."

There was plenary evidence to sustain the issue—it was competent record evidence. C. S., 1763; *Ratliff v. Ratliff*, 131 N. C., 425; C. S., 1779. The motion for nonsuit made by Murchison (C. S., 567) was properly overruled by the court below.

The complaint was sworn to, and in paragraph 6 was the following: "That an actual partition of the lands themselves cannot be made without injury to the parties interested, owing to the small number of acres to which each would be entitled in division."

The other tenants in common, all made parties defendants and served with process, filed no answer denying this allegation in the complaint. The 37½ acres, less 3 acres, if actual division were made, would give each tenant only a few acres of land. Under C. S., 3233, upon satisfactory proof that actual partition cannot be made without injury to some or all of the parties interested, *"the court shall order a sale,"* etc. The court found: "It further appearing to the satisfaction of the court that a partition of the land mentioned in the petition cannot be made without injury to the petitioners, and it also appearing that a sale of said lands would be more advantageous to the petitioners than a division thereof," etc.

We think there was some competent evidence for the court below to base its finding to order a sale of the land. The court in the judgment ordered a sale. On the record, we see no prejudicial or reversible error.

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

Affirmed.

J. W. McALISTER v. YANCEY COUNTY.

(Filed 13 October, 1937.)

1. Taxation § 2c—

Ch. 116, secs. 1 and 2, Public Laws of 1919, imposing a privilege tax on the ownership of dogs is valid and constitutional, and is made applicable to Yancey County by ch. 318, Public Laws of 1929, which repealed ch. 84, Public Laws 1923. N. C. Code, 1673, 1684 (b).

2. Animals § 2: Mandamus § 1—County is not liable in corporate capacity for damage inflicted by dogs and mandamus will not lie to compel payment.

Ch. 116, sec. 7, Public Laws of 1919, does not impose liability on a county in its corporate capacity for damages to person or property caused by dogs, a claim for such damage, when established under the statute, being payable only on order of the board of commissioners, and then only from moneys derived from the tax on dogs therein imposed, and *mandamus* will not lie against the county to compel payment of such damage upon allegation that its board of commissioners arbitrarily refused to appoint a jury to investigate the claim as required by the statute, plaintiff's remedy on the allegations being against the board of commissioners to compel them to act as required by the statute.

APPEAL by defendant from *Alley, J.*, at June Special Term, 1937, of YANCEY. Reversed.

This action was begun in the Superior Court of Yancey County on 10 April, 1937.

The facts alleged in the complaint as constituting plaintiff's cause of action against the defendant are as follows:

"1. That the plaintiff is a citizen and resident of Yancey County, North Carolina.

"2. That during and prior to the month of March, 1936, the plaintiff was the owner and legal possessor of 24 head of sheep, in Cane Creek Township, county and State aforesaid.

"3. That during the said month of March, 1936, the 24 head of sheep hereinbefore mentioned were killed by dogs in the county and State aforesaid.

"4. That on 3 August, 1936, the plaintiff presented his verified and itemized claim to the board of commissioners of defendant county for payment by said county, as provided by law.

"5. That the defendant, through its board of commissioners, refused to recognize its liability; that said board of commissioners has arbitrarily, grossly, flagrantly, and wantonly abused its discretion, and has arbitrarily and willfully refused to appoint a jury to appraise the sheep killed by dogs, or to ascertain whose dogs killed the sheep of the plaintiff

and to report to the board of commissioners of defendant county, as provided by law.

"6. That the sheep owned by the plaintiff and killed by dogs as hereinbefore alleged were reasonably worth the sum of $125.00."

On these facts plaintiff prayed judgment:

"1. For a writ of *mandamus* compelling the board of commissioners of defendant county to pay said claim.

"2. For the costs of the action, to be taxed by the clerk of the court; and,

"3. For such other and further relief as to the court may seem just and proper."

In apt time the defendant filed its demurrer, in writing, to the complaint on the following grounds:

"1. That the court has no jurisdiction of the person of the defendant or of the subject of the action, in that the plaintiff's action, if any he has, is under the statutes of the State of North Carolina, and the penalty for the failure to discharge any duty imposed by said statutes is therein set forth.

"2. That there is a defect of parties defendant for the specific reason that only the corporate defendant Yancey County is a party defendant, and the members of the board of commissioners of Yancey County have not been made parties to the action.

"3. That the complaint does not state facts sufficient to constitute a cause of action in that:

"(a) It fails to show any facts creating liability on the part of the defendant to pay plaintiff's alleged claim;

"(b) It fails to show that there has been satisfactory proof offered to the board of commissioners of Yancey County of any injury to or destruction of property, which said board of commissioners has a duty to investigate, or for which the defendant is required to pay damages;

"(c) It fails to show that the defendant now has or has ever had funds in hand out of which the alleged claim of plaintiff, if lawful, could have been paid;

"(d) It seeks a writ of *mandamus* to compel the board of commissioners of Yancey County to pay plaintiff's claim without showing a clear legal right on the part of the plaintiff to demand such writ, and without showing any legal obligation on the part of the defendant to perform any act whatever with respect to said claim."

At the hearing of the action on the complaint and demurrer, it was ordered by the court that the demurrer be and the same was overruled, and that the defendant have thirty days within which to file an answer to the complaint.

From the order overruling its demurrer, the defendant appealed to the Supreme Court, assigning error in the order.

Bill Atkins for plaintiff.
Anglin & Randolph for defendant.

CONNOR, J. It is provided by statute in this State that every person who owns or keeps a dog of the age of six months or more shall pay annually, for the privilege of owning or keeping said dog, a license tax, the amount of the tax to be determined by the sex of the dog. Sections 1 and 2 of chapter 116, Public Laws of North Carolina, 1919; N. C. Code of 1935, section 1673. Since the repeal of chapter 84, Public Laws of North Carolina, 1923, by chapter 318, Public Laws of North Carolina, 1929; N. C. Code of 1935, section 1684 (b), this statute and all its provisions are applicable to persons residing in Yancey County. The statute is valid and constitutional. See *Board of Commissioners v. George*, 182 N. C., 414, 109 S. E., 77; *Newell v. Green*, 169 N. C., 462, 86 S. E., 291.

It is provided by section 7 of the statute "that the money arising under the provisions of this act shall be applied to the school funds of the county in which said tax is collected; provided, it shall be the duty of county commissioners, upon complaint made to them of injury to person or of injury to or destruction of property by any dog, upon satisfactory proof of such injury or destruction, to appoint three freeholders to ascertain the amount of damages done, including necessary treatment, if any, and all reasonable expenses incurred, and upon the coming in of the report of such jury of the damage as aforesaid, the said county commissioners shall order the same paid out of any moneys arising from the tax on dogs, as provided in this act."

Under the provisions of this statute, no liability for damages resulting from an injury to person or from an injury to or destruction of property by dogs is imposed upon a county in its corporate capacity. A claim for such damage, when established in accordance with the provisions of the statute, is payable only upon the order of the board of commissioners of the county, and then only from moneys which have arisen or which shall arise from the tax on dogs owned or kept by persons who reside in the county. Such claim is in no event payable out of the general fund of the county. For this reason, no action can be maintained against a county to which the statute applies for damages resulting from injury to person or from injury to or destruction of property by dogs.

If, as alleged in the complaint, the board of commissioners of Yancey County has arbitrarily refused to consider the claim of the plaintiff, and to hear proof of such claim, and determine whether or not such proof was satisfactory to said board, as it was its statutory duty to do, then and in that event the plaintiff can maintain an action against said board of commissioners for a writ of *mandamus* compelling the said

board of commissioners to consider his claim, and determine whether or not his proof of said claim is satisfactory to the said board. See *Reed v. Farmer,* 211 N. C., 249, and *Barnes v. Commissioners,* 135 N. C., 27, 47 S. E., 737.

There was error in the order overruling the demurrer in this case. The order is

Reversed.

NEWLAND SPARKS AND WIFE, ELLA SPARKS, BY HER NEXT FRIEND, G. C. WILLIS, v. TENNESSEE MINERAL PRODUCTS CORPORATION.

and

ELLA SPARKS, BY HER NEXT FRIEND, G. C. WILLIS, v. TENNESSEE MINERAL PRODUCTS CORPORATION.

(Filed 13 October, 1937.)

1. **Negligence §§ 3, 19a—Evidence held sufficient for jury on issue of negligence in mining operations.**

   Evidence that defendant mining company's agent discovered that dynamite had been put in a blasting hole without his knowledge or direction, and that without investigating the other blasting holes that had been drilled, he further loaded, wired, and fired them, without notice to nearby property owners, and that the explosion therefrom was exceptionally violent and caused large rock to be thrown through the roof of plaintiffs' house, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence.

2. **Negligence § 3—**

   The operator of a mine is liable for damage caused by negligence in the use of unsafe or unnecessarily violent explosive material, or by the careless management of materials in common use.

3. **Negligence §§ 3, 18—**

   In an action to recover for damage caused by mining operations, the evidence may render it competent and material for the jury to consider whether it was defendant's custom to give notice before setting off a blast, and whether such notice was given before the explosion causing injury.

4. **Damages § 1—**

   While ordinarily fright and nervousness alone may not be made an element of damage, if such fright and nervousness is caused by defendant's negligence, and results in impairment of health and loss of bodily power, the injury is a proper subject of compensatory damages.

APPEAL by plaintiffs from *Clement, J.,* at July Term, 1937, of MITCHELL. Reversed.

These two consolidated actions were instituted to recover damages for personal injuries to the plaintiff Ella Sparks, and for property damage

to the house of Ella Sparks and her husband, Newland Sparks, resulting from the alleged negligent manner in which the defendant carries on its blasting operations in mining for feldspar. From the judgment of nonsuit entered at the conclusion of all the testimony, plaintiffs appealed.

Geo. M. Pritchard, M. A. James, Geo. L. Greene, and Chas. Hutchins for plaintiffs, appellants.

Walter C. Berry, McBee & McBee, and Walter Hoyle for defendant, appellee.

BARNHILL, J. The evidence, viewed in the light most favorable to the plaintiffs, tends to show that when the defendant's blasting in connection with its mining operations is carried on in a careful and workmanlike manner it would only throw small gravel and small rock at short distances, never as far as to the residence of the plaintiffs, and that the noise from the blast was not such as to disturb the plaintiffs; that on the day in question there was an unusually loud and violent explosion caused by the blasting of the defendant; that this blasting hurled rock through the roof, walls, and windows of the house and into the kitchen of plaintiffs; that the *feme* plaintiff was then in her kitchen; that she suffered terrible shock and injury to her nerves, resulting in loss of weight, nervousness, periodical confinement in bed, and other ailments; that the defendant ordinarily gave notice to the plaintiffs and others prior to blasting, but that on this occasion it failed to give any notice to these plaintiffs; that about 28 days prior to the blasting in controversy the defendant's employees had drilled seven deep holes and thirty dobie holes; that the holes ranged from seven inches to ten feet deep; that on the day of the blasting defendant's employees ascertained that the gunny sacks put in the holes when drilled had been removed and the holes had been filled with rocks, sticks, steel, and other debris; that defendant's agent in charge of blasting began to unstop the holes; that in so doing he located one-half joint of dynamite in one of the holes, which was not put there by him or with his knowledge; that when he found the dynamite he did no more work whatsoever towards cleaning out the holes, because he became frightened. He went ahead and loaded them and put from one-fourth joint to one-half joint in ten dobie holes and one-half joint in the eight-foot hole, which had been cleared out a distance of from 18 inches to four feet; that thereupon the ten dobie holes and the large hole were connected to the lead wire and "fired"; that the explosion which resulted was out of proportion to the quantity of dynamite put in the holes by the blaster.

It appears from this testimony that the blast in question was unusually violent and out of the ordinary, and that it threw rocks a distance of

125 feet over, across, and upon the house of the plaintiffs, doing damage to the house and frightening the *feme* plaintiff to such an extent that she has been more or less incapacitated since. It also tends to show that the agent of the defendant discovered that dynamite had been put in the blasting holes without his knowledge or direction, and that notwithstanding such information he abandoned further effort to clear out the holes or to ascertain to what extent the holes had been loaded with dynamite by some other person; that he, having received warning from his discovery, and having knowledge that the holes had been tampered with and dynamite put therein, proceeded to further load the holes and to wire and fire them without first ascertaining to what extent, if any, the holes had already been loaded with dynamite. In that connection defendant's witness testified: "I didn't clear the 8-foot hole clean because there was in it rock and dirt and sticks and I never got it cleaned out and I couldn't tell you what was in it down there, only there was bound to have been some explosive. I don't know what was in that hole, but I found enough to be careful. It kind of excited me; you see this one hole was actually loaded and nobody knew about it. Dobie holes are more dangerous to scatter little things than the holes drilled and loaded deep. They make little damage. A big damage is like I tell you, you have to throw big rocks to go through a house and you have got to have more than dobies shooting a large hole in a house."

This evidence was sufficient to be submitted to the jury upon the question of defendant's negligence. Where there is testimony tending to show that injuries done to the adjacent land, or the buildings on it, were due to the use of unsafe or unnecessarily violent explosive material, or were caused by the careless management of the materials in common use, and also contradictory evidence, it is for the jury to find the facts upon which the question of negligence depends. Where a human being is killed or injured at his dwelling on his own land by a blast on the right of way, condemned out of the same tract, in addition to passing upon the questions whether proper material was used and handled with skill, the testimony may make it material for the jury to determine whether the agents of the corporation had been accustomed to give the injured party a signal before igniting the powder, and, if so, whether such notice was given before the explosion which caused the injury. *Blackwell v. R. R.*, 111 N. C., 151, and cases therein cited.

The fact that the *feme* plaintiff was not actually struck by one of the flying rocks does not necessarily preclude recovery. *Wiggins v. R. R.*, 171 N. C., 773.

While fright and nervousness alone, unaccompanied or followed by physical injury, do not constitute an element of damages, if this fright and nervousness is a natural and direct result of the negligent act of the

defendant and naturally and directly causes an impairment of health or loss of bodily power, then this would constitute an element of injury to be considered by the jury. *Kimberly v. Howland*, 143 N. C., 398; *Kirby v. Stores Corp.*, 210 N. C., 808.

The judgment of nonsuit is

Reversed.

J. C. THOMPSON v. HARNETT COUNTY, A BODY POLITIC AND CORPORATE, AND J. B. ENNIS, J. S. BARKER, G. R. NOEL, E. L. COOK, AND A. A. CAMERON, AS THE BOARD OF COUNTY COMMISSIONERS OF HARNETT COUNTY.

(Filed 13 October, 1937.)

Taxation § 4—Vote is not necessary for issuance of county bonds to refund township bonds constituting valid existing debt of county.

Defendant county proposed to issue bonds to refund bonds of several of its townships, which bonds constituted a valid existing debt of the county, the county having received the benefit of the proceeds of the bonds and having agreed to assume the indebtedness prior to the adoption of the amendment to Art. V, sec. 4. Plaintiff contended that the county bonds could not be issued without a vote by mandate of Art. V, sec. 4, as amended. *Held:* The proposed county bond issue was to refund a valid existing debt of the county within the meaning of Art. V, sec. 4, as amended, and under the exception therein provided a vote is unnecessary, nor could the means for the repayment of the bonds be adversely affected by any constitutional change.

APPEAL by plaintiff from *Harris, J.*, at Chambers, 26 June, 1937. From HARNETT. Affirmed.

This is a motion in the cause, filed 26 June, 1937. The prayer was: "Wherefore, the plaintiff prays that the county commissioners be permanently enjoined and restrained from carrying out their proposed scheme of refunding the township indebtedness by an issuance of county bonds."

The motion came on for hearing and the following judgment was rendered: "This cause coming on to be heard before the undersigned judge, holding the courts of the Fourth Judicial District, at Chambers, both the plaintiff and the defendants being represented by counsel, and having waived all notice, agreed to the hearing of the cause at this time and place, the court finds the following facts and conclusions of law: (1) That the bond issues of the several townships of Harnett County referred to in the complaint constitute a valid, existing indebtedness of the several townships of Harnett County as set forth in the original complaint. (2) That this indebtedness was incurred for the benefit of the county as a whole and the county has a right and has agreed in its

proposed issuance of new bonds to assume the said indebtedness, and the said agreement on the part of the county was made prior to the adoption of the amended section 4 of Article V of the Constitution in 1936. (3) That the proposed bond issue of Harnett County is for the purpose of funding a valid existing debt within the meaning of the amended section 4 of Article V of the Constitution. Therefore, the motion of the plaintiff for an injunction is denied and the proposed issuance of bonds is declared to be valid and lawful exercise of the authority vested by law in the board of commissioners. This 26 June, 1937. W. C. Harris, *Judge Presiding,* etc."

To the foregoing judgment plaintiff excepted and assigned error and appealed to the Supreme Court.

Jernigan, Godwin & Strickland for plaintiff.
H. C. Strickland, I. R. Williams, and Ross & Ross for defendants.

CLARKSON, J. The General Assembly of North Carolina, at its session of 1935, submitted several amendments to be voted on by the qualified voters of the State at the next general election, which was in November, 1936. The following one was ratified, which is now Article V, sec. 4, of the Constitution of North Carolina, and reads as follows: "The General Assembly shall have the power to contract debts and to pledge the faith and credit of the State and to authorize counties and municipalities to contract debts and pledge their faith and credit, for the following purposes: To fund or refund a valid existing debt; to borrow in anticipation of the collection of taxes due and payable within the fiscal year to an amount not exceeding fifty per centum of such taxes; to supply a casual deficit; to suppress riots or insurrections, or to repel invasions. For any purpose other than these enumerated, the General Assembly shall have no power, during any biennium, to contract new debts on behalf of the State to an amount in excess of two-thirds of the amount by which the State's outstanding indebtedness shall have been reduced during the next preceding biennium, unless the subject be submitted to a vote of the people of the State; and for any purpose other than these enumerated the General Assembly shall have no power to authorize counties or municipalities to contract debts, and counties and municipalities shall not contract debts, during any fiscal year, to an amount exceeding two-thirds of the amount by which the outstanding indebtedness of the particular county or municipality shall have been reduced during the next preceding fiscal year, unless the subject be submitted to a vote of the people of the particular county or municipality. In any election held in the State or in any county or municipality under the provisions of this section, the proposed indebtedness must be ap-

proved by a majority of those who shall vote thereon. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

This case was before this Court and the decision filed 18 March, 1936 —*Thomson v. Harnett County et al.*, 209 N. C., 662.

It is contended by plaintiff that the above amendment restricted the power of the county to issue bonds, unless submitted to a vote of the people of the particular county. We cannot so hold. It does to some extent, but one of the exceptions is "to fund or refund a valid existing debt." The objection complained of by plaintiff was a valid existing debt of the county, and so decided in the *Thomson case, supra.* In that decision the judgment of the court below was affirmed, which reads, in part, as follows (p. 663): "That the county of Harnett as a whole received a direct benefit from the expenditure of the money represented by said indebtedness, and the proposed underwriting of said indebtedness by the issuance of county bonds is in accordance with law and for a county purpose. That the carrying out of the proposed arrangements, as outlined in the complaint, will violate no constitutional right of the plaintiff, or any other taxpayer, but will inure to the benefit of the plaintiff and all other taxpayers of the county as a whole. Therefore, the motion of the plaintiff for an injunction is denied, the proposed issuance of bonds is declared to be a valid and lawful exercise of the authority vested by law and in said board of commissioners, and the action is therefore dismissed. N. A. Sinclair, *Judge.*"

In *Nash v. Comrs. of St. Pauls,* 211 N. C., 301 (303), it is said: "It is recognized that the bonds now outstanding, which defendants seek to refund, could not be adversely affected by any act of assembly under the constitutional change, 'for a state, no more by constitutional amendment than by statute, can impair the vested rights held by the creditor in assurance of his debt' (citing authorities). It is likewise well established that the laws in force at the time and place of the making of contracts enter into and become integral parts thereof as much so as if they had been expressly incorporated therein," citing authorities.

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

Affirmed.

R. C. COPNEY v. W. M. PARKS.

(Filed 13 October, 1937.)

Arbitration and Award § 1—Uniform Arbitration Act does not exclude common-law remedy of arbitration.

The Uniform Arbitration Act. ch. 94, Public Laws of 1927, N. C. Code, 898 (a) (x), does not exclude the common-law remedy of arbitration, but is cumulative and concurrent thereto, and the act does not prevent the parties to a controversy from contracting by parol to submit their differences to arbitration in cases where a parol agreement on the subject matter would be enforceable, and an award reached under the parol agreement to arbitrate will not be invalidated by reason of failure to follow in all respects the method and procedure prescribed by the statute.

APPEAL by defendant from *Daniels, J.*, at April Term, 1937, of WAYNE. No error.

Plaintiff's action was instituted to enforce an award made pursuant to an agreement to arbitrate a disputed account between the parties.

Plaintiff alleged and offered evidence tending to show that he was a half-share tenant on land of the defendant during the year 1935, that a controversy arose as to the settlement of accounts and proceeds of sale of crops, and that a parol agreement was entered into between them to submit all papers, books, accounts, and evidence to Henry H. Brown as arbitrator to determine and settle the matter, they to be bound by his award.

That, in accordance with this agreement, the arbitrator considered all the evidence and records submitted by both sides, and found that the defendant was indebted to plaintiff in the sum of $340.90, and made his award in writing to that effect.

Defendant denied that he entered into an arbitration agreement, and denied that he was indebted to the plaintiff in any amount.

Appropriate issues were submitted to the jury, who found for their verdict that an agreement to arbitrate their differences was entered into between the parties, as alleged in the complaint, and that, as set out in the award, the defendant was indebted to plaintiff in the sum of $340.90.

From judgment on the verdict defendant appealed.

Scott B. Berkeley for plaintiff, appellee.

Fred P. Parker, Jr., and W. A. Deeds for defendant, appellant.

DEVIN, J. The defendant concedes that there was evidence to support the verdict, but contends that by chapter 94, Acts of 1927, known as the

Uniform Arbitration Act, an exclusive method for the determination of matters by arbitration was prescribed, and that plaintiff's action to enforce an award based upon a parol agreement, not in accordance with the act, cannot be maintained.

The Uniform Arbitration Act of 1927 (codified in Michie's N. C. Code as secs. 898 [a] to 898 [x]) provides that: "Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this article, any controversy existing between them at the time of the agreement to submit. Such an agreement shall be valid and enforceable, and neither party shall have the power to revoke the submission without the consent of the other party or parties to the submission save upon such grounds as exist in law or equity for the rescission or revocation of any contract." Other sections of the act prescribe the procedure and contain provisions for the enforcement of the award.

This act was considered by this Court in *Andrews v. Jordan,* 205 N. C., 618. In that case it was said, *Clarkson, J.,* speaking for the Court: "The parties to this controversy did not submit it to be arbitrated in conformity with the provisions of this article. The action was pending in the Superior Court, and referred by the court to a referee when the agreement to arbitrate was entered into. If the defendant intended that the Uniform Arbitration Act and its provisions should apply, it should have been written into the agreement to arbitrate."

At common law no particular form was necessary for the submission of a controversy to arbitration, and the agreement therefor was not required to be in writing in those cases where the subject matter was such that a parol agreement would be enforceable.

While there is some support in other jurisdictions for the view that statutory provisions for arbitration exclude the common law remedy for the settlement of disputes by arbitration, it has been generally held that statutes relating to arbitration, unless expressly exclusive of other methods, do not abrogate the common-law right, by contract, to submit matters in controversy to arbitration, and that the statutory methods of arbitration are to be regarded merely as constituting an enlargement on the common-law rule, and that the provisions of the statute are cumulative and concurrent rather than exclusive. *Fuerst v. Eichberger,* 224 Ala., 31; *Gannon v. McClannahan,* 204 Ky., 67; *Johnsen v. Wineman,* 34 N. D., 116; *Isaac v. Ins. Co.,* 301 Pa., 351; *Ezzell v. Rocky Mt. Co.,* 76 Col., 409; *Utah Construction Co v. Railway Co.,* 174 Cal., 156; 6 Corpus Juris Secundum, 134; 3 American Jurisprudence, 838.

We conclude that upon reason and authority, the Uniform Arbitration Act does not prevent parties to a controversy from contracting by parol,

in proper cases, to settle their differences by the simple and speedy method of arbitration, and that the award may not be invalidated by reason of failure to follow in all respects the method and procedure prescribed by the statute.

In the trial we find

No error.

GEORGE W. HIGGINS AND EVA HIGGINS GIBBS AND HUSBAND, H. C. GIBBS, v. GUY HIGGINS AND WIFE, CINDY HIGGINS, BOB (R. L.) HIGGINS AND WIFE, WINNIE HIGGINS, ET AL.

(Filed 13 October, 1937.)

1. Partition § 5—

Where defendants in partition proceedings filed answer pleading sole seizin, the proceeding becomes in effect an action of ejectment.

2. Same: Ejectment § 13—In action to recover land plaintiff may attack deed set up in answer without allegation of its invalidity.

In this proceeding in partition defendants pleaded sole seizin, and alleged that the common ancestor under whom plaintiffs claimed had deeded the land to them prior to his death. Plaintiffs introduced the deed in evidence for the purpose of attack, and offered evidence of mental incapacity of the grantor, which evidence was excluded because plaintiffs had not filed a reply alleging its invalidity. *Held:* The exclusion of the evidence was erroneous, defendants having given notice in their answer that they relied upon the deed in question to establish their title, and plaintiffs being entitled, therefore, to anticipate defendant by introducing the deed for the purpose of attack.

APPEAL by the plaintiffs from *Alley, J.*, at June Special Term, 1937, of YANCEY. New trial.

Anglin & Randolph for plaintiffs, appellants.

G. D. Bailey and Charles Hutchins for defendants, appellees.

SCHENCK, J. This was a proceeding for partition of land, begun before the clerk. Two of the defendants pleaded sole seizin and the other defendants filed no answer. The case was then transferred to the court at term. The proceeding thereby became in effect an action of ejectment. *Ditmore v. Rexford,* 165 N. C., 620.

The plaintiffs alleged that J. N. Higgins died seized of a certain tract of land in Yancey County, leaving them and the defendants as his heirs at law, and that they desired to hold their interests in said land in severalty, and prayed that said lands be partitioned among the plaintiffs and defendants as their several interests appeared.

The defendants Bob (R. L.) Higgins and his wife, Winnie Higgins, filed answer and admitted that J. N. Higgins had died and that the parties, plaintiffs and defendants, were his heirs at law, but denied that he was seized of the land at the time of his death, since he had conveyed the said land to them prior thereto by deed duly recorded 28 May, 1936, in Book 79, at pp. 89-90, Record of Deeds of Yancey County.

The plaintiffs introduced in evidence a deed from one Marinda Higgins to John (J. N.) Higgins covering the *locus in quo,* recorded 12 December, 1885, in Book 10, at p. 191, Record of Deeds for Yancey County, and then offered to introduce in evidence for the purpose of attack the deed from J. N. Higgins to R. L. Higgins and wife, Winnie Higgins, mentioned in the answer, stating that they proposed to show that J. N. Higgins at the time he signed said purported deed was without sufficient mental capacity to make a valid conveyance. Plaintiffs also offered to introduce in evidence testimony of certain witnesses tending to prove that J. N. Higgins was without mental capacity to make a valid conveyance at the time he signed the said purported deed. To the introduction in evidence of the purported deed and of the testimony attacking same the defendants objected, and the objections were sustained, and the plaintiffs reserved exceptions.

It appears in the record that the court predicated its ruling upon the fact that there was no reply filed by the plaintiffs containing any allegation upon which the contention of lack of mental capacity in the grantor in the deed from J. N. Higgins to R. L. Higgins and wife, Winnie Higgins, could be based. This ruling was erroneous.

The second syllabus of *Fitzgerald v. Shelton,* 95 N. C., 519, which properly interprets the opinion, reads: "In an action to recover land, it is competent for one party to show that a deed offered by the other, in support of his title, is void for want of capacity in the vendor, although such deed may have been specially set up in the pleadings and relied upon, and no formal reply thereto or notice of attack given before that trial."

In the ejectment case of *Alley v. Howell,* 141 N. C., 113, wherein there was no allegation of lack of mental capacity, the Court said: "The judge properly admitted evidence upon the question of the mental capacity of Susan Ervin (the common source of title) to execute the deed, as that went to the issue whether legal title had passed to the defendant, and evidence (if offered) of fraud in the *factum* would also have been competent. *Mobley v. Griffin,* 104 N. C., 112; *Jones v. Cohen,* 82 N. C., 80; *Young v. Greenlee, ibid.,* 346."

In *Helms v. Green,* 105 N. C., 251, it is said: ". . . In actions for the recovery of land, as in the old action of ejectment, any deed offered as a link in a chain of title is thereby exposed to attack for

incapacity in the maker or because it was void under the statute of frauds, though it may not have been mentioned in the pleadings. *Jones v. Cohen,* 82 N. C., 75; *Fitzgerald v. Shelton,* 95 N. C., 519."

The fact that the plaintiffs offered in evidence the deed in question for the purpose of attack, instead of waiting to make the attack when the defendants had offered it to prove their title, makes no difference in principle. The defendants had given notice in their answer that they relied upon the deed in question to establish their title, and would therefore introduce it in evidence, and this notice enabled the plaintiffs to anticipate the defendants by introducing the deed for the purpose of attack.

For the errors assigned, the plaintiffs are entitled to a

New trial.

STATE HIGHWAY AND PUBLIC WORKS COMMISSION v. C. B. BASKET ET AL.

(Filed 13 October, 1937.)

Eminent Domain § 6—Highway Commission may condemn top soil for road construction.

The State Highway and Public Works Commission is authorized by ch. 2, sec. 22, Public Laws of 1921 (N. C. Code, 3846 [bb]) to acquire by condemnation top soil deemed necessary and suitable for road construction, "top soil" being included in the generic term "earth," and its power to acquire top soil is not limited to lands contiguous to the highway upon which it is to be used.

CONNOR, J., dissenting.

THIS was a condemnation proceeding, instituted in VANCE Superior Court and heard by *Parker, J.,* at Chambers, on 10 July, 1937, in HALIFAX. Affirmed.

Charles Ross for petitioner, appellee.

J. H. Bridgers and Jasper B. Hicks for respondents, appellants.

SCHENCK, J. On 3 July, 1937, the petitioner procured from Harris, J., an order temporarily restraining the respondents from interfering with its taking top soil from the lands of the respondents with which to construct a public highway, and on 5 July, 1937, the respondents procured from Parker, J., an order temporarily restraining the petitioner from taking top soil from their lands for the purpose of constructing a public highway. Both orders were returnable to Parker,

Resident Judge, who, after holding a joint hearing thereon, dissolved the order procured by the respondents and continued in effect the order procured by the petitioner, and directed "that this cause be retained on the special proceeding docket for the purpose of determining the amount of compensation which the defendants may be entitled to." From this ruling the respondents appealed, assigning errors.

The proceeding of the petitioner was instituted under section 22 of chapter 2 of the Public Laws of 1921 (being sec. 3846 [bb], N. C. Code of 1935, Michie), creating the State Highway Commission, and containing this specific grant of power: "The State Highway Commission is vested with the power to acquire such rights of way and title to such land, gravel, gravel beds or bars, sand, sand beds or bars, rock, stone, boulders, quarries, or quarry beds, lime, or other earth or mineral deposits or formations, and such standing timber as it may deem necessary and suitable for road constructions, maintenance, and repair, and the necessary approaches and ways through, and a sufficient amount of land surrounding and adjacent thereto, as it may determine to enable it to properly prosecute the work, either by purchase, donation, or condemnation, in the manner hereinafter set out: . . ."

It is the contention of the respondents, first, that the statute does not vest in the petitioner the power to acquire top soil, deemed necessary and suitable for road construction, and, second, even if the statute does vest the power to acquire top soil, that it does not vest such power to acquire top soil from lands not contiguous to the highway upon the construction of which such soil is to be used.

We are of the opinion, and so hold, that neither of these contentions can be sustained.

The statute uses the word "earth," which, as used, is a generic term and includes top soil, a species of earth. *Hoke, J.*, in *Jennings v. Highway Commission*, 183 N. C., 68, in interpreting this statute, says: "And in chapter 2, section 22, they have also given defendant board the right to acquire material, gravel beds, sand bars, rocks, or other soil, mineral deposits, etc., necessary and suitable for the construction and maintenance of such roads. . . ."

There is nothing in the statute that limits the taking of the earth deemed necessary and suitable for road construction, maintenance, and repair to lands contiguous to the highway upon which it is to be used.

The judgment of the Superior Court is

Affirmed.

CONNOR, J., dissenting: It is provided by statute that "The State Highway Commission is vested with power to acquire such rights of way and title to such lands, gravel, gravel beds or bars, sand, sand beds or

bars, rock, stone, boulders, quarries, or quarry beds, lime or other earth, or mineral deposits or formations, and such standing timber as it may deem necessary and suitable for road construction, maintenance, and repair, and the necessary approaches and ways through, and a sufficient amount of land surrounding and adjacent thereto, as it may determine, to enable it to properly prosecute the work, either by purchase, donation, or condemnation in the manner hereinafter set out." N. C. Code of 1935, sec. 3846 (bb).

This statute, which authorizes the State Highway Commission, as an agency for the State, to take private property for public use, by the exercise of the power of eminent domain, should be construed strictly. The words "and other earth," used in the statute, should be construed in accordance with the doctrine of *ejusdem generis*, which is fully discussed in 59 C. J., at page 981.

Thus construed, the words do not, in my opinion, include "top soil," which is valuable for growing crops. I cannot think that it was the intention of the General Assembly that the State Highway Commission should have the power under the statute to enter upon cultivated land and to remove therefrom the "top soil" to be used in the construction of a highway at last three miles distant from the land.

I think there is error in the judgment for which it should be reversed.

WOODROW CALLAHAN, BY HIS NEXT FRIEND, J. H. CALLAHAN, v. TOM ROBERTS AND WIFE, ELIZABETH ROBERTS.

(Filed 13 October, 1937.)

1. Master and Servant § 11—Negligence is not presumed from mere fact of injury.

Evidence that plaintiff was hurt while pushing lumber off a stack in the course of his employment when the measuring stick of a fellow employee struck him in the eye, *is held* insufficient to be submitted to the jury on the issue of the employer's negligence in an action instituted in the Superior Court, negligence not being presumed from the mere fact of injury.

2. Appeal and Error § 41—

Where it is decided on appeal that the judgment of nonsuit was properly entered for want of evidence of actionable negligence, other exceptions need not be considered.

APPEAL by plaintiff from *Alley, J.*, at March Term, 1937, of MITCHELL.

Action to recover damages for alleged personal injury.

This case was formerly before this Court on appeal by plaintiff from judgment of the Superior Court sustaining demurrer to the jurisdiction of the court, interposed upon the ground that it appeared upon the face of the complaint that the case was cognizable by the North Carolina Industrial Commission. The judgment was reversed. The opinion is reported in 208 N. C., 768, 182 S. E., 657.

The defendants having by answer denied the allegations of the complaint, the case came on for trial in the court below. Then the plaintiff, alone, in support of the issue of negligence, testified as follows: "I was employed by Tom Roberts. I had been working in Buncombe County for him for about four months before 11 March, 1935. I was hauling lumber and pushing lumber off of the stack. . . . I was working with Mack Byrd on that day. . . . Mack was measuring lumber and I was pushing the lumber off after Mack Byrd measured it. On 11 March I was pushing lumber off the stack down to some fellow who laid it on the truck. I was pushing lumber off the stack and I reached down to pick up the board and as I reached down after the board, Mack struck me with the rule and it put my eye out. . . . It was about 2 o'clock in the afternoon of 11 March when I was injured. I had been working there all day with Mack Byrd. I had been working with him about 30 minutes and was standing by his side but I couldn't say which side. I was pushing lumber from the stack as he measured it. Nobody else was on the stack with me but Mack Byrd." And on cross-examination he testified: "I couldn't say whether he accidentally threw the measuring stick around and hit me in the eye. I don't know if it was an accident. Yes, he was at work, doing his duty, and the measuring stick hit me, that is what occurred. He was measuring lumber."

The plaintiff further testified as to his injury and suffering, and offered evidence tending to show that, although there were regularly employed in the business of the defendants a sufficient number of employees to bring the defendants within the provisions of the North Carolina Workmen's Compensation Act, neither the defendant Tom Roberts nor the defendants were operating under the act.

From judgment as of nonsuit at the close of the plaintiff's evidence, the plaintiff appealed to the Supreme Court and assigned error.

M. L. Wilson and Watson, Fouts & Watson for plaintiff, appellant.
Charles Hutchins and W. C. Berry for defendants, appellees.

WINBORNE, J. Conceding, but not deciding, that this case is not within the jurisdiction of the North Carolina Industrial Commission,

and that plaintiff can maintain this action in the Superior Court, all the evidence, considered in the light most favorable to the plaintiff, fails to show any actionable negligence on the part of the defendants, or either of them. The judgment as of nonsuit was properly entered. *Smith v. Sink,* 211 N. C., 725, and cases there cited.

It rather appears that the unfortunate injury to plaintiff was one of those accidents which sometimes happen unexpectedly—"an event resulting from an unknown cause, or an unusual or unexpected event from a known cause; chance; casualty." Black's Law Dictionary. *Crutchfield v. R. R.,* 76 N. C., 320; *Martin v. Mfg. Co.,* 128 N. C., 264, 38 S. E., 876; *Thomas v. Lawrence,* 189 N. C., 521, 127 S. E., 585; *Ingle v. Cassady,* 208 N. C., 497, 181 S. E., 562.

"An employer is not responsible for an accident simply because it happened, but only when he has contributed to it by some act or omission of duty." *Thomas v. Lawrence, supra; Luttrell v. Hardin,* 193 N. C., 266, 136 S. E., 726.

The judgment as of nonsuit being sustained for lack of evidence of actionable negligence, other exceptions upon which plaintiff relies for a new trial need not be considered. *Shoemake v. Refining Co.,* 208 N. C., 124, 139 S. E., 334.

The judgment below is

Affirmed.

H. C. ALLSBROOK, ADMINISTRATOR, v. E. A. WALSTON.

(Filed 13 October, 1937.)

1. Limitation of Actions § 16—

Where defendant pleads the statute of limitations, the burden is on plaintiff to show that the claim is not barred.

2. Seals § 3—

The introduction in evidence of an instrument having the printed word "Seal" in brackets after the blank where defendant signed same, without reference thereto in the body of the instrument, is sufficient evidence that the instrument was under seal in the absence of evidence by defendant that he intended otherwise.

3. Limitation of Actions §§ 2a, 2e, 18—Instrument having printed word "Seal" in brackets after signature held evidence of sealed instrument.

Plaintiff introduced in evidence an instrument having the printed word "Seal" in brackets after the blank where defendant signed the instrument, the body of the instrument making no reference thereto. Defendant pleaded the statute of limitations, it being conceded that if the instrument were under seal the ten-year statute was applicable and the action was not barred, C. S., 437, while if it were a simple note, the three-year statute

was applicable and the action was barred. C. S., 441. *Held:* In the absence of evidence by defendant that he did not intend to adopt the word "Seal," plaintiff's evidence is sufficient to show a sealed instrument, and a directed verdict in his favor is without error. *Williams v. Turner*, 208 N. C., 202, cited and distinguished.

APPEAL by defendant from *Grady, J.*, at March Term, 1937, of HALIFAX.

Civil action to recover balance due on promissory note in words and figures as follows:

"$1,000.00. SCOTLAND NECK, N. C., June 11, 1925.

"On October 11, 1925, after date, I promise to pay to the order of E. A. Allsbrook, One Thousand and No/100 Dollars with interest at 6% per annum, after date.

"Payable at The Scotland Neck Bank, Scotland Neck, N. C., for value received.

(Signed) E. A. WALSTON. [SEAL]

..... [SEAL]."

Three credits appear on said note, the last being for $25.00 paid on 26 November, 1930. This action was instituted 30 November, 1936.

The defendant admitted the execution of the note, pleaded that it was not under seal, and interposed by way of defense the three-year statute of limitations.

Plaintiff offered the note in evidence, admitted that the word "Seal" in brackets, opposite defendant's signature, was printed on the note before the defendant signed it, and rested.

The defendant demurred to the evidence, which was overruled, and he appeals from a directed verdict and judgment for plaintiff, assigning errors upon exceptions duly preserved.

Stuart Smith and Ashby Dunn for plaintiff, appellee.

E. L. Travis and Wade H. Dickens for defendant, appellant.

STACY, C. J. The defendant having pleaded the statute of limitations, the burden was on the plaintiff to show that his suit was commenced within the requisite time from the accrual of the cause of action, or that otherwise it was not barred. *Rankin v. Oates*, 183 N. C., 517, 112 S. E., 32; *Drinkwater v. Tel. Co.*, 204 N. C., 224, 168 S. E., 410. "Upon the plea of the statute of limitations the burden is upon the plaintiff to show or to offer evidence tending to show that he has brought a live claim to court"—*Brogden, J.*, in *Savage v. Currin*, 207 N. C., 222, 176 S. E., 569.

It is conceded that if the note in suit be a sealed instrument, the ten years statute, C. S., 437, applies, otherwise the three years statute, C. S., 441, is applicable; and further, that if the ten years statute be applicable, the action is not barred, while if the three years statute apply, it is barred. *Trust Co. v. Clifton,* 203 N. C., 483, 166 S. E., 334.

The case, then, comes to a single question: Has the plaintiff offered evidence of a sealed instrument? We think the trial court correctly answered the question in the affirmative.

It is true, the note contains no recital of a seal in the body of the instrument, nevertheless the word "Seal" appears in brackets at the end of the line, opposite defendant's signature, which is the usual place for a seal. In *Hughes v. Debnam,* 53 N. C., 127, it was said that a seal appearing upon an instrument, opposite the name of the grantor, in the place where the seal belongs, will, in the absence of proof that the grantor intended otherwise, be valid as a seal. To like effect are the decisions in *Devereux v. McMahon,* 108 N. C., 134, 12 S. E., 902, and *Yarborough v. Monday,* 13 N. C., 493; *S. c.,* 14 N. C., 420. See *Philip v. Stearns,* 20 S. Dak., 220, as reported in 11 Ann. Cas., 1110, and note. *Contra: Caputo v. DiLoreto,* 110 Conn., 413, 148 Atl., 367.

The plaintiff rested his case upon offering evidence of a sealed instrument. There is no proof that the maker intended otherwise. This defeats the motion to nonsuit. *Baird v. Reynolds,* 99 N. C., 469, 6 S. E., 377; *Harrell v. Butler,* 92 N. C., 20; *Pickens v. Rymer,* 90 N. C., 282.

The case of *Williams v. Turner,* 208 N. C., 202, 179 S. E., 806, cited and relied upon by defendant, is not in point. There the court was dealing with a finding upon the record that the maker of the note had no intention at the time of executing a sealed instrument, and that he did not adopt as his seal the word "Seal" appearing in parentheses at the end of the line opposite his signature. Hence, upon the finding, it was declared to be a simple contract. *Lynam v. Califer,* 64 N. C., 572. Here, there is no such finding. *Ins. Co. v. Morehead,* 209 N. C., 174, 183 S. E., 606. There, we were not concerned with any question of evidence or the burden of proof. Here, we are concerned with a question of evidence and the burden of proof. There, the note contained no recital respecting a seal, and it was not required by law to be under seal. Here, the note contains no recital respecting a seal and it is not required by law to be under seal. There, the action was between the administrator of the payee and the maker of the note. Here, the action is between the administrator of the payee and the maker of the note. It is obvious, therefore, that with the exception of the two similarities just mentioned, *i.e.,* character of action and absence of recital respecting seal, the two cases are quite dissimilar. They are not alike either in principle or result. The holding there was that an action to recover

on a note, found to be not under seal, is barred by the three years statute of limitations, the statute having been pleaded. The holding here is that a note ostensibly under seal is evidence of a sealed instrument. This is as far as we are required to go on the present record.

The authorities elsewhere are in hopeless conflict and confusion. *Note,* 19 Ann. Cas., 674. They abound in every variety of decision. 24 R. C. L., 686; 56 C. J., 889. All agree that "as a man consents to bind himself, so shall he be bound." *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356. They differ as to how this consent shall be evidenced or ascertained. Some take the easier way, and declare that the presence of a seal on any instrument raises a conclusive presumption against the executant, and forecloses any further inquiry into his intention. The holding no doubt makes for certainty and has the merit of simplicity, but the law is supposed to deal with the life of a people. This is neither certain nor simple; it is complex. In North Carolina our predecessors have pursued the ideal of doing exact justice in the particular case. *Lynam v. Califer, supra.* This pursuit we continue.

The verdict and judgment will be upheld.

No error.

A. V. JONES AND WIFE, ALETHIA JONES, v. R. J. STEWART.

(Filed 13 October, 1937.)

Equity § 2—Plaintiffs held estopped by laches from attacking foreclosure for misrepresentations when facts had been of record for six years.

Defendant, the last and highest bidder at a judicial sale, had his bid transferred to plaintiffs, as shown by the commissioner's records, and the commissioner executed deed to plaintiffs subject to a prior mortgage, which deed was registered but not delivered. Defendant paid the commissioner the amount of the bid, less the amount of the encumbrance. Plaintiffs, who had agreed to buy the land from defendant at a stipulated price, part in cash, were unable to make the cash payment, and in lieu thereof executed a deed of trust on the tract conveyed and on other lands of plaintiffs, to secure the entire purchase price. Plaintiffs alleged that defendant represented he owned the fee simple unencumbered title to the lands, but that soon after the transaction they received notice of interest due from the prior mortgagor, that they paid interest to the prior mortgagor upon defendant's statement that he would credit them with the amounts paid. Default having been made on defendant's deed of trust, he had the trustee foreclose, and bid in the entire property at the sale. This action was instituted some three years after foreclosure and some six years after the execution of the commissioner's deed, plaintiffs contending that they did not see the commissioner's deed until the institution of the action, and that they had been damaged by defendant's fraudulent misrepresentations. *Held:* The circumstances under which the com-

missioner's deed was executed does not invalidate the deed of trust executed by plaintiffs, and plaintiffs are estopped by their laches from maintaining this action, the facts being of record and ascertainable by plaintiffs upon the exercise of due diligence.

APPEAL by plaintiffs from *Grady, J.*, at May Term, 1937, of WARREN. Affirmed.

This is a civil action, instituted by the plaintiffs to invalidate a trust deed executed by them to T. S. Kittrell, trustee, securing a note in the sum of $1,900, payable to the defendant; for the recovery of certain sums expended upon a first mortgage on the lands in controversy and for taxes; and to recover damages. Defendant's motion to dismiss as of nonsuit at the conclusion of all the evidence was allowed and the plaintiffs excepted and appealed.

John Kerr, Jr., and W. H. Yarborough for plaintiffs, appellants.
Julius Banzet and Frank Banzet for defendant, appellee.

BARNHILL, J. In 1929 the administratrix of Charles Jones, deceased, instituted a special proceeding against his heirs to sell land to make assets. An order was entered, appointing T. S. Kittrell commissioner, and directing that the land be sold at public auction for cash. At the sale the defendant R. J. Stewart became the last and highest bidder in the sum of $1,000. The defendant entered into negotiations with the plaintiffs to purchase said land, allegedly representing that he was the owner thereof in fee and that the land was free and clear of any encumbrance. The plaintiffs agreed to purchase the lands for $1,900, to be paid $300.00 in cash and the balance in installments. Thereupon, the defendant assigned his bid to the plaintiffs and the commissioner reported the sale and the transfer of bid and the same was duly confirmed. The report of sale, the written transfer of bid, and the decree of confirmation all appear on the same sheet of paper. Shortly thereafter the plaintiffs and the defendant met in the office of the commissioner to close the deal. It then appeared that the plaintiffs were not in a position to pay the $300.00 cash as agreed. In lieu of the cash payment the defendant agreed to permit the plaintiffs to include a 12¾-acre tract of land then owned by them in the deed of trust as additional security for the purchase price. The commissioner's deed was filed for recordation, either by the commissioner or the defendant, but was not delivered to the plaintiffs, and they did not see it until the day of the trial. The commissioner, instead of collecting the purchase price in full, made the deed subject to a then outstanding Land Bank mortgage and the defendant paid the difference.

In December, 1929, the plaintiffs received notice of semiannual installment due the Federal Land Bank, and they paid amounts on the

Land Bank mortgage on several occasions thereafter. Upon receiving a notice from the Land Bank, the plaintiffs saw the defendant and called his attention to his representation that he was the owner of the land in fee, free of encumbrance. The defendant thereupon instructed the plaintiffs to pay the Land Bank installments and he would credit such payments on the installments due him, and the plaintiffs did make payments through December, 1932, but paid the defendant nothing. The plaintiffs surrendered the land in December, 1932; the deed of trust was foreclosed in May, 1932, and the defendant became the purchaser of both tracts. This suit was instituted 27 August, 1935.

The mere statement of the pertinent facts discloses that the plaintiffs discovered the falsity of the alleged representations made by the defendant to induce them to purchase the land and to execute a mortgage almost six years prior to the institution of this suit, and that they waited more than three years after the foreclosure of the deed of trust before taking action. It may be that the economic conditions existing at that time led the plaintiffs to believe that in no event did they have any real financial interest in the property. Whatever may have been the moving cause of their delay, it appears from this record that the plaintiffs' own negligence and lack of diligence has caused them to lose any rights they may have had in the premises. One whose laches is so pronounced cannot successfully seek relief in a court of equity, whatever his original rights may have been.

In the argument here counsel for the plaintiffs stressed the evidence tending to show the circumstances under which the commissioner's deed was executed. Even should it be conceded that this testimony tends to establish a fraud upon the court, it is to be doubted that the purchaser could take advantage of it. Certainly the contention that these circumstances invalidates the trust deed executed by the plaintiffs is not available to the plaintiffs. While they did not originally receive the deed, it was on record and the plaintiffs could have discovered, by the exercise of ordinary diligence, the full circumstances of the sale. They let more than six years elapse before discovering the provisions of the special proceedings and the deed, never having gone to the register's office for that purpose. They ascertained the truth only when the deed was offered in evidence by the defendant. Nor are any facts in relation to the circumstances surrounding the sale of the land pleaded in the complaint.

It is unfortunate that the plaintiffs were unable to pay for the land purchased, and that in attempting to acquire more property they lost that which they already had. This is but a casualty of the adverse economic conditions then existing and the laches of the plaintiffs themselves. They have slept upon their rights. The judgment below is

Affirmed.

BELLE STOCKTON v. LORA MANEY.

(Filed 13 October, 1937.)

1. Curtesy § 1—

Where the court finds that a wife died intestate seized in fee of certain lands, and left her surviving her husband and a child by such husband, the husband is entitled to an estate by the curtesy in the lands. C. S., 2519.

2. Insurance § 17—

A tenant by the curtesy has an insurable interest in buildings and structures on the lands.

3. Insurance §§ 19, 24d: Trusts § 15—Nothing else appearing, policy procured by life tenant insures only his interest in the property.

Nothing else appearing, a policy of fire insurance which a tenant by the curtesy procures to be issued to him, insures only his interest in the dwelling insured, and upon its destruction by fire, the life tenant is entitled to the entire proceeds of the policy, and the remainderman has no interest in other property bought by the life tenant with the proceeds thereof.

APPEAL by plaintiff from *Johnston, J.*, at August Term, 1937, of BUNCOMBE. Affirmed.

This is an action for judgment that plaintiff is the sole owner, in fee, of certain lots or parcels of land described in the complaint; that the defendant has no right, title, interest, or estate in or to said lots or parcels of land; and that defendant's claim to an interest in said lots or parcels of land is a cloud upon plaintiff's title.

In her answer, the defendant alleges that she is the owner in fee of an undivided one-third interest in the lots or parcels of land described in the complaint under the last will and testament of James W. Burleson, deceased.

When the action was called for trial, both plaintiff and defendant waived trial by jury of the issues raised by the pleadings, and agreed that the court should find the facts. Accordingly, the court found the facts to be as follows:

"1. The plaintiff Belle Stockton is the daughter and sole heir at law of Miria E. Burleson, who died during the year 1924, leaving surviving her husband, James W. Burleson, who was the father of the plaintiff.

"2. At her death Miria E. Burleson was seized in fee and in possession of (1) two lots of land situate in the town of Barnardsville, Buncombe County, North Carolina, known as the Matt Burleson lots; and one tract or parcel of land situate on the north fork of Ivey Creek, in Buncombe County, North Carolina, known as the McKinney tract.

"3. After the death of Miria E. Burleson in 1924, her husband, James W. Burleson, the father of the plaintiff, entered into possession of said

lots and parcel or tract of land, and remained in such possession until his death in 1936.

"4. After the death of Miria E. Burleson and while he was in possession of the said lots and parcel or tract of land, James E. Burleson procured the issuance of a policy of insurance insuring him against loss or damage by fire on a dwelling house located on one of the lots situate in the town of Barnardsville, described in the complaint, at the date of the death of Miria E. Burleson; the said dwelling house was destroyed by fire during the month of September, 1934; and the amount due under said policy of insurance, to wit: $2,808.13, was paid by the insurer to James W. Burleson.

"5. Thereafter James W. Burleson purchased a house and lot known as No. 40, All Souls Crescent, in Biltmore, Buncombe County, and also a lot in the town of Barnardsville, Buncombe County; the said James W. Burleson caused both of said lots to be conveyed to him in fee; he paid for the said house and lot in Biltmore the sum of $1,500, and for the lot in Barnardsville, the sum of $650.00. Both said sums were paid by James W. Burleson out of the money paid to him under the policy of insurance insuring the dwelling house located on the lot in the town of Barnardsville, against loss or damage by fire.

"On the foregoing facts, the court was of opinion and accordingly held:

"(1) That the plaintiff is the owner and is entitled to the possession of the two lots of land situate in the town of Barnardsville, and of the tract or parcel of land situate on the north fork of Ivey Creek in Buncombe County, North Carolina, and,

"(2) That the lot in Biltmore, and the lot in Barnardsville, both of which were purchased by James W. Burleson and paid for by him out of the money paid to him under the policy of insurance on the dwelling house located on the lot in Barnardsville which was owned by Miria E. Burleson at her death, were owned by James W. Burleson in fee at his death, and descended to his heirs at law, or passed under his last will and testament to the devisees named therein."

From judgment in accordance with the opinion of the court, the plaintiff appealed to the Supreme Court, assigning as error so much of the judgment as is adverse to her contentions.

C. E. Blackstock for plaintiff.

R. M. Wells and J. G. Merrimon for defendant.

CONNOR, J. On the facts found by the court, at the death of his wife, Miria E. Burleson, James W. Burleson was entitled to an estate by the curtesy for his life in the two lots of land which are situate in the town

of Barnardsville and in the tract or parcel of land which is situate on the north fork of Ivey Creek, in Buncombe County, North Carolina. C. S., 2519.

As such tenant for life, James W. Burleson had an insurable interest in the dwelling house which was located on one of the lots situate in the town of Barnardsville and which was owned by Miria E. Burleson in fee at her death. 26 C. J., p. 34, sec. 17.

Nothing else appearing (*Houck v. Ins. Co.*, 198 N. C., 305, 15 S. E., 628; 21 C. J., p. 954, sec. 92 [9]), the policy of insurance which James W. Burleson procured to be issued to him on the dwelling house, insured only his interest in said dwelling house. It did not insure the plaintiff, as remainderman. When the dwelling house was destroyed by fire, the amount due under the policy was paid to James W. Burleson, to cover his loss. The plaintiff had no interest in said amount, and therefore, in no event, in the lots purchased by James W. Burleson and paid for by him out of said amount. See *Batts v. Sullivan*, 182 N. C., 129, 108 S. E., 511.

There is no error in the judgment. It is

Affirmed.

STATE v. MELTON BAKER.

(Filed 13 October, 1937.)

1. Abortion § 8—Evidence held sufficient for jury on issue of defendant's guilt of advising and procuring criminal abortion.

The evidence favorable to the State tended to show that defendant had been friendly with deceased and had visited her frequently for eighteen months prior to her fatal illness, that she left her mother's home with defendant, about twelve noon one Sunday, in apparently good health, that defendant returned her to her mother's home early the following Monday morning in bad physical condition, that the abortion took place during that time, and that it caused peritonitis resulting in death. *Held:* The evidence, although contradicted in material aspects by defendant's evidence, was sufficient to show facts from which the jury could reasonably infer that defendant willfully and feloniously advised and procured the commission of a criminal abortion, and defendant's motion to nonsuit was properly overruled.

2. Criminal Law § 52b—

Evidence which tends to prove the fact in issue, or which conduces to that conclusion as a fairly logical and legitimate deduction, and which raises more than a mere suspicion or conjecture of guilt, is sufficient to be submitted to the jury, it being for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt.

3. Criminal Law § 53f—

A misstatement by the court of the testimony of a witness must be called to his attention in apt time to afford opportunity for correction in order for an exception based thereon to be considered on appeal.

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

APPEAL by defendant from *Frizzelle, J.*, at March Term, 1937, of NASH. No error.

The defendant was tried on an indictment in which it was alleged that "Melton Baker, late of the county of Nash, on the ..... day of June, 1936, with force and arms, at and in the county aforesaid, willfully and feloniously did advise and procure one Madell Williams, then pregnant and quick with child, to take medicine, drugs, and other substances, and to use and employ, and to have used and employed certain instruments and other means with intent thereby to destroy such child, such not being necessary to preserve the life of the said Madell Williams, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

There was a verdict of guilty.

From judgment that he be confined in the State's Prison for a term of not less than three or more than five years, the defendant appealed to the Supreme Court, assigning errors in the trial.

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

T. T. Thorne and T. A. Burgess for defendant.

CONNOR, J. Madell Williams died in a hospital in the city of Rocky Mount, N. C., on 1 July, 1936.

At the trial of this action there was evidence for the State tending to show that her death was the result of peritonitis caused by a criminal abortion, which was committed some time between 12 o'clock noon on Sunday, 7 June, 1936, and the early morning of Monday, 8 June, 1936.

There was evidence for the State further tending to show that the deceased, Madell Williams, left her mother's home in Nash County about 12 o'clock noon on Sunday, 7 June, 1936, in an automobile with the defendant Melton Baker, who had called for her there; that at the time she left her mother's home, with the defendant, the deceased was apparently in good health; that when she returned to her mother's home with the defendant, early Monday morning, she was in bad physical condition, and immediately went to bed; and that she remained in bed for about a week, at her mother's home, and then, upon the advice of a physician, was taken to the hospital at Rocky Mount, where she remained until her death.

The evidence for the State further tended to show that on the day after the deceased was taken to the hospital, her mother went to see the defendant, who lived a short distance from her home, and who had been visiting the deceased for about 18 months prior to her death; that at the request of the mother of the deceased, the defendant went at once to the hospital in Rocky Mount, and there saw and talked with the deceased; and that the defendant agreed to pay and did pay for the medical service and hospital expenses rendered to and incurred by the deceased.

The defendant denied that he had advised or procured the commission of an abortion upon the deceased, or that he was responsible for her condition. He admitted that he had visited the deceased frequently prior to her illness, and testified that his relations with her were at least friendly. He further admitted that he paid her bill for medical services and hospital expenses, and testified that he did so because of his friendship for her and her mother.

Evidence for the defendant tended to show that he did not take the deceased from her mother's home, in an automobile, on Sunday, 7 June, 1936, and that he was not with her at any time during said day away from her mother's home.

The evidence for the State was sufficient to show facts from which the jury could reasonably infer that the defendant willfully and feloniously advised and procured the commission of a criminal abortion upon Madell Williams, and was for that reason properly submitted, together with the evidence for the defendant, to the jury. There was no error in the refusal of the trial court to allow defendant's motion at the close of all the evidence for judgment as of nonsuit.

In *S. v. McLeod,* 198 N. C., 649, 152 S. E., 895, it is said: "The general rule is, that if there is any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury; otherwise not, for short of this, the judge should direct a nonsuit, or an acquittal on a criminal prosecution. *S. v. Vinson,* 63 N. C., 335. But if the evidence warrant a reasonable inference of the fact in issue, it is for the jury to say whether they are convinced beyond a reasonable doubt of such fact, the fact of guilt. *S. v. Blackwelder,* 182 N. C., 899, 109 S. E., 644."

A careful examination of the record in this appeal fails to disclose any error in the trial.

If, as contended by the defendant, the judge, in response to questions of jurors, inadvertently misstated the testimony of certain witnesses for the State, the defendant should have called such misstatement to the attention of the judge, before the jury retired. In such case, the judge

would have had an opportunity to correct his alleged misstatement. A defendant cannot rely upon a general exception to an inadvertent misstatement by the judge of the testimony of a witness where, as in the instant case, the ground for such exception was not brought to the attention of the judge before the case was submitted to the jury. See *S. v. Sterling*, 200 N. C., 18, 156 S. E., 96.

The judgment is affirmed.

No error.

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

G. P. HUGHES v. S. E. LONG, DEFENDANT, AND GULF REFINING COMPANY, INTERVENER.

(Filed 13 October, 1937.)

1. Landlord and Tenant § 17—Parties held not to have intended cancellation of sublease on undisputed facts of this case.

A., having a leasehold estate in a filling station for a period of years, assigned his lease to B., who subleased back to A. for the entire period, and then conveyed his interest in the property to C., subject to the rights of A. under the sublease. C. then leased the property to A. for a period of one year, at a rental of one cent on every gallon of gas sold, and A. operated the station, but prior to the expiration of the one-year period the agreement was canceled by mutual consent, and A. leased to B. and asked C. to "change over his gas contract" to D. C. then rented to D. for one cent a gallon of gas sold, the contract being in the same terms as the "gas contract" which A. asked to be "changed over." D. went into possession and operated the station, paying A. the stipulated monthly rental under his agreement with A., and paying C. the rental of one cent a gallon for gas sold in accordance with his agreement with C. Thereafter D. refused to pay A. further rent, D. and C. contending that A. relinquished all right in the property when the "gas contract" between A. and C. was canceled by mutual consent. *Held:* The cancellation of the "gas contract" did not affect the sublease from B. to A., and C. took subject to A.'s rights thereunder, and the parties themselves construed their rights under the agreements by D.'s going into possession and paying rents to A. and C. under his respective agreements with them, and A. is entitled to possession of the property upon D.'s refusal and failure to pay the monthly rental stipulated in the agreement between them.

2. Contracts § 8—

The courts will generally adopt that construction given the agreement by the parties themselves before differences between them.

APPEAL by defendant and intervener from the Superior Court of NORTHAMPTON, *Grady, J.*, presiding. Affirmed.

HUGHES *v.* LONG.

This was a proceeding for the possession of a gasoline service station near Jackson, North Carolina, instituted by plaintiff, alleged leaseholder, against defendant Long, sublessee, alleged to be holding over. The Gulf Refining Company was permitted to intervene, claiming a leasehold on the premises and to be the lessor of defendant Long.

At the trial it was agreed that no issue of fact was presented by the evidence, and that the presiding judge should determine the rights of the parties upon the written leases and oral testimony offered. From judgment that the plaintiff was the owner of a leasehold in the premises, and that defendant Long was in wrongful possession thereof, and that intervener's lease was subordinate to plaintiff's right, both the defendant and the intervener appealed.

Eric Norfleet for plaintiff, appellee.
Gay & Midyette for Gulf Refining Company, intervener.

DEVIN, J. The material facts were not controverted. They may be briefly summarized as follows: The owners of the real estate, whose title is not involved, leased the premises to the plaintiff Hughes for a term ending 14 August, 1939. On 30 November, 1929, for a valuable consideration, plaintiff assigned and conveyed his lease to H. O. Carlton, and H. O. Carlton, on the same date, leased the premises again to plaintiff for the term ending 14 August, 1939, at a rental of fifteen dollars per month.

On 1 February, 1931, H. O. Carlton assigned and conveyed all his interest in the lease to the intervener, Gulf Refining Company, expressly excepting and reserving, however, all the right and interest acquired by plaintiff Hughes under the sublease to him dated 30 November, 1929, thereby substituting Gulf Refining Company for Carlton as owner of the lease, subject to the right of plaintiff to his sublease thereon for the entire period. Plaintiff operated the service station.

On 29 May, 1935, Gulf Refining Company and plaintiff entered into a new contract of rental, for a period of one year, for the payment of one cent on each gallon of gasoline sold to be paid as rent. On 17 December, 1935, plaintiff made and signed an entry on the last mentioned contract of 29 May, 1935, "Canceled by mutual consent."

On 15 December, 1935, plaintiff leased the premises to defendant Long for a rental of one dollar per day, and defendant Long paid that rent for the period of one year and until 15 December, 1936, since when he has failed and refused to pay, and remains in possession of the premises. This proceeding was instituted 10 February, 1937.

On 17 December, 1935, intervener, Gulf Refining Company, executed a lease of the property to defendant Long for a year for payment as

rental of one cent per gallon on gasoline sold. This lease is in same form as that given plaintiff on 29 May, 1935.

Plaintiff testified that at the time he turned the service station over to defendant Long he so advised the intervener, and asked that his "gas contract" be "changed over" to Long, and testified: "We changed it."

Upon these facts, the appellants' contention is that the plaintiff, on 29 May, 1935, then in possession of the premises under the intervener, entered into a new agreement, the terms of which were inconsistent with and in substitution for the existing contract, and that when he consented to cancel and surrender the lease of 29 May, 1935, he parted with all interest in the premises, and should not now be allowed to assert any right thereto.

But it is apparent that plaintiff's sublease from Carlton for the period ending 14 August, 1939, has not been abrogated. It was expressly acknowledged in the conveyance from Carlton to the Gulf Refining Company, and excepted from the provisions of the latter's lease. It was still subsisting and was not canceled, nor intended to be canceled, by the later agreement, which provided for payment based on the quantity of gasoline sold, and was limited to one year. It would seem that the plaintiff's understanding, when he consented to cancel the contract of 29 May, 1935, was that he "changed over his gas contract" to Long. He testified this was done with the knowledge and consent of intervener. Certainly it is not controverted that thereupon Long went into possession of the service station, paying intervener one cent per gallon for gasoline sold and paying plaintiff one dollar per day for the period of one year, and until 15 December, 1936. This was the construction placed upon these leases and contracts by the parties themselves, and their course of dealing was in accordance with this interpretation, until shortly before the institution of this proceeding.

There is a well defined rule of construction that, in cases of doubtful meaning of the language of contracts, the interpretation the parties themselves have put upon them will ordinarily be followed by the courts. *Cole v. Fibre Co.*, 200 N. C., 484.

We conclude that the court below has correctly decided the controversy, on the leases and evidence offered, and that the judgment to the effect that plaintiff's sublease of the premises is subsisting, and that as lessee of the intervener he is entitled to the possession of the premises, and that defendant wrongfully withholds possession from him, was properly entered.

Judgment affirmed.

N. C. HENRY v. FARMER HERBERT SANDERS.

(Filed 13 October, 1937.)

Judgments § 19c—Grantee having knowledge of maiden name of grantor takes subject to lien of judgment against grantor indexed under maiden name.

Judgment was obtained against a single woman, but was docketed after her marriage and indexed in her maiden name. Thereafter she acquired property, which she subsequently sold to defendant. Defendant had knowledge of her maiden name, but failed to inform his lawyer who investigated the title. *Held:* Defendant having knowledge of the name of his grantor before her marriage, took with notice of the prior judgment, since a search of the records under her maiden name would have disclosed the judgment, and the failure of defendant to impart his knowledge to his attorney cannot affect the rights of the parties. C. S., 613, 614.

APPEAL by defendant from *Alley, J.*, at July-August Term, 1937, of TRANSYLVANIA. Judgment affirmed.

The controversy without action was submitted upon an agreed statement of facts, the material portions of which may be concisely stated in chronological order as follows:

On 21 October, 1930, plaintiff obtained judgment in the sum of $161.00 before a justice of the peace against Minnie Brewer.

On 2 January, 1931, Minnie Brewer married H. C. Baynard.

On 4 March, 1931, plaintiff's judgment was docketed in the Superior Court of Transylvania County (the county in which the land lies and where all the parties except plaintiff reside), and was indexed and cross indexed in the name of Minnie Brewer.

On 1 October, 1934, H. C. Baynard died, leaving a will in which he devised the premises to his wife, Minnie Baynard.

On 11 August, 1936, Minnie Baynard conveyed the land (8 acres) in fee to the defendant.

It was admitted that the defendant Sanders had actual knowledge at the time that the name of Minnie Baynard before her marriage was Minnie Brewer; that he employed an attorney to examine the title, but did not inform his attorney of the former name of Minnie Baynard, and the attorney reported that the title was good.

Plaintiff seeks to subject the land to levy and sale under execution by virtue of the lien of his judgment. The court below held that the judgment constituted a lien on the land conveyed by Minnie Baynard (formerly Minnie Brewer), and that plaintiff was entitled to have execution issue. Judgment was entered accordingly, and defendant appealed.

G. H. Valentine for plaintiff, appellee.
Ralph H. Ramsey, Jr., for defendant, appellant.

DEVIN, J. The question presented by this appeal is whether a judgment entered against an unmarried woman in her name at that time and docketed shortly after her marriage and consequent change of name, constitutes a lien on after acquired real property. The statute (C. S., 613) requires that judgments shall be indexed and cross indexed, and that the entries must contain the names of the parties. While docketing is not an essential condition to the efficacy of a judgment, docketing is required in order that third persons may have notice of the existence of the judgment lien. *Trust Co. v. Currie,* 190 N. C., 260. C. S., 614, provides that a judgment docketed on the judgment docket of the Superior Court of any county "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 docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter."

In *Dewey v. Sugg,* 109 N. C., 329, it was said that these statutes were intended "to enable any person to learn that there is a docketed judgment in favor of a certain party or parties, and against certain other parties. . . . The purpose is, that the index shall point to a judgment against the particular person inquired about if there be a judgment on the docket against him." *Trust Co. v. Currie, supra.*

Appellant contends that on the facts stated the plaintiff's lien was lost and cites in support of his view the case of *Huff v. Sweetser,* 8 Cal. App., 689 (1908), where, upon facts somewhat similar, the Court held the purchaser took title freed from the lien of the judgment. While the reasoning in that case is persuasive, we are not inclined to apply it to the facts in the case at bar.

A purchaser of land is affected with such notice as the docket and index entries afford. "If they (the entries) are of such character as would induce a cautious and prudent man to make an examination, he must make such investigation, or the failure to do so will be at his peril." *Metz v. Bank,* 7 Neb., 165.

Here it is admitted that the defendant knew that the name of his grantor before her marriage to Baynard was Minnie Brewer. An examination of the judgment docket for the name of Minnie Brewer would have revealed plaintiff's judgment. The fact that he did not impart his knowledge of the pertinent facts to his attorney cannot avail him.

We concur in the ruling of the court below, and the judgment is

Affirmed.

RAY T. DENT v. THE ENGLISH MICA COMPANY.

(Filed 13 October, 1937.)

1. Appeal and Error § 37e—

Findings of fact made by a referee, approved by the judge of the Superior Court, are conclusive on appeal to the Supreme Court if they are supported by any competent evidence.

2. Reference § 9—

Upon appeal to the Superior Court in a consent reference, the trial judge has the power to make his own findings of fact upon matters presented by exceptions.

3. Appeal and Error § 40a—

Where the findings of fact of the referee are supported by evidence and are approved by the trial court, judgment in accordance with correct conclusions of law based on the facts will be affirmed.

4. Appeal and Error § 8—

Where a party contends in the Superior Court that no contract existed between him and the adverse party at the time, he may not contend on appeal to the Supreme Court that the contract alleged is not binding or enforceable, since the appeal will follow the theory of trial in the lower court.

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

APPEAL by defendant from *Clement, J.*, at July-August Term, 1937, of MITCHELL.

Civil action to recover for services rendered under contract of employment and for damages resulting from the breach of said contract.

Upon denial of the contract (under which plaintiff served as plant manager of defendant corporation), and counterclaim or cross demand for moneys overpaid the plaintiff, there was a reference under the Code, apparently by consent, though no order of reference appears on the record. The report of the referee, which appears only in the judgment, finds for the plaintiff on his first cause of action ($5,842.54, with interest), against him on the second, and denies the defendant's counterclaim.

Upon exceptions duly filed, the matter came on for hearing at the July-August Term, 1937, Mitchell Superior Court, and resulted in adoption and confirmation of the referee's report. Defendant appeals, assigning errors.

McBee & McBee and Harkins, VanWinkle & Walton for plaintiff, appellee.

Hamilton Douglas and Alfred S. Barnard for defendant, appellant.

STACY, C. J. It is the established rule of procedure in this jurisdiction that the findings of fact made by a referee, adopted and concurred in by the judge of the Superior Court, are conclusive on appeal, if they are supported by any competent evidence. C. S., 578; *S. v. Jackson,* 183 N. C., 695, 110 S. E., 593; *Dorsey v. Mining Co.,* 177 N. C., 60, 97 S. E., 746; *Comrs. v. Abee Bros.,* 175 N. C., 701, 96 S. E., 21; *Hudson v. Morton,* 162 N. C., 6, 77 S. E., 1005; *Thornton v. McNeely,* 144 N. C., 622, 57 S. E., 400; *Hunter v. Kelly,* 92 N. C., 285. Indeed, it was said in *Boyle v. Stallings,* 140 N. C., 524, 53 S. E., 346, that the Supreme Court has "no power to review the conclusions of fact as found by the referee and sustained by the judge, unless it appears that such findings have no evidence to support them." The rule, of course, is otherwise in the Superior Court, where the judge, upon exceptions, may make his own findings of fact. *Mineral Co. v. Young,* 211 N. C., 387, 190 S. E., 520; *Anderson v. McRae, ibid.,* 197, 189 S. E., 639; *Maxwell v. R. R.,* 208 N. C., 397, 181 S. E., 248; *Dumas v. Morrison,* 175 N. C., 431, 95 S. E., 775.

Here, the findings of fact made by the referee are amply supported by competent evidence, and his conclusions of law, based thereon, are correct. These have been adopted and concurred in by the judge. Hence, upon the record, the judgment will be upheld.

Before the referee, and in the court below, the position of the defendant was, that no contract of employment existed between the plaintiff and the defendant during the time for which plaintiff sues. On appeal, the position of defendant is that the contract is not binding or enforceable. This is taking "two bites at the cherry." *Thompson v. Funeral Home,* 205 N. C., 801, 172 S. E., 500. Having tried the case upon one theory, the law will not permit the defendant to change its position, or "to swap horses between courts in order to get a better mount in the Supreme Court." *Weil v. Herring,* 207 N. C., 6, 175 S. E., 836; *Holland v. Dulin,* 206 N. C., 211, 173 S. E., 310. "The theory upon which a case is tried must prevail in considering the appeal, and in interpreting a record and in determining the validity of exceptions"—*Brogden, J.,* in *Potts v. Ins. Co.,* 206 N. C., 257, 174 S. E., 123.

No damages were awarded the plaintiff for breach of the contract. His recovery has been limited to services rendered thereunder. No sufficient cause has been made to appear for disturbing the judgment.

Affirmed.

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

LAT R. YOUNG, ADMINISTRATOR OF ESTATE OF RALPH YOUNG, v. MAYLAND MICA COMPANY AND ED VANCE.

(Filed 13 October, 1937.)

1. Master and Servant § 49—Refusal to dismiss on ground that Industrial Commission had exclusive jurisdiction held supported by jury's finding.

Where, in an action instituted in the Superior Court, the jury finds upon conflicting evidence that defendant employer regularly employed less than five employees, there being no contention that the employer and employees had voluntarily elected to be bound by the Compensation Act, C. S., 8081 (u) (b), judgment overruling defendant's plea to dismiss on the ground that the action was within the exclusive jurisdiction of the Industrial Commission is without error.

2. Courts § 1c—Conflicting evidence as to fact determining jurisdiction of Industrial Commission held properly submitted to jury.

Where a plea to the jurisdiction of the Superior Court is filed on the ground that the Industrial Commission has exclusive jurisdiction, the Superior Court has the duty and power to find the jurisdictional fact, and where the plea is dependent upon the number of employees regularly employed by defendant, and the evidence on the point is conflicting, the evidence is properly submitted to the jury for their determination of the jurisdictional fact.

APPEAL by defendant from *Clement, J.*, at January Term, 1937, of YANCEY.

Action to recover damages for alleged wrongful death.

Plaintiff filed complaint alleging actionable negligence and damages. The defendant filed answer and denied the allegations of the complaint, and further set up plea denying the jurisdiction of the Superior Court to hear and determine the issues involved, for that it alleges the North Carolina Workmen's Compensation Act applies in that the defendant was engaged in business in Newdale, Yancey County, having regularly in service in its said business more than five employees, including the plaintiff's intestate; and that the accident resulting in the death of plaintiff's intestate arose out of and in the course of his employment within the meaning of the Workmen's Compensation Act.

The following issue, among others, was submitted to the jury: "Did the defendant regularly employ in its service less than five employees?" This was answered in the affirmative.

From judgment on verdict rendered defendant appealed, assigning error.

Charles Hutchins and Anglin & Randolph for plaintiff, appellee.

J. W. Ragland for defendant, appellant.

WINBORNE, J. The principal question involved on this appeal is as to jurisdiction. The defendant challenges jurisdiction of the Superior Court, and contends that the parties are subject to the provisions of the North Carolina Workmen's Compensation Act. On the facts found, this contention is not sustained.

The Workmen's Compensation Act does "not apply . . . to any person, firm, or private corporation that has regularly in service less than five employees in the same business within the State," unless such employees and their employers voluntarily elect to be bound by the act in the manner therein provided. C. S., 8081 (u) (b).

It is not contended in the instant case that the parties have voluntarily elected to be bound. The only question of fact is as to the number of employees regularly in service in the business of the defendant in this State. This is a jurisdictional fact which the Superior Court has the duty and power to find. *Aycock v. Cooper*, 202 N. C., 500; 163 S. E., 569.

There is evidence tending to show that there were four men employed at the time the intestate was injured. There was also testimony tending to show that the plant was sometimes operated by less than four men, sometimes by one man, and at one time by two men. The father of the intestate testified: "My boy was about what they had to boss." There was also testimony that four men were employed in the day and four at night; that some of the men would be out part of the time; and "they tried to get along with less than four." On this conflicting evidence it was proper for the fact to be determined by submission of an issue to the jury. The jury did not accept defendant's contention. In the trial and judgment we find

No error.

STATE v. FRANKLIN BREWINGTON.

(Filed 13 October, 1937.)

1. Seduction § 1—

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 § 8—

By provision of the statute, C. S., 4339, there must be evidence of each of the essential elements of seduction, independent of the testimony of prosecutrix, in order to sustain a conviction.

3. Seduction § 8—Held: Nonsuit should have been granted for failure of supporting evidence as to innocence and virtue of prosecutrix.

In this prosecution for seduction, the only evidence outside the testimony of prosecutrix on the question of her innocence and virtue was the testimony of a witness, in answer to a question as to her general reputation, that he knew her when he saw her and had heard nothing for or against her. *Held:* Defendant's motion to nonsuit for failure of supporting evidence on the element of the innocence and virtue of prosecutrix should have been allowed.

APPEAL by defendant from *Harris, J.*, at April Term, 1937, of WAYNE. Reversed.

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

J. Faison Thomson for defendant, appellant.

SCHENCK, J. The defendant was convicted upon a bill of indictment charging a violation of C. S., 4339, which reads: "If any man shall seduce an innocent and virtuous woman under promise of marriage, he shall be guilty of a felony, and upon conviction shall be fined or imprisoned at the discretion of the court, and may be imprisoned in the State's Prison not exceeding the term of five years: *Provided,* the unsupported testimony of the woman shall not be sufficient to convict. . . ."

When the State had produced its evidence and rested its case, the defendant moved to dismiss the action and for judgment of nonsuit (C. S., 4643), and the court's refusal to allow the motion is the basis of an exceptive assignment of error.

The constituent elements of the offense against which the statute inveighs, and which must be proven beyond a reasonable doubt, are: (1) Seduction, (2) promise of marriage, (3) innocence and virtue of the prosecutrix, and, in addition, the statute contains the proviso that "the unsupported testimony of the woman shall not be sufficient to convict." This proviso requires evidence of facts and circumstances independent of the testimony of the prosecutrix tending to establish each of the constituent elements of the crime. *S. v. Forbes,* 210 N. C., 567; *S. v. Patrick,* 204 N. C., 299.

It may be conceded that there is in this case supporting evidence of all the constituent elements of the offense except that of the innocence and virtue of the prosecutrix. The only evidence offered to establish such innocence and virtue is the testimony of the witness R. B. Radford, as follows:

"Q. Do you know the girl (prosecutrix)?

"A. I know her when I see her.

"Q. Do you know her reputation in the community, whether good or bad?

"A. Nothing against her, or for her, that I know of. I just know her when I see her, that's all."

While it has been repeatedly held by this Court that evidence of the good character or reputation of the prosecutrix prior to the alleged seduction is sufficient to constitute supporting testimony within the meaning and requirement of the statute, *S. v. Horton*, 100 N. C., 443; *S. v. Malonee*, 154 N. C., 200; *S. v. Moody*, 172 N. C., 967; *S. v. Patrick, supra*, we think that the testimony of the witness Radford fails to support the testimony of the prosecutrix tending to establish her good character or reputation, or innocence and virtue. The positive testimony of the witness is "I just know her when I see her, that's all." The rest of his testimony is negative, and has no probative force.

Because the testimony of the prosecutrix as to her innocence and virtue, a constituent element of the offense, was unsupported, the defendant's motion for judgment of nonsuit should have been allowed.

The judgment below is

Reversed.

T. L. EDGE ET AL. v. NORTH STATE FELDSPAR CORPORATION.

(Filed 13 October, 1937.)

1. Reformation of Instruments § 11—Verdict held fatally defective as being in the alternative.

In a suit for reformation, an issue whether the clause sought to be inserted by plaintiff was omitted from the deed "by mutual mistake or by the fraud of grantee" is defective as being in the alternative, and on appeal from judgment entered on an affirmative answer thereto a new trial will be awarded, since the verdict is uncertain and establishes neither proposition with definiteness.

2. Trial § 37—

Two distinct propositions, to which different answers might be returned, should not be submitted to the jury in one issue, and where such propositions are submitted in the alternative in one issue, an affirmative answer thereto is fatally defective for uncertainty and ambiguity.

3. Same—

While a verdict will be interpreted with reference to the pleadings, evidence, admissions of the parties, and charge of the court, an affirmative answer to an issue embodying two separate propositions in the alternative cannot be made definite by such interpretation.

APPEAL by defendant from *Clement, J.*, at January Term, 1937, of YANCEY.

Civil action to reform deed and to declare rights of parties under the deed as reformed.

On 22 May, 1923, plaintiffs executed and delivered to defendant deed for mill site situated in Yancey County, containing about an acre of land, and it is alleged that a reverter clause, in case the mill ceased to operate, was omitted through the mutual mistake of the parties.

On the trial, plaintiff was allowed to amend so as to allege that the omission was occasioned by the fraud of the grantee.

The jury returned the following verdict:

"Was the provision that the property conveyed in the deed should revert to the grantors when the mill ceased to operate omitted from the deed of T. L. Edge and wife, Bessie Edge, to the North State Feldspar Corporation by mutual mistake or by the fraud of the grantee? Answer: 'Yes.'"

There was a judgment on the verdict, from which the defendant appeals, assigning errors.

Charles Hutchins and Watson & Fouts for plaintiffs, appellees.
J. W. Ragland and G. D. Bailey for defendant, appellant.

STACY, C. J. The verdict is uncertain or ambiguous. *Wood v. Jones,* 198 N. C., 356, 151 S. E., 732. It is in the alternative. *Pearce v. Fisher,* 133 N. C., 333, 45 S. E., 638. Its inconclusiveness necessitates another hearing. *Plotkin v. Bond Co.,* 200 N. C., 590, 157 S. E., 870; *Bank v. Broom Co.,* 188 N. C., 508, 125 S. E., 12; *Holler v. Tel. Co.,* 149 N. C., 336, 63 S. E., 92. "A verdict finding matter uncertainly or ambiguously, is insufficient, and no judgment shall be given thereon." Coke on Littleton, 227, quoted with approval in *Crews v. Crews,* 64 N. C., 536. "It is misleading to embody in one issue two propositions as to which the jury might give different responses." *Emery v. R. R.,* 102 N. C., 209, 9 S. E., 139; *Carey v. Carey,* 108 N. C., 267, 12 S. E., 1038; *Mfg. Co. v. Assur. Co.,* 106 N. C., 28, 10 S. E., 1057; *DeHart v. Jenkins,* 211 N. C., 314, 190 S. E., 218.

A verdict, whether upon one or many issues, should be certain and determinative of the controversy. *Plotkin v. Bond Co., supra; Chapman-Hunt Co. v. Board of Education,* 198 N. C., 111, 150 S. E., 713; *Bank v. Broom Co., supra; McAdoo v. R. R.,* 105 N. C., 140, 11 S. E., 316; *Emery v. R. R., supra.*

Here, the alternative verdict establishes neither proposition with certainty or definiteness, as the evidence of mutual mistake, if any, is very slight, and the sufficiency of the allegation of fraud is quite doubtful, if not deficient. *Pearce v. Fisher, supra.*

Nor is the verdict capable of interpretation so as to support the judgment *quod recuperet*, by proper reference to the pleadings, the evidence, the admissions of the parties, and the charge of the court. *Newbern v. Gordon*, 201 N. C., 317, 160 S. E., 182; *Short v. Kaltman*, 192 N. C., 154, 134 S. E., 425; *Kannan v. Assad*, 182 N. C., 77, 108 S. E., 383.

The rights of the parties have not been sufficiently determined.

New trial.

FRED M. PARRISH ET AL. v. CHARLES E. HARTMAN ET AL.

(Filed 13 October, 1937.)

1. Appeal and Error § 10b—

The allowance by the judge of the Superior Court of appellee's motion to strike out appellant's purported statement of case on appeal is without error upon the court's finding that the statement of case on appeal was not filed within the time allowed.

2. Appeal and Error § 31b—

Failure to have a statement of case on appeal does not *ipso facto* work a dismissal, but the Supreme Court may review the record proper for errors appearing upon its face.

3. Judgments § 17b—

Where the verdict establishes defendant's indebtedness to plaintiff, but does not award interest, a judgment for the indebtedness with interest from the date the indebtedness was incurred is in excess of the verdict and will be modified to conform to the verdict.

APPEAL by defendants from *Clement, J.*, at December Term, 1936, of YADKIN.

Civil action to recover of Charles E. Hartman the sum of $2,500 with interest, and to have the same declared a lien on certain lands in Yadkin County.

The jury returned the following verdict:

"1. Is C. E. Hartman the owner of the land described in the complaint in fee simple? Answer: 'Yes.'

"2. What sum is C. E. Hartman indebted to the plaintiffs? Answer: '$2,500.'

"3. Is said sum a charge upon the lands, as alleged in the complaint? Answer: 'Yes.'"

The verdict appears on the record three times, twice as above, and once with the second issue answered: "$2,500, with interest from 31 January, 1933."

In the judgment it is decreed that "the said $2,500, with interest from 5 January, 1933, be and the same is hereby adjudged a charge and lien on the lands above referred to."

The defendants gave notice of appeal in open court, and were allowed 40 days to prepare and serve their statement of case on appeal. The trial term of court adjourned 17 December, 1936, and appellants' statement of case on appeal was served 4 February, 1937. The judge finds as a fact that appellants' "Case" was not served within the time allowed, and, upon motion of appellees, ordered that the same be stricken from the file of the papers in the case. From this ruling, defendants also appeal.

Parrish & Deal for plaintiffs, appellees.
Grant & Grant for defendants, appellants.

STACY, C. J. The order striking out defendants' purported statement of case on appeal, because not served in time, is supported by a long line of decisions, of which *S. v. Moore,* 210 N. C., 686, 188 S. E., 421, may be cited as the most recent. The failure to have a "case on appeal," however, does not *ipso facto* work a dismissal. *Roberts v. Bus Co.,* 198 N. C., 779, 153 S. E., 398. *Non constat* that error may not appear on the face of the record proper. *Edwards v. Perry,* 208 N. C., 252, 179 S. E., 892; *Wallace v. Salisbury,* 147 N. C., 58, 60 S. E., 713.

Here, error does appear on the face of the record proper. The judgment is in excess of the verdict in its award of interest on the recovery. This will be modified so as to conform with the verdict as it appears of record in the Superior Court of Yancey County.

Modified and affirmed.

MARY J. EDWARDS v. C. E. UPCHURCH AND ANNIE UPCHURCH.

(Filed 13 October, 1937.)

Trial §§ 43, 49—Trial court may set aside verdict, but has no power to change or modify the verdict as returned by the jury.

While the trial court has the power to set aside a verdict when he is of the opinion that it is not supported by the evidence or is against the weight of the evidence, C. S., 591, he has no power to change or modify a verdict because in his opinion the jury made an error in computing the amount returned in their answer, and a new trial will be awarded upon appeal from a judgment rendered on the verdict as modified by the court.

APPEAL by plaintiff from *Cowper, Special Judge,* at January Term, 1937, of LEE. New trial.

This is an action to recover on a note for $874.58, dated 15 May, 1929, and due on 1 November, 1929.

It is alleged in the complaint that the only payments made on the note sued on are as follows: On 2 December, 1929, $106.23; on 21 December, 1929, $120.00; and on 3 February, 1930, $200.00.

At the trial the defendants admitted the execution by them of the note, as alleged in the complaint, and that the plaintiff is the holder of the note.

The issue submitted to the jury was answered as follows:

"What amount of payments have been made on the note sued on? Answer: '$855.58.'"

After the verdict was returned by the jury, the court was of opinion, as appears from recitals in the judgment, that the jury had erroneously included in their answer to the issue the sum of $200.00, and that said sum of $200.00 should be deducted from the total amount of payments on the note as testified by the defendant C. E. Upchurch, to wit: $805.00, leaving the sum of $605.00, which added to the amount of the payments alleged in the complaint, to wit, $426.23, exceed the amount of the note, and accordingly adjudged that plaintiff recover nothing of the defendants in this action.

The plaintiff appealed to the Supreme Court, assigning numerous errors in the trial, and error in the judgment.

J. G. Edwards and K. R. Hoyle for plaintiff.
Gavin & Jackson for defendants.

CONNOR, J. The trial judge has the power to set aside a verdict and order a new trial, when in his opinion the verdict is not supported by the evidence or is against the weight of the evidence. In proper cases, it is manifestly his duty to exercise this power, and thus prevent injustice. See C. S., 591; *Bundy v. Sutton,* 207 N. C., 422, 177 S. E., 420; *Hyatt v. McCoy,* 194 N. C., 760, 140 S. E., 807; *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32. He has no power, however, ordinarily to change or modify a verdict as returned by the jury and render judgment on the verdict as changed or modified by him.

On the facts recited in the judgment in the instant case, the verdict should have been set aside and a new trial ordered by the trial judge. For that reason the judgment is reversed to the end that the plaintiff may have a new trial, to which, in view of her assignments of error on this appeal, she is entitled.

New trial.

MRS. N. L. SORRELLS, LINNIE SORRELLS, INDIVIDUALLY AND AS ADMINISTRATRIX OF J. N. SORRELLS; MRS. L. G. STACY, AND W. W. SORRELLS, v. MISS JOYCE DECKER, ADMINISTRATRIX OF J. E. DECKER, DECEASED.

(Filed 13 October, 1937.)

Trial § 33—

Inadvertence in the statement of the contentions of the parties and the evidence supporting them must be brought to the court's attention in apt time to afford opportunity for correction.

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

APPEAL by defendant from *Alley, J.*, at July Term, 1937, of McDOWELL. No error.

Action by plaintiffs to enjoin mortgage sale of land upon the ground that the debt had been paid and the mortgage canceled, and also to recover the sum of $347.78 alleged overpayment on the note, made by mistake.

There was verdict for plaintiffs establishing the fact that the note had been paid, the mortgage canceled, and that the amount claimed had been overpaid by mistake.

From judgment on the verdict, defendant appealed.

No counsel for plaintiffs, appellees.
Morgan & Story for defendant, appellant.

PER CURIAM. The only exceptions noted at the trial and brought forward in the assignments of error relate to the judge's charge to the jury. The portions excepted to contained statements of the contentions of the parties and the evidence supporting. If there were any inadvertence on the part of the judge in these recitals, his attention should have been called to it at the time so that correction, if deemed important, might have been made. *S. v. Sinodis,* 189 N. C., 565; *S. v. Barnhill,* 186 N. C., 446. The controversy presented issues of fact which have been resolved against the defendant.

In the trial, we find

No error.

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

J. ED BASS v. FREMONT WHOLESALE CORPORATION.

(Filed 13 October, 1937.)

Master and Servant § 22—Agreement held to constitute truck owner independent contractor for delivery of tobacco sticks for defendant.

The owner of a truck agreed to furnish his truck with driver and helper and gas to deliver a truck load of tobacco sticks for defendant, a part of the load to be delivered at several places. At the place of the first delivery, defendant directed the driver as to the places where the balance of the load was to be delivered. Plaintiff, on invitation of the driver, rode on the truck from one place of delivery to another, and was injured as the truck was leaving the last place of delivery. *Held:* Defendant was interested only in the delivery of the tobacco sticks and exercised no control over the operation of the truck, and cannot be held liable by plaintiff.

APPEAL by plaintiff from *Harris, J.*, at May-June Term, 1937, of WAYNE.

Action to recover damages for alleged personal injury.

The evidence tends to show that on 27 July, 1935, the defendant had a quantity of tobacco sticks at Benson which it desired to have hauled and delivered, partly at its warehouse at Fremont and the balance to go to Pikeville; a part to the Ray Smith farm and a part to the Berger farm. The defendant entered into a contract with R. A. Yelverton to do the hauling for an agreed consideration. Yelverton furnished his own truck with driver and helper and gas; Yelverton gave directions and the driver and helper drove the truck to Benson, loaded it and drove back to the warehouse of defendant, where a part of the sticks were unloaded. Yelverton was there at that time and directed the driver and helper to go to Pikeville and make deliveries to the Smith and Berger farms. A part of the sticks for the Berger farm were to go to the plaintiff's house. From there the plaintiff, on invitation of the driver, rode in the truck to Hancock Coley's on the Smith farm. While the truck was in the act of leaving there, it was unexpectedly moved and the plaintiff, who had gotten on the body of the truck, was thrown to the ground and injured.

From judgment as of nonsuit the plaintiff appealed to the Supreme Court, and assigned error.

Scott B. Berkeley and Paul B. Edmundson for plaintiff, appellant.
D. H. Bland and B. F. Aycock for defendant, appellee.

PER CURIAM. Upon all the evidence taken in the light most favorable to the plaintiff, the plaintiff fails to bring himself within the doctrine of *respondeat superior.*

It appears that the defendant exercised no control over the operation of the truck. It was interested in the delivery of the tobacco sticks, and not in the steps leading to the delivery.

It is a settled principle of law that "where the contract is for something that may lawfully be done, and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it, and no general control is reserved either in respect to the manner of doing the work or the agents to be employed in it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, the latter is not liable to third persons for the negligence of the contractor as his master. Cooley on Torts (2 Ed.), sec. 548, p. 646." *Craft v. Timber Co.,* 132 N. C., 152, at 158, 43 S. E., 597; *Embler v. Lumber Co.,* 167 N. C., 457, at 462; *Waters v. Lumber Co.,* 115 N. C., 652, 20 S. E., 718.

The judgment of the court below is

Affirmed.

REX LEWIS v. J. R. PATE AND WIFE, KITTIE PATE.

(Filed 13 October, 1937.)

Husband and Wife § 12: Execution § 12—

A husband owns and has the right to dispose of all the income, rents and profits, products, etc., accruing from an estate held by entirety so that execution against him may be levied thereon to the exclusion of any claim of the wife.

EXCEPTIONS to report of appraisers allotting personal property exemptions, heard before *Alley, J.,* at June Special Term, 1937, of YANCEY. No error.

The plaintiff having procured a judgment in this cause against the defendant J. R. Pate, an execution issued thereon, under which the sheriff proceeded to have the defendant's personal property exemptions allotted. In the allotment of exemptions crops raised on lands owned by the defendant and his wife as tenants by the entirety were set apart to the defendants, as a part of his personal property exemption, and certain parts of the crops were ordered sold under the execution.

In the trial below, upon issues submitted, the jury found, under instructions of the court, that the crops levied upon belonged to the defendant J. R. Pate. From judgment thereon the defendants appealed.

Watson, Fouts & Watson for plaintiff, appellee.

Charles Hutchins for defendants, appellants.

PER CURIAM. While there are a number of exceptions in the record, the appellant presents to this Court for determination only one question, to wit: "Does the husband own and have the right to dispose of all the income, rents and profits, products, etc., accruing from an estate held by entirety to such an extent that an execution against him may be levied upon it to the exclusion of any interest the wife may have?" This question must be answered in the affirmative. It is well established law in this State that the husband, during coverture and as between himself and the wife, has absolute and exclusive right to the control, use, possession, rents, issues, and profits of property held as tenants by the entirety. The common-law rule still prevails. *Davis v. Bass,* 188 N. C., 200; *Bynum v. Wicker,* 141 N. C., 95; *Greenville v. Gornto,* 161 N. C., 342; *Dorsey v. Kirkland,* 177 N. C., 523; *Simonton v. Cornelius,* 98 N. C., 437; *Bryant v. Bryant,* 193 N. C., 372; 30 C. J., 567.

We have examined the other exceptions contained in the record and find them without substantial merit. In the trial of this cause below there was

No error.

CLARK HALL, ADMINISTRATOR OF THE ESTATE OF LEE HALL, v. KENTUCKY-VIRGINIA STONE COMPANY AND PAUL McCURRY, LON LAMBERT, AND ERNEST GALLOWAY.

(Filed 13 October, 1937.)

Removal of Causes § 4a—Complaint held to state joint cause, and petition for removal was properly denied.

A complaint alleging that plaintiff's intestate was riding in a truck which was being negligently driven at an unlawful speed, and that the truck collided with another truck which was negligently and unlawfully parked on the highway, resulting in the death of intestate, and that the accident was the result of the concurrent negligence of the drivers, *is held* to state a cause of action for joint negligence, and petition of the nonresident defendants to remove to the Federal Court was properly denied, the cause of action as stated in the complaint being determinative on the question of separable controversy.

APPEAL by petitioners from *Alley, J.,* at June Special Term, 1937, of YANCEY. Affirmed.

This was a petition for removal to the United States District Court by the defendants Kentucky-Virginia Stone Company and Lon Lambert on the ground of diversity of citizenship and separable controversy. From judgment denying the removal, petitioners appealed to this Court.

Charles Hutchins and E. L. Briggs for plaintiff, appellee.
Jones & Ward and J. M. Horner, Jr., for defendants, appellants.

PER CURIAM. The complaint alleges that the death of the plaintiff's intestate was caused by the joint negligence of the defendants in the operation of two trucks on the public highway. The plaintiff and the defendants Ernest Galloway, Paul McCurry, and Lon Lambert, according to the allegations of the complaint, are residents of North Carolina, and the defendant Kentucky-Virginia Stone Company is a nonresident corporation.

The complaint alleges that the plaintiff's intestate received fatal injuries as a result of a collision of the truck in which he was riding, which was owned by Galloway and driven by McCurry, with a truck owned by the Kentucky-Virginia Stone Company and driven by Lon Lambert; that these two trucks collided as a result of "the mutual and concurrent negligence of the defendants, and each of them," in that Galloway's truck was being operated on the public highway at a negligent and unlawful speed, and the Stone Company's truck was negligently and unlawfully parked upon said highway.

Upon a petition for removal to the Federal Court on the ground of diversity of citizenship and separable controversy, the plaintiff is entitled to have his cause of action considered as stated in the complaint. It is obvious that the complaint under consideration alleges a cause of action based upon the joint and concurrent negligence of both resident and nonresident tort-feasors. This case is governed by *Rucker v. Snider Bros.*, 210 N. C., 777, and the petition for removal was properly denied.

Affirmed.

AGNES ALLEN, BY HER NEXT FRIEND, H. A. ALLEN, v. KENTUCKY-VIRGINIA STONE COMPANY, LON LAMBERT, ERNEST GALLOWAY, AND PAUL McCURRY.

(Filed 13 October, 1937.)

APPEAL by the defendants Kentucky-Virginia Stone Company and Lon Lambert from a refusal to grant a petition for removal to the Federal Court by *Alley, J.*, at June Special Term, 1937, of YANCEY. Affirmed.

Huskins & Wilson for plaintiff, appellee.
Jones & Ward and J. M. Horner, Jr., for defendants, appellants.

PER CURIAM. The plaintiff in this case alleges that she was injured while a passenger in the truck owned by Galloway and driven by McCurry at the time of the collision with the truck owned by the Kentucky-Virginia Stone Company and driven by Lambert referred to in the case of Clark Hall, administrator of Lee Hall, against the same defendants as in this case. The decision of this case is governed by the decision of the *Hall case, ante*, 254.

Affirmed.

THOMAS M. BATTON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 3 November, 1937.)

1. Master and Servant § 25—

Where it is admitted or established by verdict of a jury that a railroad employee was injured while engaged in his duties in interstate commerce, the action to recover for such injuries is governed by the Federal Employers' Liability Act.

2. Courts § 10: Master and Servant § 26—

In an action governed by the Federal Employers' Liability Act, instituted in the courts of this State, the Federal decisions are controlling in the construction and operation of the act, but the rules of practice and procedure of this State will be followed.

3. Master and Servant § 27—

In an action under the Federal Employers' Liability Act, the evidence will be considered in the light most favorable to plaintiff employee, and he is entitled to every reasonable inference therefrom and every reasonable intendment thereon.

4. Same—Evidence held sufficient to be submitted to the jury on issue of negligence of railroad employer.

Plaintiff's evidence tended to show that he was employed as a flagman, that his duties required him to inspect the rear of trains at stops, that at the stop where the accident occurred the train usually cleared the trestle before stopping so that none of the cars extended beyond the station platform, but that on the night in question the train was unusually long, and that the rear cars protruded beyond the platform and over the trestle, that plaintiff was unable to go through the train to the rear because of a locked private car on the rear, and that as plaintiff was walking on the platform inspecting the brakes of the cars in the course of his duties in going to the rear to inspect the rear signal lights as required of him, he fell off the end of the platform to his serious injury. The evidence was also to the effect that the night was rainy and dark, that the end of the platform was unlighted for some distance, and that there was no barricade or guard at the end of the platform for a distance of three feet from the train, and that plaintiff carried only a small signal lamp, which was inadequate to light the way. *Held:* The evidence was

sufficient to be submitted to the jury on the issue of defendant's negligence in stopping the train before clearing the trestle, contrary to custom, and in failing to exercise due care to furnish plaintiff a reasonably safe place to work.

5. **Master and Servant § 28—Employee does not assume risk of injury from negligence of employer.**

An employee assumes the ordinary and usual risks of his employment, but he does not assume extraordinary risks, or those due to the employer's negligence, until he is made aware of them and continues in the employment without objection, but he assumes such extraordinary risks, even though he makes objection and obtains a promise from the employer to remedy same when they are so imminent and dangerous that a man of ordinary prudence would not rely on the promise and continue in the employment. The development of the doctrine and the trend of modern decisions discussed by MR. JUSTICE CLARKSON.

6. **Master and Servant § 26—**

The Federal Employers' Liability Act, being a humane and remedial statute, should be liberally construed.

7. **Master and Servant § 28—Question of assumption of risks held for jury upon the evidence in this case.**

The question of assumption of risks is ordinarily for the jury, and the evidence in this case tending to show that plaintiff flagman had often gotten off the platform at the stop where the accident occurred, but that the train customarily cleared the trestle at the end of the platform, permitting plaintiff to inspect the rear of the train from the platform, and that on the occasion of the injury the rear cars extended beyond the platform over the trestle, and that plaintiff fell from the end of the platform in attempting to inspect the rear of the train in the course of his duties, and that the end of the platform had no guard or rail where plaintiff was walking, and that the night was rainy and dark, *is held* to require the submission of the issue of assumption of risk to the jury, and defendant's motion for judgment as of nonsuit and request for a directed verdict were properly overruled.

8. **Same: Trial § 36—**

Defendant's exception to a portion of the charge on the question of assumption of risk is not sustained in this case, the charge on the issue being without prejudicial error when construed as a whole.

APPEAL by defendant from *Grady, J.*, and a jury, at March Term, 1937, from HALIFAX. No error.

This is an action to recover from defendant damages for personal injuries which the plaintiff, a flagman of defendant company, 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.

The complaint of plaintiff is fully set forth in *Batton v. R. R.*, 210 N. C., 756. The plaintiff set forth in his complaint the cause of action

in detail, and his permanent injuries and demand for damages. The defendant admitted paragraphs 1, 2, and 3 of the complaint, and said: "(4) So much of paragraph 4 of the complaint as alleges that 'on 18 April, 1934, the plaintiff, being then engaged in the employment of the defendant as a flagman on the passenger train from Richmond, Va., to Florence, S. C., was ..... such flagman when said train on its southbound trip from Richmond to Florence, being engaged in interstate commerce, arrived at the town of Weldon about 2:15 a. m.' is admitted. The remaining part of said paragraph and each allegation thereof is denied. (5) Paragraph 5 is stricken from the complaint by the clerk, on defendant's motion, for irrelevancy and redundancy, under C. S., 537. (6) Paragraph 6 of the complaint and each of its subparagraphs (a), (b), (c), (d), (e), (f), (g), (h), (i), and (j) is denied. (7) Allegations of paragraph 7 of the complaint are denied. (8) As to the allegations of paragraph 8 of the complaint, defendant has no knowledge or information sufficient to form a belief, and therefore denies the same."

The defendant denied negligence and alleged that plaintiff's own negligence contributed to his injury; that plaintiff's own negligence was the sole proximate cause of his injury, and that plaintiff assumed the risk of his injuries. Upon motion of defendant, the following words were stricken from the complaint: In paragraph 4, "passenger and," "passengers and," "either passengers or," "passengers alighting from defendant's train and," and "passengers or," etc. These were stricken out throughout the entire complaint.

The evidence of plaintiff was to the effect that he was 57 years old, lived in Richmond, Virginia, and was an employee of defendant as a passenger train flagman. He had been in the employment of defendant 26 years and passenger flagman 15 years or more. His wages were about $200.00 a month. About 2:15 a.m. on 18 April, 1934, he was performing his duties as flagman on passenger train No. 83, going south from Richmond, Va., to Florence, S. C. It was a local train, had 18 cars and a private car on the rear for Charleston, S. C., which had Yale locks on the inside and he had no way of getting into that car. His duties required him to protect the rear of the train when it reached the station at Weldon. He was riding ahead of the private car, could not go through same and had to get down on the platform to go back to perform his duties in protecting the rear and to look over for brakes dragging, hot boxes or damage that could not be observed from the front of the train. He could smell a box if he got close to it, and if he had a light he could detect brakes rigging down or dragging. He had to go outside the car to detect such defects and would have to go to the rear of the train. Marker lights, one on each side to indicate the rear of the train, and he had to see that the markers were burning and adjusted

to the track, that is, keeping them straight back—red lights to the back, yellow to the front and side.

Plaintiff testified, in part: "On this particular occasion one of the markers was twisted around, and that is what I was going to adjust when I went back. Also I had to see that the steam in cold weather was blown out every 10 or 15 miles. At that time we had a rule to blow out the steam every 10 to 15 miles. I am pretty familiar with the rules which were in force at that time. I hold in my hand book entitled 'Rules and Regulations of the Operating Department of Atlantic Coast Line Railroad Company.' Rule 908, page 113, says: 'Special Duties to Protect.' That is the printed rule of the company and was furnished me by the company for my guidance and instruction. It was very dark and rainy when the train reached Weldon at 2:15 a. m. The train was about an hour late. I had duties to perform at the rear of the train in respect to the valves. I had to blow the steam out; that was my duty. My next stop was at Rocky Mount, N. C., which was a terminal where they switched the train and detached the engine. Q. Was there any other place between Weldon and Rocky Mount that you could attend to the valves other than Weldon? Answer: No, that was the only place. My duties at the station with respect to inspection of the valves were that I always blow steam out of the rear of the train when it stops at a station. Weldon was a regular stop. The engineer gave the regular stop signal as we approached Weldon—one long blast of the engine, but the cord was not pulled because it was a regular stop. Q. State whether or not there was any custom, regular custom, as to stopping place for this train upon the platform at Weldon. Ans.: This specific train was always a short train, hardly ever over 15 cars; never carried a long train, and was carrying an unusually long train, because with local trains it is hard to make time. There were 19 cars on this train. Q. State whether there was a custom with respect to where the local train stopped upon the platform. Ans.: Always clear of the platform. I had been operating over that road 26 years, and I had hardly ever operated with trains of 18 or 19 cars except on the tourist trains. I had operated on trains with 19 cars very frequently in the tourist season, but never had occasion to get off. Those trains did not stop at Weldon. Q. Had you had occasion to have a train of 19 cars to stop at Weldon? Ans.: I cannot recall having one that did not clear the platform. Q. What was the custom with respect to all the trains that you had had experience with, with respect to stopping on the platform? Ans.: I said all trains I went on that stopped at Weldon, but the longest trains that I rode on did not stop there. Q. And was that the custom, the regular custom, with respect to trains which stopped at Weldon to stop on the platform? Ans.: It was. Just as soon as the train stopped

on the 18th of April I turned the valve on the third car from the rear and walked back to the rear of the train, the two cars I rode ahead of, with intention of blowing the steam out of the two cars in the rear and to straighten my markers so that when I got to Rocky Mount I could open the valve on the third car and blow the steam out of the whole train. That was my duty. There were no lights at the rear of the platform at all, I should say, for 5, 6, or 8 car-lengths, there were no lights; only where the passengers got off the train was lighted at the time. The only place there were any lights at all was just about where the passengers get off the day coaches and Pullmans. That was at the wide part of the platform near the station, and was more than 1,000 feet from the north end of the platform. As I went toward the rear of the cars I went along inspecting the train, and went back to adjust my markers and blow out the steam, and I had no idea I was anywhere near the end of the platform and I walked off the platform before I realized it. It was dark and rainy and I never touched a thing when I walked through; no barricade or anything to protect. While I was walking to the rear I was actually engaged in inspecting those two cars while walking along. I had a lantern with me. Those lanterns give a light about as big as your finger. The purpose of those lanterns was only to give signals and not to light up. They did not have any capacity for lighting up. At the end of the platform, to prevent my getting off next to the train, there was one 12-inch board and one 2 x 4 running down as a brace in the corner, and a space of three feet from the brace to the track unprotected. That brace was right at the end of the platform; so was the board. Before I reached the extreme end of the platform, there was no barrier or guard. There was no marker of any kind at the footboard to indicate where the edge of the platform went off. There was no warning whatever. The platform I refer to is on the south side of the river. The platform is an approach to the station. Trains come across the river from the north on this high trestle and into the station at Weldon. The north end of the platform is to walk on and it is supposed to be there to go around and inspect the trains. None of the train crew, except the flagman, has to get off there back at that part of the train. The train crew gets off at the wide part of the station except the flagman. I think the platform is about 1,000 feet long from the station. Q. How much space at the north end of the platform was there that was entirely open? Ans.: Three feet; I measured it; three feet was unprotected altogether. That is the space that was adjacent to the train and alongside of the train. I made that measurement since they reconstructed it, but I have looked at it lots of times before that. In passing over it and from general view you could surmise, but I did not measure it until since. . . . Between the 2 x 4 and the track

there is a space you can walk through without even touching anything. I did not touch a thing. . . . There was no obstacle of any kind to impede my progress or stop me until I got to the north end of the platform. . . . The end of the platform was about 60 feet above the ground below. Falling felt like a thousand feet. When I stepped off the end of the platform I fell to the ground below in a sitting position. The ground was the first thing I struck. I do not think that, under the conditions that were then obtaining, I could distinguish three feet ahead, as dark as it was and raining. This was the main track and was the track over which all trains coming from the north had to travel in order to get through Weldon. I would think that the car was hanging over the end of the platform, maybe 10 or 12 feet; that much of the car was beyond the end of the platform. I was walking along the east side. . . . Rule 913, page 114, 'Rules and Regulations of Operating Department of Atlantic Coast Line R. R.,' which reads: 'Flagman must take care of the markers and other rear train signals, put them in place, see that they are properly displayed, and that the signal lamps are clean, trimmed, burning brightly, and that the markers are kept adjusted to the track.' . . . When I got on the train in Richmond I got on the third car from the rear after I put my markers on. I rode in that car because the rear car was a private car and the next to the rear car was a deadhead. The private car was the end car that I could not get in. I did not see the conductor after he showed me orders at Broad Street Station in Richmond. . . . After I fell and struck the ground it knocked the breath out of me, and as soon as I regained enough strength I crawled out of the hole I made in the ground and found that I had broken my white lantern and put my red lantern out, so I lighted my red lantern and crawled up almost 12 feet or as far as I could to attract attention to the red lantern. Then I got exhausted and laid down and could not turn over and in that position they found me at 7:45. I fell at 2:15 and they found me at 7:45. . . . They put me on a train and took me to South Rocky Mount Hospital, where I stayed for five months and five days the first time, then for three months, then for one month; almost continually going back and forth, and have to be under the doctor's care now. My back was broken and seven ribs. I fell in a sitting position and my knees drove up in my stomach and upset my bowels and bladder. . . . After this fall on 18 April, 1934, I have had no control of my bladder or my bowels, and I have to take purgative medicine every third day or I never have any bowel movement, and when I do I do not have any more control over them than a baby. I have to wear an urinal bag and have to use an urinal at night. That is attached to me in the daytime and at night I take it off and use an urinal pan. When my bowels are loose I have no control over them, just like a baby.

Of course, I suffer all the time with my back in two places and my intestines are always sore and aching, and especially in damp weather. Prior to 18 April I had no difficulty of this kind whatever."

On cross-examination plaintiff testified, in part, as follows: "Out of the 15 or 16 years in the service I would say that I was on 80 and 89 about three years, including trains 33 and 34. They also stopped at Weldon. 89 and 80 made ten round trips a month. In other words, I passed through Weldon 20 times each month and got off on that platform 20 times each month for three years; according to your figures, I got off on this platform 720 times in three years when running those two sets of trains. I have not figured it up. I am not disputing your figures. 83 and 82 were both night trains. 89 and 80 were both day trains. I got off on the platform at Weldon every time I came in there on 89 and 80. On 89 I would come in from the north and get off at the end of the trestle but we had short trains. I would get off 7 or 8 cars from the end of the trestle. I would get off and knew that the trestle was a high trestle above the ground. . . . I did not run on 82 and 83 very long. I was on the Florida Special when they cut that off, and I went back to 82 and 83. I rode the Florida Special only the last three years; the other times I was riding 83 and 82, and I was on a short run between Richmond and Petersburg for a long time. I would say that I ran from Richmond, Va., to Florence, S. C., on 82 and 83 not over two years. That would be 480 times I got off, one-half at the north end and one-half at the south end of the platform at Weldon. The Florida Special did not stop at Weldon; 83, 82, 89, 80, 33, and 34 were the trains I stopped on at Weldon. They always stopped at Weldon; 33, 34, 89, and 80 stopped in the daytime, the others at night. . . . When I got off the car I was the third car from the rear. I think the standard cars are 50 or 60 feet long. I never measured one. That would put me 150 or 180 feet from the rear of the train. I got off the rear end of the third car and started on back to the rear of the train. I was looking the train over, inspecting it for the purpose of seeing whether there was a hot box. I could smell a hot box when walking along, but could not when riding ahead. There are 8 boxes on each car, on the new cars. I did not see any hot boxes. When I was there looking at the boxes on the rear I was looking underneath to see if there was anything needed fixing. That was what I was doing when I stepped off the platform. That is what I had been doing since I stepped off the train and started walking to the back of the train. There were no lights in about four car-lengths of the rear end of the platform. There had been lights all the way back, but they had burned out or fallen out and when they were there they were very small lights. There were poles there, but no lights. There were no lights on the last three poles. Within 50 feet of the rear

of the platform there is a pole for a light, but there was no light. I know there was no light because I looked back, and there were no lights. I looked back when I was stopping. I looked up to see if there were any lights, and the last three poles did not have any lights, I saw that that night. I could not say exactly how many nights before the lights had been out. I would say approximately one month or two."

Redirect examination: "Q. At the time that you were walking down along the side of the train did you know or realize that you were in any danger in walking down in the direction toward the rear of the train? Ans.: I had no idea that I was anywhere near the rear of the platform, for the fact that those trains had stopped clear of the end of the platform."

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Ans.: 'Yes.'

"2. Did the plaintiff, by his own negligence, contribute to his injuries alleged in the answer? Ans.: 'Yes.'

"3. Did the plaintiff voluntarily assume the risk of injury as alleged in the answer? Ans.: 'No.'

"4. What damage, if any, is the plaintiff entitled to recover? Ans.: '$37,500.'

"5. Was the plaintiff, at the time of his injury, engaged in interstate commerce? Ans.: 'Yes.'"

The court rendered judgment on the verdict. Defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

E. L. Travis, A. W. Oakes, Jr., and Langston, Allen & Taylor for plaintiff.

F. S. Spruill, Jr., Spruill & Spruill, Dunn & Johnson, Geo. C. Green, Thos. W. Davis, and V. E. Phelps for defendant.

CLARKSON, J. This action was here before—*Batton v. R. R. Co.*, 210 N. C., 756. There were two causes of action alleged by plaintiff in his complaint: (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 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 were 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. Plaintiff appealed to this Court.

This Court said, at p. 765: "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. . . . 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 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."

It is admitted, and found by the jury, that at the time of plaintiff's injury the defendant was engaged in interstate commerce. Therefore the action is governed by the Federal Employees' Liability Act. The decisions of the Federal courts control the State courts in all actions prosecuted in the State courts, but the rules of practice and procedure are governed by the laws of the State where the cases are pending.

In *Hamilton v. R. R.*, 200 N. C., 543 (552-3-5), we find:

"The Second Federal Employers' Liability Act was held valid. 223 U. S., 1, 56 L. Ed., 327. 'The first section provides that every common carrier by railroad while engaged in interstate commerce shall be liable to every employee while employed by such carrier in such commerce or, in case of his death, to certain beneficiaries therein named, *for such injury or death, resulting in whole or in part, from the negligence of the carrier, or its employees, or by defects or insufficiencies due to negligence in any of its equipments or property.* The second section provides that every common carrier by railroad on lands of the United States other than states shall be liable in the same way to any of its employees. *The third section prescribes that contributory negligence shall not bar recovery, but shall only diminish the damages,* except that no employee *injured or killed where the violation of a safety law for employees contributed to the injury, shall be held to have been guilty of contributory negligence.*' . . . (553) '*Further prescribes that the jurisdiction of the courts of the United States under the act shall be concurrent with that of the courts of the several states,* and no case arising under the act

and brought in any State court of competent jurisdiction shall be removed to any court of the United States.' (Italics ours.) . . . (P. 555.) 'The term "Negligence" has been defined by the National Supreme Court to be the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the situation. Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances. *Charnock v. Texas & R. R. Co.*, 194 U. S., 432, 48 L. Ed., 1057.' *Roberts, supra* (2 Fed. Lib. and Car. [2nd Ed.], 1929, sec. 811, pp. 1558-9). In *Baltimore & O. R. R. Co. v. Groeger*, 266 U. S., at p. 24, we find: 'The credibility of witnesses, the weight and probative value of evidence are to be determined by the jury and not by the judge. However, many decisions of this Court establish that, in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding.'"

The defendant made motions in the court below for judgment as in case of nonsuit at the close of plaintiff's evidence and at the close of all the evidence. C. S., 567. The court below overruled these motions, and in this we can see no error.

The following prayers for special instruction to the jury, requested by defendant, were properly refused by the court below: "(1) If you find the facts to be as testified to by all the witnesses, the court instructs you to answer the first issue 'No.' (2) If you find the facts to be as testified to by all the witnesses, the court instructs you to answer the third issue 'Yes.' (3) The court instructs you that the plaintiff's negligence was the sole and direct cause of his injury and you will, therefore, answer the first issue 'No.'"

(1) Was there sufficient evidence to be submitted to the jury that plaintiff was injured by the negligence of the defendant, as alleged in the complaint? We think so.

In 2 Roberts Federal Liabilities & Carriers (2nd Ed.), sec. 711, p. 1337, it is said: "The courts are agreed that the Federal Employers' Liability Act, being a humane and remedial statute, should invariably be given a liberal construction, to the end that the remedy proposed shall be advanced, and that the evil against which it was directed shall be corrected."

We set forth the evidence at length. All exceptions by the defendant to the competency of the evidence have been abandoned. The defendant

introduced no evidence. It is well settled by this and the Federal Court that the evidence must be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

The plaintiff, a flagman, had certain positive and important duties to perform at Weldon, when the train stopped there, to protect his employer. The train on this occasion had 19 cars, though it usually carried 17. The engineer knew this. The rear car was a private car, fastened by a Yale lock on the inside. The engineer had always theretofore cleared the railroad trestle, which was some 60 feet high. The custom was to stop on the platform. On this occasion he neglected to do so. He knew the flagman's duties when he stopped at Weldon—they were defined in the rules and regulations of the railroad company as follows: "Flagman must take care of the markers and other rear train signals, put them in place, see that they are properly displayed and that the signal lamps are clean, trimmed, burning brightly and that the markers are kept adjusted to the track." It was a dark and rainy night. There were no lights at the rear of the platform at all for some 5, 6, or 7 car-lengths. The lights were only where the passengers got off near the station; this was about 1,000 feet from the northern end of the platform. Plaintiff got off the train to do his duty. He walked along the platform inspecting the train, to adjust the markers and blow out the steam. There was no barricade or anything indicating that it was the end of the platform, and while walking along, actually engaged in inspecting the two cars, with a lantern intended for the purpose of giving signals and not capable of illuminating his surroundings, with no idea that he was anywhere near the end of the platform, he fell some 60 feet. The space of three feet at the end of the platform was altogether unprotected, entirely open. This is the space adjacent to and alongside the train. There was no obstacle of any kind to impede his progress or to stop him until he got to the northern end of the platform, and then, proceeding in the line of duty, he fell off the end of the platform. It was incumbent on plaintiff to take care of the markers and rear train signals. On this occasion one of the markers was twisted around, and to adjust this and perform the other duties required of him under the rules, he proceeded on, without warning, and was injured.

In *Jamison v. Encarnacion,* 281 U. S., 635 (641), 74 Law Ed., 1082 (1085-6), it is written: "The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted, and to that end the word may be read to include all the meanings given to it by courts and within the word as ordinarily used. *Miller v. Robertson,* 266 U. S., 243, 248, 250, 69 Law Ed., 265, 271, 272, 45 Sup. Ct. Rep., 73."

In 18 R. C. L., "Master and Servant," sec. 95, pp. 593, 594, 595, is the following: "Although the doctrine has met with some opposition, the courts have generally held that an employer owes to his employees a duty to make safe the place where they are required to perform their services, failing in which he renders himself liable to an employee who may sustain injuries as the proximate result of his neglect. In this respect as in others, the employer is not liable as an insurer, but is bound only to the exercise of ordinary or reasonable care, the degree depending upon the dangers attending the employment, and the standard being the care exercised by prudent employers under similar circumstances. This duty of the employer is affirmative and continuing, and it cannot be delegated to another so as to relieve the employer of liability in case of nonperformance. The dangers to which the employer's duty extends are all such as are latent and concealed, and hence beyond the knowledge of the employee. To discover such dangers, the employer must make proper tests and inspections, and after ascertaining their existence he must, as a rule, give the employee warning thereof. The employee may assume that the employer has discharged this duty, and no obligation rests upon him to make inspections with a view to discovering latent perils. Whether in any particular case the employer has discharged his duty in this respect is ordinarily a question for the jury's determination." *Highfill v. Mills Co.*, 206 N. C., 582 (585-6); *Riggs v. Mfg. Co.*, 190 N. C., 256.

We think the evidence sufficient to be submitted to the jury on the issue of negligence. The court below charged clearly the law of negligence applicable to the facts on this issue and proximate cause, to which no exception was taken.

(2) The question of contributory negligence is out of the picture. The answer to that issue was "Yes." The court below charged the rule as to diminished damage, to which no exception was taken.

(3) Did the plaintiff voluntarily assume the risk of injury as alleged in the answer? The jury answered "No." We see no error on this issue.

"A servant does not assume the extraordinary and unusual risks of the employment, and he does not assume the risks which would not have existed if the employer had fulfilled his contractual duties. But only those risks are assumed which the employment involves after the employer has done everything that he is bound to do for the purpose of securing the safety of his servants, that is, he does not assume the risk of injury from the negligence of the master." Richey, Federal Employers' Liability Act (2nd Ed.), p. 179; *Pyatt v. R. R.*, 199 N. C., at p. 404; *Hamilton v. R. R., supra,* at p. 561.

This question of assumption of risk is fully set out in *Cobia v. R. R.*, 188 N. C., 487 (491), as follows: "By the common law the employee

assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks and those due to the employer's negligence he does not assume until made aware of them, or until they become so obvious and immediately dangerous that an ordinary prudent man would observe and appreciate them, citing *N. Y. C. R. R. Co. v. White,* 238 U. S., 507; *Seaboard v. Horton,* 233 U. S., 492; *Gila Valley, etc. R. R. v. Hall,* 232 U. S., 94; *Gaddy v. R. R.,* 175 N. C., 515."

The principles of law governing the submission of the issue of assumption of risk to the jury are also stated in *Cobia's case, supra,* at p. 491, as follows: "In a clear case the question of assumption of risk by the employee is one of law for the court, but where there is doubt as to the facts or as to the inferences to be drawn from them, it becomes a question for the jury. To preclude a recovery on that ground it must appear that the employee knew and appreciated, or should have known and appreciated the danger to which he was exposed, and in case of doubt, that is for the jury. . . . The burden of proof as to the assumption of risk is upon the defendant; and where there is any doubt as to the facts, or inference to be drawn from them, the question is for the jury."

In the case of *Hamilton v. R. R., supra, certiorari* denied, 284 U. S., 636, the court, recognizing departure from the usual practice as a basis of liability, said, at p. 584: "There was evidence to the effect that the Southern, *earlier* than was customary, went on the 'exchange track' to get a car which, in the exercise of due care, it knew or ought to have known was being repaired, and in making the repair plaintiff would of necessity be under the car; it gave no warning before picking up the crippled car by ringing a bell or sounding a whistle; it coupled with unusual and unnecessary force; *it did not, as was the custom, stop the train before coupling,* and a member of the crew get on the ground and look around and see if the car was ready to be moved; it had no right under the Safety Appliance Act to handle a crippled car." (Italics ours.)

The charge of the court below on assumption of risk has abundant authorities to support it. For example, the following portions of the charge are supported almost word for word in the cases: "Assumption of risk is founded upon knowledge of the employee, either actual or constructive, of the risks and hazards to be encountered in the performance of his duties and his consent to take the chance of injury therefrom. It is based upon the contract of employment and is distinguished from contributory negligence, which is solely a matter of conduct." See *Horton v. R. R.,* 175 N. C., at p. 475, quoting from Labatt, Master and Servant, secs. 305, 306. "Under the law the employee assumes the risk

normally incident to the occupation in which he voluntarily engages, except those which are extraordinary or which are due to the master's negligence." See *Pyatt v. R. R.*, 199 N. C., at p. 404, and *Hamilton v. R. R., supra,* at p. 561, both quoting from Richey, Federal Employers' Liability Act (2nd Ed.), at p. 179. "Extraordinary risks, and those which are due to the negligence of the employer, are not assumed by the employee until he is made aware of them, or until they become so apparent and obvious that any person of ordinary care and prudence could not fail to observe them." See *Maulden v. Chair Co.*, 196 N. C., at pp. 124, 125; *Pyatt v. R. R., supra,* 405, 406. "In either case, or both, if he continues in the work without objection or protest, or without obtaining from the employer an assurance that the danger will be remedied or removed, he is deemed to have assumed them, and he takes the risk upon himself. If the dangers incident to the employment be so imminent and so apparent that no man of ordinary prudence would continue to rely upon such promises of the employer to remedy them under the circumstances, then he is deemed to have assumed the risks even pending the performance of the promise." See *Seaboard v. Horton, supra,* 239 U. S., at pp. 597, 602, affirming *Horton v. Seaboard, supra,* 169 N. C., 109.

The judge's charge fairly and adequately stated the doctrine of assumption of risk as it has developed to date since its first recognition in England in 1837 (*Priestly v. Fowler,* 3 M. & W., 1), its transfer to America prior to the War Between the States (in 1841—*Murray v. R. R.*, 22 S. C., 385, in 1843—*Farwell v. R. R.*, 45 Mass., 49, citing both the *Priestly* and the *Murray cases*), and its definite acceptance in North Carolina by the turn of the century (*Turner v. Lumber Co.*, 119 N. C., at pp. 398, 399; *Smith v. R. R.*, 129 N. C., at p. 177). At first the doctrine was, at times, confused with the doctrine of contributory negligence (*Rittenhouse v. R. R.*, 120 N. C., 544), but having drawn the line between the two doctrines in *Thomas v. R. R.*, 129 N. C., 392, this Court inked in the doctrine and indicated its general limits in *Hicks v. Mfg. Co.*, 138 N. C., at p. 327, where the Pennsylvania interpretation of the doctrine was accepted as stated in *Patterson v. Pittsburgh,* 76 Pa. St., 389. The doctrine reached the full flower of growth with the first of the two *Horton cases, supra,* in the decision of this Court (169 N. C., 109), and those of the United States Supreme Court (233 U. S., 492, and 239 U. S., 595). More recent cases have amplified the definitions and corollaries of the doctrine and traced in many of the refinements of the doctrine. Among the leading cases on the subject in this jurisdiction in more recent years are: *Pyatt's case, supra; Hamilton's case, supra* (284 U. S., 636), *certiorari* to U. S. Supreme Court denied, and *Hubbard v. R. R.*, 203 N. C., 675.

The Federal Employers' Liability Act, being a humane and remedial statute, should be liberally construed. The assumption of risk as a defense to the recovery of damages had its origin in judicial decisions and may be properly classified as judge-made law. Congress and legislative bodies, from time to time, have endeavored to relieve employees who have suffered injuries from this defense. The trend of legislative action and judicial decisions in modern times, except in rare cases, is that this defense works injustice to employees.

"If the dangers incident to the employment be so imminent and so apparent that no man of ordinary prudence would continue to rely upon such promises of the employer to remedy them under the circumstances, then he is deemed to have assumed the risks even pending the performance of the promise." *Seaboard v. Horton, supra.*

It was for the jury to say, under the facts and circumstances of this case, whether plaintiff assumed the risk. Plaintiff was bound to examine the markers, etc., and go to the rear of the car to see that the lights were properly burning, in accordance with the rules. The place to do this was made dangerous by the cars, contrary to custom, stopping over the trestle—unknown to plaintiff. There was nothing to warn him in the performance of a positive duty. No guards, no lights, no platform to walk on to reach the rear of the train to see the tail lights, nothing to put him on notice. This is plaintiff's view and the jury has so found.

The only exception and assignment of error made by the defendant to the charge: "Now, gentlemen of the jury, if you find from the evidence and by its greater weight, remembering the burden is on the defendant, that the plaintiff knew and understood for a long period of time that this bridge or platform constituted a dangerous situation, and he passed over it a number of times each month for a period of years, and that he continued in the employment of the defendant while fully aware of the dangers, if you find that it was dangerous, and that he continued in the employment of the company, doing the same class of work, following this same train or a similar train, stopping at this same place, then he would be chargeable with knowledge, of course, of the dangers which he himself testified existed, and under the circumstances it would be your duty to find as a fact that he did assume the risk of his employment and answer this issue 'Yes'; if you find by the greater weight of the evidence." This exception and assignment of error cannot be sustained. Taking this with the prior parts of the charge, we cannot hold it for error.

This case is distinguishable from *C. & O. Ry. Co. v. Niham*, 280 U. S., 102, 74 L. Ed., 207; *B. & O. R. R. v. Bray*, 286 U. S., 272-276, 76 L. Ed., 272; *Howell v. R. R.*, 211 N. C., 297.

We think this case similar in many respects to *Inge v. R. R.*, 192 N. C., 522, where the authorities are fully set forth. *Certiorari* denied by the Supreme Court of the United States, 273 U. S., 753.

The charge of the court below defined negligence, proximate cause, assumption of risk; properly placed the burden of proof and applied the law applicable to the facts. No exception was taken to any part of the charge except that above set forth. The concluding part of the charge cannot be bettered: "About the best guide that I have ever known for the government of a jury or a judge, or anybody else in passing upon questions which arise between individuals, or between corporations and individuals, and which I will give to you as my parting injunction is: 'Ye shall do no unrighteousness in judgment; thou shall not respect the person of the poor, nor honour the person of the mighty: but in righteousness shalt thou judge thy neighbour' (Lev. 19:15)."

For the reason given we find

No error.

DALLAS C. KIRBY v. ROBERT R. REYNOLDS, WESLEY E. MACDONALD, AND THE HOME OWNERS' LOAN CORPORATION.

(Filed 3 November, 1937.)

1. **Pleadings § 15—**

Upon a demurrer to the complaint on the ground that it fails to state a cause of action, C. S., 511 (6), the pleading will be liberally construed in favor of the pleader with a view to substantial justice between the parties, C. S., 535, and the demurrer will not be sustained unless the complaint is wholly insufficient.

2. **Conspiracy § 2—Complaint must state facts from which agreement may be inferred and stipulate specific unlawful acts agreed upon.**

Since the elements of a conspiracy are an agreement to do an unlawful act or an agreement to accomplish a lawful end by unlawful means, a complaint does not state a civil action for conspiracy unless the acts which it alleges defendants agreed to do are unlawful, since an agreement to do a lawful act is not actionable, and mere allegation of an agreement without facts from which such agreement may be inferred, or mere allegation that the agreement was malicious and unlawful without stipulation of specific unlawful acts, is insufficient.

3. **Master and Servant § 7d—Employee at will may not maintain action against third person for procuring employer to demand resignation.**

An employee may maintain an action against a third person for wrongfully causing the employee's discharge, but where the employee has no term of office, but may be discharged at will, and voluntarily resigns under threat that if he fails to resign he will be discharged, he has no right of action against the third person for procuring his employer to demand his resignation, since such resignation is not under duress in law, the employer having the right to discharge him at will.

4. Conspiracy § 2—Complaint held insufficient to state cause of action for conspiracy between defendants to obtain discharge of plaintiff.

The complaint alleged in substance that plaintiff and the secretary of a United States Senator had an argument resulting in bad feeling between them, that plaintiff had a position with a governmental agency, that application of a third person for a loan had been refused, and that plaintiff wrote a letter to the Senator suggesting that he take the matter up with a member of the review committee of the governmental agency, that the governmental agency obtained the letter, and as a result thereof demanded plaintiff's resignation, stating that if the resignation was not forthcoming, plaintiff would be discharged. *Held:* The complaint fails to allege facts tending to show, directly or circumstantially, a conspiracy or agreement between the Senator and his secretary to procure plaintiff's discharge, and fails to allege facts sufficient to constitute duress in the procurement of his resignation, and defendants' demurrer to the complaint for failure to state a cause of action for wrongful conspiracy between the Senator and his secretary to procure plaintiff's discharge should have been sustained.

5. Duress.

A threat to do what one has a legal right to do cannot constitute duress.

6. Pleadings § 20.

A demurrer admits facts properly alleged, but not conclusions of law.

APPEAL by defendants from *Alley, J.*, at May Term, 1937, from DAVIE. Reversed.

This is an action brought by plaintiff against defendants for conspiracy, alleging damage.

The complaint alleges, in substance, that the defendant Robert R. Reynolds is a resident of North Carolina and elected junior Senator from the State of North Carolina to the United States Senate. That the defendant Wesley E. MacDonald claims to be a resident and citizen of North Carolina, but in fact is a resident and citizen of the State of Virginia. That the Home Owners' Loan Corporation is a corporation existing under and by virtue of the law of the United States, with its principal office in Washington, D. C. That it maintains state and regional offices in the states of the Union. That T. C. Abernathy is the manager in North Carolina, with offices in Greensboro, N. C. That plaintiff, while in the offices of Robert R. Reynolds, talking to a party, was asked by the party where MacDonald was from. Plaintiff replied that MacDonald was from Virginia. Shortly afterwards MacDonald called plaintiff into a private office and remarked to plaintiff that he had almost gotten him into trouble. That plaintiff expressed surprise and begged to be informed as to the circumstances. MacDonald told him that he had overheard the conversation. Plaintiff told MacDonald that he was of the opinion and was informed that he was a resident and citizen of Virginia, but if misinformed he would gladly correct his state-

ment. MacDonald stated to plaintiff while he was born and reared in Virginia, that on his vacation he had acquired real estate and proposed to build a summer home, and that he had registered as a voter and from then on he proposed to hold himself out as a citizen and resident of North Carolina. To this method of acquiring citizenship and the privilege of voting in North Carolina, plaintiff warned MacDonald against, and called his attention to the laws of North Carolina requiring *bona fide* residence of one year before being eligible to vote. Attention was called to the criticism directed toward Senator Robert R. Reynolds for appointing as his secretary a nonresident, also the probable political reaction to Reynolds should his political enemies desire to make capital of the illegal registration of his secretary as a voter, and the possible criminal prosecution against MacDonald for making a false oath to his actually being a *bona fide* resident and his citizenship. Whereupon, MacDonald contended that his ownership of real estate in North Carolina gave him a right to vote and his registration was legal. That for no reason other than the fact that plaintiff refused to condone, agree and to so state that MacDonald was a resident and citizen of North Carolina, MacDonald, from time to time after the conversation before mentioned, changed his whole attitude towards plaintiff and in divers ways and means showed resentment of plaintiff's presence in or about the office of Senator Reynolds.

On 20 February, 1934, without notice, reason or cause, and without any explanation to plaintiff, the locks on the doors of the office, which plaintiff had at all times since his stay in Washington had keys, were changed. That in September, 1934, plaintiff was introduced by John H. Cathey, of Asheville, N. C., to one Harvey L. Jones, assistant to the general counsel of the Home Owners' Loan Corporation, and as a result plaintiff obtained a position with the corporation as traveling attorney, at a salary of $3,600 a year. While working for said corporation, in October, 1934, a lady from Winston-Salem, N. C., came to Washington to see if she could obtain a loan, was refused because of certain legal complications, and being unable to sufficiently explain the legal questions herself she wired her attorney, William Porter, at Winston-Salem to come to Washington. That plaintiff, after talking to Porter, also spoke to John H. Cathey, now assistant regional counsel for the Home Owners' Loan Corporation in Omaha, Neb., and one Harry L. Smith, now assistant regional counsel in Baltimore, Md. Both agreed with plaintiff that the loan was eligible and should be made. Plaintiff suggested to the attorney that he see Senator Robert R. Reynolds and ask him to take the matter up with the Loan Review Committee in Washington, to the end that the loan be sent to Washington for review by said committee. That William Porter went to the office of Robert R.

Reynolds to secure his help and assistance, and shortly thereafter returned and said that Reynolds was out of the city and would not be back for at least a week. On learning that Senator Reynolds had returned, plaintiff called him over the telephone and advised him of the matter and suggested to Reynolds that the matter be taken up with Wallace Walker, a member of the review committee, that possibly he could help the party save her home by obtaining a loan. That Reynolds asked plaintiff to write him a letter about it and he would take the matter up as suggested. That some time thereafter plaintiff had a letter from William Porter asking what, if anything, Reynolds had done, calling attention to the fact that his client was about to be ejected from her home. The letter reached plaintiff while on duty for the corporation in Charleston, West Virginia, and he forwarded the letter to Reynolds. A few days thereafter he received a letter from Reynolds stating that his secretary, MacDonald, had taken the matter up with a Mr. Penniman. That the day following the forwarding of the letter to Reynolds, with reference to MacDonald's action in writing Penniman, he (plaintiff) was called over the telephone by MacDonald and was threatened with serious results, both physical and otherwise. The seriousness and the means of punishment were to be determined upon on the return of Reynolds from a hospital in Baltimore. Soon thereafter plaintiff was ordered to duty in Charleston, West Virginia, for a few days and returned to Washington on 20 December, 1934. That on the morning of 21 December, 1934, by memorandum, he was ordered to report to W. T. Stockton, assistant general counsel for the Home Owners' Loan Corporation, at 2 o'clock p. m. That plaintiff went at the time and place mentioned, and upon arrival there met, along with Stockton, Col. Harvey L. Jones, assistant general counsel of the Home Owners' Loan Corporation, Mrs. Horace Russell, Wallace Walker, a member of the Loan Review Committee, and the party that he had suggested that Reynolds contact in the interest of the loan, and John W. Childress, assistant to the chairman of the board of the Home Owners' Loan Corporation. Thereupon, Stockton stated to plaintiff that he had evidence that tended to show that he had suggested to a member of Congress how he might bring pressure to bear on a member of the corporation, meaning, as he understood, Wallace Walker. He stated to Stockton that he supposed he had reference to the letter which he had in hand and the letter he had written to Senator Reynolds, which Stockton said was correct. He stated to Stockton that he had written the letter, but denied having any intention of making any suggestion as he referred to or that the letter was susceptible of any such construction. "8. But this plaintiff further avers and alleges that prior to the time of the meeting above referred to in the office of W. T. Stockton that the de-

fendants Robert R. Reynolds and Wesley E. MacDonald had wantonly, willfully, maliciously and unlawfully conspired, combined, confederated and agreed, for the purpose of injuring this plaintiff, and which did injure him to his great damage, to corruptly, wantonly, willfully, maliciously and unlawfully use the influence and prestige of his office as United States Senator to persuade certain officials of the Home Owners' Loan Corporation, to wit: John H. Fahey, chairman of the board above mentioned, and his assistant, John W. Childress, without cause and in total disregard of this plaintiff's rights or the effect on his character and professional reputation, to have or caused to have this plaintiff discharged from his position with said defendant Home Owners' Loan Corporation; that the said John H. Fahey and the said John W. Childress, as officers and employees of the Home Owners' Loan Corporation, yielded to the wanton, willful, malicious, and unlawful combine, conspiracy, confederation and agreement to influence and persuade them, and entering into said wanton, willful, malicious, and unlawful combine, conspiracy, confederation and agreement with the said defendants Robert R. Reynolds and Wesley E. MacDonald, at their solicitation and persuasion, and for the purpose of injuring this plaintiff, as above stated, did wantonly, willfully, maliciously, and unlawfully have or cause to have this plaintiff discharged from his position as above stated, and to his great damage.

"9. That notwithstanding the fact that this plaintiff was able to do, and was doing, as he is informed, advised and believes, the work for which he was employed by the defendant Home Owners' Loan Corporation, and notwithstanding the fact that his record was good and that he was rendering satisfactory service in his position as a member of the legal division of the Home Owners' Loan Corporation, which said record and satisfactory service was, as he is informed and believes, mentioned and certified to in his behalf by his superiors in the legal division, this plaintiff avers and alleges that, yielding to the influence and persuasion and thereby entering into same with the defendants Robert R. Reynolds and Wesley E. MacDonald, in furtherance of their wanton, willful, malicious and unlawful combine, conspiracy, confederation and agreement to injure this plaintiff as above stated, the said John H. Fahey and John W. Childress, as officers and agents of the defendant Home Owners' Loan Corporation, and while acting as officers and agents of said defendant corporation, did force this plaintiff, against his will and under threats to discharge upon his failure to do so, to resign his position as traveling attorney, as aforesaid, and thereby deprive him of his position and its attendant salary, thereby denying him the right to earn a livelihood and to support and maintain his family as in law and in right he was under obligation to do and to his great damage.

"10. That at the conclusion of the meeting in the office of W. T. Stockton, as above mentioned, this plaintiff was instructed to report to Col. Harvey L. Jones within one hour; that the plaintiff did report to the said Harvey L. Jones as instructed to do so, and was told by the said Harvey L. Jones to come back the following morning; that upon reporting the following morning, as he had been instructed, this plaintiff was informed by the said Harvey L. Jones that due to the plaintiff's good record as a member of the legal division that it had been decided to permit this plaintiff to resign, but that upon his failure to resign plaintiff would be discharged. That thereupon this plaintiff tendered his resignation, effective 31 December, 1934.

"11. That this plaintiff was forced to resign or take the alternative of being discharged as hereinbefore alleged, not because of any wrong he had done or any act of his toward any person or official of the defendant Home Owners' Loan Corporation, but solely because of the wanton, willful, malicious, and unlawful conduct of the defendants Robert R. Reynolds and Wesley E. MacDonald, and the corrupt and unlawful use of his office as United States Senator in inducing and persuading the officers and agents of the said Home Owners' Loan Corporation to have this plaintiff dismissed and expelled from his position as aforesaid; that this plaintiff had made a good record with said defendant corporation and was well liked by his superiors in the legal division as well as other members of the same. That after this plaintiff's connection with the said Home Owners' Loan Corporation had terminated, as above mentioned, he applied for a position with the litigation division of the National Recovery Administration. That in filing his application he gave as reference of his ability as an attorney his former superiors in the Home Owners' Loan Corporation.

"That this plaintiff was appointed a member of the legal division of the Home Owners' Loan Corporation on 14 September, 1934, at a salary of $3,600 per year and expenses while away from the city of Washington and on duty for said corporation; that, as hereinbefore alleged, this plaintiff had a good record as an attorney, with good chances of promotion and increase of salary, and this plaintiff avers and alleges that had it not been for the wanton, willful, malicious, and unlawful conduct of the defendants, as hereinbefore alleged, he would have held his position for at least two years and perhaps longer. That after his connection with said Home Owners' Loan Corporation, as above set forth, this plaintiff, as he was in law and equity compelled to do, used all reasonable efforts to secure other employment; that after the termination of his services with the Home Owners' Loan Corporation on 31 December, 1934, he secured, as hereinbefore alleged, a position with the litigation division of the National Recovery Administration on 8

February, 1935, at a salary of $3,600 a year and expenses; that shortly thereafter, to wit, he was transferred and assigned to the regional office of the National Recovery Administration at Atlanta, Ga.; that on 10 June, 1935, after the invalidation of the National Recovery Act by the Supreme Court, he returned to Washington and, because the reason for his employment had ceased, his connection with the National Recovery Administration terminated on 15 July, 1935. That thereafter for several months he used every possible means to secure further employment but was unable to do so. That by reason of the wanton, willful, malicious, and unlawful combine, conspiracy, confederation and agreement of the defendants, hereinbefore set forth, this plaintiff has been damaged by loss of salary in the sum of $6,653.35. That the acts and conduct of the defendants, as hereinbefore alleged, were wanton, willful, malicious and unlawful, without justification in law or in fact; that they were done for the purpose of injuring this plaintiff, and which did injure him as aforesaid; that the defendants Robert R. Reynolds and Wesley E. MacDonald are insolvent and any monetary judgment against them by way of punitive damages would be worthless and of no account. Wherefore, this plaintiff prays judgment against the defendants in the sum of $6,653.35; for cost, and for such other and further relief as he may be entitled. That as to the defendants Robert R. Reynolds and Wesley E. MacDonald, this plaintiff prays judgment as in arrest and bail for any and all amounts found to be due him, for in that, as hereinbefore alleged, the acts of the defendants were wanton, willful, malicious, and unlawful."

The defendants entered a demurrer as follows: "The defendants Robert R. Reynolds and Wesley E. MacDonald demur to the plaintiff's complaint filed in this action on 31 December, 1936, and as grounds for their demurrer they say: (1) That the complaint does not state a cause of action because the plaintiff alleges in the complaint that he resigned his position with the Home Owners' Loan Corporation, effective 31 December, 1934, and in that the complaint does not allege that the plaintiff was discharged by the Home Owners' Loan Corporation, his employer. (2) That the complaint does not state a cause of action because nowhere in the complaint is it alleged that the plaintiff was appointed for any particular period of time, that he had any tenure of office whatever, or that he held his office other than at the will of the proper officers of the Home Owners' Loan Corporation. (3) That the complaint does not state a cause of action because that plaintiff alleges in the complaint that, while holding the position of attorney with the Home Owners' Loan Corporation, he wrote a letter to a member of the United States Senate to secure his help and assistance, and to get the United States Senator to take up with a member of the Loan Review

Committee the matter of making a loan to an applicant whose loan had been denied in the regular course of business by the corporation, thereby showing that the plaintiff gave the officers of the Home Owners' Loan Corporation adequate reasons for requesting his resignation. Wherefore, the defendants pray that this action be dismissed, and that the defendants go without day and recover their costs of the plaintiff."

The judgment in the court below is as follows: "This cause coming on for hearing before the undersigned judge presiding at the May Term of the Superior Court of Davie County, upon the complaint of the plaintiff and the written demurrer and the demurrer *ore tenus* filed thereto. Whereupon, after hearing the oral arguments of counsel, it was agreed that the court might take with him the record in the cause and determine and decide the case outside of Davie County or outside of the Seventeenth Judicial District. It is now, therefore, upon a careful consideration of the record, the oral arguments, and the briefs filed by the parties plaintiff and defendants, considered and adjudged that the written demurrer and the demurrer *ore tenus* be and they are now overruled and disallowed. Done at Chambers in Wilkesboro, Wilkes County, North Carolina, as of the May Term, 1937, of the Superior Court of Davie County. This 10 June, 1937.

FELIX E. ALLEY,
Judge Presiding."

The defendants excepted and assigned error to the judgment as signed and overruling the demurrer of defendants, and appealed to the Supreme Court.

In the Supreme Court the following demurrer *ore tenus* to the complaint was filed: "Upon the call of the case for argument upon the written demurrer, the defendants demur *ore tenus,* upon the additional ground: That the complaint does not state a cause of action, in that the communication which forms the basis of the alleged cause of action was privileged as a matter of law, and on the further ground that the substantial facts properly alleged in the complaint do not constitute a cause of action."

"Now come the defendants, and in addition to the grounds for demurrer appearing in the record they demur *ore tenus* on the following grounds, and say that the courts of the State of North Carolina do not have jurisdiction of this action for the reason that it appears from the complaint that the defendant Robert R. Reynolds is an officer of the United States, to wit, a member of the Senate of the United States, and that the defendant Wesley E. MacDonald is an officer or employee of the United States, to wit, secretary to the defendant Robert R. Reynolds as a member of the Senate of the United States; and further, that the

alleged acts of the defendants complained of were done in connection with, or in the discharge of, the duties of the defendants in their respective offices. Wherefore, the defendants pray that the action be dismissed for the additional reasons herein stated."

Grant & Grant and Powell W. Glidewell for plaintiff.
Robinson, Pruette & Caudle, and Parrish & Deal for defendants.

CLARKSON, J. We think the demurrer of defendants should have been sustained 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).

C. S., 535 is as follows: "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties."

In *Blackmore v. Winders,* 144 N. C., 212 (215-16), speaking to the subject we find: "The uniform rule prevailing under our present system is that, for the purpose of ascertaining the meaning and determining the effect of a pleading, its allegations shall be liberally construed, with a view to substantial justice between the parties. Revisal, sec. 495 (C. S., 535). This does not mean that a pleading shall be construed to say what it does not, but that if it can be seen from its general scope that a party has a cause of action or defense, though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken against him as to deprive him of it. *Buie v. Brown,* 104 N. C., 335. As a corollary of this rule, therefore, it may be said that a complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective or redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient," citing numerous authorities. N. C. Prac. & Proc. in Civil Cases (McIntosh), sec. 443, p. 454; *Fairbanks, Morse & Co. v. Murdock Co.,* 207 N. C., 348 (351).

In *Manning v. R. R.,* 188 N. C., 648 (663), citing a wealth of authorities, it is said: "A demurrer is the formal mode of disputing the sufficiency in law of the pleading to which it pertains. It admits only such averments as are well pleaded and such inferences as may be drawn therefrom, but it does not admit any legal inferences or conclusions of law that may be alleged. We must therefore refer to the complaint in

order to determine the scope and effect of the defendants' admissions." *Conrad v. Board of Education,* 190 N. C., 389 (393); *Distributing Corp. v. Maxwell, Comr. of Revenue,* 209 N. C., 47 (48).

The language in *Harley & Lund Corp. v. Murray Rubber Co.,* 31 Fed. (2nd), 932 (934-5), is pertinent to the complaint in this action: "Much, indeed, has been written about the admissible latitude in pleadings sounding in 'conspiracy.' There is, however, no more reason why a pleader in such actions should not definitely commit himself to the facts on which he means to stand than elsewhere; indeed there is vastly less. The notion that it is enough vaguely to charge defendants with 'conspiracy,' garnished with such adverbs as 'maliciously' and 'wrongfully,' has done more to bewitch the whole subject than anything else. Whether, if the plaintiff at bar is properly confined, any substance will not evaporate with the rhetoric, we do not find it necessary now to decide."

The complaint is bottomed on conspiracy, alleging damage. In *S. v. Martin,* 191 N. C., 404 (406), we find: "A conspiracy has been defined to be 'an engagement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way.' *S. v. Dalton,* 168 N. C., 204. A conspiracy has been further defined as a 'combination among two or more persons to accomplish, by concerted action, an unlawful purpose, or a purpose not in itself unlawful, by unlawful means. But whether it is a wrongful or illegal conspiracy depends not upon the name given by the pleader, but upon the quality of the acts charged to have been committed. If these acts are not wrongful or illegal, no agreement to commit them can properly be called an illegal and wrongful conspiracy.' *Ballentine v. Cummings,* 70 Atl., 548, . . . (p. 407). However, the proof must be sufficient to create more than a suspicion. Testimony that raises no more than a suspicion is not sufficient to be submitted to a jury as evidence of guilt. *Perry v. Ins. Co.,* 137 N. C., 404. The principle is thus stated in *Brown v. Kinsey,* 81 N. C., 245: 'The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than materials for a mere conjecture, the court will not leave the issue to be passed on by the jury.' *Sutton v. Madre,* 47 N. C., 320; *Liquor Co. v. Johnson,* 161 N. C., 77; *Seagroves v. Winston,* 167 N. C., 207; *S. v. Bridgers,* 172 N. C., 882; *S. v. Prince,* 182 N. C., 790."

In R. C. L., Vol. 15, part sec. 29, p. 68, is the following: "In a leading English case it seems to have been taken for granted by all the judges, affirmative and dissentient, that if the defendant has used a means that could be denominated unlawful in order to bring about an employee's discharge he would be liable. As this represents the general

doctrine it becomes necessary to consider what specific means or modes of interference with a man in his trade or calling can be said to be unlawful. The most obviously unlawful of all means is of course violence. As a general proposition any interference with the free exercise of another's trade or occupation or means of livelihood by preventing people by force, threats, or intimidation from trading with, working for, or continuing him in their employment, is an actionable wrong."

The long and verbose complaint of plaintiff indulges in generalities and conclusions: That defendants had prior thereto conspired "to persuade certain officials of the Home Owners' Loan Corporation" to cause plaintiff to be discharged, using "the influence and prestige of his office as United States Senator" for such purpose. Par. 9. ". . . That yielding to the influence and persuasion and thereby entering into same with the defendants Robert R. Reynolds and Wesley E. MacDonald, in furtherance of their wanton, willful, malicious, and unlawful combine, conspiracy, confederation and agreement to injure this plaintiff, as above stated, the said John H. Fahey and John W. Childress, as officers and agents of the defendant Home Owners' Loan Corporation, and while acting as officers and agents of said defendant corporation did force this plaintiff, against his will, and under threats of discharge upon his failure to do so, to resign his position as traveling attorney. . . ." Par. 12: That but for the conspiracy and resulting resignation plaintiff "would have held his position for at least two years and perhaps longer." The complaint does not allege any tenure of office whatever. Except for redundant use of the words "wrongfully, maliciously, wantonly, and unlawfully," the nearest to an allegation of fact as to defendants appears in paragraph 8: ". . . that the defendants . . . had conspired . . . to use the influence and prestige of his office as U. S. Senator to persuade certain officials of Home Owners' Loan Corporation . . . to have this plaintiff discharged," and as a result thereof plaintiff resigned a position to which he alleges no tenure of office and no term of employment.

The complaint shows lack of discretion on plaintiff's part in writing a letter to a United States Senator attempting to get him to use the influence of his position to cause the review committee of the Home Owners' Loan Corporation to make a loan which had been denied. This attempt to go over the heads of the executive officers of the Home Owners' Loan Corporation, the complaint clearly shows, was the reason plaintiff's resignation was demanded. The letter is not set out in the complaint, but it was the outcome of an appeal by plaintiff himself to Senator Reynolds over the telephone, who requested a letter to him stating the facts. This letter was turned over to the Home Owners' Loan Corporation by Senator Reynolds to aid the plaintiff in getting

the loan. It was the individual act of Reynolds, no semblance of any conspiracy with MacDonald. The Home Owners' Loan Corporation took offense at plaintiff's letter—hence the request for his resignation.

The whole complaint indicates that the controversy was between plaintiff and Senator Robert R. Reynolds' secretary, Wesley E. MacDonald, and not with Reynolds. Plaintiff was not discharged, he resigned. No violence or such a threat or intimidation which was sufficient in law to show that the resignation was not the voluntary act of plaintiff. He gave as reference in his application for another position his former superiors in the Home Owners' Loan Corporation. He stayed with the government until the Congressional Act (N. R. A.) under which he was employed was declared unconstitutional by the Supreme Court of the United States.

The use in the complaint of the words "That the defendants Robert R. Reynolds and Wesley E. MacDonald had wantonly, willfully, maliciously, and unlawfully conspired, combined, confederated, and agreed for the purpose of injuring the plaintiff and which did injure him, to his great damage," etc., is a conclusion of the pleader, and there are not sufficient facts alleged in the complaint to sustain the allegations that there was a conspiracy between Reynolds and MacDonald to injure plaintiff, causing damage. The allegations show a mere conjecture, suspicion or guess, which has no probative force.

Where two defendants were indicted for conspiracy, the court properly instructed that the jury must find either both guilty or both not guilty. *S. v. Lewis,* 185 N. C., 640. Conspiracy, not its execution, is the offense. *S. v. Lea,* 203 N. C., 13; *certiorari* to U. S. Supreme Court denied, 287 U. S., 649, 77 L. Ed., 561.

It goes without saying that the complaint is wholly insufficient to show anything done by the Home Owners' Loan Corporation to hold it for conspiracy if it, being a governmental agency, could be held on a conspiracy charge.

It has been frequently held that an employee who resigns has no cause of action against his employer for wrongful discharge. The plaintiff was *sui juris* and voluntarily resigned his position. The allegations in the complaint are not sufficient to charge duress. The conclusion of the pleader is not sufficient. The complaint clearly indicates that plaintiff was an employee at will, with the right of his employer to discharge him at any time. In fact, he alleges, "This plaintiff was forced to resign or take the alternative of being discharged," etc. A threat to do what one has a legal right to do cannot constitute duress. 13 C. J., 399; *Smithwick v. Whitley,* 152 N. C., 369; *Bank v. Smith,* 193 N. C., 141; *Randolph v. Lewis,* 196 N. C., 51.

The pleading alleges no tenure of office. In *Richardson v. R. R.,* 126 N. C., 100 (101), we find: "The engineers have a right to quit when-

ever they get ready, and the company has a right to discharge any engineer at any time without cause. But upon the plaintiff's own showing, his discharge was within the right of the defendant, and not wrongful, and malice disconnected with the infringement of a legal right cannot be the subject of an action." *Holder v. Mfg. Co.*, 138 N. C., 308.

The Home Owners' Loan Corporation was a governmental agency and Reynolds a United States Senator. How far the conduct of Senator Reynolds was privileged we are not called upon to say. In *Spalding v. Vilas*, 161 U. S., 780, it was held: "The head of an executive department cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress and in respect of matters within his authority, by reason of any personal or even malicious motive that might be alleged to have prompted his action."

In Newell Slander and Libel (4th Ed.), sec. 445, p. 482, it is written: "Criticism of the official conduct of a public officer is always a proper subject for public discussion and information, and a communication made in good faith for the purpose of redressing some injury or to prevent or punish a public abuse is privileged, if addressed to a person or board having an interest or duty in the matter, or jurisdiction to entertain the complaint or redress the grievance. Residents of a place may petition the mayor and aldermen to revoke the license of a merchant, or may petition the board of excise protesting against the licensing of a tavern, and their communications will be privileged. This privilege, however, must not be abused, for, if such communication be made maliciously and without probable cause, the pretense under which it is made, instead of furnishing a defense, will aggravate the case of the defendant." *S. v. Publishing Co.*, 179 N. C., 720.

On the plaintiff's complaint, liberally construed, it is wholly insufficient to show a conspiracy between the defendants causing damage to plaintiff. In the broad aspect of the complaint it would indicate a quarrel between, as it seems, two former friends—the plaintiff and defendant MacDonald, secretary to Senator Reynolds—as to whether MacDonald was a resident and citizen of Virginia and had become a *bona fide* resident of North Carolina. The language of both in this regard became heated and acrimonious. The aftermath, in regard to overriding the review committee of the Home Owners' Loan Corporation on the loan which plaintiff was trying to obtain for another, is a different matter. The telephone conversation of plaintiff, in which he appealed to Senator Reynolds, was about the loan. A new and distinct matter. Reynolds requested plaintiff to write him about the matter. The letter was not attached to or set out in the complaint. Plaintiff's letter to Senator Reynolds reached the Home Owners' Loan Corpora-

tion, the officers of which seem to have taken offense at same, bringing about plaintiff's resignation without legal duress. There is nothing in the pleadings except a conclusion that plaintiff did not hold his position at will. There is no direct or circumstantial allegation in the complaint to show any conspiracy between Senator Reynolds and his secretary, MacDonald, to injure plaintiff. The allegations in the pleadings, "their wanton, willful, malicious, and unlawful combine, conspiracy, confederation, and agreement to injure this plaintiff," etc., are not borne out by the long details of the pleadings, and were merely conclusions of the pleader and not considered on a demurrer.

On the pleadings the demurrer must be sustained and the judgment of the court below

Reversed.

J. M. PALMER, A CITIZEN AND TAXPAYER OF HAYWOOD COUNTY, IN BEHALF OF HIMSELF AND OTHER CITIZENS AND TAXPAYERS OF HAYWOOD COUNTY, NORTH CAROLINA, v. THE COUNTY OF HAYWOOD, A BODY POLITIC AND CORPORATE, AND J. A. LOWE, R. T. BOYD, T. R. MOORE, G. C. ROGERS, G. C. PALMER, C. C. MEDFORD, AND JARVIS ALLISON, BOARD OF COMMISSIONERS OF HAYWOOD COUNTY, NORTH CAROLINA.

(Filed 3 November, 1937.)

1. **Taxation § 4—County may not issue bonds to build annex to county hospital without submitting question to vote.**

   Defendant county proposed to issue bonds to construct an annex to its county hospital, to be used principally for the care of the indigent sick of the county, without submitting the question to a vote. *Held:* The building of an annex to the county hospital is not a necessary expense of the county within the meaning of Art. VII, sec. 7, of the Constitution of North Carolina, and plaintiff taxpayer is entitled to an order restraining the issuance of the bonds.

2. **Same—**

   What are necessary expenses of a county or municipality within the meaning of the Constitution is a question of law for the courts.

3. **Taxation § 5—**

   Taxes may be levied only for a public purpose. Art. V, sec. 3, of the Constitution of North Carolina.

CONNOR, J., concurring.

BARNHILL, J., dissenting.

CLARKSON, J., concurs in dissenting opinion.

APPEAL by plaintiffs from *Alley, J.*, at Chambers, from HAYWOOD.

Action for injunction against issuance of county bonds to build annex to county hospital.

Bonds are proposed to be issued under the following resolution: "Be it ordered by the board of county commissioners of the county of Haywood as follows: (1) For the purpose of constructing an addition to the county hospital, which shall be used principally for the care of indigent sick and afflicted poor of the county, bonds of the county shall be issued to the aggregate amount of $30,000. (2) A tax sufficient to pay the principal and interest of the bonds when due shall be annually levied and collected. (3) A statement of the county debts has been filed with the clerk and is open to public inspection. (4) This order shall take effect 30 days after the first publication thereof after final passage unless in the meantime a petition for its submission to the voters is filed under the County Finance Act, and in such event it shall take effect when approved by the voters of the county at an election, as provided in the said act."

The time for filing petition for an election on the issuance of the bonds has expired and no petition has been filed. Defendants were about to issue the bonds when restrained in this action. On hearing below, parties agreed that the court might find the facts. The court found, among other things, in substance that: About 1927 the county of Haywood, pursuant to Art. II, ch. 119, of the Consolidated Statutes of North Carolina entitled "Municipal Hospitals," after an election as therein provided, and upon approval of a majority of the qualified voters of the county, issued and sold bonds of the county for the purpose of building and did build a county hospital "for the care of the sick of the county and others who might be brought for treatment." The hospital, at the time of its erection, was deemed and considered adequate for the needs. The county has been able to maintain said hospital under proper standards, but the *patronage* thereof has grown and increased until the hospital is now inadequate and insufficient to care for many patients brought in, and in particular for the indigent sick of Haywood County. The hospital has a normal capacity of 55 beds with emergency capacity of 65 beds. In 1936 of 26,644 patient days, 19,473 received contribution from private indigent fund. It has become necessary to enlarge the hospital by building an annex which is contemplated to be "used principally for the care of indigent sick and afflicted poor of the county." Thereupon the court adjudged that "the proposed issuance of bonds and the levying of a tax by the defendants, as hereinbefore set out, is a necessary expense and not in violation of Art. VII, sec. 7, of the Constitution of North Carolina, or other provision of the Constitution or statutes of the State." Motion for restraining order against the issuance of bonds and levying of taxes as proposed was denied.

From adverse judgment plaintiffs appealed to the Supreme Court and assigned error.

PALMER *v.* HAYWOOD COUNTY.

W. T. Crawford for plaintiff, appellant.
J. R. Morgan for defendants, appellees.

WINBORNE, J. The question: Is the building of annex to county hospital a necessary expense within the meaning of Art. VII, sec. 7, of the Constitution of North Carolina? The answer is "No."

Art. VII, sec. 7, reads: "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."

What are necessary expenses is a question for judicial determination. The judicial decisions in this State uniformly so hold. "The courts determine what class of expenditures made or to be made by a municipal corporation come under the definition of 'necessary expense.' The governing authorities of the municipal corporations are vested with the power to determine when they are needed. . . . That is to say, the courts determine whether a given project is a necessary expense of a municipality, but the governing authorities of the municipality determine in their discretion whether such given project is necessary or needed in the designated locality." *Starmount Co. v. Hamilton Lakes,* 205 N. C., 514, 171 S. E., 909; *Black v. Comrs.,* 129 N. C., 121, 39 S. E., 818; *Fawcett v. Mt. Airy,* 134 N. C., 125, 45 S. E., 1029; *Storm v. Wrightsville Beach,* 189 N. C., 681, 128 S. E., 17; *Henderson v. Wilmington,* 191 N. C., 269, 132 S. E., 25.

In defining "necessary expense" it is said in *Henderson v. Wilmington, supra,* "We derive practically no aid from the cases decided in other states. . . . We must rely upon our own decisions." Then, after reviewing numerous cases dealing with the subject of "necessary expense," page 278, *Adams, J.,* said: "The cases declaring certain expenses to be necessary refer to some phase of municipal government. This Court, so far as we are advised, has given no decision to the contrary." Then, on page 279, continues: "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."

This Court has repeatedly held that the building, maintenance, and operation of public hospitals is not a "necessary expense."

In *Armstrong v. Comrs.,* 185 N. C., 405, 117 S. E., 388, speaking to the question of erecting a tubercular hospital for Gaston County, *Mr. Jus-*

tice Hoke said: "Appellants insist further that a hospital of this character should be considered a necessary expense, and so comes directly within the purview and effect of the cases cited, but we cannot so hold."

In *Nash v. Monroe,* 198 N. C., 306, 151 S. E., 634, a "residence lot and dwellings and buildings thereon" had been given to the city of Monroe for the "purpose of providing a hospital for the sick and diseased and others requiring surgical or medical attention." The city had contracted the operation of the hospital to a private physician. Then, in order to obtain certain benefits from the Duke Foundation, it was proposed that the management of the hospital should be changed, and that the city and county should buy the physician's equipment for operating the hospital. The city borrowed $5,000 and gave its note for that purpose in anticipation of collection of taxes. Speaking to the question of validity of the note and the levy of the tax, *Mr. Justice Brogden,* for the Court, said: "The maintenance of a municipal hospital is not a necessary governmental expense. . . . Moreover, 'for purposes other than necessary expenses a tax cannot be levied within or in excess of the constitutional limitation except by a vote of the people under special legislative authority.' The city of Monroe . . . undertook to pledge the faith and credit of the city in order to obtain the money. This cannot be done except in accordance with methods provided by law."

In *Burleson v. Spruce Pine,* 200 N. C., 30, 156 S. E., 241, plaintiff sought to enjoin a bond issue under the Municipal Finance Act for the purpose of "constructing, maintaining, and operating a public hospital" in the town of Spruce Pine, after the question had been submitted to and approved by the qualified voters of the town, for the reason, among others, that said bonds are not for necessary expenses within the meaning of Art. VII, sec. 7, of the Constitution. After citing the opinion in the *Armstrong case, supra, Mr. Justice Connor* stated: "In the instant case, therefore, the bonds will not be valid, unless their issuance was authorized by the General Assembly and approved by a majority of the qualified voters of the town of Spruce Pine. *Henderson v. City of Wilmington,* 191 N. C., 269, 132 S. E., 25, and cases there cited. In that case, speaking of Art. VII, sec. 7, Constitution of North Carolina, it is said: 'In analyzing and construing this section in its relation to the sixth section of Art. V, the court has held: (1) That for necessary expenses the municipal authorities may levy a tax up to the constitutional limitation without a vote of the people and without legislative permission; (2) that for necessary expenses they may exceed the constitutional limitation by legislative authority, without a vote of the people, and (3) that for purposes other than necessary expenses a tax cannot be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority.' This is a clear and

accurate statement of the principles of constitutional law applicable to municipal taxation in this State.

"In the instant case, the issuance of bonds and the levy and collection of the tax was approved by the people of the town of Spruce Pine—that is, by a majority of the qualified voters of said town. The bonds are, therefore, valid, if their issuance was authorized by statute duly enacted by the General Assembly."

It is significant to note that: (1) The resolution in question expresses as the purpose of the bond issue: "Constructing an addition to the county hospital, which shall be used *principally* for the care of indigent sick and afflicted poor of the county," and (2) in the contention that the present county hospital is over-crowded, only about 70 per cent of the use of the hospital in 1936 is classified as for indigent patients. "Taxes shall be levied only for public purposes." Art. V, sec. 3, North Carolina Constitution. This is a fundamental principle in the law of taxation.

In *Ketchie v. Hedrick*, 186 N. C., 392, 119 S. E., 767, the Court states: "The limitation of the Constitution is very wise. . . . It restricts taxation to necessary governmental purposes, except when a purpose outside this sphere has secured a majority of the registered voters authorizing taxation to be levied for such purpose."

Defendants rely upon the cases of *Martin v. Comrs. of Wake County*, 208 N. C., 354, 180 S. E., 777, and *Martin v. Raleigh*, 208 N. C., 369, 180 S. E., 786. These cases relate to the construction of a special act of the Legislature, authorizing the board of county commissioners in those counties to which the act is applicable to contract for provision for medical treatment and hospitalization of the sick and afflicted poor of the county. It is sufficient to note that this act does not apply to Haywood County, the defendant in the instant case. It was specifically exempted.

Judgment of the court below is

Reversed.

CONNOR, J., concurs in the decision by the Court of the question presented by this appeal for the reason that the hospital was constructed under the provisions of Art. II of Chapter 119, N. C. Code of 1935, but is of the opinion that there may be a factual situation under which the construction or maintenance of a hospital for the care and treatment of sick and indigent persons may be a necessary expense of a town, city or county for which bonds, when authorized by an act of the General Assembly of this State, may be issued by the governing body of such town, city or county, without the approval of a majority of the qualified voters of such town, city or county. See *Atkins v. Durham*,

210 N. C., 295, 186 S. E., 330. In such case the construction or maintenance of a hospital may be a necessary, governmental expense of the municipality, and bonds issued for that purpose will be valid and binding on the town, city or county. *Henderson v. Wilmington,* 191 N. C., 269, 132 S. E., 25.

In *Walker v. Faison,* 202 N. C., 694, 163 S. E., 875, the late *Justice Brogden,* speaking for this Court, said:

"The law is an expanding science, designed to march with the advancing battalions of life and progress, and to safeguard and interpret the changing needs of a commonwealth or community."

This broad and comprehensive statement of the philosophy of the law in its relation to life was approved in the opinion of *Justice Devin* in *Goswick v. Durham,* 211 N. C., 687, 191 S. E., 728.

BARNHILL, J., dissenting: The court below found that during the past two years the Haywood County Hospital has cared for indigent sick and afflicted poor of Haywood County in excess of its full normal capacity, and has not been able by reason of the crowded condition to provide for hospital care and treatment for all the indigent sick and afflicted poor of the county needing hospital treatment; that it has become necessary for the defendant county to enlarge its hospital by the building of an annex, which is contemplated to be used principally for the care of the indigent sick and afflicted poor of the county, and that the expense therefor is necessary within the meaning of the Constitution, and that there is no other hospital in Haywood County.

The plaintiff does not allege or contend that the issuance of these bonds will violate the provisions of Art. V, sec. 6, of the Constitution, nor is there any allegation of any defect or irregularity in the resolution, or in the proceedings of the commissioners authorizing the issuance and sale of the bonds. He rests his case squarely upon the question as stated in his brief: "Is the proposed building of an annex to the Haywood County Hospital principally for the care of indigent sick and afflicted poor of the county a necessary expense, or would the issuance of the bonds for that purpose and the levying of the tax for the payment of principal and interest thereof without a vote of the people be a violation of Art. VII, sec. 7, of the Constitution of North Carolina?"

That the court has the power to determine what are necessary expenses is not debatable. It is the only means through which the people of the State are assured that the governing agencies will not exceed the limitations prescribed by the Constitution.

It is too well established in this State that the State and its subdivisions are charged with the duty as a governmental function to care for the poor and to protect the health of the citizens of the State to re-

quire the citation of authorities. The counties are the governmental agencies through which these duties are to a large extent performed. A county is not in a strict legal sense a municipal corporation, it is rather an instrumentality of the State, by means of which the State performs certain of its governmental functions within its territorial limits. *Bell v. Comrs.*, 127 N. C., 85; *Jones v. Comrs.*, 137 N. C., 579. In the exercise of ordinary governmental functions they are simply agencies of the State constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of such functions they are subject to almost unlimited legislative control, except when the power is restricted by constitutional provisions.

County organizations are created almost exclusively with a view to the policy of the State at large for the purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of the means of travel and transfer, for the promotion of the health and general welfare of the people, and especially for the general administration of justice. The county organizations have a direct and exclusive reference to the general policy of the State, and are in fact but a branch of the general administration of that policy, and they are an integral portion of the general administration of State policy.

If it is a governmental function of the State to make provision for the poor and for the protection of the health of its citizenship, then the State has the power to delegate the performance of this duty to the respective counties. The Legislature has exercised this right of delegation and has vested the counties with authority to provide for the maintenance, comfort and well-being of the poor; C. S., 1297, subsection 28, and to establish public hospitals, C. S., 1297, subsection 29; C. S., 1334 (8); ch. 81, P. L. 1927. The defendants do not have to rely upon the provisions of C. S., ch. 119.

If, then, the proposed expenditure is either a means by which the county seeks to provide for the comfort and well-being of the poor or to promote the health of its citizens, it is a necessary expense.

The opinion correctly states the rule to be followed by the court in determining what expenses are necessary, that is to say, the courts determine what class of expenditures made, or to be made, come under the definition of necessary expenses. The sole duty of the court is to classify the expense, and if it falls within a class of expenses which is governmental in its nature, or in furtherance of governmental functions, it is necessary. "Necessary expense" refers to the ordinary and usual expenditures required to enable a county to properly perform its duties as part of the State government and to exercise the functions delegated to the county by the Legislature. The words must mean such expenses as are or may be incurred in the establishing and procuring of those

things without which the peace and order of the community, its moral interests, or the health and the protection of the property of its inhabitants would suffer considerable damage, leaving out of view the matter of the great inconvenience that would be attendant upon our social life for want of such expenditures. What particular projects or means shall be adopted, or whether an expenditure shall be made in the furtherance of governmental functions rests exclusively in the sound discretion of the governing body. *Evans v. Comrs.*, 89 N. C., 154; *Brodnax v. Groom*, 64 N. C., 244.

Some of the projects approved by the court and the class within which the expense therefor falls are as follows: (1) The building and maintenance of public roads, streets, sidewalks and bridges—public convenience, intercourse, travel and commerce; (2) lighting streets and building light plants—public safety and convenience; (3) jetties—protection of property; (4) water and sewer systems, abattoirs—protection of health; (5) incinerators—sanitation.

The court reviews the ultimate purpose—not the incidental means; the primary objective—not individual projects or items. To do otherwise, and undertake to determine that a particular project is not necessary, is to invade the policy making field, which belongs exclusively to other branches of the government. The wisdom of expenditures must be left to the sound discretion of the governing agency. Speaking to this subject more than sixty years ago in *Brodnax v. Groom, supra*, *Pearson, C. J.*, says: "Who is to decide what are the necessary expenses of a county? The county commissioners to whom are confided the trust of regulating all county matters. 'Repairing and building bridges' is a part of the necessary expense of a county as much so as keeping the roads in order, or making new roads; so the case before us is within the power of the county commissioners. How can this Court undertake to control its exercise? Can we say such a bridge does not need repairs, or that in building a new bridge near the site of an old bridge it should be erected as heretofore upon posts so as to be cheap, but warranted to last for some years, or that it is better policy to locate it a mile or so above where the banks are good abutments and to have stone pillars at a heavier outlay at the start, but such as will insure permanency and be cheaper in the long run?

"In short, this Court is not capable of controlling the exercise of power on the part of the General Assembly, or of the county authorities, and it cannot assume to do so without putting itself in antagonism as well to the General Assembly as to the county authorities and erecting a despotism of five men, which is opposed to the fundamental principles of our government and the uses of all times past.

"For the exercise of powers conferred by the Constitution the people must rely upon the honesty of the members of the General Assembly and of the persons elected to fill places of trust in the several counties.

"This Court has no power and is not capable if it had the power of controlling the exercise of power conferred by the Constitution upon the legislative department of government or upon the county authorities."

It appears to me that the vice in the opinion of the Court and in the opinions contained in the cases cited in support of the position taken by the Court, to wit: The *Armstrong case, supra,* the *Nash case, supra,* and the *Burleson case, supra,* lies in the fact that the Court undertakes to determine the necessity of a particular project without relating the expenditure to the class of expense within which it properly falls. An examination of practically all the other cases bearing upon this question discloses that the Court classified the proposed expense and by so doing avoided falling into the error which I feel is attendant upon this decision.

The expense here proposed may be classified as one in furtherance of the governmental function of providing for the indigent sick and afflicted poor. The Constitution expressly provides that it is the purpose of the government to make charitable institutions as nearly self-sustaining as is consistent with the purposes of their creation. Art. XI, sec. 11.

But even if it be conceded that the language of the resolution authorizing the issuance of the proposed bonds is such as to remove the proposed expense from this class, then surely it falls within the class of expenses which are for the protection of the health of the citizens of the county. As I understand it, this is an undisputed governmental function and duty. The wisdom of such expenditure rests in the sound discretion of the board of commissioners. Our State is constantly growing in wealth and population. Our civilization is advancing with the habits and customs of necessary changes. New conditions create new necessities. What sometimes appears at the time to be an unwise and extravagant expenditure, when viewed in retrospect, is considered an evidence of sound business judgment. It is to be expected that in the changed conditions which occur in the lives of a progressive people that things at one time considered luxuries grow to be necessities. The luxuries of yesteryear are the necessities of today and the luxuries of today become the necessities of tomorrow.

In the not far distant past the State was practically without hospital facilities. Hospitals were available only to the rich, and even they considered it extravagant to make use of such facilities except in extreme cases. Today we have hospitals in practically every large town in the State, and registered nurses are located in practically every town and village. Hospitals and nursing facilities have grown to be the principal means through which the medical science is given a practical application.

If it is to be conceded that it is the duty of the government to protect the health of its citizens and to administer medical care and attention to the indigent sick and afflicted poor, then it must be conceded that the State may delegate these duties to the county, and the county has the right in the exercise of its sound discretion to perform these duties through the medium of a hospital adequate in size and equipment.

I conceive it to be the duty of the Court to interpret the law, within the limitations of the Constitution, with a view to meeting present conditions and present needs. If the decisions cited and relied upon by the Court are in conflict with and prohibit the proposed expenditures, then these decisions should be overruled and the proposed expense should be placed in the class to which it properly belongs and declared to be a necessary expense of the government in the protection of the health of the people of this county who have no other hospital facilities available to them within their county. The decisions of the Court should be mile-posts marking the progress of the law, and not hitching posts, beyond which the law may not go.

In *Fawcett v. Mt. Airy,* 134 N. C., 124, it is said: "In the effort of the courts to check extravagance and prevent corruption in the government of towns and cities, the judicial branch of the government has probably stood by former decisions from too conservative a standpoint, and thereby obstructed the advance of business ideas which would be most beneficial if put into operation; and this conservatism of the courts, outgrown by the march of progress, sometimes appears at a serious disadvantage."

The Constitution protects the people even against unduly restrictive action of the courts. The Court enforces its protective provisions as against the other branches of the government, and must likewise do so as to its own interpretation and application of the law.

The law as now declared by the Court is such that it is lawful to incur an expense in building jetties in the sea to protect the property of summer cottagers on the seashore, but prohibits the construction of a hospital intended primarily to minister to the indigent sick and the afflicted poor—playgrounds and public parks to preserve the health of the well-to-do are necessary, while a hospital, with its attendant nursing facilities, to restore to health those who are sick, is not. This, to my mind, creates an inconsistency that operates to the disadvantage of those who are most in need of the ministering care of a progressive democratic government committed to Christian principles, and it ought not to be.

I am authorized to say that MR. JUSTICE CLARKSON concurs in this dissent.

FRED S. WINNER, GUARDIAN, PETITIONER, v. J. H. BRICE AND HIS WIFE, IRENE BRICE, RESPONDENTS.

(Filed 3 November, 1937.)

1. Clerks of Court § 7—Juvenile court has jurisdiction of child in improper environment whose custody is in controversy.

Allegations of a petition, admitted by demurrer, that the children in question were each under sixteen years of age, resided in the county, and were subject to such conditions and improper guardianship and control as to endanger their morals, health, and general welfare, and that petitioner was entitled to their custody as their guardian under a deed executed by their father, C. S., 2150, for the purpose of placing them in a private institution in accordance with the wishes of their father, are sufficient to show exclusive original jurisdiction of the children, for the purposes of the statute, in the juvenile court of the county, ch. 97, Public Laws of 1919 (N. C. Code, 5039, 5062).

2. Same—Person having knowledge of facts sufficient to confer jurisdiction upon juvenile court may file petition.

A person filing a petition alleging facts conferring jurisdiction upon the juvenile court of the children named in the petition, and alleging that petitioner has knowledge or information of the facts alleged, is a competent person to file the petition, and it is immaterial, for the purposes of jurisdiction, whether petitioner is guardian for the minors therein named, and the petition confers jurisdiction on the juvenile court for the purposes of the statute.

3. Same—Respondents served with notice may not complain that no summons or notice was served on children whose custody is sought.

Where a duly verified petition, alleging facts sufficient to confer jurisdiction of the children therein named on the juvenile court of the county, is filed and notice of the filing of the petition and the pendency of the proceeding is duly served on respondents having the said children in their custody, the respondents may not complain that no summons or notice was served on the minor children, the service on the respondents being a sufficient compliance with the provisions of the statute to confer jurisdiction of respondents upon the court, it being within the discretion of the court whether summons should be issued to and served on the children.

4. Same—

The statute creating juvenile courts in the several counties of this State is valid, N. C. Code, 5039, 5062, and the statute confers jurisdiction on the courts to place children under its jurisdiction in public and private institutions in proper instances, N. C. Code, 5047 (4), 5053.

APPEAL by petitioner from *Hamilton, Special Judge*, at July Term, 1937, of DUPLIN. Reversed.

This is a proceeding involving the custody and welfare of four children, each of whom is under the age of sixteen years. The petitioner

and the respondents and all of said children are residents of Duplin County, North Carolina.

The proceeding was begun on 15 June, 1937, by a petition filed with the clerk of the Superior Court of Duplin County, as the judge of the juvenile court of said county, by Fred S. Winner, guardian. The petition was duly verified by the petitioner. Notice of the filing of the petition and of the pendency of the proceeding was duly served on the respondents, who thereafter filed an answer to the petition, denying the material allegations therein.

It is alleged in the petition that William Harrel Winner, about ten years of age; Benedict L. Winner, about eight years of age; Paul Howard Winner, about six years of age, and Iona Christine Winner, about four years of age, are the children of R. L. Winner and his wife, Grace Marie Winner; that Grace Marie Winner, the mother of said children, died during the month of March, 1934, and that R. L. Winner, the father of said children, is a disabled World War veteran, and is now and has been since November, 1936, confined in an institution which is maintained by the government of the United States for the care and treatment of disabled veterans of the World War.

It is further alleged in the petition that some time during the month of November, 1936, the petitioner, Fred S. Winner, who is a brother of R. L. Winner, was duly appointed by the clerk of the Superior Court of Duplin County as guardian of the said R. L. Winner and has duly qualified as such guardian; and that on 11 June, 1937, the said R. L. Winner, by a deed duly executed by him in accordance with the provisions of C. S., 2150, constituted and appointed the petitioner, Fred S. Winner, as guardian of his said minor children.

It is further alleged in the petition that after the death of his wife, the mother of his said minor children, and prior to the execution by him of the deed by which he constituted and appointed the petitioner, Fred S. Winner, as guardian of his said minor children, the said R. L. Winner, who is a member and communicant of the Catholic Church, had negotiations with the Catholic Orphanage at Nazareth, near the city of Raleigh, N. C., for the admission of his said children into said orphanage; that at the date of the execution by him of the deed by which he constituted and appointed the petitioner guardian of his said minor children the said R. L. Winner requested and directed the petitioner to have his said minor children placed in the Catholic Orphanage at Nazareth, near the city of Raleigh, N. C., and that the petitioner desires to place the said children in said orphanage, in compliance with the request and direction of their father, the said R. L. Winner.

It is further alleged in the petition that the Catholic Orphanage at Nazareth, near the city of Raleigh, N. C., is incorporated under the

laws of the State of North Carolina, and has been approved by the Board of Charities and Public Welfare of North Carolina, and is authorized by the said board to admit, care for, maintain and educate children under the age of twenty-one; and that said orphanage is in all respects equipped to care for, maintain and educate the said minor children of R. L. Winner.

It is further alleged in the petition that since his appointment by the said R. L. Winner as guardian of his said minor children the petitioner has faithfully endeavored to have the said minor children placed in the Catholic Orphanage at Nazareth, near the city of Raleigh, for care, maintenance and education by said orphanage, and that said orphanage will now admit said minor children and provide for their care, maintenance and education, provided they and each of them are committed to its custody by an order of the juvenile court of Duplin County.

It is further alleged in the petition that after his appointment by the said R. L. Winner as guardian of his said minor children, and pending their admission into the Catholic Orphanage at Nazareth, near the city of Raleigh, N. C., the petitioner placed the said children temporarily in the custody of the respondents, who are their maternal grandparents; that at the time the petitioner placed the said minor children temporarily in the custody of the respondents the respondents approved the purpose of the petitioner to place the said minor children in the custody of the said Catholic Orphanage for care, maintenance and education by the said orphanage, and agreed to return said children to the custody of the petitioner as soon as arrangements could be made for their admission into said orphanage, and that respondents now, unlawfully and without excuse or justification, refuse to surrender the said minor children to the petitioner that he may place them in said orphanage.

It is further alleged in the petition:

"A. That the respondents are unfit and unsuitable persons to have the custody, care, control and rearing of said four infant children of the said R. L. Winner, the respondents being aged persons, almost entirely illiterate, are persons of very small means and are unable financially to properly educate, provide for and maintain young children; that the family of respondents is composed of the respondents, one son who is an imbecile-invalid, and one daughter, generally known as Ruby Brice, whose moral life and character is very bad and unsavory, and who, because of the advanced ages of the respondents and their frequent absences from their home, performs most of the duties of their household, and manages and controls their home.

"B. That the said daughter of the respondents, who has the care and management of their home and now exercises control of the said children, is a person of bad moral life and character, she having been once

married and shortly thereafter divorced from her husband; that she has since lived with two men, to whom she claims to have been married; that long after her separation from her husband she resided at a roadhouse and at other places of bad repute and questionable character and surroundings in New Hanover County; that while so residing in said county, and while associating with a married man, the said daughter gave birth to a child, which was taken from her care and custody by the welfare authorities of New Hanover County; that the said daughter of the respondents has been convicted of crimes involving moral turpitude in both the recorder's court and the Superior Court of New Hanover County, and is now a fugitive from the justice of said county, where she lived in immoral relations with men for a period of over a year and until a few months prior to the commencement of this proceeding.

"C. That because of conditions surrounding and existing in the home of the respondents, as set forth in paragraphs A and B hereof, the said four children and each of them are now daily exposed and subjected to influences which greatly endanger their moral life, health and general welfare, and their best interests require that they and each of them be removed from the home of the respondents and restored to the custody of the petitioner, who is their paternal uncle, in order that said children may be placed in the Catholic Orphanage at Nazareth, near the city of Raleigh, N. C., in accordance with the request and direction of R. L. Winner, their father.

"D. That the petitioner is ready, willing and able forthwith to provide for the said children a desirable and suitable home in the Catholic Orphanage at Nazareth, near the city of Raleigh, N. C., where they and each of them will be properly maintained, carefully trained, and be given a good practical education, thus enabling said children to become good and useful citizens of the State."

After they had filed an answer to the petition in which they denied the material allegations thereof, the respondents filed a demurrer in writing to the petition and moved that the proceeding be dismissed, for that on the facts stated in the petition the juvenile court of Duplin County is without jurisdiction to hear, try, determine, or adjudge the control or custody of the children named in the petition. The demurrer to the petition was overruled, and the motion to dismiss the proceeding was denied. The respondents excepted and appealed to the Superior Court of Duplin County.

The appeal of the respondents was heard at July Term, 1937, of the Superior Court of Duplin County, where the order of the judge of the juvenile court, overruling the demurrer and denying the motion to dismiss, was reversed. Petitioner excepted.

From judgment that the proceeding be dismissed, for that on the facts stated in the petition the juvenile court of Duplin County was without jurisdiction of the proceeding, the petitioner appealed to the Supreme Court, assigning error in the judgment.

Wm. F. Jones for petitioner.
Gavin & Gavin and Geo. R. Ward for respondents.

CONNOR, J. The juvenile courts of the several counties of this State, which were created by statute (ch. 97, Public Laws of North Carolina, 1919, N. C. Code of 1935, secs. 5039-5062), have exclusive original jurisdiction of any child residing in their respective counties:

"(a) Who is delinquent or who violates any municipal or State law or ordinance, or who is truant, unruly, wayward or misdirected, or who is disobedient to parents or beyond their control, or who is in danger of becoming so; or

"(b) Who is neglected, or who engages in any occupation, calling or exhibition, or is found in any place where a child is forbidden by law, and for permitting which an adult may be punished by law, or who is in such condition or surroundings or is under such improper or insufficient guardianship or control as to endanger the morals, health, or general welfare of such child; or

"(c) Who is dependent upon public support or who is destitute, homeless or abandoned, or whose custody is subject to controversy."

It is provided by statute that "when jurisdiction has been obtained in the case of any child, unless a court order shall be issued to the contrary, or unless the child be committed to an institution supported and controlled by the State, it shall continue for the purposes of this act during the minority of the child. The duty shall be constant upon the court to give each child subject to its jurisdiction such oversight and control in the premises as will conduce to the welfare of such child and to the best interest of the State."

By virtue of the foregoing statutory provisions the juvenile court of Duplin County, on the facts alleged in the petition and admitted by the demurrer, has exclusive original jurisdiction of each of the four children named in the petition. Each of said children is under the age of sixteen; he resides in Duplin County; he is now under such conditions and surroundings and under such improper guardianship and control as to endanger his morals, health, and general welfare, and his custody is subject to controversy. These facts are sufficient to give the said court jurisdiction of said children, for the purposes of the statute, provided the said court has jurisdiction of this proceeding.

It is provided by the statute that "any person having knowledge or information that a child is within the provisions of this act, and subject

to the jurisdiction of the court, may file with the court a petition verified by affidavit, stating the alleged facts which bring such child within said provisions. The petition shall set forth the name and residence of the child and of the parents, or the name and residence of the person having the guardianship, custody or supervision of such child, if the same be known or ascertained by the petitioner, or the petition shall state that they are unknown, if that be the fact."

This proceeding was begun by a petition which complies in all respects with these statutory requirements and is sufficient to confer jurisdiction upon the court of the proceeding. Whether or not the petitioner is the duly constituted and duly appointed guardian of the children named in the petition is immaterial, at least for purposes of jurisdiction. It appears from the allegations of the petition, which are admitted by the demurrer, that the petitioner is a person who has knowledge or information of the facts alleged in the petition which are sufficient under the statute to confer jurisdiction upon the court, both of the children named in the petition, and of the proceeding which was begun by the filing of the petition. This, under the express provisions of the statute, is sufficient to confer jurisdiction for the purposes of the statute.

It is provided by the statute that "upon the filing of the petition or upon the taking of the child into custody, the court may forthwith or after an investigation by a probation officer or other person, cause to be issued a summons signed by the judge or the clerk of the court, directed to the child, unless such child has been taken into custody, and to the parents, or in case there is no parent, to the person having the guardianship, custody, or supervision of the child, or the person with whom the child may be, requiring them to appear with the child, at the place and time stated in the summons to show cause why the child should not be dealt with according to the provisions of this act."

The notice issued by the judge of the juvenile court of Duplin County, addressed to the respondents and appearing in the record, was sufficient compliance with the foregoing statutory provisions. This notice was duly served on the respondents who appeared as required and filed answer to the petition. It was within the discretion of the court as to whether summons should be issued to and served on the children. The respondents have no cause to complain that no summons or notice was served on the children, who were in their custody.

The validity of the statute creating juvenile courts in the several counties of this State has been upheld, and its provisions construed and applied by this Court in *In re Coston,* 187 N. C., 509, 122 S. E., 183; *In re Hamilton,* 182 N. C., 44, 108 S. E., 385, and *S. v. Burnett,* 179 N. C., 735, 102 S. E., 711. In view of the situation presented by the record in this proceeding, it may be well to direct attention to the following provisions of the statute:

The court "may commit the child to a suitable institution maintained by the State or any subdivision thereof, or to any suitable private institution, society or association incorporated under the laws of the State and approved by the State Board of Charities and Public Welfare, authorized to care for children or to place them in suitable homes." N. C. Code of 1935, sec. 5047, subsection 4.

"In committing any child to any institution or other custodial agency other than one supported and controlled by the State, or in placing the child under any guardianship other than that of its natural guardians, the court shall as far as practicable select as the custodial agency an institution, society, or association governed by persons of like religious faith as the parents of such child or an individual holding the same religious faith." N. C. Code of 1935, sec. 5053.

There was error in the judgment of the Superior Court dismissing this proceeding on the ground that the juvenile court of Duplin County was without jurisdiction of the children named in the petition, of this proceeding, and of the respondents. The judgment is reversed to the end that the order of the judge of the juvenile court, overruling the demurrer and denying the motion that the proceeding be dismissed, may be affirmed and the proceeding remanded to the juvenile court of Duplin County that it may be heard by said court.

Reversed.

STATE v. HENRY P. WHITEHURST.

(Filed 3 November, 1937.)

1. Statutes § 7—

The rule that a criminal statute must be strictly construed does not mean that a criminal statute should be construed stintingly or narrowly, but that it may not be extended by implication or equitable construction beyond the scope of the language employed.

2. Embezzlement § 1—

The embezzlement statute, C. S., 4268, being a penal statute creating a new offense, cannot be extended by construction to include persons not within the classes of persons therein defined as being subject to its provisions.

3. Same: Banks and Banking § 13: Receivers § 7—Bank receiver does not come within purview of embezzlement statute.

A receiver of a State bank is an officer of the court, and the fund he administers is *in custodia legis*, but he is not a public officer, nor an agent of the bank nor a trustee within the meaning of the embezzlement statute, and his motion to quash an indictment drawn under C. S., 4268, for

appropriating the funds of the insolvent bank to his own use, is properly granted, since he does not come within any of the classes of persons defined in the statute who may fall within its condemnation.

4. Embezzlement § 5—

Where an indictment of a bank receiver for embezzlement is drawn under C. S., 4268, it is unnecessary to determine whether an indictment under other of the cognate statutes, C. S., 4269 to 4276, could be sustained.

5. Constitutional Law § 6a—

It is the duty of the courts to declare the law as written.

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

APPEAL by State from *Frizzelle, J.*, at July Special Term, 1937, of CRAVEN.

Criminal prosecution in which the defendant as receiver of the Bank of Vanceboro is charged with embezzlement.

The indictment charges that in May, 1924, the defendant was duly appointed receiver for the Bank of Vanceboro, a State banking institution, and that, as such, in the exercise of a public trust and as agent, consignee, clerk, employee and servant of the court and of the depositors, stockholders and creditors of the insolvent bank, he was entrusted with and did receive and take into his possession and have under his care large sums of money, to wit, $14,547.94, the property of said receivership, which the said Henry P. Whitehurst (being over the age of 16 years) did feloniously embezzle, fraudulently misapply, convert to his own use, etc., against the form of the statute in such case made and provided, and against the peace and dignity of the State.

Before pleading to the indictment, the defendant, through counsel, entered a demurrer and moved to quash upon the ground that a receiver is not covered by the embezzlement statute.

From judgment of quashal the State appeals, assigning error.

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

A. D. Ward, L. I. Moore, W. B. R. Guion, and R. E. Whitehurst for defendant, appellee.

STACY, C. J. Does the fraudulent misapplication of receivership funds by the receiver of a State bank come within the purview of the embezzlement statute, C. S., 4268? We agree with the trial court that a receiver of an insolvent corporation is not within the terms of the statute.

A receiver is not *eo nomine* mentioned in the statute, and it is not thought that the language is broad enough to include a receiver of an insolvent corporation under the rule of *ejusdem generis*. See *Calkins*

v. State, 18 Ohio State, 366, as reported in 98 Am. Dec., 121, with valuable note covering the whole subject.

As a forerunner to the embezzlement statute, provision was made in the Revised Code of 1854, ch. 34, sec. 18, for punishment at the whipping-post of any servant who withdrew from his master and went away with any money, goods or other chattels of the value of five dollars, to him entrusted by his master, with intent to steal the same, or who, being in the service of his master, embezzled any such money, goods or other chattels, or otherwise converted the same to his own use, contrary to the trust and confidence in him reposed. (Brought forward in Battle's Revisal, ch. 32, sec. 16.) See *S. v. Lanier*, 88 N. C., 658; *S. c.*, 89 N. C., 517.

Then, in 1872, by act of Assembly adopted 8 February of that year, it was enacted: "If any officer, agent, clerk or servant of any corporation, or any clerk, agent or servant of any person or copartnership (except apprentices and other persons under the age of sixteen years) shall embezzle or fraudulently convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently convert to his own use any money, goods or other chattels, . . . belonging to any other person or corporation which shall have come into his possession or under his care by virtue of such office or employment, he shall be deemed guilty of felony, and upon conviction thereof shall be punished as in cases of larceny." Chap. 145 Pub. Laws 1871-72. This is known as the embezzlement statute, and it appears in Battle's Revisal (1873) as ch. 32, sec. 136. It was brought forward as section 1014 in The Code of 1883.

In 1889 the section was amended by adding "consignee" to the persons designated, and enlarging its scope by inserting after the word "fraudulently," wherever it appears, the words "or knowingly and willfully misapply or." Chap. 226, Public Laws 1889.

Following the decision in *S. v. Connelly*, 104 N. C., 794, 10 S. E., 469 (Fall Term, 1889), in which it was held that a "clerk of the Superior Court" was not within the terms of the statute, the section was again amended making it applicable to any "public officer, clerk of the Superior or other court, sheriff or other person, or officer exercising a public trust or holding public office." Ch. 188, Laws and Resolutions, 1891.

In 1897 the section was further amended so as to embrace "guardians, administrators and executors." Ch. 31, Pub. Laws 1897.

With these amendments added, the statute was brought forward as section 3406 in the Revisal of 1905. It now appears as section 4268 in the Consolidated Statutes of 1919. (In the Code of 1883 the word "employee" appeared in the statute, but this has been eliminated in subsequent compilations. Similarly, the words "or copartnership" were omitted beginning with the Revisal of 1905, and the exception as to

"apprentices" does not appear in the Consolidated Statutes of 1919, as the law on apprentices was repealed by ch. 97, Pub. Laws 1919.)

Lastly, by amendment in 1931, the statute was made applicable to any "trustee" who embezzles the funds of his *cestui*. Ch. 158, Pub. Laws 1931.

Hence, in its present form, the statute applies to "any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any officer or agent of a corporation, or any agent, consignee, clerk or servant, except persons under the age of sixteen years, of any person."

Thus it will be seen that, by repeated amendments, the scope of the statute has been gradually enlarged and its base progressively broadened. But at no time has it been made applicable, *ipsissimis verbis,* to receivers of insolvent corporations. Nor does it appear, under the rule of strict construction (25 R. C. L., 1076) that the statute is susceptible of the interpretation inclusive of such receivers.

By the rule of strict construction, however, is not meant that the statute shall be stintingly or even narrowly construed (*S. v. Earnhardt,* 170 N. C., 725, 86 S. E., 960), but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used. *U. S. v. Wiltberger,* 5 Wheat., 76. Criminal statutes are not to be extended by implication or equitable construction to include those not within their terms, for the very obvious reason that the power of punishment is vested in the legislative and not in the judicial department. It is the General Assembly which is to define crimes and ordain their punishment. *Jennings v. Commonwealth,* 109 Va., 821, 63 S. E., 1080, 132 A. S. R., 946, 17 Ann. Cas., 64, 21 L. R. A. (N. S.), 265. Compare *S. v. Humphries,* 210 N. C., 406, 186 S. E., 473, and *S. v. Bell,* 184 N. C., 701, 115 S. E., 190.

The embezzlement statute begins by defining the classes of persons who may fall within its condemnation, or who may commit the statutory crime of embezzlement, and as it is a penal statute, creating a new offense, it cannot be extended by construction to persons not within the classes designated. 2 Bishop Crim. Law, sec. 331. In other words, if the statute be so worded as not to include the defendant, his office, or his status, an indictment thereunder will not lie against him. *S. v. Keith,* 126 N. C., 1114, 36 S. E., 169; *Calkins v. State, supra.*

A receiver is usually denominated an officer of the court—an "arm" or "hand" of the court—but he holds no public office. *Baird v. Lefor,* 52 N. D., 155, 201 N. W., 997, 38 A. L. R., 807; 23 R. C. L., 7; 22 R. C. L., 398. Nor is he engaged in exercising a public trust. *People v. Showalter,* 126 Cal. App., 665, 14 Pac. (2nd), 1034. He is not an agent within the meaning of the embezzlement statute. *S. v. Hubbard,* 58 Kan., 797, 51 Pac., 290, 39 L. R. A., 860. "The term 'agent of a bank'

would ill describe the office of a receiver"—*Mr. Justice Brandeis* in *U. S. v. Weitzel,* 246 U. S., 533. Nor is he a trustee in the sense this term is used in the statute. The property he administers is said to be *in custodia legis.* High on Receivers (4th Ed.), ch. 1, page 3. It may be noted, however, that the offense here charged apparently took place prior to the amendment of 1931, interpolating the word "trustee," and the term is not used in the indictment.

"A receiver is a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit merely to take possession of and preserve, *pendente lite,* the fund or property in litigation, when it does not seem equitable to the court that either of the litigants should have possession of it. He holds the property for the benefit of all the parties interested. His title and possession is that of the court, and any attempt to disturb his possession or to interfere with him, when he is acting under the authority and orders of the court, is contempt, and punishable accordingly"—*Walker, J.,* in *S. v. R. R.,* 152 N. C., 785, 67 S. E., 42, 21 Ann. Cas., 692, 26 L. R. A. (N. S.), 710.

"Generally speaking a receiver is not an agent, except of the court appointing him; the very term receiver negatives such an idea. He is merely a ministerial officer of the court or, as he is sometimes called, the hand or arm of the court, . . . really representing the court, and acting under its direction, for the benefit of all the parties in interest. . . . His acts and possession are the acts and possession of the court. . . . The parties to the litigation have not the least authority over him. . . . His authority is derived solely from the act of the court appointing him, . . . and he is the subject of its order only." 23 R. C. L., p. 7.

In *People v. Goldman,* 318 Ill., 77, it was held that a receiver of a partnership estate was covered by the embezzlement statute under the principle of *ejusdem generis,* executors and administrators being specifically mentioned therein. The Illinois statute is also somewhat broader than ours. Whether a collector of a decedent's estate would come within the purview of our statute we make no decision. The question is not before us.

Nor is it essential presently to premise whether a receiver of an insolvent corporation is covered by any of the cognate statutes, C. S., 4269 to 4276, inclusive. It is enough to say the defendant is not indicted under any of these statutes.

The case of *S. v. Ray,* 207 N. C., 642, 178 S. E., 224, wherein a commissioner to sell land was charged with embezzlement, is not an authority in support of the present indictment. There the bill was not challenged by demurrer or motion to quash, and its sufficiency was not mooted. The case was made to turn on the inadequacy of the court's charge to the jury.

Whether the scope of the statute should again be enlarged so as to include receivers is a legislative rather than a judicial question. *Wake County v. Faison,* 204 N. C., 55, 167 S. E., 391. "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. What the General Assembly has written it has written, and if it be not satisfied with its present writing it can write again. However much we may think the law might well be otherwise, this should not blind our judgment to what it really is. It is ours only to declare the law, not to make it. *Moore v. Jones,* 76 N. C., 187. A *casus omissus* is not unusual, especially in legislation of this kind, as witness the numerous amendments to the statute. *U. S. v. Weitzel, supra.* On the other hand, it is remembered that receivers are required to give bond, and they are subject to the summary powers of the court. *S. v. Morris,* 120 Wash., 146, 207 Pac., 18. No doubt, in the instant case, had the facts been developed, a different picture would have been presented. But why go through the tedium of a trial if the bill charge no crime? *S. v. Barton,* 125 N. C., 702, 34 S. E., 553.

On the record as it now appears, and under the law as written at the time, the judgment of quashal would seem to be correct.

Affirmed.

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

THE NATIONAL COUNCIL, JUNIOR ORDER UNITED AMERICAN MECHANICS; THE STATE COUNCIL, JUNIOR ORDER UNITED AMERICAN MECHANICS OF NORTH CAROLINA; BURKEMONT COUNCIL No. 44, JUNIOR ORDER UNITED AMERICAN MECHANICS; AND ERNEST BOLICK, RECORDING SECRETARY OF BURKEMONT COUNCIL No. 44, JUNIOR ORDER UNITED AMERICAN MECHANICS, PLAINTIFFS, v. MRS. CHARLES E. TATE AND ROSEBUD TATE, DEFENDANTS.

(Filed 3 November, 1937.)

1. Insurance § 36a—Wife of insured held his "legal dependent" and entitled to proceeds of mutual benefit insurance contract.

The by-laws of plaintiff fraternal benefit society provided that upon the death of a member in good standing in its funeral benefit association, his "legal dependent" should receive the amount stipulated in the contract. At the time of insured's death there were no by-laws governing change of beneficiary. At the time he became a member of the association

insured was supporting his wife and daughter, but shortly thereafter his daughter, who was over eighteen years of age, moved to another state and ceased to live with her parents. Insured signed a memorandum, which was filed in the roll book of the local council by the recording secretary, stating he wished his funeral benefit insurance paid to his daughter, as he considered her his legal dependent, his wife having other insurance. *Held:* Upon the death of insured his wife alone was his legal dependent and entitled to the payment of the funeral benefits, and while an insured ordinarily may change the beneficiary of an insurance contract, unless restrained by some provision of law or rule of the order, the paper-writing signed by insured erroneously describing his daughter as his "legal dependent" cannot have this effect.

2. Legal Dependents.

A "legal dependent" of a person is one whom he is required by law to support and not merely one he may lawfully support, and the legal wife of a person is a "legal dependent." C. S., 6508, 4447.

3. Insurance § 6a—

Where two rival claimants for the proceeds of a life insurance contract threaten suit, a suit instituted by insurer to determine which is lawfully entitled thereto, cannot constitute a waiver or ratification of an attempted change of beneficiary by insured prior to his death.

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

APPEAL by defendant Mrs. Charles E. Tate from judgment rendered by *Harding, J.*, at June Term, 1937, of BURKE. Reversed.

Action to determine the proper beneficiary of funeral benefits or insurance on the life of Charles E. Tate, deceased. The plaintiff, Junior Order United American Mechanics, a fraternal benefit society, acting through its funeral benefit department, is ready to pay the proceeds of the benefits due on the death of decedent, to wit, $500.00, and check for same is in the custody of plaintiff Ernest Bolick, recording secretary of the local council of said society, for payment to the legal beneficiary. Each of the defendants, Mrs. Charles E. Tate, the widow, and Rosebud Tate, daughter of decedent, claims to be the legal beneficiary entitled to the fund. By order of court the plaintiff was permitted to pay the fund (less certain expenses) into court and to be discharged from all further liability, leaving the two defendants to litigate their respective claims.

Jury trial was waived, and it was agreed that the trial judge should hear the evidence, find the facts, and render judgment upon his conclusions of law thereon.

The material and pertinent facts found by the judge may be summarized as follows:

The Junior Order of United American Mechanics is a fraternal benefit society. The plaintiff, National Council or supreme governing body of the society, is a corporation organized and existing under the laws of

the State of Pennsylvania. The plaintiff, State Council Junior Order United American Mechanics of North Carolina, is a corporation organized under the laws of North Carolina and is the state council of said society. The plaintiff, Burkemont Council, No. 44, is the subordinate council or lodge of said society, of which deceased was a member, and Ernest Bolick, a citizen of Burke County, is the recording secretary of the local council.

That prior to 29 September, 1924, Charles E. Tate, the decedent, was duly elected, initiated, and admitted to membership in said Burkemont Council, No. 44, and thereupon said society, acting through its funeral benefit department, contracted and agreed with the decedent that in the event he was a member of said society, in good standing, at the time of his death the said society, acting through its funeral benefit department, would pay funeral benefits amounting to $500.00 to the legal dependent of said decedent. Decedent continued to pay his dues as a member of said order until his death in 1931.

That on 29 September, 1924, decedent was living with and supporting his wife (defendant Mrs. Charles E. Tate) and his daughter, Rosebud Tate, at his home in Morganton, North Carolina. That on said date said Rosebud Tate was over eighteen years of age. That in 1925 defendant Rosebud Tate removed to Knoxville, Tennessee, and thereafter lived separate and apart from the decedent until his death.

That on 29 September, 1924, decedent dictated and signed a paper-writing in the following words: "I, C. E. Tate, hereby request the Junior Order to pay my funeral benefit insurance to my youngest daughter, Miss Rosebud Tate, as I consider her my legal dependent, as my wife has other insurance. (Signed) C. E. Tate. Witness: T. L. Sigmon." This paper-writing was placed by the then recording secretary, R. E. Cox, in the roll book of said local council where the name of decedent as a member was written and where it remained until produced in court by the present recording secretary.

"That there was no written or established rule of the council at the time as to how, by what method, or to whom paper-writing affecting its contract of insurance should be presented or filed, other than such as are incident to the duties of a recording secretary, and the customary procedure of the then recording secretary of placing such papers in the roll book where the names of members were recorded. That the by-law of the society providing the method of designating a beneficiary, now in force, was not adopted until after the death of decedent."

It was admitted in the answer of defendant Rosebud Tate that at the time of filing the paper-writing referred to with the recording secretary there was no rule or regulation of the society affecting the contract of the society, except Art. VII, sec. 1, of the by-laws, which reads as fol-

lows: "Upon the death of a member of this council in good standing in the funeral benefit association his legal dependent shall receive $500.00."

Upon the facts found the court below concluded that the decedent had the right to designate his legal dependent and to name the beneficiary of his funeral benefits, and did so designate defendant Rosebud Tate by the paper-writing referred to; that the acceptance and filing of said paper-writing by the recording secretary, with the implied assent of the local council, was binding on the Junior Order United American Mechanics and the funeral benefit department, the facts found constituting a ratification by the plaintiffs of the act of the recording secretary in accepting said paper-writing, and that the plaintiffs by bringing this suit waived all objections as to the method in which the paper-writing was filed. Thereupon judgment was rendered that defendant Rosebud Tate was entitled to the fund, and defendant Mrs. Charles E. Tate appealed.

Robert W. Proctor for Mrs. Charles E. Tate, appellant.
I. T. Avery for Rosebud Tate, appellee.

DEVIN, J. While there was no written certificate of insurance issued, it was admitted and found by the court below that the Junior Order United American Mechanics, a fraternal benefit society, acting through its funeral benefit department, contracted with Charles E. Tate, the decedent, then a member of the order, that in the event he was a member of said society, in good standing at the time of his death, the named society, the plaintiff, acting through its funeral benefit department, would pay funeral benefits amounting to $500.00 to the legal dependent of said decedent. It was further admitted that Charles E. Tate died in 1931, and that up to the time of his death he was a member, in good standing, of the order. The by-laws of the society provided that, "Upon the death of a member of this council, in good standing in the funeral benefit association, his legal dependent shall receive $500.00." The money has been paid into court.

Upon the death of the decedent, who was the legal dependent under the terms of the contract and upon the facts found by the trial judge?

Legal dependent means something more than one who is deriving support from another. It imports one who has the right to invoke the aid of the law to require support. And the status of a wife living with her husband as being his legal dependent, entitled in law to his support, is recognized by our statutes, C. S., 6508, 4447.

In the case of *Vaughan v. United American Mechanics,* 136 Mo. App., 362, a suit by the mother of the decedent to recover under a contract by this same plaintiff to pay the insurance to his legal dependent, the Court

used this language: "The term 'legal dependent' is used in a more limited sense than that of 'lawful dependent,' which would include all persons except those who might occupy an unlawful relation to the insured. There was no legal duty imposed by law on the insured to support his mother, yet at the same time it would have been lawful for him to have done so. A man's legal dependents are his wife and minor children, and the law imposes upon him the duty to support them. The term 'legal' means that which is according to law. It does not mean permitted by law, but means created by law."

In *Applebaum v. Commercial Travelers,* 171 N. C., 435, it was held that when the constitution of the fraternal benefit association limited the beneficiary to a person dependent on the member, this meant legally dependent, and that a wife by a bigamous marriage, though named in the certificate of insurance as beneficiary, was not entitled to the insurance.

It is admitted that defendant Mrs. Charles E. Tate had continuously lived with decedent during the entire period and up to the time of his death, and that defendant Rosebud Tate, since 1925, had continuously lived separate and apart from him and in another state.

However, defendant Rosebud Tate contends that by the paper-writing signed by decedent 29 September, 1924, in which he requested the order to pay his insurance to his daughter as his legal dependent, he designated her as his legal dependent, and that this written designation to that effect, filed by the recording secretary of the local council in the roll book, was impliedly assented to by the local council, and that this had the effect of binding the funeral benefit department of the order, and that by bringing this action plaintiffs have ratified and acquiesced in this designation.

But the facts found do not justify this conclusion. It does not appear that there was any provision in the rules and by-laws of the order that would give effect to this written request of a member made subsequent to the contract, and filed with the recording secretary of the local council, that the insurance be paid to a person whom he mistakenly designated as his legal dependent. The contract at the time it was entered into made the benefits upon his death receivable only by his legal dependent.

Ordinarily a member of a fraternal benefit society may change the beneficiary in his policy or contract of insurance, unless restricted by some provision of law or by some rule of the order (*Pollock v. Household of Ruth,* 150 N. C., 211), but in this case there was an attempt on the part of the member erroneously to define his legal dependent, and to designate one who does not come within the meaning of the term.

"When a person's eligibility as a beneficiary depends upon his sustaining a particular relation to the member, his eligibility is generally determinable as of the member's death." 45 C. J., 167.

The institution of action by the plaintiffs, where two rival claimants threaten suit, cannot be held to constitute ratification or waiver. *Keener v. Grand Lodge,* A. O. U. W., 38 Mo. App., 543. The defendant Rosebud Tate had ceased to be in any sense dependent upon the decedent for six years prior to and at the time of his death. His wife alone could be held to be his legal dependent, and under the terms of the contract is the one entitled to the funeral benefits upon his death, and to the fund now in the hands of the court.

We conclude that there was error in the court below in holding, under the facts presented, that defendant Rosebud Tate was entitled to the fund, and the judgment to that effect must be

Reversed.

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

E. C. SMITH AND HIS WIFE, MAMIE J. SMITH, v. TURNAGE-WINSLOW COMPANY, INC. (NOW J. E. WINSLOW COMPANY, INC.).

(Filed 3 November, 1937.)

1. Deeds § 10b—Purchasers for value in registered instruments take free from claims arising from unregistered instruments.

Ordinarily, a person interested in a transaction involving title to land may rely upon the public records, and a grantee, mortgagee, or trustee for value in registered instruments takes title conveyed in such instruments free from claims arising from prior unregistered instruments, and no notice, however full and formal, will supply want of registration. C. S., 3309, 3311.

2. Deeds §§ 7, 10b—Purchase money deed of trust from husband on lands deeded to wife held ineffective as against purchaser from wife.

Where the owner of lands deeds same to a wife, according to the language of the registered instrument, and the husband alone executes a purchase money deed of trust on the lands which is registered prior to the registration of the deed in fee to the wife, the records are insufficient to show that the husband had any interest in the land, and the purchase money deed of trust is ineffective as against creditors or subsequent purchasers for value from the wife, and where the husband and wife thereafter execute a mortgage, which is duly registered, the mortgagee is entitled to foreclose same upon default as against those claiming title by foreclosure under the purchase money deed of trust, and this result is not affected by the fact that the mortgage, in the clause warranting title, referred to the purchase money deed of trust by page number of the

registry book, since such reference does not constitute even constructive notice in that the records would not have shown that the husband had any interest in the land, and since no notice, however full and formal, will supply want of registration. C. S., 3309, 3311.

APPEAL by defendant from *Cranmer, J.*, at April Term, 1937, of PITT. Reversed.

This is an action to enjoin the sale of a tract of land described in the complaint under the power of sale contained in a mortgage from Mary Paramore and her husband, W. B. Paramore, to the defendant, dated 12 February, 1929, and duly recorded in the office of the register of deeds of Pitt County, on 13 February, 1929, in Book B-17, at page 243.

The plaintiffs allege in their complaint that they are the owners in fee and in possession of the tract of land described in the complaint, and that they claim title to said tract of land under and through deeds and conveyances as follows:

1. Deed from G. W. Haddock and his wife, Bessie Haddock, to W. B. Paramore, dated 21 October, 1922, and conveying the tract of land described in the complaint.

This deed is not recorded in the office of the register of deeds of Pitt County; there is, however, a deed dated 21 October, 1922, from G. W. Haddock and his wife, Bessie Haddock, to Mary Paramore, wife of W. B. Paramore, recorded in said office, on 9 February, 1929, in Book E-17, at page 422.

2. Deed of trust from W. B. Paramore to A. W. Bailey, trustee, dated 21 October, 1922, and duly recorded in the office of the register of deeds of Pitt County, on 24 October, 1922, in Book P-14, at page 293. The said tract of land is the same as that described in the complaint and in the deed from G. W. Haddock and his wife, Bessie Haddock, to Mary Paramore, wife of W. B. Paramore, dated 21 October, 1922, and recorded in the office of the register of deeds of Pitt County, on 9 February, 1929, in Book E-17, at page 422.

An endorsement, as follows, appears on the margin of the page on which the said deed of trust is recorded:

"This deed of trust has been foreclosed. The land described therein was purchased by G. W. Haddock. This 12 December, 1930.

A. W. BAILEY, Trustee.
Book P-14, page 293,
Pitt County Registry."

3. Deed from A. W. Bailey, trustee, to G. W. Haddock, dated 12 December, 1930, and duly recorded in the office of the register of deeds of Pitt County, on 12 December, 1930, in Book U-18, at page 145. The tract of land conveyed by this deed is the same as that described in the complaint.

4. Deed from G. W. Haddock and his wife, Bessie Haddock, to J. S. Paramore, dated 21 December, 1934, and duly recorded in the office of the register of deeds of Pitt County, on 21 December, 1934, in Book U-18, at page 38. The tract of land conveyed by this deed is the same as that described in the complaint.

5. Deed from J. S. Paramore and his wife, Myrtle Paramore, to E. C. Smith and his wife, Mamie J. Smith, dated 24 October, 1935, and duly recorded in the office of the register of deeds of Pitt County, on 24 October, 1935, in Book F-16, at page 14. The tract of land conveyed by this deed is the same as that described in the complaint.

The defendant in its answer denies that plaintiffs are the owners in fee of the tract of land described in the complaint, and alleges that W. B. Paramore, under whom the plaintiffs claim title to said tract of land, never had title to the same, and that for that reason his deed of trust to A. W. Bailey, trustee, conveyed no title to said tract of land.

The plaintiffs further allege in their complaint that at the date of the execution of the deed from G. W. Haddock and his wife, Bessie Haddock, and at the date of the execution of the deed of trust from W. B. Paramore to A. W. Bailey, trustee, to wit: 21 October, 1922, the grantee named in said deed was W. B. Paramore; that after the delivery of said deed to W. B. Paramore, and after the registration of said deed of trust from W. B. Paramore to A. W. Bailey, trustee, and before the registration of the deed from G. W. Haddock and his wife, Bessie Haddock, on 9 February, 1929, W. B. Paramore caused his name to be stricken from said deed as the grantee named therein, and the name of his wife, Mary Paramore, to be written therein as the grantee; and that after the said change in the name of the grantee in said deed, the said deed was recorded in the office of the register of deeds of Pitt County, on 9 February, 1929, in Book E-17, at page 422, with the result that the name of Mary Paramore appears in the said deed as grantee, whereas the name of W. B. Paramore should appear in said deed as grantee.

The defendant in its answer denied this allegation in the complaint, and alleges that if the change in the name of the grantee in said deed was made as alleged in the complaint, the defendant at or before the date of its mortgage from Mary Paramore and her husband, W. B. Paramore, to wit: 12 February, 1929, the defendant had no notice of such change, and that it took said mortgage as security for the indebtedness of the said Mary Paramore and her husband, W. B. Paramore, to the defendant, relying upon the records in the office of the register of deeds of Pitt County.

The plaintiffs further allege in their complaint that on 12 February, 1929, W. B. Paramore and his wife, Mary Paramore, executed a mortgage by which they conveyed to the defendant the tract of land described

in the complaint, together with other property, real and personal, for the purpose of securing the payment of their indebtedness to the defendant as recited in said mortgage; that said mortgage was duly recorded in the office of the register of deeds of Pitt County, on 13 February, 1929, in Book S-17, at page 293; and that said mortgage contains a clause in words as follows:

"The parties of the first part further represent that they are the owners in fee simple of the property above described, and that the same is not encumbered by any other mortgage or judgment, or in any manner, except P-14, 293, on real estate."

The defendant in its answer admits this allegation of the complaint, and alleges that by reason of said mortgage from Mary Paramore and her husband to the defendant, the defendant has a lien on the tract of land described in the complaint prior to any claim of the plaintiffs to said tract of land. The defendant further admits in its answer the allegation of the complaint that the defendant has advertised the tract of land described in the complaint for sale under the power of sale contained in the said mortgage, and that unless enjoined and restrained by the court in this action, the defendant will sell the said tract of land in accordance with said advertisement.

When the action was called for trial, and the pleadings read, the court was of opinion that on the allegations of the complaint, and the admissions of the answer, the plaintiffs are the owners in fee simple and entitled to the possession of the tract of land described in the complaint, and that the mortgage from W. B. Paramore and his wife, Mary Paramore, to the defendant, by reason of the reference therein to the deed of trust from W. B. Paramore to A. W. Bailey, trustee, as recorded in the office of the register of deeds of Pitt County, in Book P-14, at page 293, is not a lien on the said tract of land, and accordingly adjudged that the plaintiffs are the owners in fee and entitled to the possession of the said tract of land, and enjoined the defendant from selling said tract of land under the power of sale contained in said mortgage. It further adjudged that the costs of the action be taxed against the defendant.

From said judgment the defendant appealed to the Supreme Court, assigning error in the judgment.

Blount & James for plaintiffs.
J. L. Evans and Albion Dunn for defendant.

CONNOR, J. A person interested in a transaction involving the title to land situate in any county of this State may ordinarily rely upon the public records of said county for the purpose of ascertaining the true title to said land.

It is provided by statute that "no conveyance of land, or contract to convey or lease of land for more than three years, shall be valid to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or lessor, but from the registration thereof within the county where the land lies." C. S., 3309.

It is further provided by statute that "no deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or mortgagor, but from the registration of such deed of trust or mortgage on the county where the land lies; or in case of personal estate, where the donor, bargainor, or mortgagor resides; or in case the donor, bargainor, or mortgagor resides out of the State, where the said personal property, or some part of the same, is situated; or in cases of choses in action, where the donee, bargainee, or mortgagee resides." C. S., 3311.

In construing and applying the foregoing statutes, this Court has uniformly and consistently held that no notice, however full and formal, will supply want of registration where the unregistered deed conveys land, or the unregistered deed of trust or mortgage conveys land or personal property to one who is claiming said land or personal property against a purchaser for value from or against a creditor of one whose title to the said land or personal property is derived from a duly registered deed, deed of trust, or mortgage. Such construction and application is necessary to enforce the public policy of this State, as declared in these statutes. This policy cannot be varied to meet the apparent hardship of an individual case, such as that presented by the record in this appeal. See *Duncan v. Gulley,* 199 N. C., 552, 155 S. E., 244, and numerous other cases which may be found in digests in general use.

If it be conceded in this case that the words and figures found in the clause contained in the mortgage from Mary Paramore and her husband, W. B. Paramore, to wit: "Except P-14-293," are sufficient as a reference to the deed of trust from W. B. Paramore to A. W. Bailey, trustee, recorded in the office of the register of deeds of Pitt County, on 24 October, 1922, in Book P-14, at page 293, it does not follow that such reference was sufficient notice to the defendant at the date of the execution of its mortgage from Mary Paramore and her husband, W. B. Paramore, that W. B. Paramore had title, legal or equitable, to the land conveyed to the defendant by its mortgage. An investigation of the records in the office of the register of deeds of Pitt County, at or before the date of the execution of said mortgage, would have disclosed a deed from G. W. Haddock and his wife, Bessie Haddock, to Mary Paramore, dated 21 October, 1922, and recorded in said office on 9 February, 1929, in Book E-17, at page 422; such investigation would not have disclosed any deed to W. B. Paramore, conveying to him the land which he conveyed

by his deed of trust to A. W. Bailey, trustee. When the defendant accepted the mortgage from Mary Paramore and her husband, W. B. Paramore, it had no notice, actual or constructive, that the deed from G. W. Haddock and his wife, Bessie Haddock, at the date of its delivery, conveyed the land described therein to W. B. Paramore, and not to his wife, Mary Paramore, as shown by the record. See *Hardy v. Fryer,* 194 N. C., 420, 139 S. E., 833, where the facts are readily distinguishable from the facts of this case.

There is error in the judgment on the pleadings in the instant case. The judgment is reversed and the action remanded to the Superior Court of Pitt County for trial by a jury of the issues raised by the pleadings. What the legal effect of answers to these issues favorable to the plaintiff will be is not presented on the record in this appeal.

Reversed.

ELLA SPEAR HAMPTON v. J. T. WEST.

(Filed 3 November, 1937.)

1. Wills § 31—

A will must be construed as a whole from its four corners to give effect to the intent of the testator as expressed in the language used.

2. Same—

The rule that a general devise will be construed to be in fee, C. S., 4162, applies only when the language employed by testator fails to show a clear intent to convey an estate of less dignity.

3. Same—

While ordinarily a general devise with power of disposition vests the fee in the first taker, the rule does not apply where the power of disposition, as to part of the estate at least, is limited to disposition by will, with provision for the vesting of the estate undisposed of by will in named beneficiaries.

4. Wills § 33a—General devise held not to convey fee simple in view of subsequent items of will showing intent to convey estate of less dignity.

A general devise to testator's wife with subsequent items providing that one-half the estate "remaining" at her death should go to his adopted son in fee, and the other half, in the event the wife did not dispose of the residue of the estate by will, to go to the children of L., *is held* to show an intent to convey an estate of less dignity than a fee simple to testator's wife, rebutting the presumption that the general devise to the wife should be construed to be in fee, C. S., 4162, the power of disposition of part of the estate, at least, being limited to disposition by will, and the widow does not have the power to convey the entire estate by deed in fee simple.

SCHENCK, J., dissenting.

BARNHILL, J., concurs in dissenting opinion.

HAMPTON *v.* WEST.

APPEAL from *Williams, J.*, at April Term, 1937, of CURRITUCK.

This was a controversy without action. Plaintiff contracted to sell and defendant to buy certain real estate in Currituck County. The plaintiff tendered deed therefor and defendant refused to accept same and pay the agreed price on the ground that plaintiff is unable to convey a fee simple title to the real estate involved.

It is admitted that the land, the title to which is in controversy, passed under the will of H. D. Spear, the late husband of the plaintiff, and that the determination of the questions at issue depends upon the construction of said will which was probated 4 June, 1927.

The pertinent portions of the will are as follows:

"3rd. All the remainder and residue of my estate of every sort, kind and description, whether real, personal or mixed, and wherever situate, I give, devise and bequeath to my beloved wife Ella Spear.

"4th. Upon the death of my wife I further direct that one-half of my estate bond money real or personal then remaining as a part of my estate shall be given to Charlie Spear in fee simple.

"5th. Upon the death of my wife I further direct that in the event that she should not leave a will disposing of the residue of my estate, I give, devise and bequeath to Mrs. Matthew Lagasse children then living and to be equally divided."

Harry J. Berg and John H. Hall for plaintiff, appellee.
Chester R. Morris for defendant, appellant.

DEVIN, J. Construing the will of H. D. Spear as a whole, and looking at it from its four corners, in the effort to give effect to his intent as expressed in the language used (*Heyer v. Bulluck,* 210 N. C., 321), it would seem that the testator did not intend that his widow should have a fee simple estate in all his land, for he sets forth two provisions for its disposition after her death. If he had stopped with a general and indefinite devise of his estate to his wife, as stated in the third item, by the force of the statute, C. S., 4162, undoubtedly it would have been construed a devise in fee simple. If in the fourth item he had merely added to the indefinite devise that after her death the land remaining (presumably meaning undisposed of) be given to another, and said no more, the rule laid down in *Hambright v. Carroll,* 204 N. C., 496, 168 S. E., 817, and *Carroll v. Herring,* 180 N. C., 369, 104 S. E., 892, would have controlled. It was said in *Patrick v. Morehead,* 85 N. C., 62, quoting the language of *Chancellor Kent* in *Jackson v. Robbins,* 16 Johnson, 537: "A devise of an estate generally or indefinitely, with a power of disposition over, carries the fee." However, the fourth item provides for the devolution of only one-half of his estate "remaining"

after the death of the testator's wife. If the language used in the fourth item be construed to imply an unrestricted power of disposition of an one-half interest in the land the devolution of the other half interest in the land is set out in the fifth item.

In the fifth clause the power is restricted and limited to disposition by will. The testator there inserts a further and additional direction with respect to the other half of his estate, and uses this language: "Upon the death of my wife I further direct that in the event that she should not leave a will disposing of the residue of my estate, I give, devise and bequeath to Mrs. Matthew Legasse children."

The title we are called upon to decide did not pass by a will executed under the power conferred, but the widow, having married again, proposes to execute a deed to the defendant West, conveying the entire interest in the land in fee simple, disregarding the fifth clause entirely.

In *Hambright v. Carroll,* 204 N. C., 496, 168 S. E., 817, land was devised to be "divided equally between my children (naming them) and my granddaughter, Louise Hambright. The share Louise Hambright will receive I want my executor to hold in trust and give her the proceeds; . . . but should she die without children, then what remains of her share becomes a part of my estate." The ground upon which the devise to Louise Hambright was held a fee appears from the following quotation from the opinion. "To his three children the testator gave a fee or absolute title; the plaintiff was to have an equal share—share equal in quantity with the others. The phrase 'what remains of her share' carries the connotation that nothing may remain; and this implies an unrestricted power of disposition."

In *Carroll v. Herring,* 180 N. C., 369, 104 S. E., 892, the devise was of two tracts of land to "James A. Carroll in fee, but if he die, without heirs, possessing the lands or either tract, with remainder to the heirs of J. W. Carroll." There the decision was predicated upon a similar view. Not only was the devise to the first taker in fee, but the limitation over was in case he die "possessing the lands," indicating full power of disposition in James A. Carroll.

But the situation here is distinguishable. It is out of the facts that the law arises. The devise was not in fee to the first taker. The application of C. S., 4162, is negatived by the remaining clauses of the will. The language of the will, in effect, that one-half of his estate remaining after the death of his wife be given in fee simple to Charlie Spear, his adopted son, and that the other half, if undisposed of by the widow by will, be given to the Legasse children, indicates the definite intention of the testator that his widow should not have power to convey the entire estate by deed in fee simple.

The requirement of C. S., 4162, that a devise to any person shall be construed to be in fee simple, is qualified by the remaining portion of

the section, "Unless such devise shall in plain and express words show, or it shall be plainly intended by the will or some part thereof that the testator intended to convey an estate of less dignity."

Taking the will in question by its four corners and giving effect to every part thereof, including the fourth and fifth items, it seems to have been plainly intended by the testator that an estate of less dignity than a fee simple be conveyed. In *Rees v. Williams*, 165 N. C., 201, 81 S. E., 206, the devise was: "1. My house and lot . . . I leave to my daughter Jennie Lee. 2. In case my daughter Jennie Lee shall die without issue surviving her, then I desire said property to return to my eldest daughter." It was held that the intention not to give an estate in fee simple plainly appeared.

In *Roberts v. Saunders*, 192 N. C., 191, 134 S. E., 451, the devise in the first paragraph was in these words: "I give to my beloved wife, Martha Roberts, all my estate, real and personal." In the third paragraph the testator used this language: "All the rest of my property I give to my wife as above stated, during her widowhood; if she should marry, she would be entitled to a dower on the estate in form according to the laws of North Carolina." It was held the controlling intention of the testator was not to convey a fee simple. To the same effect is the holding in *Foil v. Newsome*, 138 N. C., 115, 50 S. E., 597; *Shuford v. Brady*, 169 N. C., 224, 85 S. E., 303; *Pilley v. Sullivan*, 182 N. C., 493, 109 S. E., 359; *Jolley v. Humphries*, 204 N. C., 672, 169 S. E., 417; *Alexander v. Alexander*, 210 N. C., 281; *Barco v. Owens, ante*, 30.

We conclude that the plaintiff cannot convey a fee simple title to the entire interest in the land as contracted, and that the defendant may not be required to accept the deed tendered therefor. The ruling of the court below must be held for error.

Judgment reversed.

SCHENCK, J., dissenting: I find myself unable to agree with the opinion of the Court.

The pertinent portion of the will presented for construction reads:

"1st. I desire that all of my just debts and funeral expenses be paid as soon after my death as may be convenient.

"2nd. I give, devise and bequeath to Mrs. Matthew Lagasse one dollar as she has been provided for in cash.

"3rd. All the remainder and residue of my estate of every sort, kind and description, whether real, personal or mixed, and wherever situate, I give, devise and bequeath to my beloved wife Ella Spear.

"4th. Upon the death of my wife I further direct that one-half of my estate bond money real or personal then remaining as a part of my estate shall be given to Charlie Spear in fee simple.

"5th. Upon the death of my wife I further direct that in the event that she should not leave a will disposing of the residue of my estate, I give, devise and bequeath to Mrs. Matthew Legasse children then living and to be equally divided."

Nothing else appearing, Ella Spear (now Hampton) took a fee simple title to the lands of which her late husband, H. D. Spear, died seized, by virtue of the 3rd item of his will. C. S., 4162.

The words in the 4th item of the will, "Upon the death of my wife I further direct that one-half of my estate . . . then remaining as part of my estate shall be given to Charlie Spear in fee simple," carry the connotation that nothing may remain, and this implies an unrestricted power of disposition. *Hambright v. Carroll,* 204 N. C., 496. So the fee is carried "when an estate is devised generally with a power of disposition or appointment, or with a gift over to another of such part as may not be disposed of by the first taker." *Hambright v. Carroll, supra; Patrick v. Morehead,* 85 N. C., 62. "Where real estate is given absolutely to one person, with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void, as repugnant to the absolute property first given; and it is also established law that where an estate is given to a person generally or indefinitely, with a power of disposition, or to him, his heirs and assigns forever, it carries a fee, and any limitation over or qualifying expression of less import is void for repugnancy. The only exception to such a rule is where the testator gives to the first taker an estate for life only by certain and express terms, and annexes to it the power of disposition. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the naked gift of a power of disposition." *Hambright v. Carroll, supra,* quoting from *Carroll v. Herring,* 180 N. C., 369.

The words "residue of my estate" used in the 5th paragraph of the will refer to the residue of the estate after one-half of the remaining portion thereof at the death of the testator's wife has been taken by Charlie Spear as provided in the 4th paragraph of the will, and not to the residue of the estate at the death of the testator. In other words, the words "residue of my estate" mean the residue of the estate remaining at the death of the testator's wife, after one-half thereof has been taken by Charlie Spear. Thus, the language of this section likewise implies that nothing may be left at the death of the first taker and supports the interpretation that the wife had an unrestricted power of disposition.

I think this controversy is governed by the authorities cited, and the judgment of the Superior Court should be affirmed.

I am authorized to state that MR. JUSTICE BARNHILL concurs in this dissent.

IN RE NEWSOME WORSLEY.

(Filed 3 November, 1937.)

Insane Persons § 4—In proceedings under C. S., 2285, court should define standard of mental capacity constituting "want of understanding."

In this proceeding for the appointment of a guardian for respondent on the ground that he was incompetent for "want of understanding to manage his own affairs," C. S., 2285, respondent *held* entitled to a new trial for that the court, although giving the respective contentions of the parties upon the issue, failed to define the legal meaning of the term or instruct the jury as to the standard of mental capacity recognized by the law.

APPEAL by respondent, Newsome Worsley, from *Cranmer, J.*, at February Term, 1937, of PITT. New trial.

This proceeding was begun on 23 December, 1936, by a petition filed by N. A. Worsley, a son of Newsome Worsley, before the clerk of the Superior Court of Pitt County, in accordance with the provisions of C. S., 2285. The petition was verified by the petitioner, and was filed in his behalf by his attorney.

It was alleged in the petition that Newsome Worsley is a resident of Pitt County, North Carolina, and is the owner of property, real and personal, in said county; that the said Newsome Worsley is now incapable from want of understanding to manage, care for, and control his property; and that because of such incapacity there is grave and immediate danger that the property of the said Newsome Worsley will be disposed of and squandered by him without profit to himself or to those who are interested in said property.

On these allegations, the petitioner prays that notice be issued by the court to the said Newsome Worsley advising him of the pendency of this proceeding, and requiring him to show cause, if any he has, why a guardian should not be appointed by the court, to manage, care for, and control his property, as provided by C. S., 2285.

Pursuant to the prayer of said petition, notice was duly served on the respondent Newsome Worsley, who thereafter duly filed an answer to the petition, in which he denied the allegation therein that he is incapable from want of understanding to manage, care for, and control his property. He alleged in said answer that his mind is clear and that he is capable and competent to manage his affairs. He prayed that the prayer of the petitioner be denied and that the proceeding be dismissed.

The issue raised by the petition and the answer thereto was submitted to a jury which was duly summoned, sworn, and impaneled as provided by statute.

The jury having heard the evidence offered by both the petitioner and the respondent, answered the issue as follows:

"Is the said Newsome Worsley incompetent from want of understanding to manage his own affairs? Answer: 'No.'"

It was thereupon ordered and adjudged by the court that the prayer of the petition be and the same was denied, and that the proceeding be and the same was dismissed, and that the petitioner be taxed with the costs of the proceeding. The petitioner appealed from the order and judgment of the clerk to the Superior Court of Pitt County.

The proceeding was called for trial *de novo* at February Term, 1937, of the Superior Court of Pitt County. At said trial, the issue was submitted to a jury, which was duly sworn and impaneled. After hearing the evidence offered by both the petitioner and the respondent, and the charge of the court, the jury answered the issue "Yes."

Judgment was accordingly rendered by the court that "the respondent Newsome Worsley is incompetent from want of understanding to manage his affairs."

It was thereupon ordered by the court that the proceeding be remanded to the clerk of the Superior Court of Pitt County with direction that said clerk appoint a guardian for the respondent, Newsome Worsley, as provided by statute.

From this judgment and order the respondent appealed to the Supreme Court, assigning errors in the trial.

Blount, James & Taft for petitioner, N. A. Worsley.
Julius Brown and J. B. James for respondent, Newsome Worsley.

CONNOR, J. At the trial in the Superior Court of the issue raised by the pleadings in this proceeding, there was evidence offered by the petitioner and evidence offered by the respondent tending to support their respective contentions as to the answer to the issue, the petitioner contending that the jury should answer the issue "Yes," and the respondent contending that the jury should answer the issue "No."

Witnesses for the petitioner testified that they knew the respondent, Newsome Worsley; that they had known him for many years; and that in their opinion, based upon observation of him and upon conversations with him, he was not competent for want of understanding to manage, care for, and control his property. Each of these witnesses, on his cross-examination by counsel for the respondent, testified that in his opinion the respondent knew the property which he owned, and had an opinion as to its value, and that respondent knew his children, and his relations to them.

Witnesses for the respondent testified that they knew the respondent, Newsome Worsley; that they had known him for many years, and that in their opinion, based upon observation of him, and conversations with him, he was competent to manage, care for, and control his property. Each of these witnesses, on his direct examination, testified that in his opinion the respondent knew the property which he owned, and had an opinion as to its value, and that respondent knew his children and his relations to them.

All the evidence showed that respondent is about 89 years of age; that he owns a farm in Pitt County, located about 2 miles from the town of Bethel, and a house and lot in the town of Bethel; that respondent purchased both the farm and the house and lot, and that both the farm and the house and lot are free and clear of encumbrances; that when he purchased the house and lot in Bethel, he had it conveyed to his wife, and that he now owns an estate for his life in said house and lot, with remainder to his children, as the heirs at law of his wife; and that he owns the farm in fee simple.

There was no evidence tending to show that respondent had sold or disposed of his property, real or personal, or any part thereof, except some chickens which he sold at the market price. He has rented his farm to one of his sons for an annual rent of $600.00. There was evidence tending to show that he had executed his last will and testament and had thereby devised his farm to the son to whom it is now rented, and that respondent had said to one of his children that he had "cut" her and his other children out of his property by his said last will and testament.

An examination of the charge of the court to the jury shows that the court stated the contentions of the petitioner and of the respondent, respectively, to the jury with respect to their answer to the issue, but failed "to state in a plain and correct manner the evidence given in the case, and to declare and explain the law arising thereon," as required by C. S., 564.

The court charged the jury as follows:

"The petitioner contends, gentlemen of the jury, that Mr. Newsome Worsley is incompetent to manage his own affairs. He contends that he is a man of advanced years and is failing physically, and is not competent to manage his own affairs; that his mind is not what it has been, and that you should so find from the evidence, and should answer the issue 'Yes.' He contends that he is incapable of directing his affairs; that he has some property and is incapable of managing and saving it, and that therefore you should find that he is incompetent to manage his own affairs, and answer the issue 'Yes.'

"The respondent, Mr. Newsome Worsley, contends that he is competent to manage his own affairs. He contends that he has produced a number of witnesses, who are his neighbors and are intimate with him, and that they have testified that his mind is clear, and that he himself has so testified. He contends that it is your duty to take into consideration his demeanor on the stand, how he answered the questions put to him. He contends that it is true that he is not as active as he once was, that he has reached old age, but that he is competent to manage his own affairs; that what he has is his, and that he has a right to do with it as he pleases; that it is his property and the law gives him the right to do with it as he pleases; that he accumulated it, and made it, and he contends that he is competent to use his property and to do with it as he pleases, and that you should so find.

"So, gentlemen of the jury, these are the contentions of the parties.

"It is a question of fact for you, gentlemen, as you find the facts to be from the evidence, the burden being upon the petitioner to satisfy you by the greater weight of the evidence. If he has so satisfied you, it will be your duty to answer the issue 'Yes'; if he has not so satisfied you, it will be your duty to answer the issue 'No.' But if, on the other hand, you find the evidence equally balanced, it will be your duty to answer the issue 'No.'"

Nowhere in the charge does the court define the words "incompetent for want of understanding to manage his own affairs," as used in the statute, C. S., 2285, and in the issue in this proceeding, or instruct the jury as to the legal significance of these words. The jurors were left to set up, each, his own standard of mental capacity, without any instructions from the court as to the standard recognized and enforced by the law. See *In re Anderson*, 132 N. C., 244, 43 S. E., 649, where it is said: "The fourth class of persons mentioned in section 1670 of The Code (now C. S., 2285) must really be embraced under the head of lunatics, that is, their want of understanding in order to render them incompetent to manage their own affairs must be complete. As in lunacy, there must be a total privation of understanding; mere weakness of mind will not be sufficient to place a person in the list of those described in the fourth class mentioned in the statute."

For error in the charge, as indicated in this opinion, the respondent is entitled to a new trial. It is so ordered.

New trial.

HOME OWNERS' LOAN CORPORATION v. L. S. FORD AND WIFE, CLARA FORD.

(Filed 3 November, 1937.)

1. Reformation of Instruments § 7—

Where defendants contend that the contract as written failed to express the agreement between the parties, defendants must clearly allege the facts constituting fraud or mutual mistake relied upon.

2. Evidence § 39—

All prior negotiations are merged in the written contract, and ordinarily parol or extrinsic evidence is incompetent to contradict, vary, modify, or add to the written agreement.

3. Contracts § 8—

Where the language of a contract is clear and unambiguous, the courts are bound thereby and the contract must be enforced as written.

4. Mortgages § 39f—In this action in ejectment by purchaser at foreclosure sale, peremptory instruction in favor of plaintiff held proper.

The *cestui que trust* bid in the property at the foreclosure sale of the deed of trust, and brought suit in ejectment against the trustor. The trustor admitted the execution of the notes and deed of trust and the record evidence established default in payment. The trustor relied solely upon alleged agreements with the *cestui* prior to the execution of the instrument, without alleging fraud or mistake. *Held:* The evidence of the alleged parol agreements was properly excluded, and the sole issues presented were the title of plaintiff purchaser and its right to possession, and whether defendants were in unlawful possession, and plaintiff is entitled to peremptory instructions under the evidence.

APPEAL by defendants from *Johnston, J.*, and a jury, at May Term, 1937, of CALDWELL. No error.

The complaint alleges that the defendants executed and delivered to Alan S. O'Neal, trustee (T. C. Abernathy appointed thereafter substitute trustee), a deed of trust on real estate, describing same, duly recorded, to secure certain indebtedness due plaintiff by defendants. That the land was sold on default in the payment of the indebtedness and by the terms of the deed of trust, on 11 November, 1935, at 12 o'clock m., protest being made at the sale by defendants, and purchased by plaintiff, it being the last and highest bidder. There was no upset bid in the time allowed by the statute. That the plaintiff is the owner in fee and defendant is in the wrongful possession of the land and refuses to vacate same. That plaintiff is entitled to possession of same with the rental value of $25.00 per month, from 22 November, 1935. The defendants admit the allegations of indebtedness and the deed of trust to secure same, deny the allegations of the appointment of substitute trustee and

other allegations, and pray that plaintiff take nothing and defendants be declared the owners, and that the deed of trust be declared null and void, and for further relief as may seem just and proper.

The judgment of the court below is as follows: "This cause coming on for hearing and being heard before his Honor, A. Hall Johnston, and a jury, at the May Term, 1937, Caldwell Superior Court, and the court having submitted two issues, which were answered by the jury as follows: (1) Is the plaintiff the owner and entitled to the possession of the property described in the complaint? Answer: 'Yes.' (2) Are the defendants unlawfully in possession of said property? Answer: 'Yes.' It is, therefore, upon motion of counsel for plaintiff, considered, ordered, adjudged, and decreed that the plaintiff is the lawful owner and entitled to the immediate possession of the following described property, to wit (describing same). It is further ordered, adjudged, and decreed that the defendant surrender and deliver possession of the foregoing described property to the plaintiff forthwith. It is further ordered that the sheriff of Caldwell County be and he is hereby ordered, directed, and empowered to remove the defendants from the above described premises, and to place the plaintiff in possession thereof. It is further ordered, adjudged, and decreed that the defendants be taxed with the cost of this action. This 18 May, 1937.

A. HALL JOHNSTON,
Judge Presiding."

The defendants made numerous exceptions and assignments of error as to the exclusion of evidence on the trial, and also excepted and assigned error to the signing of the judgment, and appealed to the Supreme Court.

Thomas P. Pruitt for plaintiff.
L. S. Ford in propria persona for defendants.

CLARKSON, J. We do not think any of the exceptions and assignments of error made by defendants can be sustained. The undisputed evidence on the record admitted and excluded by the court below was to the effect that the defendants had given a deed of trust to secure certain indebtedness to the Mortgage Service Corporation, on which there was some $3,300 due. It had foreclosed same and defendants were desirous of redeeming their home. They applied to plaintiff (through its state manager, Alan S. O'Neal) to make a loan for the purpose, which was done. The loan was made 11 November, 1935, and duly recorded, in the sum of $3,469.09, with interest at 5 per cent, and the deed of trust provided in part as follows: "It is agreed that the borrower may pay a

sum of $14.46 monthly from date until June, 1936, representing interest only on said debt, at his option, provided all other conditions and covenants of said note and the instruments securing the same are promptly met, and thereafter the monthly payments shall be $32.08 per month, to be applied first to interest on the unpaid balance and the remainder to principal until said debt is paid in full. . . . In the event of default in the payment of any installment for a period of ninety days, the holder of said note may, at its option, declare all the remainder of said debt due and collectible, and any failure to exercise said option shall not constitute a waiver of the right to exercise the same at any other time," etc.

It also provided for a substitute trustee, which was carried out in conformity with the terms of the deed of trust. The amount loaned was to be paid in plaintiff's bonds, which it was agreed between the parties were to be sold for 80 cents of their par value, and the Mortgage Service Corporation agreed to take the proceeds of the sale of the bonds and cancel its indebtedness and in turn convey the property to defendants, which was done. In the loan of $3,469.09 made by plaintiff there were taxes of $111.45 and insurance of $12.64 due. It was estimated that when the periodical payments, which were to commence in June, 1936, were paid, plaintiff's loan to defendants would be settled in full (both principal and interest) in some twelve years. From the date of the loan, 15 November, 1933, until the trial of this action, May, 1937, nothing has been paid by defendants on the deed of trust securing the indebtedness to plaintiff. The land was sold by the substituted trustee to plaintiff on 11 November, 1935, for $3,610. No upset bid was made. Out of the proceeds plaintiff was paid on its note $3,423.19, taxes due to Caldwell County and city of Lenoir, expense of advertising and incidental expenses, making a total of sale $3,610. This was audited, filed and approved by the clerk on 30 December, 1935.

In the answer of defendants they admit the execution and delivery of the deed of trust securing the indebtedness of $3,469.09, dated 15 November, 1933. The defendants set up no equitable relief that the deed of trust was executed by fraud or mutual mistake, or mistake of one party induced by false representations of the other in signing the instrument. It is well settled law in this jurisdiction that the facts constituting fraud or mutual mistake, etc., must be clearly alleged and proved to set aside a contract. The terms and offer made by Alan S. O'Neal, state manager for plaintiff, as to advancing $200.00 for painting house were never complied with by defendants. The defense of defendants and their evidence were vague and uncertain, and we can see no merit in them. The contract between the parties was in writing, and we are bound by its terms.

The principle of law in this action is well stated in *Potato Co. v. Jenette*, 172 N. C., 1 (3): "The parties had the legal right to make

their own contract, and if it is clearly expressed, it must be enforced as it is written. We have no power to alter the agreement, but are bound to interpret it according to its plain language. There is no rule of evidence better settled than that prior negotiations and treaties are merged in the written contract of the parties, and the law excludes parol testimony offered to contradict, vary, or add to its terms as expressed in the writing. *Moffitt v. Maness,* 102 N. C., 457."

The exceptions to this rule, which are not applicable in this case, are set forth in the *Jenette case, supra.* The contract was in writing. The rule and exceptions are also set forth in *Insurance Co. v. Morehead,* 209 N. C., 174. No fraud or mutual mistake, etc., are alleged or proved. There were no issues of fact to be submitted to the jury except the ones on which the peremptory charge of the court below was given. Defendants made no exception to the issues, nor did they submit or tender others. The charge of the court below was correct. The defendant L. S. Ford, *in propria persona,* argued this case with persuasive force, which appealed to our sympathy, but the law against his contentions is well settled. It is hard for any one to lose his home, but that is one of the casualties of the life of many, especially in recent deflated times. From the record it appears that plaintiff has been patient in enforcing its claims. The references to this Court made by the defendant on the argument of the case were kind and gracious, but we cannot make contracts—we can only construe them.

On the record we find

No error.

MEREDITH COLLEGE, INC., v. J. T. LEE AND HIS WIFE, ALDONIA LEE; W. L. ADAMS AND HIS WIFE, MATTIE ADAMS; JOHN JERNIGAN AND HIS WIFE, LIZZIE JERNIGAN; AND OTHERS.

(Filed 3 November, 1937.)

1. **Mortgages § 23b—Liability of grantee on debt assumption contract is limited as to both mortgagor and mortgagee by stipulations in contract.**

   Where a grantee in a deed assumes and agrees to pay off the mortgage debt against the property as a part of the consideration for the conveyance of the lands, the grantee becomes personally liable to the mortgagor and to the mortgagee, but such liability is limited, as to both of them, by stipulations in the debt assumption contract.

2. **Same—Liability of grantee to mortgagee held discharged under limitation in debt assumption contract upon payment of one-half of mortgage debt.**

   Where successive grantees of a part of lands embraced in a mortgage each agree to assume and pay off one-half the mortgage debt as a part of

the purchase price, their respective liabilities to the mortgagee are limited to one-half the mortgage debt, with interest thereon only from the time of the debt assumption contract, and where the lands conveyed to them are foreclosed under the mortgage and the proceeds of sale, amounting to more than one-half the mortgage debt, are applied on the notes, the liability of the grantees is discharged in accordance with the limitation in the debt assumption contract, and the mortgagee may not hold them liable for the balance of the mortgage debt.

APPEAL by defendants W. L. Adams and John Jernigan from *Harris, J.*, at April Term, 1937, of JOHNSTON.

This is an action to recover on a note for $1,600, which was executed on 18 August, 1920, by the defendants J. T. Lee and his wife, Aldonia Lee, and is payable to the order of the plaintiff. The note sued on bears interest from date at the rate of 6 per centum per annum, payable semiannually, and was due three years after its date. Interest has been paid on said note to 1 January, 1929. This action was begun in the Superior Court of Johnston County on 22 November, 1935.

It is alleged in the complaint that after its execution the defendants W. L. Adams and John Jernigan, each for a valuable consideration, and successively, assumed the payment of the note sued on, and agreed to pay the said note to the plaintiff.

This allegation is denied in the answer of each of said defendants.

At the trial the facts were shown to be as follows:

1. On 18 August, 1920, in consideration of money loaned to them by the plaintiff, the defendants J. T. Lee and his wife, Aldonia Lee, executed their note for $1,600, payable three years after its date to the order of the plaintiff, and bearing interest from date at the rate of 6 per centum per annum, payable semiannually. The interest on said note has been paid to 1 January, 1929.

2. Contemporaneously with the execution of said note, and for the purpose of securing its payment according to its terms, the defendants J. T. Lee and his wife, Aldonia Lee, executed a mortgage by which they conveyed to the plaintiff two tracts of land described in said mortgage, and situate in Johnston County, North Carolina, each containing about 18 acres, and both being of practically the same value. This mortgage was duly recorded in the office of the register of deeds of Johnston County in Book G, No. 7, at page 574.

3. Thereafter, to wit, on or about 2 April, 1927, for the recited consideration of $2,500, the defendants J. T. Lee and his wife, Aldonia Lee, conveyed one of the tracts of land described in their mortgage to the plaintiff to the defendant W. L. Adams, who thereupon and contemporaneously with the execution of the deed by the said J. T. Lee and his wife, Aldonia Lee, conveying the said tract of land to him, as-

sumed the payment of one-half the note of the said J. T. Lee and wife, Aldonia Lee, to the plaintiff, and agreed to pay said one-half to the plaintiff in part consideration of the conveyance of said tract of land to him by the said J. T. Lee and his wife, Aldonia Lee.

4. Thereafter, to wit, on or about 29 October, 1927, for the recited consideration of $2,500, the said W. L. Adams and his wife, Mattie Adams, conveyed the tract of land described in the deed from J. T. Lee and his wife, Aldonia Lee, to him to the defendant John Jernigan, who thereupon, and contemporaneously with the execution of the deed by the said W. L. Adams and his wife, Mattie Adams, conveying the said tract of land to him, assumed the payment of one-half the note of J. T. Lee and his wife, Aldonia Lee, to the plaintiff, and agreed to pay said one-half to the plaintiff in part consideration of the conveyance of said tract of land to him by the said W. L. Adams and his wife, Mattie Adams.

5. Contemporaneously with the execution of their deed conveying one of the tracts of land described in their mortgage to the plaintiff to the defendant W. L. Adams, to wit, on 2 April, 1927, the defendants J. T. Lee and his wife, Aldonia Lee, for the recited consideration of $2,500, conveyed the other tract of land described in said mortgage to Jesse Tart, who thereupon, and contemporaneously with the execution of the deed by the said J. T. Lee and his wife, Aldonia Lee, conveying said tract of land to him, assumed the payment of one-half the note of J. T. Lee and his wife, Aldonia Lee, to the plaintiff, and agreed to pay said one-half to the plaintiff in part consideration of the conveyance of said tract of land to him by the said J. T. Lee and his wife, Aldonia Lee.

6. Since the conveyance by J. T. Lee and his wife, Aldonia Lee, of one of the tracts of land described in their mortgage to the plaintiff to Jesse Tart the said tract of land has been sold under a mortgage which was prior to the mortgage from J. T. Lee and his wife, Aldonia Lee to the plaintiff. The plaintiff received no part of the sum realized from the sale of said tract of land as a payment on its note for $1,600 from J. T. Lee and his wife, Aldonia Lee, nor has it received from Jesse Tart any sum as a payment on said note.

7. Since the commencement of this action the plaintiff has foreclosed the mortgage which the defendants J. T. Lee and his wife, Aldonia Lee, executed to the plaintiff, and has sold the tract of land which the said J. T. Lee and his wife, Aldonia Lee, conveyed to the defendant W. L. Adams by their deed dated 2 April, 1927, and which the defendant W. L. Adams and his wife, Mattie Adams, conveyed to the defendant John Jernigan by their deed dated 29 October, 1927. The plaintiff received from the sale of the said tract of land the sum of $1,282.47, which it has applied as a payment on its note from J. T. Lee and wife, Aldonia Lee, leaving the amount due on said note on 19 April, 1927, $1,117.53

8. The plaintiff has heretofore in this action recovered judgment against the defendants J. T. Lee and his wife, Aldonia Lee, on the note sued on. This judgment has not been paid.

On the foregoing facts, admitted in the pleadings and found by the jury in response to issues submitted to them, it was ordered, considered, and adjudged by the court that the plaintiff recover of the defendants W. L. Adams and John Jernigan the sum of $558.76, with interest on said sum from 19 April, 1937, until paid, and the costs of the action, to be taxed by the clerk.

From this judgment the defendants W. L. Adams and John Jernigan appealed to the Supreme Court, assigning errors in the trial and error in the judgment.

Winfield H. Lyon for plaintiff.
L. L. Levinson and Larry F. Wood for defendant W. L. Adams.
Parker & Lee for defendant John Jernigan.

CONNOR, J. On the facts admitted in the pleadings and found by the jury at the trial of this action, the defendants W. L. Adams and John Jernigan were each personally liable to the plaintiff on the note sued on in this action. In *Bank v. Randolph,* 207 N. C., 241, 176 S. E., 561, it is said:

"Whatever conflict there may appear to be in the decisions of this Court with respect to the liability of the grantee of land who has assumed the payment of an indebtedness of his grantor which was secured by a prior mortgage or deed of trust executed by the grantor, as said in *Bank v. Page,* 206 N. C., 18, 173 S. E., 312, 'the law undoubtedly is, that when a purchaser of mortgaged lands, by a valid and sufficient contract of assumption, agrees with the mortgagor, who is personally liable therefor, to assume and pay off the mortgage debt, such agreement inures to the benefit of the holder of the mortgage, and upon its acceptance by him, or reliance thereon by the mortgagee, thenceforth, as between themselves, the grantee occupies the position of principal debtor and the mortgagor that of surety, and the liability thus arising from said assumption agreement may be enforced by suit in equity under the doctrine of subrogation, *Baber v. Hanie,* 163 N. C., 588, 80 S. E., 57, or by an action at law as upon a contract for the benefit of a third person, *Rector v. Lyda,* 180 N. C., 577, 105 S. E., 176.'"

The liability of a grantee of mortgaged lands, by reason of an assumption agreement with his grantor, both to the mortgagor and to the mortgagee, arises out of his contract, and is limited by its terms. See 41 C. J., p. 760, sec. 837.

Where, as in the instant case, the grantee by his assumption agreement with his grantor limits his liability on the indebtedness of his grantor secured by a mortgage on the land, such limitation applies to his liability not only to the mortgagor but also to the mortgagee.

The defendants in this case, by reason of their assumption agreements with their respective grantors, were liable to them and to the plaintiff for only one-half of the indebtedness of J. T. Lee and his wife, Aldonia Lee, to wit, $800.00 and interest which should accrue after the dates of their respective agreements. This liability was discharged by the payment made on said note out of the proceeds of the sale of the land which was conveyed to the defendants, to wit, the sum of $1,282.47. Neither of them is now liable to the plaintiff on the note sued on.

There is error in the judgment that plaintiff recover of the defendants the sum of $558.76. The action is remanded to the Superior Court of Johnston County that judgment may there be entered in this action in accordance with this opinion.

Error and remanded.

TOWN OF ASHEBORO v. CLIFFORD MORRIS AND DOROTHY MORRIS, HIS WIFE; GEORGE T. MURDOCK, TRUSTEE, AND E. G. MORRIS, JR.,

and

E. G. MORRIS, JR., v. THE TOWN OF ASHEBORO AND L. T. HAMMOND, COMMISSIONER.

(Filed 3 November, 1937.)

1. Municipal Corporations § 34: Limitation of Actions § 1—

An action to enforce a lien against property for paving assessments is not barred in three years from maturity of the installments, since C. S., 441 (10), relates to individuals and not to the sovereign power.

2. Limitation of Actions § 1—

Statutes of limitation never apply to the sovereign unless expressly named therein.

3. Municipal Corporations § 34: Limitation of Actions § 2f—

An action by a municipality to foreclose a certificate of sale of land for paving assessments is not barred until after twenty-four months from the date of the certificate, C. S., 8037, and where the action is instituted within that time, and kept alive by the issuance of *alias* summons, the plea of the statute is bad.

4. Municipal Corporations § 34: Limitation of Actions § 1—

Where a municipality elects to enforce a lien against land for paving assessments by action under C. S., 7990, no statute of limitations is applicable, and the pleadings in this action are *held* sufficient to bring the action within the procedure under this statute.

ASHEBORO *v.* MORRIS and MORRIS *v.* ASHEBORO.

APPEAL by defendant E. G. Morris, Jr., from *Rousseau, J.*, at July Term, 1937, of RANDOLPH. No error.

This is an action originally instituted by the town of Asheboro against Clifford Morris *et al.*, 31 May, 1932, to foreclose the lien of a street assessment. The street assessment was confirmed on 31 August, 1925, and was payable in ten equal annual installments, the first of which matured 1 October, 1926. No part of the original assessment has been paid. E. G. Morris, Jr., intervened as the then owner of the equity in said property and entered a plea of the statute of limitations as set out in the opinion.

The original defendants filed no answer.

An interlocutory order of sale having been made prior to the time E. G. Morris, Jr., intervened, this defendant instituted an action to enjoin the sale. The two cases were consolidated and heard at the July Term, 1937, Randolph County Superior Court. The court submitted one issue as follows:

"Is the plaintiff's cause of action for the foreclosure of its street and sidewalk assessment lien against the property described in the complaint barred by the ten-year statute of limitations?" Under the instructions of the court the jury answered the issue "No." Judgment was rendered thereon, dissolving the restraining order and directing the sale of the property to satisfy the lien. The defendant E. G. Morris, Jr., excepted and appealed.

L. T. Hammond and H. M. Robins for plaintiff, appellee.
J. A. Spence and J. G. Prevette for defendant, appellant.

BARNHILL, J. No evidence offered at the trial is included in the record. It does not appear whether the cause was submitted to the jury upon evidence offered or upon the admissions contained in the pleadings. It, therefore, does not appear just why the quoted issue was submitted to the jury. There is no plea of the ten-year statute of limitations made by the defendant. Be that as it may, the record presents questions of law which are determinative of the rights of the parties hereto. The case might well be considered as one in which judgment was rendered upon the pleadings, which is apparently the ultimate effect of the proceedings below.

The defendant makes two contentions, to wit:

(1) "That more than three years have elapsed from the time of the coming due of said street assessments to the beginning of this action, and also to the sale of said land for assessments, and the same is pleaded in bar of plaintiff's recovery"; and (2) "that more than eighteen months elapsed from the date of certificate of sale of the property de-

scribed in the complaint to the beginning of this action, and the same is pleaded in bar of plaintiff's recovery."

1. The plaintiff was not required to institute its action within three years after the maturity of the street assessment installments. C. S., 441 (10), relates to individuals and not to the sovereign power. C. S., 7987, provides that the lien on realty for taxes levied "shall continue until such taxes, with any penalty and costs which shall accrue thereon, shall be paid." *Carstarphen v. Plymouth,* 186 N. C., 90; *Vaughan v. Lacy,* 188 N. C., 123; *New Hanover County v. Whiteman,* 190 N. C., 332. Statutes of limitations never apply to the sovereign, unless expressly named therein. *New Hanover County v. Whiteman, supra.*

2. Considering the action instituted by the town of Asheboro as an action to foreclose the tax sale certificate defendant's second plea is without merit. The record shows that the sale was had 2 June, 1930. This action was instituted 31 May, 1932, and was kept alive by alias summons. C. S., 8037, provides that cities, towns and counties shall institute an action to foreclose certificates of sale within twenty-four months from the date of the certificate and the action was instituted within the time prescribed by this statute.

But in no event are the pleas entered by the defendant well founded. An examination of the record discloses that the plaintiff proceeded under the terms of C. S., 7990. It is true that the complaint makes reference to the sale by the tax collector and the issuance of the tax sale certificate, but the defendant's answer to this section constitutes a denial. The plaintiff further alleges: "(7) There is now outstanding due the plaintiff, by virtue of the aforesaid assessment and lien, and unpaid, the sum of $1,270.47, with interest thereon from 31 August, 1925, until paid, etc., and the same was and is a first lien against said property"; and in its prayer for relief it demands judgment that the said amount be declared a first lien on the aforesaid real estate, that said lien be foreclosed and said property sold and the proceeds applied, so far as the same will go, or may be required, in discharge of said assessment and lien, with interest and costs. Where the sovereign elects or chooses to proceed under C. S., 7990, no statute of limitations is applicable. *Logan v. Griffith,* 205 N. C., 580; *New Hanover County v. Whiteman, supra.*

The defendant has no just cause for complaint. The property now owned by him has received the benefits arising from the improvements made, and he purchased the property subject to the lien. Equity and good conscience require that the property shall be liable for its just portion of the cost. There was no error in the refusal of the court below to submit the issues tendered by the defendant, nor in its instructions to the jury. The facts admitted in the pleadings would entitle the plaintiff to the judgment entered.

No error.

M. S. NOBLES v. D. M. ROBERSON AND ROBERSON'S SLAUGHTER HOUSE.

(Filed 3 November, 1937.)

1. **Receivers § 8: Judgments § 22—If order appointing receiver is erroneous, remedy of judgment debtor is by appeal.**

An order appointing a receiver after due notice to the insolvent, in a cause pending in a court having jurisdiction of the parties and subject matter, and directing the receiver to take possession of insolvent's property, which order is filed in compliance with statute in the county in which the insolvent resides and the property is situate, C. S., 724, 722, is not void, and if erroneous, may be attacked by the insolvent only by perfecting an appeal therefrom.

2. **Contempt of Court § 2c—Willful disobedience of lawful court order by party fixed with knowledge constitutes contempt of court.**

A judgment debtor, fixed with knowledge as a party upon whom notice was served, is guilty of contempt of court in willfully preventing the receiver from taking possession of the property in conformity with a lawful order of the court, even though the order may be erroneous, if no appeal therefrom was perfected by him, C. S., 978.

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

APPEAL by defendant D. M. Roberson from *Cranmer, J.*, at April Term, 1937, of PITT. Judgment affirmed.

The appellant was adjudged in contempt of court for interfering with and obstructing a receiver who had been appointed by the Superior Court of Pitt County and who was attempting to take possession of certain property pursuant to an order of court.

The material findings of fact and the judgment of the court below thereon are as follows:

"This cause coming on to be heard before his Honor, E. H. Cranmer, judge presiding at the April Term, 1937, of Pitt Superior Court, and being heard upon the petition of Joseph W. Bailey, receiver, and the order of the court duly issued herein citing the defendant D. M. Roberson to appear at the courthouse in Greenville at 1:30 p. m. on 22 March, 1937, and show cause, if any he has, why he shall not be attached for contempt on account of the matters and things set forth in the report and petition of the receiver, said matter having been continued by consent to be heard at the present term of said court, and being heard, the court finds the following facts, to wit:

"That at the October Term, 1936, in the above entitled action an order was duly entered appointing J. W. Bailey receiver to take charge of and possess himself of the effects and properties of the said defendant

D. M. Roberson wherever the same might be found, and authorizing and directing said receiver, upon giving bond to be approved by the clerk of this court in the sum of one thousand ($1,000) dollars, 'to enter into and take possession of the slaughter house property and business of the defendant, purported to have been leased to H. G. Young, together with all of the stock, provisions and equipment of said business, and is authorized, empowered and directed to operate said business as receiver of this court, and said receiver is authorized, empowered and directed to institute such action as may be necessary to vacate and set aside lease and any other instruments appearing of record which, in the opinion of the receiver, were executed by the defendant for the purpose of defrauding his creditors, and particularly the deed of trust purporting to secure defendant's wife for an alleged indebtedness to her, which deed of trust is referred to in the examination had before the referee, and the said receiver is further authorized, empowered and directed to possess himself of all the property and effects of the defendant, wherever same may be found and of whatever nature they may be, and is authorized, empowered and directed to take charge of and possess himself of any bank account of the aforesaid slaughter house business, and presentation of a certificate copy of this order shall be sufficient order to any such bank, where any such deposit may be carried, to deliver the same to the receiver.'

"That said receiver duly qualified by giving bond in the sum of one thousand ($1,000) dollars, as required, with the United States Fidelity and Guaranty Company as surety, which said bond was duly approved by the clerk of this court.

"That the defendant excepted to said order and appealed to the Supreme Court, but said appeal was never perfected and was abandoned by the defendant.

"That a certified copy of the order of receivership was duly filed in the office of the clerk of the Superior Court of Martin County, where the judgment debtor resides, as provided in the order of receivership and by statute in such case made and provided.

"That on 10 March, 1937, J. W. Bailey, the receiver theretofore appointed by Judge Sinclair entered in and upon the premises of the slaughter house of the defendant D. M. Roberson, then and there advising the defendant D. M. Roberson that he had come for the purpose of executing the order of Judge Sinclair, and for the purpose of taking charge of the slaughter house property; and thereupon the defendant D. M. Roberson, in utter and complete defiance of the order of receivership, and in contempt thereof, contemptuously and violently cursed and abused the receiver, accusing said receiver of graft or attempted graft, and that but for the fact that the receiver was acting pursuant to an

order of the court he would then and there whip said receiver, and that when the matter was settled he was going to whip him, and then and there, by his insults and profane abuse and intimidation of the receiver, contemptuously and in utter defiance of the order of this court, prevented the receiver from taking possession of the slaughter house property, as in said order of Judge Sinclair directed; and by reason of the aforesaid willful, contemptuous and unlawful abuse of the receiver by the defendant the receiver was compelled to desist from his purpose to execute the order of Judge Sinclair, and since said time, by reason of the aforesaid willful and contemptuous conduct of the defendant, has been prevented from executing the order of receivership and from taking possession of the property of the defendant, as in the order of this court directed.

"Upon the foregoing findings of fact, the court being of the opinion that the acts and conduct of the defendant, as above set forth, were contemptuous and in utter defiance of the orders of this court, and that the defendant for said conduct ought to be adjudged in contempt of this court.

"It is now, therefore, considered, ordered and adjudged that the defendant be and he is hereby declared to be in contempt of this court, and he is hereby fined the sum of one hundred fifty ($150.00) dollars for such contempt, which amount shall be forthwith paid into the office of the clerk of this court for the use of the public school fund, and if he fail to pay said fine, it is ordered and directed that defendant be committed to jail to remain therein until said fine is paid, or be otherwise discharged by law."

From the judgment rendered, defendant D. M. Roberson appealed.

H. C. Carter and H. S. Ward for appellant.
No counsel contra.

DEVIN, J. The facts found by the judge are supported by the affidavits and are sufficient to constitute contempt of court, and to sustain the judgment.

The order appointing the receiver was made, after due notice to appellant, in a cause then pending in Pitt County, by a court which had jurisdiction of the parties and of the subject matter, and authorized and directed the receiver to take possession of certain real property in Martin County. This order was filed in the Superior Court of Martin County where the property was situated and the judgment debtor resided, in compliance with the statutes, C. S., 724, and C. S., 722. This order was not void and was entitled to respect by the appellant, who

was a party to the cause. If the order were in any respect erroneous, he should have perfected his appeal therefrom.

Willful disobedience and resistance to a lawful court order on the part of one who, as a party and by notice served, is fixed with knowledge, comes within the purview of the statutes defining contempt of court, and is punishable as such. C. S., 978; *Fleming v. Patterson,* 99 N. C., 404; *Delozier v. Bird,* 123 N. C., 689; *In re Railroad,* 151 N. C., 467; *Weston v. Lumber Co.,* 158 N. C., 270; Rapalje on Contempt, secs. 16, 24.

The general rule is stated in 13 Corpus Juris, p. 21, as follows: "As a receiver is an officer of the court, and his possession is the possession of the court, any interference with, or disturbance of, his possession without permission of the court subjects the disturber to punishment for contempt."

Judgment affirmed.

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

THE STATE OF NORTH CAROLINA, UPON THE RELATION OF G. C. ADAMS, v. VIOLA LEE ADAMS, GUARDIAN, ET AL.,

and

THE STATE OF NORTH CAROLINA, UPON THE RELATION OF MINNIE FERRELL BROWNING ET AL., v. VIOLA LEE ADAMS, GUARDIAN, ET AL.,

and

THE STATE OF NORTH CAROLINA, UPON THE RELATION OF EDITH PEARL ADAMS, v. VIOLA LEE ADAMS, GUARDIAN, ET AL.

(Filed 3 November, 1937.)

1. Guardian and Ward § 23—Surety on bond of original guardian is not liable for default of successor guardian.

While the sureties on successive bonds of a guardian are jointly and severally liable for default of the guardian, where a guardian dies and his administratrix takes over funds in his hands belonging to the wards' estate, and the administratrix is appointed successor guardian and files bond, the surety on the bond of the original guardian is not liable for default of the successor guardian, and where the pleadings fail to allege default on the part of the original guardian, the demurrer of the surety on his bond should be sustained, and the contention that since both bonds were given to insure faithful administration of but one estate, the sureties on both bonds are liable for impairment of the estate by wrongful act of either guardian, is untenable.

2. Clerks of Court § 6—

Where it appears that one of the minor children of a deceased person was not made a party plaintiff in an action to recover on the bond of their guardian, it is the duty of the clerk, as probate judge, to take such action as is necessary to protect the interest of such infant.

APPEAL by defendant Massachusetts Bonding & Insurance Company from *Harris, J.*, at the April Term, 1937, of JOHNSTON.

The above three actions are identical in character with the exception of the names of the respective plaintiffs, and were instituted for the same purpose, viz.: To compel an accounting for the funds belonging to said plaintiffs as minor children of Jesse A. Adams, deceased, and for whom J. B. Adams first qualified as guardian. The three actions were consolidated and referred by consent to D. H. Bland, Esq., who reported his findings of fact and conclusions of law to the Superior Court.

J. B. Adams qualified as guardian for the infant plaintiffs, children of Jesse A. Adams, deceased, on 23 November, 1923, giving bond with personal sureties. Later, on 1 September, 1930, said guardian entered into bond in the sum of $3,000, with Massachusetts Bonding & Insurance Company as surety. This guardian filed a number of reports, the last of which was filed 26 August, 1930. This account showed that he then had a balance in hand belonging to his said trust in the sum of $1,089.89.

J. B. Adams died intestate on 4 March, 1931. Viola Lee Adams, his widow, was appointed and qualified as administratrix of his estate, and thereafter, on 30 April, 1931, likewise was appointed and qualified as guardian of the infants herein referred to, giving bond in the sum of $2,000, with the Employers' Liability Assurance Corporation as surety. On 14 December, 1931, Viola Lee Adams filed a final account as administratrix of J. B. Adams, guardian, purporting to close up and settle the trust account of said deceased guardian. This account showed a balance due the wards in the sum of $1,348.81. Thereafter on 26 January, 1933, Viola Lee Adams, as guardian for said infants, filed an account in the office of the clerk of the Superior Court of Johnston County, wherein she acknowledged a balance on hand belonging to said wards in the sum of $1,483.77. Demand was made upon Viola Lee Adams, guardian, for an accounting, and upon her failure to account, after certain proceedings before the clerk, these actions were instituted.

The referee reported his conclusion of law, among others, that the demurrer *ore tenus* interposed by the Massachusetts Bonding & Insurance Company should be sustained, and so recommended. Upon appeal, this conclusion of law, among others duly excepted to by the appellees, was overruled, and judgment was entered against all the defendants, and the defendant Massachusetts Bonding & Insurance Company excepted and appealed.

Winfield H. Lyon for plaintiffs, appellees.

A. J. Fletcher for Massachusetts Bonding & Insurance Company, defendant, appellant.

Abell & Shepard for Employers' Liability Assurance Corporation, defendant, appellee.

BARNHILL, J. If the complaints fail to state a cause of action against the Massachusetts Bonding & Insurance Company the other exceptions presented on this appeal become immaterial.

An examination of the complaints discloses that there is no breach of its bond by the Massachusetts Bonding & Insurance Company charged or alleged. The language most nearly approximating an allegation to this effect is as follows: "14. As plaintiff is advised, informed and believes, the guardianship estate belonging to this plaintiff, and the other wards named, which was in the hands of the said J. B. Adams, guardian as aforesaid, at the time of his death, came into the hands of Mrs. Viola Lee Adams, the administratrix upon his estate, and thereafter, upon her petition for guardianship of the estate of this plaintiff and the other wards named, she was duly appointed, and she regularly qualified and entered upon the discharge of her duties as such on 30 April, 1931." In a subsequent paragraph the complaints alleged that demand was made upon the successor guardian, Viola Lee Adams, and that she has failed to account. Paragraph 14 of the complaint, when construed in connection with the other allegations, more nearly constitutes an allegation of full compliance than a breach, and the judgment overruling the demurrer *ore tenus* was erroneous.

But it is contended that the bond of the Massachusetts Bonding & Insurance Company and the bond of the Employers' Liability Assurance Corporation were executed to assure the faithful administration of one estate and are cumulative; that being cumulative, default on the part of either guardian would impose liability upon both bonds.

A guardian occupies a position of trust which exists during the nonage of his ward, unless sooner terminated by death, resignation or removal. Where he has given successive bonds with different sureties, the sureties are jointly and severally liable, and upon default of the guardian they are liable to contribution among themselves proportionate to the amount of their respective bonds. *Thornton v. Barbour,* 204 N. C., 583, and cases therein cited. When, however, the term of the guardian for whom the bond is written ends, the liability of the bond ceases. The surety for a guardian is in nowise liable for the default or miscarriage of a successor guardian, nor is the surety for a successor guardian in anywise chargeable with the maladministration of the original guardian. Each term stands upon its own bottom. *Thornton v. Barbour, supra.*

The contention that in any event the default of the successor guardian imposed liability upon the appealing defendant, surety for the original guardian, on the theory that the two bonds were given to assure the faithful administration of the same estate, cannot be sustained.

It appears from the record that one of the infant children of Jesse A. Adams, deceased, is not a party plaintiff. It is the duty of the clerk, as probate judge, to take such action as may be necessary to protect the interest of this infant.

The judgment below, in so far as it affects the Massachusetts Bonding & Insurance Company, is

Reversed.

J. ELTON LEE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 3 November, 1937.)

1. Railroads § 9—Evidence held to show contributory negligence as matter of law in driver's colliding with flat car standing at crossing.

The evidence favorable to plaintiff tended to show that he drove his car across the main line track of one railroad and then across the main line track of defendant railroad, and collided with a flat car standing across the road on a sidetrack about fifteen feet beyond defendant's main line track, that the highway was darkened at the sidetrack by houses and trees on defendant's right of way, that the lights of plaintiff's car went under the flat car, and that, though going at a speed of 15 or 18 miles per hour as he neared the sidetrack, he did not see the flat car in time to avoid hitting it, although he put on his brakes as soon as he saw it. *Held:* Plaintiff's evidence discloses contributory negligence barring recovery as a matter of law, since he would be guilty of contributory negligence if he were driving too fast under the conditions then existing to stop within the distance his lights would disclose an obstruction, or if he could have seen the obstruction in the exercise of due care in time to have stopped and failed to see it.

2. Negligence § 11—

It is not necessary that contributory negligence be the sole proximate cause of the injury in order to bar recovery, it being sufficient for this purpose if it is one of the proximate causes.

CLARKSON, J., dissents.

CIVIL ACTION before *Harris, J.*, at May Term, 1937, of WAYNE. Reversed.

Paul B. Edmundson and Ehringhaus, Royall, Gosney & Smith for plaintiff, appellee.

D. H. Bland, W. B. R. Guion, Thos. W. Davis and V. E. Phelps for defendant, appellant.

SCHENCK, J. This was an action by the plaintiff 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 entered the alternative plea of contributory negligence in bar of recovery. The case was tried upon the usual issues of negligence, contributory negligence and damage. The jury answered the issues in favor of the plaintiff, and from a judgment on the verdict the defendant appealed, assigning as error the refusal of the court to allow its motion for judgment as in case of nonsuit made when the plaintiff had introduced his evidence and rested his case and renewed after all the evidence was in. C. S., 567.

Viewing the evidence in the light most favorable to the plaintiff it tends to show that on the night of 12 June, 1935, at 8 o'clock, the plaintiff was driving his '29 Model A Ford coach eastward on State Highway 402; that on the west side of the city of Goldsboro said highway crosses the Southern Railway Company's main line track, and about 60 or 70 yards farther east crosses the defendant's main line track, and still farther east about 12 or 15 feet crosses a side track of the defendant; that said highway is practically straight and level as it approaches and crosses said three tracks; that the plaintiff drove his said automobile across the two main line tracks, and attempted to drive it on farther eastward when it collided with a flat car composing a part of a train of the defendant, which was standing across said highway on said side track; that owing to shadows cast by trees and small houses on the defendant's right of way, and the failure of the defendant to provide lights or signals of the presence of the flat car, the highway was darkened, and the plaintiff could not, and did not, see the flat car in time to stop his automobile and avoid a collision between it and the defendant's flat car.

Conceding, but not deciding, that the defendant was negligent in permitting the trees and houses to remain on its right of way and in allowing its flat car to stop across the highway without lights or other signals of its presence, still we think the evidence discloses contributory negligence on the part of the plaintiff which bars recovery. It is sufficient to defeat recovery if plaintiff's negligence is one of the proximate causes of the injury, it need not be the sole proximate cause. *Construction Co. v. R. R.*, 184 N. C., 179; *Davis v. Jeffreys*, 197 N. C., 712.

The plaintiff testified that he was operating his automobile between the main line track of the Southern Railway Company and the main line track of the Atlantic Coast Line Railroad Company at about 30 miles per hour; that he had slowed down from that rate of speed as he neared the side track; that he was running about 15 or 18 miles an hour

when he discovered something was ahead of him, when he slammed on his brakes and dragged his wheels; that notwithstanding he was driving at the rate of speed indicated he could not stop his automobile after he discovered there was something across the highway in time to avoid colliding with the flat car; that he first saw the flat car when he was in about ten feet of it; that his lights were in good condition and shone under the flat car.

We think, and so hold, that this case is governed by the principles enunciated in *Weston v. R. R.,* 194 N. C., 210, wherein *Brogden, J.,* states: "Hence, in the final analysis, the case presents the question of the duty of an automobile driver, operating his car in the nighttime, with his vision obscured by rain or other conditions upon the highway." In the case at bar there was no rain, but there were "other conditions on the highway," namely, the darkened condition of the highway caused by the shadows from the trees and houses on the defendant's right of way. If this darkened condition rendered it impossible for the plaintiff to see a flat car across the highway in time to enable him to stop his automobile at the rate of speed at which he was operating it soon enough to avoid a collision, there was a failure to exercise due care on the part of the plaintiff in operating his automobile at such a rate of speed. If the plaintiff saw, or by the exercise of due care could have seen, the flat car in time to stop his automobile soon enough to avoid the collision and failed to do so, there was likewise a failure to exercise due care on his part. The plaintiff, according to his own testimony, was guilty of contributory negligence either in failing to drive within the radius of his lights, that is at a speed at which he could stop within the distance to which his lights would disclose the existence of obstructions, or in failing to see the flat car in time to avoid the collision. It makes no difference which horn of the dilemma the plaintiff takes, his cause of action is defeated by his own negligence.

The general rule applicable to cases circumstanced as the case at bar is quoted from Huddy on Automobiles, 7 ed., 1924, sec. 396, in *Weston v. R. R., supra,* as follows: "It was negligence for the driver of the automobile to propel it in a dark place in which he had to rely on the lights of his machine at a rate faster than enabled him to stop or avoid any obstruction within the radius of his light, or within the distance to which his lights would disclose the existence of obstructions. . . . If the lights on the automobile would disclose obstructions only ten yards away it was the duty of the driver to so regulate the speed of his machine that he could at all times avoid obstructions within that distance. If the lights on the machine would disclose objects farther away

than ten yards, and the driver failed to see the object in time, then he would be conclusively presumed to be guilty of negligence, because it was his duty to see what could have been seen."

We think the motion for judgment as in case of nonsuit should have been allowed, and, therefore, the judgment of the Superior Court is

Reversed.

CLARKSON, J., dissents.

IN RE HELEN SYLIVANT.

(Filed 3 November, 1937.)

Insane Persons § 4: Appeal and Error § 1—Where statute under which proceeding is begun does not provide for appeal, no appeal may be taken.

Petitioner, who had been adjudged *non compos mentis* under C. S., 2285, filed this petition under C. S., 2287, to have herself adjudged no longer insane, and prayed for the discharge of her guardian and the possession of her property. Upon the finding of the jury she was adjudged no longer insane and the prayers of her petition granted. Her guardian appealed to the Superior Court. *Held:* The appeal should have been dismissed, since C. S., 2287, does not provide for appeal. Whether the clerk's order could be reviewed by the Superior Court pursuant to a writ of *certiorari*, and whether the clerk's order was void *ab initio* on the ground that the person adjudged insane cannot file a petition under C. S., 2287, *held* not presented for decision, but *semble*, the clerk's order was voidable and not void, and it was error for the Superior Court to dismiss the proceeding.

APPEAL by Helen Sylivant, petitioner, from *Cranmer, J.*, at February Term, 1937, of GREENE. Reversed.

This proceeding was begun on 30 September, 1936, by a petition filed before the clerk of the Superior Court of Greene County by Helen Sylivant, in accordance with the provisions of C. S., 2287. The petition was duly verified by her, and was filed in her behalf by her attorneys.

In the petition it was alleged that on 10 March, 1934, in a proceeding begun before the clerk of the Superior Court of Greene County in accordance with the provisions of C. S., 2285, on the finding of the jury that the petitioner, Helen Sylivant, was then incompetent for want of understanding to manage her affairs, it was adjudged by the court that she was *non compos mentis;* that thereupon it was ordered by the court that Hattie White be and she was duly appointed as guardian of the said

Helen Sylivant; and that thereafter the said Hattie White duly qualified as such guardian.

It was further alleged in the petition that the petitioner, Helen Sylivant, has fully regained her sanity, and is now competent to manage her affairs.

On these allegations the petitioner prayed that it be adjudged by the court that she has been restored to sanity and is now competent to manage her affairs, and that it be ordered by the court that Hattie White be removed as her guardian, to the end that she may take possession of, manage and control her property.

In accordance with the provisions of C. S., 2287, jurors were duly summoned, sworn and impaneled by the court to try the issue involving the sanity of the petitioner. At the trial of the issue, evidence was offered by the petitioner tending to support the allegations of her petition, and, with the permission of the court, by her guardian tending to show the contrary.

The issue submitted to the jury was answered as follows:

"Is Helen Sylivant sane and of sound mind and memory? Answer: 'Yes.'"

It was accordingly adjudged by the court that the petitioner, Helen Sylivant, is now sane and of sound mind and memory, and is competent, both mentally and physically, to manage and control her property. It was ordered by the court that Hattie White, guardian of Helen Sylivant, file with the court her final account as such guardian within twenty days, and that upon filing such final account she be removed as the guardian of the petitioner.

The proceeding was thereafter docketed in the Superior Court of Greene County, and was heard at the February Term, 1937, of said court on the appeal of Hattie White, guardian, from the order of the clerk of the Superior Court of Greene County.

In apt time the petitioner, Helen Sylivant, moved that the appeal of Hattie White, guardian, be dismissed on the ground that she had no right to appeal from the order of the clerk in this proceeding. The motion was denied, and the petitioner duly excepted.

The court was of opinion that the proceeding having been begun by a petition filed by Helen Sylivant, who had been duly adjudged *non compos mentis,* and not by her guardian or by a next friend, or by some person on her behalf, was void *ab initio,* for the reason that the clerk of the Superior Court of Greene County had no jurisdiction of the matters alleged in the petition.

It was accordingly ordered and adjudged by the court that the proceeding be and the same was dismissed, and that the costs of the proceeding be taxed against the petitioner.

From this order and judgment the petitioner appealed to the Supreme Court, assigning as errors the refusal of the court to dismiss the appeal of Hattie White, guardian of the petitioner, and the order and judgment dismissing the proceeding.

Roberts & Williford for petitioner.
K. A. Pittman and Harding & Lee for the guardian.

CONNOR, J. It is provided by statute in this State that "any person, in behalf of one who is deemed an idiot, inebriate or lunatic, or incompetent for want of understanding to manage his own affairs, by reason of the excessive use of intoxicating drinks, or other cause, may file a petition before the clerk of the Superior Court of the county where such supposed idiot, inebriate or lunatic resides, setting forth the facts duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the supposed idiot, inebriate or lunatic, to the sheriff of the county, commanding him to summon a jury of twelve men to inquire into the state of such supposed idiot, inebriate or lunatic.

"Upon the return of the sheriff summoning said jury, the clerk of the Superior Court shall swear and organize said jury and shall preside over said hearing, and the jury shall make return of their proceedings under their hands to the clerk, who shall file and record same, and he shall proceed to appoint a guardian of any person so found to be an idiot, inebriate, lunatic, or an incompetent person by inquisition of a jury.

"Either the applicant or the supposed idiot, inebriate, lunatic, or incompetent person may appeal from the finding of said jury to the next term of the Superior Court, where the matters at issue shall be tried regularly *de novo* before a jury." C. S., 2285.

Prior to the filing of her petition in this proceeding the petitioner had been duly adjudged, upon the finding of a jury, *non compos mentis*, in accordance with the provisions of the foregoing statute, and thereupon Hattie White had been duly appointed as her guardian.

It is further provided by statute that "where any insane person or inebriate becomes of sound mind and memory or becomes competent to manage his property he is authorized to manage, sell and control all his property in as full and ample a manner as he could do before he became insane or inebriate, and a petition in behalf of such person may be filed before the clerk of the Superior Court of the county of his residence, setting forth the facts, duly verified by the oath of the petitioner, whereupon the clerk shall issue an order, upon notice to the person alleged to be no longer insane or inebriate, to the sheriff of the county, commanding him to summon a jury of six freeholders to inquire into

the sanity of the alleged sane person, formerly a lunatic or the sobriety of such alleged restored person, formerly an inebriate. The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same, and if the jury shall find that the person whose mental or physical condition was inquired into is sane and of sound mind and memory or is no longer an inebriate, as the case may be, the said person is authorized to manage his affairs, make contracts, and sell his property, both real and personal, as if he had never been insane or inebriate." C. S., 2287.

No provision is made in the foregoing statute for an appeal from the finding of the jury or from the order of the clerk pursuant to such finding. Whether, in a proper case, such finding or such order may be reviewed by the Superior Court pursuant to a writ of *certiorari* is not presented by this appeal.

In the absence of a provision in the statute under which this proceeding was begun and prosecuted, for an appeal from the order of the clerk to the Superior Court, there was error in the refusal of the court to dismiss the appeal of Hattie White, guardian in this proceeding. See *Ray v. Ray,* 33 N. C., 357, 3 C. J., p. 649, sec. 512.

As there was error in the refusal of the court to dismiss the appeal of the guardian, the question as to whether there was error in the order dismissing the proceeding is not presented by this appeal. However, it would seem that at most the order of the clerk of the Superior Court of Greene County in this proceeding was voidable and not void, and that there was error in the order of the court dismissing the proceeding. See *Tate v. Mott,* 96 N. C., 19.

In accordance with this opinion the order and judgment of the Superior Court in this proceeding is

Reversed.

ADDIE R. COLLETT, GUARDIAN, ET AL., v. DAISY COLLETT FARNAN.

(Filed 3 November, 1937.)

Wills §§ 36, 38—Bequest held specific bequest of articles of personalty and money for life, and legatee was entitled to possession of corpus.

After directing the payment of debts and providing for certain specific legacies, the will in question directed that the remainder of the money be divided between testatrix' sisters and brothers, or their children, and by later item provided that one of the sisters should have for her lifetime only certain enumerated articles of personalty "and money if any are to come back to my estate." *Held:* The gift to the sister of her share of the money was made in the prior item, and the later item gave a life interest in the enumerated articles of personalty, and provided that the

money as well as the articles of personalty should "come back to my estate," or be limited to a life estate, and the later item does not constitute a residuary bequest to be enjoyed by persons in succession, entitling the sister only to the income from the money, but is a specific bequest for life, entitling the sister to the *corpus* of the money, with remainder over only in such amount as might remain at the death of the sister.

APPEAL by defendant from *Warlick, J.*, at Chambers. From BURKE. Reversed.

This is a civil action in which the plaintiffs seek a construction of the will of Minerva Ruffin Collett and a declaratory judgment determining the rights of the respective legatees and directing the plaintiff, administrator C. T. A., as to the distribution of the funds of the estate. From the judgment entered the defendant appealed.

Mull & Patton for plaintiffs, appellees other than First National Bank, administrator C. T. A.

O. L. Horton and S. J. Ervin, Sr., for defendant, appellant.

BARNHILL, J. The defendant excepts to that portion of the judgment which reads as follows: "That the share of the money left to Mrs. Daisy Collett Farnan for life in said will shall be retained by First National Bank of Morganton, administrator C. T. A. of Miss Minerva Ruffin Collett, and invested in such securities as are authorized in investments for fiduciaries under sections 4018 and 4018-A of the Consolidated Statutes; and that the net proceeds of such investments be paid over to Mrs. Daisy Collett Farnan in semiannual installments for and during the term of her natural life; and that the *corpus* of said investments after the death of Mrs. Daisy Collett Farnan referred to the estate of the testatrix, Miss Minerva Ruffin Collett, and that the same shall be distributed by the administrator to the heirs at law of the testatrix, Miss Minerva Ruffin Collett, said distribution to be made *per stirpes* and not *per capita.*"

The pertinent portions of the will of the deceased necessary to be considered to determine the question of law involved on this appeal reads as follows:

(1) "I wish all money I have invested or loaned out shall be collected, and my farm sold if it has not been sold, my debts paid.

(2) "Omitted.

(3) "After my debts are paid I want $8,000 (eight thousand) dollars paid to the estate of my brother Stirling Ruffin Collett, this being money he has given to me from time to time.

(4) "I want $1,000 (one thousand) invested for the care of the Episcol (Episcopal) Church Yard. The remainder of my money if there is any divided between my sisters and brothers, or their children.

(5) "I will to my sister Daisy Collett Farnan, for her life time *only* at her death these things and money if any are to come back to my estate. The portraits of our Great grandfather and Grandmother Caldwell. The silver candlestick which was our Grandmother Caldwell's. The book case in the hall, 1 of the four old straight chairs in my living room."

The will then proceeds to bequeath to others various articles of personal property, consisting largely of household furniture and silverware.

The paragraphs are numbered by the court for convenience of reference.

If the gift to the defendant amounted in terms to a residuary bequest, enjoyed by persons in succession, the judgment of the court below is correct. If the bequest is specific and not of the residuum there was error in the judgment, and the defendant is entitled to the possession of the money as well as of the other articles of personal property during her lifetime. The controlling rule is stated in *Simmons v. Fleming,* 157 N. C., 389, *Allen, J.,* as follows: "The rule seems to be that whenever personal property is given, in terms amounting to a residuary bequest, to be enjoyed by persons in succession, the interpretation the court puts upon the bequest is that the persons indicated are to enjoy the same in succession; and in order to give effect to its interpretation the court, as a general rule, will direct so much of it as is of a perishable nature to be converted into money by the executor, and the interest paid to the legatee for life and the principal to the person in remainder. (*Ritch v. Morris,* 78 N. C., 377), but when the bequest is specific and is not of the residuum, the executor should deliver the property to the one to whom it is given for life, taking an inventory and receipt for the benefit of the remainderman. *Williams v. Parker,* 84 N. C., 90; *Herring v. Williams,* 158 N. C., 1; *Ernul v. Ernul,* 191 N. C., 347; *Swain v. Spruill,* 57 N. C., 364. In *Swain v. Spruill, supra, Ruffin, J.,* says: "Where a testator expressly gives, specifically for life, with a limitation over, things which *ipso usu consumuntur* the court has no power to control the disposition of the testator by denying that use to the first taker which has been bestowed by the will, although it may impair the value or extinguish the existence of the thing itself, to the loss of the ulterior taker. It must be taken that the testator had considered the chances of benefit to those in remainder after the prior benefit bestowed by him on the first taker, and that he only meant to limit over those chances."

The gift of the money was in paragraph four of the will and provides that proceeds of notes and the sale of her farm after the payment of debts and certain legacies should be divided between testatrix' sisters

and brothers, or their children, the defendant being a sister. The defendant, under the terms of that paragraph, receives her share, if there is any, of the money remaining after the specified disbursements. There is no limitation of the gift in succession or otherwise. While the amount is to be determined the gift is specific—her share of the money after certain deductions are made.

It then becomes necessary to interpret the term "money if any" as used in the fifth paragraph. The words of gift in this paragraph relate only to the articles of personal property. The words "and money if any" are interpolated to indicate the desire of the testatrix that the limitation of the gift of the personal property shall apply likewise to the money bequeathed in the preceding paragraph. The language used put in proper sequence would read: "At her death these things, and money if any, are to come back to my estate." The terms used indicate the disposition of the property to be made as of the death of the devisee. So considered, "money if any" means so much of the money devised to her as shall remain at the time of her death. The term indicates the intent that the legacy shall be delivered, that it may be consumed and that no part thereof may remain at her death. That the bequest to the defendant was not intended as a residuary clause within the meaning of the rule laid down in *Simmons v. Fleming, supra,* seemed to be clearly indicated. After this gift she devised many other articles, and closes the will with a touch of pathos in the following language: "I wish I could will everything, but I am too tired." We are of the opinion that a proper interpretation of the language used in the fifth paragraph entitles the defendant to the possession of the *corpus* of the money devised to her. The authorities cited by plaintiffs are not in conflict with the opinion herein announced. The judgment below is

Reversed.

PEOPLES LOAN AND SAVINGS BANK v. MRS. J. A. KING.

(Filed 3 November, 1937.)

1. Drainage Districts § 2—

Where one of three drainage commissioners dies, the two surviving have authority, until the election and qualification of their successors, to levy an additional assessment against the lands of the district necessary to discharge the obligations of the district, C. S., 5339 (4).

2. Drainage Districts § 9—Lands of drainage district are liable to assessments necessary to repay money properly used for benefit of district.

An additional levy of assessments against lands in a drainage district is valid when necessary to repay money borrowed by the district and

properly used by it in draining the lands within the district, and it is immaterial that the district borrowed money in excess of the amount of the authorized bond issue when the balance of the debt necessitating the levy of the additional assessments is less than the amount borrowed in excess of the authorized bond issue, and the court finds that part of the money borrowed was used to pay interest on the indebtedness of the district, and that all amounts borrowed were properly used for the benefit of the district.

APPEAL by defendant from *Pless, J.*, at May Term, 1937, of IREDELL. Judgment affirmed.

Action to foreclose certificate of sale of land for drainage assessment.

At the trial certain facts were agreed upon, and it was further agreed that the court, without the intervention of the jury, should find such additional facts as were necessary for the determination of the controversy. The material facts agreed to and found by the court may be concisely stated as follows:

The Fourth Creek Drainage District of Iredell County was duly organized, under applicable statutes, in 1911, and a bond issue of $25,000 authorized. The drainage commissioners being unable to sell the bonds at their face value, borrowed from the First National Bank of Statesville $25,000 and later increased the debt to $32,500, and placed the $25,000 of bonds with the bank as collateral. All of the proceeds of the loan were used by the commissioners for draining and ditching the lands in the district and for the payment of interest from time to time.

The present indebtedness to the plaintiff, Peoples Loan and Savings Bank, is in the principal sum of $6,960.06, and constitutes the balance due for money borrowed by the drainage commissioners to pay the debt to the First National Bank. The original bonds are now held by the plaintiff. The debt of plaintiff was reduced to judgment in January, 1933. To discharge the judgment the two surviving commissioners in 1934 levied an assessment upon the lands embraced in the district. The defendant owns 23.86 acres of land within the district and the assessment levied on her land was $68.29.

At the time of the organization of the district the three commissioners elected were qualified to act. Since then there has been no election of commissioners to replace them, and one of the commissioners has died, and the other two had ceased to own land in the district at the time the assessment was levied by them as commissioners.

It was admitted that the assessment roll was filed with the clerk of the Superior Court, the treasurer of Iredell County and the sheriff, and that the sheriff notified the defendant of the assessment. No written notice was given by the county treasurer to the drainage commissioners or to the clerk of the court.

The trial judge held that under C. S., 5339 (4) the surviving commissioners were authorized to discharge the necessary duties of the board until the vacancy caused by the death of a member was filled, and that their acts were valid and binding on the district; that the borrowing of money from the banks and the use of the bonds as collateral was irregular, "but the proceeds of the loans were used for the valid objectives contemplated by the Drainage Act, and that no question having been raised as to the validity of said obligation for a period of some twenty years, and no action brought to invalidate the transaction, and judgment having been procured more than two years prior to the institution of this action, it would constitute an inequity and injustice to the plaintiff to permit the defendant and other landowners to obtain and accept the benefit of said loans without liability therefor."

It was thereupon adjudged that the assessment against the land of defendant for the purpose therein set out constituted a specific lien on said land in the amount of $68.29, and that plaintiff was entitled to foreclose its certificate of sale made pursuant thereto. Defendant appealed.

P. P. Dulin and Robert A. Collier for plaintiff, appellee.

Jack Joyner, W. R. Battley and Lewis & Lewis for defendant, appellant.

DEVIN, J. The ruling of the court below must be affirmed. The action of the two surviving drainage commissioners, until their successors were elected and qualified, was within the powers conferred by the Drainage Act. C. S., 5339 (4).

There was no suggestion of lack of good faith on the part of the commissioners, or that the plaintiff's debt was otherwise than for money which had been borrowed and properly used for the draining of the lands within the district. The obligation was incurred for the benefit of the lands embraced in the district, and upon these lands the law imposed liability therefor.

The fact that $7,500, in addition to the amount of the authorized bond issue, was borrowed by the district for drainage purposes, becomes immaterial in view of the fact that the total indebtedness has been reduced, as assessments were collected, to $6,960.06, and the finding by the court that a part of the loan was used for the payment of interest from time to time (*Carter v. Comrs.*, 156 N. C., 183, 72 S. E., 380), and that all of the proceeds of the loans were used for draining and ditching the lands in the district.

In *Bank v. Watt*, 207 N. C., 577, 178 S. E., 228, the question of the liability of lands within this same drainage district to further assessment

was considered, in connection with the present plaintiff's judgment for the balance due on its loan to the drainage commissioners, and it was there said, "It is obvious that the drainage statutes impose liability upon land within the district until the original bond issue for making the improvements or indebtedness incurred therefor has been paid."

Judgment affirmed.

STATE v. EUGENE CASEY.

(Filed 3 November, 1937.)

1. Jury § 9: Criminal Law § 81a—

The trial judge has the discretionary power to issue a writ of *venire facias*, C. S., 2338, instead of directing the jurors to be drawn from the jury box, and the court's action in issuing the writ is not reviewable in the absence of abuse of discretion.

2. Homicide § 20—

In a prosecution for homicide, testimony of a witness that she was going with deceased and one of defendants, is competent, as against the defendant identified, for the purpose of showing motive.

3. Criminal Law § 48b—

Where evidence is competent as against one defendant only, an exception of the other defendant to its general admission cannot be sustained in the absence of a request by him at the time that its purpose be restricted.

4. Homicide § 18—

A statement by a person fatally wounded that "If you don't do something for me, I am going to die right now," is insufficient predicate for the admission of his subsequent declarations as dying declarations, since the statement does not show an unqualified belief by him that he was going to die.

5. Homicide § 2—Defendant present and aiding and abetting commission of crime is equally guilty with actual perpetrator.

Where the State contends on its evidence that one defendant killed deceased and the other defendant aided and abetted the commission of the crime, and such other defendant contends that, while present, he did nothing to aid or abet, the defendant charged with aiding and abetting may be acquitted, or may be found guilty of the same degree of the crime as the other defendant, but the two defendants cannot be found guilty of different degrees of the crime, and a charge and statement to the jury to this effect is not error.

APPEAL by defendant from *Cranmer, J.*, at April Term, 1937, of CRAVEN. No error.

STATE *v.* CASEY.

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

William Dunn, Jr., J. A. Jones and Allen & Allen for defendant, appellant.

SCHENCK, J. Eugene Casey and his codefendant, Carl Hill, were convicted on a joint bill of indictment of murder in the second degree and appealed to the Supreme Court. The defendant Hill abandoned his appeal.

The first group of assignments of error relate to the issuing to the sheriff of a writ of *venire facias,* commanding him to summons the jurors instead of directing the jurors to be drawn from the jury box. These assignments are untenable, since the issuing of a writ of *venire facias,* by C. S., 2338, is placed in the discretion of the trial judge, and his action in issuing the writ is not reviewable, in the absence of abuse of his discretion. *S. v. Smarr,* 121 N. C., 669; *S. v. Brogden,* 111 N. C., 656.

The second group of assignments of error relate to the refusal of the court to exclude the testimony of the witness Miss Grace O'Neill to the effect that she "was going with Hill (the codefendant of the appellant) and English (the deceased) both." This evidence was competent against Hill to show motive, and the record fails to show that the appellant ever asked the court to restrict the purpose for which the evidence was admitted, but contented himself with a general objection thereto. Rules of Practice in the Supreme Court, 21, 200 N. C., 827, in part reads: " . . . nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted." *S. v. Hendricks,* 207 N. C., 873. These assignments cannot be sustained.

The third group of assignments of error relate to the court's refusal to allow the testimony of the witness Miss Sue Hargett as to what the appellant contends was a dying declaration of the deceased. The witness testified that the deceased, a short time prior to his death, said: "If you don't do something for me, I am going to die right now." This statement did not lay the proper foundation or predicate for the introduction in evidence of the other declarations of the deceased, since it failed to establish that the deceased at the time of the utterance knew that he was *in extremis,* or had given up all hope of recovery. "An undoubting belief existing in the mind of the declarant at the time the declarations are made, that the finger of death is upon him, is indispensable to that sanction which the law exacts, and therefore if it shall appear, in any mode, that there was a hope of recovery, however faint

it may have been, still lingering in his breast, that sanction is not afforded, and his statement cannot be received." 1 R. C. L., par. 82, p. 539.

The fourth and final group of assignments of error relate to a negative reply given by the court to a question propounded by a juror as to whether the jury could return a verdict of guilty of murder in the second degree as to one defendant and guilty of manslaughter as to the other. Upon the evidence and the theory upon which the case was tried this was a proper reply, and the instruction given therein was without error. The State's evidence tended to show and the contention of the State was that the defendant Hill fatally stabbed the deceased in the breast, and that the appellant Casey was present aiding and abetting. Casey's contention was that while he was nearby he did nothing to aid and abet the defendant Hill. The court instructed the jury that they could convict both of the defendants of murder in the second degree, or both of manslaughter, or acquit both of the defendants, or they could convict one and acquit the other, and if the evidence failed to satisfy them beyond a reasonable doubt that the appellant Casey was present, aiding and abetting Hill, that they should return a verdict of not guilty as to Casey. This was a correct charge and rendered it proper in response to the question of the juror to instruct the jury that they could not convict one of the defendants of murder in the second degree and the other of manslaughter, for manifestly if the appellant Casey was guilty of anything he was guilty of the same offense of which Hill was guilty. "Where two persons aid and abet each other in the commission of a crime, both being present, both are principals and equally guilty." *S. v. Jarrell,* 141 N. C., 722.

We find on the record,

No error.

RENA WARREN v. PILOT LIFE INSURANCE COMPANY.

(Filed 3 November, 1937.)

1. Insurance § 41—

The double indemnity clause in this policy of insurance provided that the benefits under this clause should be null and void if insured's death should result from injuries inflicted intentionally by another person. *Held:* Insurer has the burden of proving facts bringing the case within the proviso.

2. Same—In action on double indemnity clause, instruction held erroneous as requiring insurer to prove third person intentionally killed insured.

Where a double indemnity clause in a policy of insurance provides that benefits thereunder should be null and void if insured's death should

result from injuries inflicted intentionally by another, insurer is required to prove only that the fatal injuries were intentionally inflicted by another, and an instruction requiring insurer, in effect, to prove that such third person was present with the intention of assaulting insured's companion, and intentionally killed insured to prevent interference with his nefarious purpose, is erroneous as requiring insurer to prove the purpose and intent to kill on the part of such third person.

APPEAL by defendant from *Daniel, J.*, at May Term, 1937, of PITT.

Action to recover on policy of insurance.

On 1 July, 1935, defendant issued and delivered to Alexander Warren a policy of life insurance for $2,500.00, in which the plaintiff was named as beneficiary. The policy provided, among other things, that: "Upon receipt of satisfactory proof that . . . the insured . . . has sustained bodily injury resulting in death . . . through external, violent and accidental means . . . the company will pay in addition to the face amount of this policy the sum of $2,500. The agreement as to benefits under this provision shall be null and void if death shall have resulted from bodily injuries inflicted intentionally by another person. . . ."

Warren, the insured, was shot to death on the night of 28 February, 1936.

Plaintiff contends that the death was "through external, violent and accidental means" and within the meaning of the said provision of the policy. Defendant pleads as defense and bar to the right of plaintiff to recover that the death "resulted from bodily injuries inflicted intentionally by another person."

The evidence tended to show that Warren, accompanied by the young lady to whom he was engaged, had parked his automobile on a road near the fair ground at Greenville. As he was in the act of dialing the radio in his car the right-hand door of the automobile was suddenly opened by a man who grabbed the young lady around the neck with his left arm. The man had a pistol in his right hand pointed in the car and almost instantly the pistol fired; the bullet struck Warren in the right breast and he died instantly. The man dragged the young lady out into a field, threatened her, went back and looked in the car, then returned to where she was, dragged her farther into the field, partially disrobed her, and ran away when the lights of an approaching automobile shone on the spot. It was contended that the man was bent upon criminally assaulting the lady. Later the man was arrested, identified as Willie Tate, and indicted for murder. In the trial the young lady was a witness for the State. On the trial of the instant case she testified as to what occurred at the time Warren was shot. She was examined as to the report of her testimony given in the murder trial. She admitted the correctness of the report.

The court submitted the following as the first issue: "Was the death of Alexander Warren the result of bodily injuries intentionally inflicted by another person, as alleged in the answer?" The jury answered the issue "No."

From adverse judgment defendant appealed to the Supreme Court, and assigned error.

H. Hannah, Albion Dunn, Gaylord & Brown for plaintiff, appellee.
Smith, Wharton & Hudgins and J. B. James for defendant, appellant.

WINBORNE, J. We are of opinion that exception to a portion of the charge relating to the first issue is well taken.

Where, as in this case, the defendant insurer seeks to avoid liability under a policy of life insurance on the ground that the policy contains provision that it shall be null and void if death of insured resulted from bodily injuries intentionally inflicted by another, the burden rests upon the defendant to prove facts bringing the case within that provision. The court properly charged the jury to this effect. But, after reviewing contention of the defendant that the assailant, intending to commit a criminal assault upon the young lady, had the motive to kill Warren, the insured, to prevent interference with his nefarious purpose, the court charged the jury as follows: "And if the evidence does so satisfy you gentlemen, by its greater weight, upon a fair and honest consideration of it, that this man was there for that evil purpose, intentionally killed young Warren, shot him and killed him, then you should answer the first issue 'Yes.' Unless you are so satisfied you should answer it 'No.'"

The charge is subject to challenge in that it is susceptible of creating the impression that before the jury could answer the first issue in the affirmative the defendant must have satisfied the jury, by the greater weight of evidence, of two facts: (1) That the assailant was there for the evil purpose of criminally assaulting the young lady, and (2) that the assailant intentionally killed Warren—that an intent to kill must be shown. The inquiry is as to the *intent to inflict bodily injury* which resulted in death.

As the case goes back for a new trial for error in the charge, other exceptions upon which the defendant relies for new trial need not be considered. *Shoemake v. Refining Co.*, 208 N. C., 124, 179 S. E., 334; *Callahan v. Roberts, ante,* 223.

New trial.

MRS. ARMETTA RANKIN, WIDOW OF BENNIE RANKIN, EMPLOYEE, *v.* BROWN MANUFACTURING COMPANY, EMPLOYER, AND TRAVELERS' INSURANCE COMPANY, CARRIER.

(Filed 3 November, 1937.)

Master and Servant § 55g—While Superior Court may remand proceedings for necessary findings, it is error to remand for immaterial findings when appeal may be determined by review of conclusions of law.

The Industrial Commission found that the employee was killed in a fight following an altercation with defendant employer's gateman when the employee attempted to enter the plant without a pass. The Industrial Commission concluded as a matter of law that the injury was by accident but that the accident did not arise out of and in the course of the employment. *Held:* The Superior Court on appeal should have passed upon the conclusions of law of the Industrial Commission, and accordingly affirmed or reversed the award, and it was error to remand the proceedings to the Industrial Commission for specific findings as to who was the aggressor in the fight and whether the gateman used excessive force, and was acting within the scope of the employment, such findings being immaterial.

APPEAL by defendants from *Pless, J.*, at June Term, 1937, of CABARRUS. Error.

This was a proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act.

The proceeding was begun before the North Carolina Industrial Commission, and was first heard by Commissioner Buren Jurney at Concord, N. C., on 16 June, 1936.

On his finding that the death of plaintiff's husband, Bennie Rankin, was the result of an injury by accident which arose out of and in the course of his employment by the defendant, Brown Manufacturing Company, Commissioner Buren Jurney awarded compensation to the plaintiff, as the sole dependent of her deceased husband, to be paid by the defendants.

On the application of the defendants for a review, the proceeding was heard by the Full Commission at Raleigh, N. C., on 4 September, 1936.

At said hearing the Full Commission found:

1. That at the date of his death, to wit, 15 March, 1935, plaintiff's husband, Bennie Rankin, was an employee of the defendant, Brown Manufacturing Company, at its factory in Concord, N. C.; that both the said Bennie Rankin, as employee, and the said Brown Manufacturing Company, as employer, were subject to the provisions of the North Carolina Workmen's Compensation Act, and that the defendant Travelers' Insurance Company was the insurance carrier for the said Brown Manufacturing Company, employer.

2. That at about 2 o'clock p.m. on 15 March, 1935, while he was standing outside the fence which encloses the factory of the Brown Manufacturing Company at Concord, N. C., near the gate, quarreling with the gateman who had refused to let him enter upon the premises through the gate without a pass as required by the rules of said company, Bennie Rankin was assaulted by the gateman, who cut his throat with a knife, thus causing an injury from which he died almost immediately; that the death of the said Bennie Rankin was the result of an injury by accident, but that the accident did not arise out of and in the course of his employment by the defendant, Brown Manufacturing Company.

On these findings of fact the Full Commission set aside the award of Commissioner Buren Jurney and made an award denying claimant any compensation for the death of her husband.

The plaintiff appealed from the award of the Full Commission denying compensation to the Superior Court of Cabarrus County.

The appeal was heard by the judge presiding at the June Term, 1937, of the Superior Court of Cabarrus County.

At said hearing it was ordered by the court that the proceeding be and it was remanded to the North Carolina Industrial Commission, with direction that said Commission make specific findings (1) as to whether the deceased or the gateman was the aggressor; (2) as to whether the gateman used excessive force in cutting the deceased, and causing his death, and (3) as to whether the action of the gateman was within the scope of his employment by the defendant, Brown Manufacturing Company.

From this order the defendants appealed to the Supreme Court, assigning error in the order.

W. S. Bogle and E. Johnston Ervin for plaintiff.
Guthrie, Pierce & Blakeney for defendants.

CONNOR, J. In proper cases, the judge of the Superior Court has the power to remand a proceeding for compensation under the North Carolina Workmen's Compensation Act, pending in the Superior Court on an appeal from the award of the North Carolina Industrial Commission, to said Commission for further hearing, before passing upon the award. Otherwise an injustice may be done, because of an inadvertence on the part of the Industrial Commission. See *Butts v. Montague Bros.*, 208 N. C., 186, 179 S. E., 799.

However where, as in the instant case, the Industrial Commission is directed by the court only to make specific findings as to matters which are manifestly immaterial, *Conrad v. Foundry Co.*, 198 N. C., 723, 153

S. E., 266, it is error for the judge to remand the proceeding to the Industrial Commission. The court should ordinarily consider and pass upon conclusions of law made by the Industrial Commission in support of its award, and accordingly affirm or reverse the award.

The order of the judge of the Superior Court in this case is reversed and set aside.

Error.

JOHN W. COLLINS AND EDWIN C. COLLINS, INDIVIDUALLY AND AS TRUSTEES, AND PLATO COLLINS, SR., v. LIZZIE WOOTEN, KATE STROUD, MAB STROUD, AND CLYDE STROUD, CHILDREN AND HEIRS AT LAW OF ANNIE STROUD, DECEASED, ET AL.

(Filed 3 November, 1937.)

1. **Judges § 2a—**

The constitutional requirement that a judge shall reside in the district for which he is elected confers no jurisdiction, and the resident judge, while not holding the courts of his district by assignment, exchange, or special commission, has jurisdiction of matters pending in his district only when expressly conferred by statute.

2. **Courts § 3—Where order of resident judge is void for want of jurisdiction, judge holding subsequent term may hear matter.**

Where the resident judge, while not holding courts in the district, approves the clerk's order allowing attorneys' fees in a special proceeding, another judge subsequently holding court in the county may hear an appeal from the clerk's order, the appeal not being from one Superior Court judge to another, since the order of approval is void for want of jurisdiction.

3. **Executors and Administrators § 29—**

Beneficiaries of an estate have a right to have a Superior Court judge, having jurisdiction, hear and determine their appeal from the clerk's order allowing attorneys' fees for services rendered in connection with the sale of lands to make assets and sale for division.

APPEAL by the defendants, Mrs. Mary Hill Manning, Mrs. Leah Hill Nunn, Nathan Hill and Norman Hill, from *Hamilton, Special Judge,* at August Term, 1937. From LENOIR. Error and remanded.

This was a special proceeding instituted by the plaintiffs before the clerk of the Superior Court of Lenoir County for the sale of certain lands belonging to the parties hereto as heirs at law of the late Nathan B. Wooten. After the death of Nathan B. Wooten, in a proceeding to sell his land for division, Allen W. Wooten, commissioner appointed by the court, sold and conveyed to H. W. Davis Lot No. 3 of said land and took as part payment for the purchase price four notes secured by trust

deed. The commissioner failed to collect said notes or to foreclose said deed of trust, and the same became barred by the statute of limitations. Jones and wife conveyed said tract of land to E. A. and J. R. Hardy. The plaintiffs procured quitclaim deeds from E. A. Hardy and wife and J. R. Hardy to them as trustees for the heirs of Nathan B. Wooten, and this proceeding was instituted for the purpose of selling the said land for division.

After the land had been sold and the sale confirmed, counsel for the plaintiffs filed a petition before the clerk for an allowance for attorneys' fees, setting forth in the petition that the plaintiffs have entered into a contract to pay said counsel 33 1-3 per cent of the full purchase price. Decree was entered, allowing plaintiffs' counsel $1,333.33 without notice to the defendants, and the order allowing attorneys' fees was on the same date, to wit, 3 July, 1937, approved and confirmed by Henry A. Grady, resident judge. On 13 July, 1937, certain of the defendants filed exceptions to said order and served notice of appeal. Thereupon the clerk voluntarily reduced the amount allowed to $1,000. When the cause came on to be heard in the Superior Court the judge found that the said order is an order of the resident judge and that the court was without authority to pass upon the exception of the defendants and dismissed the appeal. The above named defendants excepted and appealed.

Louis I. Rubin and Rouse & Rouse appearing herein on their own behalf as petitioners, appellees.

S. H. Newberry, for defendants, appellants.

BARNHILL, J. A judge of the Superior Court, when not holding the courts of the district of his residence by assignment under the statute, or by exchange, or under a special commission from the Governor, has jurisdiction in matters pending in his home district only when such jurisdiction is expressly conferred by statute. No jurisdiction is conferred upon the resident judge by the requirement of the Constitution that every judge of the Superior Court shall reside in the district for which he is elected. *Ward v. Agrillo,* 194 N. C., 321; *Howard v. Coach Co.,* 211 N. C., 329.

The approval by the resident judge of the order of the clerk allowing attorneys' fees neither added to nor subtracted from its legal effect. It remained essentially an order of the clerk. There is no statute conferring upon the resident judge the duty or authority to approve or disapprove orders made by a clerk allowing attorneys' fees in special proceedings. The appeal by the defendants from the order of the clerk as approved by the resident judge was not an appeal from one judge of the Superior Court to another. *Dail v. Hawkins,* 211 N. C., 283; *S. v.*

Lea, 203 N. C., 316, 166 S. E., 292; *Wellons v. Lassiter,* 200 N. C., 474, are not in point.

We are not called upon at this time to decide whether the clerk had the authority to allow counsel for the plaintiffs attorneys' fees for services rendered in this proceeding. Even if it be conceded that the clerk possessed such power the defendants are entitled to have their appeal heard and determined by the judge of the Superior Court having jurisdiction thereof.

There was error in the judgment, and the cause is remanded for a hearing upon defendants' appeal.

Error and remanded.

STATE v. EARL MILLER.

(Filed 3 November, 1937.)

Receiving Stolen Goods §§ 2, 7—Charge that defendant would have guilty knowledge if he reasonably believed or knew goods to be stolen held error.

Guilty knowledge is an essential element of the offense defined by C. S., 4250, and while such knowledge may be implied or inferred by the jury from the facts and circumstances, it is error for the court to instruct the jury to the effect that defendant would have knowledge within the meaning of the statute if he received the goods under circumstances "such as to cause defendant to reasonably believe or know" that the property had been stolen, "reasonable belief" and "implied knowledge" not being synonymous.

APPEAL by defendant from *Pless, J.,* at May Term, 1937, of ROWAN. New trial.

Attorney-General Seawell for the State.

Woodson & Woodson, P. S. Carlton, A. A. Whitener and George R. Uzzell for defendant, appellant.

SCHENCK, J. The appellant was convicted upon a bill of indictment charging that Earl Miller ". . . 2 cases of Camel cigarettes, 2 cases of Chesterfield cigarettes of the value of two hundred and five dollars aforesaid, of the goods, chattels and moneys of the said Jake Rendleman before then feloniously stolen, taken and carried away, feloniously did receive and have . . . the said Earl Miller . . . then and there well knowing said goods, chattels and moneys to have been feloniously stolen, taken and carried away, contrary to the form of the statute in such cases made and provided."

The appellant assigns as error the following excerpt from the charge: "The term 'knowledge,' gentlemen of the jury, is not so limited in its scope as to mean that a defendant must know to the extent of actually having seen the property stolen, but it means, gentlemen of the jury, that if the facts, the circumstances and the surroundings of the transactions at the time the property is received are such as to cause the *defendant to reasonably believe or know* that the property was stolen, then, gentlemen of the jury, that would constitute knowledge within the purview and intent of the statute. *Using that as a definition,* gentlemen of the jury, if you shall find and find beyond a reasonable doubt, the burden being on the State to prove it, that the defendant, Earl Miller, received cigarettes which had theretofore been stolen from Jake Rendleman, the prosecuting witness, and you further find beyond a reasonable doubt that at the time of so doing he knew that the same had theretofore been stolen, then, gentlemen of the jury, the court instructs you that it would be your duty to render a verdict of guilty of receiving stolen property." We are constrained to sustain this assignment of error.

C. S., 4250, under which the bill of indictment was drawn, provides that the person charged shall receive the stolen goods "knowing the same to have been feloniously stolen or taken," thereby making guilty knowledge one of the essential elements of the offense, which the law requires to be proven beyond a reasonable doubt as a condition precedent to conviction.

S. v. Stathos, 208 N. C., 456, does not sustain his Honor's charge. In that case it is said: "This knowledge may be actual or it *may* be implied when the circumstances under which the goods were received were sufficient to lead the party charged to believe they were stolen. However, while it is true that it is not necessary that the person from whom the goods are received shall state to the person charged that the goods were stolen, and while the guilty knowledge of the person charged may be inferred from the circumstances of the receipt of the goods, still it is necessary to establish either actual or implied knowledge on the part of the person charged of the fact that the goods were stolen." It will be noted that the opinion uses the expression "may be implied" and not "will be implied." In other words, "when the circumstances under which the goods were received were sufficient to lead the party charged to believe they were stolen," the jury may find that he received the goods "knowing the same to have been feloniously stolen," but it is not mandatory that the jury so find under such circumstances. *S. v. Spaulding,* 211 N. C., 63. "To reasonably believe" and "to know" are not interchangeable terms. While the latter may be implied or inferred from circumstances establishing the former, it does not follow that reasonable belief and implied knowledge are synonymous. The State must

establish that the defendant received the goods "knowing the same to have been feloniously stolen or taken," and this is not necessarily accomplished by establishing the existence of circumstances "such as to cause the defendant to reasonably believe" the goods were stolen. Knowledge connotes a more certain and definite mental attitude than reasonable belief, and whether knowledge is implied from circumstances sufficient to establish reasonable belief is a question for the jury. "Where the defendant in a criminal action is charged with a statutory crime, it is incumbent on the State to satisfy the jury beyond a reasonable doubt, by the evidence, of all the facts which constitute the crime as defined by the statute." *S. v. Folger,* 211 N. C., 695.

For the error assigned the defendant is entitled to a new trial, and it is so ordered.

New trial.

WILLIAM T. DIXON AND E. P. DIXON, SURVIVING PARTNERS OF D. V. DIXON & SON, A PARTNERSHIP, v. B. F. IPOCK, DR. ZEB V. MOSELEY, AND MRS. REID C. MOSELEY.

(Filed 3 November, 1937.)

1. Laborers' and Materialmen's Liens § 5a—

In an action against the owner to enforce a materialman's lien, a demurrer should be sustained when the complaint fails to allege that at the time of giving notice there was money due the contractor by the owner, the statutory lien being available only before the owner shall have paid the contractor. C. S., 2437, 2438, 2440.

2. Same—

While the burden of proof is upon the owner to show that at the time of notice to him there was nothing due by him to the contractor, where the evidence affirmatively shows that there was nothing due, the owner's motion to nonsuit is properly granted.

APPEAL by plaintiffs from *Sinclair, J.,* at May Term, 1937, of LENOIR. Judgment affirmed.

Action to enforce lien for materials furnished to the contractor for a building being erected on land of defendants Moseley.

Plaintiffs alleged that during the year 1936 defendants Moseley contracted with defendant Ipock to erect a building on described lands, Ipock to furnish all labor and materials; that plaintiffs sold and delivered to said Ipock certain building materials which were used in said building, and that there is a balance due plaintiffs of $516.21; that on 15 July, 1936, notice of these facts was served on defendants Moseley, and they were notified to retain, out of the amount due said Ipock

under the contract, the amount due plaintiffs for the materials furnished; that material furnisher's lien was duly filed 30 July, 1936. Defendants Moseley answered admitting that they contracted with defendant Ipock to construct a building for them on defendants' land, and that the contractor purchased certain materials from plaintiffs, but that at the time notice was given them of plaintiffs' claim they were not indebted to the contractor in any amount, that they had overpaid him; that when the materials were furnished defendants advised plaintiffs of the terms of the contract, that there was nothing due the contractor, and that they would not be responsible for materials furnished him.

Plaintiffs offered in evidence the contract between defendants Moseley and Ipock, showing that the contract price was $4,958.59, and that payments thereon were due as follows:

"(1) When foundation and basement walls are completed, $540.00; (2) when framing and sheathing is completed, $760.00; (3) when roofing and face brick work and rough wiring, plastering, windows, basement floor and tile work is completed, $1,520; (4) when interior trim is completed, $540.00; (5) the balance when the building is completed and accepted, $1,598.59."

Plaintiffs also offered evidence tending to show the delivery by plaintiffs of building materials for the erection of defendants' building of the value alleged, and that at the time notice was given defendants, Ipock had practically quit the job. Plaintiffs offered defendant Ipock as a witness, who testified that on the contract price of $4,958.59 defendant Moseley paid him $2,000; that he did not complete the job; that this was due to disagreement between him and defendants Moseley; that he did none of the interior trim of the building, and did not finish roofing, face brick work, plastering, windows, etc. The basement floor was finished and rough wiring done. The plastering was done except some cement work. "It was between last of June to the first or middle of July I quit work on the job." The last money defendants paid was to plasterers.

Defendants demurred *ore tenus* to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

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

Charles F. Rouse for plaintiffs, appellants.
Allen & Allen for defendants, appellees.

DEVIN, J. An examination of the complaint would seem to justify defendants' demurrer *ore tenus* interposed in the court below and in this

Court, for it is nowhere alleged that at the time the notice of materialman's claim was given defendants there was anything due the contractor. The remedies by statutory liens, authorized by sections 2437, 2438, 2440, and 2442 of the Consolidated Statutes, under which plaintiffs' lien was filed and this action brought, are available only "before the owner shall have paid the contractor." *Rose v. Davis,* 188 N. C., 355, 124 S. E., 576.

While upon the question whether at the time of notice to owner there is anything due the contractor, the burden of proof is upon the owner (*Lumber Co. v. Hayworth,* 205 N. C., 585, 172 S. E., 194), the evidence in this case shows affirmatively that there was nothing due, and hence, under the statutes, plaintiffs' claim against the owners, the defendants Moseley, failed, and judgment of nonsuit was properly entered.

Judgment affirmed.

MRS. PINKNEY TOMLIN NEELY, WIDOW, AND DEPENDENTS OF WILLIAM LLOYD NEELY, DECEASED, v. CITY OF STATESVILLE AND THE TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 3 November, 1937.)

Master and Servant § 40d—

Death of a fireman from heart failure brought on by excitement and exhaustion in fighting a fire, is not the result of an accident within the meaning of the Workmen's Compensation Act, C. S., 8081 (i, subsec. f), heat, smoke, excitement, and physical exertion being the ordinary and expected incidents of the employment.

APPEAL by plaintiff from *Rousseau, J.,* at August Term, 1937, of IREDELL.

Proceeding under North Carolina Workmen's Compensation Act to determine liability of defendants to widow of William Lloyd Neely, deceased, employee.

The deceased was chief of the fire department of the city of Statesville. On 15 November, 1936, about noon, the fire department was called to the home of G. E. French to extinguish fire which was burning in the roof above the attic and the third floor. On arriving at the place of the fire, deceased, assisted by J. R. Benfield, working rapidly, pulled approximately 700 feet of fire hose from a truck. This hose weighed 75 to 80 pounds per length of 50 feet. This was the customary and ordinary method of handling the hose under the circumstances. When the truck could not pull the hose up to the house, the men did it. The deceased rushed into the burning building, went up two flights of stairs,

ran up one, and then up into the attic. The fire was burning very rapidly. There he assisted in pulling a section of hose filled with water and under pressure through a window. He remained there for some 10 or 15 minutes. During that time he was assisting and directing others in fighting the fire. The smoke was very dense and the heat intense, and almost unbearable. Frequently the men had to seek fresh air. The roof of that particular part of the burning building fell in. Then the deceased came out of the attic to a landing at head of stairway. A short time thereafter he collapsed and fell on the stairway and died within a few minutes.

The deceased was and had been for more than two years a sufferer from a chronic cardiac condition. There was considerable excitement incident to the fire. The medical testimony was to the effect that the excitement, the unloading of the hose in a hurried manner, running up the steps and fighting the fire aggravated the condition with which deceased was suffering and accelerated his death; that the proximate cause of his death was excitement, exhaustion, and heart failure.

The Commissioner who heard the case awarded compensation. On appeal to Full Commission the award was affirmed.

On appeal to the Superior Court the award was reversed. From adverse judgment in accordance with decision of the court below the claimant appealed to the Supreme Court and assigned error.

Jack Joyner and W. R. Battley for plaintiffs, appellants.
Sapp & Sapp for defendants, appellees.

WINBORNE, J. The sole question on this appeal is: Did the death of William Lloyd Neely result from "injury by accident" within the meaning of the North Carolina Workmen's Compensation Act? We think not.

There is no controversy as to the fact that the death arose out of and in the course of the employment. Hence, inquiry is as to what is such "injury by accident." C. S., 8081 (i, subsec. f). The meaning of that term is clearly and fully discussed and treated by *Stacy, C. J.*, in the case of *Slade v. Hosiery Mills,* 209 N. C., 823, 184 S. E., 844. The fact situation of that case is on almost "all-fours" with the instant case. The decision there controls here.

The work in which the deceased was engaged was the usual work incident to his employment. The surrounding conditions might be expected at a fire. The falling in of the roof is a natural result of fire burning there. Heat and smoke are expected. Physical exertion is required in handling the hose and fire-fighting equipment. The firemen, of neces-

sity, act hurriedly. We find no evidence of an accident. "There must be an accident followed by an injury by such accident which results in harm to the employee before it is compensable under our statute." *Slade v. Hosiery Mills, supra.*

Judgment below is

Affirmed.

R. T. ALLEN v. THOMAS F. HEWITT.

(Filed 3 November, 1937.)

1. **Wills § 31—**

The terms "loan" and "lend," when used in a will, are to be interpreted as "give" or "devise," unless it is manifest that the testator intended otherwise.

2. **Wills § 33b—**

A devise to one for life with limitation over to his heirs in fee conveys a fee simple under the rule in *Shelley's case*, which is a rule of law and not of construction, and the rule applies when the intent is apparent to convey the fee in remainder to the heirs, and is unaffected by a further limitation over.

3. **Same—Rule in Shelley's case held applicable to devise in question.**

A devise to F. "for his use and benefit during his natural life and at his death to go to his heirs in fee simple forever; and I further will and direct that the said land . . . shall return into and make a part of the surplus of my estate to be disposed of by my executor as directed in my will" *is held* to convey the fee simple to F. by operation of the rule in *Shelley's case*, and the subsequent provision that the lands should return into the estate, to be disposed of by the executor as directed, is void as being repugnant to the fee.

APPEAL by defendant from *Hamilton, Special Judge,* at August Term, 1937, of LENOIR. Affirmed.

This is an action to recover upon an agreement of purchase and sale of a certain tract of land described in the pleadings. The defendant admitted the agreement, but alleged that the plaintiff did not own said land in fee and could not comply with his contract to convey in fee simple. On motion of the plaintiff, judgment was entered upon the pleadings in favor of the plaintiff and against the defendant and the defendant appealed.

Matt H. Allen for plaintiff, appellee.

R. F. Hoke Pollock for defendant, appellant.

BARNHILL, J. The plaintiff derived such title as he possessed by *mesne* conveyances from Elijah LaFayette Franck. The quality of the

title of Elijah LaFayette Franck depends upon the interpretation of the language contained in the codicil to the will of John M. Franck as follows: "Whereas, I, John M. Franck, have made my last will and testament in writing, bearing date the .....day of ....., and have thereby made sundry devises and bequests according to the then existing circumstances of my estate, but circumstances having now materially changed, I do by this writing which I hereby declare to be a codicil to my said will to be taken and construed as a part thereof. In consideration of love and affection do hereby will and direct that a certain tract of land lying on the west side of public road (then proceeds to describe) containing by estimation 25 acres, more or less, which in my will was devised to my two daughters, Leah J. Franck and Sybil Franck, that said tract of land is hereby loaned to my son Elijah LaFayette Franck for his use and benefit during his natural life and at his death to go to his heirs in fee simple forever; and I further will and direct that the said 25 acres of land taken out of the legacies to my two daughters shall return into and make a part of the surplus of my estate to be disposed of by my executor as directed in my said will and testament of which this codicil is hereby declared to be a part."

It is admitted that this appeal turns upon an interpretation of the gift to Elijah LaFayette Franck, and that if he acquired a fee under the terms of said will the judgment should be affirmed.

The terms "loan" and "lend" when used in a will are given the interpretation of the words "give" and "devise" unless it is manifest that the testator intended otherwise. *Sessoms v. Sessoms,* 144 N. C., 121, citing *Cox v. Marks,* 27 N. C., 361; *King v. Utley,* 85 N. C., 59; *Robeson v. Moore,* 168 N. C., 388; *Waller v. Brown,* 197 N. C., 508.

A devise to one for life with limitation over to his heirs in fee simple conveys a fee simple under the rule in *Shelley's case.*

It is established by repeated decisions of this Court that the rule in *Shelley's case* is still recognized in this jurisdiction, and where the same obtains it does so as a rule of property without regard to the intent of the grantor or devisor. *Jones v. Whichard,* 163 N. C., 241; *Price v. Griffin,* 150 N. C., 523; *Edgerton v. Aycock,* 123 N. C., 134; *Chamblee v. Broughton,* 120 N. C., 170; *Starnes v. Hill,* 112 N. C., 1; *Bank v. Dortch,* 186 N. C., 510; *Wallace v. Wallace,* 181 N. C., 158; *Hampton v. Griggs,* 184 N. C., 13. In *Hampton v. Griggs, supra,* it is said by the present Chief Justice: "It is further conceded by practically all the authorities that the rule in question is one of law and not one of construction, and that at times it overrides even the expressed intention of the grantor or that of the testator, as the case may be, but when this is said it should be understood as meaning that only the particular intent is sacrificed to the general or paramount intent. It is not the estate

which the ancestor takes that is to be considered so much as it is the estate intended to be given to the heirs. As said in *Baker v. Scott,* 62 Ill., 88: 'It has frequently been adjudged that though an estate be devised to a man for his life, or for his life *et non aliter,* or with any other restrictive expressions, yet if there be afterward added apt and proper words to create an estate of inheritance in his heirs, or the heirs of his body, the extensive force of the latter words should overbalance the strictness of the former and make him tenant in tail or in fee. The true question of intent would turn not upon the quantity of estate intended to be given the ancestor, but upon the nature of the estate intended to be given to the heirs of his body.' "

The subsequent provision attached to the gift that the same should return into and make a part of the surplus of the testator's estate is repugnant to the gift in fee and is inoperative. *Barco v. Owens, ante,* 30, and cases there cited. The plaintiff is the owner of the tract of land described in the pleadings in fee and the judgment below is

Affirmed.

JOSEPH A. RINGGOLD v. T. E. LAND.

(Filed 3 November, 1937.)

1. **Libel and Slander § 3—Words held actionable per quod and not per se.**

Allegations that defendant, in the presence of others, charged plaintiff with being dishonest and with getting goods and then not paying for them, and that defendant used other abusive and insulting language, are insufficient to charge words actionable *per se,* since words are actionable *per se* only when they charge a crime or indictable offense involving moral turpitude, or punishable by imprisonment.

2. **Libel and Slander § 9—Held: Complaint alleging words actionable per quod without allegation of special damages is demurrable.**

Where the complaint alleges words actionable only *per quod* and that plaintiff suffered great humiliation and was damaged in his good name and reputation as a direct result thereof, defendant's demurrer thereto should be sustained, it being required of plaintiff in such instance to allege special damages, which are damages accruing to the particular individual by reason of the particular circumstances of the case, and injury to feelings and reputation being general damages, which might accrue to any person similarly injured.

APPEAL by defendant from *Cranmer, J.,* at May Term, 1937, of CRAVEN. Reversed.

Abernethy & Abernethy for plaintiff, appellee.
W. B. R. Guion for defendant, appellant.

SCHENCK, J. The defendant demurred to the complaint for that it failed to allege a cause of action. The demurrer was overruled and the defendant reserved exception and appealed to the Supreme Court.

The pertinent portion of the complaint reads:

"3. That on 10 September, 1936, at 3:30 p. m. the plaintiff was riding in a car driven by LeRoy Smith. The car stopped in front of the store of the defendant, T. E. Land, at 26 Middle Street. Upon stopping the car the defendant, T. E. Land, came up to the car and started a conversation with the plaintiff, in the presence of others in the car, and spoke of and concerning the plaintiff the following false, malicious and slanderous words:

" 'When are you coming to see me?'

" 'Most any time,' answered the plaintiff.

"The defendant continued, 'I thought you were a preacher.'

"The plaintiff answered, 'Is that anything against me?'

"The defendant continued, 'There is no use to lie or to tell a damn lie. You owe me $8.00.'

"The plaintiff answered, 'I only owe you $7.00. I paid you $1.00.'

"The defendant continued, 'You are a damn common and dishonest man who gets a man's goods and not pay for them.'

"Then the defendant continued his abuse and stuck his head in the car in a menacing and threatening manner and said the following false, malicious and slanderous words, in the presence of many divers persons as follows:

" 'You are a common d—s—o—b—. You can take it or not.'

"The plaintiff answered, 'I do not intend to take it.'

"In order to prevent further difficulty and to prevent an assault on the plaintiff the driver of the car drove away while the said defendant continued to abuse and vilify the plaintiff herein. That the words set out in the previous allegation caused great embarrassment and humiliation to the plaintiff and that the uttering of the said false, malicious and slanderous words has greatly humiliated and embarrassed the plaintiff, and has had a tendency to lower him in the esteem of his fellow men and cause him great mental suffering and great and lasting damage.

"4. That as a result of the false, wanton, malicious and slanderous words so uttered and published in a public place before many and divers persons there assembled, by the defendant of and concerning the plaintiff, the plaintiff has been greatly damaged in his good name and reputation, and has been humiliated to his great and lasting damage in the amount of $5,000."

The language charged to have been uttered by the defendant did not impute to the plaintiff an indictable or criminal offense involving moral

turpitude or punishable by imprisonment, therefore the alleged utterances were not slanderous *per se*. *Barnes v. Crawford,* 115 N. C., 76; *Crawford v. Barnes,* 118 N. C., 912. "The principle seems to be well established in relation to the action of slander that the words spoken should contain an express imputation of some crime liable to punishment, some capital offense, or other infamous crime, or misdemeanor. Words which convey only the imputation of an imperfect sense or practice of moral virtue, duty, or obligation are not sufficient to support the action. The crime charged, too, must be such as is punishable by the common or statute law, for if it be only a matter of spiritual cognizance it is not, according to the authorities, actionable to charge it. Cro. Eliz., 205; Salk., 696; 6 Term., 694." *Eure v. Odom,* 9 N. C., 52. "The use of mere abusive epithets by defendant, and by him spoken of or to the plaintiff, is not actionable." *Idol v. Jones,* 13 N. C., 162.

Since the alleged utterances were not slanderous *per se,* the demurrer must be sustained for the reason that there is no allegation in the complaint of special damages, which is necessary where the alleged utterances are only slanderous *per quod.* "The difference between the two is that if actionable *per se,* malice and damage are conclusively presumed, but if actionable only *per quod,* both malice and special damages must be alleged and proved." *Oates v. Trust Co.,* 205 N. C., 14; *Payne v. Thomas,* 176 N. C., 401.

"Special damages are those which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions. Hence general damages are such as might accrue to any person similarly injured, while special damages are such as did in fact accrue to the particular individual by reason of the particular circumstances of the case." Black's Law Dictionary, 2d Ed., pp. 314-15, and authorities there cited.

"Actual damages are synonymous with compensatory damages and with general damages. *Newell, supra* (Newell on Slander and Libel), 839; 18 Am. & Eng. Ency. (2d Ed.), 1081, *et seq.* Damages for mental suffering are actual or compensatory. They are not special nor punitive, and are given to indemnify the plaintiff for the injury suffered. 1 Am. & Eng. Ency. (2d Ed.), 602. The law infers actual or compensatory damages for injury to the feelings and reputation of the plaintiff from a libel calculated to humiliate him or injure his reputation or character." *Osborn v. Leach,* 135 N. C., 628.

The demurrer is sustained, and the judgment below is

Reversed.

FLORA E. PUGH v. THE PRUDENTIAL INSURANCE COMPANY.

(Filed 3 November, 1937.)

Insurance § 31a—Where application denominates answers declarations in lieu of medical examination, such answers come within purview of C. S., 6460.

In the application for the policy in suit, which was issued without a medical examination, insured answered a number of questions under the heading "Declarations in Lieu of Medical Examination," including questions as to whether applicant had been attended by a physician during the prior three years and as to time lost from work through illness during that period. Insurer contended that the answers to these two questions constituted material misrepresentations which did not relate to the physical condition of applicant, and that therefore insurer was entitled to avoid the policy without showing fraud. *Held:* The answers to the questions were denominated by insurer declarations made in lieu of medical examination, and therefore come within the purview of C. S., 6460, and under the provisions of the statute insurer is not entitled to cancellation of the policy in the absence of fraud.

APPEAL by defendant from *Alley, J.*, at February Special Term, 1937, of RANDOLPH.

Civil action to recover on a policy of life insurance.

On 19 November, 1934, the defendant issued a $1,000 policy of insurance on the life of Mattie Marguerite York, payable to plaintiff as beneficiary. The policy was issued and delivered without medical examination of the insured under authority of C. S., 6460. The insured died 28 January, 1935, and it is admitted that all premiums were duly paid thereon.

In the written application a large number of questions were answered by the insured under the heading: "Declarations in Lieu of Medical Examination."

Defendant alleges that many of these answers were "misrepresentations as to the physical condition of the applicant," fraudulently made, which render the policy void; and further, that at least two of them—first, as to whether she had been "attended by a physician in the past three years," and second, as to the amount of time she had "lost from work through illness during the last three years"—were material to the risk, did not relate to her physical condition, were false, and therefore vitiate the policy.

The jury found that the defendant had not been induced to issue and deliver the policy "by reason of any false and fraudulent misrepresentation."

From judgment on the verdict defendant appeals, assigning errors.

J. V. Wilson and Moser & Miller for plaintiff, appellee.
J. A. Spence for defendant, appellant.

STACY, C. J. It is freely conceded by the defendant that as the policy in suit does not exceed $5,000 and was issued without medical examination of the insured, it can take no advantage of "any misrepresentation as to the physical condition of the applicant," in the absence of fraud. C. S., 6460; *Eckard v. Ins. Co.*, 210 N. C., 130, 185 S. E., 671; *Headen v. Ins. Co.*, 206 N. C., 270, 173 S. E., 349; *Potts v. Ins. Co.*, 206 N. C., 257, 174 S. E., 123; *Holbrook v. Ins. Co.*, 196 N. C., 333, 145 S. E., 609.

The position of the defendant is that the policy is void because of representations, falsely made, which do not relate to the physical condition of the applicant, but which were material to the risk, to wit, the one pertaining to the attendance of a physician, and the other to the amount of time lost from work through illness during the last three years. *Inman v. Woodmen of the World*, 211 N. C., 179, 189 S. E., 496; *Potts v. Ins. Co., supra.* Compare *Anthony v. Protective Union*, 206 N. C., 7, 173 S. E., 6.

Without making definite ruling as to whether the representations in question relate directly or indirectly to the physical condition of the applicant, we think it proper to hold that as they were "declarations in lieu of medical examination," made at the instance of the defendant, they should be regarded as coming within the purview of C. S., 6460.

In this view of the case it follows that the verdict and judgment should be upheld, which will accordingly be done.

No error.

HERBERT K. ADAMS v. HALLIE MAE ADAMS (ORIGINAL PARTY DEFENDANT) AND T. K. ADAMS, BRANCH BANKING & TRUST COMPANY OF FAISON, AND BRANCH BANKING & TRUST COMPANY OF WARSAW (ADDITIONAL PARTIES DEFENDANT).

(Filed 3 November, 1937.)

Divorce § 13—

In the husband's suit for divorce, in which the wife files answer demanding alimony *pendente lite* and alimony without divorce, it is error for the court, upon the hearing for alimony *pendente lite*, C. S., 1666, to issue an order for alimony without divorce under C. S., 1667.

APPEAL by plaintiff from *Grady, J.*, at Chambers, from DUPLIN.

Action for divorce on alleged abandonment and two years separation.

Plaintiff alleged that he and defendant were married on 12 May, 1918; that on 19 October, 1931, the defendant without cause willfully abandoned plaintiff and has since lived separate and apart from him, and that he has been a resident of the State for more than two years next preceding the institution of this action.

Defendant filed answer in which she admitted marriage on 12 May, 1918, and that plaintiff had resided in the State, but denied abandonment. As further defense and cross action defendant alleged that plaintiff on numerous occasions had willfully and without cause abandoned the defendant and the four minor children of their marriage, and failed, neglected and refused to provide the necessary subsistence for her and for them in accordance with his means and condition in life; that defendant is without means to provide reasonable subsistence for herself and children pending the action and to defend the same; that the plaintiff is "a man of property," owning certain valuable real and personal property. She thereupon prays that plaintiff's action for divorce be dismissed and that she be awarded custody of the children and alimony without divorce, alimony *pendente lite,* and allowance for reasonable attorney's fees.

From order dated 3 June, 1937, plaintiff appeals to the Supreme Court and assigns error.

J. D. Johnson, Jr., for plaintiff, appellant.
Butler & Butler for defendant Hallie Mae Adams, appellee.

WINBORNE, J. The order to which this appeal relates was made under C. S., 1667, and is in error. *Dawson v. Dawson,* 211 N. C., 453, 190 S. E., 749. The same is stricken out. The cause is remanded to the end that the facts may be found and further proceedings had under C. S., 1666.

Error and remanded.

R. E. CAYTON v. G. A. CLARK AND MASON HOWARD.

(Filed 3 November, 1937.)

Judgments § 23—

A denial of a motion to set aside a judgment under C. S., 600, will not be disturbed on appeal when there is neither allegation nor finding of a meritorious defense, and the Supreme Court will not consider affidavits for the purpose of finding facts in motions of this sort.

APPEAL by defendant, Mason Howard, from *Cranmer, J.,* at May Term, 1937, of PITT.

Motion made under C. S., 600, to vacate judgment on ground of excusable neglect.

The case was tried at the April Term, 1937, of Pitt Superior Court, in the absence of the defendant and his then counsel (he is now represented by other counsel), albeit the case was regularly set as the first on the calendar for Monday, 19 April, and continued until late in the afternoon of that day to await the arrival of defendant's counsel who lived in Kinston, a distance of thirty miles from Greenville, but who failed to appear.

The judge found the facts relative to defendant's alleged excusable neglect and denied the motion. Defendant appeals.

Roberts & Williford for plaintiff, appellee.
John G. Dawson for defendant, appellant.

STACY, C. J. Even if it be conceded that upon the facts found by the judge the question of excusable neglect may fairly be debatable under the decision in *Sutherland v. McLean,* 199 N. C., 345, 154 S. E., 662 (delimited in *Carter v. Anderson,* 208 N. C., 529, 181 S. E., 750; *Kerr v. Bank,* 205 N. C., 410, 171 S. E., 367, and *Dail v. Hawkins,* 211 N. C., 283, 189 S. E., 774), still the judgment would seem to be correct as there is neither allegation nor finding of any meritorious defense. This is fatal to appellant's case. *Bowie v. Tucker,* 197 N. C., 671, 150 S. E., 200; *Bank v. Duke,* 187 N. C., 386, 122 S. E., 1; *Land Co. v. Wooten,* 177 N. C., 248, 98 S. E., 706; *School v. Peirce,* 163 N. C., 424, 79 S. E., 687; *McLeod v. Gooch,* 162 N. C., 122, 78 S. E., 4; *Hardware Co. v. Buhmann,* 159 N. C., 511, 75 S. E., 731; *Norton v. McLaurin,* 125 N. C., 185, 34 S. E., 269; *Taylor v. Gentry,* 192 N. C., 503, 135 S. E., 327; *Albertson v. Terry,* 108 N. C., 75, 12 S. E., 892. "We do not consider affidavits for the purpose of finding facts ourselves in motions of this sort." *Gardiner v. May,* 172 N. C., 192, 89 S. E., 955; *Holcomb v. Holcomb,* 192 N. C., 504, 135 S. E., 287.

It would be idle to vacate a judgment where there is no real or substantial defense on the merits. *Lumber Co. v. Cottingham,* 173 N. C., 323, 92 S. E., 9; *Land Co. v. Wooten, supra.* "Unless the court can now see reasonably that defendants had a good defense, or that they could make a defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside?"—*Brown, J.,* in *Glisson v. Glisson,* 153 N. C., 185, 69 S. E., 55. "One who asks to be relieved from a judgment on the ground of excusable neglect must show merit, as otherwise the court would be asked to do the vain thing of setting aside a judgment when it would be its duty to enter again the same judgment on motion of the adverse party"—*Allen, J.,* in *Crumpler v. Hines,* 174 N. C., 283, 93 S. E., 780.

A party who seeks to be relieved from a judgment on the ground of excusable neglect or irregularity must show merit, otherwise the court would be engaged in the vain procedure of setting aside a judgment, when, if there be no defense, it would be its duty to enter the same judgment again on motion of the adverse party. *Woody v. Privett,* 199 N. C., 378, 154 S. E., 625; *Taylor v. Gentry, supra; Duffer v. Brunson,* 188 N. C., 789, 125 S. E., 619.

Affirmed.

VIRGINIA FARROW, BY HER NEXT FRIEND, RANDOLPH FARROW, v. RICHARD WHITE AND L. S. POWELL.

(Filed 3 November, 1937.)

Automobiles § 18h: Trial § 29b—

Where there is no allegation or evidence that defendant driver failed to give a warning signal required of him by the statute under the circumstances, it is error for the court to charge the law requiring the giving of such signal, since the court is required to charge the law arising upon the evidence, C. S., 564.

APPEAL by defendants from *Sinclair, J.,* at May Term, 1937, of LENOIR. New trial.

William A. Evans and Charles F. Rouse for plaintiff, appellee.
J. A. Jones for defendants, appellants.

SCHENCK, J. This is an action to recover damages for personal injuries to the plaintiff alleged to have been proximately caused by the negligence of the defendants in striking the plaintiff with an automobile operated on a public highway while the plaintiff was a pedestrian thereon.

The complaint alleges that "the defendants were negligent in the operation of said car which caused the injuries to the plaintiff in the following respects: (a) That while traveling along State Highway No. 11 on a straight strip of said road and at a time when there was no other vehicular traffic thereupon, deliberately, or without any regard to the rights and safety of the general public, and particularly the plaintiff, Virginia Farrow, who was walking on said road at said time, operated their said automobile on the left-hand side thereof as they were proceeding and on the wrong side of said road as regards the defendants, and on the left-hand side of the center of said road as the plaintiff was walking, which was the proper and legal side for her to walk upon, and struck and injured the plaintiff as hereinbefore set forth."

The appellant assigns as error the following excerpt from the charge: "Here is the law in this State applied to driving upon the highway approaching pedestrians going in front of a car. The law requires every person operating an automobile upon the public highway to use that degree of care that a reasonably careful person would use under like or similar circumstances to prevent injury or death to persons on or traveling over, upon or across such highway, and any person so operating an automobile when approaching a pedestrian who is upon the traveled part of the highway and not upon the sidewalk shall slow down and give timely signal with his bell, horn or other device for signaling, and the failure of such person so operating such motor vehicle so to do is negligence."

This assignment of error must be sustained since there is no allegation in the complaint and no evidence in the record that the defendants failed to give a timely signal with bell, horn or other device for signaling. There is no mention in the complaint or in the evidence of any signal, or any failure to give a signal. The judge "shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." C. S., 564.

For the error assigned the defendants are entitled to a new trial, and it is so ordered.

New trial.

D. S. WILLIAMSON, ADMINISTRATOR, ET AL. v. PILOT LIFE INSURANCE COMPANY.

(Filed 3 November, 1937.)

Insurance § 30c—Insurer may not contradict recital of payment in policy for purpose of declaring forfeiture for nonpayment.

Where a policy in the hands of the beneficiary recites that the first annual premium is to be paid before delivery, insurer may not show that the policy was delivered upon payment of an initial semiannual premium for the purpose of declaring a forfeiture for nonpayment of the second semiannual premium, the recitation in the policy being conclusive, in the absence of fraud, on the question of forfeiture, although it is only *prima facie* evidence of payment and rebuttable on the question of the recovery of the balance of the premium.

APPEAL by plaintiffs from *Sinclair, J.*, at January Term, 1937, of DUPLIN.

Civil action to recover on a $1,000 policy of life insurance.

The policy in suit was issued 14 December, 1934, on the life of Lewis Cass Houston, a minor twelve years of age. His mother, Elsa B. Far-

rior, was named beneficiary therein, and she was given control of the policy during the minority of the insured.

The policy contains the following recital:

"Premium: Twenty-three and 40-100 Dollars to be paid on or before the delivery of this Policy, and annually thereafter on or before the fourteenth day of December in each year during the continuance of this Policy until twenty full years' regular premiums in all shall have been paid."

It is admitted that the insured and his mother both died on 1 September, 1935. The policy was in the possession of the beneficiary at the time of her death.

Over objection, the defendant was allowed to offer evidence tending to show that at the time of the delivery of the policy only a semiannual payment of $12.16 was collected, and the official receipt returned to the defendant with notation, "Change to Semi-An." Semiannual receipt was sent to defendant's agent, but he never delivered it to the beneficiary or to the assured. The agent's reason for not delivering the semiannual receipt was, "I had already delivered the policy." Thereafter defendant mailed Elsa B. Farrior notice of semiannual premium due 14 June, 1935. This was not paid.

From judgment of nonsuit, entered at the close of all the evidence, plaintiff appeals, assigning errors.

Robert C. Wells and Rivers D. Johnson for plaintiffs, appellants.

Smith, Wharton & Hudgins and Beasley & Stevens for defendant, appellee.

STACY, C. J. The theory of the nonsuit is that the policy lapsed for nonpayment of semiannual premium of $12.16 due 14 June, 1935. Nevertheless the policy recites payment of $23.40, annual premium, before unconditional delivery, which, on its face, is sufficient to keep the policy in force until 14 December, 1935. This defeats the motion to nonsuit. *Ferrell v. Ins. Co.*, 208 N. C., 420, 181 S. E., 327, *S. c.*, 207 N. C., 51, 175 S. E., 692; *Green v. Casualty Co.*, 203 N. C., 767, 167 S. E., 38.

The authorities are to the effect that a recital of payment in a policy of insurance, unconditionally delivered, may not be contradicted to work a forfeiture of the policy, or to defeat a recovery thereon, in the absence of an allegation of fraud. *Grier v. Ins. Co.*, 132 N. C., 542, 44 S. E., 28. To this extent it is contractual and binding upon the parties. *Britton v. Ins. Co.*, 165 N. C., 149, 80 S. E., 1072. Compare *Smith v. Land Bank, ante*, 79.

"If the premium in fact is not paid, the acknowledgment of payment, so far as it is a receipt for money, is only *prima facie*, and the amount

can be recovered; but so far as the acknowledgment is contractual, it cannot be contradicted so as to invalidate the policy"—*Clark, C. J.*, in *Grier v. Ins. Co., supra.* See *Kendrick v. Ins. Co.*, 124 N. C., 315, 32 S. E., 728; 70 A. S. R., 592; *Harper v. Dail*, 92 N. C., 394; *Bank v. Robertson*, 210 N. C., 436, 187 S. E., 575; *Pate v. Gaitley*, 183 N. C., 262, 111 S. E., 339; *Ins. Co. v. Morehead*, 209 N. C., 174, 183 S. E., 606.

The *Britton case, supra,* is directly in point and decisive of the present appeal. As said by *Brown, J.*, in that case: "The defendant better change its custom rather than knowingly to embody in its policies statements it declares are untrue."

There was error in sustaining the motion to nonsuit.

Reversed.

TOWN OF TAYLORSVILLE v. R. L. MOOSE AND WIFE, FLORENCE HAFER MOOSE; WILLIAM L. MOOSE AND WIFE, ADA MOOSE; ALMA WARREN AND HUSBAND, L. M. WARREN; MANO MOOSE JENKINS AND HUSBAND, SHUFORD JENKINS; MRS. ARLIE WHITE AND HUSBAND, WADE M. WHITE; SOLON MOOSE, LAURA BOWMAN AND HUSBAND, A. T. BOWMAN.

(Filed 3 November, 1937.)

Payment § 11: Municipal Corporation § 34—Introduction of receipts in evidence establishes prima facie payment, taking issue to the jury.

In this suit to foreclose lien for street assessments, defendants offered in evidence receipts issued by the clerk of the town acknowledging payment in full. Plaintiff municipality offered evidence that the receipts were given by the clerk without authority, in exchange for notes, which transaction did not constitute payment, C. S., 7977. *Held:* Defendants did not admit that the receipts were given in exchange for notes, and the introduction of the receipts in evidence established *prima facie* payment entitling defendants to the submission of the issue to the jury, under appropriate instructions, and a directed verdict for plaintiff municipality is error.

APPEAL by defendants from *Pless, J.*, at June Term, 1937, of ALEXANDER. New trial.

Action to foreclose lien for alleged unpaid street assessments levied on lots of W. L. Moose, now deceased. The defendants are his heirs at law.

Defendants pleaded payment. The trial judge gave peremptory instructions to the jury to answer the issues in favor of the plaintiff for the amounts claimed.

From judgment on the verdict defendants appealed.

Burke & Burke for plaintiff, appellee.

A. C. Payne, Sam Poole, and Thos. P. Pruitt for defendants, appellants.

DEVIN, J. In support of their plea of payment the defendants offered in evidence two receipts issued by the clerk of the town of Taylorsville acknowledging payment of the total balance due on the street assessments sued on, and also certain audits of the town, covering the period, in which the statement of street assessments showed nothing due by the Moose estate.

The plaintiff in rebuttal alleged and offered evidence tending to show that the receipts were given by the clerk, without authority of the town, in exchange for certain notes of the Campbell Lumber Company, that no money was actually paid, and that on the books of the town the transaction was entered as a credit "by note."

The statute provides that taxes are payable in existing national currency (C. S., 7977), and it has been held that ordinarily the tax collector has no right to receive payment in any other form, so as to discharge the lien (*Guaranty Co. v. McGougan*, 204 N. C., 13, 167 S. E., 387; *Kerner v. Cottage Co.*, 123 N. C., 294, 31 S. E., 718). But the production of the receipts of the town clerk, showing payment in full, constituted *prima facie* evidence of payment by the defendants, and this would require that the issues raised be submitted to the jury for their determination, under appropriate instructions from the court. The defendants did not admit that the receipts were given for notes or for payment in any other form than money. *R. R. v. Lumber Co.*, 185 N. C., 227, 117 S. E., 50.

There was error in giving the peremptory instructions complained of, necessitating a new trial.

New trial.

JOSEPH L. AUTEN v. CITY OF ASHEVILLE.

(Filed 3 November, 1937.)

Attorney and Client §§ 9, 10—

Allegations that plaintiff attorney was employed by certain taxpayers of a municipality, and succeeded in having a judgment obtained against the municipality in the action reversed on appeal, to the municipality's great benefit, are insufficient to support an action against the municipality for the services rendered upon implied contract, nor would plaintiff be entitled to a lien for his services.

AUTEN *v.* ASHEVILLE.

APPEAL by defendant from *Sink, J.*, at April Term, 1937, of BUNCOMBE.

Civil action instituted in the General County Court of Buncombe County to recover for services rendered as counsel in litigation resulting in benefit to the defendant.

The gravamen of the complaint is that in December, 1934, plaintiff was employed by a number of citizens and taxpayers to intervene in the case of "W. C. Moreland *v.* City of Asheville," then pending in the Superior Court of Buncombe County, for the purpose of appealing from a judgment rendered therein adverse to the defendant, the city having abandoned its appeal, which intervention was allowed and resulted in great benefit to the defendant, the judgment having been reversed, 208 N. C., 35; wherefore, plaintiff demands $6,600, counsel fees as upon implied contract or *quantum meruit*.

A demurrer was interposed by the defendant on the ground that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled in the General County Court and this ruling was affirmed on appeal to the Superior Court. Defendant appeals, assigning error.

J. Will Pless, Sr., for plaintiff, appellee.
Philip C. Cocke, Jr., for defendant, appellant.

STACY, C. J. It is not alleged in the complaint that plaintiff was one of the interveners in the case of *"Moreland v. Wamboldt,"* reported in 208 N. C., 35. The allegation is that he represented certain citizens and taxpayers who intervened therein for the purpose of appealing from the judgment rendered against the city of Asheville. True, he alleges the intervention resulted in great benefit to the defendant, but this was brought about by the action of his clients, the interveners. It would seem that the plaintiff has sued the wrong party. His right of action, if any he have, is against those who employed him. *Grant v. Lookout Mountain Co.*, 93 Tenn., 691, 28 S. W., 90, 27 L. R. A., 100; *Meeker v. Winthrop Iron Co.*, 17 Fed., 48. An implication upon an implication, such as plaintiff here invokes, finds no support among the authorities to sustain his action. He is not permitted to take this short cut. *Non constat* that the interveners may not be content to bear their loss or to defray the expenses which they incurred. The plaintiff has no lien for his services. *Stephens v. Hicks*, 156 N. C., 239, 72 S. E., 313.

The complaint is bad as against a demurrer.

Reversed.

FRED SMITH ET AL. v. WILLIE EAKES ET AL.

(Filed 3 November, 1937.)

Homestead § 8—Tenant in common does not waive homestead by joining in petition for sale of lands for partition.

A tenant in common does not waive her right to homestead exemption by joining in a petition for sale of the lands for partition, but is entitled to have her share of the proceeds of sale within the amount of the exemption held for her benefit, and the net income therefrom paid to her until the termination of her homestead rights.

APPEAL from *Hamilton, Special Judge.* at August Term, 1937, of DUPLIN. Affirmed.

Beasley & Stevens for appellants.
No counsel for appellees.

PER CURIAM. This was a proceeding under chapter 63 of the Consolidated Statutes for a sale for partition of land held by tenants in common. After the sale and confirmation thereof had been had Fred Smith, one of the petitioners and the last and highest bidder at the sale, filed a supplemental petition alleging that there had been found a judgment in favor of G. B. D. Parker, properly recorded in Duplin County, against Elizabeth Smith, one of the petitioners, owning an undivided one-eighth interest in the land; that said Parker was now dead and that L. R. Hagood and Mary Belle Parker were his administrators, and that Mary Belle Parker now owned said judgment, and requesting that said administrators and Mary Belle Parker be made parties "to make any objection, or otherwise, why said lands should not be relieved from said judgment, and said judgment attached to the money derived from said lands." Said administrators and Mary Belle Parker were served with summons and filed a petition alleging the existence of said judgment, and asking that the interest of Elizabeth Smith in the proceeds of the sale, less costs, be paid to Mary Belle Parker, the present owner of said judgment, to be credited thereon. Mrs. Elizabeth Smith filed answer to said supplemental petitions and admitted the existence of a judgment against her for more than $1,000, as alleged, and asked that her homestead be allotted in her undivided interest in the proceeds of the sale of the lands.

The clerk of the Superior Court found the facts to be as set forth in the petition, supplemental petitions and answers, and in addition thereto that the price of $500.00 paid for the land was the reasonable worth thereof, and that Elizabeth Smith owned no other lands, and adjudged that the interest of Elizabeth Smith in the proceeds of the sale be paid

by the commissioner into the office of the clerk, to be held and invested, and the net income paid to Elizabeth Smith until her homestead rights shall be terminated, and then the *corpus* paid to Mary Belle Parker or her assigns, to be credited on the said judgment.

Upon appeal to the judge of the Superior Court from the clerk thereof, the judge found substantially the same facts as the clerk and entered substantially the same judgment. To this judgment the administrators and Mary Belle Parker reserved exception and appealed to the Supreme Court.

We are of the opinion, and so hold, that the appellants' contention that Elizabeth Smith, by joining in the petition for sale for partition, waived her right to homestead exemption in the proceeds of the sale of the lands, is untenable.

"The fact that a tenant in common is entitled to a homestead against the judgment cannot prevent a sale for partition. *Kelly v. McLeod,* 165 N. C., 385. His share of the proceeds of the sale will be reserved and his homestead right therein protected by a proper decree." *Holley v. White,* 172 N. C., 77.

The judgment of the Superior Court is

Affirmed.

T. H. SANSOM v. N. M. JOHNSON.

(Filed 3 November, 1937.)

1. Homestead § 6—

A tenant in common is not entitled to allotment of homestead as against execution for his pro rata share of the costs of the partition proceedings in which his part of the land was allotted to him in severalty.

2. Judgment § 21—

An invalid allotment of homestead does not arrest the running of the statute of limitations, and the lien of judgments are lost after the lapse of ten years, notwithstanding the invalid allotment of homestead to the judgment debtor.

APPEAL by defendant from judgment rendered by *Sinclair, J.,* at Chambers, September, 1937, from SAMPSON. Judgment affirmed.

The facts were these. Plaintiff derived his title from Joe T. Warren by deed dated 12 August, 1936. The land had been allotted to Joe T. Warren as his share under partition proceedings instituted in 1927 among the heirs of H. F. Warren. The costs of the partition proceeding were assessed against the several tracts, Joe T. Warren's share thereof being one-seventh of $68.00. Following confirmation of the

partition, execution was issued against Joe T. Warren and wife for their part of the costs and homestead allotted.

On April 14, 1920, there was docketed judgment against Joe T. Warren in the sum of $292.06 in favor of Geo. O. Godwin.

Upon the conveyance of the land by Joe T. Warren and wife to the plaintiff, execution was issued on the Godwin judgment and the land sold thereunder by the sheriff and purchased by one Clifford Warren. Of this attempted sale by the sheriff, plaintiff had no knowledge.

It appeared that there were other judgments against Joe T. Warren which were barred by the statute of limitations, as well as the Godwin judgment, unless the allotment of homestead arrested the running of the statute. Certain other encumbrances were agreed to by the defendant.

His Honor was of opinion, and so adjudged, that the attempted allotment of the homestead in the special proceeding was void and of no effect, that the Geo. O. Godwin judgment was barred by the statute of limitations, and that plaintiff was seized in fee of the land (subject to the agreed encumbrances), and that he was entitled to recover of the defendant the purchase price upon execution and delivery of the deed.

Dupree & Strickland for plaintiff, appellee.
J. R. Williams for defendant, appellant.

PER CURIAM. The ruling of the court below must be affirmed in accordance with the decisions of this Court in *Williams v. Whitaker,* 110 N. C., 393; *Hinnant v. Wilder,* 122 N. C., 149, and *Wilson v. Lumber Co.,* 131 N. C., 163.

The amount assessed in the partition proceeding against the share of Joe T. Warren for one-seventh of the costs of the proceeding was not a personal judgment upon which an allotment of a homestead could be based, and the allotment being invalid, the lien of the docketed judgments was lost by lapse of ten years from the date of docketing the judgments. *Pasour v. Rhyne,* 82 N. C., 149; *Lyon v. Russ,* 84 N. C., 588; *Lytle v. Lytle,* 94 N. C., 683; *Hyman v. Jones,* 205 N. C., 266.

Judgment affirmed.

MABEL BRIGHT, ADMINISTRATRIX OF JAMES C. BRIGHT, JR., v. N. B. & C. MOTOR LINES, INC., AND B. HAMPTON ELLINGTON.

(Filed 3 November, 1937.)

Master and Servant § 49—Award under Compensation Act precludes action for wrongful death against employer.

An award by the Industrial Commission to the widow of an employee excludes all other rights and remedies, and the administrator of the

employee may not maintain an action against the employer for wrongful death, and the fact that the injury resulted from negligence in the violation by the employer of a criminal statute does not alter this result. C. S., 8081 (r).

APPEAL by the plaintiff from *Cranmer, J.*, at April Term, 1937, of PITT. Affirmed.

S. J. Everett for plaintiff, appellant.
Thos. W. Ruffin for defendant, appellee.

PER CURIAM. This was an action to recover damages for wrongful death alleged to have been negligently caused by the defendant motor lines in directing the plaintiff's intestate to drive upon the public highways in an automobile with a trailer not firmly attached thereto, and equipped with inadequate brakes, in violation of the criminal statutes.

The pleadings (complaint, answer and reply) disclose that at the time the plaintiff's intestate received the fatal injuries alleged in the complaint the defendant motor lines had more than five employees, including the plaintiff's intestate, and that neither the plaintiff's intestate nor the defendant motor lines had rejected the provisions of the North Carolina Workmen's Compensation Act, and that said motor lines had procured insurance for its employees thereunder, and that an award had been made by the North Carolina Industrial Commission to Appie Gerrard Bright, widow of the plaintiff's intestate, and was now being paid to her in weekly installments by the American Mutual Liability Insurance Company, insurance carrier.

Upon the pleadings the court awarded judgment for the defendants and the plaintiff appealed to the Supreme Court, assigning the signing of the judgment as error.

The award by the Commission to the widow of the employee excludes all other rights and remedies of such employee or his personal representative against his employer at common law, or otherwise, on account of personal injury or death. The appellant's suggested distinction between an injury by accident and an injury resulting from negligence due to the violation of a criminal statute cannot avail her. C. S., 8081 (r), *Pilley v. Cotton Mills,* 201 N. C., 426.

The complaint alleges no cause of action against the defendant B. Hampton Ellington.

The judgment below is

Affirmed.

STATE v. R. E. SENTELLE.

(Filed 3 November, 1937.)

1. Criminal Law §§ 44, 81a—

A motion for a continuance, made on the ground of absence of a material witness, is addressed to the sound discretion of the trial court, and his decision thereon is not reviewable in the absence of abuse of discretion.

2. Criminal Law § 42—Testimony held properly excluded as hearsay and statement of solicitor held not to estop State from objecting thereto.

A question, asked on cross-examination of a State's witness, whether a third person, who did not testify at the trial, had not made a certain statement on the night of defendant's arrest, is properly excluded as hearsay, and this result is not altered by the fact that the solicitor, upon the argument of defendant's motion for a continuance, stated he would admit such third person would so testify if present in court, where it is not made to appear that defendant accepted this offer, or that the admission was excluded from the evidence at the trial.

3. Criminal Law § 40—

While a character witness may testify of his own accord as to defendant's reputation for particular traits of character, defendant may not elicit such testimony by direct question, the witness being competent only to prove the general character of defendant.

APPEAL by defendant from *Rousseau, J.*, at July Term, 1937, of MONTGOMERY.

Criminal prosecution tried upon warrant charging operation of motor vehicle on the public highway while under the influence of an intoxicant.

Verdict: Guilty of driving drunk.

Judgment: Thirty days in jail, fine of $225.00, and depriving of right and surrender of license to operate motor vehicle for twelve months.

The defendant appeals to the Supreme Court and assigns error.

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

Brock Hurley, Ehringhaus, Royall, Gosney & Smith for defendant, appellant.

PER CURIAM. The case on appeal fails to disclose error.

On affidavit duly made, warrant issued out of the recorder's court of Montgomery County charging that on or about 27 March, 1937, defendant did unlawfully and willfully operate a motor vehicle on the

public highway of Montgomery County while under the influence of an intoxicant, contrary to the form of the statute. From judgment finding defendant guilty of driving drunk and imposing jail sentence and fine he appealed to the Superior Court.

When the case was called for trial in the Superior Court defendant moved for continuance on account of absence of a material witness, the wife of defendant. The motion was denied. The question of granting or refusing a motion for the continuance of an action is peculiarly within the discretion of the court. Unless that discretion is abused, the decision of the court below is not subject to review on appeal. *S. v. Banks*, 204 N. C., 233, 167 S. E., 851.

In the course of the argument of that motion "the solicitor for the State in open court agreed to admit, without objection, that the wife of the defendant, if present in court, would testify that the defendant at the time he was arrested by Sheriff Bruton was not under the influence of intoxicants without admitting the truthfulness thereof." The record fails to show that defendant accepted this offer, or that the admission was excluded as evidence on the trial.

On cross-examination of the sheriff, who was a witness for the State, defendant offered to show that on the night of the arrest the wife of defendant stated that the defendant was not under the influence of intoxicants and had drunk no liquor. This was properly excluded as hearsay.

Defendant proposed to show by means of questions to his own witness, who had testified to his good character, that the witness had never heard of defendant using intoxicants in any form, and that the reputation of defendant in that particular is one of total abstinence and total sobriety. This evidence is clearly incompetent. "A party offering a character witness can only prove the general character of the person inquired about, but the witness *of his own accord* may say in what respect the character of such person is good or bad." *S. v. Nance*, 195 N. C., 47, and cases cited.

The evidence for the State tended to show that when seen driving his automobile on the public highway in Montgomery County on the night in question defendant was intoxicated. The defendant testified in his own behalf that he was not a drinking man, that he had drunk no liquor that night, and that he was not intoxicated. On this conflict of testimony the question was one for the jury.

No exception is taken to the charge of the court.

We have carefully considered the case and find

No error.

FLOYD BREECE v. ASHEVILLE COCA-COLA BOTTLING COMPANY.

(Filed 3 November, 1937.)

Food § 16—

Evidence that plaintiff was injured by slivers of glass in a soft drink bottled by defendant, and that foreign and deleterious substances were found in other drinks bottled by defendant at about the same time, is sufficient to take the case to the jury on the issue of negligence.

APPEAL by defendant from *Johnston, J.*, at June Term, 1937, of BURKE.

Action to recover damages for alleged actionable negligence.

Plaintiff alleged and offered evidence tending to show that on 3 December, 1936, he purchased a bottle of coca-cola from the Dixie Stores in Valdese, North Carolina, which contained chips of glass; that he inadvertently swallowed the glass and suffered injury therefrom; that the bottle of coca-cola was manufactured in and sold by the plant of the defendant in Hickory, and that about the same time in other bottles of coca-cola manufactured in and sold by the said plant of the defendant for human consumption there were found by other purchasers deleterious and foreign substances.

Defendant denied negligence and pleaded in defense and offered evidence tending to show that its plant in Hickory is equipped with machinery and appliances such as are modern, approved and in general use for washing and sterilizing bottles and bottling of coca-cola, and that in the bottling of coca-cola it had exercised reasonable care and prudence to free the product from deleterious and foreign substances.

The jury answered the issues against the defendant.

From judgment on verdict defendant appealed to the Supreme Court and assigned error.

Ervin & Butler for plaintiff, appellee.
Mull & Patton for defendant, appellant.

PER CURIAM. A careful consideration of the case on appeal fails to disclose error. The case was properly submitted to the jury and appears to have been tried in full compliance with settled rules of law in this State governing such cases. *Enloe v. Bottling Co.*, 208 N. C., 305, 180 S. E., 582, and cases therein cited. *Blackwell v. Bottling Co.*, 211 N. C., 729.

We find

No error.

LOUIS BAER v. JONAH McCALL AND W. J. GODWIN, SURETY ON REPLEVIN BOND.

(Filed 3 November, 1937.)

1. Courts § 7—

Where plaintiff declares on two causes of action which together exceed the jurisdictional amount of the recorder's court, he may, upon defendant's motion to dismiss for want of jurisdiction, withdraw one count, and it is error for the recorder's court to refuse to allow such withdrawal and dismiss the action for want of jurisdiction.

2. Courts § 2a—

Upon appeal from judgment of a recorder's court dismissing the action for want of jurisdiction for that the amount demanded on the two causes of action alleged exceeded the jurisdictional amount of the court, the Superior Court may allow plaintiff to withdraw one cause of action and proceed to trial upon the other.

3. Judgments § 23—

Where the court finds that defendant in claim and delivery proceedings was in court when his attorney was allowed to withdraw from the case, and was told he would have to employ other counsel, and the case continued to the next term, the refusal of the motion made by himself and the surety on his replevin bond to set aside the judgment taken at the next succeeding term on the ground of mistake, surprise, and excusable neglect is properly refused. C. S., 600.

APPEAL by defendants from *Daniels, J.*, at March-April Term, 1937, of HARNETT. Affirmed.

The whole matter of the litigation is carefully set forth in the judgment of Daniels, J., as follows:

"This cause coming on to be heard and being heard by and before his Honor F. A. Daniels, judge presiding, on 7 April, 1937, of Harnett County Superior Court at Lillington, North Carolina, upon motion to vacate and recall execution issued herein filed by defendants, and upon motion made by defendants to set aside the judgment heretofore rendered in this cause by reason of mistake, surprise, and excusable neglect, and upon the hearing of said motions the court finds the following facts and renders judgment as follows:

"1. That on 31 December, 1936, the defendants filed motion before the clerk of the Superior Court of Harnett County to vacate and recall execution issued on the judgment entered herein on 7 December, 1936; that plaintiff filed demurrer to said motion and said demurrer was sustained by the clerk, and defendants appealed from the clerk's ruling to the judge of the Superior Court at term; that said motion came on for hearing before his Honor, W. C. Harris, judge, at February Term,

1937, of Harnett Superior Court, at which time counsel for defendants made an oral motion to set aside the judgment heretofore rendered in this cause by reason of mistake, surprise, and excusable neglect, and his Honor, W. C. Harris, judge, continued both motions to the March-April Term, 1937, of Harnett Superior Court, in order that the defendants might prepare and file their formal motion to set aside the judgment for mistake, surprise, and excusable neglect.

"2. That this action originated in the recorder's court of Dunn, N. C., and that the maximum jurisdiction of said court, either in contract or tort, is $500.00; that in this action plaintiff filed his duly verified complaint containing two counts or separate causes of action, to wit: One for $500.00 for debt due the plaintiff by the defendant, Jonah McCall, and for possession of the personal property securing said debt and described in the claim and delivery issued in this action, and the other for $200.00 damages for the wrongful detention of said property, and asked for judgment for $500.00 on the debt for possession of said property and $200.00 damages for wrongful detention of property.

"3. That the defendant, Jonah McCall, gave replevin bond in the sum of $1,000, with W. J. Godwin, surety, and filed his duly verified answer setting up a counterclaim; that when this cause came on for trial in the recorder's court of Dunn the defendant, Jonah McCall, through his counsel, moved the court to dismiss the action for want of jurisdiction and demurred *ore tenus* to the jurisdiction of the court; that thereupon and prior to the dismissal of the case in the recorder's court of Dunn plaintiff offered to withdraw his count set up in the complaint for $200.00 as damages for the wrongful detention of the personal property seized under the claim and delivery issued in this action and proceed with the trial on the count for $500.00 debt and possession of the personal property; that this motion of plaintiff was declined by the court on the ground that plaintiff had no right to withdraw said count and that the court did not have jurisdiction, and the case was dismissed on 2 January, 1936, and plaintiff appealed from said judgment and had his appeal properly docketed in the Superior Court of Harnett County.

"4. That this cause was placed on the calendar at the February Term, 1936, of Harnett Superior Court and came on for hearing at said term, at which time C. L. Guy, attorney representing the defendant, Jonah McCall, asked permission of the court to withdraw as counsel for the defendant, whereupon an order was entered allowing C. L. Guy to withdraw as counsel for the defendant; that the defendant, Jonah McCall, was present in person and was notified by the court, in open court, that he would have to get another attorney to represent him in the case and that the case would be continued to the June Term, 1936; that the case

was placed on the calendar for trial at the June Term, 1936, of Harnett Superior Court, and was reached in regular order on said calendar, and the said case was tried at said term before his Honor, N. A. Sinclair, judge presiding, at which time counsel for plaintiff withdrew his count set up in the complaint for $200.00 for wrongful detention of the personal property, and the court proceeded to try the case on the count for $500.00 debt and possession of the personal property seized under the claim and delivery and issues were answered by the jury, as appears of record, and judgment signed; that neither the defendant, Jonah McCall, nor W. J. Godwin, surety on his replevin bond, was present in court at the trial of the case; that the defendant, Jonah McCall, had full knowledge that said case was pending for trial in the Superior Court and failed to employ counsel after C. L. Guy had withdrawn as his attorney and paid no attention to the case until after execution was served on W. J. Godwin, surety; that W. J. Godwin, surety, may have had no formal notice that said case was pending on appeal in the Superior Court of Harnett County, but that the defendant, Jonah McCall, was his agent and notice to McCall was notice to him and he is bound by the judgment as surety.

"5. That on 11 September, 1936, execution was issued to the sheriff of Cumberland County against the defendant Jonah McCall, and for the possession of the property seized under the claim and delivery issued in this action and said execution was returned with the following entry made by the sheriff of Cumberland County: 'After due and diligent search the property not found'; that on 7 December, 1936, execution was issued to the sheriff of Harnett County against the defendant, Jonah McCall, and W. J. Godwin, surety, and thereupon the motion to recall and vacate said execution was filed before the clerk of the Superior Court of Harnett County.

"6. That the plaintiff had the right to withdraw his count for $200.00 damages for wrongful detention of personal property, and upon his offering to withdraw said count in the recorder's court of Dunn, the said recorder's court of Dunn had jurisdiction of the count for $500.00 debt and possession of the personal property and should have proceeded with the trial on said count; that the plaintiff had right to withdraw his said count of $200.00 damages at the time the case came on for trial in the Superior Court, and upon his withdrawal of the same at that time the Superior Court had jurisdiction of the count for $500.00 debt and possession of the personal property, and the judgment entered by said court is a valid judgment.

"7. That the court finds no excusable neglect on the part of either the defendant, Jonah McCall, or W. J. Godwin, surety on his replevin bond.

"8. That the ruling of the clerk on the demurrer filed by the plaintiff to the motion of the defendants to vacate and recall the execution is hereby sustained and the motion of the defendants to set aside judgment on the grounds of mistake, surprise, and excusable neglect is denied."

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

J. Robert Young and J. A. McLeod for plaintiff.
R. L. Godwin for defendants.

PER CURIAM. In the finding of facts in the court below is the following: "That when this cause came on for trial in the recorder's court of Dunn the defendant, Jonah McCall, through his counsel, moved the court to dismiss the action for want of jurisdiction and demurred *ore tenus* to the jurisdiction of the court; that thereupon and prior to the dismissal of the case in the recorder's court of Dunn plaintiff offered to withdraw and moved the court to be allowed to withdraw his count set up in the complaint for $200.00 as damages for the wrongful detention of the personal property seized under the claim and delivery issued in this action, and proceed with the trial on the count for $500.00 debt and possession of the personal property; that this motion of plaintiff was declined by the court on the ground that plaintiff had no right to withdraw said count and that the court did not have jurisdiction, and the case was dismissed on 2 January, 1936, and plaintiff appealed from said judgment and had his appeal properly docketed in the Superior Court of Harnett County."

On appeal in the Superior Court "plaintiff withdrew his count set up in the complaint for $200.00 for wrongful detention of the personal property, and the court proceeded to try the case on the count for $500.00 debt," etc. The maximum jurisdiction of the recorder's court of Dunn, N. C., either on contract or tort is $500.00.

In *Jones v. Palmer,* 83 N. C., 303 (304), *Ashe, J.,* said: "This is a suit brought for two causes of action or, in other words, an action containing two distinct counts, the one to recover a debt of fifty dollars and the other to recover specific property. It does not follow that because the magistrate had no jurisdiction of one count he therefore had none of the other. . . . But even if the magistrate had no jurisdiction of the second count he most clearly had of the first, and there is no reason why a want of jurisdiction or defect in the second count should deprive the justice of jurisdiction of the case. One bad count in a declaration never vitiates those that are good though, in such a case if there be a general verdict on both counts, no judgment can be rendered. *Mitchell v. Durham,* 13 N. C., 538; *Honeycut v. Angel,* 20 N. C.,

449. . . . The plaintiff had the right to enter a *nolle prosequi* to either or all of the counts or causes of action in his complaint. Sanders Rep., 207, note 2. His motion for leave to amend his complaint and waive the second count was virtually asking leave of the court to enter a *nolle prosequi* as to that count, a thing he had the right to do without the leave of the court. His Honor committed an error in disallowing the motion of the plaintiff and dismissing the action. The plaintiff had the right to enter a *nolle prosequi* as to the second count and proceed on the first."

We think this case is governed by the *Jones case, supra.* The facts in *Perry v. Pulley,* 206 N. C., 701, are distinguishable. We think the court correct in refusing to set aside the judgment on the ground of mistake, surprise, and excusable neglect. N. C. Code, 1935 (Michie), sec. 600. The facts found show clearly no mistake, surprise, and excusable neglect.

The judgment of the court below is

Affirmed.

MILDRED PROPER v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY.

(Filed 3 November, 1937.)

Negligence § 4b—Evidence of negligence held for jury in this action by store customer to recover for personal injuries.

Evidence that plaintiff, a customer in a store, was struck and injured while standing with her back to a row of shelves, by a sack of flour which fell from a shelf about eight or ten feet high when an employee attempted, with the aid of a hooked stick, to pull a sack of flour off the shelf for another customer, without warning plaintiff, *is held* sufficient to take the case to the jury on the issue of negligence, and defendant store company's motion to nonsuit and request for peremptory instructions were properly refused.

APPEAL by defendant from *Spears, J.,* at March Term, 1937, of RANDOLPH. No error.

This is an action to recover damages resulting from personal injuries alleged to have been caused by the negligent conduct of the defendant's employee. Appropriate issues were submitted to the jury and answered in favor of the plaintiff. From judgment thereon the defendant appealed.

Moser & Miller and Lovelace & Kirkman for plaintiff, appellee.

Sapp & Sapp for defendant, appellant.

PER CURIAM. The plaintiff's evidence tends to show that she and her husband were in the defendant's store in High Point as customers on the night of 12 October, 1935; that there were rows of shelves on each side of the store, with no counter on the right side; that the shelves extended to a height of about eight or ten feet; that on these shelves were placed various articles of merchandise, and on the top shelf on the right-hand side, near the rear of the store, were placed 24-pound sacks of flour, three deep; that while the plaintiff and her husband were standing near the meat counter at the rear of the store and near the row of shelves on the right side just below where the flour was packed the manager of the store came around in a hurry to the shelves where the flour was stacked for the purpose of taking down a sack of flour for another customer; that the plaintiff was standing with her side toward the shelves; that the defendant's employee had a stick three or four feet long with a hook on the end, and that he caught the hook in the end of the flour that was tied up in some way and undertook to pull the flour down off the shelf without any warning to the plaintiff, and that in so doing the flour fell against the plaintiff and inflicted certain personal injuries. There was evidence *contra.*

The evidence offered by the plaintiff was sufficient to be submitted to the jury and the court below properly overruled the defendant's motions to dismiss as of nonsuit. The cause is essentially one of fact for the determination of a jury and the jury, under instructions of the court, which are unchallenged, has answered the issues in favor of the plaintiff.

As the plaintiff offered sufficient evidence to be submitted to the jury, there was no error in the refusal of the court below to give the special instructions which amounted to a peremptory charge requested by the defendant.

There is no error appearing in the record.

No error.

UNION NATIONAL BANK v. A. GARLAND JONAS AND ALEXANDRIA L. JONAS.

(Filed 3 November, 1937.)

1. Limitation of Actions § 18: Seals § 2—Introduction of note appearing upon its face to be under seal raises presumption to that effect.

The introduction in evidence of a note appearing on its face to be under seal, with deed of trust securing same referring to the note as a bond, without evidence on the part of the maker that he did not intend to adopt

the seal appearing upon the note, is sufficient to support a directed verdict that the note is not barred by the three-year statute under the presumption arising from the evidence that the note was under seal.

2. Limitations of Actions § 18: Bills and Notes § 10a—Person signing note on its face is presumed to be maker.

Where a wife signs a note with her husband on its face, she is presumed to be a maker, and where she does not offer evidence tending to rebut this presumption, or allege that she signed the note as surety, introduction in evidence of the note under seal is sufficient to support a directed verdict that the action on the note was not barred as to either by the three-year statute.

APPEAL from *Johnston, J.*, at the May Term, 1937, of CALDWELL. No error.

This is a civil action to recover balance due on promissory note signed by the defendants and appearing upon its face to be under seal. The note on its face makes reference to a trust deed and the trust deed describes the note as a bond. There was a first mortgage on the premises described in the trust deed securing this note, which first lien has been foreclosed.

The defendants, answering, admitted that they executed a note to the plaintiff, not under seal, but denied upon information and belief the correctness of the copy attached to the complaint and pleaded the three-year statute of limitations.

At the trial the plaintiff offered evidence as to the execution of the note and as to the balance due thereon, introduced the note in evidence and rested.

While the defendant, A. Garland Jonas, testified in his own behalf, he did not in his testimony, at any time, deny the adoption by him of the seal appearing upon the note. The *feme* defendant did not testify. The note was signed 12 August, 1932, and credits appeared thereon subsequent to that date. Summons was issued 22 May, 1936. The jury under the instructions of the court answered the issues adversely to the defendants and the defendants appealed.

B. F. Williams for plaintiff, appellee.

Newland & Townsend for defendants, appellants.

PER CURIAM. The note bearing seals opposite the names of the respective makers constitutes presumptive evidence that the note was under seal. This was fortified by the reference appearing in the face of the note to the trust deed securing the same. The defendants offered no evidence in rebuttal. It follows that the note was not barred by the three-year statute of limitations and that the instructions of the court

were correct. This case is controlled by *Allsbrook v. Walston, ante,* 225, and cases there cited.

A person who signs a note upon its face is, under the statute, presumed to be a maker. This presumption may be rebutted by competent testimony. The *feme* defendant, however, did not in her answer set up the defense that she was a surety upon said note, nor did she offer any evidence to that effect. In the trial below there was

No error.

CARL SWICEGOOD v. SWIFT & COMPANY.

(Filed 3 November, 1937.)

Automobiles § 24b—Nonsuit held proper upon failure of evidence tending to show that employee was driving in performance of his duties.

Owner's motion to nonsuit held properly granted upon evidence tending to show that employee driving the car at the time of the collision was driving for his own pleasure without the owner's permission, and contrary to its instructions, without evidence on the part of the plaintiff tending to show that at such time the employee was driving the automobile in the performance of the duties of his employment. *Puckett v. Dyer,* 203 N. C., 684, cited and distinguished.

APPEAL by plaintiff from *Williams, J.,* at May Term, 1937, of BEAUFORT. Affirmed.

This is an action to recover damages for personal injuries suffered by the plaintiff as the result of a collision on a highway in Beaufort County during the nighttime, between an automobile in which the plaintiff was riding and an automobile which was owned by the defendant and at the time of the collision was driven by James R. Holton, one of its employees.

It is alleged in the complaint that the collision which resulted in injuries to the plaintiff was caused by the negligence of James R. Holton, an employee of the defendant, and that at the time of the collision the said employee was driving defendant's automobile in the performance of his duty as its employee. This allegation is denied in defendant's answer.

At the close of the evidence at the trial the court was of opinion that there was no evidence tending to show that at the time of the collision James R. Holton was driving the automobile owned by the defendant in performance of his duty as its employee, and accordingly allowed defendant's motion for judgment as of nonsuit. Plaintiff excepted.

From judgment dismissing the action the plaintiff appealed to the Supreme Court, assigning error in the judgment.

LeRoy Scott, E. A. Daniels, and H. S. Ward for plaintiff.
MacLean & Rodman for defendant.

PER CURIAM. After careful examination of all the evidence appearing in the record in this appeal, we concur with the opinion of the trial court that there was no evidence at the trial of this action tending to show that at the time of the collision which resulted in injuries to the plaintiff, James R. Holton, an employee of the defendant, was driving its automobile in the performance of his duty as its employee. All the evidence, on the contrary, shows that James R. Holton at the time of the collision, was driving defendant's automobile without its permission, contrary to its instructions, and for his own pleasure. The judgment dismissing the action is therefore affirmed.

Puckett v. Dyer, 203 N. C., 684, 167 S. E., 43, is distinguishable from the instant case. In that case there was evidence for the plaintiff tending to show that the defendant Jim Dyer was driving the automobile owned by his codefendant and employer, on the business of his employer. It was accordingly held that the evidence for the plaintiff, although controverted by evidence for the defendant, was properly submitted to the jury. In the instant case there was no evidence for the plaintiff tending to show facts on which the defendant is liable to the plaintiff on the principle of *respondeat superior.*

The judgment dismissing the action is

Affirmed.

HARRY S. GURGANUS v. R. H. McLAWHORN, EXECUTOR OF THE ESTATE OF IRA H. FRIZELLE; J. F. J. McLAWHORN, TRUSTEE AND INDIVIDUALLY; NANNIE FRIZELLE; HARRIET ZELOTA McLAWHORN, INFANT; FREDERICK GRAY McLAWHORN, INFANT; AND IRA JEROME McLAWHORN, INFANT, HEIRS AT LAW OF IRA J. FRIZELLE, DECEASED.

(Filed 24 November, 1937.)

1. Executors and Administrators § 31—In proceeding to sell land to make assets, heirs may set up action against executor to surcharge account.

Where the widow and devisees are made parties to a proceeding by a creditor to compel the executor to sell land to make assets to pay his debt, and the devisees file a cross action against the executor to surcharge and falsify the executor's account, alleging that the personalty of the estate, if properly administered, was sufficient to pay the debts of the estate, and the executor denies the material allegations of such cross action in his answer, it is proper for the clerk to transfer the action to

the Superior Court for trial upon the issues of fact raised by the pleadings, the Superior Court having been given concurrent, original jurisdiction of such matters by statute, N. C. Code, 135, 136, and the executor's demurrer, made for the first time after the Superior Court had ordered a compulsory reference, on the ground that the cross complaint was insufficient to state a cause of action, N. C. Code, 511 (6), and that the cross action was improperly brought, and constituted a misjoinder of actions, is properly overruled.

2. Pleadings § 19—

All grounds for demurrer are waived by failure to file demurrer in apt time, except demurrers to the jurisdiction of the court and for that the complaint fails to state a cause of action, and demurrers on these grounds may be filed even in the Supreme Court on appeal. C. S., 518.

3. Executors and Administrators § 13a—Devisees under a will held entitled to file cross action to surcharge account to prevent sale of lands.

The personalty of the estate must be first applied to the payment of debts, even those secured by mortgage on realty, before the lands of the estate may be sold to make assets, C. S., 74, and in proceedings to sell lands to make assets the heirs may file a cross action to surcharge and falsify the executor's account upon allegation that the personalty, if properly administered, was sufficient to pay all debts, and the devisees under a will are not estopped by the provisions of the will directing the payment of debts from maintaining such cross action, when the will makes them the residuary legatees, and directs that the personalty and a particular tract of land, which had been sold by the executor, be first used to pay debts.

4. Reference § 13—

The appellant in a compulsory reference waives his right to trial by jury by failing to demand a jury trial separately under each of his exceptions to the referee's findings of fact and by failing to tender an issue upon each exception.

5. Appeal and Error § 39d—

Error in the admission or exclusion of evidence must be material and prejudicial in order to entitle appellant to a new trial.

6. Executors and Administrators § 13c—

An administrator or executor cannot purchase property at his own sale, even in good faith for a fair price, without the sanction or ratification of those interested.

7. Reference § 17—

In a compulsory reference, where appellant has failed to preserve his right to jury trial upon his exceptions, the trial judge must pass upon each finding and review the evidence, and has the power to affirm, modify, set aside, make additional findings, and confirm, in whole or in part, or disaffirm the referee's report.

8. Appeal and Error § 40a—

Where appellant in a compulsory reference fails to preserve his right to trial by jury upon his exceptions, the findings of fact, set forth by the court in affirming the referee's report, are conclusive on appeal when supported by any sufficient competent evidence.

GURGANUS *v.* MCLAWHORN.

APPEAL by R. H. McLawhorn, executor, from *Cranmer, J.*, at May Term, 1937, of PITT. Affirmed.

The plaintiff, at October Term, 1932, obtained a judgment against R. H. McLawhorn, executor of the estate of Ira J. Frizelle, for the sum of $3,316.25 and interest from 28 April, 1931, and costs, which is unpaid. It is alleged in the complaint that the personal property of the estate has been exhausted and that demand has been made and refused by the executor to sell certain real estate to make assets to pay the debts, a guardian *ad litem* be appointed to represent the interest of certain minors, children of Ira J. Frizelle. That the sale be made of a tract of land containing 151.74 acres, known as the "Home Place." That the said Frizelle died leaving a last will and testament in which said tract of land was devised in trust to the defendant J. F. J. McLawhorn, for the use and benefit of the three infant defendants, as set out in Item 2 of the last will and testament of Ira J. Frizelle.

The defendant R. H. McLawhorn, executor, admits the judgment rendered and alleges that the personal estate has been exhausted. "That the defendant knows of no way to satisfy said judgment except by sale of real estate." Defendant J. F. J. McLawhorn, trustee, individually and as guardian *ad litem* of the infant defendants and heirs at law of Ira J. Frizelle, answers and says, "That as these defendants are advised and believe, the said executor should have, out of the assets which have come into his hands from the estate of his testator, a sufficient amount of cash to pay the claim of the plaintiff in full," etc. In further answer these defendants set up a cross action and affirmative defense to "surcharge and falsify" the executor's account, setting forth same with particularity. That upon proper accounting there will be in the executor's hands approximately $6,569.07, considerably more than enough to satisfy the claim of plaintiff and prays: "(1) That no order of sale for said lands be entered until the executor, in this proceeding, has come to a true accounting with the estate of his testator and has accounted both for the assets which upon a proper administration of said estate ought now to be in his hands. (2) That the executor be required to account in this action for the assets which have come into his hands and which ought now to come into his hands. (3) That the executor be required to satisfy plaintiff's claim out of the personal assets as an accounting will disclose the estate of his testator to be entitled to have. (4) For such other and further relief as may be necessary and proper and the nature of the same demands."

The executor, R. H. McLawhorn, in his reply denies the material allegations of the cross action and that the relief demanded by his codefendants be denied and he go without day and recover his costs.

The clerk of the Superior Court made an order transferring the cause to the civil issue docket for trial, reciting in the order "In this

cause answer having been filed raising issues of fact which should be heard by a jury."

At March Term, 1934, Daniels, J., made an order appointing Jack Edwards, Esq., referee, "for findings of fact and conclusions of law thereon." C. S., 573. The following appears in the order: "The reference herein ordered is a compulsory reference, and all parties hereto except and demand a jury trial."

In the hearing before the referee is the following:

"After reading of the pleadings the defendant R. H. McLawhorn, executor, entered a special appearance and moved to dismiss the purported cause of action of J. F. J. McLawhorn, trustee, and individually, and the children of J. F. J. McLawhorn, first, for in that the answer and cross action of said defendants does not state a cause of action as against this defendant, executor; second, for that there is a misjoinder of action; third, for that the purported cross action is improperly brought or set out in this proceeding; and fourth, for that under the last will and testament of the late Ira J. Frizelle the defendants, J. F. J. McLawhorn and others named, are precluded or estopped from setting up said cross action. Overruled. Exception."

The referee made his report setting forth fully the findings of fact and conclusions of law thereon. All the attorneys for the litigants were present at the hearing. Nannie Frizelle, who although summoned, failed to answer.

The plaintiff made certain exceptions to the report of the referee as to the finding of facts and conclusions of law, setting them out in detail, and set forth: "Upon the foregoing exceptions and objections the plaintiff tenders the following issues and demands a jury trial thereon in the manner provided by law. Issues submitted as follows:

"1. Has the personal estate of Ira J. Frizelle, deceased, been exhausted by R. H. McLawhorn, executor, as alleged in the complaint? Answer: .....

"2. If not, does R. H. McLawhorn, executor, have in hand sufficient personal estate of Ira J. Frizelle to pay and satisfy the judgment of plaintiff in the amount of $3,316.25, with interest thereon from 28 April, 1931? Answer: .....

"3. In what amount, if any, is the defendant R. H. McLawhorn, executor, indebted to the estate of Ira J. Frizelle by reason of the mismanagement of and sale of personal property as alleged in the answer of J. F. J. McLawhorn and others? Answer: .....

"4. Did W. H. Woolard, R. H. McLawhorn, and the Atlantic Christian College wrongfully conspire, collude, and agree that the said R. H. McLawhorn should acquire the Tuten farm from the Atlantic Christian College upon payment to it of its legacy of $2,500, and thereby procure

the foreclosure sale by the said W. H. Woolard, trustee, at less than its actual value at the time of sale as alleged in the answer of J. F. J. McLawhorn and others? Answer: .....

"5. If so, what was the reasonable market value of the Tuten farm on 27 April, 1931? Answer: .....

"The plaintiff, Harry S. Gurganus, tenders and files the foregoing exceptions and issues arising thereon. This 30 March, 1927."

The defendant R. H. McLawhorn, executor, made certain exceptions to the report of the referee as to the findings of fact and conclusions of law, setting them out in detail. The first as follows: "Exceptions of R. H. McLawhorn, executor, to the report of Jack Edwards, referee. In the above entitled action the defendant R. H. McLawhorn, executor, excepts to the report of Jack Edwards, Esq., referee, which has been filed in this cause, and herewith files the following specific exceptions thereto: (1) To Finding of Fact No. 7 on page 2 of the report, as follows: 'The personal property belonging to said estate was sold at public auction on 9 May, 1931, by said executor and purchased by said executor, R. H. McLawhorn, through his brother, Dennis McLawhorn, the same being delivered by Dennis McLawhorn to said executor and kept by him on the premises of lands known as the Tuten farm, which farm thereafter came into possession of said executor. Said personal property sale was held on the premises of said Tuten farm. After the purchase of the said personal property by the executor same has thereafter been in his possession on said Tuten farm.' For that there is no evidence in the record to support such finding—in fact, it is contrary to all evidence offered. The evidence of D. T. or Dennis McLawhorn, appearing on pages 60-64 of the report, is contrary to said finding, as well as the evidence of R. H. McLawhorn, executor, appearing on page 83." The other exceptions to the findings of fact are of a similar nature.

The defendant R. H. McLawhorn further set forth: "Should the court deny or overrule the motions to dismiss made by this answering defendant, executor, and thus reverse the referee, said executor reserves all rights thereunder and all rights under the exceptions to both findings of fact and conclusions of law, and tenders the following issues, demanding a jury trial thereon, as required by law:

(1) Has the personal estate of Ira J. Frizelle, deceased, been exhausted by R. H. McLawhorn, executor, as alleged in the petition? Answer: .....

(2) Did the personal property bring a fair and reasonable price at the sale held by R. H. McLawhorn, executor? Answer: .....

(3) Was the sale of the Tuten farm by W. H. Woolard, trustee, valid? Answer: .....

Motion to overrule exceptions of R. H. McLawhorn, executor, to report of referee to confirm the report, and exceptions to issues tendered by the plaintiff and issues tendered in lieu thereof. The defendant J. F. J. McLawhorn, trustee, and others, . . . reserving their right to a trial by jury upon the report of Honorable Jack Edwards, referee, and upon the exceptions to said report filed by R. H. McLawhorn, executor, move the court to overrule the exceptions of the plaintiff and to confirm said report; and further move the court, reserving their rights to a trial by jury as aforesaid upon the overruling of the exceptions of the said R. H. McLawhorn, executor, to deny a trial by jury to R. H. McLawhorn, executor, for that R. H. McLawhorn has failed to preserve his right to a trial by jury; for that he has failed to tender issues upon his exceptions in accordance with the practice and procedure in case of compulsory reference; for that R. H. McLawhorn has failed to assert his right to a trial by jury definitely and specifically in each exception to the referee's report, and his demand for a jury comes too late at the end of his exceptions, and for that the respective issues should have appeared under the respective exceptions, and for that said issues are not pertinent to the facts found by the referee and raised by the pleadings.

The moving defendants, still reserving their right to a trial by jury in the event the court shall refuse to overrule the exceptions of R. H. McLawhorn, executor, and shall hold that R. H. McLawhorn, executor, is entitled to trial by jury upon said report, and reserving their exceptions to such holding, if any, the defendants now except to the issues tendered by R. H. McLawhorn, executor, as set forth in his exceptions to the report of the referee, and in lieu thereof tender the following issues upon said exceptions:

1. Upon the first exception to Finding of Fact No. 7 the moving defendants tender this issue: (1) What was the reasonable market value of the personal property of the late Ira J. Frizelle at the time of the sale thereof had by R. H. McLawhorn, executor? And upon said issue the moving defendants demand a trial by jury.

2. Upon the second exception to Finding of Fact No. 9 (the issue raised by this exception is covered by the issue under the first exception, but the same is repeated) the moving defendants tender the following: "Issue: (2) What was the reasonable market value of the personal property of the late Ira J. Frizelle at the time of the sale thereof had by R. H. McLawhorn, executor? And upon said issue the moving defendants demand a trial by jury," and set forth other exceptions to the findings of fact by the referee, in the same manner, and demanded a trial by jury on each exception.

"The moving defendants further move the court, reserving their rights to trial by jury if said motion shall be denied, that the issues tendered by the executor be stricken out, for that said issues are too general and are not pertinent to the facts found by the referee and the issues raised by the pleadings. And for the further reason that the executor as aforesaid has failed to specifically set forth his respective issues under his respective exceptions. This 29 April, 1937."

"Motion to overrule plaintiff's exceptions to report of referee to confirm the report and exceptions to issues tendered by the plaintiff and issues tendered in lieu thereof: The defendant J. F. J. McLawhorn, trustee, and others, . . . reserving their right to a trial by jury upon the report of Honorable Jack Edwards, referee, and upon the exceptions to said report filed by the plaintiff, move the court to overrule the exceptions of the plaintiff and to confirm said report; and further move the court, reserving their rights to a trial by jury as aforesaid, upon the overruling of the exceptions of the plaintiff, to deny a trial by jury to the plaintiff, for that the plaintiff has failed to preserve his right to a trial by jury; for that he has failed to tender issues upon his exceptions in accordance with the practice and procedure in case of compulsory reference; for that the plaintiff has failed to assert his right to a trial by jury, definitely and specifically in each exception to the referee's report, and his demand for a jury comes too late at the end of his exceptions, and for that the respective issues should have appeared under the specific exceptions, and for that said issues are not pertinent to the facts found by the referee and raised by the pleadings.

"The moving defendants, still reserving their right to trial by jury, in the event the court shall refuse to overrule the exceptions of the plaintiff and shall hold that the plaintiff is entitled to trial by jury upon said report, and reserving their exceptions to such holding, if any, the defendants now except to the issues tendered by the plaintiff, as set forth in his exceptions to the report of the referee, and in lieu thereof tender the following issues upon said exceptions: (1) Upon the first exception (to the ninth finding of fact) the moving defendants tender this issue: 'What was the reasonable market value of the personal property of the late Ira J. Frizelle at the time of the sale thereof by R. H. McLawhorn, executor?' And upon said issue the moving defendants demand a trial by jury," and set forth other exceptions to the findings of fact by the referee in the same manner, and demanded a trial by jury on each exception.

The court below rendered judgment as follows: "This cause coming on to be heard before his Honor, E. H. Cranmer, judge presiding, at the May Term, 1937, of Pitt Superior Court, and being heard upon the report of Jack Edwards, Esq., referee, and the several exceptions filed

thereto by the plaintiff and the defendant R. H. McLawhorn, executor, and upon the motion of J. F. J. McLawhorn, trustee for the minor defendants, and individually, to overrule the exceptions of the plaintiff and the defendant executor, and to deny a trial by jury to the plaintiff and said executor and to confirm the report of the referee, and the court being of the opinion that the plaintiff and the defendant R. H. McLawhorn, executor, have waived their right to a jury trial, for that the plaintiff and the executor have failed to tender issues upon their respective exceptions in accordance with the practice and procedure in cases of compulsory reference by failing to assert their right to a trial by jury definitely and specifically under each exception to the referee's report, and for that the issues tendered are not pertinent to the inquiry, the court thereupon proceeded to hear the report of the referee upon the exceptions of the plaintiff and the executor appearing in the record, and the court now, upon consideration of the referee's report, the evidence taken before him, the exceptions filed by the respective parties, and the oral arguments made by counsel, and without needlessly repeating all of the findings of fact of the referee by referring to and reaffirming such findings as appear to be pertinent to the inquiry, and overruling such findings and conclusions as appear to the court proper to be overruled, and particularly overruling the demurrer and special appearance entered by the defendant executor, for that the court finds as a fact that the executor duly filed an answer to the cross action and affirmative defense, the court now finds the facts and renders judgment thereon as follows," etc.

The findings of fact and conclusions of law are set out fully in the judgment, and the judgment concludes: "Upon the foregoing findings of fact and conclusions of law it is ordered, adjudged, and decreed as follows, to wit: (1) That the plaintiff be and he is entitled to have paid to him out of the assets of the estate of Ira J. Frizelle the sum of $3,316.25, with interest from 28 April, 1931, and the costs incurred in his action against the executor, in which said amount was recovered. (2) That the plaintiff and the defendant J. F. J. McLawhorn, trustee, have and recover of the executor the sum of $1,131.69, with interest thereon from 9 May, 1931, which amount when paid shall be applied to the satisfaction of the indebtedness due and owing the plaintiff. (3) That the plaintiff and the said J. F. J. McLawhorn, trustee, have and recover of the defendant executor the sum of $1,286.43, being the amount of commissions disallowed the executor, which amount when paid shall be applied to the payment of plaintiff's judgment, and the said executor is ordered and directed to forthwith pay said sum of $1,131.69, with interest from 9 May, 1931, and the sum of $1,286.43 into the office of the clerk of the Superior Court of Pitt County, to be

applied to the payment of plaintiff's judgment. (4) That R. H. McLawhorn, executor, holds title to the Tuten farm as trustee for the use and benefit of the estate of the late Ira J. Frizelle, to be administered in accordance with the provisions of the last will and testament with respect to said Tuten farm, and the plaintiff is entitled to have said Tuten farm sold in this action for the purpose of satisfying his said judgment, and for the purpose of effecting this decree Albion Dunn is hereby appointed a commissioner of this court and is hereby authorized, empowered, and directed to sell said land at public auction to the highest bidder, for cash, after first advertising said land as provided by law in such cases, and with the proceeds arising from said sale the said trustee shall first pay all costs incident to said sale, then to the said executor the sum of $9,000, and any balance then remaining in the hands of the commissioner shall be applied, first, to the payment of any balance due on plaintiff's judgment, and the remaining amount in his hands shall then be applied and paid in accordance with the further orders of this court. (5) That in the event, after applying the amounts hereinbefore directed to be applied to the satisfaction of plaintiff's judgment, there shall still be a balance due and owing on plaintiff's judgment, then it is ordered and directed that the lands devised to J. F. J. McLawhorn, trustee, shall be sold for the satisfaction of said judgment, and for the purpose of effecting this decree Albion Dunn be and he is hereby appointed a commissioner of this court, and said commissioner is hereby authorized, empowered, and directed to offer said lands for sale to the highest bidder, for cash, at public auction at the courthouse door in the town of Greenville, after first advertising the same as provided by law, and with the proceeds arising therefrom the commissioner shall first pay all costs incident to said sale, then the balance which may be due and owing on plaintiff's judgment, and any balance then in his hands shall be paid to J. F. J. McLawhorn, trustee, for the use and benefit of the minor defendants. (6) It is further ordered and adjudged that the defendant R. H. McLawhorn, executor, pay the costs of this proceeding, to be taxed by the clerk. And this matter is retained for the report of the commissioner and for further orders on such reports and for no other purpose.

E. H. CRANMER,
Judge Presiding."

The following stipulation, duly signed, is in the record: "In the above entitled cause pending in the Superior Court of Pitt County in which Jack Edwards, attorney, was appointed referee and filed his report on 18 March, 1937, it is understood and agreed by the plaintiff and the defendants that either or all of the parties to said action may

have until 1 May, 1937, within which time to prepare and file exceptions to said reports. This stipulation or agreement is entered into without prejudice to any and all rights of parties to the action, and all parties especially reserve the right to a jury trial to be had at May Term. This 24 March, 1937."

"The defendant R. H. McLawhorn, executor, excepts to the court's ruling that the executor has failed to tender issues upon the respective exceptions in accordance with the practice and procedure in cases of compulsory reference, and for that the issues tendered are not pertinent to the inquiry, and holding that by reason thereof said executor has waived his right to a jury trial. The defendant R. H. McLawhorn, executor, further excepts to the findings of fact by the court. The defendant R. H. McLawhorn, executor, further excepts to the court's conclusions of law. The defendant R. H. McLawhorn, executor, further excepts to the court's sustaining and confirming the report of Jack Edwards, referee. The defendant R. H. McLawhorn, executor, again excepts to the confirmation of the referee's findings of fact and conclusions of law and the overruling of exceptions thereto, duly filed by R. H. McLawhorn, executor. (The exceptions to each of the findings of fact and conclusions of law and the overruling of said exceptions by the court were duly taken and noted after each exception and the ruling thereon.) The defendant R. H. McLawhorn, executor, further excepts to the judgment signed by his Honor, E. H. Cranmer, judge presiding, and appeals to the Supreme Court."

The evidence is set forth in full in the record. Numerous other exceptions and assignments of error are made by R. H. McLawhorn, executor. The material ones and other necessary facts will be considered in the opinion.

Lewis G. Cooper for plaintiff (Amicus Curiæ).

Harding & Lee and J. B. James for R. H. McLawhorn, executor.

Albion Dunn for J. F. J. McLawhorn, trustee for Harriet Zelota McLawhorn, Frederick Gray McLawhorn, and Ira Jerome McLawhorn, heirs at law of Ira J. Frizelle, and individually.

CLARKSON, J. The material questions involved on this appeal are set forth by R. H. McLawhorn, executor, as follows:

First. "Was the court in error in overruling defendant executor's motion to dismiss, for that: (a) The cross action does not state a cause of action; (b) there was a misjoinder of action; (c) the purported cross action was improperly brought; (d) under the will, the defendants represented in the cross action are estopped from setting up said cross action?"

We think all these questions must be answered against the contentions of the executor, R. H. McLawhorn. The executor, R. H. McLawhorn, J. F. J. McLawhorn, trustee and individually, and the heirs at law of Ira J. Frizelle and the widow, were all made parties defendant to the action brought by plaintiff to have his judgment paid out of the assets of the estate of Ira J. Frizelle.

N. C. Code, 1935 (Michie), sec. 135, is as follows: "In addition to the remedy by special proceeding, actions against executors, administrators, collectors, and guardians may be brought originally to the Superior Court at term time; and in all such cases it is competent for the court in which said actions are pending to order an account to be taken by such persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief, as the nature of the case may require."

Section 136: "If it appears at any time during or upon, or after the taking of the account of a personal representative that his personal assets are insufficient to pay the debts of the deceased in full, and that he died seized of real property, it is the duty of the judge or clerk, at the instance of any party, to issue a summons in the name of the personal representative or of the creditors generally to the heirs, devisees and others in possession of the lands of the deceased to appear and show cause why said lands should not be sold for assets. Upon the return of the summons the proceeding shall be as is directed in other like cases."

In a civil action to settle estates and subject real estate to the payment of debts, concurrent original jurisdiction with the clerk of the Superior Court is conferred on the Superior Court. In *Fisher v. Trust Co.*, 138 N. C., 90 (98), it is said: "The jurisdiction of courts of equity to entertain administration suits at the instance of creditors, devisees, or legatees has been uniformly recognized and frequently exercised. Such suits are less frequent since the distinction between legal and equitable assets has been abolished and full powers in the settlement of estates conferred upon courts of probate. Whatever doubt may have existed in respect to the jurisdiction after the establishment of our present judicial system was removed by the Act of 1876, ch. 241, Code, sec. 1511 (C. S., 135); *Haywood v. Haywood,* 79 N. C., 42; *Pegram v. Armstrong,* 82 N. C., 327."

In *S. v. McCanless,* 193 N. C., 200 (205), it is stated: "In the present action the administrators and sureties on their bond, and administrators personally, heirs at law and distributees and widow of N. B. McCanless, are all made parties defendant. Plaintiff has obtained a judgment of $4,000 and interest against the administrator and it is unpaid. As to surety, see C. S., 358. The action is in the nature of a bill to

surcharge and falsify the account. It was well settled under the old practice that an action of this kind could be brought in the court of equity. C. S., 135 (ch. 241, sec. 6, Laws 1876-7), *supra,* is in confirmation. We think the Superior Court has jurisdiction of the defendants and the subject of the action."

Plaintiff, who had a judgment against the executor, alleged in the complaint that the personal property of the estate has been exhausted and demand has been made and refused by the executor to sell a certain tract of land to make assets to pay the debts. The executor admits the judgment rendered and that the personal estate has been exhausted, and says "That defendant knows of no way to satisfy said judgment except by sale of real estate." J. F. J. McLawhorn, trustee, individually and as guardian *ad litem* of the infant defendants, heirs at law of Ira J. Frizelle, in answer says there are sufficient personal assets to pay plaintiff's claim, and sets up a cross action and affirmative defense to "surcharge and falsify" the executor's account. At this stage of the pleading the executor did not make the contention he now does. He makes reply and denied the material allegation of the cross action, and prays that he go without day and recover his costs. This raised issues of fact, and the clerk made an order transferring the cause to the Superior Court for trial before a jury.

Section 511: "The defendant may demur to the complaint when it appears upon the face thereof, either that: . . . (6) The complaint does not state facts sufficient to constitute a cause of action."

We think the cross action states a cause of action and there was no misjoinder of action. All objections except those on the ground that the court has no jurisdiction of the person of the defendant or the subject matter of the action, and that the complaint does not state facts sufficient to constitute a cause of action, are waived unless they are taken by demurrer or answer. But the exceptions referred to may be taken advantage of by demurrer even in the appellate court. *Clements v. Rogers,* 91 N. C., 63, 64. See sec. 518 and the note thereto. *S. v. McCanless, supra,* p. 206.

The personal property of the estate of Ira J. Frizelle must be exhausted before resort to the real estate held by J. F. J. McLawhorn, trustee, may be had. The will provides, under Item 3, that the "Tuten Place" and personal property thereon and his life insurance be used to pay his debts referred to in Item 1, where he provides that his "just debts" be paid by the executor, except those secured by real estate deed of trust and mortgage. This controversy relates primarily to the "Tuten Place" and the personal property thereon. Then again, the residuary clause in the will leaves all assets not disposed of to "my next of kin." If his personal property and real estate were not exhausted, J. F. J.

McLawhorn, trustee, and the heirs at law had the right to see that this was done and to "surcharge and falsify" the executor's account. They were all parties to the action and they are not estopped to do this under the will of Ira J. Frizelle and the cross action was proper. *Lee v. Beaman,* 101 N. C., 295; *Smith v. Brown,* 101 N. C., 347; *Fisher v. Trust Co.,* 138 N. C., 90; *Thigpen v. Trust Co.,* 203 N. C., 291; *Barkley v. Realty Co.,* 211 N. C., 540. While the lands may be sold where the personal estate is insufficient, the rule is that the personalty must be first applied before resorting to the realty; and this, even though the debts are secured by mortgage on realty. C. S., 74; *Wadford v. Davis,* 192 N. C., 484; *Creech v. Wilder, ante,* 162 (165). Ira J. Frizelle's last will and testament, under the facts in this case, does not change the above rule.

Second. "Was the court in error in denying defendant executor's right to a trial by jury?" We think not. In the judgment of the court below, in part, is the following: "The court being of the opinion that the plaintiff and the defendant R. H. McLawhorn, executor, have waived their right to a jury trial, for that the plaintiff and the executor have failed to tender issues upon their respective exceptions in accordance with the practice and procedure in cases of compulsory reference by failing to assert their right to a trial by jury definitely and specifically under each exception to the referee's report, and for that the issues tendered are not pertinent to the inquiry, the court thereupon proceeded to hear the report of the referee upon the exceptions of the plaintiff and the executor appearing in the record."

In *Driller Co. v. Worth,* 117 N. C., 515 (521), it is said: "We think that the court erred in holding that the defendants were entitled to a jury trial upon any exception which did not embody a definite and specific demand for a trial by jury upon that particular exception. It was error also to hold if such specific demand had been made that the right extended further than the issues 'raised by the pleadings.'" *S. c.,* 118 N. C., 746.

In *Cotton Mills v. Maslin,* 200 N. C., 328 (329), it is held: "A party who would preserve his right to a jury trial in a compulsory reference must object to the order of reference at the time it is made, and on the coming in of the report of the referee, if it be adverse, he should seasonably file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. *Wilson v. Featherstone,* 120 N. C., 446, 27 S. E., 124; *Yelverton v. Coley,* 101 N. C., 248, 7 S. E., 672. This was not done in the instant case. Although a party may duly enter his objection to the order of reference, he may yet waive his right to a jury

trial by failing to assert such right definitely and specifically in each exception to the referee's report and by his failing to tender the proper issues. *Alley v. Rogers,* 170 N. C., 538." *Texas Co. v. Phillips,* 206 N. C., 355 (358); *Ogden v. Land Co.,* 146 N. C., 443 (446); *Robinson v. Johnson,* 174 N. C., 232; *Booker v. Highlands,* 198 N. C., 282; *Bank v. Fisher,* 206 N. C., 412.

In N. C. Prac. & Proc. in Civil Cases (McIntosh), sec. 525, at p. 567, it is said: "A party claiming a jury trial in a compulsory reference must protect his right in the following manner: (1) He must object to the order of reference at the time it is made, and he may designate the particular issues of fact to be tried, but it is held that a general objection and exception in the form, 'defendant's counsel except to the above order of reference,' is sufficient to preserve the right. (2) When the report of the referee is filed he should file exceptions to particular findings of fact in apt time, tender appropriate issues based upon such facts, and demand a jury trial on each issue; filing exceptions without tendering specific issues or designating the specific points upon which he demands a jury trial is not sufficient," citing many authorities.

The plaintiff, in his brief as *Amicus Curiæ,* says: "In general the profession does not appear to have strictly followed these decisions. . . . And it so happens that the plaintiff in this particular case filed exceptions and followed the usual custom. Not being advertent at the time to the particularity required by the decisions above cited, plaintiff's exceptions, however, were filed solely for the purpose of staying in court until the defendants shall have litigated and determined the controversy between them now before this Court." The brief cites authorities sustaining the ruling of the court below. The plaintiff, *Amicus Curiæ,* concludes his brief as follows: "It is respectfully submitted to the Court that upon a reading of the evidence before the referee the same strongly supports the findings of the court below, and upon rereading becomes stronger and stronger, and no doubt had the same been submitted to a jury identical findings would have resulted. The plaintiff is only interested in the collection of his debt, and a new trial or reversal in this cause will further delay plaintiff in realizing upon his indebtedness, and since the defendant executor has had his day in court, the plaintiff now respectfully submits to the court that no reversible error has been committed below and that the judgment entered below should be affirmed."

The executor failed to follow the procedure set forth in the decisions of this Court. J. F. J. McLawhorn, trustee, individually and as guardian *ad litem* of the heirs at law of Ira J. Frizelle, did so in accordance with the opinions and with unusual particularity, as will be seen by

the record. *Contracting Co. v. Power Co.*, 195 N. C., 649; *Anderson v. McRae*, 211 N. C., 197. It seems that the learned judge in the court below followed carefully the decisions of this Court on this aspect.

Third. Further, the executor's questions involved: "(3) Was the court in error in excluding testimony and allowing other testimony over the objection of the defendant executor? (4) Was the court in error in overruling exceptions of defendant executor in the report of the referee? (5) Was the court in error in sustaining the report of the referee? (6) Was the court in error in denying defendant executor's motion to dismiss? (7) Was the court in error in its findings of fact and conclusions of law? (8) Was the court in error in signing the judgment appealed from?" We cannot hold with the executor. If there was any error in allowing or excluding testimony it was immaterial and not prejudicial. The law in reference to the conduct of an executor in dealing with estate of his testator is well settled in this jurisdiction.

In *Taylor v. Taylor*, 108 N. C., 69 (73), citing authorities, it is written: "An administrator cannot purchase property at his own sale, even in good faith, fairly, and for a fair price; certainly he cannot in any case without the sanction or ratification in some sufficient way manifested by those interested. This rule is well settled and founded in reason, justice and sound policy." The dealings where trust relationship exists is fully gone into in *Hinton v. West*, 207 N. C., 708; *Harrelson v. Cox*, 207 N. C., 651.

The court below did not perfunctorily affirm the referee's findings of fact and conclusions of law, but passed on each in detail and carried out to the letter what is required in the decisions of this Court.

In *Trust Co. v. Lentz*, 196 N. C., 398 (at p. 406), it is said: "In view of the position taken by some of the parties that the judge was without authority to change the report of the referee—the reference being by consent—it is sufficient to say that, in a consent reference as well as in a compulsory one, upon exceptions duly filed, the judge of the Superior Court, in the exercise of his supervisory power and under the statute, may affirm, modify, set aside, make additional findings and confirm, in whole or in part, or disaffirm the report of a referee. *Contracting Co. v. Power Co.*, 195 N. C., 649; *Mills v. Realty Co.*, 196 N. C., 223." *Abbitt v. Gregory*, 201 N. C., 577 (596); *Polikoff v. Service Co.*, 205 N. C., 631 (634).

The competent evidence was sufficient for the court below to find the facts as set forth in the record and affirm the referee's report. This is binding on this Court if there was sufficient competent evidence to support them. *Dent v. Mica Co., ante*, 241 (242). We think there was. We see no error in the conclusions of law. The parties men-

tioned by the executor we do not think necessary parties for the determination of this controversy. *Higgins v. Higgins, ante,* 219. The stipulation was "without prejudice" and waived no right.

From a careful review of the whole record we can find in law no prejudicial or reversible error. The judgment of the court below is

Affirmed.

CHARLES PEARSON v. OLIVETTE LUTHER.

(Filed 24 November, 1937.)

1. Trial § 22b—

Upon a motion to nonsuit, all the evidence tending to support the cause of action alleged is to be considered in the light most favorable to the pleader, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. Negligence § 11—

Contributory negligence is negligence on the part of plaintiff concurring and cooperating with defendant's negligence to produce the injury, and negligence and contributory negligence do not essentially differ.

3. Negligence § 17—

The burden of proving negligence is on plaintiff, while the burden of proving contributory negligence is on defendant.

4. Negligence § 19b—Right to nonsuit for contributory negligence.

Defendant is entitled to a nonsuit on the ground of contributory negligence where plaintiff's own evidence establishes contributory negligence, but contributory negligence must be a proximate cause of the injury to bar recovery, and where more than one inference can be drawn from the evidence as to whether plaintiff was guilty of contributory negligence, or whether such contributory negligence was a proximate cause of the injury, the issue is for the jury.

5. Automobiles §§ 8, 18a—

The violation of a safety ordinance is negligence *per se,* but is not actionable negligence unless a proximate cause of the injury, and the question of proximate cause is ordinarily for the jury.

6. Automobiles § 12e—Right of way at through street intersection.

While the failure to stop before attempting to cross a through street intersection in violation of a municipal ordinance is negligence *per se,* a vehicle traveling along the through street does not have the right of way at the intersection if a vehicle from the cross street is already in the intersection before the vehicle traveling along the through street is near enough the intersection to constitute an immediate hazard. N. C. Code, 2617 (a), Ordinance of the City of Asheville.

7. Automobiles §§ 12e, 18c—Contributory negligence in failing to stop before entering through street intersection held for jury under evidence.

In this action to recover for injuries received in an automobile collision, defendant filed a cross action alleging negligence on the part of plaintiff, and plaintiff filed a reply alleging contributory negligence of defendant as a bar to recovery on the cross action. The evidence favorable to defendant on the issue of her contributory negligence tended to show that as she approached a through street intersection she put her car into low gear, but did not stop as required by ordinance, that because of obstructions she had to enter the intersection before she could see vehicles approaching along the through street from her left, that when she entered the intersection she saw plaintiff's car approaching from her left, that she thought she had ample time to get across the intersection, and started on across, and put her car into second gear, that she then saw plaintiff's car almost upon her, and turned her car to the right, but was unable to avoid hitting plaintiff's car on its rear right, and that plaintiff's car was 200 feet away from the intersection at the time she entered it, but was being driven at an excessive, dangerous, and unlawful speed. *Held:* Whether defendant's contributory negligence in failing to stop before entering the through street intersection was a proximate cause of the collision, is for the jury under the evidence, and plaintiff's motion to nonsuit the cross action was properly denied.

8. Automobiles § 18h—Instruction in regard to negligence and proximate cause in entering through street intersection held without error.

The instruction in this case upon the question of negligence in failing to stop before entering a through street intersection, as required by municipal ordinance, and the rule of the prudent man and the speed limit in entering an obstructed intersection, and proximate cause, *is held* without error when construed as a whole, and appellant's objections thereto on the ground that it did not sufficiently instruct the jury that the failure to stop before entering the through street intersection was negligence *per se*, and for the failure of the court to give special instructions requested upon the question, are untenable.

9. Evidence § 30—

Where a witness properly identifies photographs as being of the scene of the accident in suit, the admission of the photographs in evidence for the purpose of explaining the witness' testimony is not error.

10. Same—

Where the testimony is conflicting as to whether certain photographs of the scene of the accident in suit were taken after the place had been substantially changed, the admission of the photographs in evidence rests in the sound discretion of the trial court, and the court's order excluding them from evidence will not be held for error.

APPEAL by plaintiff from *Sink, J.*, at May Term, 1937, of BUNCOMBE. Affirmed.

This is an action for actionable negligence, alleging damage, commenced by the plaintiff, Charles Pearson, against the defendant, Olivette Luther, for the recovery of damages to the person and property

of the plaintiff Pearson, because of the alleged negligent acts of the defendant Luther growing out of an automobile collision that occurred between the automobile driven by the plaintiff Pearson and that driven by the defendant Luther in the city of Asheville, at the intersection of Hilliard and Church streets. The defendant Luther filed answer denying plaintiff's allegations and set up a counterclaim for injuries which she alleged she sustained by reason of the alleged negligent acts of plaintiff Pearson at the time of the aforesaid automobile collision. In reply to the counterclaim of the defendant, the plaintiff pleaded the contributory negligence of the defendant in bar of her recovery against him. The case was heard before his Honor, Kitchin, J., presiding over the general county court, and a jury, and upon a verdict in favor of the defendant, as against the plaintiff, in the sum of $3,000, a judgment in said amount was entered and the plaintiff appealed to the Superior Court of Buncombe County for errors assigned. The case then duly came on for hearing on plaintiff's appeal before his Honor, H. Hoyle Sink, Judge of the Superior Court of Buncombe County, at the May Term, 1937. Judge Sink ruled on each one of plaintiff's exceptions and assignments of error, refusing to sustain said exceptions and assignments of error, and affirmed the judgment of the general county court. The plaintiff excepted to the signing of the judgment by Sink, J., and to each ruling of the court excepted and assigned errors, and appealed to the Supreme Court.

The collision, which is the subject of this controversy, took place about 6 o'clock p. m. on 21 May, 1936, at the intersection of Church and Hilliard streets in the city of Asheville, N. C. The plaintiff and defendant were both driving automobiles and both at the wheel. As one would approach Hilliard Street from Church Street, either north or south, there was hung a sign about 18 inches broad, some 12 feet high, at the intersection; the word "Stop" was printed on each side of the sign—on the north and south side of the sign. When one approached Church Street from Hilliard Street, from either side, on the sign was "Slow." The word "Stop" was written in white on Church Street on either side just before one entered Hilliard Street. Plaintiff was approaching Church Street and testified, in part, as follows: "As I approached the intersection of Hilliard and Church streets and observing the sign which hung up there I slowed down to about 12 or 15 miles an hour. Seeing the way was clear ahead of me, I proceeded on. As I got to the front side of Church Street there was a car coming rapidly to my right up Church Street, not stopping at the stop sign, and knowing it was going ahead of me I tried to dodge it but I couldn't. The car struck me on the post, the door post, the post that holds my door to my car that is on the back of the door, not on the front. It struck me on

the right side. It struck me there on the right rear fender and running board. When it struck me it turned my car around and over on the left side, with my car heading west. . . . When I observed this car which did collide with me it was coming over the 'stop sign' this way. That car did not stop, as far as I could see. I think Miss Luther was operating that other car. That is, the defendant in this action; this lady here. . . . I observed it approaching me there; I know it seemed to be coming pretty fast toward me. (Cross-examination.) That is a blind corner and a slow sign is there. . . . When I approached that intersection I slowed down to 12 or 15 miles an hour. Seeing the the way clear, I proceeded on. . . . I run around her and I speeded up to try to get away from her. I can't tell you whether I went to my left or didn't. I went right straight ahead fast as I could. . . . I imagine it would take a car's length, maybe two car's lengths, to stop that car."

Defendant Olivette Luther testified, in part, as follows: "The collision occurred at the intersection of Church and Hilliard streets. I was proceeding up Church Street, north. I was driving my car. . . . I had a collision with a car there. The car was going down Hilliard toward Biltmore Avenue, going east on Hilliard, coming from my left. I was coming from his right. Mr. Pearson was driving that car. . . . Q. Miss Luther, on approaching that intersection what did you do in reference to the operation of your car? Ans.: I hadn't been back in town very long. I had been out of town in Florida. I saw the 'stop sign' and slowed up, went to low gear—I didn't absolutely stop the car, but I went into low gear. You know you have to go mighty slow to go into low gear. I couldn't see a thing. It was a blind corner. I put it into low gear, eased across the street in order to see up the street; eased across the sign up into Hilliard Street. I saw Mr. Pearson's car at the end of the block. I thought I had plenty of time to get across the street. I started across the street, was changing into second gear, something attracted my attention; I guess his brakes squeaking, he was coming so fast he was going to hit me; I pulled out Hilliard towards Biltmore, east, cut my car around; when I did that he was on me; we came together like this (indicating). Front end of my car hit the back end of his car. My car was knocked across the street over on the southern side of Hilliard Street. He was coming so fast his car turned over and turned around, reversed ends. As to how far out Hilliard Street from Church Street his car came to a standstill, from the spot of oil that was on the street when his car turned over—you stepped it off—30 feet. . . . At the time his car came in contact with my car I was turning out Hilliard in order to avoid the collision. Of course, he was pulling away from me the same as I was pulling away from him. He

pulled out towards the north side of Hilliard Street. From my observation of the operation of his car on that occasion, in my opinion he certainly was flying; he was going very fast—about sixty miles per hour, I imagine. I have an opinion as to how fast my car was moving at the time I entered the intersection and at the time he came in contact with my car with his machine. I wasn't going as fast as ten miles an hour because the needle of my speedometer was down below ten, between five and ten, around eight, I should say. As to how far up Church Street you have to get before you could see out Hilliard, the middle of the car had to be out Hilliard, because this corner is in the way. A car has to be out fully—if the car is 15 feet long, it would have to be fully seven or eight feet out in the street before you could see. As to why I didn't stop instead of pulling on into the street, I think I stated that. I stated that when I said what I did. I almost stopped there. I couldn't see anything. It was a blind corner. I had to ease out into the street. Anybody has to ease out in the street. You can come up Church Street and can't see anything—you have to get out in there before you can see out in the street. He was inside the block. I had plenty of time to go across there had he been traveling at a normal rate of speed. . . . As to whether Mr. Pearson or I entered the intersection first, I was in the intersection when he was out on the street end—not end—but just inside the block down in front of Ravenscroft Drive. I was in the intersection of Church and Hilliard and he wasn't. When I speak of the intersection that is where the two streets cross here. It would be right there (witness marks on board). I was in that square prior to the time of the entry of Mr. Pearson, entry of his car. Mr. Pearson's car when I first saw it was just inside the block on Hilliard Street, I guess about 80 feet inside the block, down in front of Ravenscroft Drive about, I imagine, since the block is 280 feet it was probably 200 feet from me, around 200 feet from me. When I first saw him I could not judge his speed. I saw the car inside this block and I was in this intersection. I thought I had time to get across the street is the reason I started, proceeded to cross the street. He gave me no signal of his intention of coming on me. He made no signal at all. As to when I formed my opinion as to his speed he was a great deal closer to me. I must have heard his brakes squeaking—something made me realize he wasn't slowing up. Changing into second gear, I looked up—there he was right on me. He covered that distance in that period of time. As a consequence of that, I swerved my car sharply out to Hilliard Avenue. I turned to the east in order to avoid his car that was rushing down on me. The cars came in contact. . . . I said it was the fault of Mr. Pearson because he was speeding, so I also said look at the skid marks on the street. (Cross-examination.) I was proceeding up Church

Street northwardly. The grade on this street is upgrade, very slight one on this end and more—it starts immediately at that intersection more steep. It begins to get steeper along about here. I was driving on the right-hand side of the street, right up this way. I saw the stop sign as I came up the street, the one on top. I saw the stop sign located here. As I approached them I saw those stop signs. I think the stop sign was a little farther back than it shows on this map, but I wouldn't say. I practically stopped momentarily. I went into low gear. You know how slow your car goes. I couldn't see anything. I had to go into low gear, moved on up in order to see. I think the stop sign was a little farther back this way. I came up to the stop sign and changed into low gear there. I couldn't see the street at that time. I couldn't see anything, that is why I went into low gear. I proceeded to cross on up this way. I changed gears back here and proceeded on. Q. Did you stop here? Ans.: No, sir. Mr. Brown: Now explain, if you wish. Ans.: I was in low gear; I didn't stop; I was looking out the street. I saw the car at the head of the hill. I had plenty of time to get across the street. Q. You didn't stop up here? Ans.: No, sir. Q. That is when you could first get view of this street? Ans.: Yes, sir. Q. You proceeded right on? Ans.: Yes, I proceeded right on and thought I had time to get across the street because the other car was at the end of the block. Q. You traveled right on from this point without stopping? Ans.: Yes, sir. I got as far as the middle of the street, or approximately the middle of the street, and the other car was coming at such a rate of speed I saw I couldn't get the rest of the way across so I swerved my car out Hilliard. I did not proceed straight from this point in low gear right straight across, I was changing gears about the time I realized Mr. Pearson's car was going to hit me, so I swerved then. . . . He veered his car but not far enough. He had so much speed he would have turned over if he had. He would have missed me, but turned over. He turned over the moment of the collision. He was about on one wheel when he hit me. He turned over, spinned around. My car didn't spin around as his did. . . . These pictures that have been placed in evidence were made by Mr. Sanford Brown, attorney, and I was along. The first time I saw Mr. Pearson's car after I got out in the street, his car was in the block, but it was at the farther end of the block." . . .

Eleven pictures were introduced by defendant, and the following occurred: "Defendant offers pictures to illustrate the witness' testimony. Plaintiff objected; objection overruled; plaintiff excepted. (The court.) The picture is admitted with the same restrictions as the others. The jury is instructed these photographs cannot be considered by you as substantive evidence, but may be used and considered only for the pur-

pose of illustrating such testimony as has been given or will be given by this witness. Q. Miss Luther, yesterday I handed you a number of pictures, which I now place back in your hand—please look those over. A. (Witness looks over pictures.) Q. State whether or not you were present at the taking of each and every one of those pictures? Plaintiff objected; objection overruled; plaintiff excepted. Yes, they were taken at two different times. Mrs. Brown was along one time. The other time you and I made them. The condition existing on 21 May, 1936, the date of this collision, had not changed as to any of these different views represented by these pictures, except the signboard had been moved. As to how far, the Outdoor man said yesterday it was ten feet. Q. These pictures, state whether they are true representations of those views? Plaintiff objected; objection overruled; plaintiff excepted. Ans.: Yes, sir. Plaintiff moved to strike out answer; denied; plaintiff excepted." A photographer was introduced by plaintiff, who took three pictures about the time of the trial, some time after the collision. "(Mr. Walton.) I would like to offer these pictures in evidence, these three pictures. Defendant objected; objection sustained; plaintiff excepted."

J. L. West, a former witness for plaintiff, was recalled by plaintiff and testified: "Q. Mr. West, I show you a photograph here and ask you whether or not the picture shown on there is a true representation of the intersection as you saw it from this window at the time of the accident about which you have testified: Ans.: It is. Q. I believe you stated on direct examination you were sitting in the last window at the rear of that house? Ans.: Yes, sir. Q. What window were you sitting in? Ans.: The rear window. (Mr. Walton.) The plaintiff offers this picture in evidence. Defendant objected; objection sustained; plaintiff excepted. (The court.) The pictures cannot be used as evidence. (Mr. Walton.) I ask that they be introduced and identified. It is only for the purpose of interpreting and explaining this witness' testimony which he has already made and at this time makes on the witness stand. (The court.) This is sort of a reversal in the usual order of using a photograph. (Mr. Walton.) It is the same theory you let theirs in, your Honor, please. (The court.) The other witness had photographs which she took herself and testified about. (Mr. Walton.) She never did testify she took the photographs, she said Mr. Brown took them. (The court.) The pictures are not offered under the same circumstances as the pictures taken for the defendant. I will allow you to use these pictures where they are properly shown to be taken and properly identified by any witness testifying on the witness stand. He may use them to explain his testimony. That is the only purpose they could be permitted. (Mr. Walton.) Your Honor is permitting the other pictures

to be introduced under the same theory. (The court.) No, sir. You may think that, but I admitted them under entirely different circumstances. Q. Have you been about that scene of this intersection recently? Ans.: I was there yesterday morning. Q. State whether or not conditions there now are substantially similar to those existing there at the time this accident occurred, particularly with reference to the visibility of this intersection from where you were sitting? Defendant objected; objection sustained; plaintiff excepted." The defendant Olivette Luther, in rebuttal, stated that the conditions were not the same as at the time of the collision. Both parties introduced evidence corroborating their version of the collision. There was evidence that the cars were damaged and both plaintiff and defendant injured—defendant seriously so.

The plaintiff introduced an ordinance of the city of Asheville, N. C., as follows:

"Section 72. Vehicle Entering Through Highway or Stop Intersection. (2) The driver of a vehicle shall stop as required by this act at the entrance to a through highway and shall yield the right of way to other vehicles which have entered the intersection from said through highway or which are approaching so closely on said through highway as to constitute an immediate hazard, but said driver having so yielded may proceed, and the drivers of all other vehicles approaching the intersection on said through highway shall yield the right of way to the vehicle so proceeding into or across the through highway. (b) The driver of a vehicle shall likewise stop in obedience to a stop sign as required herein at an intersection where a stop sign is erected at one or more entrances thereto although not a part of a through highway, and shall proceed cautiously, yielding to vehicles not so obliged to stop which are within the intersection or approaching so closely as to constitute an immediate hazard, but may then proceed."

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the property of the plaintiff damaged by the negligence of the defendant as alleged in the complaint? Answer: 'No.'

"2. Was the plaintiff personally injured and damaged by the negligence of the defendant as alleged in the complaint? Answer: 'No.'

"3. Was the defendant damaged by the negligence of the plaintiff as alleged in the answer? Answer: 'Yes.'

"4. Did the defendant by her own negligence contribute to any injury which she received and as alleged in the reply of the plaintiff? Answer: 'No.'

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

"6. What amount of damages, if any, is defendant entitled to recover of the plaintiff? Answer: '$3,000.'"

The material exceptions and assignments of error and other necessary facts will be considered in the opinion.

Harkins, Van Winkle & Walton for plaintiff.
Sanford W. Brown and J. W. Haynes for defendant.

CLARKSON, J. The questions involved: First. Did the trial court err in refusing to grant motion for judgment of nonsuit on counterclaim of defendant? We cannot so hold.

At the close of defendant's evidence and at the close of all the evidence the plaintiff, in the general county court of Buncombe County, made motions for judgment as in case of nonsuit as to defendant's counterclaim. C. S., 567. These motions were overruled and affirmed on appeal to the Superior Court. In this we see no error.

The evidence which makes for plaintiff's claim, or tends to support his cause of action, is to be taken in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

The evidence was to the effect that, although there was a stop signal, the view of Hilliard Street coming into it from Church Street going north was obstructed. It was a blind corner. Defendant slowed up and went into low gear, she eased out into the street. Had to get out into Hilliard Street before she could see out in the street, and if plaintiff had been traveling at a moderate rate of speed, in accordance with the law, she would have had plenty of time to get across the street. Before entering Hilliard Street she practically stopped momentarily, then proceeded, going less than 10 miles an hour. When she first saw plaintiff he was at the end of the block and she thought she had plenty of time to get across the street. "He was certainly flying, he was going very fast, about 60 miles per hour, I imagine." She was in the intersection and he was some 200 feet from it. He gave no signal, he was not slowing up; she got as far as the middle of the street and saw plaintiff's car was coming at such a rate of speed that she could not get across the street and would be hit, so she swerved her car.

In *Jones v. Bagwell*, 207 N. C., 378, at p. 386, it is written: "It is well settled that contributory negligence is plaintiff's negligent act occurring and coöperating with defendant's negligent act in producing injury. Negligence and contributory negligence do not essentially differ. *Liske v. Walton*, 198 N. C., 741. The burden of proving negligence is on plaintiff, that of contributory negligence is on defendant.

In *Elder v. R. R.*, 194 N. C., 617 (619), citing authorities, is the following: 'Originally, under C. S., 567, in cases calling for its application, there was some question as to whether a plea of contributory negligence (the burden of such issue being on the defendant) could be taken advantage of on a motion to nonsuit, but it is now well settled that such may be done when the contributory negligence of the plaintiff is established by his or her own evidence, as he or she thus proves himself or herself out of court.'"

In *Hendrix v. R. R.*, 198 N. C., 142 (144), it is written: "It is well settled in this jurisdiction that the violation of a town or city ordinance, or State statute, is negligence *per se*, but the violation must be the proximate cause of the injury. Ordinarily this is a question for the jury if there is any evidence, but if there is no evidence that the violation of the ordinance or statute is the proximate cause of the injury, this is for the court to determine."

If there is more than a scintilla of evidence, contributory negligence is for the jury. *Moseley v. R. R.*, 197 N. C., 628. There must be a casual connection between the negligent act and the injury. The negligence must be the proximate cause or one of the proximate causes of the injury. N. C. Code, 1935 (Michie), sec. 2617 (a), requires under certain conditions that motor vehicles must come to a full stop at highway crossings. In the section is the following: "This section shall not interfere with the regulations prescribed by towns and cities. No failure so to stop shall be considered contributory negligence *per se* in any action for injury to person or property; but the facts relating to such failure to stop may be considered with other facts in determining negligence."

The city of Asheville passed an ordinance requiring persons to stop before entering Hilliard Street, but there are limitations in the ordinance: "And shall proceed cautiously, yielding to vehicles not so obliged to stop which are within the intersection or approaching so closely as to constitute an immediate hazard, but may then proceed." The testimony of defendant was that she was in the intersection and plaintiff was some 200 feet away.

Section 2618(D) is as follows: "Fifteen miles per hour in traversing an intersection of highways when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last one hundred feet of his approach to such intersection he does not have a clear and uninterrupted view upon all of the highways entering such intersection for a distance of two hundred feet from such intersection."

The street intersection, to say the least, was a peculiar one. Plaintiff was coming east on a 7 per cent down grade on Hilliard Street into the intersection of Church and Hilliard streets. His view was ob-

structed. The defendant was driving north on Church Street, 24 feet in width, and had to drive into Hilliard Street, upgrade, before she could see, on account of the concrete wall and evergreen hedge to her left—the direction from which plaintiff was coming. She was in the intersection when she saw plaintiff 200 feet away coming at 60 miles per hour. She had the right of way, and the evidence indicates that she was trapped by plaintiff's speed. Whether her failure to stop was the proximate cause of the injury was at least a question of fact for the jury to determine and not one of law for this Court.

Second. Did the trial court err in refusing to submit to the jury special instructions as requested and err in his charge to the jury in response to an inquiry from juror? We think not.

Under the view we take of the evidence, we think plaintiff's prayers for special instructions, as requested, were properly refused, but the court below gave same in substance. The court defined correctly negligence, contributory negligence, and proximate cause under the respective issues, and charged: "So when plaintiff has shown by the greater weight of the evidence that the defendant failed to exercise due care, and that in the failure to exercise due care she violated some legal duty to the plaintiff, and such failure on her part was the proximate cause of the collision and consequent injuries, then he will have established actionable negligence, so if you find by the greater weight of the evidence, it being the duty of the defendant to obey all the laws of the State and the city to stop at the intersection before entering, if you find she did not stop as required by law, and if you find her failure to stop at the intersection before entering it was the proximate cause of the collision, then you would, and it would be your duty to answer the first issue 'Yes,' or if you find by the greafer weight of the evidence that the defendant, Miss Luther, drove her car into the intersection at a rate of speed in excess of fifteen miles an hour, that would be negligence, and if you find that the speed of the car, if you find she did drive at that speed into the intersection was the proximate cause of the collision, then it would be your duty to answer the first issue 'Yes.' The violation of any law or ordinance enacted or intended for the preservation or protection of the life, limb, or property is negligence in itself, and when it is shown by the greater weight of the evidence that such negligence was the proximate cause of the injuries complained of, then it would be actionable negligence, and you would answer the first issue 'Yes.' The violation of any law or ordinance enacted or intended for the preservation or protection of the life, limb, or property is negligence in itself, and when it is shown by the greater weight of the evidence that such negligence was the proximate cause of the injuries complained of, then it would be actionable negligence, and you would answer the first issue

'Yes.' Not every negligent act is actionable negligence. Defendant may have been however negligent, if her negligence resulted in no injury as the proximate result of the injury, then it is not actionable negligence; only when negligence becomes the proximate cause of the injury does it establish liability on the part of the defendant. The court charges you it is a violation of the law to drive an automobile past the stop sign on Church Street at this intersection without bringing the car to a stop. The court charges you it would be a violation of the law to drive a car up Church Street into the intersection at a rate of speed in excess of fifteen miles an hour at this point." The charge covers clearly the law applicable to the facts.

Inquiry of the juror was as follows: "(Court.) Gentlemen, I take it you have not arrived at a verdict. First juror: We have all agreed that both parties were negligent. Second juror: Your Honor, the movement of the defendant's car into this hazardous place, it seems to have a tendency we don't get that cleared up exactly—in other words, what we have in mind is as to its stillness to a stop or whether coming in there it could gradually be moved and not necessitate a standstill. (Court.) Gentlemen, these parties are to be judged by the jury in the light of the circumstances in which they appeared to have been at the time. (Court.) The violation of a statute is not necessarily actionable negligence, but it is negligence, but not necessarily such negligence as would warrant a recovery against the party violating it unless the jury shall find by the greater weight of the evidence that the movement of the car of the defendant in entering the intersection was not in accordance with the standard of the prudent man, then it would be negligence, actionable negligence; in other words, the defendant is required to exercise that care which is commensurate with the circumstances in which she is placed; due care is that care which any person of ordinary prudence would have used in the same circumstances. If she failed to exercise due care in entering the intersection, regardless of whether she was violating the statute or not, if she failed to exercise due care, it would be negligence, because the duty she owed to the plaintiff was to exercise due care. Due care is a well defined meaning in the law, and that is always measured by the standard of what a person of ordinary prudence would have done under the same circumstances. If she failed to exercise that care, the next question that comes to the jury is, Was her failure the proximate cause, that is, the cause of the collision, the cause without which it would not have occurred? Suppose, for instance, that the jury should have found she stopped at the intersection, she stopped before entering, and then have done the same thing she says she did, if she was exercising due care when she drove into the intersection in the manner in which she contends she did. Every person is charged with

the duty in operating an automobile to exercise due care. Neither party is required, under the law, to anticipate the other party will violate the law. If the driver of an automobile sees another car approaching him in the middle of the street, he has the right to assume, before the car gets to him, the party driving the car in the middle of the street will go to his own side of the road, and he has the right to act upon that assumption, so if the plaintiff was coming down the street, he had the right to assume every person crossing that intersection would obey the law and not cross the intersection without ascertaining the condition of the traffic in it. On the other hand, the defendant had the right to assume, if she saw the plaintiff driving down the hill at a rapid rate of speed, she had the right to assume before he got to the crossing he would bring his car down to the speed required by law and bring himself within the law before he reached the intersection. She had a right to assume he would do that and to act upon that assumption, and she could act upon it without being held guilty of negligence. It is a question of what a person of ordinary prudence would have done under those circumstances. There is no degree of care to be used. The test is whether the care that was exercised was such care as a person of ordinary prudence should have used when confronted by the same situation, charged with a like duty. A person handling sticks of dynamite would be required to use that care which a person of ordinary prudence should use when handling dynamite. A person handling stovewood would be required to use that degree of care which a person of ordinary prudence should use when handling stovewood. It would naturally, of course, require more care in handling dynamite than in handling stovewood. But the test is: 'What would a person of ordinary prudence have done under those circumstances, what would you or any other person of ordinary prudence have done when confronted and placed in the same situation?' Both parties are held to the degree of care which a person of ordinary prudence should have used under the circumstances in which they were placed; as I say, both parties may rely upon the other party or assume the other party will obey the law, and if one violates the law, then the question is whether that violation was the cause of the accident. Proximate cause is that cause without which it would not have happened, the actual cause that produced the collision, and that is the question you have to decide, of course, and you must decide it from the evidence as you heard it here, measure the conduct of the parties by the rule of the prudent man."

Taking the charge in connection with the charge previously given, that it was the duty of the defendant "to stop at the intersection before entering," etc., we see no prejudicial or reversible error.

Third. Did the trial court err in its ruling as to the introduction of certain evidence? This relates to the photographs exhibited by defendant. They were not introduced as substantive evidence.

In *Elliott v. Power Co.*, 190 N. C., 62 (65), it is said: "Plaintiffs excepted because certain pictures were submitted to the jury. All of these pictures were used to explain the witnesses' testimony to the jury. It was not error for the court to allow the jury to consider the pictures for this purpose and to give them such weight, if any, as the jury may find they are entitled in explaining the testimony." *Honeycutt v. Brick Co.*, 196 N. C., 556; *Kelly v. Granite Co.*, 200 N. C., 326. We think they were competent and the restriction properly made "cannot be considered by you as substantive evidence, but may be used and considered only for the purpose of illustrating such testimony as has been given or will be given by this witness." After plaintiff had objected and excepted to these pictures, it seems about the time of the trial he had a photographer take three pictures. The plaintiff then recalled J. L. West, who had theretofore testified for plaintiff, and asked certain questions in regard to the photographs. The defendant objected, and the objection was sustained.

The defendant, Olivette Luther, in rebuttal testified that the conditions were not the same as at the time of the collision. Thus there was evidence, pro and con, as to the similarity of conditions. We think, under the facts and circumstances of this case, the matter was in the sound discretion of the trial court. N. C. Handbook of Evidence (Lockhart), sec. 277; *Hampton v. R. R.*, 120 N. C., 534. The court below overruled all the exceptions and assignments of error made by plaintiff in the general county court and found no error in the judgment. On the whole record we see no prejudicial or reversible error.

The judgment of the court below is

Affirmed.

TOWN OF EAST SPENCER v. ROWAN COUNTY, THE BOARD OF COMMISSIONERS OF ROWAN COUNTY, AND THE BOARD OF EDUCATION OF ROWAN COUNTY.

(Filed 24 November, 1937.)

1. Schools §§ 8, 9—County board of education has no jurisdiction over or duty in respect to maintenance of schools in special charter district.

Where a school district with boundaries practically coterminous with an incorporated town is created by the private act incorporating the town, ch. 74, Private Laws of 1901, and thereafter the act of incorporation is amended by striking out the provision in regard to the school district and

inserting in lieu thereof an act requiring the board of aldermen of the town to elect a school committee, and giving such school committee complete supervision over the schools of the district and the right to receive all school funds allotted from the State or the county, ch. 70, Private Laws of 1923, the amendment constitutes the district a special charter district within the meaning of sec. 3, ch. 136, Public Laws of 1923 (N. C. Code, 5387) and an indebtedness incurred by the district for schools therein erected without the approval of the board of county commissioners or the county board of education is a debt of the district and not of the county, and said boards properly refused a demand of the district to build said schools, the said boards having been relieved by the act creating the special charter district of any duty in respect to and all jurisdiction over the schools in the district (N. C. Code, 5430).

2. Schools § 32: Counties § 10—County has discretionary power to assume special charter district debt incurred for constitutional school term.

By virtue of N. C. Code, 5599, the board of education of a county, with the approval of the board of county commissioners, has the discretionary power to assume the indebtedness of a special charter district of the county when such indebtedness was incurred by the district for the purpose of constructing and equipping schools necessary for the maintenance of the constitutional school term therein.

3. Same: Mandamus § 2b—County may assume debt of school district in its discretion, but mandamus will not lie to compel it to assume debt of one district when it has not assumed debt of other districts.

The power of a county to assume the debt of a special charter school district, when such debt was contracted by the district for the erection and equipment of schools necessary to the maintenance of the constitutional school term therein, is a discretionary power, and *mandamus* will not lie to compel the county to assume such debt unless the district shows a clear legal right to have the county assume such debt by showing that the county had assumed the debt of other special charter districts within its boundaries, and where there is no finding by the jury, or by the court with the consent of the litigants, that the county had assumed like debts of other districts of the county, *mandamus* proceedings against the county should be dismissed, and a finding that the county, in the exercise of its discretion, had from time to time appropriated and paid to other districts money in aid of such districts in the construction and equipment of schoolhouses therein, or as partial payments on the indebtedness of such districts, is not a finding that the county had assumed the indebtedness of said districts, or any part thereof.

APPEAL by defendants from *Pless, J.*, at May Term, 1937, of ROWAN. Reversed.

This is an action to compel the defendants by a writ of *mandamus:*

(1) To assume the payment of certain bonds heretofore issued by the plaintiff as a special charter school district of Rowan County, aggregating the sum of $44,000, for the purpose of providing money for the construction and equipment of schoolhouses which are located in said district, and which were reasonably necessary for the maintenance and

operation of schools in said district, as a part of the general and uniform system of public schools in this State, as required by sec. 3 of Art. IX of the Constitution of North Carolina;

(2) To levy annually on all the taxable property in Rowan County a tax sufficient to raise money required to pay said bonds and to collect said money and apply the same to the payment of said bonds as they shall severally become due; and

(3) To pay to the plaintiff the sum of $43,200, and thereby reimburse plaintiff for money heretofore paid by it on account of bonds issued by it for said purpose.

This action was begun on 22 September, 1936, in the Superior Court of Rowan County, and was tried at May Term, 1937, of said court. Judgment was rendered as follows:

"This cause coming on to be heard at the May Term, 1937, of the Superior Court of Rowan County, before his Honor, J. Will Pless, Jr., judge presiding, and a jury, and it having been agreed that judgment may be signed out of the county and out of term, and now coming on to be heard at Statesville, N. C., and it appearing to the court that the defendants demanded a trial of the issues of fact arising upon the pleadings by a jury, and a jury at the May Term, 1937, of the Superior Court of Rowan County having answered the issues as follows:

" '1. Did the town of East Spencer lawfully issue and sell $60,000 of bonds for the purpose of providing buildings and equipment for schools conducted and operated within said district, as alleged in the complaint? Answer: "Yes."

" '2. Were the proceeds of said bonds used by the plaintiff for the purpose of providing buildings, equipment, and sites for schools in said district, as alleged in the complaint? Answer: "Yes."

" '3. What amount of said bonds so issued are still outstanding for schools for white children in said district? Answer: "$37,000, with interest from 1 January, 1937."

" '4. What amount of said bonds so issued are still outstanding for schools for colored children in said district? Answer: "$7,000, with interest from 1 January, 1937."

" '5. Were the buildings, equipment, and site constructed and used by the plaintiff in 1922 reasonably essential and necessary for the conduct and operation of the six months school term for white children, at the time they were acquired and constructed, as contemplated by sec. 3 of Art. IX of the Constitution of North Carolina? Answer: "Yes."

" '6. Are the said buildings and facilities reasonably necessary for the conduct of the constitutional six months school term of said district? Answer: "Yes."

" '7. Were the buildings, equipment, and site constructed and used by the plaintiff in 1922 reasonably essential and necessary for the conduct and operation of the six months school term for colored children at the time they were acquired and constructed, as contemplated by sec. 3 of Art. IX of the Constitution of North Carolina? Answer: "Yes."

" '8. Are the said buildings and facilities reasonably necessary for the conduct of the constitutional six months school term of said district? Answer: "Yes." '

"Independently of the verdict of the jury, and by consent of counsel for plaintiff and counsel for defendants, the court finds the following facts:

"1. That prior to the issuance of school bonds, the construction of school buildings, and the purchase of equipment for said buildings by the plaintiff, as alleged in the complaint, the mayor of the town of East Spencer appeared before the defendant, the Board of Education of Rowan County, and orally demanded that the defendants furnish school buildings and equipment reasonably necessary for the conduct of schools in said town for the constitutional six months term; that said demand was refused, and that thereupon and thereafter the town of East Spencer proceeded according to law to provide for said school buildings and equipment, and issued bonds to pay for said school buildings and equipment, as alleged in the complaint.

"2. That the plaintiff has paid as interest on said bonds since 22 September, 1933, which date is within three years next preceding the institution of this action, the sum of $1,320 on 1 January and July of each year thereafter, or the total amount of $9,240, and is entitled to judgment against the defendants for said amount.

"3. That the present school bonded indebtedness of the town of East Spencer, or of East Spencer Special Charter School District of Rowan County, in the principal sum of $44,000, with interest as heretofore stated, represents the unpaid balance of the original school bonded indebtedness of said district in the principal sum of $60,000, represented by 60 bonds, each for the sum of $1,000, and due and payable as follows: $2,000 annually from 1 July, 1925, to 1 January, 1936, inclusive; $3,000 annually from 1 July, 1936, to 1 July, 1939, inclusive, and $2,000 annually from 1 July, 1940, to 1 July, 1952.

"4. That the town of East Spencer has heretofore paid on the principal of said bonded indebtedness the sum of $16,000 and the sum of $43,520 as interest on said bonded indebtedness.

"4-A. That prior to the institution of this action the plaintiff filed formal demand on the defendants that they assume the payment of the indebtedness incurred by the plaintiffs for the construction of school

buildings in the town of East Spencer, and that the defendants reimburse the plaintiff for all money paid by it on account of the bonds issued by the plaintiff for the construction of said buildings, and that said demand was refused by the defendants.

"5. That the defendant the Board of Education of Rowan County, between 1922 and 1928, with the approval of the defendant the Board of Commissioners of Rowan County, let contracts for, erected and equipped new school buildings in the following school districts of Rowan County, the said defendant borrowing from the State Literary Fund and the State Special Building Fund one-half the cost of the erection of said buildings, and paying same to said districts, and said districts each paying the remaining half of said cost out of bonds issued by said district, the said one-half of the cost of said buildings in said districts being as follows:

Granite Quarry School District, No. 7	$ 20,000.00
Special School Tax District, No. 3, China Grove Township	32,000.00
Woodleaf Special School Tax District	38,000.00
Cleveland Special School Tax District	24,000.00
Mt. Ulla Special School Tax District	24,000.00
Providence Special School Tax District	20,000.00
Faith Local Tax District, Rockwell School District	25,000.00

"6. That the defendant the Board of Education of Rowan County, with the approval of the defendant the Board of Commissioners of Rowan County, let the contract for, erected, and equipped a new school building known as the R. G. Kiser Elementary School, the said defendant borrowing from State loan funds one-half the cost of said building, to wit, the sum of $15,000, and applying said sum to the payment of one-half the cost of said building, the remaining one-half having been paid by private subscriptions.

"7. That on or about 15 July, 1926, the defendants assumed the payment of the sum of $80,000 (which amount was originally borrowed from the State School Fund) of the bonded indebtedness of the Salisbury Special Charter District for school purposes, in consideration of the said Salisbury Special Charter District having theretofore furnished tuition free in the schools of said district to children residing in Rowan County outside said district whose boundaries are practically coterminous with the corporate limits of the city of Salisbury, and agreeing to furnish tuition free to children residing in Rowan County outside the boundaries of said district for six months during each year for five years thereafter.

"8. That the total bonded school indebtedness of the city of Salisbury as a special charter district on 15 July, 1926, was $806,000, which had

been reduced on 31 December, 1936, to the sum of $663,000, and that the assumption by the defendants of the sum of $80,000 of said indebtedness on or about 15 July, 1926, was an assumption of approximately one-tenth of the total indebtedness of the city of Salisbury for school purposes at the date of said assumption.

"9. Some time during the year 1926 the defendants agreed to pay and did pay the sum of $30,000 to the town of Spencer in Rowan County, which said sum was applied by said town on its bonded school indebtedness, amounting at the date of said payment to the sum of $110,000; that of said sum the sum of $98,000 is now outstanding, and that the total cost of the school buildings and equipment in the town of Spencer was $180,000.

"10. That the total bonded indebtedness of Rowan County for school purposes amounted to $672,000 on 1 July, 1936.

"Upon the verdict of the jury and the additional findings of fact made by the court, the court being of opinion that the plaintiff is entitled to a writ of *mandamus,* requiring the defendants to assume the payment of and to pay the school bonded indebtedness of the plaintiff, the town of East Spencer, and to pay to said town the additional sum of $9,240, to reimburse said town of East Spencer for the amount paid by it on said school bonded indebtedness within the three years next preceding the institution of this action, as prayed in the complaint:

"It is now, therefore, ordered, adjudged, and decreed that the county of Rowan shall forthwith assume and pay the school bonded indebtedness of the town of East Spencer, or the East Spencer Special Charter District, in the principal sum of $44,000, with interest thereon from 1 January, 1937, as and when the said indebtedness becomes due.

"It is further ordered, adjudged, and decreed that the plaintiff recover judgment against the county of Rowan in the sum of $9,240, and that the county of Rowan forthwith assume and pay the said sum to the plaintiff, the town of East Spencer.

"It is further ordered, adjudged, and decreed that the county of Rowan shall not make any levy or collect any taxes exclusively in the town of East Spencer or in the East Spencer Special Charter District for the purpose of paying said indebtedness or any part of same, and the property owners of said town and district are relieved of the payment of any taxes which might otherwise be levied on said town or district exclusively for the year 1937, or any subsequent year, on account of such debt and said debt and interest thereon, together with this judgment for $9,240, shall be paid by the county of Rowan out of revenues lawfully provided for that purpose.

"The defendants will pay the costs of this action, to be taxed by the clerk."

The defendants excepted to the foregoing judgment and appealed to the Supreme Court, assigning errors at the trial and error in the judgment.

Hutchins & Parker for plaintiff.

T. G. Furr, Walter H. Woodson, Linn & Linn, and Craige & Craige for defendants.

CONNOR, J. The town of East Spencer in Rowan County, North Carolina, is a municipal corporation. It was incorporated by ch. 74, Private Laws of North Carolina, 1901. Provisions are made therein for the government of said town. Its corporate limits are defined by section 2 of said chapter. Sections 21 and 22 of said chapter are as follows:

"Sec. 21. The town of East Spencer and within a radius of one-half mile or less from the corporate limits of said town, east of the railroad, shall constitute a public school district, and the proper county authorities who have the right to lay off school districts and establish school districts shall proceed at once to establish a free public school district by the name of East Spencer District, for the school children of said district, and the proper authorities as provided by law shall apportion, appropriate and set aside for this district all the school funds it may be entitled to and appoint school committees to take charge, look after and proceed to erect, equip, and construct a public schoolhouse for the white children of said town, with whatever aid and donations they may be able to get, and said school shall be proceeded with as early as possible, and be in operation not later than the fall term of public schools of that year. The board of aldermen of said town shall apply all its school taxes collected from the property in said town toward this school."

"Sec. 22. The board of aldermen of said town shall have the right to borrow a sum not exceeding one thousand dollars for the purpose of this school, aid in erecting a schoolhouse, building a town hall or mayor's office, repairing the streets of said town, and may pledge the faith and credit of said town to secure the same, and execute a note or bond in the name of the town, signed by the mayor thereof, with the seal of said town, and attested by the tax collector of said town. That said note or bond shall be valid and legal in every respect in the hands of a *bona fide* holder thereof."

After the organization of the town of East Spencer as a municipal corporation, created by ch. 74, Private Laws of North Carolina 1901, the said chapter was amended by the General Assembly by ch. 15, Private Laws of North Carolina, Extra Session 1920. By said amendment the town of East Spencer was authorized, through its governing

body, to issue its bonds in the sum of not less than one hundred and twenty-five thousand ($125,000) dollars. It was provided that if said bonds were issued as authorized by the General Assembly, bonds aggregating not to exceed the sum of eighty thousand ($80,000) dollars should be designated as "Sewerage Bonds," and that the proceeds of said bonds, when sold, should be used by said town exclusively for the purpose of constructing and installing in said town a system of sewerage, and that bonds not exceeding the sum of forty-five thousand ($45,000) dollars should be designated as "School Bonds," and that proceeds of said bonds, when sold, should be used by said town exclusively for the purpose of building, equipping, furnishing, and maintaining in said town public schools in which tuition for children of both races in said town should be free.

It does not appear from the record in this appeal that any bonds authorized by the General Assembly by ch. 15 of Private Laws of North Carolina, Extra Session 1920, were issued and sold by the town of East Spencer. It does appear, however, from recitals in the preamble of ch. 22, Private Laws of North Carolina 1921, that a bond ordinance passed by the governing body of the town of East Spencer as authorized by the Municipal Finance Act, 1921, was approved by a majority of the qualified voters of said town at an election held therein on 23 May, 1921. The said bond ordinance authorized the issuance by the governing body of the town of East Spencer of its bonds in the sum of $60,000 for school purposes and the levying of a tax on the property in said town to pay said bonds, when sold, as they should become due. The bonds authorized by said ordinance, and the election held approving the said ordinance and the issuance of said bonds, were validated by ch. 22, Private Laws of North Carolina 1921. These bonds were issued and sold by the town of East Spencer. The proceeds of these bonds, aggregating the sum of $60,000, were used by the town of East Spencer for the construction of schoolhouses in said town and the equipment of said schoolhouses for school purposes. These are the bonds which are involved in this action.

After the construction of said schoolhouses and the purchase of equipment for said schoolhouses by the town of East Spencer, ch. 70, Private Laws of North Carolina 1923, was enacted by the General Assembly of this State. By said chapter, sec. 21 of ch. 74, Private Laws of North Carolina 1901, was stricken from said chapter and the following was inserted in lieu thereof:

"The board of aldermen of the town of East Spencer shall elect and appoint school committees for the respective public or graded schools within said town, and the school committee shall have charge of said schools, the buildings belonging to said schools, the power to elect teach-

ers, and have general supervision over all school property within said town, and that all school funds, either State, county, or city, going to or belonging to the schools of said town, which is District Number Eight, shall be paid to the treasurer of said town, and said treasurer shall disburse all school funds for school purposes on warrants issued or to be issued by the school committee of said town; and the Board of Education of Rowan County and the superintendent of public instruction of said county are hereby directed and authorized to turn over to the treasurer of said town all school funds belonging to or going to the school districts of said town."

By virtue of ch. 70, Private Laws of North Carolina 1923, the school district known as East Spencer District in Rowan County, which was established by sec. 21, of ch. 74, Private Laws of North Carolina 1901, and whose boundaries are practically coterminous with the corporate limits of the town of East Spencer, a municipal corporation, became a special charter district of Rowan County, as defined by sec. 3, of ch. 136, Public Laws of North Carolina 1923, N. C. Code of 1935, sec. 5387. Since the enactment of said ch. 70, Private Laws of North Carolina 1923, the schools of said district have been under the exclusive control and supervision of the school committee elected or appointed by the board of aldermen of the town of East Spencer. The school buildings now located in said district were constructed by the said school committee, without the approval of the Board of Education or the Board of Commissioners of Rowan County. The indebtedness incurred by the town of East Spencer for the construction and equipment of said buildings was incurred without the approval of either the said board of education or the said board of commissioners. The said indebtedness is not the indebtedness of Rowan County, but is the indebtedness of the town of East Spencer, lawfully incurred by said town, with the approval of the General Assembly of this State and of a majority of the qualified voters of said town of East Spencer.

Prior to the construction of the schoolhouses in the town of East Spencer, which were required for the operation of public schools in said town, the mayor of East Spencer appeared before the Board of Education of Rowan County and demanded that said board and the Board of Commissioners of Rowan County construct in said town school buildings reasonably necessary for the maintenance and operation of schools in said town for a minimum term of six months. This demand was refused, and properly so. The General Assembly, by the enactment of ch. 70, Private Laws of North Carolina 1923, had relieved both said boards of any duty with respect to the schools in the town of East Spencer, and had deprived the said boards of any power or jurisdiction over said schools. Sec. 30, of ch. 136, Public Laws of North Carolina 1923, N. C. Code of 1935, sec. 5430.

The power of the Board of Education of Rowan County, with respect to the bonded indebtedness of the town of East Spencer at the date of the commencement of this action, is conferred by statute, which is as follows:

"The county board of education, with the approval of the board of commissioners, may include in the debt service fund in the budget (*i.e.*, the May budget, which the board is required by statute to prepare each year. See N. C. Code of 1935, sec. 5596), the indebtedness of all districts, including special charter districts, lawfully incurred in erecting and equipping school buildings necessary for the six months school term, and when such indebtedness is taken over for payment by the county as a whole, and the local districts are relieved of their annual payments, then the county funds provided for such purpose shall be deducted from the debt service fund prior to the division of this fund among the schools of the county as provided in this section." N. C. Code of 1935, sec. 5599.

By virtue of the provisions of this statute the defendant the Board of Education of Rowan County, with the approval of the defendant the Board of Commissioners of Rowan County, had the power to include in the debt service fund in its May budget of any year prior to the commencement of this action the indebtedness of the town of East Spencer, as a special charter district of Rowan County, in the sum of $44,000, and evidenced by its bonds, which was lawfully incurred by said town in erecting and equipping school buildings in said town necessary for the maintenance and operation in said town of schools for a minimum term of six months during each year, and thereby assume the payment of the said indebtedness as an obligation of Rowan County, with the result that the property in said town would be relieved of taxes for the payment of said indebtedness.

It is expressly provided in said statute that the power conferred thereby on the board of education of a county in this State, with respect to the assumption of the indebtedness of a district of the county, shall be exercised by said board in its discretion. When the board of education of a county has, in the exercise of its discretion, under the provisions of the statute, assumed the indebtedness of a district of the county, such assumption is valid, and will be enforced by the courts of this State. It was so held by this Court in *Marshburn v. Brown,* 210 N. C., 331, 186 S. E., 265. In the opinion in that case it is said:

"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 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 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,* 204 N. C., 74, 167 S. E., 454, 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, N. C. Code of 1935 (Michie), sec. 5599.' "

While, ordinarily, the question as to whether the board of education of a county shall assume the indebtedness of a district, under the provisions of the statute, is addressed to the discretion of the board, and may be answered by the board in the exercise of its sound discretion, after a consideration of all the facts involved, there have been and doubtless will be cases in which the board is required to assume the indebtedness of a district, without the exercise of any discretion. In such cases the district has a clear legal right to the assumption by the board of its indebtedness, which may be enforced by a writ of *mandamus.* Thus in *School District v. Alamance County,* 211 N. C., 213, 189 S. E., 873, where a special charter district in Alamance County had lawfully

incurred an indebtedness for the purpose of constructing and equipping schoolhouses in the district, which were reasonably necessary for the maintenance and operation within the district of schools for a minimum term of six months during each year, and the Board of Education of Alamance County had assumed the indebtedness of other districts in said county, lawfully incurred for the said purpose, it was held by this Court that the Board of Education of Alamance County could not rightfully or legally refuse to assume the indebtedness of the special charter district, and that the district was entitled to a writ of *mandamus* to enforce such assumption. The judgment of the Superior Court in that case was affirmed, on the authority of *Hickory v. Catawba County*, 206 N. C., 165, 173 S. E., 156. In the opinion by *Clarkson, J.*, it is said:

"On this record it appears that the county of Alamance has assumed every school debt of every school district in the county except the debts of the special charter districts of Mebane, Haw River, Graham, and Burlington. Having assumed some, we think it mandatory on the county commissioners to assume all if the Mebane district buildings, sites and equipment are necessary for the conduct of the constitutional school terms."

The decisions of this Court in *School District v. Alamance County* and in *Hickory v. Catawba County* support the contention of the defendants in the instant case that in the absence of an assumption by the defendants of the indebtedness of any district of Rowan County, the refusal of the defendants to assume the indebtedness of the plaintiff, although such indebtedness was incurred for the construction and equipment of schoolhouses which were necessary for the maintenance and operation of schools in said district for a minimum term of six months during each year, cannot be reviewed by the courts for the reason that such refusal was the result of an exercise by the defendants of the discretion vested in them by statute.

At the trial of this case the jury has not found by an answer to an appropriate issue submitted by the court, nor has the court found, with the consent of the plaintiff and the defendants, that the defendants have assumed the indebtedness of any district of Rowan County which was lawfully incurred by such district for the construction and equipment of schoolhouses reasonably required for the maintenance and operation of schools in said district for a minimum term of six months during each year. The finding by the court, with the consent of plaintiff and defendants, that the defendant the Board of Education of Rowan County has, from time to time, appropriated and paid to certain districts in Rowan County sums of money to aid such districts in the construction and equipment of schoolhouses in said district, or as partial

payments on the indebtedness of such districts, is not a finding that said board of education has assumed the indebtedness of said districts or any part thereof. Such appropriations and payments were made under statutory authority, and in the exercise of discretion vested by statute in the Board of Education of Rowan County. In the absence of an assumption by the defendants of the indebtedness of any district in Rowan County, the discretion vested by statute in the board of education of said county, with respect to the assumption by said board of the indebtedness of any district of the county, remains in said board. For this reason there is error in the judgment of the Superior Court in this case.

The judgment is reversed to the end that the action may be dismissed.

Reversed.

W. W. MARTIN AND CALLIE M. BEACH v. W. J. BUNDY, TRUSTEE (ORIGINAL PARTY DEFENDANT), AND JNO. W. MARTIN, LELA FLEMING, KATIE BEACH, JOHN D. MARTIN, H. W. MARTIN, C. W. MARTIN, W. J. CARSON, BAUGH & SONS CO., AND J. W. H. ROBERTS, GUARDIAN AD LITEM OF KATIE BEACH.

(Filed 24 November, 1937.)

1. Husband and Wife § 1—Power of married women to make contracts affecting property.

By virtue of C. S., 2507, a married woman may make contracts affecting her personal and real property as though she were unmarried, except that her privy examination must be taken and her husband's written consent had to conveyances of her real property, and the requirements of C. S., 2515, must be met in contracts between her and her husband affecting her real property or the *corpus* of her personal property. N. C. Constitution, Art. X, sec. 6.

2. Partition § 11—

Deeds executed by tenants in common among themselves to effect a partition of the property are not deeds of bargain and sale and do not convey title, but merely destroy the unity of possession and designate the share of each by metes and bounds.

3. Adverse Possession § 4a—

Where tenants in common, pursuant to a parol partition, take possession in severalty and make no demand on each other for rents, issues, or profits, but recognize each other's possession to be of right and hostile, the law will presume an actual ouster and a supervening adverse possession.

4. Adverse Possession §§ 4a, 16—Pleadings held sufficient to raise issue of adverse possession of tenant in common under parol partition.

Where it is alleged that defendant's predecessor in title went into possession of the *locus in quo* pursuant to a parol partition between him

and his cotenants in common, and that each tenant thereafter held his share so allotted in severalty and hostilely to his cotenants for more than twenty years, the allegations are sufficient to raise the issue of title by adverse possession in the tenant in common, C. S., 430, and it is error for the trial court to disregard the plea of title by adverse possession and refuse to submit the case to the jury.

5. Estoppel § 6g—Married woman may be estopped when her acts change conditions so that parties may not be placed in statu quo.

The land in question was held by tenants in common. The husband of one of the tenants bought the interest of another tenant, and thereafter the husband and the heirs entered into a parol agreement, and pursuant thereto deeds were exchanged between each of the heirs and the husband to effect a partition, but in the deed to the husband, signed by his wife as one of the heirs, the wife's privy examination was not taken and the certificate of the clerk was not executed as required by C. S., 2515. Thereafter the wife, prior to the effective date of the Martin Act (C. S., 2507), with the written consent of her husband, conveyed the share allotted to her in the partition. *Held:* Upon the death of the wife her husband her surviving, her inchoate dower in the share allotted to him was terminated, and even conceding her joinder in the partition deed to him was inoperative under C. S., 2515, her heirs may be estopped under the doctrine of estoppel by laches as existing prior to the Martin Act, from setting up any interest in the share allotted to him, since her valid conveyance of the share allotted to her prevents the parties from being placed *in statu quo*.

APPEAL by defendants W. J. Bundy, trustee, John W. Martin, W. J. Carson, and Baugh & Sons Company, from *Cranmer, J.*, at April Term, 1937, of PITT. Reversed.

This is an action brought by plaintiffs against certain of the defendants to restrain the sale of land (describing same), in which plaintiffs with their brothers and sisters (afterwards made parties defendant) claim a one-fifth interest. The restraining order was continued to the hearing. The facts of record are as follows: (1) W. G. Whichard, of Pitt County, N. C., died about 1875 intestate, seized and possessed of some 500 acres of land in Pitt County known as his "Home Place." He left surviving him five children—Ashley Whichard, W. A. Whichard (who married J. G. Taylor), M. L. Whichard (who married John W. Martin), and M. R. Whichard (who married J. J. Jones), and F. M. Whichard. On 7 December, 1882, Ashley Whichard and wife conveyed their interest in the land to John W. Martin, the deed being duly recorded.

It is alleged in the answer of appealing defendants: "That in the early fall of 1885 the children of W. G. Whichard above named, except Ashley Whichard and John W. Martin, entered into an agreement to divide the W. G. Whichard land among the said children of W. G. Whichard and John W. Martin, the said John W. Martin taking one share or a

child's part, he having purchased the share and interest of Ashley Whichard in said W. G. Whichard land. That they agreed to make a mutual partition or division among themselves, and to pass deeds to each other, instead of partition by special proceeding in court. That, pursuant to said agreement, the said children and John W. Martin called in Willis Whichard, a prominent citizen of the county and who was also a surveyor, and Marcus Manning, a surveyor, and had them to survey and divide said land equally and fairly among said children and John W. Martin, he representing one share and interest as above stated. That they proceeded to divide said land in five shares or lots, each share adjoining or running to the run of Grindal Creek on the north, and said shares or lots were numbered 1, 2, 3, 4, and 5. That said children and John W. Martin drew for said land and John W. Martin drew lot 1; W. A. Whichard drew lot 2; M. R. Whichard drew lot 3; M. L. Martin (who married John W. Martin) drew lot 4, and F. M. Whichard drew lot 5. That the said Willis Whichard drew the said division deeds and all of said children, including M. L. Martin, signed the said deed to John W. Martin for lot 1; and all of said children, including John W. Martin and wife, signed a deed to W. A. Whichard for lot 2; and all of said children, including John W. Martin and wife, M. L. Martin, signed deed to M. R. Whichard for lot 3; and all of said children, including John W. Martin, signed deed to M. L. Martin for lot 4; and all of said children, including John W. Martin and wife, M. L. Martin, signed deed to F. M. Whichard for lot 5. The said deeds were all executed on 9 September, 1885, and all acknowledged before E. A. Moye, C. S. C., on the same day and ordered recorded by him; and all of said deeds recorded in Book I-4 of the Pitt County registry. . . . The plaintiffs contend that the defendant's title is defective, for that the certificate of probate of E. A. Moye, clerk of the Superior Court of Pitt County, in probating the deed of F. M. Whichard, M. L. Martin et als. to John W. Martin, recorded in Book I-4, page 505, of the Pitt County registry, does not show that M. L. Martin was privately examined, nor that the clerk found the facts required to be found by sec. 2515 of the Consolidated Statutes of North Carolina. Defendant John W. Martin, opposing defendants' contentions, alleged that it was not necessary to put title in John W. Martin, as he took a child's part from Ashley Whichard and wife by deed, as above set out, and this particular deed did not pass title to John W. Martin, it simply allotted to him and fixed his possession and restricted his possession to that which was already his, and that was the case with the other tenants in common receiving deeds. That M. L. Martin took and accepted a deed for Lot No. 4 signed by John W. Martin and the other tenants in common, and she joined in the deeds to the other tenants in common,

and she was bound by her action, and was estopped to claim any part of Lot No. 1 deeded and assigned to John W. Martin as long as she took and held Lot No. 4, which she did, and her children, including the plaintiffs, are estopped to now question or attack said deed or to claim any interest in the land described and allotted and conveyed in said deed; and the defendant pleads the said action of M. L. Martin as a complete bar and estoppel against the plaintiffs and the other children of M. L. Martin to claim or recover anything in this action."

Thereafter, on 15 January, 1895, the said M. L. Martin conveyed her said Tract No. 4 to J. J. Jones. "That said deed was for a valuable consideration set out in said deed; that her husband, John W. Martin, joined with her in said conveyance; that it was duly probated with her private examination and recorded, and the grantee went in possession under said deed, and he and his assigns have since held said land. That the said M. L. Martin, having entered into said partition agreement with her cotenants in common, as above set out, and having executed deeds to her said co-tenants in common, including the deed to John W. Martin, the deed in question, and having accepted deed from her co-tenants in common for Lot No. 4, said W. G. Whichard land, and having accepted the same and held the same for more than seven years, nearly ten years, and having then sold the same by proper deed to J. J. Jones, she estopped herself to claim any right or interest in Lot No. 1 conveyed to John W. Martin, or to claim any right or interest in the lots of land conveyed and allotted to the other tenants in common, and she never did claim or assert any right or interest in lot 1 assigned and deeded to John W. Martin, nor to any of the other lots assigned and deeded to the other tenants in common, and she died in 1902. That the plaintiffs and the other children of M. L. Martin are likewise estopped by the said action of M. L. Martin above set out to claim or hold any rights or interests in the said Lot No. 1 allotted and deeded to John W. Martin as above set out; and the defendant pleads such acts and deed of M. L. Martin as a complete bar and estoppel against the plaintiffs and the other children of M. L. Martin to maintain this action. That the defendant John W. Martin has held the land in question in absolute and adverse possession, in his own right and under known and visible lines and boundaries, for 50 years, and under colorable title during said term of 50 years, and he pleads such adverse possession under known and visible lines and boundaries and under colorable title in bar to any recovery against him in this action. And on account of the adverse possession of the defendant for the term above set out he pleads the 20-year statute of limitations and the 7-year statute of limitations in bar of any recovery by the plaintiffs or any of the children of M. L. Martin."

The defendant John W. Martin, together with his wife, Laura Martin, whom he married after the death of M. L. Martin (his first wife), made a deed of trust to W. J. Bundy, trustee, to secure certain indebtedness. The defendants Baugh & Sons Co. and W. J. Carson are holders of notes secured by the deed of trust.

Defendants pray, in part: "That the action be dismissed at the cost of the plaintiffs, and that the defendant John W. Martin be adjudged the sole and absolute owner in fee simple of the tract of land in controversy, subject to the deed of trust in question."

The judgment of the court below was as follows: "This cause coming on to be heard before his Honor, E. H. Cranmer, judge presiding, and a jury, at the April Term, 1937, of the Pitt Superior Court, and being heard, and upon the reading of the pleadings and argument of counsel for plaintiffs and defendants, it appearing to the court that the deed from M. L. Martin and others to the defendant John W. Martin, of record in Book I-4, at page 505, of the Pitt County public registry, was void for the reason that same was not acknowledged in the manner provided for by law, as set out in C. S., 2515. Now, therefore, it is, upon motion of plaintiff, ordered, adjudged, and decreed that the plaintiffs W. W. Martin and Callie M. Beach, together with John W. Martin, Lela Fleming, Katie Beach, John D. Martin, C. W. Martin, and H. W. Martin are owners in fee of a one-fifth undivided interest in and to the land described in the complaint, subject only to the life estate of their father, J. W. Martin, as tenant by the curtesy thereon. That the defendant W. J. Bundy, trustee, be and he is hereby forever restrained from selling the reversionary interest in the said one-fifth undivided interest in said tract of land to satisfy the lien of the deed of trust of record in Book S-18, at page 306, of the Pitt County public registry. It is further ordered and adjudged that the defendants Jno. W. Martin, W. J. Carson, Baugh & Sons Co., and W. J. Bundy, trustee, pay the costs of this action, to be taxed by the clerk. It is further ordered and adjudged that the said deed of trust as to the four-fifths undivided interest in favor of John W. Martin and as to the life estate of John W. Martin upon the remaining one-fifth undivided interest be and the same is hereby foreclosed, etc. . . . And this matter is retained for the further orders of the court with respect to the sale of the interest herein directed to be sold, and for no other purpose.

E. H. CRANMER,
Judge Presiding."

The defendants W. J. Bundy, trustee, John W. Martin, W. J. Carson, and Baugh & Sons Co. excepted, assigned error to the foregoing judgment, and appealed to the Supreme Court.

Albion Dunn for plaintiffs.
Coburn & Coburn for W. J. Bundy, trustee, and Baugh & Sons Co.
Julius Brown for John W. Martin.
William S. Tyson for W. J. Carson.

CLARKSON, J. The exceptions and assignments of error of appealing defendants are as follows: "(1) For that the pleadings raised issues of fact that were material to the rights of the defendants, and under the law had to be passed upon by a jury, and in taking the case from the jury and signing the judgment, as he did, the court deprived the defendants of their rights under the law and the Constitution. (2) That the answers of the defendant appellants all alleged that the land in question was a part of the W. G. Whichard, deceased, land, and that it was divided by mutual agreement by and between his heirs and John W. Martin, the said John W. Martin having purchased the share and interest of Ashley Whichard, a son and heir of W. G. Whichard. That quitclaim or allotment deeds were passed between the said heirs, including John W. Martin, who had purchased the share of Ashley Whichard. That M. L. Martin and the other heirs of W. G. Whichard joined in a quitclaim deed or allotment deed to John W. Martin and releasing and assigning to him Lot No. 1 of the W. G. Whichard land; and the said John W. Martin and the other heirs of W. G. Whichard joined in a quitclaim deed or allotment deed to M. L. Martin alloting and releasing to her Lot No. 4 of the W. G. Whichard land. That the Ashley Whichard deed and the said two quitclaim or allotment deeds are copied and attached to the answers of W. J. Bundy, trustee, and also Baugh & Sons Co., and marked Exhibits A, B, and C, as shown in the record. That the complaint alleges that the land in question, the land which the plaintiffs are claiming an interest in, to be Lot No. 1 in the division of the lands of W. G. Whichard, and with said allegation in the complaint, and the allegations above referred to in the said answers . . . the court was in error in entering judgment without a verdict of the jury. (3) For that it is alleged that Lot No. 4 of the W. G. Whichard land was allotted to M. L. Martin, and, as alleged in the answers of the appellants, that John W. Martin and the other heirs of W. G. Whichard made and executed a quitclaim deed or allotment to M. L. Martin for said Lot No. 4, and that she took charge and possession of the same and more than ten years thereafter conveyed it to J. J. Jones; and they further pleaded that in so doing she ratified and approved said division and the said quitclaim division deeds or allotments, and pleaded her said action as an estoppel against the plaintiffs and the other children of M. L. Martin to claim or hold any of the land in controversy or Lot No. 1; and the judgment signed by the court ignored said plea of estoppel, and this was error. (4) For that the judgment signed ignored the

statute of limitations pleaded by the defendants, appellants, and deprived them of said plea, and this was error. (5) For that in addition to the reasons above set out why the said judgment so signed was erroneous, the defendants, appellants, say that the court placed the wrong construction upon the purported deed of M. L. Martin and others to John W. Martin, the deed or paper writing in question; for that he construed and treated it as a deed of bargain and sale conveying the land to John W. Martin, when in fact and in truth it was only a partition allotment and located and described his interest in severalty and conveyed nothing; for his title was derived by his deed from Ashley Whichard and wife, and therefore the probate to said purported deed or paper writing did not violate C. S., 2515, or other requirements of the law."

On the defense, set up by the appealing defendants, certain material facts were alleged. These facts were not tried by a jury, nor found by the court below by consent and a jury waived. The defenses set up were germane, and if found to be true were valid and would defeat the plaintiffs and the claim of the others.

N. C., Code, 1935 (Michie), sec. 2515, is as follows: "No contract made between husband and wife during coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, unless such contract is in writing and is duly proved as is required for conveyances of land; and upon the examination of the wife, separate and apart from her husband, as is now or may hereafter be required by law in the probate of deeds of *femes covert,* it shall appear to the satisfaction of such officer that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her. The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be."

In *Caldwell v. Blount,* 193 N. C., 560 (562-3), it is written: "It has been uniformly held by this Court that the deed of a wife, conveying land described therein to her husband, is void unless there is attached or annexed to said deed the certificate of the probate officer as required by statute. . . . (P. 563.) No deed from a wife to her husband, conveying her land to him, is valid unless the officer who certifies that he privately examined the wife, as required by statute, shall also state in his certificate his conclusions that said deed is not unreasonable or injurious to her." *Foster v. Williams,* 182 N. C., 632. See C. S., 3351.

Const. of N. C., Art. X, sec. 6, is as follows: "The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed and, with the written assent of her husband, conveyed by her as if she were unmarried." C. S., 2506.

C. S., 2507 (Martin Act, Pub. Laws 1911, ch. 109), is as follows: "Subject to the provisions of section 2515 of this chapter, regulating contracts of wife and husband affecting *corpus* or income of estate, every married woman is authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, but no conveyance of her real estate shall be valid unless made with the written assent of her husband as provided by sec. 6 of Article X of the Constitution, and her privy examination as to the execution of the same taken and certified as now required by law." The effect of the Martin Act (this section), is to take married women out of the classification which the law recognized prior to its enactment and to make them, with respect to capacity to contract, *sui juris*. This section should be held to mean what it plainly says, that, except as to contract with her husband, in which the forms required by section 2515 must still be observed, and except in conveyances of her real estate, in which case her privy examination must still be taken and her husband's written consent had, a married woman can now make any and "all contracts, so far as to affect her real and personal property," in the same manner and to the same effect as if she were unmarried. *Warren v. Dail*, 170 N. C., 406 (410); *Lipinsky v. Revell*, 167 N. C., 508; *Everett v. Ballard*, 174 N. C., 16 (18); *Brown v. Brown*, 205 N. C., 64. This section practically constitutes married women free traders as to all their ordinary dealings.

In *Harrison v. Ray*, 108 N. C., 215 (216-17), it is said: "The grantors were not conveying any additional estate or interest to Oakley Harrison. He had bought nothing, and they were not making him a present of anything. The deed only assigned to him in severalty and by metes and bounds what was already his. The grantors conveyed no part of their shares. They had no interest in the share embraced in the deed to Oakley Harrison, and could convey no interest therein to him or any one else. It was his by the conveyance from his father. He received no title nor estate by virtue of the deed from his brothers and sisters, nor could his wife. His direction to the other heirs (if given) to convey to himself and wife could not have the effect to make the deed a conveyance of anything to his wife when it was not such as to himself.

The title being already in him, the deed merely designated his share by metes and bounds and allotted it to be held in severalty. No title passed by the deed, nor by any of the deeds. 'Partition makes no degree. It only adjusts the different rights of the parties to the possession. Each does not take the allotment by purchase, but is as much seized of it by descent from the common ancestor as of an undivided share before partition.' Allnatt on Partition, 124. The deed of partition destroys the unity of possession, and henceforth each holds his share in severalty, but such deed confers no new title or additional estate in the land. 2 Bl., 186. Hence it is that in partition, whatever the form of the deed, there is an implied warranty of title by each tenant to all the others. *Huntley v. Cline,* 93 N. C., 458." *Jones v. Myatt,* 153 N. C., 225 (230); *Millard v. Smathers,* 175 N. C., 60; *Valentine v. Granite Corp.,* 193 N. C., 578 (580-1); *Insurance Co. v. Dial,* 209 N. C., 339 (348).

In *Collier v. Paper Corp.,* 172 N. C., 75-6, we find: "Mrs. Collier and those claiming under her have been in continuous and exclusive possession since aforesaid partitions now nearly forty years. A parol partition is not void, but merely voidable. It is not necessary to pass on the point whether the plat made by the surveyors at the instance of the executors when they executed the power, conferred by the will, to make partition, and which plat was adopted by them, take this out of the class of parol partitions. The partition is valid, since it has been acquiesced in for more than twenty years. Treating this as an oral partition, 'Any evidence is admissible which tends to show either ratification of the partition or conduct from which the parties seeking to disregard it are held to be estopped from so doing.' 30 Cyc., 164. . . . The plaintiffs and defendants have been in undisputed possession of the tracts as allotted by the executors in execution of the power in 1877. In *Rhea v. Craig,* 141 N. C., 602, it is said: 'Where, after a parol partition between the tenants in common, who severally took possession, each of his part, and have continued in the sole and exclusive possession for twenty years without making any claim or demand for rents, issues or profits by any of them upon the others, but recognizing each other's possession to be of right and hostile, the law will presume an actual ouster and a supervening adverse possession, as much so as where the possession was of the whole instead of a part only.'" *Roberts v. Ins. Co., ante,* 1.

Conceding, but not deciding, that the partition deed made by M. L. Martin to John W. Martin, her husband, for lot 1 was inoperative under section 2515 *supra,* John W. Martin was the owner of one-fifth (1/5) interest in the 500 acres of land purchased from Ashley Whichard on 7 December, 1882, in his own right.

N. C. Code, 1935 (Michie), sec. 430, reads: "No action for the recovery or 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."

If by parol there was a division in the fall of 1885 of the W. G. Whichard land, and John W. Martin went into possession of the land at that time and he and others who claim title under him have been in possession of same for 20 years, in accordance with section 430 *supra*, he has a statutory fee simple title. *Owens v. Lumber Co.*, 210 N. C., 504; *S. c., ante*, 133; *Berry v. Coppersmith, ante*, 50. Then again M. L. Martin, wife of John W. Martin, went into possession of her one-fifth (1/5) interest, Lot No. 4, in her own right under the partition deed or by parol division in 1885, and had possession of same and sold same to J. J. Jones on 15 January, 1895. The parties cannot now be placed in *statu quo*. From the long period of delay on the facts developed the doctrine of estoppel by laches may apply. *Sprinkle v. Holton*, 146 N. C., 258 (266).

The principle of estoppel is thus stated: "The doctrine is founded upon equity and good conscience; and the party claiming the estoppel must have done something, paid something, or in some way changed his position for the worse, so that he will not be left or cannot be put back in his former condition, in case the other party is allowed to assert his original rights." Story's Eq. Jur., Vol. 3, sec. 1898 (14 ed.); *Trust Co. v. Wyatt*, 191 N. C., 133 (136); *Oil Co. v. Jenkins, ante*, 140 (144-5).

M. L. Martin, wife of John W. Martin, had only an inchoate right of dower in Lot No. 1, when she died this right was extinguished. Since M. L. Martin received the land by parol partition, and with her husband conveyed it prior to the Martin Act, the application of the doctrine of estoppel to her, except where the doctrine of estoppel by laches prevails, must be determined in the light of the law as it existed prior to the Martin Act, *supra*. The full doctrine of estoppel did not apply to a married woman because she was not *sui juris* and was under disability, but she could bind herself by way of estoppel by some affirmative act of fraud upon which a prudent man might rely to his injury in matters affecting her rights. *Towles v. Fisher*, 77 N. C., 443; Kelly Contracts of Married Women, p. 122; Bishop, the Law of Married Women, Vol. 2, p. 395. The rule was stated by *Smith, C. J.*, in *Weathersbee v. Farrar*, 97 N. C., at p. 111, as follows: "Unless the element of fraud is

present in the declarations or conduct of a woman under coverture, upon the faith of which another has acted to his own injury, and which may reasonably be supposed to induce him to act, she cannot lose any of her just rights of property."

Even after the enabling statute there is authority to support the view that although estoppel applies generally to women, still it does not apply with reference to her claim of real estate unless there has been actual fraud on her part. Harris, Contracts by Married Women, p. 435. However the more general and better view is that "to the extent that new enactments liberate and remove her disabilities and enlarge her powers as a *feme sole,* and she commits acts of estoppel, they may estop her if sought to be enforced against her." Cord, Legal and Equitable Rights of Married Women, 2nd ed., sec. 1287, and cases cited in notes 2 and 3 thereunder; Bishop, Law of Married Women, *supra,* p. 398, citing with approval *Bodine v. Killeen,* 53 N. Y., at p. 96, where *Allen, J.,* concludes, "The reason of the rule ceasing with the removal of the incapacity, the rule fails." Kelly, Contracts of Married Women, *supra,* pp. 122-3.

If M. L. Martin herself was not estopped, under the prior law, those succeeding to her title cannot now assert her rights as they have by their own laches permitted another doctrine to become operative. If the possession of the land has been held adversely for twenty years, in accordance with the statute, C. S., 430, *supra,* they cannot now claim the land.

For the reasons given the judgment of the court below is

Reversed.

EARL LEDFORD v. B. A. SMITH.

(Filed 24 November, 1937.)

1. Appeal and Error § 21—

Where the charge is not in the record it will be presumed that the trial court correctly charged the law applicable to the facts.

2. Process § 14—

The essential elements of abuse of process are: (1) The existence of an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular prosecution of the proceeding.

3. Process § 15—Use of criminal process to collect civil debt constitutes abuse of process.

Plaintiff's evidence was to the effect that he paid defendant the balance due on the purchase price of land and defendant handed him a deed for the property, that defendant then contended that certain fixtures did not

go with the building and that plaintiff owed interest on the money, and told plaintiff if he took the deed with him without paying these items he would have plaintiff indicted, that plaintiff insisted he had paid the full purchase price and took the deed, and that defendant thereafter swore out a warrant charging false pretense, that on the trial before the recorder, the recorder told defendant he could still have the deed set aside, and defendant's attorney stated on the trial that the reason they did not sue plaintiff civilly was that plaintiff had nothing, and that they could collect the money after the conviction for false pretense. *Held:* The evidence was sufficient to be submitted to the jury in plaintiff's action for abuse of process in using criminal process to collect a civil debt.

4. Same: Trial § 37—Issue, taken with allegations and evidence, held sufficient to support judgment for abuse of process.

In an action for abuse of process, an issue as to whether defendant abused the process of the court in having plaintiff indicted as alleged in the complaint, *is held* sufficient to support judgment in plaintiff's favor, when construed with the allegations and evidence to the effect that defendant abused the process of the court in wrongfully and willfully using it to collect a civil debt.

5. Execution § 25—Execution against the person may be issued upon verdict in plaintiff's favor in action for abuse of process.

An order for execution against the person of defendant to be issued upon return of execution against his property unsatisfied, is proper upon a verdict establishing that defendant wrongfully and willfully abused the process of the court, fraud not being an element of abuse of process, and the constitutional provision against imprisonment for debt except in cases of fraud not being applicable to torts. N. C. Constitution, Art. I, sec. 16; C. S., 767, 768.

6. Constitutional Law § 34—

The constitutional provision that no person shall be imprisoned for debt except in cases of fraud, Art. I, sec. 16, applies to actions *ex contractu*, and has no application to actions in tort.

BARNHILL, J., dissenting.

STACY, C. J., and WINBORNE, J. concur in dissent.

APPEAL by defendant from *Johnston, J.*, and a jury, at March Term, 1937, of CLEVELAND. No error.

This was a civil action tried at the March Term, 1937, of Cleveland County Superior Court. The plaintiff, for his first cause of action, alleged that the defendant, maliciously and without probable cause, caused and procured the plaintiff to be indicted by swearing out a warrant charging the plaintiff with the crime of false pretense, and that the defendant prosecuted the plaintiff before the recorder of Cleveland County, N. C., and caused him to be held under a $200.00 bond for his appearance to the Superior Court of Cleveland County, N. C., and that the solicitor refused to send a bill to the grand jury for said offense; and that the purpose of defendant was to use the process of the courts to

oppress the plaintiff and force the plaintiff to pay the defendant money which he did not owe, and that because of same the plaintiff had been damaged.

For the second cause of action the plaintiff alleged that defendant maliciously and falsely, with intent to oppress, abuse, and malign plaintiff, did unlawfully, willfully, and feloniously charge that the plaintiff committed a crime of larceny after trust, and caused the plaintiff to be indicted before the grand jury on said charge, and that the defendant employed counsel to prosecute said charge. That said charges of grand larceny and false pretense were maliciously and falsely spoken and uttered by the defendant with intent to harass, vex, annoy, and injure the standing and reputation of the defendant in the community, and that on this bill of indictment, after B. A. Smith testified, the court instructed the jury to enter a verdict of "not guilty." The plaintiff elected to try the case, and the case was tried on the theory of "Abuse of Process."

The allegations of the complaint and the evidence on the trial were to the effect: That plaintiff was 33 years old and had a wife and two children. His general reputation was good, and he had never been indicted before. Plaintiff had a transaction with defendant in regard to the purchase of some real estate from defendant. It was a 25-foot lot with a building on it which had been half torn down. Plaintiff was to fix it up and purchased it for $650.00. There were some stools in the building fastened to the floor, but in the trade no exception was made about them. Plaintiff was to pay $5.00 a week until he had paid $250.00, and the balance of $400.00 was to be financed through the Building and Loan Association. He repaired the building and paid the $5.00 a week until the $250.00 was paid. Plaintiff testified: "I told him (defendant) if he would have the deed fixed I would pay the balance. He came down and told me he had the deed fixed, and I went and he handed me the deed and I counted out the balance, $400.00, and he said, 'Those stools, they don't belong in with the building.' He says, 'You will have to pay extra for those.' I says, 'Mr. Smith, I bought the building for $650.00 like it was and I was supposed to fix it up. I paid for having it fixed up and $5.00 a week until I paid you $250.00 and paid you the other $400.00, and you give me the deed,' and I said 'I think it is paid for. That is the amount I was supposed to pay.' And he said, 'There is interest on that, too.' Thirty-nine dollars and something I believe he said. I says and told him how I was supposed to pay it and I had paid it, and he says, 'Well, you can't take that deed off from here without you finish paying for it; pay the balance for the stools, and interest.' I says, 'Well, I have done paid you and you gave me the deed,' and I says, 'It belongs to me.' He says, 'If you take that

deed off I will have you arrested.' I says, 'You will have to have me arrested. I paid for it and it belongs to me'; and he went and swore out a warrant for me charging me with false pretense."

Plaintiff was arrested on the warrant and kept in custody several hours until he gave bond. The case was heard before the recorder, plaintiff called for a jury, but the recorder said it was out of his jurisdiction and he would have to determine if there was probable cause to bind over to the Superior Court. Plaintiff had no counsel. He testified: "Mr. Smith got up and told about me getting the deed and everything from him, and everything he would say, why the recorder would agree with him and tell him that was right. The recorder stopped him and told him how he could still have the deed set aside, and it looked like they were sort of making a joke out of me, laughing and joking and winking. The recorder and Smith's attorney and Mr. Smith were laughing. The attorney representing Mr. Smith and Mr. Smith were laughing, the attorney represented Mr. Smith in prosecuting me. Q. They were making a monkey out of you? Ans.: Looked like they were; winking at each other. I didn't see Mr. Smith wink at anybody, I saw the recorder wink at him. (The court: Winking is not competent.) The recorder asked me if I had anything to say. I went on the stand. The recorder said, 'I want to warn you that anything you say will be held against you.' I said, 'I want to go on the stand anyhow.' I got up and told how it was, and he said, 'Well, I am going to bind you over anyhow.' He said, 'Do you reckon you can get up a $200.00 bond?' I said 'I think I can.' He put a $200.00 bond on me and sent it on up to Superior Court. The attorney representing Mr. Smith in prosecuting me made the statement in open court the reason they didn't sue me was because I didn't have nothing, and said they would get me for false pretense and then they could get their money. I appeared at the July Term of Superior Court, and I guess my expenses altogether, going backwards and forwards and attorney fees, were over a hundred dollars. In the Superior Court they changed the charge to larceny, and I was not tried on the charge of false pretense. . . . During the progress of the trial the court ordered a verdict of not guilty after the State's witness, B. A. Smith, testified in the case. . . . I gave him (Smith) $400.00 and he gave me the deed, we were at his store and he had the deed in the safe, and when I paid him he went and got it and gave it to me. . . . I admit he collected all that was in the deed and tried to collect more for it."

A justice of the peace testified: "Some time in the summer of 1936, I don't recall the date, Mr. B. A. Smith came to me for a warrant against Mr. Earl Ledford. Q. Go ahead and state what you told him and what he said. Ans.: He came to me for a warrant; said he wanted

a warrant for Mr. Ledford. I said for what, and he explained it, and I said, 'Well, what shall we charge him with?' He said, 'Stealing, I guess.' I said, 'I don't know if it would be larceny.' 'Well,' he said, 'my attorney said it would.' I said, 'Do you have an attorney employed?' He said 'Yes.' I said, 'If your attorney thinks it is larceny and will draw the warrant I will sign it, but I don't think it is.' And he went away and he didn't come back to me at all. In a few minutes thereafter he came back with one signed and gave it to an officer, but I don't know what he charged him with."

The issues submitted to the jury and their answers thereto were as follows:

"1. Did the defendant abuse the process of the courts by having plaintiff indicted on 24 June, 1936, as alleged in the complaint? Answer: 'Yes.'

"2. What actual damages is the plaintiff entitled to recover of the defendant? Answer: '$500.00.'

"3. What punitive damage is plaintiff entitled to recover of the defendant? Answer: ....."

Judgment was rendered on the verdict. Defendant, at the close of plaintiff's evidence and at the close of all the evidence, made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions. The defendant excepted and assigned errors and also excepted and assigned error to the judgment as signed, and appealed to the Supreme Court.

B. T. Falls for plaintiff.

E. A. Harrill and D. Z. Newton for defendant.

CLARKSON, J. We see no error in the judgment of the court below. The charge of the court is not in the record and the presumption of law is that the court below charged the law applicable to the facts. The case was tried in the court below on the theory of "abuse of process." The law in regard to abuse of process is well settled in this jurisdiction.

In *Abernethy v. Burns,* 210 N. C., 636 (639), we find: "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 (citing authorities). . . . 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 (citing authorities). . . . Speaking to the subject in *Klander v. West,* 205 N. C., 524, 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; and 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.'"

In abuse of process there are two essential elements: (1) The existence of an ulterior purpose; (2) a willful act in the use of the process not proper in the regular prosecution of the proceeding.

The evidence all indicates that the process was used to collect a debt, if any existed, by using the criminal law for that purpose. Defendant said he would have plaintiff arrested if he took the deed without paying the interest. The recorder, on the trial, informed the defendant that he could still have the deed set aside. Defendant's attorney made the statement, in prosecuting plaintiff on the trial in the recorder's court for false pretense, "The reason why they did not sue me, because I didn't have nothing and said they would get me for false pretense and they could get their money." In the Superior Court the charge was changed to larceny. This and other evidence on the trial was sufficient to be submitted to the jury on abuse of process. The process, it appears, was a whip to force the payment of an alleged indebtedness.

Taking the allegations in the complaint and the evidence adduced on the trial, the issue tendered and answered "Yes" will support the judgment "Did the defendant abuse the process of the courts by having plaintiff indicted on 24 June, 1936, as alleged in the complaint?"

The defendant excepted and assigned error to the judgment as follows: "It is thereupon considered, ordered, and adjudged that the plaintiff, Earl Ledford, have and recover of the defendant, B. A. Smith, the sum of $500.00, with interest thereon until paid, together with the costs of the action to be taxed by the clerk and execution will issue accordingly, and upon return of execution unsatisfied in whole or in part, execution will issue against the person of the defendant." This exception and assignment of error cannot be sustained.

Citing again *Klander v. West,* 205 N. C., 524 (526), we find it there written: "To justify an execution against the person in an action for malicious prosecution there must be affirmative finding by the jury of express or actual malice. *Watson v. Hilton,* 203 N. C., 574; *Harris v. Singletary,* 193 N. C., 583; *Swain v. Oakey,* 190 N. C., 113, 116. 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. In the absence of a finding of express malice or the willful abuse of process the

person of the defendant cannot be taken in execution." *Ledford v. Emerson,* 143 N. C., 527; *Michael v. Leach,* 166 N. C., 223; *Foster v. Hyman,* 197 N. C., 189; N. C. Code 1935 (Michie), secs. 767, 768.

Article I, sec. 16, of the Constitution of North Carolina, provides "There shall be no imprisonment for debt in this State except in cases for fraud." This proviso of the Constitution has no application to actions of *tort,* but is confined to actions arising *ex contractu. Long v. McLean,* 88 N. C., 3.

In the present case the jury found abuse of process, which was willful according to the allegations of the complaint. A *tort* action "injury to person or property." Sec. 768, *supra.*

For the reasons given, in the judgment of the court below, we find

No error.

BARNHILL, J., dissenting: While the complaint undertakes to state two causes of action, the first of which relates to the procurement of a warrant for the arrest, and the arrest, of the defendant, on or about 24 June, 1936, and the second of which relates to the indictment of the plaintiff in the Superior Court subsequent thereto, the plaintiff at the conclusion of all the evidence elected to rest his case upon the allegation of "abuse of process of the courts." While the word "indicted" is used in the first issue, the date contained therein is the date on which the defendant procured the issuance of a warrant for the arrest of the plaintiff. So that, both by the election of the plaintiff and the issues submitted, the trial was restricted to the instances surrounding the original arrest of the plaintiff.

The answer to the first issue is insufficient to support the judgment in this cause. There can be no abuse of process in the procurement of the issuance of a warrant or other process of the court. 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. *Abernethy v. Burns,* 210 N. C., 636; *Martin v. Motor Co.,* 201 N. C., 641; *Griffin v. Baker,* 192 N. C., 297; 1 Am. Jur., 176. On a cause of action for abuse of process the two essential elements to be established 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. *Carpenter v. Hanes,* 167 N. C., 551. "Where the matter complained of concerns the issuance of process, the action is either strictly or by analogy one for malicious prosecution. In this category are included actions for the malicious institution of criminal proceedings," etc. 1 Am. Jur., 177. In *Wright v. Harris,* 160 N. C., 542, it is said: "An abuse of process consists in its *employment* for some unlawful pur-

pose or use, which it was not intended by the law to effect and amounts to a perversion of it. It is not the illegality or maliciousness of legal proceedings leading up to it which forms the basis of the distinct cause of action for its abuse, which is independently actionable, when the process itself is used for an unlawful or oppressive purpose, or is used to coerce or harass the defendant." The foregoing cases cite many others to the same effect.

Where the charge of the court is not in the record there is a presumption of law that the court below correctly charged the law applicable to the facts relating to the issues submitted. It is also a rule of this Court that where an issue and the answer thereto, standing alone, do not establish sufficient facts to support a verdict, but an examination of the charge discloses that the answer of the jury, taken in connection with the statements made by the court in its charge, is sufficient, then the verdict will be upheld. That is, if the charge taken in connection with the answer fully amplifies and explains the answer, so as to make it, when considered in connection with the charge, sufficient, it will be sustained. This Court, however, has never gone so far as to hold that it will presume that a charge not in the record was sufficient to so amplify and explain a verdict, otherwise inadequate, as to justify upholding a verdict otherwise totally insufficient. When the charge is not in the record we presume that the court below fully charged the jury as to the law and the facts relating to the issues submitted. This is the extent of former decisions and is as far as we can now safely go. Shall we presume that the court below instructed the jury that if the defendant, after the issuance of the warrant, procured the arrest of the plaintiff, not in good faith for the purpose of prosecuting a violation of the criminal law, but for the ulterior purpose of collecting a debt, that then such finding on their part would constitute an abuse of process in procuring the issuance of the warrant, or, shall we presume that the court below correctly instructed the jury as to the liability of the defendant for statements of his counsel made in open court in respect to purpose of the prosecution, when there was no evidence of express authority for such statement and that if the jury found that such statements were authoritatively made, then that it constituted proof of, or that it might be considered as evidence of the ulterior purpose of the prosecution? This is the only manner in which this evidence could be related to the issues submitted. If the court below had so related this evidence to the issue it would have been error, for the reason that abuse of process after its issuance does not constitute an abuse of process in procuring the issuance of the process, for the simple reason that there can be no abuse of process in the procurement of the issuance thereof.

There is no sufficient evidence in the record to support a finding that there was an abuse of process in this cause. The evidence is fully set out in the opinion, from which it appears that the defendant delivered to the plaintiff a deed for certain property in anticipation that the plaintiff would then and there pay him the balance due; that the plaintiff did not pay the amount the defendant contends was due, and the defendant thereupon demanded a return of his deed and forbade the plaintiff to carry the same away. The plaintiff, having insisted that he paid all that was due, retained the deed and the defendant thereupon procured a warrant, under advice of counsel. After the procurement of the warrant he did nothing further than to testify as a State's witness when called upon to do so. The plaintiff testified "I do not remember Mr. Smith saying on the stand anything about getting his money." The only evidence relating to any ulterior purpose attendant upon the prosecution is the following: "Mr. Harrell represented Mr. Smith in prosecuting me and made the statement in open court the reason they did not sue me was because I did not have nothing, and said they would get me for false pretense and then they could get their money." I do not deem this sufficient evidence to support the charge of abuse of process, even upon a proper issue. The inference that the defendant was prompted by the ulterior purpose of collecting money by the prosecution is to be drawn from the plaintiff's complaint and not from the evidence.

I am authorized to say that MR. CHIEF JUSTICE STACY and MR. JUSTICE WINBORNE concur in this dissent.

WESLEY LEE v. AMERICAN ENKA CORPORATION AND FRED BAKER.

(Filed 24 November, 1937.)

1. Master and Servant § 36—

The North Carolina Workmen's Compensation Act is founded upon mutual concessions of the employers and employees covered by the act, and is constitutional as a valid exercise of the police power of the State.

2. Master and Servant § 37—

The purpose of the Workmen's Compensation Act is to afford employees an expeditious remedy to recover for injuries compensable under the act without regard to whether such injuries were caused by the negligence of the employer.

3. Master and Servant § 38—Employers and employees within scope of Compensation Act are bound thereby, in absence of notice to contrary.

All employers and employees not coming within those specifically excepted from the operation of the Workmen's Compensation Act by sec. 14 of the act, are conclusively presumed to have accepted the provisions of the act and are bound thereby unless they give notice to the contrary in writing or print in apt time to the Industrial Commission. N. C. Code, 8081 (k), and where the facts admitted or agreed establish that defendant employer regularly employed more than five employees in its manufacturing plant, and that no notice of an election not to be bound by the act was given by defendant employer or plaintiff employee, the parties are bound by its provisions.

4. Master and Servant § 40a—Injuries compensable under Compensation Act.

Under the Compensation Act injuries by accident arising out of and in the course of the employment are compensable regardless of whether the accident was the result of the employer's negligence, but injuries not resulting from an accident arising out of and in the course of the employment, and diseases which do not result naturally and unavoidably from an accident are not compensable, N. C. Code, 8081 (i), subsec. (f).

5. Master and Servant § 37—By accepting provisions of Compensation Act the parties make mutual concessions in regard to liability for injuries.

The Workmen's Compensation Act is not compulsory, as either the employer or the employee may reject its provisions by proper notice to the Industrial Commission, but where its provisions are accepted by the parties they are bound by the mutual concessions therein provided under which the employer is required to pay for injuries compensable regardless of whether the accident resulting in injury was caused by its negligence, and the employee gives up his right of action at common law for injuries caused by negligence.

6. Master and Servant § 49—Compensation Act excludes right of action at common law for injuries which are not compensable under the Act.

Plaintiff instituted this action against his employer in the Superior Court, alleging that he contracted tuberculosis as a result of breathing sulphuric acid in the course of his employment, and alleging acts and omissions on the part of the employer constituting negligence proximately causing the injury. The facts admitted or agreed established that the parties were bound by the Workmen's Compensation Act, and the Superior Court dismissed the action for want of jurisdiction. *Held:* Even though the injury is not compensable under the Compensation Act, the Superior Court properly dismissed the action, since plaintiff, by accepting the provisions of the Compensation Act, surrendered his right to maintain an action at common law to recover for an injury caused by the negligence of his employer, and in exchange therefor received the benefit of the employer's assumption of liability for injuries compensable under the act regardless of negligence. N. C. Code, 8081 (r).

APPEAL by plaintiff from *Phillips, J.*, at March Term, 1937, of SWAIN. Affirmed.

This is an action to recover damages for personal injuries suffered by the plaintiff which resulted from a disease, to wit, tuberculosis, which plaintiff contracted while at work as an employee of the defendant, American Enka Corporation, in Swain County, North Carolina, under the supervision of the defendant, Fred Baker, superintendent of the defendant corporation.

The action was begun in the Superior Court of Swain County.

In his complaint the plaintiff for his cause of action against the defendants alleged:

1. That the plaintiff is a citizen of North Carolina and a resident of Swain County in said State.

2. That the defendant, American Enka Corporation, is a corporation, duly created, organized and existing and at the time of the grievances hereinafter complained of was and still is engaged in the manufacture of rayon from paper and wood pulp, and other ingredients, and has and maintains its principal office and place of business at Enka, Buncombe County, North Carolina, where it owns, has, maintains, and operates a large factory and plant for the purposes aforesaid.

3. That at the time of the grievances hereinafter complained of the defendant Fred Baker was in the employ of the defendant corporation as a foreman and as superintendent of the said rayon plant, and was in charge of what is known as the spinning room and acid room, and at the time aforesaid the defendant corporation had invested the said Fred Baker with power to supervise, control, and direct the operations in said plant, and to supervise, order and direct the employees employed and working in said department, and in like manner had invested the said Fred Baker with power and authority to employ and discharge hands and laborers and to report them for disobedience of orders and thereby procure their discharge and at the time aforesaid the said Fred Baker was a citizen of North Carolina and a resident of the city of Asheville, in Buncombe County, North Carolina.

4. That the plaintiff was employed by the defendant corporation in June, 1933, and remained continuously in the employment of the defendant corporation until the .... day of ....., 1934, at which time the plaintiff, because of the diseases and grievances hereinafter complained of, which were caused and sustained by reason of the wrongful, careless, and negligent acts and omissions of the defendants, was forced to give up and abandon his said employment with the defendant corporation.

5. That when the plaintiff entered the employment of the defendant corporation he was ordered and directed by the defendants and each of them to work in the spinning department of said acid room, and in the course of his employment was required by the defendants and each of them to assist in cleaning out large tanks, holding thousands of gallons

of sulphuric acid and other chemicals; that the plaintiff was required to work in and around said large tanks or vats, containing chemicals and sulphuric acid and other acids, which were used in said manufacturing plant, and plaintiff was ordered and directed and required to work in the spinning room in said plant and to handle pulp frisco, which was then and there manufactured in said plant from wood fibre and other materials which were soaked and treated with the aforesaid chemicals, sulphuric acid and other acids, which were stored in said large tanks or vats.

6. That in cleaning the said tanks and vats plaintiff was ordered and required to get inside same, and it was impossible to clean out said tanks and vats in any other manner, and in working in said spinning room it was necessary for plaintiff to move and handle the aforesaid frisco pulp which had been treated with said sulphuric acid and other chemicals. That said sulphuric acid and chemicals used by defendants in defendant corporation's said plant as aforesaid gave off and emitted poisonous and deleterious fumes and gases which were irritating and injurious to human flesh and tissues, and in coming in contact with human flesh or the human body, naturally and in the course of events, caused serious and permanent injuries, and said fumes and poisonous gases are particularly injurious and irritating to the throat and lungs, and if inhaled and breathed over a long period of time will cause tuberculosis of the lungs and throat, all of which were well known to the defendant.

7. That in the manufacture of rayon in said plant of the defendant corporation it became and was necessary for the defendant to use said sulphuric acid and other chemicals in the treatment of wood pulp and other fibre which they thereby converted into rayon or artificial silk, and that no other process or means could be used by the defendants in said plant in the manufacture of rayon or artificial silk; that on account of the composition and inherent nature of said sulphuric acid and other chemicals, hereinafter referred to, irritating and dangerous fumes and gases were constantly thrown off and emitted by same, and on account of the peculiar composition and nature of said sulphuric acid and other chemicals, when same were used in the manufacture of rayon, it was impossible to prevent said poisonous fumes and gases from being thrown off and emitted therefrom.

8. That the defendants and each of them well knew of the essential nature and composition of said sulphuric acid and other chemicals used by the said plant in the manufacture of rayon, or artificial silk, and it was well known to the defendants and each of them that said sulphuric acid and other chemicals, constantly and in the usual course of events, throw off and emit poisonous gases and fumes which were injurious

to human flesh and tissues, and were especially dangerous, irritating and injurious to the throat and lungs of any person inhaling and breathing the said fumes and gases.

That the plaintiff was inexperienced in work of the aforesaid kind and character in and around rayon plants and was ignorant of the nature and composition of said sulphuric acid and other chemicals, and defendants and each of them negligently, carelessly, and recklessly failed to warn and notify the plaintiff that said poisonous and irritating fumes and gases were constantly thrown off and emitted by the said sulphuric acid and other chemicals as aforesaid, and of the danger to the plaintiff from breathing and inhaling same.

9. That from the time of his employment in June, 1933, plaintiff worked as aforesaid in said rayon plant for a period of about one year and six months, and during all of said time was constantly subjected to the aforesaid poisonous and irritating gases, and constantly breathed and inhaled same, without any warning from defendants, until plaintiff's lungs were injured and weakened and plaintiff was caused thereby to contract tuberculosis of the lungs, which was directly and proximately caused by plaintiff's breathing and inhaling said poisonous fumes and gases, and during the period of his aforesaid employment plaintiff alleges that if he had known of the danger of breathing and inhaling said poisonous fumes and gases, or had had any knowledge of the effect of breathing and inhaling said fumes and gases in his lungs, he would have immediately left said employment and not encountered or subjected himself to the peril and hazard of working in and around said sulphuric acid and other chemicals.

10. That the disease of tuberculosis of the lungs, which plaintiff contracted as aforesaid, was caused and brought about in the usual and ordinary course of events and was incidental and essential to the particular employment in which the plaintiff was engaged. That the plaintiff was not accidentally injured, but contracted and acquired tuberculosis which was proximately caused and produced by the constant breathing and inhalation of said poisonous fumes and gases for a long period of time, and plaintiff's lungs were thereby weakened and impaired gradually without his knowledge, and tuberculosis of the lungs was thereby caused and developed as aforesaid.

11. That the defendants, and each of them, carelessly, negligently and wrongfully failed to warn and notify the plaintiff that the said sulphuric acid and other chemicals emitted said poisonous fumes and gases, although this was well known to the defendants and each of them, and each of the defendants carelessly, negligently, and wantonly assured plaintiff that the fumes and gases emitted by said sulphuric acid and other chemicals were harmless and would not injure him in any manner,

and defendants thereby negligently, carelessly, and recklessly misled, permitted, allowed and induced the plaintiff to continue in his said employment and to breathe said poisonous fumes and gases without any warning of the danger thereof, and plaintiff avers that the said careless, negligent, and tortious act, conduct and omission of said defendants, and each of them, directly, jointly, concurrently, and proximately contributed to, and were the direct, joint, concurrent, and proximate cause of plaintiff's said injuries, and he avers by reason thereof, and as the direct and proximate result thereof, the plaintiff was seriously and permanently injured, in that he was caused to contract tuberculosis of the lungs as aforesaid, and his health has thereby been permanently injured and ruined, and plaintiff's lungs and other organs of his body have been diseased by reason of his inhaling said poisonous gases as aforesaid.

"That plaintiff was forced to quit work and on account of his weakened condition has been unable to work and perform manual labor, and that he has thereby been caused great suffering and agony, and has been compelled to spend large sums of money for medical treatment, and plaintiff alleges further that his lungs are so diseased and weakened that he will never be able to do any more work or manual labor, but will remain a hopeless invalid for the remainder of his life, unable to earn a living for himself and his family; that before his said injuries plaintiff was a strong, able-bodied man and earned the sum of $18.00 per week, and worked regularly, and that since suffering the injuries aforesaid he has been unable to earn any sum whatever, and that by reason of the matters and things herein pleaded the plaintiff alleges that he has been damaged in the sum of $30,000."

In their answer the defendants denied each and all the material allegations of the complaint, and in support of their contention that the plaintiff cannot maintain this action, and of their prayer that the action be dismissed, alleged:

"That if the plaintiff was injured as alleged in the complaint, which is again denied, then the defendants aver that said injuries arose out of and in the course of the employment of the plaintiff by the defendant, American Enka Corporation, and the defendants further aver that the North Carolina Workmen's Compensation Act provides an exclusive remedy between employers and employees; that during the entire period of the employment of the plaintiff by the defendant, American Enka Corporation, the plaintiff and the said defendant were each subject to, were operating under, and were bound by the terms of the North Carolina Workmen's Compensation Act, respectively, to pay and to receive compensation according to the provisions of said act, for all injuries to the plaintiff arising out of and in the course of his employment by

the said defendant, and the terms and provisions of the North Carolina Workmen's Compensation Act are pleaded in bar of plaintiff's right to maintain this action, or to recover of the defendants damages by this action."

At the trial of this action a stipulation was entered in the record as follows:

"It is stipulated and agreed by and between the plaintiff and the defendants that during all the time the plaintiff was in the employment of the defendant, American Enka Corporation, as alleged in the complaint, the said American Enka Corporation had regularly in its employment more than five persons, and that neither the plaintiff nor the said defendant had given notice to the North Carolina Industrial Commission, in writing, that they or either of them intended not to be bound by the provisions of the North Carolina Workmen's Compensation Act.

"By this stipulation the plaintiff does not concede that the North Carolina Industrial Commission had jurisdiction of plaintiff's cause of action against the defendants, as alleged in the complaint in this action."

On the facts alleged in the complaint and admitted in the answer, and on the stipulation appearing in the record, the court was of opinion that the plaintiff cannot maintain this action, for the reason that the Superior Court of Swain County has no jurisdiction of the cause of action alleged in the complaint, and accordingly rendered judgment dismissing the action.

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

Edwards & Leatherwood for plaintiff.
J. Bat Smathers and S. G. Bernard for defendants.

CONNOR, J. Chapter 120, Public Laws of North Carolina, 1929 (the North Carolina Workmen's Compensation Act), became effective as to all its provisions and for all its purposes on 1 July, 1929. The act since said date has been and, as amended from time to time, is now in full force and effect as the law of this State. It was enacted by the General Assembly in the exercise of its police power, and is constitutional and valid in all respects. *Hanks v. Utilities Co.*, 204 N. C., 155, 167 S. E., 560; *Heavner v. Lincolnton*, 202 N. C., 400, 162 S. E., 909; *Hagler v. Highway Commission*, 200 N. C., 733, 158 S. E., 383. The purpose of the act is to provide compensation for an employee in this State who has suffered an injury by accident which arose out of and in the course of his employment, the compensation to be paid by the employer, in accordance with the provisions of the act, without regard to

whether the accident and resulting injury was caused by the negligence of the employer, as theretofore defined by the law of this State. See *Winslow v. Carolina Conference Association*, 211 N. C., 571, 191 S. E., 403. The right of the employee to compensation, and the liability of the employer therefor, are founded upon mutual concessions, as provided in the act, by which each surrenders rights and waives remedies which he theretofore had under the law of this State. The act establishes a sound public policy, and is just to both employer and employee. *Conrad v. Foundry Co.*, 198 N. C., 723, 153 S. E., 266. As administered by the North Carolina Industrial Commission, in accordance with its provisions, the act has proven satisfactory to the public and to both employers and employees in this State with respect to matters covered by its provisions.

It is provided by section 2, paragraph (a) of the act that the term "employment" as used therein includes all private employments in which five or more employees are regularly employed in the same business or establishment. The act is applicable to all employers and employees in this State, except those specifically excepted or exempted from its provisions, sec. 14. As to all employments not specifically excepted or exempted, in the absence of a notice in writing or in print, to the contrary, given in apt time to the North Carolina Industrial Commission, which is created by the act and charged with its administration, it is conclusively presumed that both the employer and the employee have accepted the provisions of the act, the one to pay and the other to accept compensation for an injury suffered by the employee by an accident which arose out of and in the course of his employment. In such case both the employer and the employee are bound by the provisions of the act. Sec. 4, N. C. Code of 1935, sec. 8081 (k).

On the facts alleged in the complaint, and admitted in the answer, and agreed at the trial of the instant case, as appears from the stipulation in the record, both the plaintiff, as an employee and the defendant, American Enka Corporation, as an employer, are conclusively presumed to have accepted the provisions of the North Carolina Workmen's Compensation Act, and are bound by said provisions with respect to injuries suffered by the plaintiff, by accident which arose out of and in the course of his employment, not including, however, a disease in any form which did not result naturally and unavoidably from the accident. Sec. 2, N. C. Code of 1935, 8081 (i), paragraph (f).

Under the provisions of the North Carolina Workmen's Compensation Act an employee, when both he and his employer are subject to the provisions of the act, has a right to compensation in accordance with its provisions only for an injury as defined in paragraph (f) of section 2 of the act, N. C. Code of 1935, sec. 8081 (i), which is as follows:

" 'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form except when it results naturally and unavoidably from the accident."

Such injury is compensable under the provisions of the act, without regard to whether it was the result of an accident which was caused by the negligence of the employer. An injury is not compensable, however, under the provisions of the act where it was not the result of an accident which arose out of and in the course of the employment, nor where the injury is a disease in any form, unless such disease resulted naturally and unavoidably from an accident.

By his acceptance of the act as binding upon him in all its provisions, an employee surrenders his right in the event his injury was caused by the negligence of his employer, without fault on his part, to recover of his employer damages for his injury to be assessed by a jury in accordance with well settled principles of law, and the employer agrees to pay compensation to his employee for his injury, without regard to whether the injury was caused by his negligence, and in such case surrenders his right to invoke certain defenses which are well recognized in the law of this State as bars to a recovery by the employee of damages for his injury, although the injury was caused by the negligence of the employer. The validity of the North Carolina Workmen's Compensation Act has been upheld because of the mutual concessions of employer and employee under its provisions. The act is not compulsory. It is expressly provided therein that it shall be binding on an employer and an employee only when it has been accepted by both. Either may reject its provisions as applicable to him.

The remedy provided by the North Carolina Workmen's Compensation Act for the enforcement by both an employer and an employee of their mutual rights under its provisions is a proceeding begun and prosecuted before the North Carolina Industrial Commission, which is created by the act. It is provided in the act that processes and procedure in a proceeding before the Industrial Commission shall be as summary and simple as reasonably may be. The proceeding is conducted under rules prescribed by the Industrial Commission and is usually expeditious and satisfactory in its results to both employer and employee. An award made by the Industrial Commission in accordance with its findings of fact and conclusions of law is ordinarily conclusive and final. Only its conclusions of law may be reviewed by the courts on an appeal from its award in a proceeding begun and prosecuted before the Industrial Commission for compensation under the provisions of the North Carolina Workmen's Compensation Act.

The question presented by this appeal is whether in a case where both an employee and his employer are subject to the provisions of the

North Carolina Workmen's Compensation Act, neither having rejected said provisions, it being conclusively presumed for that reason that both have accepted said provisions, and where the employee has suffered an injury while engaged in the performance of the duties of his employment, which is not compensable under the provisions of the act, because the injury was not by accident which arose out of and in the course of the employment, but is a disease which did not result naturally and unavoidably from an accident, but was the result of conditions which are not attributable to negligence on the part of the employer, has the employee the right to recover damages of the employer to be assessed by a jury, and for that purpose to maintain an action in the Superior Court against the employer?

The answer to this question requires a consideration of a provision of the North Carolina Workmen's Compensation Act which is as follows:

"The rights and remedies herein granted to an employee, where he and his employer have accepted the provisions of this act, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representatives, parents, dependents, or next of kin, as against his employer, at common law or otherwise, on account of such injury, loss of service, or death." Sec. 11, N. C. Code of 1935, sec. 8081 (r).

When the plaintiff in this action failed to reject the North Carolina Workmen's Compensation Act, as applicable to his employment by the defendant, American Enka Corporation, and thereby became subject to its provisions, in consideration of the liability assumed by the said defendant to pay to him compensation for an injury which he might suffer by an accident arising out of and in the course of the employment, without regard to whether the accident and resulting injury were caused by its negligence, he surrendered his right to recover of the defendant damages for an injury caused by the negligence of his employer, and waived his right to maintain an action in the Superior Courts of this State to recover such damages. See *Pilley v. Cotton Mills,* 201 N. C., 426, 160 S. E., 479, and *Francis v. Wood Turning Co.,* 208 N. C., 517, 181 S. E., 628.

The validity of the North Carolina Workmen's Compensation Act, by which rights are conferred upon employees and liabilities imposed upon employers in this State upon the principle of mutual concessions, is largely dependent upon the foregoing provision of the act.

In view of said provision there is no error in the judgment dismissing this action. The judgment is

Affirmed.

J. R. OLIVER v. THE CITY OF RALEIGH.

(Filed 24 November, 1937.)

1. Municipal Corporations § 14—Municipality is required to keep streets and sidewalks reasonably safe for use for which they are intended.

A municipality is required to keep its streets and sidewalks in reasonably safe condition for the use for which they are intended, the sidewalks reasonably safe for pedestrians, the streets, except at intersections, reasonably safe for vehicular traffic, but this rule does not necessarily mean that a pedestrian is prohibited from using the streets except at intersections, or that he may not recover, upon a proper showing, for injuries received as a result of defects in the streets.

2. Same—Evidence held to show contributory negligence on part of pedestrian injured in fall on street, barring recovery as matter of law.

Plaintiff's evidence was to the effect that he was injured in a fall at nighttime when he stepped from the sidewalk into the street, carrying a 160-pound load to his parked car, that at the place where plaintiff stepped into the street there was a five-inch depression where a ditch dug for gas mains had been filled in with broken pieces of concrete and dirt, that plaintiff could not see the depression because it was in shadow cast by cars parked along the curb. On cross-examination plaintiff testified that he had loaded his parked car from the same storage room over that side of the street practically daily for a period of ninety days without seeing the defect or knowing the height of the curb. *Held:* Plaintiff's evidence discloses contributory negligence barring recovery as a matter of law, since he either had implied notice of the defect and failed to take care to ascertain whether he was stepping off the curb at the place of the defect, or, if he were not charged with implied notice, he stepped from the sidewalk into the street at nighttime carrying a 160-pound weight without knowing the height of the curb.

3. Same—

A pedestrian stepping into a street other than at an intersection is required to use a higher degree of care for his own safety than when walking along the sidewalk, since he may not presume that the municipality has kept the street, at such place, in reasonably safe condition for pedestrians.

CLARKSON, J., dissenting.

CONNOR and SCHENCK, JJ., concur in dissent.

APPEAL by defendant from *Spears, J.*, at Third April Term, 1937, of WAKE. Reversed.

This is an action instituted by the plaintiff to recover damages for personal injuries sustained by him in stepping from the curb of the sidewalk on the north side of East Davie Street, in the city of Raleigh, into the asphalt street in front of his place of business at night into a defective place in the street, which caused him to fall and suffer serious

injury. The city had permitted a ditch to be cut in the street five feet east of the entrance to plaintiff's storeroom for the purpose of installation of gas or other pipes. The ditch began at the curb and extended out toward the center of the street about five feet and was about eighteen inches wide. It had been filled in with the broken pieces of concrete and dirt which were removed at the time the ditch was dug. At the time of the accident the ditch was 4½ to 5 inches deep at the curb, and its depth gradually lessened as it extended out towards the street.

The plaintiff was a salesman for the Toledo Scales Company and leased a building on the north side of East Davie Street for a storeroom for scales he kept on hand.

On the night of the injury plaintiff drove his automobile as near to the front of his building as he could get due to other parked automobiles, went into his storeroom, got a pair of scales weighing 160 pounds and came out to put the same on his automobile. He stepped off the curb into the depression caused by the ditch then existing, fell and received serious injuries. There was evidence that the parked automobiles cast a shadow across the ditch so that the plaintiff did not see it. The usual issues of negligence, contributory negligence, and damages were submitted to the jury and answered in favor of the plaintiff. From judgment thereon the defendant appealed.

Jones & Brassfield for plaintiff, appellee.
Clem B. Holding for defendant, appellant.

BARNHILL, J. Ordinarily sidewalks are constructed for the use of pedestrians and public streets for vehicular travel, except at street intersections. This does not necessarily mean that a pedestrian is prohibited from using any portion of a street except at an intersection, or that a city in no event would be liable for injuries sustained by a pedestrian while traversing or walking upon a public street at a place other than an intersection. Each case must be determined upon its merits.

All portions of a public street from side to side and end to end are for the public use in the appropriate and proper method, but no greater duty is cast upon the city than that it shall maintain the respective portions of its streets in a reasonably safe condition for the purposes for which such portions of the streets are respectively devoted. *Kohlof v. Chicago*, 192 Ill., 249; 85 Am. S. R., 335. A municipality is only required to maintain the respective portions of the streets in reasonably safe condition for the purposes to which they are respectively devoted; thus, the driveway must be kept in such a state of repair as to be reasonably safe for horses and vehicles, but not necessarily for pedestrians. 43 C. J., 1006; 16 Ann. Cases, 424; L. R. A., 1917 F., 710; 19 L. R. A., 221.

In each case the way is to be pronounced sufficient or insufficient as it is, or is not, reasonably safe for the ordinary purposes of travel under the particular circumstances which exist in connection with that particular case. 43 C. J., 1011.

But we need not concern ourselves with the determination of the sufficiency of the evidence to establish negligence on the part of the defendant. If the plaintiff's evidence is such as to tend to show that he was guilty of contributory negligence as a matter of law, he cannot recover.

The plaintiff had been occupying the building near which this defect existed for ninety days. He testified: "I have been loading scales all the time since I have been selling them; I had been loading them there every day for ninety days, possibly. I had loaded them from the middle of the street even. I had loaded them from every part around there. I have stepped off of that sidewalk and that curb a number of times at different places, day and night. I never saw that hole before. I had been coming and going night and day for ninety days. I was within four or five feet of the place every time I went out, as a rule, depending on how I could get my car to the curb; if I went straight out I went four or five feet from this hole. I didn't have occasion to look right down in the gutter. I looked ahead of me where I was walking." He further testified: "I would not know how high the curb is there from the street up to the sidewalk level. I would not like to say it—I would not like to say because I would be guessing and I would not like to guess; it would be somewhere between two feet and six feet, but nothing near six feet, I am sure. I should think it would be anywhere between nothing and three feet; I think that that curb possibly would be a little more than one foot high."

If the period of time over which this plaintiff had been using this particular portion of the street and the conditions under which he used it are considered such as to put him on notice of the existence of the defect in the street, then it appears that in the nighttime, while carrying a weight of 160 pounds he walked out into the street without first ascertaining whether he was stepping from the curb at the place of the defect. If he had neither actual nor implied knowledge of the existence of the defect, then it appears from his testimony that while he was carrying a weight of 160 pounds in the nighttime and not knowing the depth of the curb, that is, the distance from the sidewalk line to the street line, he stepped off when he could not see and without first taking care to ascertain the extent of the drop from sidewalk to street. In either event, it would seem to us that this plaintiff has failed to exercise that degree of care for his own safety which the law imposed upon him and that his own negligence was at least a contributing cause of his injury.

He had a right to go into the street, but when he did so it was his duty to take notice of the fact that it was maintained primarily for vehicular traffic, and to exercise a higher degree of care for his own safety than was required of him while using the sidewalk. He had a right to presume that the sidewalk was maintained in a reasonably safe condition for pedestrians. No such presumption was available to him when he stepped off the sidewalk into the street in the middle of the block when he could not see where he was stepping. He was charged with the duty of exercising for his own safety the same degree of care which he demands of the city. Had he exercised such care it appears that this unfortunate accident would not have occurred.

There was error in the refusal of the court to grant the defendant's motion as of nonsuit.

Reversed.

CLARKSON, J., dissenting: The majority of this Court is of the opinion that the defendant's motion for judgment as of nonsuit should have been granted. With this view I cannot agree. The evidence which makes for plaintiff's claim, or tends to support his cause of action, is to be taken in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. If the evidence in its most favorable light to the plaintiff is subject to an interpretation which would permit a recovery, "the case must be left to the decision of the jury." *Tinsley v. Winston-Salem*, 192 N. C., 597 (599), and cases there cited. With this rule in mind, what are the facts?

Plaintiff was a traveling salesman away from his place of business ninety per cent of the time—a breadwinner. He operated only a storage room, which was not kept open regularly during the day. It had been rented by him for about ninety days before his injury, and was located on one of Raleigh's congested business streets, where traffic was heavy both night and day. He was "on the road" often for three or four days continuously, and when he went to his storehouse it was usually at night and for the purpose of getting new scales to be taken to prospective customers. One evening about 7:30 (in August) he carried a 160-pound scales on his shoulder from his storage room towards his automobile parked near the curb. There was no light from his place of business. Cars were parked on each side of his car, which was 150 feet from a street light. He had never seen any hole in the street at this point and did not know that there was one there. He stepped into a hole approximately five inches deep and eleven inches wide and extending, with increasing shallowness, for five feet toward the center of the street, and fractured his right ankle and is perma-

nently injured. He declared: "I was looking where I was walking, but I certainly didn't suspect a hole in the middle of the street six inches deep." The hole had been there open and unrepaired for more than two years, and the stone and old asphalt which partially filled it had become so discolored that it was not readily apparent, hidden in shadow, as it was on the night in question.

The majority is of the opinion that no jury could reasonably find that plaintiff acted as an ordinary, prudent man. He swore that he was looking where he was walking, and no witness testified to the contrary. If the jury accepted his version of the case it would necessarily find that he was not negligent, as no one testified to facts directly and unequivocally pointing to negligence on the part of the plaintiff. To conclude that he was reasonably careful it was only necessary that the jury believe plaintiff, the only eyewitness; to find that he was negligent it was necessary for the jury to do something more, *to deduce negligence* from the circumstances and his conduct. Granted that a jury *might* have found the plaintiff negligent, a jury also *might* conclude—and this appears to me the more plausible and more probable verdict—that he was not negligent. See *Doyle v. Charlotte,* 210 N. C., 709; *Duke v. Belhaven,* 174 N. C., 96. The latter view is strengthened by the fact that *the jury in this case found as a fact that he was not negligent.* When no jury has passed upon the facts, the court is sometimes justified in constructing a hypothetical and abstract set of facts which a jury might reasonably find. However, when a jury has in fact passed upon those facts a court should be slow, and reluctant, to say that no man could reasonably find the facts to be as they were found to be by the jury. Whether conduct amounts to contributory negligence in a particular case is largely a conclusion of fact to be arrived at by the jury. Shearman & Redfield, the Law of Negligence (6th Ed.), Vol. 1, secs. 52-54. "The court is not at liberty to withhold the question from the jury simply because it is fully convinced that a certain inference should be drawn so long as persons of fair and sound minds might possibly come to a different conclusion." *Ibid.,* sec. 114, citing *Emery v. R. R.,* 102 N. C., 209. Here *twelve* jurors, chosen in the usual manner and correctly charged as to the definition of contributory negligence, have unanimously concluded that plaintiff's conduct was that of a prudent man; I am unwilling to join the Court in saying that *no* man can reasonably infer or conclude that he was not negligent.

In 16 R. C. L. (Jury), sec. 3, p. 182, it is well said: "The right of trial by jury, says *Mr. Justice Story,* is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment on it has been watched with great jealousy. The right to such a trial is incorporated into and secured by the con-

stitution of every state in the Union. In Magna Charta the basic principle of that right is more than once insisted on as the great bulwark of English liberties, but especially by the provision that 'no free man shall be hurt, in either his person or property (*nisi per legale judicium parium suorum vel per legem terrae*), unless by lawful judgment of his peers or equals, or by the law of the land'—a privilege which, according to Blackstone, is 'couched in almost the same words with that of the Emperor Conrad two hundred years before.' The judgment of his peers alluded to in the Great Charter and commonly called, in the quaint language of former times, a 'trial *per pais*,' or 'trial by the country,' is the trial by a jury who are called the peers of the party accused, being of the like condition and equality in the State. The colonists in America brought that right to this country from the parent country, and it has become a part of the birthright of every free man."

Since the majority view has determined the case on the question of nonsuit, I have dealt here with that phase of the case—the *ratio decidendi*—primarily. However, I find myself unable to accept the summary of the general law of the subject as stated in the opinion. As I interpret the cases, persons passing along the streets have the right to assume that the town authorities have properly exercised their powers of supervision and maintenance, that the streets are in reasonable repair for normal vehicular use, that the sidewalks are in a safe condition for ordinary walking, and that dangerous obstructions, holes, and pitfalls have been removed or proper safeguards and warnings set up. *Bunch v. Edenton*, 90 N. C., 434; *Graham v. Charlotte*, 186 N. C., 662; *Russell v. Monroe*, 116 N. C., 720; *Bailey v. Winston*, 157 N. C., 253. In *Gasque v. Asheville*, 207 N. C., 821 (829), we find: " 'The governing authorities of a city are charged with the duty of keeping their streets and sidewalks and water meter boxes in a reasonably safe condition; and their duty does not end with putting them in a safe and sound condition originally, but they are required to keep them so to the extent that this can be accomplished by proper and reasonable care and continuing supervision. It is the duty of the city of Asheville to keep the streets, including the sidewalks and meter boxes thereon and nearby, in proper repair; that is, in such condition as that the people passing and repassing over them might at all times do so with reasonable ease, speed, and safety,' " etc. Such conditions as required by this rule are certainly the ordinary and usual conditions in the municipalities of this State.

No contention was made that holes similar to the one involved here are general and common in the streets of Raleigh. Yet the plaintiff, who did not look for and guard against such holes, is held by the majority to be barred, *as a matter of law*, because he did not foresee and

guard against the rare, the exceptional, and the unusual. In the absence of actual notice of a dangerous condition, a person should not be held to the duty of foreseeing and avoiding a condition which is well beyond the range of normal probabilities.

The majority opinion declares: "No greater duty is cast upon the city than that it shall maintain the respective portions of its streets in a reasonably safe condition for the purposes for which such portions of the streets are respectively devoted." Even under this rule it appears unreasonable upon citizens to declare that a city is justified in leaving a hole such as is described here unrepaired for more than two years. This hole was along the side of the traveled portion of the street, in an area constantly used for parking. The normal use of this section involved the passage of pedestrians to and from their cars. The danger was even greater than it would have been had the hole been in the sidewalk itself, for here it was partially concealed by the shadows and by the closely parked cars. Even if it be conceded that the duty of the city merely involved the maintenance of this portion of the street in a safe condition for vehicles, it appears that there was sufficient doubt as to the safety of the street to require the submission of the question to the jury. Such a hole in the main traveled portion of a street would constitute a trap to the prudent and the reckless motorist alike. Such a rule as that laid down by the majority, if followed by the State highway authorities, would turn our roads into shambles and line our highways with the wounded and dying. Surely it is not unreasonable to hold municipal authorities in the care of a few miles of paved streets to a standard of maintenance which the Highway Commission maintains with a high degree of consistency throughout a system of 8,640.5 miles of "all-weather" road.

I know that this, like every other case, will become the parent stock from which a motley progeny will spring. In those after years when this case, elevated to high authority by the cold finality of the printed page, is quoted with the customary "It has been said," perchance another Court will say, "Mayhaps the potter's hand trembled at the wheel." Possibly when that moment comes these words may give that Court a chance to say, "Yea, and a workman standing hard by saw the vase as it cracked."

In my opinion the case was properly submitted to the jury, and the jury having found for the plaintiff, the judgment of the court below should have been sustained.

CONNOR and SCHENCK, JJ., concur in dissent.

JOHN T. BORDERS, EMPLOYEE, v. J. R. CLINE, SHERIFF OF CLEVELAND COUNTY, EMPLOYER, AMERICAN EMPLOYERS INSURANCE COMPANY, CARRIER,

and

HEY ROSS, EMPLOYEE, v. J. R. CLINE, SHERIFF OF CLEVELAND COUNTY, EMPLOYER, AMERICAN EMPLOYERS INSURANCE COMPANY, CARRIER,

and

LON BYERS, EMPLOYEE, v. J. R. CLINE, SHERIFF OF CLEVELAND COUNTY, EMPLOYER, AMERICAN EMPLOYERS INSURANCE COMPANY, CARRIER.

(Filed 24 November, 1937.)

1. Master and Servant § 37—

The North Carolina Workmen's Compensation Act is to be liberally construed to effectuate the intent of the Legislature as gathered from the language of the act.

2. Master and Servant § 38—

The Workmen's Compensation Act is to be liberally construed to include all employments coming within the natural or ordinary meaning of the language used, but it may not be given a strained construction so as to include an occupation not coming within its terms.

3. Sheriffs § 1—

A sheriff occupies a constitutional (Art. IV, sec. 24) public office, and a sheriff takes office, not by contract, but by commission subject to the power of the Legislature to fix fees and compensation for which the Constitution does not provide.

4. Sheriffs § 2—Nature of office of deputies sheriff.

A sheriff may appoint deputies to perform the ministerial duties of his office, a general deputy having authority to execute all the ordinary duties of the office of sheriff, and a special deputy being authorized to perform a specific act, and functions of deputies sheriff are of a public character, and their fees fixed and paid as prescribed by statute and not by the sheriff.

5. Master and Servant § 38—Deputies sheriff are not employees of sheriff within meaning of Workmen's Compensation Act.

Deputies sheriff are not employees of the sheriff within the meaning of the North Carolina Workmen's Compensation Act, and are not entitled to compensation for injuries resulting from an accident arising out of and in the course of the discharge of their duties, since they occupy a public office and their compensation is fixed and paid as prescribed by statute and not by the sheriff, and the discharge of their duties is not an "employment" within the meaning of that term as used in the Compensation Act. N. C. Code, 8081 (i), (a, b, c).

6. Same—Amendment allowing sheriffs to exempt themselves from Compensation Act cannot enlarge meaning of words of original act.

Since deputies sheriff are not employees of the sheriff within the meaning of the Compensation Act, the amendment of the act by sec. 2, ch. 274,

Public Laws of 1931, permitting a sheriff to exempt himself from the operation of the act by giving the notice prescribed, cannot have the effect of bringing deputies sheriff within the intent and meaning of the act, nor may the fact that a sheriff purchases insurance to cover his compensation liability have the effect of enlarging or extending the language of the act.

DEVIN, J., dissenting.

CLARKSON and SCHENCK, JJ., concur in dissent.

APPEAL by defendants from *Alley, J.*, at November Term, 1936, of CLEVELAND.

Proceeding under North Carolina Workmen's Compensation Act to determine liability of defendants to claimants, respectively.

The Commissioner hearing the cases found the following facts, which were later adopted and approved by the Full Commission. As to claimant, John T. Borders:

"1. J. R. Cline is the high sheriff of Cleveland County. He has more than five deputies sheriff and other helpers in connection with his office as sheriff of the county. He has purchased workmen's compensation insurance to cover his compensation liability. The American Employers' Insurance Company is the carrier.

"2. John T. Borders is a deputy sheriff duly appointed by J. R. Cline, the high sheriff of Cleveland County. He was instructed by the high sheriff to transport to Goldsboro, North Carolina, two insane Negro women. He was allowed five cents a mile for the use of his automobile and for the payment of his time for services rendered.

"3. He suffered an injury by accident which arose out of and in the course of his employment and has been totally disabled since the date of the accident.

"4. He was earning as wages less than $10.00 a week as deputy sheriff.

"5. He received his compensation for services rendered as a deputy sheriff in the form of fees for serving papers, for attending trials in criminal cases, and doing other services that a deputy sheriff is ordinarily called upon to do on a fee basis.

"6. It was the duty of the sheriff to transport the two insane Negro women to Goldsboro, North Carolina. The sheriff was paid for this transportation by the county commissioners and the sheriff, in turn, turned the money over to the deputy sheriff, John T. Borders."

As to claimants Hey Ross and Lon Bowers the same facts were found, except that the two were specially deputized to assist John T. Borders in transporting the two insane Negro women to Goldsboro.

Upon these findings the Commissioner and the Full Commission concluded that each of these claimants as deputy sheriff is an employee of

the sheriff under the provisions of the Workmen's Compensation Act and entitled to the protection of law. Thereupon an award was made to each of the claimants.

On appeal to the Superior Court the three cases were consolidated for hearing. Judgment was signed affirming the findings of fact and conclusions of law and award of the North Carolina Industrial Commission as to each of the claimants.

From judgment thereon in accordance therewith the defendants appealed to the Supreme Court and assigned error.

B. T. Falls for claimants, appellees.
King & King and J. A. Cannon, Jr., for defendants, appellants.

WINBORNE, J. The question here involved: Is a deputy sheriff an employee of the sheriff, by whom he is appointed, within the meaning of the North Carolina Workmen's Compensation Act? We hold that he is not.

This specific question has not been passed upon by this Court. However, in the case of *Starling v. Morris*, 202 N. C., 564, at 568, *Connor, J.*, stated: "The question as to whether the relation between the sheriff of a county in this State, and one who has been appointed by him as a deputy is that of employer and employee, within the meaning of those words as used in the North Carolina Workmen's Compensation Act is not presented by this appeal. In view, however, of the definition in the statute of the words 'employment,' 'employer' and 'employee' as used there, it may well be doubted that a deputy sheriff is an employee of the sheriff by whom he was appointed, within the meaning of those words as used in the act."

In considering the question it is necessary to interpret the pertinent sections of the Compensation Act under appropriate rules.

The Workmen's Compensation Act should be liberally construed so as to effectuate the Legislature's intent or purpose which is to be ascertained from the wording of the act. 71 C. J., 341; *Johnson v. Hosiery Co.*, 199 N. C., 38, 153 S. E., 591; *Rice v. Panel Co.*, 199 N. C., 157, 154 S. E., 69; *Reeves v. Parker*, 199 N. C., 236, 154 S. E., 66; *Williams v. Thompson*, 200 N. C., 463, 157 S. E., 430; *West v. Fertilizer Co.*, 201 N. C., 556, 160 S. E., 765.

Again, "The rule has been said to be, to construe a compensation statute so as to include all services which can reasonably be said to come under the provisions; thus, with regard to the employments to which they apply, the acts are to be construed liberally. . . . Even such a provision, however, will not permit a forced construction to be given to their wording; and, apart from such provisions, the rule of

liberal construction cannot be carried to the point of applying an act to employments not within its stated scope, or not within its intent or purpose, or of supporting a strained construction to include an occupation or employment not falling within it." 71 C. J., 359.

The words used in the statute must be given their natural or ordinary meaning. 71 C. J., 353; *Asbury v. Albemarle,* 162 N. C., 247, 78 S. E., 146; *Comrs. v. Henderson,* 163 N. C., 114, 79 S. E., 442; *Whitford v. Ins. Co.,* 163 N. C., 223, 79 S. E., 501; *Motor Co. v. Maxwell,* 210 N. C., 725, 188 S. E., 389; *S. v. Whitehurst, ante,* 300.

With these rules for guidance we find as the definitions of the words "employment," "employee" and "employer," as used in the North Carolina Workmen's Compensation Act, in so far as pertinent to facts of instant case, C. S., 8081 (i), a, b, and c, that: "(a) The term 'employment' includes *employment* by the State and all political subdivisions thereof and all public and *quasi*-public corporations therein and all private employments in which five or more employees are regularly employed in the same business or establishment, except agriculture and domestic service and sawmills and logging operators in which less than fifteen employees are regularly employed." "(b) The term 'employee' means every person engaged in an *employment* under any appointment or contract of hire or apprenticeship, express or implied, oral or written. . . ." "(c) The term 'employer' means . . . every person carrying on any *employment.* . . ."

In reading these three sections it is seen that the word "employment" is the basic factor in determining who are "employees" and "employers" within the meaning of the act. Hence, the question: Is the position of deputy sheriff an "employment" as defined in that part reading, "All private employments in which five or more employees are regularly employed in the same business or establishment." Analyzing that clause it is seen that the word "employments" is limited by the adjective "private," and further by the words "business or establishment." In Webster's New International Dictionary, 2nd ed., we find the word "private" defined: "Belonging to, or concerning, an individual person, company or interest; peculiar to oneself; unconnected with others; personal; one's own; not public; not general; separate; as a man's private opinion; private property; a private purse; private expenses or interests; a private secretary; opposed to public. Not invested with, or engaged in, public office or employment; not public in character or nature; as a private citizen." The word "business" is defined as "A commercial or industrial establishment or enterprise." "Establishment" is defined as "An institution or place of business, with its fixed or organized staff, as a manufacturing establishment." These words, when given the natural or ordinary meaning, clearly indicate reference

to commercial or industrial employment of a private character as *contra-*distinguished from public office.

The office of sheriff is constitutional. N. C. Constitution, Art. IV, sec. 24. It is a public office. Public office is not private property. *Mial v. Ellington*, 134 N. C., 131, at 162. A sheriff takes office, not by contract, but by commission subject to the power of the Legislature to fix fees and compensation for which the Constitution does not provide. *Comrs. v. Stedman*, 141 N. C., 448, 54 S. E., 269; *Eunting v. Gales*, 77 N. C., 283; *Mills v. Deaton*, 170 N. C., 386, 87 S. E., 123. The office of sheriff is one of public confidence and fidelity to a public trust, and cannot be a matter of bargain and sale. *Cansler v. Penland*, 125 N. C., 578, 34 S. E., 683. In the main the duties of the office are prescribed by statute, *Comrs. v. Stedman, supra*, and are ministerial in character, and, as to such ministerial duties, it is implied, when not so provided by statute, that he may act by a substitute or deputy. *Yeargin v. Siler*, 83 N. C., 348; *R. R. v. Fisher*, 109 N. C., 1.

There is no statutory authority for appointment of deputies sheriff. However, "the deputy is an officer coeval in point of antiquity with the sheriff." *Lanier v. Greenville*, 174 N. C., 311, 93 S. E., 850.

"There are two kinds of deputies sheriff well known in practice: (1) A general deputy or under sheriff who, by virtue of his appointment, has authority to execute all the ordinary duties of the office of the sheriff, and who executes process without special power from the sheriff; and (2) a special deputy, who is an officer *pro hac vice*, to execute a particular writ in some certain occasion, and who acts under a specific and not a general appointment and authority." *Lanier v. Greenville, supra.*

It is said in 57 C. J., 731, sec. 4, "A deputy is the deputy of the sheriff, one appointed to act ordinarily for the sheriff and not in his own name, person or right, and although ordinarily appointed by the sheriff, is considered a public officer."

The duties and authority of a deputy sheriff relate only to the ministerial duties imposed by law upon the sheriff. How those duties are to be performed and the ends to be accomplished are as prescribed and directed by law, and not in accordance with the direction and discretion of the sheriff. By appointing a deputy the sheriff merely delegates to him the authority to execute ministerial functions of the office of sheriff. Those functions are of a public character.

The compensation of the fee deputy is that fixed by statute for the performance of duties required of the sheriff. It is paid as prescribed by statute and not by the sheriff.

"An employee is one who works for another for wages or salary, and the right to demand pay for his services from his employer would seem

to be essential to his right to receive compensation under the Workmen's Compensation Act, in case of injury sustained by accident arising out of and in the course of the employment." *Stacy, C. J.*, in *Hollowell v. Dept. of Conservation and Development,* 206 N. C., 206, 173 S. E., 603, citing *In re Moore,* 187 N. E., 219. *Bashan v. County Comrs.* (W. Va., 1933), 171 S. E., 893.

In the instant case the claimant Borders is a regular deputy appointed by the sheriff, and received as his only compensation fees fixed by statutes. Claimants Ross and Byers were special deputies to assist in the execution of the writ issued by the clerk of the Superior Court under statutory authority, committing the insane persons to the hospital. C. S., 6193. The cost and expense of conveying these persons to the hospital in accordance with the writ is required to be paid by the treasurer of the county upon order of the board of county commissioners. C. S., 6202.

Claimants contend that the amendment to sec. 17 of the Compensation Act (sec. 2, ch. 274, Public Laws 1931) which permits any sheriff to exempt himself and any and all deputies appointed by him from the provisions of the act by notice in writing to the Industrial Commission, manifests the intent of the Legislature to include sheriffs and their deputies within the meaning of the act. If the wording of the original act be not sufficient to include them, then "sheriffs and their deputies" cannot be read into the meaning of the words, originally used, by an amendment permitting a sheriff to exclude himself and his deputies. "It is ours to construe the laws and not to make them." . . . "It is in the province of the law-making power to change or modify the statute, not ours." . . . "It is ours only to declare the law, not to make it . . ." *Stacy, C. J.*, in *S. v. Whitehurst, ante* 300, citing authorities.

Claimants further contend that in view of the fact that the defendant sheriff has purchased compensation insurance to cover his compensation liability, the amendment to sec. 14 (b) of the Compensation Act (ch. 150, Laws 1935), C. S., 8081 (u) (b), affords a foothold upon which this case may stand. Holding that the relationship of employer and employee, within the meaning of the North Carolina Workmen's Compensation Act, does not exist between a sheriff and his deputy, the provisions of this amendment are not applicable to the case in hand. The defendant sheriff "purchased workmen's compensation insurance to cover his compensation liability."

The judgment of the court below is

Reversed.

DEVIN, J., dissenting: I am constrained to the view that the comprehensive language of the Workmen's Compensation Act and the statutory definitions of the terms "employment," "employer," and "employee" are sufficiently broad to embrace the service or employment of the sheriff's deputies. Every contract of service, written or implied, is presumed to have been made subject to the provisions of the act, unless therein exempted. C. S., 8181 (m).

This view is strengthened by the specific reference in the act to deputies sheriff as follows: "*Provided, however,* that any sheriff may exempt himself, and any and all deputies appointed by him, from the provisions of this act by notice in writing to the Industrial Commission." C. S., 8081 (x). The legislative intent that deputies sheriff be subject to the provisions of the act seems apparent. The heart of a statute is the intent of the lawmaking body. That is the cardinal rule of interpretation and construction. *Trust Co. v. Hood, Comr. of Banks,* 206 N. C., 268, 173 S. E., 601; *S. v. Humphries,* 210 N. C., 406, 186 S. E., 473. The portion of the act quoted above should not be disregarded. It forms the basis for the uniform ruling of the Industrial Commission that injuries by accident to deputies sheriff, arising out of and in the course of their employment as such, are compensable.

In the instant case the sheriff, with due consideration of the dangers constantly attending the services of his deputies, instead of seeking exemption for himself, has paid for insurance so that relief might be readily available for them, and the insurance carrier, for agreed compensation, has contracted to underwrite the casualty.

This construction of the Workmen's Compensation Act imposes no unnecessary hardship upon the sheriff, since he may at any time exempt himself with reference to his deputies from the provisions of the act by a notice in writing to the Industrial Commission to that effect.

The fact that the fees received by the deputy are not usually paid to him by the sheriff should not be held controlling, for the reason that compensation for his service is received by him by virtue of his appointment and employment by the sheriff in whose name alone he is empowered to act.

For instance, it has been uniformly held that a caddy employed by a golf club, but paid by those for whom he caddies, is an employee of the club within the meaning of the Workmen's Compensation Act. *Claremont Country Club v. Industrial Accident Commission,* 174 Cal., 395; *Indian Hill Club v. Industrial Commission,* 309 Ill., 271; *Bynum v. Knighton,* 137 Ga., 250.

It may not be out of place to say that, while the employment or office of deputy sheriff may not be rated very highly in dignity or emoluments, those who fill these positions are called upon to render

necessary and valuable service to the public, frequently involving danger to themselves, and society is largely dependent upon them for local enforcement of law and for carrying on the orderly processes of the administration of justice.

I am authorized to say that CLARKSON and SCHENCK, JJ., join in this opinion.

R. J. YOPP AND WIFE, LIZZIE YOPP, v. J. H. AMAN.

(Filed 24 November, 1937.)

1. Reformation of Instruments § 3—

Where an incorrect description is incorporated in a deed by the mutual mistake of the parties, as between the parties, the deed may be reformed to express the true intent.

2. Boundaries § 2—

Where the parties have a survey made or go upon the land and agree upon a definite, marked line as the boundary of the tract to be conveyed, the line as so established contemporaneously with the execution of the deed will prevail over a different description in the deed.

3. Boundaries § 8: Reformation of Instruments § 10—Evidence that parties agreed to definite boundary and different description was inserted in deed by mutual mistake, held sufficient for jury.

In this proceeding to establish the true dividing line between the lands of plaintiff and defendant, the evidence tended to show that there was a lappage in the description of two ancient deeds to contiguous lands, that defendant had owned one tract for some years when he purchased the second tract, that he and his predecessors in title had been in actual possession of the first tract up to the line contended for by him, and that thereafter he and plaintiff went upon the land and he pointed out the fence and pine stumps as constituting the boundary between the tracts, and that he and plaintiff then and there made a contract of bargain and sale for the purchase of the second tract by plaintiff, that in the deed to plaintiff the description as contained in the ancient deed was used, and that defendant went into possession of the second tract up to the boundary as pointed out by plaintiff, and did not claim the lappage until a later survey for a loan disclosed the lappage, and did not interfere with defendant's possession up to the boundary as contended for by defendant until the institution of this action. *Held:* The evidence is sufficient to be submitted to the jury upon defendant's allegation that contemporaneously with the contract of bargain and sale, the parties went upon the land and agreed upon a definite, marked boundary line, so as to override the description contained in the deed actually executed.

APPEAL by plaintiffs from *Sinclair, J.*, at April Term, 1937, of ONSLOW. No error.

This is a processioning proceeding instituted before the clerk of Superior Court of Onslow County, under the statute, to establish the dividing line between the lands of the plaintiff, R. J. Yopp, and the lands of the defendant.

The defendant and his predecessors in title have for many years owned the tract of land referred to as the Dixon land. Thereafter, about the year 1917, defendant purchased an adjoining tract of land referred to as the French land. On 4 November, 1919, the defendant and his wife conveyed the tract known as the French tract to the plaintiff, R. J. Yopp. This deed, after describing the premises, contains a further provision as follows: "The same being the lands conveyed by Emeline French, widow of William French, by deed dated 22 May, 1917, and recorded in the register of deeds' office of Onslow County in book 125, page 233." Plaintiff instituted this proceeding to establish the true dividing lines between the tract purchased by him from the defendant and the Dixon tract, which is still the property of the defendant. The defendant, answering the petition, denied the location of the line as set out in the petition; described the line as contended for by the defendant, and alleged that the respondent sold the petitioner the land conveyed to the respondent by heirs at law of William French, which land did not include any of the Stephen Dixon tract, and that at the time of sale the plaintiff and the defendant went on the land and the plaintiff was shown the line where the fence was then standing, and is now standing on the same line with the exception of a few yards at the lower end, which was changed by the respondent for convenience, and that the petitioners after the purchase established their fence on that part of the line as now contended by the respondent.

The petitioner replied to the defendant's answer and set up the deed from the defendant and his wife to the plaintiff, reciting the description therein contained, and alleged that the westerly line of said tract as described in the deed is the true dividing line between the parties. The petitioner further pleaded the warranties contained in defendant's deed as an estoppel, and that the petitioner has been in possession of the land in dispute under color of title for more than seven years. Thereupon the defendant filed a rejoinder, in which he admitted that the description as contained in the deed from the defendant to the plaintiff described the line as contended for by the plaintiff, but alleged that the true boundary line is well marked, was pointed out to the plaintiff and agreed upon between the plaintiff and the defendant as being the southwesterly boundary line of the tract of land the defendant was then selling the plaintiff, and that the description in said deed embracing more land than that agreed upon between the parties was inserted in said deed by the mutual mistake of the parties; that it was

understood and agreed between the parties at the time of the execution of said deed that the defendant was selling and the plaintiffs were purchasing the French tract of land down to the marked and well established line pointed out to the plaintiff and agreed to between the parties. The defendant thereupon prayed that the said deed be reformed to express the true intent of the parties and that the line contended for by the defendant be established as the true dividing line between the lands of the plaintiff and the defendant. Issues of fact having been raised by the pleadings filed, the cause was transferred to the civil issue docket and came on for trial at the April Term, 1937, Onslow Superior Court. Issues were submitted to and answered by the jury as follows:

1. Was the land in controversy conveyed by defendant Aman to the plaintiff Yopp by mutual mistake of the defendant Aman and plaintiff R. J. Yopp? Ans.: "Yes."

2. What is the true location of the dividing line between the lands of defendant Aman and plaintiff R. J. Yopp? Ans.: 6 to 5 and 5 to 1.

Judgment was entered upon the verdict establishing the dividing line as contended by the defendant and found by the jury and the plaintiffs appealed.

G. W. Phillips and R. A. Nunn for plaintiffs, appellants.

John D. Warlick, Summersill & Summersill, and I. M. Bailey for defendant, appellee.

BARNHILL, J. The controversy in this cause grows out of a lappage in the descriptions contained in two old deeds—one dated 10 August, 1874, which is the source of title of the Dixon tract owned by the defendant, and the other dated 1 February, 1872—which is the source of title of the French tract conveyed by the defendant to the plaintiff.

The one question presented to us for determination in plaintiff's brief is as follows: "Is there any evidence of mutual mistake herein?" All of plaintiff's exceptions are directed to this question. If there was no mutual mistake then the defendant's deed is binding upon him and he admits in his pleadings that the description contained in his deed to the plaintiff embraces the land in controversy—that is, the land between the true dividing line as contended by the plaintiff and the true dividing line as contended by the defendant.

If an incorrect description was incorporated in the deed from the defendant to the plaintiff by mutual mistake of the parties the defendant is entitled to so show and to have the deed reformed so as to conform to the true intent of the parties. Speaking to the subject in *Cox v. McGowan,* 116 N. C., 131, *Avery, J.,* says: "All rules adopted for the construction of deeds tend towards one objective point. They embody

what the law, founded on reason and experience, declares to be the best means of arriving at the intention of the parties. 3 Washburn, 428 and 429. The intention, of course, relates to the time when the deed is delivered, hence course and distance, or even what is considered in law a more certain or controlling call, must yield to evidence, if believed, that the parties at the time of the execution of a deed actually ran and located a different line from that called for, such evidence being admissible to show the description of the line to be a mistake. *Buckner v. Anderson,* 111 N. C., 572; *Cherry v. Slade,* 7 N. C., 82; *Baxter v. Wilson,* 95 N. C., 137; *Stanly v. Green,* 12 Cal., 148; 3 Washburn, 435.

"In support of the position stated, we find that Tiedeman, in his exhaustive work on Real Property, sec. 828, lays down the rule as follows: '*Contemporanea expositio est optima et fortissima in lege.* In construing deeds, courts endeavor to place themselves in the position of the parties at the time of the conveyance in order to ascertain what is intended to be conveyed. For in describing the property parties are presumed to refer to its condition at that time, and the meaning of their terms of expression can only be properly understood by a knowledge of their position and that of the property conveyed.' The familiar rule that the course of a stream called for as a boundary is to be determined by showing the location at the time of the conveyance is referred to as one illustration of the practical operation of the rule." *Realty Co. v. Boren,* 211 N. C., 446.

In *Clarke v. Aldridge,* 162 N. C., 326, it is said: "It has been long held for law, in this State, that when parties, with the view of making a deed, go upon the land and make a physical survey of the same, giving it a boundary which is actually run and marked, and the deed is thereupon made, intending to convey the land which they have surveyed, such land will pass, certainly as between the parties or voluntary claimants who hold in privity, though a different and erroneous description may appear on the face of the deed." *Reed v. Schenck,* 13 N. C., 415; *Cherry v. Slade, supra.*

In *Shaffer v. Gaynor,* 117 N. C., 15, it was held: "A deed is a contract and the leading object of the courts in its enforcement, where the controversy involves a question of boundary, is to ascertain the precise lines and corners as to which the minds of grantor and grantee concurred. Hence, though parol proof is not, as a rule, admissible to contradict a plain, written description, it is always competent to show by a witness that the parties by a contemporaneous, but not by a subsequent survey, agreed upon a location of lines and corners different from that ascertained by running course and distance." *Clarke v. Aldridge, supra; Realty Co. v. Boren, supra; Dudley v. Jeffress,* 178 N. C., 111.

Where the grantor and grantee actually go upon the land and agree upon well-marked corners and a definite, marked line as the boundary of a tract to be conveyed the same rule applies.

Was there then sufficient evidence to be submitted to the jury to support the allegation of the defendant that contemporaneously with, and as a part of the contract of bargain and sale, the plaintiff and the defendant went upon the premises and agreed upon the boundary line of the tract being conveyed to the plaintiff, so as to override the description contained in the deed actually executed and to show that it was the true intent of the parties that the deed should be so drawn as to set out and describe the line agreed upon as the boundary line between the French tract and the Dixon tract? If so, the judgment below must be affirmed. The evidence offered by the defendant and accepted by the jury in arriving at its verdict tends to show that the defendant and his predecessors in title owned the Dixon tract many years prior to the time the defendant acquired the French tract; that at point 5 there is a stake with pointers, at point 1 there is a stake and the corner of a wire fence, at 4 there is a corner of a fence and the fence continues along the line from 4 to 6 (which is the line contended for by the defendant). In the wooded portion of the land through which the line 4 to 6 goes there were marked trees; that the defendant and his predecessors in title have been in the actual possession of the Dixon tract up to the line from 4 to 5 for fifty years or more, and there has been a fence on the line for that period; that this line from 4 to 5 was actually surveyed about forty-five years ago; that the plaintiff and defendant went upon the premises and the defendant pointed out to the plaintiff two pine stumps in the Dixon line and showed him the fence that constituted the line now contended for by the defendant, and that they then and there made a bargain for the purchase and sale of the said premises with the said line as the boundary line between the Dixon and the French tract; that about 25 steps of the fence in the woods had been changed by the defendant from off the line for convenience; that after the purchase by the plaintiff he established this fence on the line as pointed out by the defendant; that the plaintiff went in possession of the tract conveyed to him down to the line so pointed out, but made no effort to take possession of, and made no claim to, either the wooded or the cleared portion of the land in controversy until 1924 (by his testimony, 1933 by defendant's testimony) at which time the plaintiff undertook to borrow money from a Federal agency and discovered from a survey made in furtherance of the loan that the courses of his deed extended over into the tract of land owned by the defendant and to the line now contended for by the plaintiff; that thereafter, without protest on the part of the plaintiff, the defendant still continued in actual possession of the lands

in controversy until the institution of this suit in March, 1936, and that the defendant is still in possession thereof.

While the description contained in the deed executed by the defendant to the plaintiff extends over into the tract of land which the defendant contends is the Dixon tract, he and his predecessors in title had long been in possession of the disputed land as the owners of the Dixon tract. The line as contended for by the defendant was surveyed more than forty-five years ago. It then can well be understood how the defendant misapprehended the meaning of the term contained in his deed to the plaintiff, to wit: "The same being the lands conveyed by Emeline French, etc., by deed dated 22 May, 1917." All the land he actually acquired by said deed was the land down to the line as established by the jury. He was already in possession of the lappage. Likewise the plaintiff so understood and construed the deed and his contract with the defendant. Notwithstanding the fact that most of the land on the westerly side of the line contended for by the defendant is under cultivation, the plaintiff went into possession of the tract purchased by him down to the line agreed upon and made no contention or claim to any lands west of said line until a survey under the description contained in his deed indicated that his line was west of the agreed line. He did not demand possession and acquiesced, without protest, in the continued use of same by the defendant for more than ten years before instituting this proceeding.

There was ample evidence to be submitted to the jury upon the first issue, and it seems that the jury was fully justified in finding that a dividing line was agreed upon at the time of the execution of the deed, and that the defendant did not intend to convey and the plaintiff did not understand that he was purchasing any lands westwardly of the line established by the jury. The jury, upon competent and sufficient evidence and under a proper charge, has answered the first issue in favor of the defendant. If the answer to that issue stands, it is admitted that the answer to the second issue is correct. In the trial of this cause we find

No error.

STATE v. WALTER CALDWELL.

(Filed 24 November, 1937.)

1. Rape § 8—

Evidence in this prosecution to the effect that defendant obtained carnal knowledge of prosecutrix against her will by threatening to kill her with a knife *is held* sufficient to be submitted to the jury on an indictment charging rape.

2. Criminal Law § 77b—

Where the charge is not in the record it will be presumed on appeal that the court correctly charged the law applicable to the facts, and covered all aspects of the case supported by the evidence.

3. Criminal Law § 81a—

The finding of the trial court on the *voir dire* that defendant's confession was voluntary is not reviewable when supported by any competent evidence.

4. Criminal Law § 33—Presence of officers does not render confession involuntary.

Confessions are competent when they are in fact voluntarily made without hope or inducement, threats or fear; but the fact that a confession was given in the presence of officers of the law, some of whom were armed, and that defendant was told by them that they would like to know the truth, does not render the confession involuntary.

APPEAL by defendant from *Rousseau, J.*, and a jury, at August Term, 1937, of IREDELL. No error.

The defendant was tried and convicted and judgment was pronounced on a bill of indictment charging him, on 31 July, 1937, "with force and arms, at and in the county aforesaid, unlawfully, willfully, and feloniously did commit an assault on one Macie Smith, a female, and her the said Macie Smith, feloniously, by force and against her will, did ravish and carnally know, against the form of the statute in such case made and provided and against the peace and dignity of the State."

Macie Smith, witness for the State, testified, in part: "I know the defendant Walter Caldwell, he has been working for us for a little over a year. I saw Walter Caldwell Saturday afternoon, 31 July, about 4:30. . . . Will Gibson and his wife left and shortly thereafter Walter Caldwell came to the back porch and asked me for some matches, as he had done before on numerous occasions. I secured the matches and handed them to Walter Caldwell, whereupon he placed his foot in the door and came up on the porch and stated that he had something he wanted to tell me. At that time I had my baby girl in my arms, she being about two years of age, and my young son, about eight years of age, was asleep in the house. I then told Walter Caldwell that he did not have anything to talk to me about. He then seized me by the arm and insisted that he had something to tell me and started pulling me toward the kitchen. After he had pushed me in the kitchen I told him that if he had anything to say to go ahead and say it. At that time he had pushed me up against the pantry door. He then stated that 'I know that you know that you can kill me for what I am going to do.' I still had my baby girl in my arms and asked him to let me take her into the house. He would not let me do this, and made me place her on the

floor by us. I stated that I heard an automobile drive up in front of the house and wanted to see who it was. He stated that he would go see who was in the car, and for me not to move from where I was. As he went out of the kitchen door I ran and got into the back yard almost to the well. He came after me and I hollered. He caught me by the arm and dragged me back into the house. He pulled me into the house and into the bedroom where he pushed me across the bed and held the broken blade of a knife to my throat. He stated that if I made any outcry he would kill me. He then accomplished his purpose. . . . During the course of what I have just related I called several times for my young son who was asleep, and Walter Caldwell told me to stop or else he would kill me, and I did not get my son awake. . . . When my husband reached home I told him what had happened. . . .Mr. Plyler and my husband then took me to the Lowrance Hospital in Mooresville and I was examined by Dr. Taylor. I had bruises about my arm, but was not otherwise hurt. . . . I smelled whiskey on Walter Caldwell's breath. He looked as if he was drunk. I have known that he drank liquor before."

Dr. G. W. Taylor, witness for the State, testified: "I examined Mrs. Smith on 31 July, about 6:30 at the Lowrance Hospital in Mooresville. I examined her and found that some one had recently had intercourse with her. The semen which I extracted was very verile and active. Mrs. Smith told me that Walter Caldwell had assaulted her. I have known Mrs. Smith for a number of years and know her to be a woman of good character. I know the same about her husband, George Smith. She had bruises on her arm and neck. (Cross-examination.) I do not know anything about the occurrence, all I know is that there had been an intercourse. In my opinion within the last three or four hours. She was not lacerated or bruised locally. There were signs of bruises on her arm. There was no evidence of a struggle."

John White Moore, sheriff of Iredell County and witness for the State, testified: "Q. Has the defendant at any time made any statement regarding this matter? Ans.: Yes, sir. Q. Where were you and who was present? Ans.: In jail, in the presence of Carl Bailey, a deputy sheriff and jailer, and Sergeant Lentz, highway patrolman. Q. What did you say to the prisoner or what did you do to him prior to the time he made the statement? Ans.: I warned him of his rights and told him he didn't have to make any statement to me whatsoever; there wasn't anybody going to hurt him, and if he did make a statement that would tend to incriminate him, it would be used against him. I said, 'If you have anything to say I'd like to hear it.' Q. Did you offer any threats of any kind? Ans.: Absolutely nothing. Q. Did you promise him any immunity or any reward? Ans.: No, sir. Q. Did any person in your

presence offer any threat or any immunity or any reward to make the statement? Ans.: No, sir. Q. Did any one else speak to him? Ans.: I believe Sergeant Lentz said 'We would like to know the truth about it.' (The court allowed defendant to ask preliminary questions. Examination by Mr. Joyner.) Q. Sergeant Lentz had on his uniform and a pistol on his side? Ans.: Yes, sir. Q. Caldwell knew you were sheriff? Ans.: Yes, sir. Q. Mr. Bailey had a pistol? Ans.: No, sir. Q. I ask you if you didn't say to him 'The best thing you can do is tell the truth?' Ans.: I don't think I told him. I told him 'We would like to know the truth.' I might have said 'The truth wouldn't hurt anybody,' but I don't think I said the best thing was to tell the truth. Q. If you didn't also tell him it would be lighter on him? Ans.: No, sir. (By the court): Q. Did you tell him it would be the best for him if he did tell the truth? Ans.: I don't know. I might have said the truth didn't hurt anybody and I'd like to know the truth about the situation. Q. You didn't tell him it would be best for him, or better, or lighter? Ans.: No, sir. Q. Did any one in your presence tell him it would be lighter or better for him if he would tell the truth about it? Ans.: No, sir. (The court offered to let the defendant put up any evidence on this particular point. Upon no evidence being produced by the defendant, the court holds the statement made by the defendant was voluntarily made.) (Examination by the solicitor.) Q. What statement did he make? Ans.: He said he was guilty of this crime that he was accused of. I asked him if he was drinking. He said he was at that time. I said, 'Did you get some liquor after you left Mr. Smith's house?' He said, 'Yes, at the Cascade he got a half pint and drank it.'"

Mrs. T. W. Plyler testified, in part: "I am a neighbor and live fifty or a hundred yards from the Smith home. On 31 July, I was at home and heard some kind of a noise at the Smith home, but thought that it was some of the children playing. I dressed and walked down to the Smith home. When I got there Mrs. Smith took me into the kitchen and asked me if I had seen Preacher Caldwell. In a few minutes she whispered to me that Preacher Caldwell tried to kill her and then told me what had taken place. The prisoner was walking out of the back door when I got to the Smith house. (Cross-examination.) I went to the Smith home on purely a social visit and not in consequence of anything I heard at the house. I did not hear any unusual noise at the Smith home and what I heard was like children playing, and it was not in consequence of what I heard that I went to the Smith house. When I came up to the back porch Preacher Caldwell was coming out of the kitchen door. He was not walking slow or fast—was coming, just walking. He did not appear to be excited and I did not notice anything unusual about his appearance. I am familiar with the Smith house

and there is no door or entrance way from the kitchen into the interior of the house. In order to get from the kitchen into the house you must go out on the back porch. I have known Preacher Caldwell since we have been living next to the Smiths and always thought he was a good Negro."

Other corroborating evidence was introduced by the State. The defendant introduced no evidence. Defendant was captured near the Cascade Mills at Mooresville, N. C., about seven miles from the scene of the crime, some three hours after the alleged crime, about 7 o'clock, and did not attempt to escape. He was drinking at the time of the alleged crime and when captured.

The defendant made several exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

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

Jack Joyner and Andrew C. McIntosh for defendant.

CLARKSON, J. At the close of the State's evidence the defendant made a motion in the court below for judgment as in case of nonsuit. N. C. Code 1935 (Michie), sec. 4643. The court below overruled the motion, and in this we can see no error. The evidence was plenary to have been submitted to the jury.

The charge of the court below is not in the record; the presumption is to the effect that the court charged the law applicable to the facts. We think the evidence objected to competent.

The defendant contends that the prosecuting witness made no outcry, which is a circumstance affecting her credibility to be considered in favor of the accused. *S. v. Dill,* 184 N. C., 645. It is presumed that the court below in the charge covered this aspect, if the evidence supported it. The testimony of the prosecuting witness was "He came after me and I hollered. He caught me by the arm and dragged me back into the house. He pulled me into the house and into the bedroom where he pushed me across the bed and held the broken blade of a knife to my throat. He stated that if I made any outcry he would kill me. He then accomplished his purpose."

The alleged confession of defendant to the sheriff while in jail, in the presence of other officers, we think was voluntarily made. On the *voir dire* the court below examined the sheriff and gave defendant an opportunity to "put up any evidence on this particular point" and held "upon no evidence being produced by the defendant, the court holds the statement made by the defendant was voluntarily made." *S. v.*

Whitener, 191 N. C., 659; *S. v. Blake,* 198 N. C., 547. This finding is not reviewable if there is any competent evidence to support same. *S. v. Moore,* 210 N. C., 686 (692-3).

In *S. v. Myers,* 202 N. C., 351 (353), it is said: "The confession in evidence was not made under the impulsion of hope or fear. The suggestion that the accused had better tell who the 'other men' were or that he 'had better go on and tell the truth' has no element of unlawful inducement. As said in *S. v. Harrison,* 115 N. C., 706, 'The rule which is generally approved is, that where the prisoner is advised to tell nothing but the truth, or even when what is said to him has no tendency to induce him to make an untrue statement, his confession in either case is admissible.' No promise was made to induce the confession; no threat was used to extort it. *S. v. Bohanon,* 142 N. C., 695."

In *S. v. Jones,* 203 N. C., 374 (376), is the following: " 'We are not aware of any decision which holds a confession, otherwise voluntary, inadmissible because of the number of officers present at the time it was made. Nor has the diligence of counsel discovered any. *S. v. Gray,* 192 N. C., 594."

In *S. v. Grier,* 203 N. C., 586 (588), it is written: "A confession voluntarily made by a person under arrest is competent. *S. v. Ellis,* 97 N. C., 447; *S. v. Rodman,* 188 N. C., 720; and all confessions are to be taken as voluntary unless the person making them shows facts authorizing a legal inference to the contrary. *S. v. Sanders,* 84 N. C., 728; *S. v. Christy,* 170 N. C., 772. But every confession must be voluntary. The test is whether it was made under circumstances that would reasonably lead the person charged to believe that it would be better to confess himself guilty of a crime he had not committed. It is expressed in various ways. The confession is inadmissible if 'the defendant was influenced by any threat or promise,' or if it is 'induced by hope or extorted by fear,' or if 'fear is excited by a direct charge or hope is suggested by assurance,' or if extorted by 'threats, promises, or any undue influence,' or if 'wrung from the mind by the flattery of hope or the torture of despair,' or by 'actual force,' or the 'hope of escape,' or the statement, 'It will be lighter on you.' *S. v. Roberts, supra* (12 N. C., 259); *S. v. Howard, supra* (92 N. C., 772); *S. v. Whitfield,* 70 N. C., 356; *S. v. Myers,* 202 N. C., 351; *S. v. Livingston, ibid.,* 809." *S. v. Fox,* 197 N. C., 478; *S. v. Gosnell,* 208 N. C., 401.

In *S. v. Stefanoff,* 206 N. C., 443 (444): "Where there is no duress, threat or inducement, and the court found there was none here, the fact that the defendants were under arrest at the time the confessions were made, does not *ipso facto* render them incompetent. *S. v. Newsome,* 195 N. C., 552; *S. v. Drakeford,* 162 N. C., 667. 'We are not aware of any decision which holds a confession, otherwise voluntary,

inadmissible because of the number of officers present at the time it was made. Nor has the diligence of counsel discovered any.' *S. v. Gray,* 192 N. C., 594." *S. v. Tate,* 210 N. C., 613 (617).

No threat or promise of any immunity or reward was made defendant. The confession was voluntary, made neither under the influence of hope nor fear. "I told him we would like to know the truth." This was no inducement. From the competent evidence we think the confession voluntary, and it was so found by the court below.

On the record we see no prejudicial or reversible error.

No error.

IN THE MATTER OF EXECUTION OF JUDGMENT AGAINST N. WILSON WALLACE, JR., IN AN ACTION ENTITLED: T. A. JENNINGS & SONS, INC., v. F. MARION HOWARD AND N. WILSON WALLACE, JR.

(Filed 24 November, 1937.)

Judgment § 37—Prior assignee of judgment takes title unaffected by second assignment, even though second assignment is first recorded.

A prior assignee of a judgment for a valuable consideration takes the title of his assignor unaffected by a subsequent assignment of the same judgment by the assignor to another for a valuable consideration without notice of the prior assignment, in the absence of fraud, even though the second assignee has his assignment first recorded on the judgment docket, there being no statute requiring an assignment of a judgment to be recorded. C. S., 3311, 2418, 614, 446.

APPEAL by respondent, J. W. McDonald, from *Hill, Special Judge,* at Special Term, September, 1937, of MECKLENBURG. Affirmed.

The facts were agreed to by the parties, and the clerk rendered judgment in favor of J. W. McDonald, respondent. The petitioner excepted, assigned error and appealed to the Superior Court. The facts will not be set forth, as the material ones are in the judgment of the court below.

On appeal to the Superior Court the following judgment was rendered: "This cause coming on to be heard upon appeal from an order of the clerk of the Superior Court upon the agreed statement of facts appearing of record, and being heard before his Honor, Frank S. Hill, judge holding the September, 1937, Special Term of the Superior Court of Mecklenburg County, and it appearing to the court that the question presented by this appeal relates to the priority as between successive assignees of the same judgment to the proceeds of said judgment which have come into the hands of the clerk by virtue of an execution on a junior or subsequent judgment, that is to say: S. J. Biggers, judgment creditor, sold and assigned the judgment in question to Herbert Irwin,

trustee, for the use and benefit of the petitioner, and thereafter sold and assigned the same judgment to J. W. McDonald, respondent; and it further appearing to the court that said second or subsequent assignment to the said J. W. McDonald was first entered on the judgment, and without notice of said prior assignment to Herbert Irwin, trustee; and it further appearing to the court that all the right, title, lien and interest of the said S. J. Biggers in said judgment passed to said Herbert Irwin, trustee, under said prior assignment, and the said judgment creditor having no further interest in, or control over, said judgment, no right or interest therein was created by said second or subsequent assignment to J. W. McDonald. That while the court is of the opinion that as a matter of public policy the assignment of a judgment should be entered upon the judgment docket as notice of ownership, the court is also of the opinion that this is a matter for the Legislature to determine, and is not within the province of the courts. It is therefore, on motion of the petitioner, ordered and adjudged that the order of the clerk in this cause be vacated and set aside, and that the clerk issue an order directing that the proceeds of said judgment be paid to Herbert Irwin, trustee, to be disbursed by him according to the provisions of his said trust, and to that end this cause is hereby remanded to the clerk. This 25 September, 1937.

FRANK S. HILL,
Special Judge Presiding."

To the signing and entering of the foregoing judgment J. W. McDonald excepted, assigned error, and appealed to the Supreme Court.

Fred C. Hunter for petitioner, appellee.
Jas. L. DeLaney for respondent, appellant.

CLARKSON, J. The respondent, J. W. McDonald's only exception and assignment of error is to the signing of the judgment in the court below. This exception and assignment of error cannot be sustained.

(1) The petitioner, appellee, claims the fund in controversy under an assignment of the judgment made by S. J. Biggers, on 14 September, 1936.

(2) The respondent, J. W. McDonald, claims an assignment thereafter, on 5 November, 1936, and priority, as same was recorded on the judgment docket.

In the facts found it appears: "That said second or subsequent assignment of said judgment to J. W. McDonald, as aforesaid, was entered on said Judgment Docket W, page 243, and thereafter said prior assignment made to Herbert Irwin, trustee, as aforesaid, was entered on said judgment docket."

The question presented on this appeal is: "Does a subsequent assignee of a judgment for a valuable consideration, and without notice of prior assignment, whose assignment is recorded on the judgment docket, have a prior right to that of the first assignee of said judgment who neglects to have his assignment entered on the judgment docket?" We think not.

The beneficent "Connor Act"—N. C. Code, 1935 (Michie), sec. 3311, is as follows: "No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies; or in case of personal estate, where the donor, bargainor, or mortgagor resides; or in case the donor, bargainor, or mortgagor resides out of the State, then in the county where the said personal estate, or some part of the same, is situated; or in case of choses in action, where the donee, bargainee, or mortgagee resides. For the purposes mentioned in this section the principal place of business of a domestic corporation is its residence."

Section 2418: "Whenever any judgment of the Superior Court of the county in which the registered estate is situated shall be duly docketed in the office of the clerk of the Superior Court, it shall be the duty of the clerk to certify the same to the register of deeds. The register of deeds shall thereupon enter the certificate of title, the date, and the amount of the judgment, and the same shall be a lien upon such land as fully as such docketed judgment would be a lien upon unregistered lands of the judgment debtor."

Section 614: "Upon filing a judgment roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment of the Superior Court of the county where the judgment roll was filed, and may be docketed on the judgment docket of the Superior Court of any other county upon the filing with the clerk thereof a transcript of the original docket, and 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 acquires at any time thereafter, for ten years from the date of the rendition of the judgment. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the ten years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor, or mortgagee in good faith."

Section 446: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section does not authorize the assignment of a thing in action not arising out of contract. An action may be maintained by a grantee of real estate in his own name, when he or any grantor or other person through whom he derives title might maintain such action, notwithstanding the conveyance of the grantor is void, by reason of the actual possession of a person claiming under a title adverse to that of the grantor, or other persons at the time of the delivery of the conveyance. In case of an assignment of a thing in action the action by the assignee is without prejudice to any set-off, or other defense, existing at the time of, or before notice of, the assignment; but this does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, upon good consideration and before maturity." *Petty v. Rousseau,* 94 N. C., 355 (363); *Casket Co. v. Wheeler,* 182 N. C., 459 (468); 6 C. J. Secundum, p. 1052 (Assignments).

We set forth fully all the statutes in this State which have a bearing on the controversy. We can find no statute that requires the transfer of a judgment to be recorded on the judgment docket. It is like the transfer of any chose in action. The Connor Act, *supra,* does not go so far.

In 4 Cyc., pp. 32 and 33, section 4, speaking to the subject, we find: "As between assignor and assignee it is not necessary to the validity of an assignment that the debtor be notified thereof; and, as between successive assignees of the same chose from the same person, the assignee prior in time will be prior in right, although he has failed to give notice of the assignment to the debtor, and a subsequent assignee has given such notice," etc. 6 C. J. Secundum, pp. 1145-6; 34 C. J., sec. 1001, p. 652.

In *Motz v. Stowe,* 83 N. C., 434 (440), we read: "The law does not require such an assignment to be registered. . . . Shipp and Bailey having acquired a good equitable title to the six hundred and ninety-six dollars in the hands of the sheriff of Lincoln, cannot be defeated of their rights by any act of Sloan, nor of his assignee. The assignee in bankruptcy takes the estate of the bankrupt subject to all equities against it. It is settled in this State that a purchaser at an assignee's sale takes subject to all equities whether he had notice of them or not. *Steadman v. Taylor,* 77 N. C., 134; *Clerk's Office v. Bank,* 66 N. C., 214."

In *Richmond County v. Trust Co.,* 195 N. C., 545, it is held: In the course of its dealings and for a lawful purpose a bank may negotiate notes, drafts, bills of exchange, and other evidence of indebtedness embraced by 3 C. S., 220 (a); and where there is more than one transfer of the same security, and the equities are equal, the first in time will prevail, unless there is fraud in the transfer.

In N. C. Prac. & Proc. in Civil Cases (McIntosh), sec. 669, p. 760, is the following: "While a judgment is not a contract in the strict sense, it is an obligation binding the parties, and it may be assigned as any other chose in action. No particular form of assignment is required, and it need not be in writing when docketed, as conveying an interest in land; any form of words would be sufficient which shows the intent of the parties to transfer the judgment; it need not be entered on the record, though that might be desirable for the record to show the owner of the judgment. Like the transfer of any other chose in action, the assignee takes the interest which the assignor has, subject to equities of the debtor at the time of the assignment or of notice of the assignment; the assignee becomes the real party in interest, and may sue on it in his own name." *Fertilizer Works v. Newbern,* 210 N. C., 9.

As a general rule, when one assigns a chose in action or a judgment, the assignee obtains a good title as to what the assignor had to convey, subject to set-off or other defenses, etc., existing at the time of the transfer. Sec. 446, *supra.* There is no law requiring transfer to be recorded on the judgment docket in this jurisdiction. If the assignor assigns the judgment a second time, this does not effect the first assignment, although the second assignment is recorded prior to the first assignment on the judgment docket. Of course, if the first assignment is tainted with fraud, this would be another matter. On this record, the evidence is all to the effect that the purchase by the first assignee was made in good faith and for value. There is no evidence of fraud or an equitable estoppel, or otherwise, in which the second assignee can claim priority over the first assignee in this case.

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

Affirmed.

STATE v. FRITZ MURPH, ROY BUMGARNER, AND WILL BROWN.

(Filed 24 November, 1937.)

Robbery § 3—Evidence identifying defendant as perpetrator of crime held sufficient to be submitted to the jury.

The State's evidence established that the pay roll of a mill was being counted out and put into envelopes by employees when two men came in, threatened the employees with pointed pistols, made the employees get on the floor, and took the money. One defendant did not appeal from his conviction as one of the perpetrators of the crime. The other defendant appealed from the court's refusal to grant his motion to nonsuit. Several employees, present at the time the crime was committed, testified that the voice, size, and general appearance of the appealing defendant were

similar to those of the man who, together with the defendant who was convicted, committed the crime, and there was testimony of a taxicab driver that appealing defendant, shortly after the crime was committed, aided his codefendant to get to his home in another city by taxicab. *Held:* The evidence was sufficient to be submitted to the jury upon the question of the identity of the appealing defendant as one of the perpetrators of the crime.

APPEAL by defendant Roy Bumgarner from *Sink, J.*, at June Special Term, 1937, of MECKLENBURG. No error.

The defendants in this action were tried on an indictment in which they were charged with robbery by the use or threatened use of firearms, in violation of sec. 1 of ch. 187, Public Laws of North Carolina, 1929, N. C. Code, sec. 4267(a).

As shown by the verdict, the jury found that each of the defendants is guilty as charged in the indictment.

From judgment that he be confined in the State's Prison for a term of not less than seven or more than ten years, the defendant Roy Bumgarner appealed to the Supreme Court, assigning as error the refusal of the court to allow his motion for judgment as of nonsuit. C. S., 4643.

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

Hugh G. Mitchell for defendant.

CONNOR, J. At about 2:15 p. m. on 26 May, 1937, a blue Ford automobile stopped on the street in front of the office of the Cornelius Cotton Mill, in Cornelius, N. C. There were three men in the automobile, two on the front seat and one in the rear seat. Two of the occupants of the automobile got out and went at once into the office of the Cornelius Cotton Mill, each armed with a pistol. As they entered the office they pointed their pistols at the employees at work in the office and threatened to shoot them if they or either of them refused to obey their orders. The men ordered each of the employees, who were young women, to get down on the floor of the office and to remain there. They did so. One of the men thereupon gathered up the money which was lying on a desk in the office. This money consisted of bills of various denominations and had just been brought to the office from the bank for the purpose of paying off the employees of the cotton mill. After the money, amounting to about $3,622.92, had been gathered up by them, the men left the office, taking the money with them, got into the automobile, and drove away rapidly.

A few days after the robbery the defendants were arrested and charged with the robbery of the Cornelius Cotton Mill.

At the trial there was evidence tending to identify the defendant Fritz Murph as one of the men who got out of the automobile and went into the office of the cotton mill and there, by the threatened use of his pistol, put the employees of the cotton mill then in the office in fear of death or great bodily harm, and thereby feloniously took and carried away the money of the Cornelius Cotton Mill. This evidence was submitted to the jury who found that the defendant Fritz Murph is guilty of the felony charged in the indictment. He did not appeal from the judgment of the court that he be confined in the State's Prison for a term of not less than seven or more than ten years.

There was evidence tending to show that the defendant Will Brown is one of the three men who were in the automobile as it approached the office of the Cornelius Cotton Mill. There was no evidence tending to show that he is one of the two men who got out of the automobile and went into the office of the cotton mill and there committed the crime charged in the indictment. The verdict of guilty as to the defendant Will Brown was set aside by the judge, and upon his suggestion and with his approval the action as to the defendant Will Brown was nol prossed with leave by the solicitor for the State.

There was no evidence at the trial tending to identify positively the defendant Roy Bumgarner as one of the three men who were in the automobile when it stopped on the street in front of the office of the Cornelius Cotton Mill, or as one of the two men who got out of the automobile and went into the office of the cotton mill and there committed the crime charged in the indictment. There was, however, evidence tending to show facts and circumstances from which the jury could find that the defendant Roy Bumgarner is one of the two men who got out of the automobile, went into the office of the Cornelius Cotton Mill, and there committed the said crime.

Frank Stough, witness for the State, testified as follows:

"I am treasurer of the Cornelius Cotton Mill. At about 2:15 on 26 May, 1937, as I was returning to the office at the mill from the post office I noticed a blue Ford automobile standing on the street in front of the office. There was a man in the automobile. I walked into the office and noticed one of the employees—a young woman—kneeling down on the floor as if she was looking for change. I looked up and saw a boy with a pistol drawn on her. I identify the defendant Fritz Murph as the boy who held the pistol drawn on her. He turned and pointed the pistol at me. He ordered me to get down on the floor. I did so.

"There was another man in the office with the defendant Fritz Murph. I did not see his face and cannot identify the defendant Roy Bumgarner as the other man in the office with the defendant Murph. I have observed the defendant Roy Bumgarner. He is of about the size and

weight of the other man. Both Murph and the other man had on caps and goggles. The other man also had a pistol. He scooped up the money on the desk in the office. He and Murph then left the office, taking the money with them. The money consisted of bills of various denominations and amounted to $3,622.92. I had never seen Murph or the other man prior to the robbery. I identify Murph by the contour of his face, his height and size. I saw his face for about five or ten seconds."

Miss Alice Stough, one of the employees of the Cornelius Cotton Mill, who was in its office at the time of the robbery, testified as follows:

"I was sitting in the office of the Cornelius Cotton Mill at about 2:15 p.m. on 26 May, 1937, with Miss Lottie Washam and Miss Willie Fiddler. They were both employees of the cotton mill. I was counting money and they were putting the money, as I counted it, into envelopes. I saw a blue Ford automobile stop at the sidewalk in front of the office. Two men got out of the automobile and came into the office. Both had pistols. They told us to get down on the floor of the office. We obeyed. They covered us with their pistols. One of the men gathered up the money. Both left the office, taking the money with them. They left in the automobile.

"I cannot identify either of the two men who were in the office. I heard one of them talk about four times, and the other once. I have heard the defendant Fritz Murph talk twice since the robbery. I think his voice is the voice of one of the men who was in the office.

"I have heard the voice of the defendant Roy Bumgarner since 26 May, 1937. I think his voice is the voice of one of the men who was in the office that day, whose voice I heard only once. The size of the defendants Murph and Bumgarner is about the size of the men who were in the office. I cannot positively identify the defendant Roy Bumgarner, by his voice or his size, as one of the two men who came into the office and took and carried away the money of the Cornelius Cotton Mill."

Miss Willie Fiddler, one of the employees of the Cornelius Cotton Mill who was in its office at the time of the robbery, as a witness for the State, testified as follows:

"I was sitting at Miss Stough's desk in the office of the Cornelius Cotton Mill at about 2:15 p. m. on 26 May, 1937, beside Miss Washam. Two men came into the office, each armed with a pistol. Both had on unionalls; both had on goggles; both had their caps pulled down over their eyes; both had on rubber gloves. The smaller of the two men told us to get down on the floor of the office. We did so. He then picked up the money which was lying on the desk. Both men then left the office, taking the money with them. They went out to the automobile, got in and drove away rapidly.

"I have seen the defendant Fritz Murph and the defendant Roy Bumgarner since the robbery. I cannot positively identify either of them as one of the men who were in the office and who took and carried away the money of the Cornelius Cotton Mill. I have heard both defendants speak since the robbery. Their voices sounded like the voices of the men who were in the office. I think the defendant Fritz Murph and the defendant Roy Bumgarner are the men who were in the office. I know the defendant Will Brown. I do not think he is one of the men who committed the robbery."

Miss Lottie Washam, one of the employees of the Cornelius Cotton Mill, who was in its office at the time the robbery was committed, as a witness for the State, testified as follows:

"At about 2:15 p.m. on 26 May, 1937, I was sitting in the office of the Cornelius Cotton Mill, with my back toward the door. Two men came from a blue automobile which had stopped on the street in front of the office into the office. One was a little taller than the other. The smaller man held a pistol on us and ordered us to get down on the floor. We did so. I have not heard the voice of either of the defendants since the robbery. I have not seen them since the robbery until today. From what I now observe I notice that the size of the defendant Murph corresponds with the size of the smaller man who came into the office. I did not see the larger of the two men who came into the office well enough to compare his size with the size of the defendant Roy Bumgarner."

J. W. Auten, who operates a Ford automobile agency at Huntersville, N. C., as a witness for the State, testified as follows:

"On the night of 25 May, 1937, a new blue de luxe Ford sedan was stolen from my garage. We recovered the automobile about six miles east of Mooresville, N. C. It was in the bushes, about 100 yards from the main road. I saw the defendant Fritz Murph at my place of business about a week before the robbery. He was talking about trading automobiles with me. I do not know the defendant Roy Bumgarner."

Roy Waugh, a taxi driver, who lives at Mooresville, N. C., as a witness for the State, testified as follows:

"I know the defendants Fritz Murph and Roy Bumgarner. I saw them on the night after the robbery. I saw Bumgarner at Childress' Service Station, which is just beyond the city limits of Mooresville. He told me that he wanted to go to Lexington, N. C. I told him that I would take him to Lexington in my taxicab for $4.00 He said, 'Let's go down to the lower end of the mill.' He and a girl who was with him got into the taxi, and I drove at his direction to a house. He got out of the taxi and went into the house. When he came out of the house the defendant Fritz Murph was with him. I drove them uptown, and Bumgarner then told me that he did not want to go to Lexington but that

Murph wanted to do so. I took the defendant Fritz Murph in my taxi to Lexington. He paid me $5.00 for the trip."

On his appeal to this Court the defendant Roy Bumgarner contends that there was no evidence at the trial of this action sufficient as a matter of law to show that he is one of the men who was in the office of the Cornelius Cotton Mill about 2:15 p. m. on 26 May, 1937, and who then and there committed the crime charged in the indictment, and that in the absence of such evidence there was error in the refusal of the trial court to allow his motion for judgment as of nonsuit at the close of all the evidence. This contention cannot be sustained.

The evidence tending to show similarity of voice, size, and general appearance, taken in connection with the evidence tending to show that within a few hours after the robbery the defendant Roy Bumgarner aided the defendant Fritz Murph in leaving Mooresville for his home in Lexington by means of a taxicab was sufficient to identify the defendant Roy Bumgarner as one of the men who, with Fritz Murph, committed the crime charged in the indictment. This evidence was properly submitted to the jury under instructions of the court to which defendant did not except and which are free from error. See *S. v. Lawrence*, 196 N. C., 562, 146 S. E., 395; *S. v. Burleson*, 198 N. C., 61, 150 S. E., 628; Wigmore on Evidence, Vol. 1, sec. 660, p. 1063.

There is no error in the judgment. It is affirmed.

No error.

E. N. MOORE, J. S. ALEXANDER, AND J. L. BLACKWELDER, ON BEHALF OF THEMSELVES AND OTHERS, v. BOARD OF EDUCATION OF IREDELL COUNTY.

(Filed 24 November, 1937.)

1. Schools § 14—

The county board of education has the discretionary power to select school sites in each legally established district, and such discretion, fairly exercised, is not subject to control by *mandamus*.

2. Schools § 6—Legislature retains control over agencies for the maintenance of the constitutional school term.

The duty to establish and maintain a uniform system of public schools rests exclusively upon the General Assembly, N. C. Constitution, Art. IX, and the Legislature retains control and supervision of agencies created by it for the local administration of this function, subject only to constitutional limitations.

3. Schools § 3—Legislature has power by general act to provide for redistricting territory of several counties for school purposes.

Sec. 4, ch. 562, Public Laws of 1933, as amended by sec. 5, ch. 455, Public Laws of 1935, abolishing all school districts, and providing for the

redistricting of the territory of the several counties for school purposes irrespective of the boundaries of such districts, is valid, and the act of the county board of education, under authority of the statute, in creating a new district by adding contiguous territory to an old district established by the county commissioners, may not be successfully attacked on the ground that the Act of 1933 is void in that the Constitution, Art. IX, sec. 3, imposes the duty of districting the county for school purposes on the board of county commissioners.

4. Statutes §§ 2, 5c—

Ch. 562, Public Laws of 1933, as amended by ch. 455, Public Laws of 1935, as shown by its language, is a general statute relating to all school districts of the State, and the provisions of Art. II, sec. 29, of the Constitution, prohibiting the passage of a special act relating to the boundaries of school districts, is not applicable.

5. Mandamus § 2b—

Where a county board of education has selected a school site within a duly constituted district, its exercise of this discretionary power is not subject to review or control by *mandamus*.

APPEAL by plaintiffs from *Pless, J.*, at March Term, 1937, of IREDELL.

Application for writ of *mandamus* to compel board of education of Iredell to construct school building within the boundaries of Oak Ridge-Linwood School District as established by the board of county commissioners of said county.

Plaintiffs, who are citizens and residents of Iredell and alleged "patrons of the school district" in question, filed complaint to which defendants filed answer. Thereupon plaintiffs and defendants agreed upon a statement of facts to be submitted to the court, substantially as follows: "That about the year 1906 the board of county commissioners of Iredell established" by definite boundaries a school district designated as Oak Ridge-Linwood School District, and that that board has not changed or altered said boundaries. That under ch. 562 of the Public Laws of 1933 the board of education in redistricting the county established a new school district, No. 8, which included all the territory within the Oak Ridge-Linwood School District and portions of the Mooresville and Coddle Creek School Districts, and certified same to the State School Commission on 11 August, 1933. That it became necessary to erect a new school building to provide educational facilities for the children residing in the territory comprising said District No. 8. That in 1935 the board of county commissioners of Iredell County, in coöperation with the Public Works Administration, provided the necessary moneys with which to erect the building. That the board of education, first contemplating location of the new building within the boundaries of the Oak Ridge-Linwood School District, later determined on a site outside that territory but within the boundaries of said District No. 8.

Upon the foregoing facts the court below was of opinion that the plaintiffs are not entitled to relief sought. From judgment in accordance therewith the plaintiffs appealed to the Supreme Court and assigned error.

Lewis & Lewis and Burke & Burke for plaintiffs, appellants.
Hugh G. Mitchell for defendant, appellee.

WINBORNE, J. This appeal presents one basic question: Did the General Assembly have constitutional authority to pass an act to abolish "all school districts, special tax, special charter, or otherwise" as then constituted, and to provide for redistricting the territory of the several counties for school purposes irrespective of the boundaries of such districts? Sec. 4, ch. 562, Public Laws 1933, as amended by sec. 5, ch. 455, of Public Laws 1935.

We answer in the affirmative.

It is not controverted that the board of education has the discretionary power to select sites for school buildings in school districts. It is not, therefore, contended that, if the new district in question be legally established, the discretion of the board of education fairly exercised in selecting the site therein may be controlled by *mandamus*.

Plaintiffs contend, however, that the duty of dividing the counties into convenient school districts is imposed upon the boards of county commissioners by the Constitution (Art. IX, sec. 3), and that, therefore, the Acts of 1933 and 1935 above referred to are unconstitutional in that respect. Plaintiffs further contend that it having been agreed as a fact that the district in question was established in 1906 by the board of county commissioners of Iredell County, and not having been changed or in any manner altered by that board, the district remains unaffected by the said acts.

A similar question as to the authority of board of county commissioners with respect to the establishment of a school district was raised in the case of *McCormac v. Comrs.*, 90 N. C., 441. At that time by *legislative* enactment the boards of county commissioners were constituted boards of education, charged with the general management of the public schools and vested with the power and duty to decide all controversies and questions relating to the boundaries of school districts, to the location of schoolhouses, and to the laying off and numbering of school districts in their respective counties. Secs. 2545, 2546, and 2549 of Code of 1883. In that case the Legislature had authorized the establishment of a graded school in two public school districts of Robeson County, subject to the will of the people to be ascertained in an election to be held. The board of commissioners undertook by order to include

additional territory within the district. Denying this authority to be in the board of county commissioners, and speaking to the question, the Court said: "That it is within the power and is the province of the Legislature to subdivide the territory of the State and invest the inhabitants of such subdivisions with corporate functions, more or less extensive and varied in their character, for the purposes of government, is too well settled to admit of any serious question. Indeed, it seems to be a fundamental feature of our system of free government that such a power is inherent in the legislative branch of the government, limited and regulated, as it may be, only by the organic law. The Constitution of the State was formed in view of this and like fundamental principles. They permeate its provisions, and all statutory enactments should be interpreted in the light of them when they apply.

"It is in the exercise of such power that the Legislature alone can create, directly or indirectly, counties, townships, school districts, road districts, and the like subdivisions, and invest them, and agencies in them, with powers corporate or otherwise in their nature, to effectuate the purposes of the government, whether these be local or general, or both. Such organizations are intended to be instrumentalities and agencies employed to aid in the administration of the government and are always under the control of the power that created them, unless the same shall be restricted by some constitutional limitation. Hence the Legislature may, from time to time, in its discretion, abolish them, enlarge or diminish their boundaries, or increase, modify, or abrogate their powers. . . .

"Whenever such agencies are created, whatever their purpose or the extent or character of their powers, they are the creatures of the legislative will and subject to its control, and such agencies can only exercise such powers as may be conferred upon them and in the way and manner prescribed by law . . ."

"Their (boards of county commissioners) powers as the county board of education are derived from public school laws. . . ."

The decisions of this Court through the years since have been uniform in holding that the mandate of Art. IX of the Constitution of North Carolina for the establishment and maintenance of a general and uniform system of public schools is upon and exclusively within the province of the General Assembly. Laws passed in obedience to such mandate have been repeatedly approved and upheld by the decisions of this Court. *Barksdale v. Comrs.*, 93 N. C., 472, at 484; *Smith v. Trustees*, 141 N. C., 143, at 152; *Trustees v. Webb*, 155 N. C., 379, at 384; *Woosley v. Comrs.*, 182 N. C., 429, at 432, 109 S. E., 368; *Lacy v. Bank*, 183 N. C., 373, 111 S. E., 612; *Sparkman v. Comrs.*, 187 N. C., 241, 121 S. E., 531; *Frazier v. Comrs.*, 194 N. C., 49, at 62, 138 S. E., 433.

The Act of 1933, sec. 4, also has been the subject of judicial interpretation by this Court. *Evans v. Mecklenburg County,* 205 N. C., 560, 172 S. E., 323; *Board of Education of McDowell County v. Burgin,* 206 N. C., 421, 174 S. E., 286.

In *Evans v. Mecklenburg County, supra,* speaking with reference to the provisions of ch. 562, Public Laws 1933, this Court said: "All the powers and duties conferred by the recent act and those previously conferred by law under the State Board of Equalization are now vested in the State School Commission. . . . This commission . . . shall classify each county as an administrative unit, and with the advice of the county board of education shall redistrict each county.

"These and other provisions of the Act of 1933 . . . including the clause which repeals all conflicting public, public-local and private laws, indicate a legislative intent to annul or to subordinate to the new law all statutes relating to the public schools which were in effect at the time of its enactment and to establish a uniform system under which all the public schools of the State shall be conducted."

Plaintiffs further contend that the school act in question is in conflict with that part of Art. II, sec. 29, of the Constitution, which reads as follows: "The General Assembly shall not pass any local, private or special act or resolution relating to . . . establishing or changing the lines of school districts. . . . Any local private or special act or resolution passed in violation of the provisions of this section shall be void." This contention is answered by the last sentence of said section of the Constitution which provides: "The General Assembly shall have power to pass general laws regulating matters set out in this section." The act in question relates to all school districts in the State. The purpose of the act as disclosed by its language shows it to be a general law. *Miller v. Roberts, ante,* 126; *Hancock v. R. R.,* 124 N. C., 222, 32 S. E., 769; *Webb v. Port Comm.,* 205 N. C., 663, 172 S. E., 377.

In our jurisdiction the principle is established that in the absence of gross abuse the courts will not undertake to direct or control the discretion conferred by law upon a public officer. *Newton v. School Comm.,* 158 N. C., 187, 73 S. E., 886; *Davenport v. Board of Education,* 183 N. C., 570, 112 S. E., 246; *School Comm. v. Board of Education,* 186 N. C., 643, 120 S. E., 202; *McInnish v. Board of Education,* 187 N. C., 494, 122 S. E., 182; *Board of Education v. Forrest,* 190 N. C., 753, 130 S. E., 621; *Clark v. McQueen,* 195 N. C., 714, 143 S. E., 528; *Crabtree v. Board of Education,* 199 N. C., 650, 155 S. E., 550.

In *McInnish v. Board of Education, supra,* speaking to the duties of county boards of education, the court said: "Among these is the duty of selecting sites and building schools, and the performance of this duty necessarily involves the exercise of discretion."

When an officer in the exercise of discretionary power has considered and determined what his course of action is to be, and has exercised his discretion, his action is not subject to review or control by *mandamus*. *Battle v. Rocky Mount*, 156 N. C., 329, 72 S. E., 354; *Dula v. School Trustees*, 177 N. C., 426, 99 S. E., 193; *Wilkinson v. Board of Education*, 199 N. C., 669, 155 S. E., 562.

The judgment of the court below is

Affirmed.

O. G. LEWIS, ADMINISTRATOR OF SADIE MEADE LEWIS, v. KELLY HUNTER, PRESTON SPEAR, AND CITY OF KINSTON.

(Filed 24 November, 1937.)

1. Automobiles § 18g—

Where there is evidence that intestate was injured and killed as a result of the negligent operation of his automobile by one of defendants, and conflicting evidence on the question of intestate's contributory negligence, the defendant's motion to nonsuit is properly denied.

2. Trial § 37—

Appellant's exception to the issues submitted will not be sustained when the issues afforded him full opportunity to present every essential aspect of his case.

3. Negligence § 19d—

One defendant's motion to nonsuit on the ground that the negligence of his codefendant insulated his alleged negligence, is properly refused when the evidence tends to show that the injury was the result of the joint and concurrent negligence of the defendants.

4. Automobiles § 18a—Where one driver negligently hits pedestrian and second driver negligently runs over her while lying prostrate on street, both are liable as joint tort-feasors.

The evidence favorable to plaintiff tended to show that his intestate was negligently hit by an automobile driven by one defendant, that the car carried her some distance until she rolled from the fender to the center of the street, and that as she was lying prostrate in the street, an automobile, negligently driven by the second defendant, ran over her, and that she died from her injuries shortly after reaching the hospital. *Held:* The second defendant's motion to nonsuit on the ground that there was no evidence of a joint tort committed by the defendants, was properly denied, since where two efficient proximate causes contribute to an injury, each defendant whose negligence brought about one of such causes, is jointly and severally liable.

5. Automobiles § 18i—Failure to submit separate issues as to negligence of each defendant held not error.

Recovery was sought against one defendant for negligently hitting intestate and knocking her to the street, and against the other defendant

for negligently running over her while she was lying prostrate. *Held:* An objection for the failure of the court to submit separate issues as to the negligence of defendants is untenable, an issue as to whether intestate was injured and killed by the negligence of defendants, or either of them, and if so, by which defendant or defendants, being sufficient for the presentation of all phases of the controversy.

6. Trial § 32—

A party desiring fuller or more detailed instructions must aptly tender request therefor, and a request for special instructions made two hours and 57 minutes after the commencement of the argument is not made in apt time.

7. Negligence § 10—

Where the jury answers the issue of contributory negligence in the negative, an affirmative answer to the issue of last clear chance becomes harmless surplusage.

8. Municipal Corporations § 12—Municipality is not liable for negligent operation of police car, since its operation is governmental function.

A car, equipped to receive police radio calls exclusively and used by the city solely in apprehending and transporting criminals for detention, is used for a governmental function, and the city is not liable for injury caused by its negligent operation in the performance of such duty.

9. Same—

It is the function of a city in the exercise of its police power to keep the radios on its police cars in working order, and the driving of a police car from the shop where the radio was repaired to the police garage is an operation of the car in the exercise of a governmental function.

10. Constitutional Law § 4—

The Legislature may grant a right of action against a municipality for negligence in the exercise of a governmental function, but until this is done, such right of action cannot be given by judicial decision.

APPEAL by defendants from *Sinclair, J.*, at May Term, 1937, of LENOIR.

This was a civil action to recover damages for the alleged wrongful death of the plaintiff's intestate.

There was evidence tending to show that on the evening of 10 April, 1936, about nine o'clock, the plaintiff, O. G. Lewis, and his intestate, Sadie Meade Lewis, who was his wife, were walking in the city of Kinston, east on Washington Street, and attempted to cross Queen Street at its intersection with Washington Street; that they proceeded halfway across Queen Street and were standing near the center of Queen Street to let certain traffic pass; that while they were so standing the automobile driven by the defendant Hunter approached them from the north on Queen Street, traveling south at a negligent rate of speed, and when the automobile had come close to the plaintiff and his wife the driver thereof, defendant Hunter, cut it across his left of the center of

Queen Street and struck the plaintiff's intestate and carried her on the fender of said automobile for from 50 to 70 feet, when the intestate rolled from the fender of the automobile to the street, near the center thereof; that while the plaintiff's intestate was lying prostrate and unconscious near the center of Queen Street a Terraplane automobile, owned by the defendant city and driven by the defendant Spear, approached said intestate from the north, driving south on Queen Street, and ran over and dragged the intestate; that as soon as the intestate had been extricated from the Terraplane automobile she was taken immediately in an ambulance to the hospital, where she died in about five minutes after arrival from wounds and shock that she had received as a result of the impacts with the two automobiles.

There was evidence tending to show that the intestate stepped or jumped in front of the automobile driven by Hunter, instead of the automobile being turned and driven over her, and that the automobile was being driven in a careful and lawful rate of speed. There was also evidence tending to show that the Terraplane was being driven in a careful and lawful manner, and that two or three minutes elapsed between the time the intestate was struck by the Hunter automobile and the time she was struck by the city automobile, and that the plaintiff left the intestate on the street during this interval.

All of the evidence tended to show that the Terraplane automobile was equipped with a radio and was used solely by the police department of the city of Kinston in preventing and detecting crime, making arrests, and hauling those arrested to places of detention; that the defendant Spear was employed by the hour by the city to keep the radio in repair, and that the automobile was at the time it ran over the intestate being returned from the shop of Spear to the city's garage after having been repaired by Spear in said shop. The following verdict was returned by the jury, to wit:

"1. Was the death of plaintiff's intestate caused by the negligence of the defendants, or any of them, as alleged in the complaint, and if so, by which defendant or defendants? Answer: 'Yes, all three.'

"2. If so, did the plaintiff's intestate, Sadie Meade Lewis, contribute to her own injury and death, as alleged in the answer of the defendant Kelly Hunter? Answer: 'No.'

"3. If so, did O. G. Lewis, by his own negligence, contribute to and cause the injury and death of plaintiff's intestate, as alleged in the answer of the defendants Preston Spear and the city of Kinston? Answer: 'No.'

"4. Notwithstanding the contributory negligence of plaintiff O. G. Lewis, if any, did the defendants Preston Spear and the city of Kinston

have the last clear chance to avoid the injury and death of plaintiff's intestate? Answer: 'Yes.'

"5. What amount of damages, if any, is the plaintiff entitled to recover of the defendants, or any of them? '$6,000.'"

From judgment that the plaintiff have and recover of the defendants, and each of them, jointly and severally, $6,000, the defendants appealed, assigning errors.

R. A. Whitaker, A. W. Cooper, and Ehringhaus, Royall, Gosney & Smith for plaintiff, appellee.

J. A. Jones and J. G. Dawson for Kelly Hunter, appellant.

Charles F. Rouse, Sutton & Greene, and Jones & Brassfield for City of Kinston, appellant.

Charles F. Rouse and Sutton & Greene for Preston Spear, appellant.

SCHENCK, J. Appeal of defendant Kelly Hunter: The appellant assigns as error the refusal of the court to allow his motion for a judgment as in case of nonsuit properly lodged under the provisions of C. S., 567. This assignment cannot be sustained. There was evidence tending to show that the intestate was injured and killed by the negligent operation of his automobile by the defendant Hunter; there was also evidence tending to show that the intestate was guilty of contributory negligence. This evidence was properly submitted to the jury under the issues of negligence and contributory negligence.

The appellant also assigns as error the submission of issues upon which the case was tried. This assignment cannot be sustained since the issues afforded full opportunity to the appellant to present his theory of the case, namely, the absence of negligence on his part and the presence of contributory negligence on the part of the intestate. *Potato Co. v. Jeanette,* 174 N. C., 236. The contention of the appellant that the negligence of the defendant Spear insulated any negligence on his part, and was the sole proximate cause of the intestate's death cannot be sustained, since the evidence tends to show that the death of the intestate was the result of the joint and concurrent negligence of the defendants Hunter and Spear. *West v. Baking Co.,* 208 N. C., 526, and cases there cited.

The appeal of the defendant Hunter is affirmed.

The appeal of the defendant Spear: This appellant also assigns as error the refusal of the court to allow his motion for judgment as in case of nonsuit properly lodged under C. S., 567, and contends that there was no evidence of a joint *tort* committed by the defendants Hunter and Spear. This phase of the case is governed by the principle enunci-

ated in *West v. Baking Co., supra.* "When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes he is liable." *Wood v. Public Service Corp.*, 174 N. C., 697; *White v. Realty Co.*, 182 N. C., 536. This assignment cannot be sustained.

The defendant Spear likewise assigns as error the submission of the first issue, instead of submitting separate issues as to the negligence of each of the defendants. We think, and so hold, that the issue as submitted afforded the appellant the "full benefit of his contention before the jury and a fair chance to develop his case," *Potato Co. v. Jeanette, supra,* and therefore this assignment of error cannot be sustained.

We have examined the exceptions to the admission of evidence and to the charge of the court and we find no prejudicial error. The request for special instructions two hours and 57 minutes after the argument commenced came too late. If the defendant desired more full or detailed instructions given to the jury they should have made timely request therefor. The charge is a substantial compliance with C. S., 564. The affirmative answer to the fourth issue became mere harmless surplusage in view of the negative answer to the third issue.

The appeal of the defendant Spear is affirmed.

The appeal of defendant city of Kinston: When the plaintiff had introduced his evidence and rested his case the defendant city moved the court to dismiss the action and for a judgment as in case of nonsuit, and renewed its motion after all the evidence on both sides was in. C. S., 567. The court disallowed the motion and appellant reserved exception. The appellant contends that all of the evidence, both of the plaintiff and of the defendant, establishes that the Terraplane automobile driven by the defendant Spear was the property of said city and was owned and used by the city in the performance of its governmental functions, and was being so used at the time it ran over the plaintiff's intestate, and that, therefore, the appellant, a municipal corporation, is not liable for damages caused by its wrongful or negligent operation, and that the appellant was entitled to have its motion allowed. We think this contention is well founded and that the motion should have been allowed.

The plaintiff's witness Wheeler Kennedy testified that he was a policeman of the city of Kinston, and that "This car belonged to the city and is used exclusively for police purposes. The officers use it in preserving order. At that time the city used the car for police patrol duty, answering calls and making arrests. I guess that would cover it all. The radio receiving set was fastened down under the dashboard. Police calls are all you can get on that kind of radio." To the same effect is the evi-

dence of the defendant. There was no evidence of any other use to which the automobile was put by the city. If this car was used by the city, a municipal corporation, exclusively for police purposes, a governmental function, then its negligent and wrongful operation in such use would not render the appellant liable. This has been the unbroken holding of this Court from time prior to *McIlhenney v. Wilmington,* 127 N. C., 146 (1900), to *Cathey v. Charlotte,* 197 N. C., 309 (1929), and *Broome v. Charlotte,* 208 N. C., 729 (1935).

But it is contended by the plaintiff that since Spear, the driver of the Terraplane automobile, was not invested with any police authority, the automobile was not in use at the time in the performance of any police duty. While it is true the driver of the car was not a policeman, he was employed by the hour by the city to keep in proper repair and condition the radio on said automobile, and it was the function of the city in the exercise of its police power to maintain the radio, and in the performance of the work for which he was employed Spear was performing duties incident to the police power of the city, whether he was engaged in repairing or testing the radio or whether in returning the automobile to the police garage after such repairing or testing, and anything that he did for the city with the automobile in the scope of his employment was done as an incident to the police power of the city—a purely governmental function.

"Negligence cannot be imputed to the sovereign, and for this reason, in the absence of a statute, no private action for *tort* can be maintained against the State. It follows that such an action will not lie against a municipal corporation for damages resulting from the exercise of governmental functions as an agency of the sovereign power." *Scales v. Winston-Salem,* 189 N. C., 469. If the doctrine of nonliability of a municipal corporation for injury caused by negligence in the exercise of its governmental functions is working hardship or injustice, the remedy lies in legislative action and not in judicial decisions. The Legislature can grant the right of action in such cases, but until that is done we are constrained to follow the long unbroken line of decisions of this Court.

Defendant Hunter's appeal affirmed.

Defendant Spear's appeal affirmed.

Defendant city of Kinston's appeal reversed.

CURTIS RICHARDSON ET AL. v. FLORENCE CHEEK ET AL.

(Filed 24 November, 1937.)

1. **Wills § 31—Cardinal rule for construction of wills is to effectuate intent of testator as gathered from instrument as a whole.**

To effectuate the intent of the testator as gathered from the four corners of the will, considering for this purpose the will and any codicil or codicils as but one instrument, is the cardinal rule for the interpretation of wills, to which all other rules must bend, unless contrary to some rule of law or public policy.

2. **Wills § 1—**

A will is the duly expressed mind of a competent person as to what he would have done after his death with those matters and things over which he has the right of control and disposition.

3. **Wills § 31—**

Since the intent and purpose of no two testators can be exactly alike, each will must be separately construed to effectuate the particular intent and purpose therein expressed.

4. **Wills § 38—Residuary clause held to leave money derived from payments by devisees to named beneficiaries and only personal chattels to residuary legatee of personalty.**

The will in this case provided for the payment of funeral expenses and just debts out of the first moneys coming into the hands of the executors, then made several devises covering all the real estate and required the devisees to pay designated amounts to the estate, and from the sum thus accumulated, directed a number of legacies to be paid in cash, and then contained a residuary clause directing that the "remainders of my estate, if there be any, is to be equally divided between" named sons, and that "all of my personalty is to go to" another son. *Held:* The "remainders of my estate" referred to the remainder of the sums paid to the estate by the devisees, and the legacy "of all my personalty" referred only to personal chattels owned by the testator.

5. **Wills § 31—**

Each clause of a will should be harmonized with other parts of the will and given effect unless the effect is inconsistent with the general intent and purpose of the testator, as gathered from the entire will.

APPEAL by plaintiffs from *Alley, J.*, at February Special Term, 1937, of RANDOLPH.

Civil action for construction of will.

The record discloses that John W. Richardson, late of Randolph County, died in August, 1933, seized in fee of several tracts of land situate in Randolph and Orange counties, and personal property consisting of approximately $400.00 in cash and certain farming tools, household and kitchen furniture.

By his will, provision is first made for the payment of funeral expenses and just debts "out of the first moneys" coming into the hands of his executors.

He then proceeds to divide his lands among his several children, requiring four of them "to pay to my estate" sums aggregating $2,601. The devise to his son Pearl is typical: "I give and devise to my son Pearl Richardson my home tract of land in Randolph County . . . but he is to pay to my estate the sum of $1,380."

To other children he gave "in cash" sums aggregating $1,020.

The clause which gives rise to the present controversy follows:

"The remainders of my estate, if there be any, is to be equally divided between my sons, Curtis, Clay, Bryan, and Jesse Richardson. All of my personal property is to go to my son Pearl Richardson."

The trial court being of opinion that the residuary clause contained "two apparently contradictory clauses" and that the "last one of said clauses governs," entered judgment awarding to Pearl Richardson all the residuary personal estate.

Plaintiffs appeal, assigning errors.

J. V. Wilson and H. M. Robins for plaintiffs, appellants.
Moser & Miller for defendants, appellees.

STACY, C. J. The guiding star in the interpretation of wills, to which all rules must bend unless contrary to some rule of law or public policy, is the intent of the testator, and this is to be ascertained from the four corners of the will, considering for the purpose the will and any codicil or codicils as constituting but one instrument. *Ellington v. Trust Co.*, 196 N. C., 755, 147 S. E., 286; 28 R. C. L., 211 *et seq.*

Our first concern, then, is with the intention of the testator. What did he intend by his will? To find this is to solve the problem. *Heyer v. Bulluck*, 210 N. C., 321, 186 S. E., 356.

A will is the duly expressed mind of a competent person as to what he would have done after his death with those matters and things over which he has the right of control and disposition. *Payne v. Sale*, 22 N. C., 455; *In re Edwards' Will*, 172 N. C., 369, 90 S. E., 418; *In re Deyton's Will*, 177 N. C., 494, 99 S. E., 424; *In re Seymour's Will*, 184 N. C., 418, 114 S. E., 626; 68 C. J., 410. As no two people are situated exactly alike, we would hardly expect to find identical wills or wills expressing the same intent and purpose. For this reason the aid to be derived from adjudicated cases is comparatively small in the administration of the law of wills. Every will, like every tub of Macklinian allusion, "must stand on its own bottom." (Charles Macklin, "The Man of the World," Act 1, Scene 2); *Patterson v. McCormick*, 181 N. C., 311, 107 S. E., 12.

In the instant case two questions arise out of the conflicting views of the parties:

1. Is the fund created by charges imposed against devisees, after the payment of testator's just debts, pecuniary legacies and costs of administration, to be equally divided among his sons, Curtis, Clay, Bryan, and Jesse Richardson, under the residuary bequest to them of "The remainders of my estate, if there be any," or does the residue of this fund go to Pearl Richardson under the gift to him of "All my personal property?"

2. Is the gift to Pearl Richardson of "All my personal property" limited to personal chattels, *i.e.*, to the farming tools, household and kitchen furniture?

The testator begins his will by providing for the payment of funeral expenses and his just debts out of the first moneys coming into the hands of his executors. He then makes several devises requiring the devisees to pay to his estate certain designated amounts. From the sums thus accumulated he directed a number of legacies to be paid in cash, and "if there be any remainders of my estate," *i.e.*, if there be any remainders of the sums paid into the estate by the devisees after the payment of debts, pecuniary legacies, and costs of administration, provision is made for the residue of these remainders to be equally divided among Curtis, Clay, Bryan and Jesse Richardson. If this be the true intent of the testator, and we think it is, then only the farming tools, household and kitchen furniture were intended to go to Pearl Richardson under the gift to him of "All my personal property." Such interpretation harmonizes the different clauses and gives effect to the whole will. *Pilley v. Sullivan,* 182 N. C., 493, 109 S. E., 359.

To hold that Pearl Richardson takes all of the residuary personal estate under the last clause would not only nullify the residuary division intended for his brothers, but also in effect remit part of the $1,380 charged against the devise to him of the home place. This would produce two clashes in the will, whereas the rule is to construe a will so as to give effect to every part and clause thereof, and to harmonize the several clauses, provided the effect is not inconsistent with the general intent and purpose of the testator, as gathered from the entire will. *Reid v. Neal,* 182 N. C., 192, 108 S. E., 769; *Herring v. Williams,* 153 N. C., 231, 69 S. E., 140.

"It is the approved position here and elsewhere, in the construction of wills, that unless in violation of law the intent of the testator, as expressed in the will, shall prevail, and in ascertaining this intent the entire will shall be considered, giving to each and every part significance and harmonizing apparent inconsistencies where this can be done by fair and reasonable interpretation, and that the language of the

instrument shall be given its natural and customary meaning unless it clearly appears that some other permissible meaning is intended." *Hoke, J.*, in *Goode v. Hearne*, 180 N. C., 475, 105 S. E., 5.

The conclusion we have reached gives effect to every part of the will, harmonizes the different clauses, and apparently makes the intent of the testator fair and reasonable. It eliminates any conflict and does away with the necessity of ruling out any part of the will as repugnant to any other part. "If possible apparent repugnancies must be reconciled for, as suggested in *Dalton v. Scales*, 37 N. C., 521, it is not to be admitted, unless the conclusion is irresistible, that the testator had two inconsistent intents." *Adams, J.*, in *Williams v. Best*, 195 N. C., 324, 142 S. E., 2.

The cause will be remanded for judgment in accordance with this opinion.

Error and remanded.

W. N. DENTON ET AL. v. JOHN VASSILIADES ET AL.

(Filed 24 November, 1937.)

1. Process § 5—Affidavit for service by publication must aver that defendant cannot be found, after due diligence, in the State.

While a substantial compliance with C. S., 484, will suffice for service by publication, the statutory affidavit must aver that defendant cannot be found, after due diligence, in the State, and this must be made to appear to the satisfaction of the court, and an averment that defendants are nonresidents, or that summons was duly issued and returned by the sheriff with endorsement, "Defendant, after due diligence and search, cannot be found in the" county, is insufficient, and service of process by publication based upon such affidavit is void, and the court obtains no jurisdiction over the person of defendant by such service.

2. Appearance § 1—

Where service by publication is void for having been issued upon a defective affidavit, defendant may properly enter a special appearance and move to vacate the attempted service of process, or to dismiss for want of jurisdiction for failure of any valid process.

APPEAL by defendants from *Sinclair, J.*, at August Term, 1937, of WAKE.

Civil action for specific performance.

The plaintiffs are residents of Wake County. The defendants are residents of the state of Missouri. The action is to enforce specific performance of contract to sell house and lot in the city of Raleigh.

Service of process is sought to be had on affidavit made by counsel for plaintiffs "that summons, duly issued and delivered to the sheriff of

Wake County, has been returned by the sheriff with endorsement, 'The defendants, after due diligence and search, cannot be found in Wake County,'" filing of *lis pendens*, and order of service of summons by publication.

The defendants, through counsel, entered a special appearance and moved to dismiss for want of jurisdiction, alleging that said defendants had not been brought into court by any proper service. Motion overruled. Defendants appeal.

John W. Hinsdale for plaintiffs, appellees.
Briggs & West for defendants, appellants.

STACY, C. J. Without debating the question whether *lis pendens* may be used instead of attachment in service of process where the defendants are nonresidents of the State, suffice it to say the affidavit filed by plaintiffs' attorney in the instant case is insufficient to procure service of summons by publication. *Martin v. Martin*, 205 N. C., 157, 170 S. E., 651. It is not averred in the affidavit, as required by C. S., 484, that the defendants "cannot, after due diligence, be found in the State." This is an essential requirement, and it must be made to appear "to the satisfaction of the court." *Bethell v. Lee*, 200 N. C., 755, 158 S. E., 493; *Sawyer v. Drainage District*, 179 N. C., 182, 102 S. E., 273; *Luttrell v. Martin*, 112 N. C., 593, 17 S. E., 573; *Bacon v. Johnson*, 110 N. C., 114, 14 S. E., 508.

To say that the defendants "cannot, after due diligence, be found in Wake County" (and it may be doubted whether the affidavit even avers this much) is far from saying that they "cannot, after due diligence, be found in the State." It is not enough to aver that the defendants are nonresidents. *Davis v. Davis*, 179 N. C., 185, 102 S. E., 270. *Non constat* that they may not be frequent visitors to the State and amenable to process while here. *Hill v. Lindsay*, 210 N. C., 694, 188 S. E., 406.

Speaking to the requirement of the statute in *Grocery Co. v. Bag Co.*, 142 N. C., 174, 55 S. E., 90, *Walker, J.*, delivering the opinion of the Court, said: "By the evidence to satisfy the court was meant not the sheriff's return on the summons, for if it had been the statute would have been so worded; and let us ask here, How could the fact that the defendant could not be found in the State—for that is the requisite condition of publication—be determined only by the return of the sheriff that he cannot be found in his county, when there are now in the State ninety-seven counties in all? It was intended that it should appear only in the way pointed out in the statute—that is, by affidavit. The affi-

davit is made the initial step in the case, and the order of publication based upon it is the leading process."

"The mere issuing of a summons to the sheriff of the county of Pasquotank and his endorsement upon it the same day after it came to hand, that 'the defendant is not found in my county,' is no compliance whatever with the law." *Bynum, J.*, in *Wheeler v. Cobb*, 75 N. C., 21.

In *Fowler v. Fowler*, 190 N. C., 536, 130 S. E., 315, it was held that service of summons by publication, on a defective affidavit, was ineffectual to bring the defendant into court. Indeed, it is elementary that unless one named as a defendant has been brought into court in some way sanctioned by law, or makes a voluntary appearance in person or by attorney, a judgment rendered against him is void for want of jurisdiction. *Downing v. White*, 211 N. C., 40, 188 S. E., 815; *Dunn v. Wilson*, 210 N. C., 493, 187 S. E., 802; *Spence v. Granger*, 207 N. C., 19, 175 S. E., 824; *Harrell v. Welstead*, 206 N. C., 817, 175 S. E., 283; *Graves v. Reidsville Lodge*, 182 N. C., 330, 109 S. E., 29.

Substantial compliance with the requirements of the statute will, of course, suffice. *Martin v. Martin, supra; Bethell v. Lee, supra; Best v. Mortgage Co.*, 128 N. C., 351, 38 S. E., 923; *Page v. McDonald*, 159 N. C., 38, 74 S. E., 642. But the inadequacy of the present affidavit is manifest from the decisions above cited.

The defendants have been well advised in their procedure: Special appearance and motion to vacate attempted service of process, or to dismiss for want of jurisdiction. *Buncombe County v. Penland*, 206 N. C., 299, 173 S. E., 609; *Smith v. Haughton, ibid.*, 587, 174 S. E., 506; *McCollum v. Stack*, 188 N. C., 462, 124 S. E., 864; *Motor Co. v. Reaves*, 184 N. C., 260, 114 S. E., 175; *Jenette v. Hovey*, 182 N. C., 30, 108 S. E., 301; *Brown v. Taylor*, 174 N. C., 423, 93 S. E., 982; *School v. Peirce*, 163 N. C., 424, 79 S. E., 687; *Grant v. Grant*, 159 N. C., 528, 75 S. E., 734; *Warlick v. Reynolds*, 151 N. C., 606, 66 S. E., 657; *Vick v. Flournoy*, 147 N. C., 209, 60 S. E., 978; *Scott v. Life Assn.*, 137 N. C., 515, 50 S. E., 221; *Cooper v. Wyman*, 122 N. C., 784, 29 S. E., 947, 65 A. S. R., 731; *Clark v. Mfg. Co.*, 110 N. C., 111, 14 S. E., 518; *Wheeler v. Cobb, supra;* McIntosh N. C. P. & P., sec. 328. The appeal, it will be noted, is from an order overruling a motion to dismiss, not upon the ground of irregularity or defective service of process, but for an alleged failure of any valid service of process at all, resulting in a want of jurisdiction over the defendants. *R. R. v. Cobb*, 190 N. C., 375, 129 S. E., 828; *Lunceford v. Association, ibid.*, 314, 129 S. E., 805; *Reich v. Mortgage Corp.*, 204 N. C., 790, 168 S. E., 814; *Accident Co. v. Davis*, 213 U. S., 245.

The motion to dismiss should have been allowed.

Error.

SADIE FANNIE WILLIAMS v. PHILADELPHIA LIFE INSURANCE COMPANY.

(Filed 24 November, 1937.)

1. **Insurance § 30c—Burden of proving that policy was in effect on date of insured's death is on plaintiff beneficiary.**

Where plaintiff beneficiary alleges that the policy was in full force and effect at the time of the death of insured, and insurer denies the allegation and alleges that the policy had lapsed for nonpayment of premiums, the burden of proof upon the issue of whether the policy was in full force and effect at the date of the death of insured is on plaintiff, and while the burden of going forward with the evidence to avoid hazarding an adverse verdict may shift to insurer upon the establishment of a *prima facie* case by plaintiff, an instruction placing the burden of proof on insurer upon the issue is error entitling insurer to a new trial.

2. **Evidence § 6—Distinction between burden of proof and burden of going forward with the evidence.**

While the burden of going forward with the evidence to avoid the hazard of an adverse verdict may shift from side to side, according to the nature and strength of the proofs offered in support or denial of the main fact in issue, the burden of proof on the issue rests constantly throughout the trial upon the party, plaintiff or defendant, who asserts and must establish the affirmative thereof in order to prevail.

3. **Evidence § 8—Burden of proving affirmative defenses is on defendant.**

The defendant has the burden of establishing all affirmative defenses, and what are affirmative defenses may be determined from the pleadings in most cases, and in others by presumptions arising from the evidence adduced on the hearing or from admissions made during the trial.

4. **Appeal and Error § 39g—**

The burden of proof is a substantial right, and an erroneous placing of the burden is reversible error.

APPEAL by defendant from *Spears, J.*, at second March Term, 1937, of WAKE.

Civil action to recover on policy of life insurance.

On 26 October, 1921, the defendant issued and delivered to William F. Williams a policy of life insurance in the principal sum of $1,000, payable to plaintiff as beneficiary at death of insured, which occurred 28 July, 1935.

Plaintiff alleges that the policy was in full force and effect at the death of insured. This is denied by the defendant, it being alleged that the policy had lapsed for nonpayment of premiums on 26 October, 1931.

The case was submitted to the jury upon the following controverted issue:

"3. Was the insurance policy sued upon in full force and effect on the date of the death of the insured, as alleged in the complaint?"

Upon this issue the court instructed the jury: "The burden of proof is upon the defendant in this issue to offer evidence to satisfy you by the greater weight thereof that this policy was not in full force and effect on that date. (Exception.) . . . The burden is not upon the plaintiff in this case but upon the defendant. (Exception.) . . . If the plaintiff has simply satisfied you without having any burden . . . it would be your duty to answer the issue 'Yes.'" Exception.

The jury answered the issue in the affirmative, and from judgment on the verdict defendant appeals, assigning errors.

Walter L. Spencer and D. Staton Inscoe for plaintiff, appellee.
Dupree & Strickland for defendant, appellant.

STACY, C. J. Under the pleadings and the form of the issue submitted to the jury, the burden of proof was on the plaintiff to make out her case. It is conceded that a *prima facie* right of recovery was established by her evidence. *Williamson v. Ins. Co., ante,* 377. The duty of meeting this *prima facie* case, in order to avoid hazarding an adverse verdict, was then cast upon the defendant. *Lyons v. Knights of Pythias,* 172 N. C., 408, 90 S. E., 423; *Harris v. Junior Order,* 168 N. C., 357, 84 S. E., 405; *Wilkie v. National Council,* 147 N. C., 637, 61 S. E., 580; *Doggett v. Golden Cross,* 126 N. C., 477, 36 S. E., 26. This, however, did not change the burden of proof or the burden of the issue. *Brock v. Ins. Co.,* 156 N. C., 112, 72 S. E., 213.

The burden of the issue does not shift, but the duty of going forward with evidence, to avoid the hazard or chance of an adverse verdict, may shift from side to side as the case progresses, according to the nature and strength of the proofs offered in support or denial of the main fact in issue. *White v. Hines,* 182 N. C., 275, 109 S. E., 31; *Winslow v. Hardwood Co.,* 147 N. C., 275, 60 S. E., 1130. The burden of proof continues to rest upon the party who, either as plaintiff or defendant, affirmatively alleges facts necessary for him to prevail in the case. It is required of him who thus asserts such facts to establish them before he can become entitled to a verdict in his favor; and, as to these matters, he constantly has the burden of the issue, whatever may be the intervening effect of different kinds of evidence, or evidence possessing, under the law, varying degrees of probative force. *Smith v. Hill,* 232 Mass., 188.

The defendant, of course, has the burden of establishing all affirmative defenses, whether they relate to the whole case or only to certain issues in the case. As to such defenses, he is the actor and has the

laboring oar. *Austin v. R. R.*, 187 N. C., 7, 121 S. E., 1; *Shepard v. Tel. Co.*, 143 N. C., 244, 55 S. E., 704.

What is and what is not an affirmative defense is not always easy to determine. Sometimes it is to be determined by the pleadings and at others by presumptions arising from the evidence adduced on the hearing or from admissions made during the trial. *Spilene v. Mfg. Co.*, 79 N. H., 326. Here the defendant relies upon a defense, affirmative in form perhaps, but which in reality merely traverses the allegations of the complaint.

It is true that in some of the cases expressions are to be found which may seem to justify the court's charge to the jury, unless confined to the particular fact situations there presented, but "the duty of the defendant to go forward with his proof" is not to be confused with the burden of proof or the burden of the issue. *Page v. Mfg. Co.*, 180 N. C., 330, 104 S. E., 667.

The distinction between the burden of proof and the duty of going forward with evidence was investigated in the case of *Speas v. Bank*, 188 N. C., 524, 125 S. E., 398. Much that was there said would seem to be applicable here.

The rule as to the burden of proof constitutes a substantial right, for upon it many cases are made to turn, and its erroneous placing is reversible error. *DeHart v. Jenkins*, 211 N. C., 314, 190 S. E., 218; *Boone v. Collins*, 202 N. C., 12, 161 S. E., 543; *Hosiery Co. v. Express Co.*, 184 N. C., 478, 114 S. E., 823.

For the error, as indicated, a new trial must be awarded.

New trial.

MRS. CHESTER O. BELL v. THE CITY OF RALEIGH.

(Filed 24 November, 1937.)

Municipal Corporations § 14—Recovery for injuries caused by defect in sidewalk held not barred by contributory negligence as matter of law.

The evidence tended to show that plaintiff, while walking on a sidewalk in defendant city, after sunset when it was nearly dark, stepped into a hole four or five inches deep caused by the sinking of one of the concrete blocks of the sidewalk, and as a result thereof sustained serious and permanent injury. *Held:* The evidence does not disclose contributory negligence barring recovery as a matter of law, a pedestrian having the right, ordinarily, to assume that the municipality has used reasonable care to keep the sidewalks in proper condition for the purpose for which they were constructed, and not being required by law to search for defects. *Burns v. Charlotte*, 210 N. C., 48, distinguished in that the injury in that case occurred in broad daylight.

BELL *v.* RALEIGH.

APPEAL by defendant from *Spears, J.*, at February Term, 1937, of WAKE. No error.

This is an action to recover damages for personal injuries which the plaintiff suffered when she inadvertently stepped into a hole or depression about four or five inches deep in a paved sidewalk within the corporate limits of the city of Raleigh while she was walking on said sidewalk between five and six o'clock p. m. on 30 November, 1935.

The issues submitted to the jury at the trial of the action were answered as follows:

"1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? Answer: 'Yes.'

"2. If so, did the plaintiff by her own negligence contribute to her injuries as alleged in the answer? Answer: 'No.'

"3. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: '$2,000.'"

From judgment that plaintiff recover of the defendant the sum of $2,000, and the costs of the action, the defendant appealed to the Supreme Court, assigning as error the refusal of the trial court to allow its motion for judgment as of nonsuit at the close of all the evidence.

Douglass & Douglass and Thomas W. Ruffin for plaintiff.
Clem B. Holding for defendant.

CONNOR, J. At the trial of this action the evidence for the plaintiff tended to show that between five and six o'clock p. m.—after sunset—on 30 November, 1935 the plaintiff left the home of Mrs. J. W. Goodman on Woodland Avenue, in the city of Raleigh, and walked to the sidewalk in front of Mrs. Goodman's home; that when she reached the sidewalk she walked in a northerly direction towards her husband's automobile which was parked on the street near the curb of the sidewalk; that when she had walked on the sidewalk a short distance she stepped into a hole or depression in the sidewalk about four or five inches deep and thereby twisted her right ankle and knee, causing injuries to her right leg which were painful and are permanent.

The sidewalk in front of Mrs. Goodman's home was paved with concrete blocks, each block being about five feet square. One of these blocks had sunk below the level of the sidewalk, causing a hole or depression about four or five inches deep. The defendant was notified by Mrs. Goodman some time during the summer of 1935 of the defective condition of the sidewalk in front of her home, and had promised Mrs. Goodman that it would repair the sidewalk. Notwithstanding such notice and such promise, the defendant had failed to repair the sidewalk prior to the time the plaintiff was injured when she stepped into said hole or depression.

The plaintiff had no notice or warning of the defect in the sidewalk on which she was walking at the time she was injured, and did not see the hole or depression prior to her injuries. It was nearly dark—after sunset—and she assumed that the sidewalk was level and free from defects.

This evidence was submitted to the jury, under instructions of the court in its charge, to which defendant did not except.

On its appeal to this Court the defendant, conceding that there was evidence tending to show that plaintiff's injuries were caused by its negligence, contends that there was error in the refusal of the trial court to allow its motion for judgment as of nonsuit, for that the evidence for the plaintiff shows that as a matter of law she contributed to her injuries by her own negligence as alleged in the answer. This contention cannot be sustained.

In *Neal v. Marion*, 129 N. C., 345, 40 S. E., 116, an instruction by the trial court to the jury to the effect that one who is using a sidewalk or street in a city or town in this State for the purposes for which the sidewalk or street was constructed and is maintained by the city or town has the right ordinarily to assume that the governing body of the city or town has used reasonable care to keep the sidewalk or street in proper condition, and is not required by the law to search for defects in said sidewalk or street, was approved by this Court.

This principle is applicable in the instant case, which is readily distinguishable from *Burns v. Charlotte*, 210 N. C., 48, 185 S. E., 443, where it was held that the plaintiff could not recover damages for injuries which she suffered when she stepped into a drain across a sidewalk in the city of Charlotte on which she was walking about ten o'clock a. m.

The evidence was properly submitted to the jury. There was no error in the refusal of the trial court to allow defendant's motion for judgment as of nonsuit.

No error.

LONNIE CATOE v. ROBERT BAKER AND ROBERT BAKER, JR., TRADING AS BAKER SALES COMPANY.

(Filed 24 November, 1937.)

Trespass § 7—Evidence held insufficient to show that loss by theft resulted from wrongful trespass by defendants' employee.

Plaintiff's evidence disclosed that plaintiff ordered an article of merchandise from defendants' store, to be delivered on a certain day, and that defendants were informed that there would be no one at home the following day, that the merchandise was not delivered on the day agreed, and that the following day when plaintiff and his wife left their home

they locked the doors and nailed down the windows, that when they returned the article of merchandise was sitting in the living room, the window of which was raised, and the nail which had held it forced out, and personal property of great value taken from the house, and that all the other windows and doors were locked or fastened. Plaintiff alleged that the wrongful trespass of defendants' employee in the course of his employment made it possible for a thief to enter and steal the merchandise. *Held:* In the absence of evidence that defendants' employee, after he placed the merchandise in the room through the window, failed to close and fasten the window, and that the thief entered the house because of such failure, plaintiff is not entitled to recover of defendants the value of the property stolen, and defendants' motion to nonsuit was properly allowed.

APPEAL by plaintiff from *Rousseau, J.*, at April Term, 1937, of MECKLENBURG. Affirmed.

This is an action to recover damages resulting from a wrongful and unlawful trespass by an employee of the defendants on property of the plaintiff while said employee of the defendants was acting within the scope of his employment.

From judgment dismissing the action as of nonsuit, C. S., 567, the plaintiff appealed to the Supreme Court, assigning error in the judgment.

G. T. Carswell and Joe W. Ervin for plaintiff.
John Newitt for defendants.

CONNOR, J. The facts shown by the evidence for the plaintiff at the trial of this action are as follows:

At about 2:15 p. m. on Thursday, 26 September, 1935, the plaintiff and his wife, who are residents of the city of Charlotte, N. C., purchased from the defendants at their store in said city a chair, paying for said chair the sum of $1.75. The plaintiff purchased the chair from the defendants on condition that the defendants would deliver the chair at the home of the plaintiff in the city of Charlotte during the afternoon of Thursday, 26 September, 1935. At the time of the purchase the plaintiff informed the defendants that both he and his wife would be at their home during the afternoon of Thursday, 26 September, 1935, but that neither of them would be at home during the next day. The defendants failed to deliver the chair at the home of the plaintiff during the afternoon of Thursday, 26 September, 1935.

Both plaintiff and his wife left their home at about 6:30 a. m. on Friday, 27 September, 1935. Before leaving they locked all the outside doors of their house and fastened all the windows by nails. Neither the plaintiff nor his wife returned to their home during the day. When

the plaintiff returned home at about 8:15 p. m. that day he found the chair, which he and his wife had purchased of the defendant on the preceding day, sitting in a room in his house near a window which opened on a porch. It had rained during the day, first about 10 a. m. and again about 2 p. m. There were muddy tracks on the porch and in the house. The window opening on the porch from the room in which the chair was sitting was partly raised. The nail by which the plaintiff had fastened the window before he left home that morning had fallen and was lodged between the window frame and the window casing. All the other windows in the house were fastened and all the outside doors were locked, as they were when plaintiff left home that morning. There was nothing to indicate that the other windows in the house or the outside doors had been tampered with during the day while plaintiff and his wife were away from their home.

Upon investigation the plaintiff found that various articles of personal property, including about $500.00 in money, which were in the house when he and his wife left home that morning, were missing. The missing articles of personal property were worth about $660.75.

In his complaint the plaintiff prays judgment that he recover of the defendants as his actual damages the value of the missing articles of personal property, to wit, $660.75, and the sum of $1,000 as punitive damages.

On his appeal to this Court the plaintiff contends that there is error in the judgment of the Superior Court dismissing his action, for that the jury could have found by reasonable inference from the foregoing facts that the employee of the defendants who delivered the chair which he and his wife had purchased of the defendants on Thursday, 26 September, 1935, at his home on Friday, 27 September, 1935, wrongfully and unlawfully trespassed on his property, negligently failed to close the window which he had opened in order to place the chair in the room where plaintiff found it upon his return to his home at 8:15 p. m. on Friday, 27 September, 1935, and that said employee thereby made it possible for a thief to enter the house during the absence of the plaintiff and his wife and to steal and carry away the missing articles of personal property.

Conceding, without deciding, that the jury could have found, by reasonable inference from the facts shown by the evidence for the plaintiff that the employee of the defendants who delivered the chair at the home of the plaintiff some time during Friday, 27 September, 1935, wrongfully and unlawfully trespassed on plaintiff's property, we are of the opinion that the facts shown by the evidence for the plaintiff would not justify an inference by the jury that the employee of the defendants negligently failed to close the window which he had opened only for the

purpose of placing the chair in the room where it was found by the plaintiff upon his return home after his absence during the day.

In no event is the plaintiff entitled to recover on the cause of action alleged in his complaint without proof that the employee of the defendants, who delivered the chair at plaintiff's home during his absence, negligently failed to close the window after he had opened it, whether wrongfully or not. It is not alleged in the complaint, nor was it contended by the plaintiff at the trial, that the employee of the defendant stole the missing articles of personal property. It is alleged in the complaint, and was contended by the plaintiff at the trial, that he is entitled to recover of the defendants the value of the missing articles because the wrongful act of the defendants' employee made it possible for a thief to enter the house and steal the missing articles of personal property. In the absence of evidence tending to show that the missing articles of personal property were stolen from plaintiff's house, during his absence, by a thief who entered the house because of the negligent failure of defendants' employee to close and fasten the window after he had placed the chair in the house, there is no error in the judgment dismissing the action as of nonsuit. The judgment is

Affirmed.

CHOATE RENTAL COMPANY (ORIGINAL PARTY PLAINTIFF) AND THE LIFE INSURANCE COMPANY OF VIRGINIA (ADDITIONAL PARTY PLAINTIFF) v. E. R. JUSTICE AND WIFE, MRS. E. R. JUSTICE, TRADING AS JUSTICE HOTEL,

and

CHOATE RENTAL COMPANY (ORIGINAL PARTY PLAINTIFF) AND THE LIFE INSURANCE COMPANY OF VIRGINIA (ADDITIONAL PARTY PLAINTIFF) v. E. R. JUSTICE, TRADING AS SILVER DIME CAFE, OR JUSTICE CAFE, No. 311 WEST TRADE STREET.

(Filed 24 November, 1937.)

1. Ejectment § 5: Pleadings § 22—In summary ejectment brought by rental agent, court may allow amendment making owner party plaintiff.

On appeal to the Superior Court in summary ejectment brought by the rental agent of the owner of the property, the trial court has the power to allow an amendment making the owner of the property a party plaintiff and to allow it to adopt the pleadings and affidavits filed by its rental agent, C. S., 460, 547, and although the rental agent is not a necessary party, it is a proper party, whose continuance in the case is a matter within the discretion of the trial court and not subject to review.

2. Landlord and Tenant § 6—

Testimony of a tenant that his lease was to continue until the owner decided to tear down the property establishes a lease void for uncertainty of duration, or at most a tenancy at will, terminable at any time by the landlord or tenant.

3. Landlord and Tenant § 19—

A tenant at will is entitled only to reasonable notice to quit, and a tenant from month to month is entitled to seven days notice. C. S., 2354.

APPEAL by defendants from *Rousseau, J.*, at Regular March Term, 1937, of MECKLENBURG.

Two proceedings in summary ejectment for possession and rents of store and hotel, 311 and 313½ W. Trade Street in the city of Charlotte, instituted in justice of peace court of Mecklenburg County.

On previous appeal to this Court the proceeding was sent back for new trial. (211 N. C., 54.) Thereafter, on motion and by order the Life Insurance Company of Virginia was joined as party plaintiff to the consolidated proceeding. It was ordered that the pleadings be amended to show same, that it be taken that the said company had adopted the pleadings and affidavits theretofore filed in the proceedings by Choate Rental Company and that the answers of defendants be taken as answers thereto. No exception was taken to the order.

There is no controversy of record that the Life Insurance Company of Virginia owns the property in question; that Choate Rental Company is the duly appointed property manager and agent of the Life Insurance Company of Virginia, and as such collects the rents and manages said property; that at least seven-day notices to quit were given defendants; that defendants refused to vacate, and that proceedings were instituted respectively after such refusal.

On the retrial below, plaintiffs introduced testimony tending to show oral lease from month to month. Defendants introduced testimony tending to show that there was no written lease, but that Mr. Choate of Choate Rental Company had agreed with defendant E. R. Justice orally. Justice testified: "I was to have the property as long as it was to be used for hotel purposes unless the Life Insurance Company of Virginia discontinued or tore the property down, and if so, then they would give me plenty of time to get other places. That was the agreement and the terms of the lease."

One issue was submitted to jury: "Is the plaintiff, the Life Insurance Company of Virginia, entitled to the immediate possession of the premises in controversy as referred to in the pleading?"

On peremptory instruction the jury answered the issue "Yes."

From judgment on verdict defendants appealed to Supreme Court, and assigned error.

Plaintiffs move to dismiss appeal for that defendants, pending the appeal, having voluntarily surrendered possession of the property, the right to possession becomes a moot question.

Taliaferro & Clarkson for plaintiffs, appellees.
Carswell & Ervin for defendants, appellants.

WINBORNE, J. We are of opinion, and so hold, there is no error in the refusal of the court below to grant motion for judgment as of nonsuit, or in the peremptory instruction.

"By virtue of the liberal powers of amendment, the court may, before or after judgment, in furtherance of justice . . . amend any pleading, process or proceeding by adding, or striking out, the name of any party; and at the hearing of a cause, or between terms, or at a regular term, the court may require new parties to be brought in by proper order or sufficient process." McIntosh, North Carolina Prac. & Proc., 245; C. S., 460 and 547; *Walker v. Miller,* 139 N. C., 448, 52 S. E., 125; *Rushing v. Ashcraft,* 211 N. C., 627, 191 S. E., 332; *Clevenger v. Grover, ante,* 13, 193 S. E., 12.

Conceding that the Choate Rental Company is not a necessary party under the facts of this case, it is a proper party whose continuance in the case was a matter within the discretion of the court, and not subject to review. McIntosh, P. & P., 245.

Accepting defendant's version of the terms, the lease is of uncertain duration and void. *Barnes v. Saleeby,* 177 N. C., 256, 98 S. E., 708. But if not void, the terms as stated by defendant at the most constitute a tenancy at will.

In 35 C. J., 1123: "Occupancy of premises under an agreement for an uncertain and indefinite term ordinarily creates a tenancy at will; so a tenancy at will arises under an agreement for occupancy until the premises are sold, or until the premises are rented to a third person, or until the lessor is ready to construct new buildings."

In 35 C. J., 1127: "A tenancy at will may, as the definition implies, be terminated at any time by either the landlord or the tenant."

A tenant at will if entitled to any notice to quit is entitled only to a reasonable notice. *Mauney v. Norvell,* 179 N. C., 628, 103 S. E., 372. Tenancy from month to month may be terminated by notice of seven days before the end of the month. C. S., 2354.

Therefore, applying these principles to the facts of the instant case, only one inference can be drawn from the evidence.

We have considered all other assignments and find no error.

In view of our decision the motion to dismiss is not considered.

No error.

H. C. MERRITT AND OLLIE MERRITT, THE LAST NAMED BEING A MINOR APPEARING HEREIN BY HIS NEXT FRIEND, C. R. STROTHER, v. L. T. INSCOE, ROBERT INSCOE, IDA INSCOE, KANIZA INSCOE, MRS. ANNA INSCOE GILL, J. A. MUNN, MRS. MARY EVANS, MOSES INSCOE, ROYAL INSCOE, GROVER INSCOE, OLLIE INSCOE, MRS. EFFIE HUNT, MRS. ELIZA WEBSTER, WILLIS MAY, CHARLES MAY, BETTY MAY EDWARDS, AND G. M. BEAM, TRUSTEE.

(Filed 24 November, 1937.)

1. Wills § 33c—Devisee held to take defeasible fee which became absolute upon his death leaving children him surviving.

A devise to certain beneficiaries with provision that upon their death without issue the lands should go to M., the testator's son, and should M. leave no child, the land to be divided among named remaindermen, "and in case of their death, their children to this heir same," *is held*, upon the death of the first named beneficiaries without issue, to create a defeasible fee in M., which is made absolute upon his death with children him surviving, and M.'s children take as heirs of M. and not as remaindermen under the will of their grandfather.

2. Descent and Distribution § 13—

Where parties take lands as heirs at law of their father and not as remaindermen under the will of their grandfather, they take the land subject to a mortgage executed by their father.

3. Judgments § 9—

A judgment upon an agreed statement of facts rendered out of term and out of the county may not be rendered by default final as against defendants failing to file answer, since such defendants are not parties to the agreed statement of facts, and did not consent that the judgment be signed out of term and out of the county.

APPEAL by plaintiffs and defendants Munn and Evans from *Harris, J.*, at February Term, 1937, of FRANKLIN.

On plaintiffs' appeal: Judgment affirmed.

On defendants' appeal: Judgment reversed.

Action to remove cloud on plaintiffs' title to certain land, caused by a deed of trust thereon executed by Chas. S. Merritt, deceased father of plaintiffs, heard upon agreed statement of facts. From judgment that plaintiffs are owners of the land subject to the lien of the deed of trust, plaintiffs appealed, and from so much of the judgment as decreed judgment by default against defendants Munn and Evans, holders of one of the notes secured by the deed of trust, the named defendants appealed.

W. H. Yarborough and Gholson & Gholson for plaintiffs.

G. M. Beam and White & Malone for defendants.

DEVIN, J. The only question presented by the plaintiffs' appeal is whether the deed of trust executed by plaintiffs' father, Chas. S. Merritt, constitutes a valid lien on the land, and this depends upon the construction of the will of Morris Merritt from whom the land originally descended.

The portion of the will as to which this controversy arose is in the following words: "I give and bequeath to my beloved wife, Polly Merritt, as a home for her and Nancy Morris and Lucius B. Merritt and Martha A. Merritt and Chas. S. Merritt one hundred and ninety-five acres of land known as the homestead, lying east and west of the house, and all the improvements thereon; at the death of Polly Merritt and Nancy Morris and Lucius B. Merritt and Martha A. Merritt, in case they have no living child, this land known as the homestead goes to Chas. S. Merritt, and should he leave no child, this land and homestead is to be equally divided between Polly W. Purnell, Edward M. Merritt, and John W. Merritt and Malissa Francis Merritt, and in case of their death, their children to this heir same."

It is admitted that Polly Merritt is dead, and that Nancy Morris, Martha A. Merritt, and Lucius B. Merritt died without issue, and that Chas. S. Merritt survived the other devisees named in said item, and, after executing the deed of trust referred to in 1935, died leaving the plaintiffs, H. C. Merritt and Ollie Merritt, his only children. The deed of trust conveyed the one hundred and ninety-five acres of land to G. M. Beam, trustee, to secure the payment of five notes in the sum of $560.00 each, all of which are now held by defendants and unpaid.

The provision in the will that "at the death of Polly Merritt and Nancy Morris and Lucius B. Merritt and Martha A. Merritt, in case they have no living child, this land known as the homestead goes to Chas. S. Merritt," nothing else appearing, would unquestionably, under the admitted facts, vest the title in fee simple in Chas. S. Merritt (C. S., 4162), and the added words, "and should he leave no child," the land to be divided between Polly Purnell and others, constituted a defeasible fee, which became absolute upon his death leaving children him surviving.

So that the land descended to his children, the plaintiffs, as heirs of Chas. S. Merritt, and not as remaindermen under the will of Morris Merritt. Hence it follows the plaintiffs took the land subject to the lien of the deed of trust executed by Chas. S. Merritt. *Whitfield v. Garris,* 134 N. C., 24, 45 S. E., 904.

The facts in the cases cited by plaintiffs, *West v. Murphy,* 197 N. C., 488, 149 S. E., 731, and *Hauser v. Craft,* 134 N. C., 319, 46 S. E., 756, where the devise was to the first taker for life only, are distinguishable from those upon which the well-settled rule laid down in *Whitfield v.*

Garris, 134 N. C., 24, 45 S. E., 904, was based. *Daly v. Pate,* 210 N. C., 222, 186 S. E., 348; *Murdock v. Deal,* 208 N. C., 754, 182 S. E., 466; *Alexander v. Fleming,* 190 N. C., 815, 130 S. E., 867; *Walker v. Butner,* 187 N. C., 535, 122 S. E., 301; *Vinson v. Gardner,* 185 N. C., 193, 116 S. E., 412; *Love v. Love,* 179 N. C., 115, 101 S. E., 562; *Radford v. Rose,* 178 N. C., 288, 100 S. E., 249.

The judgment declaring the plaintiffs to be the owners of the land subject to the lien of the deed of trust to G. M. Beam, trustee, is affirmed.

The appeal of the defendants, J. A. Munn and Mrs. Mary Evans, involves the correctness of the judgment by default final against them for failure to file answer to the complaint. Since it appears that the judgment was rendered upon an agreed statement of facts to which the appealing defendants were not parties, and that they did not consent that the judgment be signed out of term and out of the district, that portion of the judgment by default against these defendants must be held for error and stricken out.

On plaintiffs' appeal, affirmed.

On defendants' appeal, reversed.

R. W. RIDDLE, ADMINISTRATOR OF TED BURWELL v. R. L. HONBARRIER AND G. K. LOFTIN, TRADING AS COLONIAL MOTOR FREIGHT LINES, AND FRED LOFTIN.

and

HORTON MOTOR LINES, INC., v. R. L. HONBARRIER AND G. K. LOFTIN, TRADING AS COLONIAL MOTOR FREIGHT LINES, AND FRED LOFTIN.

(Filed 24 November, 1937.)

1. Trial § 47—

A motion for a new trial for newly discovered evidence must be made and heard at the trial term, but the parties may, either by expressed or implied consent, waive this requirement and agree that the motion be made and heard at a subsequent term.

2. Same—Plaintiff held not to have consented to hearing of motion to set aside verdict for newly discovered evidence at subsequent term.

Where a party requests a continuance for a hearing upon a motion to set aside the verdict as being against the weight of the evidence and for errors upon the trial, the court's order that by consent the cause should go over to the next term to be heard on motion to set aside the verdict, will be construed therewith, and the consent applies only to the hearing of the motion for which the continuance was requested, and does not constitute a consent to the hearing of a motion for a new trial for newly discovered evidence at the next succeeding term.

STACY, C. J., DEVIN and BARNHILL, JJ., dissent.

APPEAL by plaintiffs from *Rousseau, J.,* at March Term, 1937, of MECKLENBURG. Reversed and remanded.

Robinson & Jones and Cochran & McCleneghan for plaintiffs, appellants.

J. Laurence Jones for defendants, appellees.

SCHENCK, J. These two actions, consolidated for the purpose of trial at the February Term, 1937, of Mecklenburg, were to recover damages for the wrongful death of an intestate and for the destruction of an automobile, respectively, alleged to have been proximately caused by the negligence of the defendants. The evidence tended to show that the automobile driven by the intestate and owned by Horton Motor Lines and the automobile of the Colonial Motor Freight Lines, driven by Fred Loftin, collided on the public highway in the state of Virginia near Fredericksburg on 22 September, 1935, and that the intestate was killed and the Horton automobile damaged.

The actions were tried upon appropriate issues of negligence, contributory negligence, and damage. The issues were answered in favor of the plaintiffs. The plaintiffs tendered judgment.

The record contains the following:

"After the coming in of the verdict, and at the trial term, counsel for the defendants appeared in court and announced his intention of making a motion to set aside the verdict on the ground that it was contrary to the weight of the evidence, and because of errors committed in the course of trial, and the said counsel requested the court to continue the cases for the hearing of said motion at the next term of court in order that he might have the testimony of the witness W. D. Duckworth transcribed to use in connection with the argument of said motion. Thereupon an order was entered as follows: 'By consent, this matter goes over until next civil term, to be held on motion to set aside the verdict. Judgment may be signed at that time and have the same effect as if signed at this time.'

"At the 1 March, 1937, Term, being the next term after the trial term, the defendants filed the motion appearing in the record, based on newly discovered evidence, and did not argue motion to set aside the verdict as being against the weight of the evidence or for errors committed in the course of the trial.

"Prior to the argument of the motion for a new trial on the ground of newly discovered evidence, the plaintiffs objected to the hearing of said motion on the ground that it could not be filed and heard after the trial term, and on the ground that the order continuing the case did not continue it for the hearing of such a motion. The said objection was

overruled and the plaintiffs excepted, which is plaintiffs' Exception No. 1.

"Prior to the signing of any order on the motion for new trial the plaintiffs tendered the judgment appearing in the record and marked 'Tendered and refused.' The court declined to sign said judgment and the plaintiffs excepted, which is plaintiffs' Exception No. 2."

"It is well settled under our practice that a motion to set aside a verdict and grant a new trial upon the ground of newly discovered evidence must be made and determined at the same term at which the trial is had." *Stilley v. Planing Mills,* 161 N. C., 517. However, by consent, this requirement may be waived, and a motion to set aside the verdict for newly discovered evidence may be lodged and passed upon at a subsequent term. This consent may be either expressed or implied. *Acceptance Corp. v. Jones,* 203 N. C., 527.

So the question presented to us is as to whether the order entered at the trial term and reading: "By consent, this matter goes over until next term, to be held (heard) on motion to set aside the verdict. Judgment may be signed at that time and have the same effect as if signed at this time," shall be read in connection with the announced intention of the defendant of "making a motion to set aside the verdict on the ground that it was contrary to the weight of the evidence, and because of errors committed in the course of trial" and thereby limited to the scope of said motion, or whether the words "to be held (heard) on motion to set aside verdict" shall be interpreted without relation to any announced motion of the defendant and as meaning *any* motion to set aside the verdict for *any* cause.

We are of the opinion that the order made at the February Term was entered in pursuance of the announcement made in open court at that term by counsel for the defendants, and that the consent mentioned in the order included only such a motion as was announced as intended to be made by defendants' counsel, and for the hearing of which he requested the court to continue the case, and did not extend to any other motion to set the verdict aside. Entertaining the view that the consent order authorized the making at a subsequent term of a motion to set aside the verdict only for the reason that it was against the greater weight of the evidence or for errors committed in the course of the trial, we hold that his Honor was without jurisdiction to entertain at the March Term a motion to set aside the verdict for newly discovered evidence.

The order setting aside the verdict is reversed and the case remanded for judgment in accord with the verdict.

Reversed.

STACY, C. J., DEVIN and BARNHILL, JJ., dissent.

STATE v. W. L. ELMORE.

(Filed 24 November, 1937.)

1. **Homicide § 11—Whether defendant had reasonable ground to believe he was in danger of life or great bodily harm is for jury.**

In this prosecution for assault with a deadly weapon with intent to kill, defendant offered evidence of self-defense. The trial court instructed the jury in effect that whether defendant had reasonable ground to believe, under the circumstances, that he was in danger of his life or great bodily harm, was for the jury to determine from the testimony of defendant and the other witnesses. *Held:* The instruction was without error.

2. **Homicide § 27h—**

In this prosecution for assault with a deadly weapon with intent to kill, the court's instruction that the jury might find defendant guilty of a less degree of the crime, including assault with a deadly weapon, if they so found beyond a reasonable doubt, *is held* without error. C. S., 4640.

3. **Criminal Law § 53g—**

The charge of the court will be considered contextually as a whole.

APPEAL by defendant from *Finley, J.*, at February Term, 1937, of MECKLENBURG. No error.

The defendant was indicted for assault with deadly weapon with intent to kill, inflicting serious injury. The State's evidence tended to show an unprovoked assault with a pistol upon the person of the State's witness Knuckley, wherein the latter was shot and seriously injured. The defendant offered evidence tending to show that he acted in self-defense.

There was a verdict of guilty of assault with a deadly weapon, and from judgment imposing sentence of ten months in prison defendant appealed.

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

G. T. Carswell and Joe W. Ervin for defendant.

DEVIN, *J.* The only questions presented by this appeal relate to the judge's charge to the jury. Appellant contends that the trial court unduly restricted the jury's consideration of his plea of self-defense by the use of the following language, to which he noted exception: "On the other hand if the defendant was (not) in fault in bringing on the fuss and he was put in such position as to believe, and it is for you to say as to whether there was evidence sufficient for him to believe, and not for the defendant to say—you may take the testimony of the de-

fendant and other witnesses, but it is for you to say whether he had sufficient grounds to believe his life would be taken or that he would receive great bodily harm, and he was not in fault in bringing on the fuss, then he had the right to use such force, even to the taking of life, to defend himself."

The submission to the jury of the question whether, under the testimony, the defendant "had sufficient grounds to believe his life would be taken or that he would receive great bodily harm" in order to justify his use of force, affords the defendant no just ground of complaint. The charge as a whole on the law of self-defense was in substantial accord with the decisions of this Court. *S. v. Nash,* 88 N. C., 621; *S. v. Gray,* 162 N. C., 608, 77 S. E., 833; *S. v. Johnson,* 166 N. C., 392, 81 S. E., 941; *S. v. Glenn,* 198 N. C., 79, 150 S. E., 663; *S. v. Thornton,* 211 N. C., 413.

In *S. v. Waldroop,* 193 N. C., 12, 135 S. E., 165, *Adams, J.,* speaking for the Court, states the rule prevailing in this jurisdiction as follows: "If A. is assaulted and by reason of the assault, while free from blame in the matter and in the exercise of ordinary firmness, he actually apprehends and has reasonable ground for apprehending that his life is in danger or that he is in danger of great bodily harm, he has a right to use such force as is necessary or such force as reasonably appears to him to be necessary to save his life or to protect himself from great bodily harm—such necessity, real or apparent, to be determined by the jury upon all the facts and circumstances as they reasonably appear to him at times; and if under these conditions he takes the life of his assailant the homicide is excusable." *S. v. Glenn, supra.*

The exception to the court's instruction that under the bill of indictment the jury could find the defendant guilty of a lesser degree of the crime charged, including assault with a deadly weapon, if they so found beyond a reasonable doubt, cannot be sustained. C. S., 4640; *S. v. Lee,* 192 N. C., 225, 134 S. E., 458; *S. v. Spain,* 201 N. C., 571, 160 S. E., 825.

The other exceptions to the judge's charge are without merit. Considered contextually and as a whole the charge is free from reversible error. *Bullock v. Williams, ante,* 113; *S. v. Durham,* 201 N. C., 724, 161 S. E., 398; *S. v. Lee, supra.*

In the trial we find

No error.

STATE v. WILLIAM PERRY.

(Filed 24 November, 1937.)

1. **Homicide § 25—**

The evidence in this prosecution for homicide *is held* sufficient to be submitted to the jury on the charge of murder in the first degree, and defendant's motion to nonsuit was properly denied.

2. **Criminal Law § 33—**

Where there is evidence that defendant was advised that what he might say would be used against him, and that no inducements were held out nor threats made to cause him to confess, the evidence supports the trial court's ruling that the confession was voluntary and competent.

3. **Criminal Law § 81a—**

The trial court's ruling, after consideration of all the relevant evidence, upon the voluntariness of a confession, is ordinarily not reviewable.

4. **Criminal Law § 38—**

The admission of maps and photographs of the scene of the homicide solely for the purpose of permitting the witnesses to explain their testimony, and not as substantive evidence, is not error.

5. **Homicide § 27h—**

The charge of the court upon the question of conviction of defendant of less degrees of the crime charged *held* favorable to defendant, and defendant's objection thereto is untenable.

APPEAL from *Ervin, J.*, at July Special Term, 1937, of CHATHAM. No error.

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

H. M. Jackson and F. C. Upchurch for defendant, appellant.

SCHENCK, J. This defendant was convicted of murder in the first degree and from sentence of death appealed to the Supreme Court, assigning errors.

We have examined all of the exceptive assignments of error made by the defendant and find no error in the record.

The contention of the defendant for judgment of nonsuit upon his demurrer to the evidence (C. S., 4643) cannot be sustained, either generally or as to the charge of murder in the first degree, as there was sufficient evidence in the confession of the defendant to carry the case to the jury upon the charge of the capital offense.

The defendant assigns as error the admission in evidence of a purported confession. This assignment cannot be sustained as there was

ample evidence to support the court's ruling. Both of the witnesses by whom it was sought to prove the confession testified that the defendant was advised that what he might say would be used against him, and that no inducements were held out nor threats made to the defendant to cause him to make the statements or confession, and there is no evidence to the contrary. Voluntary confessions are competent, *S. v. Bowden,* 175 N. C., 794, and the ruling of the trial judge upon whether a confession was voluntarily made, after consideration of all the evidence offered as to the voluntariness, is ordinarily not reviewable. *S. v. Whitener,* 191 N. C., 659, and cases there cited; *S. v. Stefanoff,* 206 N. C., 443.

The assignments of error as to the admission in evidence of certain maps and photographs of the scene of the homicide cannot be sustained, as the judge was careful to instruct the jury that such maps and photographs were competent only for the purpose of permitting the witnesses to explain their testimony, and were not substantive evidence. *S. v. Jones,* 175 N. C., 709; *S. v. Lutterloh,* 188 N. C., 412; *Honeycutt v. Brick Co.,* 196 N. C., 556.

The assignments of error as to the charge are untenable. The judge made a fair and impartial statement of the evidence and explained the law arising thereon, and instructed the jury that they could return one of four verdicts: Guilty of murder in the first degree, guilty of murder in the second degree, guilty of manslaughter, or not guilty. The charge was fair, and even liberal, to the defendant, as it is doubtful if there is any evidence in the record upon which a verdict of guilty of manslaughter could have been predicated.

The State's evidence tended to show that the defendant went to the home of the deceased, when she was there alone, made indecent proposals to her, and then shot her three or four times with a pistol, and "to make sure she was dead" struck her several times over the head with a shotgun, and that the deceased died about 12 hours after the assault; the evidence further tended to show that the defendant had been "thinking about it" for over a week. The evidence was sordid, and no good purpose can be served by repeating it here in detail. Suffice it to say it was amply sufficient to sustain the verdict.

The defendant offered no evidence.

It is ordered that the judgment below be affirmed, since upon the record we find

No error.

D. J. SOSSAMON ET AL. v. OAKLAWN CEMETERY, INC.

(Filed 24 November, 1937.)

Contracts § 21—Complaint alleging substance of contract declared on is good as against a demurrer without setting out agreement in full.

Where the complaint alleges the substance of the contract declared on it is good as against a demurrer, it not being required that the entire writing be made a part of the complaint, especially where the part omitted is in the possession of the defendant, and there being no question of *profert* or *oyer*, C. S., 1823, and the action not being founded upon an instrument for the payment of money only, C. S., 540.

APPEAL by plaintiffs from *Rousseau, J.*, at May Term, 1937, of MECKLENBURG.

Civil action to recover damages for alleged breach of covenant of perpetual care for cemetery lot.

The complaint alleges that on 19 January, 1923, plaintiff took from defendant deed for cemetery lot containing covenant of perpetual care "as provided in the by-laws of Oaklawn Cemetery, Inc., of Charlotte"; that thereafter plaintiffs' daughter was buried in said lot; that plaintiffs planted flowers upon said grave, constantly visited it, and kept fresh-cut flowers thereon until 19 April, 1934, when the defendant, through its agents and employees, removed all the flowers, flower pots, shells, vessels and other decorations from plaintiffs' lot, leveled the mound until it no longer has the appearance of a grave, and otherwise desecrated the premises by permitting people to walk thereon; that defendant agreed in its by-laws to keep the graves in attractive appearance; to protect them from desecration and disturbance; to maintain the mounds, and to prevent removal of flowers or other decorations therefrom, and that defendant's breach of its covenant, as herein alleged, has resulted in great injury and damage to the plaintiffs; wherefore plaintiffs pray, etc.

The defendant interposed a demurrer upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

From judgment sustaining the demurrer and allowing plaintiffs to amend so as to set out in full the by-laws mentioned in the complaint, if so advised, the plaintiffs appeal, assigning error.

G. T. Carswell and Joe W. Ervin for plaintiffs, appellants.
H. L. Taylor for defendant, appellee.

STACY, C. J. The question for decision is whether it is mandatory in an action on a written contract to make the entire writing a part of the complaint. The answer is "No," especially where the part omitted

from the complaint, as in the instant case, is in the possession of the defendant. *R. R. v. Robeson,* 27 N. C., 391; *Gorman v. Bellamy,* 82 N. C., 497; *Thompson v. Johnson,* 202 N. C., 817, 164 S. E., 357; 21 R. C. L., 493.

An allegation containing the substance of the agreement, as in the present complaint, will suffice as against a demurrer. *Ins. Co. v. Dey,* 206 N. C., 368, 174 S. E., 89; *Deloatch v. Vinson,* 108 N. C., 147, 12 S. E., 895; McIntosh N. C. Prac. & Proc., sec. 358.

The record presents no question of *profert* or *oyer.* C. S., 1823; 21 R. C. L., 478. Nor is the action "founded upon an instrument for the payment of money only." C. S., 540.

Of course where the writing is made a part of the complaint, which is usually done, and ordinarily desirable perhaps, the court is not bound by the conclusion of the pleader as to its meaning, *Horney v. Mills,* 189 N. C., 724, 128 S. E., 324, but this is not our case. 21 R. C. L., 476.

The complaint is good as against a demurrer.

Reversed.

STATE v. HUDSON ROBINSON.

(Filed 24 November, 1937.)

1. Criminal Law § 79—

The failure of defendant to file briefs works an abandonment of the assignments of error, except those appearing on the face of the record, which are cognizable *ex mero motu.*

2. Criminal Law § 80—

Where defendant fails to file briefs, the motion of the Attorney-General to dismiss must be allowed, Rules 27 and 28, but in a capital case this will be done only after an examination of the record and case on appeal discloses no error.

3. Homicide § 25—

Where there is sufficient competent evidence by the State to sustain a verdict of guilty of murder in the first degree, and evidence in sharp conflict introduced by defendant, the conflicting evidence is for the jury, and defendant's motion to nonsuit is properly denied.

APPEAL by defendant from *Rousseau, J.,* at Regular Criminal June Term, 1937, of MECKLENBURG.

Motion by State to dismiss appeal of defendant.

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

No counsel for defendant.

WINBORNE, J. The defendant was tried upon a bill of indictment charging him with the murder of one Albert Downing. There was verdict of murder in the first degree and judgment of death by asphyxiation. Defendant gave notice of appeal to the Supreme Court and was permitted to appeal *in forma pauperis*. The record and case on appeal were duly docketed in this Court, but defendant has filed no brief, which works an abandonment of the assignments of error, *S. v. Hooker*, 207 N. C., 648, 178 S. E., 75; *S. v. Dingle*, 209 N. C., 293, 183 S. E., 376; except those appearing on the face of the record, which are cognizable *ex mero motu*. *S. v. Edney*, 202 N. C., 706, 164 S. E., 23.

The Attorney-General moves to dismiss the appeal for failure to comply with Rules 27 and 28 of this Court as to filing briefs. This motion must be allowed. *S. v. Kinyon*, 210 N. C., 294, 186 S. E., 368.

However, as is customary in capital cases, we have examined the record and case on appeal to see if any error appears. The only assignments of error are to the refusal of the court below to grant defendant's motion for judgment as of nonsuit. The case on appeal reveals evidence competent and sufficient to sustain the verdict. The evidence for defendant is in sharp conflict with that for the State. This presents a case for the jury. We find no error.

Judgment affirmed and appeal dismissed.

B. V. MATTHEWS, CHAIRMAN, LEONARD C. COOKE ET AL., CONSTITUTING THE BOARD OF PHOTOGRAPHIC EXAMINERS, AND A. A. F. SEAWELL, ATTORNEY-GENERAL, EX. REL. STATE OF NORTH CAROLINA, *v.* N. L. LAWRENCE.

(Filed 24 November, 1937.)

Injunction § 7—Injunction will not lie to enjoin violation of criminal statute.

Art. V, sec. 1, ch. 155, Public Laws of 1935, makes the practicing of photography without a license a criminal offense, and injunction will not lie to restrain defendant from violating the statute, since the commission of a crime may not be enjoined, and injunction will lie only where some private right is a subject of controversy.

APPEAL from *Sinclair, J.*, at Chambers in Raleigh, 23 September, 1937, from WAKE. Reversed.

Assistant Attorneys-General McMullan and Bruton and Norman C. Shepard, Manly, Hendren & Womble, and W. P. Sandridge for plaintiffs, appellees.

Parrish & Deal for defendant, appellant.

SCHENCK, J. This is an action instituted by those persons constituting the Board of Photographic Examiners of the State of North Carolina, created by ch. 155, Public Laws 1935, and by A. A. F. Seawell, Attorney-General, "on behalf of the State of North Carolina," wherein it is sought to restrain and enjoin the defendant from practicing photography as defined in said statute.

The complaint alleges that the General Assembly of 1935 provided for the examination, licensing and regulation of the practice of photography by the enactment of ch. 155 of the Public Laws of that session, "known as 'an act to regulate and control the practice of photography,'" and that the defendant is "practicing photography contrary to the terms and provisions of said act and without being duly licensed as therein provided."

The defendant demurred to the complaint on the ground that it does not state a cause of action, for that (1) ch. 155, Public Laws 1935, on which the plaintiffs base their complaint, provides in Art. V thereof that any person violating any provisions of the act shall be guilty of a criminal offense, and (2) that said statute is unconstitutional and void.

The court overruled the demurrer, and the defendant reserved exception and appealed to the Supreme Court.

We think, and so hold, that his Honor erred in overruling the demurrer. Art. V, sec. 1, of ch. 155, Public Laws 1935, reads in part: "Any person violating any of the provisions of this act, or engaging in any of the activities or practices herein defined without being duly licensed as herein provided, shall be guilty of a misdemeanor, and upon conviction shall be fined the sum of not less than fifty ($50.00) dollars, nor more than two hundred ($200.00) dollars for the first offense, and shall be imprisoned not more than thirty days and/or fined not exceeding two hundred ($200.00) dollars for any subsequent offense. Each and every violation hereof shall constitute a separate offense."

This statute clearly makes the alleged acts of the defendant complained of by the plaintiffs criminal, and it is a rule with us that there is no equitable jurisdiction to enjoin the commission of a crime, and that injunctions are confined to cases where some private right is a subject of controversy. 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. *Motor Service v. R. R.*, 210 N. C., 36, and cases there cited.

We do not pass upon the constitutionality of ch. 155, Public Laws 1935, since we are of the opinion that the demurrer should have been sustained upon the first ground assigned.

The judgment below is

Reversed.

J. R. WHITE v. THE CITY OF CHARLOTTE AND CHARLOTTE PARK & RECREATION COMMISSION.

(Filed 24 November, 1937.)

1. **Municipal Corporations § 17—**

Judgment of nonsuit in action against municipality to recovery for negligence resulting in death of plaintiff's daughter sustained on authority of *White v. Charlotte*, 211 N. C., 186.

2. **Abatement and Revival § 11—Parent's right of action to recover for loss of services of child abates upon death of child.**

A parent's right of action to recover for loss of services of his child, upon allegation that the child's death was caused by the negligence of defendant, abates upon the death of the child, the sole remedy being an action for wrongful death, C. S., 160, and the question of the father's right to share in the recovery being a matter between him and the child's administrator.

APPEAL by plaintiff from *Hill, Special Judge*, at 20 September Extra Term, 1937, of MECKLENBURG. Affirmed.

This is an action instituted by the plaintiff, father of Sarah Elizabeth White, for damages for loss of services of said infant, whose death is alleged to have been caused by the negligent conduct of the defendants.

The plaintiff, as administrator of the estate of Sarah Elizabeth White, an infant, instituted an action to recover damages for the wrongful death of said infant, against these defendants, upon substantially the same allegations of negligence. The facts are fully set out in the former decision, *White v. Charlotte*, 211 N. C., 186. From judgment of nonsuit the plaintiff appealed.

John Newitt for plaintiff, appellant.
J. M. Scarborough and B. M. Boyd for defendants, appellees.

PER CURIAM. The evidence in this case was substantially the same as in *White v. Charlotte*, 211 N. C., 186, except that one additional witness was offered, whose testimony tends to show contributory negligence on the part of the deceased. *White v. Charlotte, supra*, is controlling.

There is a further reason why the plaintiff is not entitled to maintain this action. Actions for wrongful death are purely statutory and the right of action rests exclusively in the administrator. Speaking to the subject in *Gurley v. Power Co.*, 172 N. C., 690, *Brown, J.*, says: "An action for the recovery of wages of a minor . . . lies in favor of the parent; but if the child dies from the injury the action abates. The only action that lies in such case, in this State, is for wrongful death, as authorized by Revisal 59, and that embraces everything. In such

action the value of the life before 21, as well as after 21 years of age, is recoverable. No other action lies than this." *Killian v. R. R.*, 128 N. C., 262.

It is true that the father was entitled to the services of his daughter, if she had lived, till her majority, but when the death of the daughter ensued the cause of action abated. The question of the father's right to share in the recovery for the prospective wages up to 21 years would be a matter between him and the administrator. *Gurley v. Power Co., supra; Killian v. R. R., supra; Insurance Co. v. Brame*, 95 U. S., page 756.

The judgment below is

Affirmed.

L. S. AND GERTRUDE GUNN v. BLUE BIRD TAXI COMPANY.

(Filed 24 November, 1937.)

Trial § 23—

Contradictory statements by plaintiff in his examination in chief and in his cross-examination do not warrant the granting of defendant's motion to nonsuit, it being for the jury to determine which version of the facts they will believe.

APPEAL by defendant from *Hill, Special Judge*, at August Special Term, 1937, of MECKLENBURG.

Civil action by L. S. Gunn to recover damages for injuries to his automobile and action by Gertrude Gunn for personal injuries, and cross action by defendant against L. S. Gunn, by consent, consolidated and tried together, as all three causes arise out of the same traffic collision.

On 12 November, 1936, a taxicab owned and operated by the defendant, collided with L. S. Gunn's Chevrolet automobile at the intersection of Fifth Street and Laurel Avenue in the city of Charlotte. L. S. Gunn was driving his car at the time and with him was his wife, Gertrude Gunn. The husband sues for damages to his automobile, the wife for personal injuries. The jury awarded the husband $200 and the wife $3,840. Defendant recovered nothing on its cross action.

From judgments on the verdicts, the defendant appeals, assigning errors.

J. L. DeLaney for plaintiffs, appellees.

J. Laurence Jones for defendant, appellant.

PER CURIAM. In view of the equivocal and somewhat confusing, if not self-contradictory, testimony of L. S. Gunn, the jury might well

have answered the issue of contributory negligence against him in his action, nevertheless there is some evidence to support the verdict, and the matter was for the twelve. *Hancock v. Wilson,* 211 N. C., 129, 189 S. E., 631; *Jackson v. Scheiber,* 209 N. C., 441, 184 S. E., 17; *Dozier v. Wood,* 208 N. C., 414, 181 S. E., 336; *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E., 601; *Insurance Co. v. Edgerton,* 206 N. C., 402, 174 S. E., 96; *Collett v. R. R.,* 198 N. C., 760, 153 S. E., 405; *Wimberly v. R. R.,* 190 N. C., 444, 130 S. E., 116.

Speaking to the point in *Shell v. Roseman,* 155 N. C., 90, 71 S. E., 86, *Allen, J.,* said: "We are not inadvertent to the fact that the plaintiff made a statement on cross-examination as to a material matter, apparently in conflict with his evidence when examined in chief, but this affected his credibility only, and did not justify withdrawing his evidence from the jury. *Ward v. Mfg. Co.,* 123 N. C., 252."

In similar fashion, in *Christman v. Hilliard,* 167 N. C., 4, 82 S. E., 949, *Walker, J.,* reversing a nonsuit, remarked: ". . . the witness R. D. Christman had the right to change his mind, and it was for the jury to say which of the two statements made by him they would accept."

Again, in *Smith v. Coach Line,* 191 N. C., 589, 132 S. E., 567, *Brogden, J.,* speaking for the Court, said: "In *Shell v. Roseman,* 155 N. C., 90, this Court has held that conflicting statements of a witness in regard to or concerning a material or vital fact does not warrant a withdrawal of the case from the jury. It affects only the credibility of the witness, and therefore, where inconsistent and conflicting statements are made by a witness or a party, the judge has no power to determine which is correct. This function belongs exclusively to the jury."

The case of the *feme* plaintiff presents little more than a controverted issue of fact, which the jury has determined in her favor. A careful perusal of the record leaves us with the impression that no substantial or reversible error has been made to appear. Hence, the verdicts and judgments will be upheld.

No error.

HARVEY H. STEWART v. W. H. THROWER.

(Filed 24 November, 1937.)

1. Landlord and Tenant § 15: Evidence § 39—

Where a lease provides that it should terminate on a certain day unless extended by a written agreement of the parties, evidence of a parol extension is incompetent as being in contradiction of the written instrument.

2. Landlord and Tenant § 19—After sale of leased lands and notice to lessee by purchaser, lessor has no authority to extend lease.

Where the purchaser of leased lands notifies the lessee and gives notice for him to quit the premises at the expiration of the lease, both prior and subsequent to the execution of the deed, the original owner has no authority to extend the lease, and a letter written by it some two months after the execution of the deed, giving notice to the lessee to quit at a date subsequent to the expiration date of the lease, is incompetent in the purchaser's action in ejectment.

APPEAL by defendant from *Olive, Special Judge*, at June Special Term, 1937, of MECKLENBURG. No error.

Whitlock, Dockery & Shaw for plaintiff, appellee.

J. D. McCall, J. C. Newell, and Louis Hunter for defendant, appellant.

PER CURIAM. This is an action in summary ejectment instituted before a justice of the peace and tried on appeal in the Superior Court. The issues were answered in favor of the plaintiff, and from judgment in accord therewith the defendant appealed to the Supreme Court, assigning errors.

The evidence tended to show that on 6 March, 1936, the Greensboro Joint Stock Land Bank entered into a written lease to the defendant of a farm in Mecklenburg County, "for the period of time, beginning with the date of this indenture and ending on the 1st day of December, 1936, and no longer, unless a written agreement is entered into between the parties hereto"; that in September, 1936, plaintiff negotiated for the purchase of the farm, and on 1 October, 1936, received a deed therefor from said land bank, which deed was duly put to record; that prior and subsequent to the placing of the deed of record plaintiff notified the defendant to quit possession of the premises on 1 December, 1936, and that defendant has refused so to do; and that this action was commenced on 9 December, 1936.

Appellant assigns as error the refusal of the court to permit him to testify in effect that he had an oral agreement with the agent of the land bank at the time he signed the lease that he could remain on the property till 1 January, 1937. This assignment cannot be sustained, as to have admitted the testimony would have been to admit oral testimony to vary and contradict the terms of the written instrument. This is contrary to the rule with us. *Dawson v. Wright*, 208 N. C., 418, and cases there cited.

Appellant further assigns as error the refusal of the court to admit in evidence a letter received by him through the United States mails from the Greensboro Joint Stock Land Bank dated 28 November, 1936,

notifying him to quit possession on or before 1 January, 1937. This letter was incompetent, since it was written nearly two months after the land had been sold to plaintiff by the land bank, and after the defendant knew that the plaintiff had purchased the land, and after the plaintiff had given defendant notice to quit possession on 1 December, 1936. The land bank, having sold the land, was without authority to extend the expiration date of the lease from 1 December, 1936, to 1 January, 1937.

Upon the competent evidence, the judge committed no error in charging the jury that if they found the facts to be as shown by all the evidence they should answer the issues in favor of the plaintiff.

No error.

CARRIE L. McLEAN, ADMINISTRATRIX OF THE ESTATE OF VIRGIL A. FLEENOR, v. RULANE GAS COMPANY.

(Filed 24 November, 1937.)

Venue § 1—

Defendant's appeal from an order of the trial court denying defendant's motion to remove the action brought by an administratrix in the county of her residence, is affirmed on authority of *Lawson v. Langley*, 211 N. C., 526.

APPEAL by defendant from *Rousseau, J.*, at March Term, 1937, of MECKLENBURG. Affirmed.

This is an action for actionable negligence, alleging damage, brought by Carrie L. McLean, the duly appointed administratrix of the estate of Virgil A. Fleenor, who died intestate in Anson County on 13 December, 1936, as a result of the alleged negligence of the defendant. The personal residence of Carrie L. McLean, the plaintiff, is in Mecklenburg County. The defendant, a corporation, is a resident of Gaston County. The plaintiff Carrie L. McLean qualified as administratrix in Anson County, where the deceased was injured and killed. The beneficiaries of any recovery are residents of Tennessee. The action was instituted in Mecklenburg County, the personal residence of the plaintiff, and the sole question is whether the defendant has the right to remove the case to Gaston County, which is the residence of the defendant.

Robinson & Jones and Simmons & Bowman for plaintiff.
Jonas & Jonas and Fred B. Helms for defendant.

PER CURIAM. We carefully considered the case of *Lawson v. Langley*, 211 N. C., 526, when before this Court. The defendant in its brief says,

in reference to the *Lawson case, supra*, and other cases: "In the face of these apparently adverse former adjudications, the appellant prosecutes this appeal only because it believes it is about to be deprived of a substantial legal right. It believes its contention ought to prevail even though it should require the review, modification, or even the overruling of former adjudications."

This statement would meet with the approval of this Court if we were of the opinion that the other cases were not correctly decided. This case is governed by the *Lawson case, supra*, and the judgment of the court below is

Affirmed.

CARRIE L. McLEAN, ADMINISTRATRIX OF ESTATE OF ESSIE JACKSON, DECEASED (SUBSTITUTED PLAINTIFF FOR ESSIE JACKSON, ORIGINAL PLAINTIFF, NOW DECEASED), v. GEORGE F. SCHEIBER AND ROBERT PEARSON.

(Filed 24 November, 1937.)

Evidence § 29—

The record of the testimony of a plaintiff in a former action against defendants is incompetent in a subsequent action brought by another plaintiff who was not a party to the former action, even though the actions arise out of the same automobile accident, since the present plaintiff had no opportunity to cross-examine the plaintiff in the former action.

APPEAL by defendant Scheiber from *Rousseau, J.*, at May Term, 1937, of MECKLENBURG. No error.

This was an action to recover for medical and hospital expenses incurred and for lost services of the minor son of plaintiff's intestate, alleged to have resulted from the negligence of the defendant in the operation of an automobile. Robert Pearson was not served with summons.

The jury answered the issues in favor of the plaintiff, and from judgment on the verdict defendant Scheiber appealed.

C. H. Gover, William T. Covington, Jr., and Hugh L. Lobdell for plaintiff.

Robinson & Jones for defendant.

PER CURIAM. The principal question presented by the appeal was as to the admissibility of the transcript of the testimony of the son of plaintiff's intestate taken in another action, in which the son was plaintiff in a suit against these same defendants for damages for personal injury suffered by him on the identical occasion here alleged (*Jackson v. Scheiber*, 209 N. C., 441, 184 S. E., 17). It appeared that in the

other case the plaintiff's intestate, Essie Jackson, was not a party, and in the trial in which the son's testimony was taken had no right or opportunity to cross-examine him. The rule was laid down in *Hartis v. Electric R. R.*, 162 N. C., 236, 78 S. E., 164, that the admissibility of evidence taken in another case depends upon the identity of the question being investigated and upon the opportunity of the party against whom the evidence is offered to cross-examine. For that reason it would seem that the ruling of the court below must be sustained.

We have examined the other exceptions noted by appellant, and find in them no substantial merit.

In the trial we find

No error.

PAYNE-FARRIS COMPANY v. MRS. L. A. KUESTER AND MISS L. E. KUESTER.

(Filed 24 November, 1937.)

Principal and Agent § 12—Acceptance and use of goods and signing replevy bond held to ratify agent's execution of conditional sales contract.

Where a conditional sales contract is signed by a person in the name of another, and the person for whom the goods were bought receives and uses same, and files a replevy bond to resist recovery by the seller in claim and delivery, she ratifies the signing of the conditional sales contract in her name, and may not deny the authority of the agent to sign same.

APPEAL by defendant Mrs. L. A. Kuester from *Harding, J.*, at February Term, 1937, of MECKLENBURG. No error.

Jake F. Newell for plaintiff, appellee.
John Newitt for defendant, appellant.

PER CURIAM. This is an action in claim and delivery of certain furniture sold and delivered on a title retained contract. Appropriate issues were submitted and answered in favor of the plaintiff, and from judgment in accord therewith defendant Mrs. L. A. Kuester appealed.

The principal assignment of error urged in the brief of the appellant is the court's failure to sustain her objection to the admission in evidence of the title retained contract signed in her name by Miss L. E. Kuester, her daughter, without the plaintiff having first established the authority of the daughter to sign the name of her mother thereto. Without passing upon the question of whether the daughter was originally authorized to sign the contract, the evidence is that the mother, the appellant,

received the furniture in her home, enjoyed the use and benefits thereof, resisted its recovery by giving replevy bond, and thereby ratified the action of her daughter in signing her name and procuring the furniture. "The relation of principal and agent is created by ratification when one person adopts an act done by another person, assuming to act on his behalf, but without authority or in excess of authority, with the same force and effect as if the relation had been created by appointment." *Trollinger v. Fleer*, 157 N. C., 81. The ratification of the action of her daughter by the appellant rendered the instrument competent evidence.

The motion for judgment as in case of nonsuit made and renewed pursuant to C. S., 567, cannot be sustained, since the evidence was sufficient to carry the case to the jury.

We have examined the other exceptive assignments of error and find no prejudicial error.

No error.

JOHN BEN JACKSON, BY HIS NEXT FRIEND, GOEBEL PORTER, v. MARYLAND CASUALTY COMPANY.

(Filed 24 November, 1937.)

1. Insurance § 43—

A policy indemnifying insured automobile owner against loss from liability imposed by law for "bodily injuries accidentally suffered by any person" does not cover an injury to a third person intentionally inflicted by a person driving the car with the owner's permission.

2. Same—Insurer held not estopped to set up defense that injury was intentionally inflicted by former verdict properly interpreted.

In an action against insurer based upon an unpaid judgment entered against the driver of the car insured on a verdict of negligence in the operation of the car, ordinarily the insurer may not set up the defense that the injury was intentionally inflicted, but where the allegations and evidence in the former trial were to the effect that the injury was intentionally inflicted, the verdict will be interpreted in reference thereto, and the former judgment will not estop insurer from setting up the defense.

3. Trial § 37—

A verdict will be interpreted in the light of the allegations and evidence.

APPEAL by plaintiff from *Hill, J.*, at September Term, 1937, of MECKLENBURG. Affirmed.

This was an action upon a liability insurance policy issued by the defendant to Geo. F. Scheiber on his automobile. The plaintiff alleged that defendant's insurance contract covered the liability of one Robert Pearson, who was driving the Scheiber automobile at the time plaintiff was injured by it, and that plaintiff's recovery of damages against

Pearson and the return of execution unsatisfied rendered defendant liable to him for the amount of his judgment against Pearson.

The defendant denied liability to the plaintiff, and alleged that the injuries for which plaintiff recovered damages were intentionally inflicted by Pearson; that the policy of insurance did not cover liability for injury intentionally inflicted by the insured; and defendant set up the judgment in *Jackson v. Scheiber,* 209 N. C., 441, wherein plaintiff's suit against Scheiber for the same injury was dismissed on the ground that plaintiff's own evidence showed an intentional injury, and defendant alleged that, it having been judicially determined that plaintiff was not entitled to recover of the owner of the automobile, the named insured, because the injury was due to the willful and intentional act of Pearson, the driver, plaintiff was estopped to maintain this action.

The policy of insurance offered in evidence stated the insuring agreement to be: "Against loss from liability imposed by law upon the assured for damages on account of bodily injuries accidentally suffered by any person, caused by the ownership or operation of the automobile described," and the policy contained the following provision: "The insurance provided by this policy is hereby made available . . . to any person operating . . . any of the automobiles described, . . . provided the use and operation thereof are with the permission of the named assured; . . . provided further, insurance payable under this policy shall be applied by the company first to the protection of the named assured, and the remainder, if any, to the protection of others entitled to insurance under the provisions and conditions of the insuring agreement as the named assured shall in writing direct."

Plaintiff's complaint in his former action against Scheiber and Pearson contained the following allegations: "That, as the plaintiff is informed and believes, the acts of the defendant in driving the said Chrysler automobile into the plaintiff and in thereafter carrying him in a helpless and unconscious condition for a distance equal to the length of a city block, as aforesaid, were willful, wanton, and reckless, and in conscious and criminal disregard of and indifference to the personal and property rights of others, and particularly of the plaintiff."

Plaintiff offered the judgment rendered in his favor and against Robert Pearson, and the verdict of the jury that he was injured by the negligence of Pearson and damaged in the sum of $300.

The only oral evidence offered by plaintiff was that of witness George F. Scheiber, who testified that on the occasion alleged Pearson drove the automobile on an errand for him. Scheiber further testified that he heard the plaintiff, John Ben Jackson, testify in the former case that he would swear Pearson ran into him on purpose, that he (Jackson) had previously shot at Pearson, and that he heard Pearson say after the

occurrence that he intended to run over him and would do it again if he had a chance.

The witness Scheiber further testified that shortly after the accident Robert Pearson left the city, that he was not present at either trial, and that witness had endeavored to locate him without success.

Thereupon plaintiff rested his case. Defendant's motion for judgment of nonsuit was sustained, and from judgment dismissing the action plaintiff appealed.

C. H. Gover, William T. Covington, Jr., and Hugh L. Lobdell for plaintiff.

Robinson & Jones for defendant.

PER CURIAM. The policy of insurance sued on did not cover the liability of the named insured, or that of any other person embraced within its terms, for a willful or intentional injury. The policy provided indemnity "against loss from liability imposed by law upon the assured for damages on account of bodily injuries accidentally suffered by any person, caused by the ownership or operation of the automobile described."

In *Jackson v. Scheiber,* 209 N. C., 441, 184 S. E., 17, it was held that the evidence of this plaintiff showed an injury intentionally inflicted on him by Pearson, the driver of Scheiber's automobile (to which the policy of insurance applied), and that Scheiber was entitled to judgment of nonsuit on that ground.

But plaintiff contends that since his judgment against Pearson was rendered upon a verdict establishing that the injury was due to the negligence of Pearson, the defendant insurer is estopped now to set up the defense that Pearson's act was intentional rather than negligent.

While, ordinarily, a liability insurer will not be permitted to set up, as a defense to an action based upon an unpaid judgment rendered against the insured on account of the negligent operation of the automobile referred to in the policy, that the injury was intentionally inflicted, that rule would not apply when the original complaint alleges as the cause of action a willful or intentional injury, and the evidence of the plaintiff shows that the injury was intentionally inflicted by the assured. The verdict should be interpreted in the light of the allegations of the complaint and the testimony at the trial. McIntosh N. C. Prac. & Proc., sec. 604; *Cox v. R. R.,* 149 N. C., 86, 62 S. E., 761.

In *Stefus v. Indemnity Co.,* 111 N. J. L., 6, 166 Atl., 339, where, in a suit by an injured third party against the liability insurer, the defense was set up that the injury complained of was willfully inflicted, it was held that this defense was unavailable for the reason that the complaint in the former suit did not charge a willful or wanton injury.

In the instant case it appeared that in the former action the plaintiff alleged a willful wrong and testified on the trial that the injury suffered by him was intentionally and purposely inflicted by Pearson, and that upon such plea and testimony judgment was rendered absolving from all liability the named insured, the owner of the automobile, for whose indemnity the policy was primarily issued. And on the trial of the present case, the testimony offered again showed that the injury was due to the willful and intentional act of the driver of the automobile described in defendant's policy.

For these reasons we hold that plaintiff has failed to make out a case against this defendant, and that the judgment of nonsuit was properly entered.

Judgment affirmed.

MRS. ANTONIE KLINGENBERG v. THE CITY OF RALEIGH.

(Filed 15 December, 1937.)

1. Municipal Corporations §§ 12, 14—Municipality may not be held liable for danger inherent in plan of construction of streets.

While municipalities may be held liable for injuries resulting from negligence in the construction of streets, and for negligence in failing to exercise due care to keep them in reasonable repair, a municipality may not be held liable for danger inherent in the original plan of construction of a street, either adopted by the municipality or ratified by it after its construction, since the adoption of a plan of construction is an exercise of a legislative, *quasi*-judicial, and discretionary function of the city.

2. Same—City held not liable for injury resulting from existence of gutter across street constructed to take care of surface water.

The evidence disclosed that defendant municipality determined that catch basins and a storm sewer were too expensive, and decided to use the only other engineering practice to take care of surface water at a street intersection, and therefore constructed valley gutters across the street approximately seven inches deep, and that plaintiff was thrown from the car in which she was riding when the car was driven over the valley gutters. Plaintiff did not allege that the valley gutters were negligently constructed or that they were not kept in repair, but based her action on the inherent danger of such construction. *Held:* Defendant municipality may not be held liable in damages, since the adoption by it of the plan of construction complained of was in the exercise of a governmental function.

3. Same—

Where a city constructs valley gutters across a street to take care of surface water, its later replacement of the original asphalt with cement and a lessening of the depth of the gutters will not be held a departure from the original plan of construction.

4. Automobiles § 12a—

The statutes prescribe certain maximum limits of speed, but a motorist must at all times operate a vehicle with due regard to the width, traffic, and condition of the highway.

CONNOR, J., dissents.

CLARKSON, J., dissenting.

APPEAL by plaintiff from *Pless, Jr., J.*, at third March Term, 1937, of WAKE. Affirmed.

This is an action instituted by the plaintiff for the recovery of damages for personal injuries sustained by her as a result of being thrown from the seat of an automobile in which she was riding as a guest along North Person Street in the city of Raleigh. At the intersection of North Person Street and East Jones Street plaintiff was thrown from the rear seat of an automobile when it struck a valley gutter constructed at said intersection. As a result thereof she sustained serious injury.

When North Person Street was paved said valley gutter was constructed across said street at the intersection of Jones to provide for surface water. Later, by reason of the heavy traffic, the asphalt surfacing was removed and replaced with concrete. At that time the depth of the valley was decreased so that there was at the time of the accident a dip of six or seven inches in the valley.

After the jury had returned a verdict in favor of the plaintiff the trial judge set the same aside as a matter of law on authority of *Blackwelder v. Concord*, 205 N. C., 792, and rendered judgment in favor of the defendant. The plaintiff excepted and appealed.

J. M. Broughton, Wm. H. Yarborough, Jr., and Jones & Brassfield for plaintiff, appellant.

Clem B. Holding for defendant, appellee.

BARNHILL, J. There is no allegation that the valley gutter constructed on North Person Street at the point where said street intersects Jones was negligently constructed or that it was in a state of bad repair. The substance of the plaintiff's allegation of negligence is to the effect that the existence of a valley gutter of this type upon a public street makes the street dangerous for traffic and creates hazards to the public, and that it is negligence on the part of the city and a failure to exercise reasonable care to permit such condition to exist and continue.

While the construction and maintenance of public roads and streets is a governmental function the courts have almost universally permitted recovery against a city or town where injury results from negligence in the construction of a street or from negligent failure to maintain the

street in a reasonably safe condition. Where, however, the condition complained of is one which forms a part of the plan of construction of the street, determined upon and adopted by the city or town, it is held by this and other courts that no recovery may be had. The distinction is this: The adoption of plans for the construction of streets requires the exercise of *quasi*-judicial and discretionary powers; whereas the actual construction and maintenance of the street is ministerial.

A municipality, in determining the character or plan of construction of streets, sidewalks and other public ways, acts in a legislative, *quasi*-judicial and discretionary capacity. Therefore, it is not ordinarily liable for injuries resulting from danger or defects inherent in the plan of construction adopted or due solely to a mistake of judgment in adopting the plan. The rule is not limited to cases where the plan adopted was determined in advance, but applies equally where it was ratified and adopted by the municipality after the actual work of construction. 43 C. J., 1015; L. R. A., 1918-D, 1103; 37 L. R. A., N. S., 1150; 43 A. R., 655.

In *Blackwelder v. Concord,* 205 N. C., 792, *Brogden, J.,* quotes from *Martin v. Greensboro,* 193 N. C., 573, with approval, as follows: "But in view of the allegations in the complaint, we must furthermore assume that the sidewalks were built and the railway track was laid in pursuance of a plan approved and adopted by the authorities of the city. We are not at liberty to conclude that they acted without deliberation or without due regard to the safety of the public. If they erred, at least the reasonable inference is that their error was one of judgment. It is generally held that a municipal corporation is not liable for injuries to person or property resulting from its adoption of an improper plan when the defects in such plan are due to mere error of this kind. It must follow that the exercise of judgment and discretion in the adoption by the city of a general plan for the improvement of its streets, the building of its sidewalks, and the selection or approval of the space to be occupied by the track of the street railway is not subject to revision by a court or jury in a private action for damages based on the theory that the plan was not wisely or judiciously chosen; although a private action may be maintained for defective construction of the work or failure to keep it in repair. Herein is the distinction between injuries resulting from the plan of a public improvement made in a city or town and those resulting from the mode of its execution. The adoption of the general plan involves the exercise of judgment; the duty of constructing and maintaining the work done in pursuance of the plan is ministerial. The exercise of discretionary or legislative power is a governmental function, and for injury resulting from the negligent exercise of such power a municipality is exempt from liability." 90 A. L. R., 1495.

McQuillan on Municipal Corporations, 2nd ed., sec. 2799, states the rule as follows:

"As a branch of the rule of nonliability of municipalities for *torts* in connection with the exercise of governmental functions, is the rule which distinguishes (1) ministerial duties from (2) legislative, judicial, and discretionary functions. Where the duty is not governmental, but ministerial and absolute, as distinguished from legislative, discretionary, judicial or *quasi*-judicial, the municipal corporation is liable for damages arising because of omission to perform it, or for negligence in its execution. . . .

"However, the line between ministerial and legislative or judicial duties is sometimes difficult to draw. The distinction would seem necessarily to rest upon a discretion had by the city to discharge or not to discharge the duty because, where the duty is absolute and imperative and the city has no discretion, the duty is ministerial, its discharge not depending on the exercise of judgment, but being required by law. It is by force of this reason for the distinction between ministerial and judicial duties that a duty which is judicial before the municipality has entered upon the performance of it, frequently becomes, when its performance is entered upon, ministerial. The municipality has a discretion to do or not to do the work; the duty is, therefore, judicial up to the time that it is determined to do the work; but when the work is ordered the law often requires that it be done in a particular manner, or that it be not done in a certain way, and, therefore, after the work is ordered, the duty of the municipality to do the work in the manner required and not to do it in the way forbidden, is ministerial. The municipality as to these two things has no discretion; as to them its judgment is superseded, controlled and directed by the requirements of the law, and its duty is to comply with these requirements. . . .

"Official action is judicial where it is the result of judgment or discretion. It is ministerial when it is absolute, certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion . . . (not so in this case).

"When the municipal council acts in its legislative capacity for governmental purposes the municipality is no more liable than the State would be for similar action taken by the Legislature. Likewise, a municipality is not liable for a failure to exercise powers entrusted to the judgment and discretion of its proper authorities, or for errors committed in their exercise. *Dargan v. Mobile,* 31 Ala., 469, 133 Am. Dec., 505; *Judd v. Hartford,* 72 Conn., 350, 44 Atl., 510; *Vaughtman v. Waterloo,* 14 Ind. App., 649, 43 N. E., 476; *Stackhouse v. Lafayette,*

26 Ind., 17, 89 Am. Dec., 450; *Brinkmeyer v. Evansville,* 29 Ind., 187; *Kelley v. Portland,* 100 Me., 260, 61 Atl., 180; *Claussen v. Luverne,* 103 Minn., 491, 115 N. W., 643, 15 L. R. A. (N. S.), 698; *Carroll v. St. Louis,* 4 Mo. App., 191; *Rosenbaum v. New Bern,* 118 N. C., 83, 24 S. E., 1, 32 L. R. A., 123; *Hill v. Charlotte,* 72 N. C., 55, 21 Am. Rep., 451; *Richmond v. Virginia Bonded W. H. Corp.* (Va.), 138 S. E., 503, 506, citing the text."

When North Person Street and other streets in that vicinity were paved it was a proper governmental function of the city of Raleigh to make provision to take care of the surface water. The commissioners determined that catch basins and a storm sewer were too expensive and decided to use the only other engineering practice for such purpose, which was the use of valley gutters.

When the street was constructed the top surfacing of the valley gutters, as well as of the street, was of asphalt composition. A change of the surfacing to concrete so as to better care for the increasing traffic upon this street was not a departure from the original plan, such as would impose liability upon the city.

It might be well to note that while the statute prescribing rules and regulations for the operation of motor vehicles provides for certain maximum limits of speed, the controlling rule is that a motorist must at all times operate his motor vehicle with due regard to the width, traffic and condition of the highway. It is to be doubted that there is any danger existing to traffic by reason of the construction of these valley gutters so long as motorists operate their vehicles across the same with due regard to the condition existing. It is difficult to make any road or street free of hazard. The court below correctly held that this action is controlled by the principles enunciated in *Blackwelder v. Concord, supra.* The judgment below is

Affirmed.

CONNOR, J., dissents.

CLARKSON, J., dissenting: The majority opinion holds that the judge in the court below should have peremptorily instructed the jury in favor of the city of Raleigh on the issue of negligence. From this view I dissent.

Ordinarily negligence is one of mixed law and fact (*Filer v. N. Y. Central R. R.,* 49 N. Y., 47), but the question of negligence is primarily factual. *Lane v. Town,* 142 N. Y., 510, 37 N. E., 473; 1 Shearman & Redfield, the Law of Negligence, 6th ed., sec. 52. "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law but of fact, and to be settled by a jury; and this whether the uncertainty arises from a con-

flict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them." *R. & D. R. v. Powers,* 149 U. S., 43, 37 L. Ed., 642. "It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court." *Grand Trunk Ry. v. Ives,* 144 U. S., 408, 36 L. Ed., 485. If more than one inference can be drawn from the facts, the one of those inferences would permit the plaintiff to recover, the plaintiff has a right to have the jury pass on the facts. Even though the judge himself may not be convinced that such an inference is the sound and correct one, he must transfer this decision to the jury, the recognized fact-finding body. 1 Shearman & Redfield, *ibid.,* sec. 54. "Courts should not speak too confidently in determining as a matter of law what facts may be ignored by prudent people whose duty it is to be reasonably careful for the personal safety of others." *Queeney v. Willi,* 225 N. Y., 374, 122 N. E., 198.

The majority opinion recognizes that a city is liable for negligence in the care and maintenance of its streets, but that this rule is subject to an exception: Where the defect is one which was a part of the original, general plan of the city in constructing the streets, the city is not liable for injuries caused thereby. The majority rests the decision in this case upon this exception as stated in *Blackwelder v. Concord,* 205 N. C., 792. The exception, as there stated, dealt with a "fault . . . of the original plan of construction and drainage," and the decision was that the injury resulted "from the plan adopted in the exercise of the judgment of the governing authorities *and not from negligence in the execution of the plan in the construction and maintenance of the streets.*" (Italics mine.) *Ibid.,* p. 795. If there was no general plan in the present case, or if after the adoption of such a plan it was executed negligently or the construction and maintenance was executed negligently, the rule of the *Blackwelder case* is itself authority to support a recovery by the plaintiff.

Whether the defect in the street involved in this case was a part of the original plan of construction or grew out of the later construction and maintenance of this street is the determinative question. On this score the majority view is that there was no evidence of a departure from the original, general plan. Here I differ. There was some evidence that there was no general plan at all, and there was considerable testimony to the effect that changes had been made in the state of the street at this point. The following, which in my opinion should have gone to the jury, indicates the tenor of this evidence:

The construction engineer, who was with the city when the street was originally paved in 1915, testified: "There was no general plan adopted by the city of Raleigh prior to the pavement on Person Street. Arrange-

ments were made for the paving of that street by petition of the property owners. . . . In the construction of the street I took into consideration the drainage of that particular area and I recommended a sewer—a storm sewer with catch basins. . . . It was determined by the city not to put in the storm sewer; only financial reasons given for it. After the city determined not to put in the storm sewer at that intersection the only other engineering practice we could do was to put in valley gutters. That was some long time before United States Highway No. 1 came to Raleigh. (This street is now a part of U. S. Highway No. 1, with its heavy through traffic, and the car in which plaintiff was riding was that of a nonresident traveling from New York to Florida.) Back in 1913 and 1915 there were very few automobiles in Raleigh then at all; the traffic at that time consisted mostly of horse-drawn vehicles. . . . In 1915 these valley drains were put in with . . . approximately ten inches fall in the valley, from the top of the crown of the street to the invert of the valley gutter. . . . These two valley gutters were a distance of 42 feet from invert to invert. . . . I would say those valleys remained there in the street eighteen months to two years the first time, and *were then partially filled in with a mixture of asphalt.* . . . I don't guess we raised the valley gutters at that time over two or three inches. . . . *Traffic conditions commenced to get more and more on the street and we got complaints about the dips there and we were trying to eliminate them as far as possible . . . We were working on those valleys, building them up, several times between 1913, 1915, and 1917. . . . During Mr. Page's administration Mr. Lassiter's force went out to that intersection and cut out the asphalt entirely down to the concrete base and replaced it with a concrete gutter; they raised the fall three or four inches, leaving anywhere from a six- to a seven-inch dip in there. That six- or seven-inch dip on each side remained as it was until February of last year* (the time of the accident). . . . *The purpose in going there and rebuilding that intersection was to eliminate that dip as much as possible, to ease it up.* . . . It eased up the accidents at that intersection; it was not a cure for them entirely; *there was still a severe traffic hazard at that intersection.* That hazard existed there up until this lady was injured last February. . . . I think the installation of catch basins placed on the west side at each corner and carried under the intersection through pipes is the only and best way to eliminate the traffic hazard at that intersection. . . . The engineering profession, as traffic has grown, put in a storm sewer and catch basin every time they can. Sometimes money keeps them from doing it. The old valleys are regarded as an antiquated method of construction."

The police officer in charge of the traffic department who served with the Raleigh police from 1924 to 1933 testified to the numerous accidents

at this point, concluding "That was considered one of the worst places in the city. . . . In approaching the dip you do not see it until you are on it."

There was a considerable body of similar evidence supporting this evidence of the engineer and police officer. In my opinion this evidence was ample to support the finding that the Raleigh officials, recognizing the defect in the original construction in the face of the increasing traffic load, undertook again and again to alter and modify that plan so as to reduce the hazard. It appears clear that such efforts, extending over a period of twenty years, were clearly *ministerial* in nature and not *governmental,* and that these were decisions of *administrative officers* in the discharge of *mandatory* general duties of maintenance and not the solemn acts of the *governing body* in the discharge of a *quasi-judicial* discretion in laying out a general plan of street construction. So long as they relied upon the original plan of construction they *might* have been protected, although there is authority to the contrary. *District of Columbia v. Caton,* 48 App. D. C., 96; *Perotti v. Bennett,* 94 Conn., 533, 109 Atl., 890; *Lebanon v. Graves,* 178 Ky., 749, 199 S. W., 1064; *Malloy v. Walker, Twp.,* 77 Mich., 448, 43 N. W., 1012.

Even where the rule permitting reliance upon the protection of the original plan is followed, if a city materially alters the original condition of a highway in the discharge of its duty to maintain it and in doing so leaves it in a condition dangerous to the general public, it should be held liable for an injury caused by its negligence. Particularly where a municipality has for twenty years had notice of the danger of a defect in original construction and has on numerous occasions altered the original condition of the street but without remedying the defect, I think it should be left to the jury to determine whether the city has departed from the original plan and, if so, whether the city in the discharge of the administrative duty of maintenance has been negligent.

A dangerous defect in a street is not by reason of its age any less dangerous to persons passing over it for the first time. A municipality does not by prescription attain the right to be negligent. Rather to the contrary, the older the defective condition the greater the certainty that the officials have notice of it. Municipalities should not be encouraged to maintain conditions which they know to be dangerous. The click of singletree and the jangle of trace chains have given way to the purr of engines and the scream of brakes. Highway conditions which were safe enough for travel in a more leisurely era may become a menace in the hurried life of today. Time marches on, and so must the law. Old rules, born of another day, must constantly be scrutinized in the light of a changing world. The ever restless troops of time in-

cessantly storm the old citadels. The oasis where we pause for the night is not the end of the pilgrimage; the Holy City which we seek always lies ahead. The unquestioning acceptance of the rules of the past is not an unmixed blessing. A formal logic which reasons from precedent alone sometimes insulates the mind against the overwhelming logic of reality. I am unwilling to extend further the logic of the rule which frees municipalities from liability for an injury due to a defect which was a part of the original, general plan of street construction. That rule savors too strongly of the attitude of the tyrant kings of the Middle Ages who justified the most vicious wrongs by the simple formula, "The king can do no wrong." In *Jack v. Greece,* 135 Misc., 479, 238 N. Y. Supp., 294, it was said: "The courts will not substitute their judgment for that of towns in planning a public improvement, but when the improvement has been made they will hold towns to their obligation to keep the improvement, if a highway, in a reasonably safe condition, and thus impose liability even though the condition was of original construction." In *Kiernan v. New York,* 43 N. Y. S., 538, 14 App. Div., 156, there is a statement of what I conceive to be the better rule: "It cannot be held, as a general proposition, that a city may excuse itself from a charge of negligence as to the condition and care of its streets merely by claiming that it acted judicially in determining to leave the street in a dangerous condition for public travel. The cases in which any such rule can be applied at all must necessarily be quite limited." It is because the view of the majority involves an extension of the rule and not a strict limitation upon its application that I dissent.

Retrospect: The plaintiff was a guest in a Buick sedan (1933 model) driven by her husband, on the way from New York to Florida. The plaintiff, her husband, and two friends were in the car. They had stopped overnight at a tourist home in Raleigh. At about 7:30 o'clock the next morning they started on to Florida. Plaintiff was sitting in the back seat with a lady friend. Her husband was driving about 18 or 20 miles an hour along Person Street, going south on U. S. Highway No. 1, and at the intersection of Person and Jones streets, plaintiff testified: "The car went down in a ditch and I was thrown up to the top of the car. It went down and I was thrown up again to the top of the car. I did not know what was going on. I just couldn't pick myself up. I fainted. That ditch was on one side of the street, on Person Street, at the intersection of Jones. I went into the first ditch and before I knew what happened we went into another ditch. . . . I was put into a cast from my knees up to my chin. . . . I had no use of my hands or arms. I couldn't sleep during that period and they had to give me injections—about four or five a day—to kill the pain for a short time, but it always came back. I cried all the time, it hurt me all

over. I suffered terribly." She described her terrible suffering. The doctor in New York, who later attended her, testified in part: "The fracture is of a permanent nature bearing in mind that there is a deformity which cannot be bettered in any way. It is a fixed deformity causing undue tension of the muscle and tendon structures about the side of fracture."

The two ditches or gulleys were six or seven inches deep, and the car in crossing caused plaintiff, while riding in the rear seat, to be thrown to the top of the car. The testimony of the city engineer shows no city planning by the governing body of the city at this intersection—at least this was a question for the jury, if the planning would determine this controversy. It was in evidence that on numerous occasions accidents occurred and cars and persons were injured at the intersection where these dips and gulleys were, and the accidents reported to the city of Raleigh. The jury awarded plaintiff a small verdict—$1,500.

We are now spending hundreds of thousands of dollars inviting strangers to North Carolina. We should at least assure these strangers of a safe haven within our borders. The jury of twelve men, under the law of "Good moral character and sufficient intelligence," gave damages. I think their verdict should be sustained. To the traveling public let us wave the usual signal, "Thank you; come again."

DOLLY O. STYERS v. FORSYTH COUNTY ET AL.

(Filed 15 December, 1937.)

1. **Sheriffs § 2—Ch. 451, Public-Local Laws of 1929, held to give county commissioners authority only over deputies placed on salary basis.**

   Ch. 451, Public-Local Laws of 1929, giving the county commissioners of Forsyth County certain authority over deputies sheriff, applies only to deputies placed on a salary basis under the discretionary power given the commissioners by the act, and the power to discharge deputies given by sec. 6 of the act refers only to deputies placed on a salary basis by the commissioners, and the county commissioners exercise no control or supervision over fee deputies, who are appointed by, and act for, the sheriff, and whose only official connection with the county is through the sheriff.

2. **Statutes § 5a—**

   The title of an act may be called in aid of its construction.

3. **Master and Servant § 38—Deputies sheriff are not employees of the county within the meaning of the Compensation Act.**

   Deputies sheriff are not employees of the county within the meaning of the North Carolina Workmen's Compensation Act as the office of deputy sheriff is constituted under the general laws of the State, and ch. 451,

Public-Local Laws of 1929, does not apply to fee deputies in Forsyth County, and has no bearing upon the question of whether such fee deputies are employees of the county. As to whether deputies placed upon a salary under provision of ch. 451, Public-Local Laws of 1929, are employees of the county within the meaning of the Compensation Act, *quære.*

4. Sheriffs § 2—Deputy sheriff is appointee of sheriff and acts in his stead in ministerial matters, and is not agent or employee.

A deputy sheriff holds office as an appointee of the sheriff, and acts in his name and stead in ministerial matters, and the law casts responsibility on the sheriff for the acts of his deputy in the same manner as if the sheriff had officially performed the acts, and a deputy holds an appointment as distinguished from an employment, and is neither an employee nor an agent of the sheriff. The cases referring to a deputy as an "agent" or "employee" of the sheriff distinguished in that those cases should be interpreted with reference to the question of law therein presented as to the liability of the sheriff to third persons injured by the acts or omissions of a deputy.

5. Master and Servant § 38—

A deputy sheriff is not an employee of the sheriff within the meaning of the North Carolina Workmen's Compensation Act.

DEVIN, J., dissenting.

CLARKSON, J., concurs in dissent.

SCHENCK, J., concurs in dissent in part.

APPEAL by plaintiff from *Hill, Special Judge,* at March Term, 1936, of FORSYTH.

Proceeding under Workmen's Compensation Act to determine liability of defendants to dependents or next of kin of Jessie J. Styers, deceased deputy sheriff.

The hearing Commissioner made findings which were later adopted and approved by the Full Commission. In summary they are:

1. The deceased, Jessie J. Styers, sustained an injury by accident on 2 October, 1934, which resulted in his death, and at the time of the accident he was engaged in the performance of his duties as a deputy sheriff.

2. The deceased left as dependents his widow, claimant herein, and one son.

3. The provisions of ch. 451, Public-Local Laws 1929, entitled "An act authorizing the placing of all deputies sheriff in Forsyth County on a salary basis," are set out and made a part of the findings. Under this act the commissioners of Forsyth County are authorized to place the deputies sheriff of said county on a salary basis, and effective contemporaneously with such determination, following discussion and consideration with the sheriff, "to employ and to discharge deputies sheriff." In section 6 of the act the commissioners are authorized and empowered in

their discretion, after consultation with the sheriff, "to discharge any deputy sheriff of the county at any time without prior notice."

4. The deceased was not placed on a salary by the county commissioners and they exercise no control over him. He was appointed by the sheriff and worked on a fee basis. He was not an employee of Forsyth County.

5. The defendant, J. Transou Scott, sheriff, had more than five regular employees in the form of fee deputies, and the said sheriff had not rejected the provisions of the Workmen's Compensation Act. The deceased was an employee of the sheriff, and the injury by accident, which resulted in his death, arose out of and in the course of his employment.

Upon these findings compensation was awarded the plaintiff as against J. Transou Scott, sheriff, and denied as against Forsyth County and its insurance carrier, the Maryland Casualty Company.

On appeal to the Superior Court it was held that the deceased was not an employee of either defendant, and that the claimant was not entitled to compensation under the act.

From the judgment of the Superior Court the claimant appeals, assigning errors.

Elledge & Wells for plaintiff, appellant.
Hutchins & Parker for defendant Forsyth County, appellee.
Ratcliff, Hudson & Ferrell for defendant sheriff, appellee.
W. C. Ginter for defendant Casualty Co., appellee.

STACY, C. J. The first question for decision is whether plaintiff's intestate at the time of his injury and death was an employee of Forsyth County, engaged in compensable work within the meaning of the Workmen's Compensation Act.

The pertinent findings of the hearing Commissioner, which were later approved by the Full Commission, follow:

"It is argued that by virtue of said ch. 451, Public-Local Laws of 1929, the deputies sheriff of Forsyth County are 'fully subject to the county commissioners.' We cannot so find. It is true that the county commissioners are authorized in their discretion to place the deputies sheriff on a salary basis and that contemporaneously with such action said chapter clothes the commissioners with the power to appoint and to discharge deputies sheriff. The evidence is that the deceased was appointed by the sheriff, that he worked on a fee basis, and there is no evidence that the county commissioners exercised any control over him. We find as a fact that the county commissioners never placed the deceased upon a salary basis and that he was not subject to discharge by them. For the reasons stated it is further found as a fact that the deceased was not an employee of Forsyth County."

Upon a review of the case the Full Commission concluded:

"We also agree with the conclusions of law of Commissioner Wilson in which he decides that Forsyth County and the insurance carrier, Maryland Casualty Company, are not liable for compensation in this case.

"The special act refers to Forsyth County, ch. 451, Public-Local Laws of 1929, relates entirely to deputies sheriff who are placed on a full time salary basis. As to these deputies the county is authorized and empowered to employ and to discharge them. It is true that in section 6 of the act the commissioners are authorized and empowered in their discretion to discharge any deputy sheriff of the county at any time without prior notice. It is our opinion that this section, construed with the act as a whole, would be limited to those deputies who were placed by the commissioners on a full time salary basis. This is the main subject matter of the act and of which it deals in details in other sections thereof."

The foregoing is correct, as the legislation in question deals only with salaried deputies, and makes no reference to fee deputies. Indeed, the title of the act, which may be called in aid of construction (*Freight Discrimination Cases,* 95 N. C., 434), is indicative of its purpose: "An act authorizing the placing of all deputies sheriff in Forsyth County on a salary basis." Those not placed upon a salary basis remain fee deputies, unaffected by the statute. This act, then, may be put aside as inapplicable. It has no bearing upon the case. The deceased did not come within its terms any more than other fee deputies appointed by the sheriff. It was not intended to cover such deputies. The commissioners exercise no control or supervision over fee deputies. This belongs exclusively to the sheriff. Nor was it intended by sec. 6 of the local act in question to confer authority upon the commissioners in their discretion to discharge such deputies. They are appointed by and act for the sheriff, who alone is responsible for their conduct. They have no official connection with the county except through the sheriff.

It is conceded that the deceased was not an employee of the county within the meaning of the Workmen's Compensation Act, unless made so by this special legislation. *Saunders v. Allen,* 208 N. C., 189, 179 S. E., 745.

In a well considered opinion in *Board of Supervisors v. Lucas,* 142 Va., 84, it was held (as stated in the 7th headnote, which accurately digests the opinion): "A deputy sheriff or special officer appointed by a sheriff fails to come within the purview of the Workmen's Compensation Act as an employee of the county, because there is no contract of hire, express or implied, between him and the county. It would also seem that he would be excluded on the ground that the duties of a deputy

sheriff are not in the usual course of the trade or business of the county or its governing body."

The law as declared in Virginia is accordant with our own decisions. *Saunders v. Allen, supra; Hollowell v. Department of Conservation and Development,* 206 N. C., 206, 173 S. E., 603. It follows, therefore, that liability was properly denied as against the county and its insurance carrier. On the argument it was stated that, in fixing the insurance rate for the county, fee deputies were not reported as basis for premium.

The second question presented for decision is whether plaintiff's intestate at the time of his injury and death was an employee of the sheriff within the meaning of the Workmen's Compensation Act. The answer to this question was adumbrated in *Starling v. Morris,* 202 N. C., 564, 163 S. E., 584, and later given in *Borders v. Cline, ante,* 472.

The status of a fee deputy in this jurisdiction is that of a ministerial officer—an "arm" or "hand" of the sheriff—who acts for the sheriff in ministerial matters in his name and stead. 22 R. C. L., 582. "A deputy is usually defined to be one who, by appointment, exercises an office in another's right." *Piland v. Taylor,* 113 N. C., 1, 18 S. E., 70. Consequently it has been held that upon the insanity of the sheriff his deputy can no longer act. *Somers v. Comrs.,* 123 N. C., 582, 31 S. E., 873.

It is true that in some of the cases a deputy is loosely spoken of as an "employee of the sheriff" or as an "agent of the sheriff," but the designation is inexact, and is not to be found in those cases dealing with his precise status. *Lanier v. Greenville,* 174 N. C., 311, 93 S. E., 850; *Cansler v. Penland,* 125 N. C., 578, 34 S. E., 683; *Patterson v. Britt,* 33 N. C., 383. Compare *R. R. v. Fisher,* 109 N. C., 1, 13 S. E., 698. In the cases where such appellation appears the court was concerned with the liability of the sheriff for some act or dereliction of his deputy, and not with the precise principle—agency, identity, or responsibility cast by law—upon which liability should be made to depend, for the application of any one of these principles would produce the same result in an action by the injured third person. See *Hanie v. Penland,* 194 N. C., 234, 139 S. E., 380, and *R. R. v. Fisher, supra.* The relation existing between the sheriff and his deputy, upon which liability for compensation depends, was not in mind or considered. 'Tis well again, perhaps, to observe the oft-repeated admonition that every expression, to be correctly understood, ought to be considered with a view to the circumstances of its use. *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356. And as said by *Marshall, C. J.,* in *U. S. v. Burr,* 4 Cranch 470: "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered."

As between the injured party and the sheriff, there is a choice of theories, equally efficacious, and all leading to liability. But when we come to consider the responsibility of the sheriff to his deputy a different question is presented. This calls for a reconsideration of the former decisions before they can be regarded as precedents in a case like the present where the correctness of the theory upon which they are predicated is to be determined. Instead of controlling precedents, forsooth some are found to be only inns for the night, good enough for the time and purpose, but the law, like the traveler, was up and moving on the morrow.

For example, it is suggested that *Willis v. Melvin,* 53 N. C., 62 (December Term, 1860), and *S. v. Alston,* 127 N. C., 518, 37 S. E., 137 (September Term, 1900), are in conflict, and, at first blush, they may seem to be. The holding in the former was that a deputy sheriff is not a "public officer" within the meaning of the reference statute, Rev. Code, ch. 31, sec. 114, while the pronouncement in the latter was that the defendant who resisted a deputy tax collector of an ex-sheriff with tax list in his hands was guilty of resisting and obstructing a "public officer." The supposed conflict, however, is more fanciful than real for, in fact, the two cases are consistent, when viewed in the light of the true character of a deputy who acts authoritatively only as the sheriff's representative. The first was an action by the sheriff against his deputy; the second a criminal prosecution.

"The deputy is not the agent or servant of the sheriff but is his representative, and the sheriff is liable for his acts as if they had been done by himself." *Waste, J.,* in *Michel v. Smith,* 188 Cal., 199, 205 Pac., 113.

In *Flanagan v. Hoyt,* 36 Vt., 563, 86 Am. Dec., 657, it was held that acts of a deputy are not to be regarded as acts of the sheriff in the sense of either agency or identity, but rather in the sense of official responsibility cast by law upon the sheriff for the acts of his deputy.

Speaking directly to the point, *Barrett, J.,* delivering the opinion of the Court, said:

"It is claimed that all official acts by the deputy are to be regarded as done by the sheriff to the same intent, and to every legal effect, as if done by the sheriff himself—in other words, that the deputy is but the agent or instrument by which the sheriff acts, and has no independent status and functions. We are mindful of what has been held and said in *Johnson v. Edson,* 2 Aiken, 299; *Davis v. Miller,* 1 Vt., 9; *Bliss v. Stevens,* 4 Id., 88, and *Ayer v. Jameson,* 9 Id., 363, and though no practical inconvenience or injury would seem likely to result from the view therein taken and expressed, as to the relation existing between the sheriff and his deputy, if confined to cases of a similar kind, it still

seems to us that it would have been as well, even in those cases, to have adopted a different view, and one that could have been practically acted upon in all cases without incongruity, and without resulting in embarrassment or injury in any.

"Without undertaking to overrule the view expressed in those cases, as applied and acted upon in them, we think the truer and more legitimate view is that while in a certain sense the acts of the deputy are to be regarded as the acts of the sheriff, yet not in the sense of either agency or identity, but rather in the sense of official relation and of responsibility cast by law upon the sheriff for the acts of his deputy, not in the sense that what the deputy does is done by the sheriff, but that for what he does the sheriff is made responsible, the same as if he had officially done the same thing."

Again, in *Rich v. Graybar Electric Co.,* 125 Tex., 470, 84 S. W. (2d), 708, 102 A. L. R., 171, it is held: "The liability of a sheriff or constable for the official acts of a deputy is not based upon the doctrine of *respondeat superior,* but on the fact that the deputy is his representative for whose acts he is liable as if they had been done by himself."

Likewise, in *Kusah v. McCorkle,* 100 Wash., 318, the whole matter is summed up in a single pithy sentence: "The acts or omissions of Gifford as deputy were the acts or omissions of McCorkle as sheriff."

Under our law a deputy is authorized to act only in ministerial matters, and in respect of these matters he acts as vice principal or *alter ego* of the sheriff, for the sheriff "and his deputy are, in contemplation of law, one person." *R. R. v. Fisher, supra; Willis v. Melvin, supra.* "Hence it is that, although a sheriff in some of his duties is a judicial officer, and as such may not act by deputy, yet in the main his duties are merely ministerial, and as to such it is implied, when not so provided by statute, that he may act by a substitute"—*Dillard, J.,* in *Yeargin v. Siler,* 83 N. C., 348. The acts of the deputy are acts of the sheriff. *Horne v. Allen,* 27 N. C., 36; *Hampton v. Brown,* 35 N. C., 18; *S. v. Alston, supra.* For this reason the sheriff is held liable on his official bond for acts of his deputy. *S. v. Roane,* 24 N. C., 144; *McLean v. Buchanan,* 53 N. C., 444; *Spencer v. Moore,* 19 N. C., 264; *S. v. Moore,* 19 Mo., 369, 61 Am. Dec., 563; *Brinson v. Thomas,* 55 N. C., 414, 67 Am. Dec., 224. "A sheriff is liable for the acts or omissions of his deputy as he is for his own." *Sutton v. Williams,* 199 N. C., 546, 155 S. E., 160. In short, a deputy is a lieutenant, the sheriff's right-hand man, whose duties are coequal in importance with those of his chief. One who represents the high sheriff of the county in the capacity of deputy occupies no mean place. To call him an under-sheriff, as he is referred to in some of the cases, is more nearly correct than to style him an employee. He holds an appointment as distinguished from an employ-

ment. Such was his status at common law. I Blackstone's Commentaries, 343; *South v. Maryland, Etc.,* 95 U. S., 396; *Wilkerson v. Dennison,* 113 Tenn., 237, 80 S. W., 765, 106 A. S. R., 821, and note, 3 Ann. Cas., 297, and note. Such is his status now. *Borders v. Cline, supra; Biehn v. Bannick,* 166 Wash., 465; *Clement v. Dunn,* 114 Cal. App., 60; *Price v. Pace,* 50 Idaho, 353; 24 R. C. L., 979; 57 C. J., 731.

The responsibility of a sheriff for the acts of his deputy, done *colore officii,* rests upon the principle that "the hand that does or procures the act is liable." *Coltraine v. McCain,* 14 N. C., 308, 24 Am. Dec., 256; *Satterwhite v. Carson,* 25 N. C., 549; *Martin v. Martin,* 47 N. C., 285; 22 R. C. L., 586. "If there be a nonfeasance or neglect of duty by the under-sheriff, the sheriff alone is responsible to the party injured, and the default is a matter to be settled between the sheriff and the under-sheriff." *Lyle v. Wilson,* 26 N. C., 226. See *Willis v. Melvin, supra.* Whether this responsibility has been shifted to the county in the case of salaried deputies, we make no decision as the question is not presently before us. No doubt the proper authorities have considered the matter.

On the whole, it is concluded that the judgment of the Superior Court is correct and that it should be upheld.

Affirmed.

DEVIN, J., dissenting: A careful consideration of this case leads me to the conclusion that by virtue of ch. 451, Public-Local Laws of 1929 (applicable only to Forsyth County), the status of a deputy sheriff as an employee of the county is thereby recognized and established, since by sec. 6 of the act express authority is given the county with reference to fee as well as salaried deputies. The statutory definitions of "employee," "employer," and "employment" are comprehensive enough to include the service of a deputy sheriff. Certainly the uncontroverted facts establish that the deceased deputy sheriff, Jessie J. Styers, serving under appointment by the sheriff, lost his life while engaged in serving papers for the county of Forsyth for which the county would have had to pay him, and it was found as a fact by the Industrial Commission that the injury resulting in his death arose out of and in the course of his employment, if he were at the time an employee of the county or the sheriff.

The holding of this Court that the deputy sheriff is an employee neither of the county nor the sheriff leaves his employment status as a species of *nullius filius*—he is employed by nobody—yet he serves.

I am authorized to say that *Clarkson, J.,* concurs in this dissenting opinion, and that *Schenck, J.,* concurs in dissent from that part of the majority opinion which holds that the deputy is not an employee of the sheriff.

STATE v. O. C. JOHNSON.

(Filed 15 December, 1937.)

1. Criminal Law § 23b—Prosecution for continuing offense as bar to subsequent prosecution.

The prosecution of a defendant for a breach of the criminal law constituting a continuing offense is a bar to a subsequent prosecution for such breach during any time up to the institution of the first prosecution, but does not bar a subsequent prosecution for such breach after the institution of the first prosecution.

2. "Continuing Offense" defined.

A continuing offense is a breach of the criminal law not terminated by a single act or fact, but which subsists for a definite period and is intended to cover or apply to successive similar obligations or occurrences.

3. Criminal Law § 23b—Prosecution for willful failure to support illegitimate child is not bar to subsequent prosecution.

Defendant was convicted and served the sentence imposed for willfully failing and refusing to support his illegitimate child, ch. 228, Public Laws of 1933. After completion of his term, defendant still willfully failed and refused to support the child, and this prosecution was instituted for breach of the statute subsequent to his release. Defendant entered a plea of former jeopardy. *Held:* The violation of the statute constitutes a continuing offense, and the prior prosecution is not a bar to a prosecution for breach of the statute for the period subsequent to defendant's release from the imprisonment imposed in the first prosecution.

4. Bastards § 1—

The willful failure and refusal to support an illegitimate child, ch. 228, Public Laws of 1933, constitutes a continuing offense, and the decisions under C. S., 4447 are inapposite, since under the former act abandonment was an essential element of the offense.

APPEAL by defendant from *Sinclair, J.*, at the May Special Term, 1937, of GUILFORD. No error.

This is a criminal action in which the defendant is charged with violating the provisions of chapter 228 of the Public Laws of 1933, C. S., 276, subsections A to I, it being charged that the defendant willfully neglected and refused to support and maintain his illegitimate child begotten of Mozelle Ray.

On 2 April, 1936, defendant was indicted by warrant issued by a justice of the peace, in which he was charged with unlawfully and willfully neglecting and refusing to support and maintain his illegitimate child, begotten of Mozelle Ray. Probable cause was found and he was held under bond for his appearance in the municipal court of Greensboro. Upon his trial in the municipal court he was convicted as charged and prosecuted his appeal to the Superior Court. On trial in the Supe-

rior Court the jury found, upon separate issues, that the defendant was the father of the illegitimate child of the prosecuting witness, and that he had willfully failed and refused to support it. Judgment was pronounced that the defendant be confined in jail for a term of six months and assigned to work the roads as provided by law. The defendant served the term imposed and after the completion thereof still willfully and unlawfully failed and neglected to support said child. Thereupon, on 1 March, 1937, another warrant, charging that the defendant unlawfully failed and refused to support his illegitimate child begotten upon the body of Mozelle Ray for the period subsequent to his discharge was issued by a justice of the peace. When the case was called for trial the defendant entered his plea of former jeopardy. Probable cause was again found and the defendant was held under bond for trial in the municipal court. The municipal court overruled the defendant's plea of former jeopardy and entered a verdict of guilty. From judgment pronounced the defendant appealed to the Superior Court.

On the trial of the defendant in the Superior Court the jury rendered the following special verdict upon the plea of former jeopardy, to wit:

"We, the jury, upon the issue of former jeopardy submitted to the jury, find the following facts and return the same as its special verdict.

"That the defendant O. C. Johnson was indicted by warrant dated 2 April, 1936, alleging that he did unlawfully and willfully fail and neglect to support an illegitimate child begotten on the body of Mozelle Ray, by the said O. C. Johnson.

"That said warrant was issued by W. S. Lyon, justice of the peace, and upon hearing on said warrant by John Strickland, J. P., before whom said case was removed, the defendant was bound to the municipal court of the city of Greensboro, in which court said case was tried on 24 April, 1936, under the law as set forth in chapter 228, Public Laws of 1933, when and where the defendant was convicted, and from the order made by said municipal court appealed to the Superior Court of Guilford County.

"That said case came on for trial at the August, 1936, Term of Guilford County Superior Court, when and where the jury returned the following answers to the issues submitted, to wit:

"1. Is the defendant the father of the illegitimate child of the prosecuting witness, as alleged by her? Answer: 'Yes.'

"2. Has the defendant willfully failed and refused to support and maintain his illegitimate child? Answer: 'Yes.'

"That said court was a court of competent jurisdiction, that the jury trying said case was duly sworn and impaneled and was legally constituted to try and pass upon said case.

"That upon the coming in of the verdict, counsel for the defendant, after conferring with his client, stated that defendant does not feel that he should make any contribution to the prosecuting witness for the use and benefit of the child after the court had intimated $1.50 per week, he admitting that he was earning $20.00 per month, and that he would rather be confined under statute.

"Whereupon, it is ordered and adjudged that the defendant be confined in the common jail of Guilford County for a period of six (6) months, to be assigned to work under the supervision of the State Highway and Public Works Commission as provided by law.

"That no other or further provision was imposed upon the defendant and he has fully served said sentence.

"That after the defendant had completed his term of six months and returned home another warrant was taken out against the defendant under date of 1 March, 1937, as follows:

"That on or about 15 February, 1937, O. C. Johnson did unlawfully fail, refuse, and neglect to provide adequate support for his illegitimate child begotten upon the body of one Mozelle Ray:

"That in answer to said charge the defendant enters a plea of former jeopardy, and alleges that he was tried and convicted of the identical offense at the August, 1936, Term of this court, and has served six months sentence, which is the maximum under law, and that said offense is not a continuing offense under the law and that he is not guilty.

"That the child with which the defendant is charged with unlawfully and willfully failing to support in the present warrant is the same child set out and described in the warrant on which the defendant was tried at the August, 1936, Term, and for which conviction he served the term of six months.

"That the defendant has never contributed anything to the support of said child.

"The defendant in the instant case was tried on said warrant in the municipal court of the city of Greensboro; his plea of former jeopardy was overruled, verdict of guilty was rendered against him, and judgment was rendered the defendant to serve a sentence of six months on the roads, to be assigned to work under the supervision of the State Highway and Public Works Commission, as provided by law, and suspended upon condition that the defendant pay to the prosecuting witness for the support of the illegitimate child in question the sum of three dollars ($3.00) per week. From said verdict and judgment the defendant gave notice of appeal to the Superior Court of Guilford County.

"We, the jury, find the foregoing facts, and if on such facts the court is of the opinion that the defendant has heretofore been placed in

jeopardy on the charge contained in the warrant, then we, the jury, answer the issue submitted to us, 'Yes'; and if the court be of the opinion that the defendant has not heretofore been placed in jeopardy, then we answer the issue, 'No.'"

An additional issue was submitted to and answered by the jury as follows:

"2. Has the defendant O. C. Johnson willfully failed and refused to support his illegitimate child? Answer: 'Yes.'"

Upon the facts found by the jury, as set forth in its special verdict, the court was of the opinion, and so held, that the defendant had not theretofore been placed in jeopardy on the charge contained in the warrant, and thereupon, under authority contained in the special verdict, answered the first issue as to former jeopardy, "No."

Upon the coming in of the verdict, the court pronounced judgment. The defendant excepted to the ruling of the court that the facts found by the jury, as incorporated in its special verdict, did not sustain the plea of former jeopardy, and likewise excepted to the judgment pronounced, and appealed.

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

Sharp & Sharp for defendant, appellee.

BARNHILL, J. Does chapter 228 of the Public Laws of 1933 create a continuing offense? This is the one question involved on this appeal. If the act does not create a continuing offense, the defendant's plea of former jeopardy must be sustained. If it does create a continuing offense, his conviction upon a charge of willfully failing and neglecting to support his illegitimate child prior to 2 April, 1937, is a bar only to any further proceedings on account of his conduct prior to the date of his conviction. The defendant, through his counsel, consented that the second issue submitted to the jury should be answered in the affirmative, and he thereby admitted that since completion of his sentence under his former conviction he has willfully failed and neglected to support his illegitimate child. If the act creates a continuing offense, his conduct after his discharge in willfully failing and neglecting to support his illegitimate child creates a separate and distinct offense and his plea of former jeopardy will not avail him.

The prosecution of a defendant charged with the violation of a continuing offense is a bar to a subsequent prosecution for the same offense charged to have been committed at any time before the institution of the first prosecution. But it is not a bar to a subsequent prosecution for

continuing the offense thereafter, as this is a new violation of the law. Each day during which it is continued constitutes a separate offense and will support a separate prosecution, provided the warrant or indictment alleges separate and distinct times during which the offense was committed. 16 C. J., sec. 447. *Com. v. Peretz,* 212 Mass., 253, 98 N. E., 1054, Ann. Cas., 1913-D, 484; *Com. v. Robinson,* 126 Mass., 259, 30 Am. R., 674. Where the periods covered by the two indictments are entirely separate and distinct a prosecution under one will not bar a prosecution under the other. 16 C. J., sec. 447; *U. S. v. Swift,* 186 Fed., 1002; *Com. v. Anderson,* 220 Mass., 142, 107 N. E., 523.

A continuing offense is an unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force however long a time it may occupy. When such an act, or series of acts, runs through several jurisdictions, the offense is committed and cognizable in each. See *Armour Packing Co. v. U. S.,* 82 C. C. A. (U. S.), 135; 14 L. R. A. (N. S.), 400, 153 Fed. Rep., 1. A continuing offense is a transaction or a series of acts set on foot by an unintermittent force no matter how long a time it may occupy. Black's Law Dictionary. *People v. Sullivan,* 33 Pacific, 701, 9 Utah, 195; *Estepp v. State,* 11 Okla. Cr., 103, 143 Pacific, 64; *State v. Brown,* 133 Pacific, 1143. A continuing offense is an offense which continues day by day. *S. v. Jones,* 201 N. C., 424, 160 S. E., 468. An offense is a crime or misdemeanor; a breach of the criminal law. "Continuing" means enduring, not terminated by a single act or fact; subsisting for a definite period or intended to cover or apply to successive, similar obligations or occurrences. A continuing offense, therefore, is a breach of the criminal law not terminated by a single act or fact, but which subsists for a definite period and is intended to cover or apply to successive similar obligations or occurrences.

Can it be said that an indictment and conviction for keeping a gaming house, or maintaining a disorderly house, or a house of ill-fame, precludes further prosecution of the same defendant for keeping the same gaming house, or maintaining the same disorderly house, or house of ill-fame, after his discharge from imprisonment under the first conviction? It has not been so held by the courts. If a person is indicted for practicing law or medicine, or other profession requiring a license, without first having obtained such license, does he by his conviction and imprisonment thereby vest himself with a license to thereafter violate the law with impunity? Would one who is convicted of maintaining a public nuisance and who received the maximum term therefor, thereafter be protected by the plea of former jeopardy in maintaining the same nuisance at the same place and under the same circumstances after his discharge from custody? Can we say that one who is convicted on the

charge of vagrancy is forever thereafter protected by such a plea? We feel that no one would undertake to answer these questions in the affirmative.

Can it be said, then, that the defendant, by reason of the fact that he has been convicted and imprisoned for his violation of the statute under consideration up to 2 April, 1937, was thereby relieved from the duty imposed upon him by the statute? After his discharge from custody, was it not still his duty to support and maintain his illegitimate child, and was not his willful failure and neglect to do so a crime separate and distinct from the one for which he was convicted? We are of the opinion that these questions must likewise be answered in the affirmative. Could it be said that if the defendant and his illegitimate child had resided in one county for the first twelve months of the life of the child and they had thereafter moved their residence to some other county the defendant by willfully failing and neglecting to support the child during the full period had not committed an offense under this statute in each of the counties? Could he be indicted in the first county under a warrant specifying the period of residence in the second county, or could he be indicted in the second county under a warrant specifying the period of residence in the first? It seems to us that of necessity this statute must be construed as a continuing offense, and that the defendant's conviction for willfully failing and neglecting to support his child prior to 2 April, 1937, is no bar to a prosecution for a violation of the same statute subsequent thereto.

We do not consider that former decisions of this Court, under the provisions of C. S., 4447, are in point or controlling. An essential element of the crime created by that statute is abandonment. Without proof of abandonment a conviction cannot be had. This is certainly true up until the time the act was amended to make the offense as to the children a continuing offense. An abandonment takes place at a time certain. It cannot be continuing in its nature. The moment a husband separates himself from his wife with the intent to discontinue the marital relations and to disregard and shirk the marital obligations and responsibilities in respect to providing for support, and otherwise, abandonment is complete. The husband cannot again commit the same crime, as to the wife, without first reassuming the marital relations.

The court below properly held that defendant's plea of former jeopardy in this cause was no bar to the present prosecution.

No error.

STATE OF NORTH CAROLINA EX REL. A. J. MAXWELL, COMMISSIONER OF REVENUE, v. D. C. WADDELL, JR.

(Filed 15 December, 1937.)

1. Taxation § 29—Liability of income of trust estates to taxation.

The successive Revenue Acts show the clear intent of the Legislature, in the general plan of taxing all incomes, to tax incomes from trust estates to the trustee if such income is not distributable during the tax year, and to the beneficiary, if distributed or distributable during the tax year.

2. Same—Rents received by beneficiary under terms of will is taxable income and not bequest deductible from net income.

The will in this case devised a certain building to defendant for life in trust for the payment of an annuity to a designated beneficiary, with provision that all income from the building in excess of the annuity should belong to the defendant, with limitation over to another trustee upon defendant's death. Defendant paid inheritance taxes apportioned and assessed against his interest in the building. Defendant contended that the income accruing to him personally from the building was a bequest within the meaning of sec. 301 (2) (c), ch. 4, Public Laws of 1923, and was therefore deductible from his gross income in determining his net taxable income, until he should receive therefrom an amount equal to the value of the building apportioned to him on which he paid inheritance tax. *Held:* Bequests referred to in the statute include bequests of the *corpus* and not income derived from the property devised, and defendant, although having paid inheritance taxes on the value of his equitable interest in the *corpus* of the property devised, is subject to income taxes on the income received by him from the property.

3. Taxation § 28—

The right to receive rents from property devised in trust creates an equitable interest in the beneficiaries in the *corpus* of the property, and inheritance taxes are properly apportioned among them in accordance with their respective interests therein.

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

APPEAL by defendant from *Spears, J.*, at Chambers of WAKE.

Application for revision of income taxes assessed and to direct refund on income taxes alleged to have been improperly levied and collected.

An agreed statement of facts was submitted to the court substantially as follows:

1. Leila J. Waddell, wife of Duncan Cameron Waddell, defendant herein, died on or about 1 December, 1924, leaving a last will and testament. In Item V of the will she bequeathed to Gabrielle DeRossett Waddell an annuity of $1,000 for and during her natural life, to be paid from the income derived from the Paragon Building in the city of Asheville, North Carolina, which annuity was made a first charge on such income.

Item VI reads: "I give, devise and bequeath all the rest, residue and remainder of the estate, real, personal and mixed, and wheresoever situate, to my husband, Duncan Cameron Waddell, in fee, except that certain property in the city of Asheville, . . . known as the Paragon Building, . . . and I give and bequeath said Paragon Building to said Duncan Cameron Waddell, in trust to handle, manage, control and improve in such way as to him may seem desirable, and to collect all income therefrom, and out of said income he shall pay to Gabrielle DeRossett Waddell the annuity herein given in Item V hereof, and all income derived from said property, not required to pay said annuity, shall be and become the personal property of the said Duncan Cameron Waddell."

Item VII. "After the death of my husband . . . I give and bequeath the said Paragon Building property aforesaid . . . to the Wachovia Bank & Trust Company of Winston-Salem in trust to be held by it . . ." for purposes not involved in this controversy.

2. After the death of the testatrix the Paragon Building was appraised for inheritance tax purposes at $175,000. The value of Waddell's interest, as apportioned by the commissioner and being held subject to inheritance taxes, was $106,116 of the $175,000 valuation, on which amount inheritance taxes were assessed against Waddell individually as beneficiary, and the total amount of such taxes were duly paid by him to the Commissioner of Revenue.

3. Thereafter, for the years 1925 to 1935, both inclusive, the Commissioner of Revenue annually assessed against the defendant income taxes on all the net rents collected by him from the said Paragon Building, which income taxes defendant paid under protest and made due demand each year upon the said Commissioner for a revision and resettlement of same and a refund of the additional amount so paid.

The amount of the income taxes in controversy is not in dispute. Upon refusal of the Commissioner of Revenue to refund the income taxes the defendant claims were illegally collected from him, exceptions were duly entered and an appeal was duly taken to the State Board of Assessment, in accordance with sec. 7880 (156) of the Consolidated Statutes. The board denied the appeal, to which ruling the defendant duly excepted and appealed to the Superior Court of Wake County. The Superior Court held as a matter of law that the net rents collected by the defendant from the Paragon Building for the years in question are subject to income taxes, were properly assessed by the plaintiff, and were legally due by defendant, and that the defendant is not entitled to have same refunded to him.

From judgment in accordance therewith, defendant appealed to the Supreme Court, and assigned error.

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

Alfred S. Barnard and Jas. I. Mason for defendant, appellant.

WINBORNE, J. Upon the agreed facts of this case, are the net rents received by the defendant from the Paragon Building taxable income within the meaning of the Revenue Act of 1923, and subsequent years? The answer is, Yes.

The question of law here presented has not heretofore been considered by this Court. Therefore, that the question may be clearly considered, it is appropriate to analyze pertinent sections of the Income Tax Schedule of the Revenue Act, ch. 4, Public Laws 1923, which were effective at the beginning of the tax years involved here.

Thus we find: The general purpose of the act is to impose a tax for the use of the State government upon and with respect to the net income as therein defined, of each resident, individual or corporation, of the State, and upon the income earned within the State of every nonresident individual or corporation having a business or agency in the State for the calendar year 1923 collectible in the year 1924, and similarly for subsequent years. Secs. 104 and 200. The tax is likewise "imposed upon resident fiduciaries, . . . which shall be levied, collected and paid annually with respect to: (a) That part of the net income of estates and trusts which has not become distributable during the income tax year. . . ." Sec. 205. Then, too, "Every individual taxable under this act who is a beneficiary of an estate or trust shall include in his gross income the distributable share of the net income of the estate or trust, received by him or distributable to him during the income year." Sec. 302. "Net income" means "the gross income of taxpayer less the deductions allowed by this act." Sec. 300. "The words 'net income' mean the gross income of a taxpayer from . . . rents . . . and income derived from any source whatever." Sec. 301 (1). "The words 'gross income' do not include the following items, which shall be exempt from taxation under this act: (c) The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income)." Sec. 301 (2).

The purpose and intent of the Legislature is manifest. The language is understandable and needs no judicial interpretation. It is clear that the Legislature intended, in the general plan of taxing all incomes, to tax incomes from trust estates: (1) To the trustee, if not distributable during the tax year; (2) to the beneficiary, if distributed or distributable during the tax year.

In the present case the effect of the will is to devise the Paragon Building to D. C. Waddell, Jr., trustee, in trust to collect the rents, and,

after paying to another a stipulated sum annually, the net rents therefrom are distributable to D. C. Waddell, Jr., individually, annually for life, with remainder over.

The defendant contends, however, that the *income* to him from the Paragon Building is a bequest within the meaning of sec. 301 (2) (c), ch. 4, Public Laws 1923, and that until he shall have received therefrom an amount equal to the value of the Paragon Building apportioned to him on which he paid inheritance tax, any amount received by him therefrom is not income, but a part of the gift.

The same question and contention, upon similar state of facts, and under like statute, has been presented to and decided by the Supreme Court of the United States. The Federal act contains a provision in the exact language of sec. 301 (2) (c), ch. 4, Public Laws 1923.

The case of *Irwin v. Gavit,* 268 U. S., 161, 69 L. Ed., 879, 45 S. Ct., 475, decided 27 April, 1925, is fully in point, and is decisive of the instant case. Under the will there involved the residue of the estate was left in trust, and a portion of the income therefrom was directed to be paid to Gavit during his life, subject to be cut off by certain prescribed conditions. The contention was made by the defendant and the court below held that the gift to Gavit was a bequest and not taxable under that provision of subsection B of sec. 2 of the Federal Income Tax Act of 1913, ch. 16, which prescribed that "the value of property acquired by gift, bequest, devise or descent" is not to be included in net income, but only the income derived from such property is subject to such tax. *Justice Holmes,* after quoting from sections of the Federal Income Tax Act of 1913, said: "The language quoted leaves no doubt in our minds that if a fund were given to trustees for A. for life with remainder over, the income received by the trustees and paid over to A. would be income of A. under the statute. It seems to us hardly less clear that even if there were a specific provision that A. should have no interest in the *corpus,* the payments would be income none the less, within the meaning of the statute and the Constitution, and by popular speech. In the first case it is true that the bequest might be said to be of the *corpus* for life, in the second it might be said to be of the income. But we think that the provision of the act that exempts bequests assumes the gift of a *corpus* and contrasts it with the income arising from it, but was not intended to exempt income properly so-called simply because of a severance between it and the principal fund. No such conclusion can be drawn from *Eisner v. Macomber,* 252 U. S., 189, 206, 207. The money was income in the hands of the trustees and we know of nothing in the law that prevented its being paid and received as income by the donee. The courts below went on the ground that the gift to plaintiff was a bequest and carried no interest in the *corpus* of the fund. We

do not regard those considerations as conclusive, as we have said, but if it were material a gift of the income of a fund ordinarily is treated by equity as creating an interest in the fund. Apart from technicalities, we can perceive no distinction relevant to the question before us between a gift of the fund for life and a gift of the income from it. The fund is appropriated to the production of the same result whichever form the gift takes."

The appellate courts of New York, considering a statute in the exact language of sec. 301 (2) (c), ch. 4, Public Laws 1923, have followed the decision of the United States Supreme Court.

In the case of *People ex rel. Knight v. Lynch,* 255 N. Y., 323, 174 N. E., 696, testator had devised and bequeathed all of his property, both real and personal, to the executors in trust to collect the rents therefrom and to pay over one-third of the net income from such property to his wife for and during the term of her natural life, in at least quarterly payments. She contended that the payments were not income. The Court of Appeals of New York, speaking to the question, said: "In a word, the income which a widow receives on her dower interest, whichever way she takes it, is income taxable under the law, and not a capital payment in any sense. . . . That the income from this trust estate is not exempt as a gift or bequest, see *Irwin v. Gavit,* 268 U. S., 161, 45 S. Ct., 475, 69 L. Ed., 897."

Again, more pertinent to the instant case is *White v. Gilchrist,* 211 N. Y. S., 746, where a beneficiary receiving income from property devised in trust, contested liability for income tax thereon. After citing and quoting *Irwin v. Gavit, supra,* the New York Court said: "We think that, under the holding of the Supreme Court, the claim of the petitioner herein cannot be sustained, namely, that as to her the annual payments constituted a 'legacy' not subject to income tax under that provision of the law . . . which excludes from gross income the value of property acquired by . . . bequest. . . . The sum involved is thus income to the estate. . . . Moreover, the mere fact that the intangible interest of petitioner was described as an 'annuity' and its capitalized value was fixed for inheritance tax purposes in 1911, the tax upon which was paid by the petitioner, does not make these annual payments exempt from income tax. This worked no real change in the character of the payments, and the State is not estopped."

In support of his contention that the income to him is a bequest within the meaning of the act, defendant relies upon *Burnett v. Logan,* 283 U. S., 404, and *Burnett v. Whitehouse,* 283 U. S., 148, 75 L. Ed., 918. These cases are distinguishable from and are not applicable to the facts in the instant case. In the *Logan case, supra,* the transaction was the sale of stock. Part of the consideration was to be paid annually

thereafter. The question related to profit—which was realizable only after the value of the stock had been paid. The *Whitehouse case, supra,* provided for an annuity of $5,000 to the defendant. Authority was given to the executors to retain personal property to provide for the payment. *Justice McReynolds,* writing the opinion, said: "As held below, the bequest to Mrs. Whitehouse was not to be paid from income, but of a sum certain, payable at all events during each year so long as she should live. . . . *Irwin v. Gavit* is not applicable. The bequest to Gavit was to be paid out of income from a definite fund. If that yielded nothing, he got nothing. This Court concluded that the gift was of money to be derived from income and to be paid and received as income by the donee. Here the gift did not depend upon income, but was a charge upon the whole estate during the life of the legatee to be satisfied like an ordinary bequest."

While the question of inheritance tax is not now before the Court, it is appropriate to refer to the section of the Inheritance Tax Schedule AA, ch. 4, Public Laws 1923, under which that tax was assessed.

Sec. 11 in part provides: "If the legacy or devise subject to the tax be given to a beneficiary for life, . . . with remainder to take effect upon the termination of the life estate, . . . the tax on the whole amount shall be due and payable as in other cases, and the tax shall be apportioned between such life tenant and the remainderman, such apportionment to be made by computation based upon the mortuary and annuity tables set out in sections 1790 and 1791 of the Consolidated Statutes, and upon the basis of 6 per cent of the gross value of the estate for the period of the expectancy of the life tenant in determining the value of the respective interests."

The value of the legacy was the value of the Paragon Building, and for inheritance tax purposes that value was apportioned among the legatees in accordance with their respective interest in the legacy.

The right to receive the rents from the building vested in defendant an interest—an equitable interest—in the *corpus* of the legacy. *Irwin v. Gavit, supra; Brown v. Fletcher,* 235 U. S., 589, 59 L. Ed., 374; *Blair v. Comrs.,* 300 U. S., 5, 81 L. Ed., 265.

The judgment below is

Affirmed.

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

TOWN OF CAROLINA BEACH v. NORMAN L. MINTZ AND NATIONAL SURETY CORPORATION.

(Filed 15 December, 1937.)

1. Municipal Corporations § 11d—In action for misfeasance, officer may not challenge constitutionality of statute under which he was elected.

A person accepting office may not challenge the constitutionality of the statute under which he was elected in an action against him for official misconduct, or in an action to recover money received by him by virtue of his office, even though the statute under which he was elected is unconstitutional in prescribing ownership of property as a qualification of electors.

2. Municipal Corporations § 11g—

A municipal officer is not entitled to receive any compensation for the performance of his duties as prescribed by statute in excess of the compensation stipulated in the statute.

3. Same: Contracts § 7f—

The commissioners of a town may not lawfully elect one of their number clerk of the town, and contract to pay him for his services as such clerk, since such election and contract are void as being against public policy, nor may he claim compensation for acting as clerk upon the principal of *quantum meruit.*

4. Municipal Corporations § 11d: Principal and Surety § 5a—Officer and surety are liable for sums received by officer in excess of salary.

Sums of money received by a municipal commissioner in excess of his compensation as fixed by statute may be recovered by the municipality in an action against him and his bondsman, nor may recovery be defeated upon the ground that he was elected clerk by the board of commissioners, since such contract is void, nor upon the principal of *quantum meruit* for services rendered as such clerk.

APPEAL by defendants from *Grady, J.,* at February Term, 1937, of NEW HANOVER. No error.

The plaintiff is a municipal corporation duly created, organized, and existing under and by virtue of the laws of the State of North Carolina.

On or about 25 April, 1933, the defendant Norman L. Mintz was duly elected commissioner of finance of the plaintiff, and pursuant to said election served as such commissioner for a term of two years, beginning on or about 1 May, 1933, and ending on or about 1 May, 1935.

The defendant National Surety Corporation was the surety on the official bond of the defendant Norman L. Mintz, commissioner of finance of the plaintiff from 16 February, 1934, until the expiration of his term.

This is an action to recover the sum of $807.75, which was paid by the plaintiff to the defendant Norman L. Mintz on vouchers which

were issued during his term of office and which were approved by him as commissioner of finance of the plaintiff. The said sum of $807.75 was paid by the plaintiff to the said defendant in addition to his lawful salary of $25.00 per annum as fixed by statute. Of said sum $417.80 was paid by plaintiff to said defendant and was received by him while his official bond, in the sum of $2,000, with the defendant National Surety Corporation as surety, was in force.

It is alleged in the complaint that the payment by the plaintiff to the defendant Norman L. Mintz of the sum of $807.75 during his term of office as commissioner of finance of the plaintiff, in addition to his lawful salary as fixed by statute, was unlawful, and that the receipt of said sum by the said defendant was in violation of his official duty and in breach of his official bond. This allegation is denied in the answer.

In their answer the defendants admit that the defendant Norman L. Mintz received the sum of $807.75, pursuant to vouchers issued to him during his term of office as commissioner of finance of the plaintiff, and approved by him as such commissioner, and that said sum was paid to the said defendant in addition to his lawful salary as commissioner of finance of the plaintiff. They allege that said sum of $807.75 was paid by plaintiff to said defendant for services rendered to plaintiff by him, and for expenses incurred by him in behalf of the plaintiff while he was acting as clerk of the plaintiff, and that for that reason said payment was lawful.

The defendants further allege in their answer that the defendant Norman L. Mintz, while acting as clerk of the plaintiff during his term of office as commissioner of finance, rendered services to the plaintiff, and incurred expenses in its behalf in the sum of $819.65, and that said sum has not been paid by the plaintiff to the said defendant. The defendant Norman L. Mintz prays judgment in this action that he recover of the plaintiff the sum of $819.65 as a counterclaim against the plaintiff.

At the trial, issues were submitted to the jury as follows:

"1. What amount of money in salary and commissions was paid to the defendant Norman L. Mintz by the plaintiff, town of Carolina Beach, and received by him over and above the salary of $25.00 per annum allowed him as commissioner of finance under the charter of the said town? Answer: .....

"2. What amount, if any, is the defendant Norman L. Mintz entitled to recover of the plaintiff, town of Carolina Beach, for services performed and moneys expended for the use and benefit of the plaintiff, as alleged in his cross bill and counterclaim? Answer: .....

"3. In what amount, if any, are the defendants Norman L. Mintz, as principal, and National Surety Company, as surety on the official bond

of Norman L. Mintz as commissioner of finance of the plaintiff, indebted to the plaintiff? Answer:....."

Pursuant to instructions of the court in its charge, the jury answered the first issue "$807.75," the second issue "Nothing," and the third issue "$417.80."

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

Kellum & Humphrey for plaintiff.
John D. Bellamy & Sons and Isaac C. Wright for defendants.

CONNOR, J. Ch. 117, Private Laws of North Carolina, 1925, is entitled "An act to incorporate the Town of Carolina Beach in New Hanover County, State of North Carolina." This act in all its essential provisions is now and has been since 6 March, 1925, in full force and effect. By virtue of these provisions the plaintiff is a municipal corporation, duly created, organized, and existing under the laws of this State. Only the provision in sec. 4 of said act, which is reënacted by ch. 78, Private Laws of North Carolina, 1929, to the effect that "all persons owning property within the corporate limits of the town of Carolina Beach shall constitute the electors of the town of Carolina Beach, and be entitled to vote in any election for the officers of said town," was challenged by the plaintiff in *Smith v. Carolina Beach*, 206 N. C., 834, 175 S. E., 313. It was held in that case that the said provision is void, but that officers of said town elected in accordance with said provision, and who had duly qualified for the performance of the duties of their respective offices, were at least *de facto* officers of the town of Carolina Beach, and that for that reason the validity of their official acts could not be successfully challenged by the plaintiff, a resident of said town. In the instant case the defendant Norman L. Mintz, who accepted the office of commissioner of finance of said town, and performed the duties of said office for a term of two years, receiving the salary fixed by statute for the commissioner of finance, will not be heard to challenge the validity of his election and his right to hold said office.

One who has accepted an office to which he has been elected under a statute is not entitled to plead that such statute is unconstitutional in an action against him for official misconduct, or in an action to recover money received by him by virtue of said office, 12 C. J., p. 770, sec. 193, and cases cited in support of the text. Thus it was held by this Court in *Board of Education v. Kenan*, 112 N. C., 566, 17 S. E., 485, that a sheriff in an action to compel the payment of money collected by him under a tax levied for school purposes, and in his hands, cannot defend

the action by alleging the invalidity of the statute under which the tax was levied and collected.

Sec. 6 of ch. 117, Private Laws of North Carolina, 1925, is as follows:

"The commissioner of finance shall be the purchasing agent of the board of commissioners of the town and all property, supplies and material of every kind whatsoever shall, upon the order of the board of commissioners, be purchased by him, and when so purchased by him the bill therefor shall be submitted to and approved by the board of commissioners before warrants are issued therefor; when such warrants are issued they shall be signed by the said commissioner and countersigned by some other person designated by the board of commissioners; he shall be collector of all taxes; he shall collect all water rents; he shall issue licenses or permits as provided by law, ordinance, or resolution adopted by the board of commissioners, or, in the absence or inability of any commissioner to act, he shall exercise temporary supervision over the department assigned to said commissioner; subject, however, to the power of the board of commissioners to substitute some one else temporarily to perform any of such duties; he shall have control of all employees not by law, ordinance, or resolution of the board of commissioners apportioned or assigned to some other department; he shall have charge of and supervision over all accounts and records of the town, and accounts of all officers, agents, and departments required by law or by the board of commissioners to be kept or made; he shall regularly, at least once in three (3) months, inspect or superintend inspection of all records or accounts required to be kept in any of the offices or departments of the city, and shall cause proper accounts and records to be kept, and proper reports to be made, and shall, acting for the board of commissioners, audit or cause to be audited by an expert accountant, if he deem it necessary, annually, the accounts of every officer or employee who does or may receive or disburse money, and he shall publish or cause to be published annually statements showing the financial condition of the town; he shall examine or cause to be examined all accounts, pay rolls and claims before they are acted on or allowed, unless otherwise provided by law or by order of the board of commissioners; he shall collect all license fees, franchise taxes, rentals, and other moneys which may be due or become due to the town; he shall report the failure on the part of any person, firm, or corporation to pay money due the town; he shall report to the board of commissioners any failure on the part of any person, firm, or corporation to make such reports as are required by law, ordinance, or order of the board of commissioners to be made, and shall make such recommendations with reference thereto as he may deem proper. The assessor, auditor, town clerk, town attorney, and their respective officers of departments, and

all employees therein, and all bookkeepers and accountants are apportioned and assigned to the department of finance, and shall be under the direction and supervision of the commissioner hereof. He shall do and perform any and all services ordered by the board not herein expressly conferred upon some other department."

The duties of the commissioner of public works and of the commissioner of public safety are specifically set out in secs. 7 and 8 of the act.

Sec. 13 of the act is as follows:

"Sec. 13. *Salaries.* The mayor and commissioners shall have offices at the town hall. The compensation of the mayor and commissioners shall be as follows: Mayor and commissioner of public safety, twenty-five ($25.00) dollars per annum. Commissioner of public works and commissioner of finance, twenty-five ($25.00) dollars each per annum. Salaries shall be paid in equal monthly installments."

It is manifest that, by virtue of the provisions of sec. 13 of the act by which the plaintiff was created a municipal corporation, no sum in excess of twenty-five dollars per annum can be lawfully paid by the town of Carolina Beach to the commissioner of finance of said town as a salary for the performance by him of his duties as prescribed by sec. 6 of the act. Any sum so paid by the town or so received by a person holding the office of commissioner of finance of said town can be recovered of such person, and the surety on his official bond, by the town of Carolina Beach by an action begun and prosecuted for that purpose in a court of competent jurisdiction. See *Comrs. of Brunswick v. Walker,* 203 N. C., 505, 166 S. E., 385.

In the instant case the defendants contend that the sum of $807.75 was paid by the plaintiff to the defendant Norman L. Mintz for services rendered by him to the town of Carolina Beach and for expenses incurred by him in its behalf while acting as clerk of said town, pursuant to his election to that office by the board of commissioners of said town, and that for this reason said sum was lawfully paid by the plaintiff to the said defendant. This contention cannot be sustained.

Conceding that there was evidence at the trial of this action tending to show that the board of commissioners of the town of Carolina Beach elected Norman L. Mintz clerk of said town during his term of office as commissioner of finance of said town, and contracted to pay him for his services as such clerk, we must hold that such election and such contract were void as against public policy. See *Snipes v. Winston,* 126 N. C., 374, 35 S. E., 610. In that case it was held by this Court that the election by a board of aldermen of one of its members as "street boss" at a fixed salary was void as against public policy, and that plaintiff could not recover of the city on said contract for services rendered by him pursuant to such election.

The principle which supports the instructions by the court to the jury at the trial of this action is stated by *Clark, C. J.*, in *Davidson v. Guilford,* 152 N. C., 436, 67 S. E., 918, as follows:

"Independently of any statute or precedent, upon the general principles of law and morality, a member of an official board cannot contract with the body of which he is a member. To permit it would open the door wide to fraud and corruption. The other members of the board in allowing compensation thus to one of its members would be aware that each of them in time might receive contracts and good compensation and thus public office, instead of being a public trust, would become, in the language of the day, 'a private snap.' "

The defendant Norman L. Mintz has no right to retain any sum paid to him by the plaintiff during his term of office as commissioner of finance of the town of Carolina Beach in excess of his lawful salary, nor has he any right to recover of the plaintiff any sum for services by him while acting as clerk of said town upon the principle of *quantum meruit.* See *Borden v. Goldsboro,* 173 N. C., 661, 92 S. E., 694.

There was no error in the trial of this action. The judgment is affirmed.

No error.

EDWARD PRICE v. ALMA F. ASKINS, ADMINISTRATRIX OF THE ESTATE OF H. N. ASKINS; FLORENCE NEAL AND HUSBAND; H. N. ASKINS, JR., AND WIFE (ORIGINAL PARTIES DEFENDANTS); AND ALMA F. ASKINS, INDIVIDUALLY, AND H. K. HELMS, ADMINISTRATOR OF THE ESTATE OF H. N. ASKINS (ADDITIONAL PARTIES DEFENDANTS).

(Filed 15 December, 1937.)

1. Evidence § 32—

A wife may testify as to a communication between her husband and a decedent in the husband's action against the decedent's estate for a money recovery, the wife not being an interested party within the meaning of C. S., 1795.

2. Frauds, Statute of, § 21—

While the statute of frauds is a defense and must be pleaded, a general denial of the allegations of the complaint setting up a contract unenforceable under the statute is a sufficient pleading of the statute.

3. Frauds, Statute of, § 9: Wills § 4—

An oral contract to devise realty in consideration of services rendered is void under the statute of frauds.

4. Evidence § 32—Where oral contract to devise is denied, wife may testify as to transactions with decedent upon action for quantum meruit.

Where, in an action on an oral contract to devise realty in consideration of services rendered, and to recover for such services upon *quantum*

meruit, defendants enter a general denial of the allegations of the complaint, such denial is a sufficient pleading of the statute of frauds, which renders the contract void and eliminates from the case the action on the contract and any inchoate interest the wife might have in the recovery of the realty, leaving the action solely for the recovery of money upon *quantum meruit*, in which action the wife is competent to testify as to a communication between her husband and the decedent tending to show the services were requested.

5. Trial § 37: Wills § 5—

The issues submitted in this action to recover for services rendered decedent upon *quantum meruit are held* sufficient to present all phases of the controversy, and defendants' objection thereto is untenable.

6. Wills § 5—Where contract to devise is void under statute of frauds, party performing services may recover upon quantum meruit.

In an action to recover for breach of an oral contract to convey in consideration of services rendered, and to recover upon *quantum meruit* for such services, defendants may not defeat recovery by pleading the statute of frauds, but plaintiff is entitled to recover for the value of such services requested and rendered, the cause surviving against the personal representative, C. S., 159, and evidence of the contract, performance by plaintiff, and breach by intestate is sufficient to take the case to the jury.

7. Executors and Administrators § 20—Attachment and appearance of heirs cannot give judgment against estate for services rendered priority.

This action against an estate to recover the value of services rendered deceased upon his request was instituted by attachment against the lands of the estate in this State, the decedent having died in another State and an administrator having been there appointed. Thereafter, the ancillary administrator in this State and the heirs at law were made parties and entered appearance. *Held:* Judgment in plaintiff's favor rendered in the action does not have priority by reason of the appearance of the heirs or the attachment, C. S., 102, 62, since the estate alone is liable for the judgment, and the judgment merely establishes plaintiff's claim and his right to participate in the distribution of the assets of the estate in accordance with priorities fixed by statute, C. S., 93.

8. Descent and Distribution § 13—Heirs have no personal liability for debts of the estate.

Heirs have no personal liability for debts of the estate, but take the realty subject only to the right of the personal representative to sell same if necessary to pay debts of the estate, C. S., 59, 60, and heirs, by making personal appearance in an action against the estate for the recovery of money, in which attachment is issued against the lands of the estate, are not estopped to deny plaintiff's contention that the attachment gives priority to his judgment.

APPEAL by defendants from *Armstrong, J.*, at August Term, 1937, of UNION.

Action to recover upon alleged contract for personal services.

These facts appear to be admitted: H. N. Askins, Sr., resident of Chesterfield County, South Carolina, died intestate in June, 1936, leaving Alma F. Askins, his widow, and two children, Florence Neal

and H. N. Askins, Jr., as his only heirs at law. Alma F. Askins qualified as administratrix of the estate of said intestate on 9 July, 1936, in said county and State. The intestate died seized of several tracts of land in Union County, North Carolina. H. K. Helms was appointed and qualified as ancillary administrator on 19 December, 1936, in Superior Court of Union County, North Carolina.

Plaintiff instituted this action on 16 December, 1936, against the administratrix appointed in South Carolina and the two children of H. N. Askins, and filed complaint in which he alleged in substance that H. N. Askins, Sr., entered into a special oral contract with him by which he was employed to attend to the wants of, render assistance to and look after said Askins when called on by him when indulging in alcoholic liquor and sick therefrom, and as consideration therefor "said Askins would give the plaintiff a home, a good home with a well of water and some 50 or 75 acres of land," the purpose and intent being that Askins would make a will devising to plaintiff the land; that plaintiff moved onto the lands of said Askins, worked as tenant, and fully complied with all the terms of the contract from then until the death of Askins; that a short time before his death Askins pointed out to plaintiff and to others the line which would separate from his other lands the boundary of about 75 acres of land which he expected and had agreed to give plaintiff, and that if plaintiff be not entitled to recover on special contract, that he recover on *quantum meruit* for services rendered in the reasonable sum of $1,500.

At the time of instituting the action, writ of attachment was issued and levy made on all the lands of which H. N. Askins died seized in Union County, North Carolina.

Pending publication of notice of summons and of attachment the defendants named therein on 4 January, 1937, entered special appearance and moved to dismiss the action and attachment. The motion was denied and appeal taken.

On 11 January, 1937, attorneys representing the South Carolina administratrix gave notice to H. K. Helms, ancillary administrator, that the administration in South Carolina was in process of settlement, that the estate was insolvent, and that it would be necessary to sell lands in Union County, North Carolina, to make assets.

On 6 February, 1937, by order, H. K. Helms, administrator, was made party defendant, and as such he filed answer denying the material allegations of the complaint.

At the February Term, 1937, of Superior Court, "by consent the motion to vacate and dismiss is overruled and the objection is withdrawn, and Alma Askins, individually, makes herself a party defendant," and she and other defendants were granted time in which to

answer or demur. On 16 March, 1937, Alma F. Askins, H. N. Askins, Jr., and wife, Mrs. H. N. Askins, Jr., Florence Neal and husband, ... Neal, filed answer denying the material allegation of the complaint.

At the trial below plaintiff offered evidence tending to support the allegations of his complaint.

Over objection by defendant, plaintiff's wife was permitted to testify that in 1928 she heard a conversation between H. N. Askins and the plaintiff as follows: "Him and Ed were sitting in the room there one day, talking, and he asked Ed, told Ed if he would take care of him he would give him a house and farm, about 50 to 75, acres to take care of him, and Ed agreed to do that."

Defendant further excepted to introduction in evidence of attachment proceedings.

The case was submitted to the jury on the following issues:

1. Did the defendant's intestate H. N. Askins and Edward Price enter into the contract alleged in the complaint?

2. Did the defendant's intestate H. N. Askins breach said contract, as alleged in the complaint?

3. Did the plaintiff Edward Price render services to the said H. N. Askins in good faith, relying on his contract and agreement with him, as alleged in the complaint?

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

Defendants objected to the submission of those issues and tendered others, which were refused, and defendants except.

The jury answered the first three issues in the affirmative and the fourth, "$1,350."

Upon the verdict judgment was rendered and the following inserted therein: "And that this judgment shall be a prior lien by reason of the attachments hereinbefore issued and by reason of the appearances herein of Alma F. Askins, widow, and Harold Askins and Florence Neal, heirs at law, on all of the assets of the estate of H. N. Askins in North Carolina against any claims or demands against said estate by the said Alma F. Askins, widow, and Harold Askins and Florence Neal, heirs at law."

Defendants appealed to the Supreme Court and assigned error.

Vann & Milliken for plaintiff, appellee.

Coble Funderburk and O. L. Richardson for defendants, appellants.

WINBORNE, J. These are the principal questions arising on this appeal: (1) In action by husband to recover for personal services is wife competent to testify to a transaction between husband and a deceased person? C. S., 1795. (2) Where right to recover on special oral con-

tract to convey real property as compensation for service rendered by husband is denied, is wife competent to testify to such contract on husband's claim for compensation on *quantum meruit?* (3) Do issues submitted fully present controversy? (4) Was refusal of motion to nonsuit proper? (5) Is plaintiff entitled to lien by virtue of attachment and by reason of personal appearance of heirs at law?

We answer the first four "Yes" and the fifth "No."

1. Defendant's contention that the wife of plaintiff is incompetent to testify to conversation she heard between plaintiff and intestate, C. S., 1795, is untenable. In *Burton v. Styers,* 210 N. C., 230, 186 S. E., 248, *Devin, J.,* said: "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." *Helsabeck v. Doub,* 167 N. C., 205, 83 S. E., 241; *Chemical Co. v. Griffin,* 204 N. C., 559, 169 S. E., 152; *Hager v. Whitener,* 204 N. C., 747, 169 S. E., 645; *Vannoy v. Stafford,* 209 N. C., 749, 184 S. E., 512; C. S., 1801.

2. The defendant challenges the testimony of the wife of the plaintiff as incompetent for that the contract sued upon relates to real property and, if established, the wife would acquire an interest therein, and thereby is interested in the event of the action. On the facts of this case the objection is not sustained. The plaintiff alleges special oral contract to convey specific real property as compensation for services rendered, and in the event that he be not entitled to recover on such special contract, that he is entitled to recover for services rendered on *quantum meruit* basis. The defendant does not plead the statute of frauds, but enters a general denial to those allegations. This is equivalent to a plea of the statute. In *McCall v. Industrial Institute,* 189 N. C., 775, 128 S. E., 349, *Connor, J.,* states: "A parol contract to sell or convey land may be enforced unless the party to be charged takes advantage of the statute by pleading the same. But a denial of the contract as alleged is equivalent to a plea of the statute." *Arps v. Davenport,* 183 N. C., 72, 110 S. E., 580; *Henry v. Hilliard,* 155 N. C., 373, 71 S. E., 439. Defendant's denial renders the special oral contract void. Plaintiff is forced to resort to recover for services on *quantum meruit.* Thus the real property and any inchoate right the wife may have in the recovery of it are eliminated from the case.

3. The issues submitted fully presented the controversy. It seems that the law is settled that if issues submitted by the court are sufficient in form and substance to present all phases of the controversy, there is no ground for exception to same. *Bailey v. Hassell,* 184 N. C., 450, 115 S. E., 166.

4. Motions for judgment as of nonsuit were properly refused. The evidence was plenary for consideration by the jury on the allegations of contract, performance by the plaintiff, breach by the intestate, and damages.

The defendant's estate cannot escape liability for the services rendered by the plaintiff to the intestate at his request by pleading the statute of frauds. *Faircloth v. Kenlaw*, 165 N. C., 228, 81 S. E., 299. It is there stated: "He asked for the services, and has received the full benefit of them, and the law implies a promise to pay for them what they are reasonably worth, otherwise the statute would be turned into an instrument of fraud instead of executing the purpose for which it was passed. It was intended to prevent and not to promote fraud."

In *Deal v. Wilson*, 178 N. C., 600, 101 S. E., 205, *Walker, J.*, said: "Where services are rendered on an agreement which is void by the statute, an action will lie on the implied promise to pay for such services, and the terms of the contract are admissible as evidence of what those services are worth." Continuing, on page 603, "It is stated in Brown on Statute of Frauds, 5 ed., sec. 118, 'One who has rendered services in the execution of a verbal contract which on account of the statute cannot be enforced against the other party, can recover the value of his services upon the basis of *quantum meruit*.'"

Pertinent to cases of this character, in *Lipe v. Trust Co.*, 207 N. C., 794, 178 S. E., 665, *Stacy, C. J.*, summarized the law: "It is established by decisions in this jurisdiction (1) that when services are performed under an oral agreement, express or implied, that compensation is to be provided for in the will of the party receiving the benefit, and no such provision is made, an action will lie to recover for the breach or to prevent an unjust enrichment, if need be, on the part of the recipient of such services," citing among other cases *Whetstine v. Wilson*, 104 N. C., 385, 10 S. E., 471; *Hager v. Whitener, supra*.

5. There is error in the judgment providing that the judgment shall be a prior lien by reason of the attachments and by reason of the appearance of the heirs at law.

The alleged contract was with the intestate. The cause of action survived against the administrator. C. S., 159. There is statutory authority for appointment of an administrator where "decedent, not being domiciled in this State, died out of the State, leaving assets" in the State. C. S., 1 (3). The right to have an appointment made was open to plaintiff. C. S., 6 (3). A sale of real property by heirs of a nonresident within two years from granting of letters is invalid as to creditors and administrators. C. S., 76. No lien can be created against the estate of decedent by the commencement of a suit against the administrator. C. S., 102 and C. S., 62. The order of payment of all debts of decedent is prescribed by statute. C. S., 93.

Upon the death of a debtor his personal estate vests in the administrator or executor, and the lands descend to his heirs or vest in the devisees, subject to be sold if necessary to make assets to pay debts. "But the administration of the whole estate is placed in the hands of the personal representative, who is required first to apply the personal assets in payment of the debts, and if they prove insufficient, then the statute prescribes how the lands may be subjected and sold . . ." *Tuck v. Walker,* 106 N. C., 285, 11 S. E., 183; *Flynn v. Rumley, ante,* 25.

There is no personal liability on the heirs at law, devisees or distributees. Their liability for the debts of a decedent extends only to the value of the property of such decedent. C. S., 59 and 60. *Moffitt v. Davis,* 205 N. C., 565, 172 S. E., 317. Hence the defendants, heirs at law of H. N. Askins, are not estopped to deny the legal effect of the attachment.

By this action the plaintiff has established his claim against the estate of the decedent and is entitled to participate in the distribution of the assets of the estate in accordance with the statute, C. S., 93, and no more.

All other assignments have been considered and found to be without merit.

The judgment, when modified in accordance with this opinion, is affirmed.

Modified and affirmed.

MRS. SARAH C. DAVIS, JOHN ROBERT DAVIS AND WIFE, SUSIE WELCH DAVIS, AND AMMIE DAVIS MERRITTE AND HUSBAND, KOKER MERRITTE, PLAINTIFFS, v. G. O. DOGGETT AND DOGGETT LUMBER COMPANY, DEFENDANTS.

(Filed 15 December, 1937.)

1. Interest § 3: Judgments § 17b—

It is within the province of the jury to allow interest on a verdict for damages, and where the verdict in such case does not allow interest the judgment may not be enlarged to include interest.

2. Mortgages § 35—Where person conducting sale bids in property as agent of cestui, trustor has election to treat sale as a nullity.

Where the agent of the trustee conducts the sale and bids in the property as an agent of the purchaser, the trustor may treat the sale as a nullity, even though the price bid represents the fair value of the property and there is no fraud or collusion, and even though competitive bidding at the sale is not discouraged, since the law will not permit the same person to represent the antagonistic interests of the seller and the pur-

chaser. The distinction is pointed out between this case in which the purchaser's agent was given authority to bid in the property at any price within a stipulated amount in his discretion, and *Elkes v. Trustee Corporation*, 209 N. C., 832, in which the attorney conducting the sale merely received a bid by telephone from the holder of the note and announced the bid at the sale.

3. Mortgages §§ 39d, 39g—Where purchaser at sale transfers land to innocent purchaser for value, trustor is remitted to action for damages.

Where foreclosure is regular upon its face, and the records do not show that the agent of the trustee who made the sale bid in the property as agent of the *cestui*, a purchaser for value from the *cestui* takes good title, and the trustor may not recover the land, but is remitted to an action against the trustee and *cestui* for damages for wrongful foreclosure.

4. Mortgages § 39e—

In an action for damages for wrongful foreclosure, the submission of an issue as to whether defendant *cestui*, who bought the property at the sale, transferred to innocent purchasers for value, is not error when the issue is raised by conflicting evidence.

5. Same: Limitation of Actions § 3—Action for damages for wrongful foreclosure held not to accrue until conveyance by cestui to third person.

Where the agent of the trustee conducts the sale and bids in the property as agent for the *cestui*, the trustor may treat the sale as a nullity, and upon his election the relationship between the parties remains that of trustor and *cestui*, and the action for damages for wrongful foreclosure does not accrue until the *cestui* conveys to a third person, and an action for damages instituted within three years from the date of the *cestui's* deed to the third person is not barred.

6. Mortgages § 39c—Conflicting evidence on issue of waiver and estoppel of trustors held for jury.

Conflicting evidence on defendant *cestui's* contention that trustors admitted after foreclosure that they could not redeem the property and acquiesced in the *cestui's* conveyance of the title acquired by foreclosure to a third person, and that therefore trustors were estopped and had waived their right to maintain an action for wrongful foreclosure, raises an issue of fact for the determination of the jury.

7. Mortgages § 32b—

An alleged agreement of the *cestui* to give the trustor actual notice of foreclosure, made after the execution of the instrument, is void for want of consideration.

8. Mortgages § 39e—

In this action for damages for wrongful foreclosure, the submission of an issue as to whether defendant *cestui* agreed to give trustors actual notice of foreclosure although the alleged agreement was void for want of consideration, *held* not prejudicial to defendant.

APPEAL by plaintiffs and defendants from *Rousseau, J.*, 20 March, 1937, from MECKLENBURG. No error.

The plaintiffs instituted this action to recover damages for the wrongful foreclosure of a trust deed executed by them to G. O. Doggett, trustee, to secure an indebtedness of $1,237.55. There was a first mortgage upon the same premises in the sum of $500.00, which was purchased by the Doggett Lumber Company just prior to the sale. At the sale W. S. Blakeney sold the property as agent for the trustee and bid in the property as agent of the Doggett Lumber Company for the sum of $1,000. The foreclosure was had 5 September, 1932; the trustee's report of sale was filed 20 October, 1932. The deed of foreclosure was dated 26 September, 1932, and was recorded 5 October, 1932. The Doggett Lumber Company conveyed said property by warranty deed dated 7 October, 1932, to James B. Davis and wife, Mary A. Davis, for a consideration of $2,225. This deed was recorded 12 October, 1932. The plaintiffs also alleged that the defendants contracted and agreed to give them actual notice of the date of foreclosure should the defendants undertake to foreclose said trust deed and that the defendants breached said contract. Summons was issued 23 September, 1935. The defendants denied any wrongful foreclosure and pleaded the three-year statute of limitations. Issues were submitted to and answered by the jury as follows:

"1. Is the plaintiffs' alleged cause of action barred by the three-year statute of limitations as alleged in the answer? Answer: 'No.'

"2. Did the defendants contract to give notice to the plaintiffs of the date of the sale under said deed of trust, and did the defendants fail to give notice to the plaintiffs of the date of the sale as alleged in the complaint? Answer: 'Yes.'

"3. Did the person who acted as agent of G. O. Doggett, trustee, in selling the property at said foreclosure sale also act as agent of the defendant Doggett Lumber Company in purchasing said property at said foreclosure sale? Answer: 'Yes.'

"4. Was G. O. Doggett, trustee, personally present at the foreclosure sale? Answer: 'No.'

"5. Did James R. Davis and wife thereafter purchase said property from the Doggett Lumber Company as innocent purchasers without notice? Answer: 'Yes.'

"6. Have the plaintiffs waived their rights to maintain this action by ratifying and confirming the acts of the defendants of which the plaintiffs now complain, as alleged in the answer? Answer: 'No.'

"7. What amount were the plaintiffs indebted to the defendant as of the date of 12 October, 1932? Answer: '$2,003.17—by consent.'

"8. What damages, if any, are the plaintiffs entitled to recover? Answer: '$1,000.' "

Upon the coming in of the verdict the plaintiffs moved for judgment in the sum of $1,000, with interest thereon from 12 October, 1932, until paid, and for costs. The court declined to sign the judgment tendered by the plaintiffs, including interest on the verdict, and the plaintiffs excepted and appealed.

The court signed judgment upon the verdict for $1,000 and costs, and the defendants excepted and appealed.

G. T. Carswell and Joe W. Ervin for plaintiffs.
Guthrie, Pierce & Blakeney for defendants.

BARNHILL, J. Plaintiffs' exception to the refusal of the court to sign judgment allowing interest upon their recovery cannot be sustained. It was within the province of the jury to allow interest. The jury having failed to do so, the court had no power to enlarge the verdict. *Parrish v. Hartman, ante,* 248.

G. O. Doggett, the trustee, testified that he did not attend the foreclosure sale and that Mr. Blakeney took his place at the trustee's sale and sold it as his agent. The record discloses the following admission: The defendants admit that W. S. Blakeney, attorney for the defendants in this case, bid in the land at the foreclosure sale on 5 September, 1932, as agent for the Doggett Lumber Company. In this connection, Lee Grier, witness for the defendants, testified: "If somebody else had put in a bid for $1,050 at the foreclosure sale, we would have possibly raised it as high as $1,237." Thus, it appears that *Elkes v. Trustee Corp.,* 209 N. C., 832, is not in point. In that case the vendor did not act as agent for the purchaser. The attorney for the trustee merely received a bid by telephone from the holder of the note and announced the bid at the sale. He was not the agent of the *cestui que trust* and did not purport to act as such. Here, it is admitted that W. S. Blakeney was agent both for the seller and for the buyer.

There are a number of decisions of this Court holding consistently that where the trustee or mortgagee, or his agent, purchases property at a foreclosure sale under the terms of the trust deed or mortgage, either for himself or another, the trustor may elect to treat the sale as a nullity and demand a resale as against the trustee or mortgagee, or his agent, or purchasers from them with notice, even though competitive bidding at the sale was not discouraged and the purchase price represented the fair market value of the property at the time of the sale, and the trustor was present at the sale and made no objection thereto. *Lockridge v. Smith,* 206 N. C., 174; *Gibson v. Barbour,* 100 N. C., 191; *Owens v. Mfg. Co.,* 168 N. C., 397; *Roberson v. Matthews,* 200 N. C., 241; *Mor-*

ris v. Carroll, 171 N. C., 761; *Brothers v. Brothers,* 42 N. C., 149; *Boyd v. Hawkins,* 37 N. C., 303.

This rule is adhered to, not because there is, but because they may be, fraud. It is the duty of the trustee in making a sale to obtain the high dollar. It is the duty of a person representing a purchaser to acquire the land at as reasonable a price as possible. When the same person is both the seller and the buyer there is a conflicting, antagonistic, interest and duty which the law condemns. This practice has been engaged in by many good men whose characters are above reproach. Even so, the practice cannot be approved for the reason that it opens the door for fraud and oppression. At all times the trustee selling under the power of sale contained in the trust deed should be and remain at arm's length to the buyer.

In this case the defendant had just invested more than $500.00 in purchasing a first mortgage upon the premises. The individual defendant, who was trustee, is the president and treasurer of the corporate defendant. The corporate defendant held a second mortgage upon the premises for $1,237.55 and interest for more than twelve months. The property was bid in for the corporate defendant by the agent of the trustee for $1,000, which is about 60 per cent of the indebtedness then due thereon. Even before the trustee's deed to the corporate defendant had been filed for recordation it had given an option on the property to another for $2,225. While there is no evidence of actual fraud, and the Court does not mean to suggest any, these circumstances indicate that the foreclosure sale was not had under circumstances which meet the approval of a court of equity under the former decisions of this Court.

The defendant Doggett Lumber Company, through the foreclosure deed from the trustee, became the apparent owner in fee of the premises in controversy. This being true, the plaintiffs, through the conduct of the defendants in conveying the property to a third party are precluded from a recovery of their land. The only other remedy left to them is the one they now seek to pursue, that is, to recover damages for the wrongful alienation of their lands by the defendants.

In their brief the defendants contend that it was error for the court below to submit the fifth issue to the jury. This issue was raised upon the pleadings and there was sufficient evidence to justify its submission to the jury. Such contention on the part of the defendants would seem to be an attack upon the deed executed by the Doggett Lumber Company to the purchaser. It would not seem to help the position of the defendant to assume that, having acquired the title in the manner disclosed by the record, such title was thereafter conveyed to a third party under circumstances which would subject the vendee to a suit for its

recovery. The evidence, which was apparently accepted by the jury, though contradicted by other testimony, tends to show that the plaintiffs sought to redeem their property after the option was given by the defendant, but before the execution of the deed, and that the defendants then, and at all times thereafter, refused to permit a redemption upon the plea that they were already bound by an option to convey the property to James R. Davis.

The agent for the trustee in making the sale, having acted as agent for the *cestui que trust* in purchasing the property, the relationship of mortgagor and mortgagee existing between the plaintiffs and the defendants was not destroyed. *Owens v. Mfg. Co.*, 168 N. C., 397; *Gibson v. Barber*, 100 N. C., 192; *Lockridge v. Smith, supra*. It follows that the plaintiffs' cause of action arose at the time the corporate defendant, acting under the trustee's deed, which purported to convey a fee simple title to it, alienated said title and conveyed said property to a third party. Plaintiffs' action was instituted within three years thereafter and is not barred by the statute of limitations.

There is some evidence in the record to the effect that the plaintiffs admitted to the defendants after the sale that they were unable to pay the debt or to redeem the property, and acquiesced in the sale. This testimony is sharply contradicted by that of the plaintiffs, which tends to show that they had actually made arrangements to redeem the property, but that the defendants sold the same before they were permitted to do so. It does not appear that waiver or estoppel is adequately pleaded by the defendants. In any event, the facts have been determined adversely to the defendants by the jury's answer to the sixth issue.

The contract alleged by the plaintiffs that the defendants agreed to give them actual notice of the date of sale was without consideration and unenforceable. The submission of an issue thereon, however, could not be held for prejudicial error.

On plaintiffs' appeal, the refusal of the court to sign judgment allowing the plaintiffs interest upon their recovery was in accord with the decisions of this Court. *Parrish v. Hartman, ante*, 248.

Upon an examination of all the exceptions contained in the record we find

On plaintiffs' appeal, no error.

On defendants' appeal, no error.

ARNOLD LOFLIN, BY HIS NEXT FRIEND, ANNIE LOFLIN, v. HIGH POINT, THOMASVILLE & DENTON RAILROAD COMPANY.

(Filed 15 December, 1937.)

1. Master and Servant § 14a—Evidence of master's negligence, resulting in injury to servant, held sufficient to be submitted to jury.

The evidence tended to show that plaintiff, in the course of his employment working with a crew putting new crossties under defendant's tracks, was required to step across rails which had been jacked up in order to take out the old ties and replace them, that as he was walking across the jacked-up tracks holding one end of a crosstie, the rail dropped down on his foot, mashing it, and that the rail fell because the "jack was not under it right." Plaintiff alleged that the "track was carelessly and negligently jacked up so that the jack was not under the rail as far as it should have been" for safety. *Held:* Under the allegations, the evidence, viewed in the light most favorable to plaintiff, was sufficient to have been submitted to the jury.

2. Master and Servant § 17—Plaintiff held not barred by assumption of risk as matter of law under the evidence.

Plaintiff's evidence tended to show that as he was walking across a track in the scope of his employment, the track, which had been jacked up in order to replace the crossties, fell and injured plaintiff's foot. *Held:* Defendant's contention that upon plaintiff's own evidence, plaintiff assumed the risk as a matter of law, cannot be sustained, since the evidence does not justify the court in holding that the danger was so obvious and immipent that plaintiff realized, or by the exercise of due care could have realized the danger.

BARNHILL, J., dissenting.

WINBORNE, J., concurs in dissent.

APPEAL by plaintiff from *Sink, J.*, at May Term, 1937, of DAVIDSON. Reversed.

J. F. Spruill for plaintiff, appellant.
Lovelace & Kirkman and Phillips & Bower for defendant, appellee.

SCHENCK, J. This is a civil action to recover damages for personal injuries to the plaintiff alleged to have been proximately caused by the negligence of the defendant.

When the plaintiff had introduced his evidence and rested his case, the defendant moved for judgment as in case of nonsuit (C. S., 567), which motion was allowed, and from judgment accordant therewith the plaintiff appealed to the Supreme Court, assigning as error the ruling and judgment of the court.

The evidence tended to show that the plaintiff was employed by the defendant as a section hand, and on 14 July, 1936, was engaged in helping the section force put in new crossties under a sidetrack of the defendant at Cunningham's brickyard, and that his duties required him to help two other section hands carry the new crossties from the west side of the sidetrack to the east side thereof to be put in the sidetrack from the east side; that the two other section hands carried the front end of the crossties which were laid across a stick, each hand supporting one end of the stick, and the plaintiff carried the rear end of the crossties, resting the end thereof "against his stomach"; that the east rail of the sidetrack had been elevated eight or ten inches by a jack to permit the removal of old ties and the placing of new ties, and that as the plaintiff was crossing the sidetrack, carrying a tie, and after the other two section hands had placed the front end of the tie upon the ground on the east side of the east rail of the sidetrack, and as the plaintiff was stooping to place the rear end of the crosstie on the ground, but before he had let loose of the tie, the east rail of the sidetrack dropped down upon the foot of the plaintiff, mashing it.

The complaint includes, among others, the following allegations of negligence: "(a) In that the defendant company negligently failed and neglected to provide plaintiff with a safe and suitable place in which to perform his work," and "(f) In that the east rail of said sidetrack was carelessly and negligently jacked up so that the jack was not under the rail as far as it should have been in order to permit the plaintiff safely to pass over same."

The plaintiff testified:

"Q. What, if you know, caused the rail to fall?

"A. The jack was not under it right.

"Q. Who directed you to carry the ties across there to where the rail was jacked up?

"A. The section foreman, Mr. Irvin Snider.

"Q. Who directed the rails to be jacked up there that day?

"A. Irvin Snider. In my opinion the rails had been jacked up about thirty minutes before the accident."

And on cross-examination the plaintiff testified:

"Q. I ask you if you didn't drop your crosstie on the rail?

"A. No, sir.

"Q. What did you do with your end of the crosstie?

"A. I throwed it down on the other side of the rail.

"Q. You threw it down on the rail and that knocked the jack off the rail on your foot?"

"A. No, sir, I never threw it on the rail.

"Q. Threw it off on the other side of the rail?

"A. Yes, sir.

"Q. Threw it off on the side of the rail the other man put it on?

"A. Yes, sir.

"Q. Did it hit the rail at all?

"A. No, sir.

"Q. Will you swear, then, that your crosstie didn't hit the rail or any other crosstie along the rail?

"A. No, sir, it never hit nothing.

"Q. Then the falling of your crosstie had nothing to do with the rail falling?

"A. No, sir. I had been working with these same men most of the time for 18 months, doing the same kind of work, but had never carried crossties across rails jacked up before. I did not help to jack the rails up, but knew they were jacked up. At the time I put my foot under the rail I was walking across with a tie and just stepped under it. The rail fell and I dropped my end of the tie.

"Q. You mean to say the rail fell before you dropped your end of the tie?

"A. Yes, sir.

"Q. You were not looking at the rail, were you?

"A. I was looking at my tie."

We are of the opinion, and so hold, that under the allegations of negligence the evidence, viewed in the light most favorable to the plaintiff, was sufficient to carry the case to the jury upon the issue of the defendant's actionable negligence.

The evidence of the plaintiff does not establish such contributory negligence as would justify the court in holding as a matter of law that the plaintiff's action was barred thereby.

The contention of defendant that, upon the plaintiff's own evidence, the plaintiff assumed the risk of being injured in the manner and way in which he was injured is untenable. "The doctrine of assumption of risk is dependent upon the servant's knowledge of the dangers incident to his employment and the ordinary risks he is presumed to know. But extraordinary risks, created by the master's negligence, if he knows of them, will not defeat a recovery, should he remain in service, unless the danger to which he is exposed thereby is so obvious and imminent that the servant cannot help seeing and understanding it fully, if he uses due care and precaution, and he fails, under the circumstances, to exercise that degree of care for his own safety which is characteristic of the ordinarily prudent man." *Pigford v. R. R.*, 160 N. C., 93; *Cherry v. R. R.*, 174 N. C., 263. The danger to which the plaintiff was exposed, under the evidence in this case, cannot be said to be "so obvious and imminent" that he could not help seeing and understanding it. The danger was more or less latent, and the evidence does not justify the

court in holding as a matter of law that the plaintiff realized, or by the exercise of reasonable care could have realized, it before the injury occurred.

The judgment of the Superior Court is

Reversed.

BARNHILL, J., dissenting: There are three reasons why I cannot concur in the majority opinion of the Court in this case.

1. In carrying the new crossties from the place where they were piled to the point where they were to be used in replacing old crossties, the plaintiff and his fellow servants who were carrying the crossties, could have crossed the track at the point where the new crossties were piled and then proceeded up the east side of the track to the point where they were to be used. Instead, they walked up the west side of the track and crossed at the point where the rails were jacked up. The plaintiff had the choice of two ways. Instead of taking the one that was safe he followed the way that involved danger.

2. The section crew at the time of this accident was engaged in repairing the defendant's railroad track by removing old crossties and replacing them with new ones. The usual and customary manner in which this work is done is to jack up the rail. This is a necessary part of the work. Any danger connected therewith is naturally incident to the employment and the employee assumes all danger which is naturally incident to the work he is employed to do.

3. There is no evidence of negligence. The only evidence with respect thereto is the statement of the plaintiff to the effect that "the jack was not under it right." He testified that he did not help put the jack under the rail and he does not testify that he saw it after the rail was jacked up. His statement is a conclusion, pure and simple. Was the head of the jack only partially under the rail in such manner that it would slip off? As to this, no witness speaks. Was the base of the jack placed upon an insecure foundation, so that it slipped and caused the rail to fall? As to this, the record is silent. Did some other employee strike the handle of the jack and cause it to fall? We are not told. Was the catch on the jack defective or insecurely fixed, by reason of which the rail fell? No witness undertakes to say. For the jury to find that the defendant was negligent, upon the evidence in this record, it would have to enter the field of surmise and conjecture. If the plaintiff did not know and does not undertake to tell us in what respect "the jack was not under it right," how could the jury tell, and how are we to say that his conclusion is correct?

In my opinion the judgment of nonsuit entered in the court below should be sustained.

WINBORNE, J., concurs in dissent.

LUCILLE DOGGETT (WIDOW), NORMAN DOGGETT, CUMELIA DOGGETT (CHILDREN OF THE DECEASED), v. SOUTH ATLANTIC WAREHOUSE COMPANY, EMPLOYER, AND GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, CARRIER.

(Filed 15 December, 1937.)

1. Master and Servant § 37—

The North Carolina Workmen's Compensation Act should be liberally construed to effectuate its purpose, and compensation should not be denied by technical, narrow, or strict construction.

2. Master and Servant § 52—

In a hearing before the Industrial Commission, the evidence which tends to support plaintiff's claim should be considered in the light most favorable to him, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

3. Master and Servant § 40b—Evidence held to support finding that disease resulted naturally and unavoidably from accident.

The evidence before the Industrial Commission tended to show that the deceased employee, for whose death compensation was sought, had been in exceptionally good health up to the time of the accident, that he fell from a platform, breaking his leg, and lay where he fell for about half-hour, exposed to the cool weather, that he was then discovered and carried into the office, where he had to wait some two hours for medical attention. There was expert opinion testimony to the effect that the exposure was a contributing factor causing acute nephritis resulting in death, and that the accident and exposure accelerated the employee's death. *Held:* The evidence is sufficient to support the finding of the Industrial Commission that the disease resulted naturally and unavoidably from the accident, N. C. Code, 8081 (i), subsecs. (f), (j).

4. Master and Servant § 55d—

The finding of fact of the Industrial Commission that the disease causing an employee's death resulted naturally and unavoidably from an accident is conclusive on appeal when supported by competent evidence.

APPEAL by defendants from *Sink, J.*, 20 September, 1937, Civil Term of GUILFORD. Affirmed.

On 2 January, 1937, application was made to the North Carolina Industrial Commission by the plaintiffs herein for a hearing in this matter; that notice of hearing was given and a hearing had at Greensboro, N. C., in Guilford County, 8 March, 1937, before Hon. J. Dewey Dorsett, Commissioner of the North Carolina Industrial Commission; that evidence was taken at said hearing. Upon the record an opinion by said Commissioner was entered containing the findings of fact, conclusions of law, and award rendered in favor of plaintiffs.

The evidence in part: Gaither Doggett was an employee of the defendant, South Atlantic Warehouse Co., as truck driver, lifting cotton or anything. He had been in their employ some 10 years. He weighed

215 pounds, fine physical appearance and had never lost any time in performing his work. He was injured on 17 September, 1936, about 7:30 p. m. while at work, slipped and fell some five or six feet from a platform and broke his leg. He lay where he fell, exposed to the weather, about half an hour and was carried into the office and stayed there about two hours—an hour waiting on the doctor, who gave him first aid—before he received medical treatment. The weather was cool and it was cold enough to wear a topcoat or overcoat. His wife testified that they had been married 18 years and had three children and he had never been sick and never lost a day from work in the 18 years. The injury occurred on 17 September and he died on 26 November, 1936.

Dr. P. A. Shelburne testified, in part, that after giving him treatment he went home and came to his office probably once a week. One of his family said he was not getting along so well and in consequence he saw him and sent him to the hospital. Dr. Shelburne further testified that in his opinion the "accident and the exposure probably shortened the man's life," that the "injury accelerated his death." Dr. W. W. Harvey, who stated that he had studied acute nephritis extensively, declared that the "accident (was a) factor" operating as the cause of death, and that considering the accident and the exposure as the cause of the fatal acute nephritis was "a very reasonable explanation." Dr. J. F. Register stated that exposure would be a definite predisposing factor in causing acute nephritis. Dr. Fred M. Patterson gave evidence to the effect that "the exposure and the trausma could be disposing causes" to acute nephritis.

Application for review by the Full Commission was given by the defendants in apt time. Said review was held before the Full Commission on 18 June, 1937, at Raleigh, N. C. Thereafter an award by the Full Commission was entered in favor of plaintiffs. Notice of the award was given to all parties, and the award, together with the findings of fact and conclusions of law of the Full Commission were duly filed. Thereafter notice of appeal to the Superior Court for Guilford County was given by defendants to plaintiffs, through their counsel, and to the North Carolina Industrial Commission. The record in this action was certified by the secretary of the North Carolina Industrial Commission to the Superior Court of Guilford County, where it was docketed and heard before the presiding judge at the 20 September Civil Term, 1937, upon the record. The judge of the Superior Court entered a judgment finding no error in the award of the Industrial Commission and affirming the award. Defendants excepted, assigned error, and appealed to the Supreme Court.

Brooks, McLendon & Holderness for plaintiffs.
Sapp & Sapp for defendants.

CLARKSON, J. The defendants admit: "That on and prior to 17 September, 1936, Gaither Doggett was an employee of the South Atlantic Warehouse Corporation; that on that date the employer had more than five employees and that the General Accident Fire and Life Assurance Corporation, Limited, was the carrier, and admit a weekly wage of $12.50."

The only question involved on this appeal is, Is there competent evidence to support the Industrial Commission's finding of fact that the disease from which the deceased died resulted naturally and unavoidably from an accident which arose out of and in the course of his employment? We think so.

N. C. Code, 1935 (Michie), sec. 8081(i) f, is as follows: "'Injury and personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident."

Sec. 8081(i) j: "The term 'death' as a basis for a right to compensation means only death resulting from an injury."

In *Johnson v. Hosiery Co.*, 199 N. C., 38 (40), it is said: "It is further provided in section 60 that the award of the Commission 'shall be conclusive and binding as to all questions of fact.' However, errors of law are reviewable. It is generally held by the courts that the various compensation acts of the Union should be liberally construed, to the end that the benefits thereof should not be denied upon technical, narrow, and strict interpretation." *Rice v. Panel Co.*, 199 N. C., 154 (157); *Southern v. Cotton Mills Co.*, 200 N. C., 165 (169); *Aycock v. Cooper*, 202 N. C., 500 (504). The evidence which makes for plaintiff's claim, or tends to support his cause of action, is to be taken in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. *Southern v. Cotton Mills Co., supra; Hildebrand v. Furniture Co., ante*, 100.

"The definition of injury given in sec. 2(f) also provides that 'it shall not include a disease in any form, except where it results naturally and unavoidably from the accident.' In applying this (*Thompson v. Williams*, 1 N. C., Industrial Commission, 124, approved in 200 N. C., 463) . . . the Commission evinced a willingness to construe definitions liberally. Plaintiff, a truck driver, sustained an injury to his eye while cleaning a carburetor. The injury irritated his eye and resulted in ulcer. Seven days after the accident the plaintiff was treated by a doctor, who gave the plaintiff some lotion to use. He visited the doctor three times. Then gonorrhea opthalmia showed up, which was on the thirteenth day after the accident. As a result of the infection the plaintiff lost one eye and suffered a partial loss of use in the other

eye. Compensation was allowed. . . . This liberal construction tends to effectuate the general purpose of the Workmen's Compensation Act." 8 N. C. Law Review, 421.

The opinion of the Full Commission, in part, is as follows: "The defendants attorney insisted upon each of the doctors answering if, in their opinion, the diseased condition of the plaintiff's deceased was the result of the accident and came on naturally and unavoidably. The Full Commission is convinced that the nephritis was aggravated by the plaintiff's injury by accident and that the plaintiff's entire condition was accelerated, aggravated, or complicated by the exposure to the cool weather. The plaintiff lay exposed for approximately thirty minutes following his accident. One witness testified that it was cool enough to wear a topcoat. Dr. Harvey testified that he had examined the authorities thoroughly before testifying and that he found that exposure was a contributing cause to nephritis. He testified, in part: 'If that (accident) didn't do it, I wouldn't know any way to explain it.' The editor in 19 A. L. R., 96, says: 'It is an established rule that the fact that an employee was suffering from a diseased condition does not necessarily bar him from a right to compensation in case of injury and disability, but that an award may be had in case of disability which was proximately caused by an accident or personal injury arising out of and in the course of the employment, which accelerated or aggravated an existing disease.' On page 104 of A. L. R. we find the following citation: 'In *Pinyon Queen Min. Co. v. Industrial Commission* (1922), Utah, 204 Pac., 323, where the act provided that personal injury should "not include a disease except as it shall result from the injury," an allowance of compensation for the full term of disability was sustained, although a dormant syphilitic condition was accelerated and prolonged the period of disability.' In 28 A. L. R., 205, the editor says: 'The established rule . . . has been affirmed in a number of recent cases.' Annotations in 19 A. L. R., 95; 28 A. L. R., 204, and 60 A. L. R., 1299, citing cases from almost every state in the Union, state the following rule: 'It is an established rule that the fact that an employee was suffering from a diseased condition does not necessarily bar him from a right to compensation in case of injury and disability, but that an award may be had in case of a disability which was proximately caused by an accident or personal injury arising out of and in the course of the employment which accelerated or aggravated an existing disease.'" *U. S. Casualty Co. v. Smith*, 34 Ga. Appeals, 363, 129 S. E., 880, at p. 884; *Maryland Casualty Co. v. Brown*, 48 Ga. Appeals, 822, 173 S. E., 925; *Pruitt v. Ocean Accident and Guaranty Corp.*, 48 Ga. Appeals, 730, 173 S. E., 238; *U. S. Casualty Co. v. Matthews*, 35 Ga. Appeals, 526, 133 S. E., 875; *Winchester Milling Corp. v. Sencindiver*, 148 Va., 388, 138 S. E., 479; *Fenton v. The Ship Kelvin* (1925), 2 K. B., 473, 14 British

Ruling Cases, 487; *Rickstadt v. Dept. of Lab. and Ind.*, 180 Wash., 391, 41 Pac. (2d) 391; *Sionek v. Glen Alden Coal Co.*, 105 Pa., 189, 160 Atl., 154; *U. S. Fid. and Guar. Co. v. Maddox*, 52 Ga. Appeals, 416, 183 S. E., 570.

For instances where compensation has been allowed for disability due to nephritis and for a discussion of the causes of such disease, see *U. S. Cast Iron Pipe and Foundry Co. v. Hartley*, 217 Ala., 462, 116 Sou., 666 (burns cause of nephritis); *United Paper Board Co. v. Lewis*, 65 Ind. Ap., 356, 117 N. E., 276 (exposure cause of nephritis), and cases grouped under the A. L. R. Annotations, *supra*, and 73 A. L. R., 532.

In the case of *Schneider v. Travelers Ins. Co.* (La. App., 1937), 172 Sou., 580, where a traumatic injury to a carpenter was a contributing cause of his disability from an arthritic condition of the liver, it was held that recovery under the Compensation Act was authorized, notwithstanding that his disability was aided and aggravated by focal infection produced by tonsils, teeth and germs. In *Doherty v. Grasse Isle Twp.*, 205 Mich., 592, 172 N. W., 596, an injury to the employee's foot was a contributing cause of his death, although the immediate cause was obstruction of the bowels, and it was held that compensation was properly allowed.

It is well settled in this jurisdiction that the findings of fact of the Industrial Commission in a hearing before it are conclusive upon appeal when there is sufficient competent evidence to support the award. *Brown v. Ice Co.*, 203 N. C., 97 (100). In the present case we think there was sufficient competent evidence to support the finding of fact that the disease from which Gaither Doggett died resulted "naturally and unavoidably from the accident."

For the reasons given, the judgment is

Affirmed.

M. L. JONES, A TAXPAYER OF ALAMANCE COUNTY, ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF ALAMANCE COUNTY WHO MAY DESIRE TO JOIN WITH HIM, v. ALAMANCE COUNTY, AND WADE H. HUFFMAN, W. R. SELLARS, L. E. GUTHRIE, W. E. STAINBACK, AND W. L. McPHERSON, BOARD OF COMMISSIONERS FOR THE COUNTY OF ALAMANCE, DEFENDANTS.

(Filed 15 December, 1937.)

Taxation § 38a—Action to restrain issuance of bonds is properly dismissed after the thirty-day period prescribed by statute.

Where it is established that a proposed bond issue of a county was duly advertised and notice to citizens and taxpayers duly published as required by the County Finance Act (ch. 81, Public Laws of 1927), as amended,

C. S., 1334), and that the issuance of the bonds was ratified by act of the Legislature prescribing that no action should be instituted attacking the validity of the bonds and no suit should be maintained to restrain the levy or collection of taxes to pay same after the expiration of thirty days from the ratification of the act, an action instituted more than thirty days after the publication of the bond order and the ratification of the public-local act is properly dismissed, the action being barred by sec. 20 of the County Finance Act, by the bond ordinance, and by the provisions of the public-local act, and plaintiff taxpayer has lost his right to controvert the fact declared in the resolution authorizing the bond issue that the indebtedness to be funded by the proposed bonds was incurred for the construction of roads and bridges in the county.

APPEAL by plaintiff from *Bone, J.*, at August Term, 1937, of ALAMANCE. Affirmed.

This was an action to restrain the issue of bonds by the county of Alamance for the purpose of refunding certain note indebtedness of the county, and to restrain the levy of tax to pay the interest and principal of said bonds.

At the trial below it was agreed that the pleadings in the action should constitute the evidence in the case, and that the court might find the facts from said pleadings and render judgment thereon.

Pursuant to this agreement, the court found the facts and entered his conclusions of law thereon as follows:

"1. That between the dates of 5 January, 1920, and 12 September, 1930, both dates inclusive, the defendant Alamance County borrowed various sums of money and issued the negotiable promissory notes of the county for the moneys so borrowed, and that the promissory notes so issued and which are involved in this action are described in plaintiff's complaint and amount to the sum of $33,040.78.

"2. That at a meeting of the board of commissioners of Alamance county held on 18 January, 1937, an order was introduced under the provisions of the County Finance Act, as amended, authorizing the issuance of bonds of Alamance County in an amount not exceeding $30,000 for the purpose of funding a like amount of the principal of the subsisting note indebtedness mentioned in the preceding paragraph. Said order provides that a tax sufficient to pay the principal and interest of such bonds when due shall be annually levied and collected. A copy of said bond order, together with the notice appended thereto, as required by sec. 16 of the County Finance Act, as amended, was duly published on 21 January, 1937, in *The Daily Times-News*, a newspaper published in Alamance County. At a meeting held on 1 February, 1937, the day fixed for the public hearing upon said bond order, the board of commissioners of Alamance County finally passed said bond order, and a copy of said bond order, together with the notice appended

thereto as required by sec. 19 of the County Finance Act, as amended, was duly published on 3 February, 1937, and on 10 February, 1937, in said *The Daily Times-News;* said bond order recites that the above mentioned note indebtedness was legally incurred before 20 March, 1931, for the construction of roads and bridges in such county, all constituting necessary expenses of the county, but the records of the county contain no evidence showing the purpose or purposes for which the note indebtedness was incurred or the purpose or purposes for which the moneys received for the notes were used.

"3. That the notice appended to said bond order and published with said bond order on 21 January, 1937, as above set forth, provides that any citizen or taxpayer may protest at a meeting of the board of county commissioners of Alamance County to be held at 10 o'clock a.m., 1 February, 1937, or an adjournment thereof, against the issuance of the proposed funding bonds, authorized to be issued by said bond order. A meeting of said board was held at said time to receive such protests, and at said meeting neither plaintiff nor any citizen or taxpayer of Alamance County, nor any other person, appeared, either in person or by attorney, to protest against the issuance of said funding bonds, nor was any protest in writing presented at said meeting by any citizen or taxpayer of Alamance County or by any other person, nor has any such protest been received at any time by the board of commissioners of Alamance County. The notice appended to said bond order and published with said bond order as finally passed on 3 February, 1937, and on 10 February, 1937, as above set forth, provides that any action or proceeding questioning the validity of said bond order must be commenced within 30 days after its first publication. No action or proceeding of any kind questioning the validity of said bond order was commenced within 30 days after 3 February, 1937, the date of the first publication of said bond order as finally passed, nor has any such action or proceeding been commenced at any time prior to the institution of this action by the filing of plaintiff's complaint herein on 3 June, 1937.

"4. That the General Assembly of North Carolina, by an act passed at its regular session in 1937 and ratified 27 February, 1937 (chapter 129 of 1937 Public-Local Laws), found and declared that the note indebtedness mentioned in the first paragraph of these findings of fact was legally incurred for the construction of roads and bridges in the county, and all of said indebtedness is by said act validated and confirmed and declared to be valid, subsisting indebtedness of the county, created for necessary expenses and for special purposes with the special approval of the General Assembly. Said act further provides that in each year while any of the proposed funding bonds shall be outstanding, there shall be levied upon all taxable property in the county a special tax

sufficient to pay the interest on said bonds as the same shall fall due, and also sufficient to provide for the creation of a special fund for the payment of the principal of said bonds at or before their maturity, which tax shall be in addition to all other taxes authorized or limited by law, and by said act the General Assembly does give its special approval to the levy of said tax for said special purposes. Said act of the General Assembly further provides that any action or proceeding in any court to set aside said bond order or to obtain any other relief upon the ground that said bond order is invalid, or that the notes to be funded are invalid, and any action or proceeding in any court to restrain or enjoin the levy of the special tax provided for in said act and in said bond order must be commenced within 30 days after the ratification of said act, and that after the expiration of said period of limitation, no right of action or defense founded upon the invalidity of said bond order or questioning the power or the authority to levy the special tax provided for in said act and in said bond order, shall be asserted, nor shall the validity of said bond order or the power or authority to levy said tax be open to question in any court upon any ground whatever, except in an action or proceeding commenced within said period. No action or proceeding to set aside said bond order or to obtain any other relief upon the ground that said bond order is invalid, and no action to enjoin the levy of the special tax approved and authorized by said bond order and by said act of the General Assembly was commenced in any court within said period of 30 days after 27 February, 1937, the date of the ratification of said act, nor has any such action or proceeding been commenced at any time prior to the institution of this action by the filing of plaintiff's complaint herein on 3 June, 1937."

From the foregoing facts the court legally concludes:

"1. That the finding and declaration of the General Assembly of North Carolina in the act ratified 27 February, 1937, that the indebtedness to be funded by the issuance of said $30,000 funding bonds was incurred for the construction of roads and bridges in said county, are conclusive and finally determine that such indebtedness was incurred for the construction of roads and bridges in said county, and such finding and declaration are binding upon and may not be reviewed by this court.

"2. That, by said act of the General Assembly of North Carolina, ratified 27 February, 1937, the special approval of the General Assembly was given to the levy of a special tax sufficient to pay the interest upon the bonds which Alamance County proposes to issue to fund the note indebtedness mentioned in the first paragraph of the findings of fact, and also sufficient to provide for the creation of a special fund for the payment of such bonds at or before their maturity, which tax shall be in addition to all other taxes authorized or limited by law.

"3. That the plaintiff and all other taxpayers and citizens of Alamance County are barred from maintaining this or any similar action by the provisions of sec. 20 of the County Finance Act, as amended.

"4. That the plaintiff and all other taxpayers and citizens of Alamance County are barred from maintaining this or any similar action by the provisions of said act of the General Assembly of North Carolina, ratified 27 February, 1937."

It was thereupon adjudged that Alamance County had authority to issue the $30,000 funding bonds and to levy tax sufficient to pay the principal and interest thereon.

From this judgment plaintiff appealed.

Carr & Vernon for plaintiff, appellant.
Rhodes & Shoffner for defendants, appellees.

DEVIN, J. The admissions of the parties and the findings of the court below establish the fact that in accord with the applicable provisions of the County Finance Act (ch. 81, Public Laws of 1937, and amendments thereto, C. S., 1334), the proposed issue of bonds was duly advertised, and notice to citizens or taxpayers was duly published, giving them opportunity to protest or object, and that no protest or objection by the plaintiff or any other person was made until more than the thirty days' limitation fixed by the statute, and by defendant's bond ordinance, and by chapter 129, Public-Local Laws of 1937, for the institution of action or proceeding to question the validity of the bonds, had expired. Hence, under the decision of this Court in *Kirby v. Board of Commissioners of Person,* 198 N. C., 440, 152 S. E., 165, upholding this limitation in the statute, plaintiff's complaint was properly dismissed.

In *Kirby v. Board of Commissioners of Person, supra,* it was said, *Brogden, J.,* speaking for the Court: "The statute in plain and imperative English provides that the validity of a bond ordinance shall not be open to question unless the suit is brought within thirty days after the first publication of notice. This statute is part of the act authorizing the ordinance, and hence all parts of the same statute must be read and construed together. The effect of the time limit is that, after the lapse of thirty days, if no suit has been instituted, the bond ordinance is deemed to be valid for all purposes."

Further, it appears that, while plaintiff seeks to controvert the facts recited in defendant's bond ordinance and in the Act of 1927, that the indebtedness ordered to be funded was incurred for the construction of roads and bridges, his allegation is that there is no public record showing the purpose for which the indebtedness was incurred. It may well be doubted whether this is sufficient to raise the issue that the indebtedness

was not in fact incurred for that purpose, as definitely declared in the defendant's bond ordinance.

However, after due notice published in the manner prescribed by the statutes, the plaintiff has failed to object or protest, or to bring his action within the time limited, and may not now be heard to controvert the facts declared by the board of commissioners of Alamance County in the resolution authorizing the funding of this indebtedness, or to question the validity of the bonds.

Judgment affirmed.

WILBUR G. SMITH v. SWIFT & COMPANY AND SECURITY MUTUAL CASUALTY COMPANY.

(Filed 15 December, 1937.)

1. Master and Servant §§ 41, 42—Where partially disabled employee obtains other work, he is entitled to only 60 per cent of difference between new wage and wage before disability.

Claimant was paid for total temporary disability under agreement of the parties, and thereafter, upon a hearing to determine whether total disability had terminated, an award was entered granting claimant compensation for partial permanent disability for the maximum period allowed by the statute, from which award neither party appealed. Thereafter claimant secured other employment and defendants filed petition to terminate payments for partial permanent disability, and introduced evidence of claimant's other employment, but no evidence relating to change of physical condition of claimant. *Held:* The fact that claimant entered the employment of another employer constitutes a "change of condition" as contemplated in sec. 46 of the Compensation Act (8081 [bbb]), and claimant was entitled as a matter of law only to 60 per cent of the difference between his average weekly wage in his new employment and his larger average weekly wage before the disability, secs. 2 (i) and 30 of the act (N. C. Code, 8081 [ll]). There was no evidence of "serious facial or head disfigurement under sec. 31 (N. C. Code, 8081 [mm]).

2. Master and Servant § 55d—

The failure of the Industrial Commission to reduce partial permanent disability compensation to 60 per cent of the difference between the employee's average weekly wage before disability and his wage upon securing new employment is error of law and reviewable.

APPEAL by claimant from *Grady, J.*, at Chambers in Wilmington, 19 February, 1937. From BRUNSWICK. Affirmed.

Burney & McClelland for claimant, appellant.
Carr, James & LeGrand for defendants, appellees.

SCHENCK, J. This is a proceeding under The North Carolina Workmen's Compensation Act, chapter 120, Public Laws 1929, N. C. Code of 1935 (Michie), section 8081 (h) *et seq.* The claimant was injured on 16 February, 1933, when the automobile he was driving wrecked, causing an injury to his nose, lacerations on his right arm and separation of the sacro-iliac joint. As a result of said injury, the defendants paid claimant for temporary total disability under the provisions of an agreement dated 18 March, 1933, based upon an average weekly wage of $28.00, until September, 1934, at which time defendants requested a hearing for the purpose of determining whether the total disability had terminated, and, if so, the extent of the partial permanent disability of the claimant. This hearing was granted, and on 28 September, 1934, it was determined that plaintiff's total disability had terminated on 14 July, 1934, and the claimant was allowed 30 per cent partial permanent disability of a general nature, amounting to $5.04 per week for 300 weeks, less the number of weeks for which claimant was paid compensation for total disability. The defendants and claimant accepted the provisions of this award without any appeal therefrom.

On 15 February, 1936, defendants filed petition to have terminated the payments for partial permanent disability for the alleged reason that the claimant, Wilbur G. Smith, when injured as an employee of Swift & Company received a weekly salary of $28.00 per week, and since December, 1934, claimant as an employee of the Southern Oil Transportation Company has received a salary of approximately $28.00 per week. Upon this petition hearing was had before Commissioner Jurney on 25 July, 1936, "at which time it was admitted that Mr. Smith entered the employ of the Southern Oil Transportation Company on or about 16 December, 1934, and that he remained in this employment until on or about 4 February, 1936, receiving for his services a weekly salary of approximately $26.80 per week; that during this period of time he received compensation for his injury on 15 February, 1933, of $5.04 per week." It further appears that "the Commissioner finds as a fact that the defendants were paying the claimant for total disability, up until the award of Commissioner Wilson in September, 1934, during which time he was totally disabled; that thereafter his compensation was reduced to 30 per cent, or $5.04 a week, and the claimant remained out of employment until December, 1934, sustaining himself upon the $5.04 per week. In December, 1934, claimant, through his own efforts, was successful in procuring another job that paid him approximately $28.00 per week, where he continued to work, as shown by the evidence offered at this hearing, until February, 1936. This Commissioner is of the opinion that if the claimant were suffering from a 30 per cent general disability in September, 1934, it being of a permanent nature, the fact that he procured work that paid him approximately the same wage that he was

receiving before the injury, which in all probability he carried on under pain as the result of his physical disability, and was able to earn a living, which the compensation of 30 per cent did not afford, the hearing Commissioner is of the opinion that he should not be denied compensation heretofore awarded. . . . Furthermore, the Commissioner finds that in the hearing at Wilmington, 25 June, the defendants offered no evidence of a medical nature showing that there had been a change in the physical condition of the claimant, but defendants sought to use an entirely different 'yardstick' than used in September, 1934, before Commissioner Wilson, and used the 'yardstick' of earnings, rather than determining of the physical condition, the inference being that because he was earning more money that his physical condition had improved. There was no medical evidence to show, however, what pain the claimant had suffered in earning that money occasioned by the original injury.

"Therefore, the Commissioner finds as a fact that there has been no change of condition of the claimant justifying any change in the award of Commissioner Wilson made in September, 1934."

Upon appeal by defendants to it, the Full Commission found as a fact that "there is no medical evidence that there has been a physical change in the claimant's condition. There is the evidence that there has been a financial or employment change of the claimant," and states that "the only real question is: Has there been a change in condition within the meaning of section 46? The answer is that there has been no change in the claimant's physical condition, but fortunate improvement in his economic status," and concludes its opinion thus: "The Full Commission affirms the findings of fact, conclusions of law, and the award of the hearing Commissioner. The appeal is dismissed and the defendants will pay the cost of this hearing."

From the judgment of the Full Commission dismissing the appeal to it, the defendants appealed to the Superior Court.

The case came on for hearing before Grady, J., holding the February Term, 1937, of New Hanover, and by consent judgment was rendered at chambers at Wilmington, 19 February, 1937. The judgment is in part as follows: "The court is of the opinion that the defendants are entitled to have the award of 28 September, 1934, modified so that the weekly allowance to be paid to claimant shall be 60 per centum of the difference between his former and his latter weekly wage; and this modification should apply from the beginning of claimant's second employment, to wit, 16 December, 1934. This cause is remanded to the Commission with direction that it enter an order in conformity with this judgment."

From this judgment claimant appealed to the Supreme Court, assigning as error the signing of said judgment.

It will be observed that section 2 (i) of the Workmen's Compensation Act, N. C. Code of 1935 (Michie), section 8081 (i), in defining dis-

ability states that "The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or *any other employment.*"

Section 30 of the Compensation Act, N. C. Code of 1935 (Michie), sec. 8081 (ll), is as follows: "Except as otherwise provided in the next section hereafter, where the incapacity for work resulting from the injury *is partial,* the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, *a weekly compensation equal to 60 per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter,* but not more than eighteen dollars a week, and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability."

We are of the opinion that the admission made at the hearing before Commissioner Jurney that the claimant "entered the employ of the Southern Oil Transportation Company on or about 16 December, 1934, and that he remained in this employment until on or about 4 February, 1936, receiving for his services a weekly salary of approximately $26.80 per week," establishes "a change of condition" of the claimant since the award of 28 September, 1934. The incapacity of the claimant for work was partial, his average weekly wage before injury was $28.00 per week, and the average weekly wage he was able to earn after his injury was (according to admission and findings of fact) $26.80 per week, and under the provision of the statute that "the employee shall pay, or cause to be paid . . . to the injured employee, during such disability, a weekly compensation of 60 per cent of the difference between his average weekly wage before the injury and the average weekly wages which he was able to earn thereafter," it followed as a matter of law that there was a change in his condition as contemplated in sec. 46 of the Compensation Act (N. C. Code, 8081 [bbb]), and that the award of 28 September, 1934, should have been diminished to comply with section 30. This the award of the Full Commission failed to do, and in such failure there was an error of law, reviewable by the Superior Court.

There is no evidence upon which the claimant's claim could be brought within the provisions of section 31 of the Compensation Act (N. C. Code, 8081 [mm]) by reason of "serious facial or head disfigurement," or otherwise.

The judgment of the Superior Court remanding the case to the Commission that an order may be made in accord with section 30 of the Compensation Act is affirmed.

Affirmed.

MILDRED E. MILLER v. J. THOMAS LITTLE.

(Filed 15 December, 1937.)

1. **Homestead § 5—**

A judgment debtor is entitled to have his homestead allotted in an equity of redemption, but the homestead should be allotted therein without regard to the mortgage encumbrance and as if it did not exist.

2. **Same—**

A judgment debtor, upon foreclosure of a mortgage or deed of trust on his lands, resulting in a surplus over the mortgage debt, is entitled to have his homestead allotted in such surplus.

3. **Execution § 20—Where homestead is allotted in encumbered lands, purchaser at execution sale of balance of lands takes same subject to mortgage.**

Where the judgment debtor has his homestead allotted in lands owned by him subject to a mortgage or deed of trust, and the balance of the land, after allotment of the homestead, is sold under valid execution, the purchaser at the execution sale takes title to that portion sold subject to the lien of the mortgage or deed of trust, and in effect becomes a comortgagor with the judgment debtor.

4. **Homestead § 5—Where homestead is allotted in encumbered lands and rest of land sold under execution, upon later foreclosure of entire tract, judgment debtor is not entitled to homestead in entire surplus.**

The judgment debtor had his homestead allotted in encumbered lands, and the balance of the lands after allotment of homestead were sold under valid execution and bought in by the judgment creditor. Thereafter, the entire tract was sold under foreclosure of the deed of trust, resulting in a surplus after payment of the mortgage debt. *Held:* The judgment debtor is not entitled to claim his homestead in the entire surplus, since the purchaser at the execution sale took title to the portion sold under execution subject only to the encumbrance, and being in effect a comortgagor in the property with the judgment debtor, and is therefore entitled to have the surplus after foreclosure divided between him and the judgment debtor in proportion to their respective interests in the land. Constitution of North Carolina, Art. X. The judgment debtor did not request that the lands outside his allotted homestead be first sold to satisfy the mortgage debt and thereby waived his right to exoneration and cannot assert such right after foreclosure at the expense of the purchaser at the execution sale.

APPEAL by plaintiff from *Warlick, J.*, at May Civil Term of UNION. Error and remanded.

The uncontroverted facts may be concisely stated as follows:

J. Thomas Little, the defendant, in 1923 executed a deed of trust on 154 acres of land, then owned by him, for the purpose of securing a debt due by him.

In 1936 Mildred E. Miller, the plaintiff, obtained and docketed a judgment against the defendant Little in the sum of $650.00, plus interest and costs. Under this judgment the homestead of defendant Little was laid off and there was allotted to him as his homestead twenty-five acres of land out of the 154-acre tract. The remainder of the tract in excess of the homestead, consisting of 129 acres, was sold under execution by the sheriff and bought by plaintiff at the sale for $350.00, and deed therefor was executed to her by the sheriff, 30 November, 1936. Plaintiff credited the purchase price, less costs, on her judgment, leaving balance due on her judgment $358.00.

On 3 March, 1937, the original deed of trust on the entire tract of 154 acres was foreclosed and the land sold and purchased at the sale by one Warren Collins at the price of $3,550. After paying the debt secured by the deed of trust and costs of sale there was a surplus of $812.27 which was paid by the trustee into the hands of the clerk. Thereupon the defendant J. Thomas Little claimed homestead in the entire surplus. The plaintiff, admitting the defendant was entitled to homestead in a portion of the fund, contended she was entitled to a part thereof, proportionate to the relative value of her 129 acres of the land at the time of the sale.

The judge of the Superior Court adjudged that defendant was entitled to homestead in the entire surplus, and that upon the falling in of homestead, plaintiff, as judgment creditor, would be entitled to the balance of her judgment, the remainder, if any, to go to the representatives of the defendant.

Plaintiff appealed.

A. M. Stack (by brief) and O. R. Richardson for plaintiff.
Vann & Milliken for defendant.

DEVIN, J. The appeal from the judgment below presents this question:

Where the homestead is allotted in a portion of a tract of land, the whole of which is subject to a prior outstanding deed of trust, and the remainder of the land in excess of the homestead is sold under execution and title conveyed to another, and thereafter the deed of trust is foreclosed and the entire tract of land sold, resulting in a surplus over the mortgage debt, is the debtor entitled to homestead in the entire surplus or only in his proportionate part thereof?

The decisions of this Court upon the various situations arising under the Homestead Law of North Carolina (Art. X, Const. of N. C.), which are pertinent to the case at bar, seem to settle these principles of law:

1. A judgment debtor is entitled to have his homestead allotted in an equity of redemption, that is, in land subject to a deed of trust or mortgage. *Cheatham v. Jones*, 68 N. C., 153; *Cheek v. Walden*, 195 N. C., 752, 143 S. E., 465; *Farris v. Hendricks*, 196 N. C., 439, 146 S. E., 77.

2. The homestead is allotted therein without regard to the mortgage encumbrance and as if it did not exist. *Crow v. Morgan*, 210 N. C., 153, 185 S. E., 668; *Chemical Corp. v. Stuart*, 200 N. C., 490, 157 S. E., 608.

3. Upon foreclosure of the mortgage or deed of trust and sale of his land, resulting in a surplus over the mortgage debt, the judgment debtor may assert his homestead right in such surplus. *Farris v. Hendricks, supra; Cheek v. Walden, supra; Montague v. Bank*, 118 N. C., 283, 24 S. E., 6; *Hinson v. Adrian*, 92 N. C., 121.

4. Where the homestead, subject to the prior lien of a mortgage or deed of trust, is laid off, and the excess over the homestead sold under valid execution by the sheriff, the purchaser steps into the shoes of the debtor and mortgagor as to such excess; that is, he becomes the owner of the land, subject to the mortgage or deed of trust. *Parrott v. Hardesty*, 169 N. C., 667, 86 S. E., 582; *Hemphill v. Ross*, 66 N. C., 477; *Jordan v. Pool*, 27 N. C., 105; 23 C. J., 746.

In *Hemphill v. Ross, supra*, it was said by this Court: "Charles F. McKesson purchased the legal right of redemption belonging to the mortgagor at the execution sale, and the sheriff's deed conveyed such estate to the purchaser and substituted him to the right of the mortgagor."

Applying these principles of law, it appears that when plaintiff obtained her judgment and defendant's homestead was laid off the homestead was allotted to the defendant in 25 acres of the land, valued without regard to the outstanding lien of the deed of trust, and that the excess over the homestead, 129 acres, also subject to the outstanding deed of trust, was sold for $350.00 (presumably bringing only the estimated value over the encumbrance) and purchased by the plaintiff. This had the effect of divesting the defendant of title to the 129 acres, and of constituting the plaintiff the owner of the 129 acres subject to the deed of trust; that is, substituting her to all the rights and burdens of the trustor or mortgagor as to that portion of the land, and putting her in a position similar to that of a joint mortgagor with the defendant Little as to the entire tract of land. Hence it follows that when the entire tract was sold under the prior lien of the outstanding deed of trust resulting in a surplus, that surplus, nothing else appearing, belonged to the mortgagors, the plaintiff and the defendant as their respective interests might be determined. The surplus did not belong entirely to defendant Little, but only that proportionate part of it which the value of his remaining land bore to the value of the whole.

For illustration, if the trustee had sold only the 129 acres, and that had satisfied the mortgage debt, defendant's homestead would have been undisturbed, subject only to the lien of plaintiff's judgment. If the trustee had sold only the 25 acres, and that had paid the debt, defendant could not have claimed a homestead in the 129 acres because that belonged to another, the plaintiff (*Sash Co. v. Parker,* 153 N. C., 130, 69 S. E., 1). If the 25 acres had brought a surplus over the mortgage debt, defendant would have been entitled to homestead in such surplus. If the 129 acres alone had been sold and brought a surplus, this surplus would have belonged to the plaintiff.

It was well said in *Hinson v. Adrian,* 92 N. C., 121, that "the policy of the law is to help the party entitled to homestead, as far as may be, without undue prejudice to the creditor entitled to have his debt paid in any case."

There is authority for the position that where lands are subject to a prior mortgage and subsequently docketed judgments, and the homestead is laid off and the excess over the homestead sold and purchased by another, the homesteader might require that the lands outside the bounds of the exemption be sold first, and that the homestead be not sold when it appears that the proceeds of the sale of the other lands will be sufficient to pay the debt. *Cheatham v. Jones,* 68 N. C., 153; *Burton v. Spiers,* 87 N. C., 87; *Butler v. Stainback,* 87 N. C., 216; *Hinson v. Adrian, supra.* The force of these authorities, however, may not be held to support defendant's contention that he is entitled to homestead in the entire surplus. Here the defendant made no effort to avail himself of this right, if such he had, before the sale, nor does it appear that the sale of a portion of the land would have been sufficient to satisfy the mortgage. Having offered no objection to the sale of the entire tract, his own portion as well as that of the plaintiff, he would be deemed to have waived his right to do so and would have no right superior to that of the plaintiff, now, with respect to the proceeds. In *Leak v. Gay,* 107 N. C., 468, 12 S. E., 261 (later overruled on another point), it was held that the homesteader could require the application of the surplus from the sale of land in excess of the homestead in exoneration of the homestead from a junior mortgage, but that surplus was derived from the sale of his own land and not another's.

None of the cases cited constitute authority for the denial of the ordinary rights of the purchaser and owner of land, outside of the bounds of the exemption, which has been sold and conveyed to him by the sheriff under execution against the debtor. The sale of all the land having been consummated and a surplus obtained arising from both tracts, it is not perceived how the defendant can now properly claim the right of homestead in the entire surplus, or invoke the application

of the equitable principle of exoneration. Equity would not permit the defendant to have the fund obtained from the sale of plaintiff's 129 acres of land applied first to the payment of his own debt in exoneration of his homestead right, at the expense of plaintiff's right to that portion of the surplus which was derived from sale of her land.

So, upon reason and authority, we conclude that there was error in the judgment as rendered, and that defendant was entitled to homestead only in that portion of the surplus fund in excess of the mortgage debt which was derived from the sale of his own portion of the land. As this essential fact has not yet been judicially determined, the cause is remanded for proper finding as to the respective values of the two portions of the land owned by plaintiff and defendant at the time of the sale, and for judgment in accordance with this opinion.

Error and remanded.

W. H. NEVINS v. CITY OF LEXINGTON.

(Filed 15 December, 1937.)

1. Municipal Corporations § 46—

An action to recover the face value of interest coupons on municipal bonds, payment having been refused except at a lower rate of interest, is an action *ex contractu*, and C. S., 1330, requiring as a condition precedent that demand for payment be made upon the proper municipal authorities, is applicable.

2. Municipal Corporations § 11c—

A city manager, under Plan D, is charged with the execution of ordinances, resolutions, and regulations of the city council, and is given authority to appoint and remove city employees and is required to make reports to the council, and is solely an administrative officer. N. C. Code, 2888, 2889, 2897.

3. Municipal Corporations § 46—

Allegation that claimant had made demand for payment of municipal interest coupons upon the city manager of a city operating under Plan D, is insufficient allegation of demand upon the "proper municipal authorities" as required by C. S., 1330.

DEVIN, J., dissenting.

BARNHILL, J., concurs in dissent.

APPEAL by plaintiff from *Armstrong, J.*, at May Term, 1937, of DAVIDSON. Affirmed.

This is an action to recover of the defendant the sum of $110.00, with interest from 1 October, 1936, and the costs of the action.

The action was begun on 1 March, 1937, in the court of a justice of the peace of Davidson County, North Carolina.

In the complaint, which is in writing and duly verified by the attorney for the plaintiff, as authorized by statute, C. S., 530, it is alleged:

"1. That the plaintiff is a nonresident of the State of North Carolina, and that the defendant is a municipal corporation, organized and existing under and by virtue of the laws of the State of North Carolina, having, among other powers, the power to issue bonds in order to construct its water and sewer lines, and did issue bonds for the purpose of constructing its water and sewer lines.

"2. That the plaintiff is the owner of coupon No. 26 on water and sewer bond No. 96, for $27.50, and is also the owner of coupon No. 26 on water and sewer bond No. 97, for $27.50, and is also the owner of coupon No. 26 on water and sewer bond No. 98, for $27.50, and is also the owner of coupon No. 26 on water and sewer bond No. 99, for $27.50.

"3. That the plaintiff presented his claim to the city manager of the city of Lexington, the defendant in this action, to be audited and allowed, and that plaintiff's attorney was advised that the defendant would not pay said coupons.

"4. That defendant, through its city manager, advised plaintiff's attorney that no deposit had been made in New York with the United States Mortgage Trust Company, or at any other place, for the payment of said coupons, above specified, at the rate of 5½ per cent, but that provision had been made for the payment of said coupons at the rate of 4 per cent, provided the plaintiff would agree to a reduction of the interest rate on said coupons, which is 5½ per cent, to 4 per cent.

"5. That the defendant has failed and refused to pay said coupons as above set out, which were due on 1 October, 1936."

In its answer to the complaint, which is also in writing and duly verified, the defendant denies that plaintiff is the owner of the coupons described in paragraph 2 of the complaint; that the plaintiff, prior to the commencement of this action, presented his claim to the city manager of the defendant, to be audited and allowed, as alleged in paragraph 3 of the complaint, and that the defendant has failed and refused to pay said coupons, as alleged in paragraph 5 of the complaint.

In further defense of the action the defendant alleges that plaintiff did not comply with the provisions of C. S., 1330, before instituting this action, and therefore prays that the action be dismissed, in accordance with the provisions of the statute.

The action was tried in the Superior Court of Davidson County, on defendant's appeal from an adverse judgment of the justice of the peace, in whose court the action was begun.

At the conclusion of the evidence for the plaintiff, on motion of the defendant, the action was dismissed by judgment as of nonsuit. Plaintiff appealed to the Supreme Court, assigning error in the judgment dismissing the action.

Don A. Walser for plaintiff.
P. V. Critcher for defendant.

CONNOR, J. C. S., 1330, is as follows: "No person shall sue any city county, town, or other municipal corporation for any debt, or demand whatsoever, unless the claimant has made a demand upon the proper municipal authorities. And every such action shall be dismissed unless the complaint is verified and contains the following allegations: (1) That the claimant presented his claim to the lawful municipal authorities to be audited and allowed, and that they neglected to act upon it or had disallowed it; or (2) that he had presented to the treasurer of said municipal corporation the claim sued on, which had been so audited and allowed, and that such treasurer had notwithstanding neglected to pay it."

The foregoing statute is applicable to this action. The cause of action alleged in the complaint is *ex contractu* and not *ex delicto*. There is therefore no error in the judgment dismissing the action if the plaintiff has failed to comply with the provisions of the statute. See *Shields v. Durham*, 118 N. C., 450, 24 S. E., 502, and *Sugg v. Greenville*, 169 N. C., 606, 86 S. E., 695. *Jones v. Comrs.*, 73 N. C., 182.

In his complaint the plaintiff alleged and at the trial of the action offered evidence tending to show that prior to the commencement of the action he presented his claim against the defendant on account of the coupons described in the complaint to the city manager of the defendant, and that said city manager advised him that no provision had been made by the defendant for the payment of said coupons according to their tenor. He contends that he thereby complied with the provisions of the statute, and that for this reason there is error in the judgment dismissing the action.

It is provided by statute that when a city has adopted Plan D for its government, the government of the city and the general management and control of its affairs shall be vested in a city council, whose members shall be elected by the qualified voters of the city, and that said city council shall exercise its powers in the manner set out in the statute, except that the city manager, who shall be appointed by the city council, shall have the authority specified in the statute. Ch. 136, Public Laws of North Carolina, 1917, Part V, secs. 2 and 3, N. C. Code of 1935, secs. 2888 and 2889.

It is further provided by statute that when a city has adopted Plan D for its government the city council shall appoint a city manager, whose powers and duties are prescribed by statute, as follows:

"The city manager shall (1) be the administrative head of the city government; (2) see that within the city the laws of the State and the ordinances, resolutions and regulations of the council are faithfully executed; (3) attend all meetings of the council, and recommend for adoption such measures as he shall deem expedient; (4) make reports to the council from time to time upon the affairs of the city, keep the council fully advised of the city's financial condition and its future financial needs; (5) appoint and remove all heads of departments, superintendents, and other employees of the city." Ch. 136, Public Laws of North Carolina, 1917, Part V, sec. 12, N. C. Code of 1935, sec. 2897.

The city manager of the defendant, whose powers and duties are administrative only, is not the "proper municipal authority," or the "lawful municipal authority," to whom a claim against the defendant must be presented for audit and allowance, before an action on the claim can be maintained against the defendant.

In the absence of allegation in the complaint and proof at the trial that the claim of plaintiff, which is the subject matter of this action, had been presented to the city council of the defendant to be audited and allowed by said council, in accordance with the provisions of C. S., 1330, there is no error in the judgment dismissing this action. The judgment is

Affirmed.

DEVIN, J., dissenting: I cannot agree with the disposition made of this case for the reason that in my opinion the plaintiff has shown a substantial compliance with the statute (C. S., 1330) by presenting for audit and allowance interest coupons of defendant's bonds to the city manager, who is admittedly the administrative head of the city government, and particularly in charge of its financial matters. It was in evidence that the city manager refused to audit, allow or pay the coupons unless the plaintiff would agree to accept 4 per cent interest instead of the contract rate of 5½ per cent, which plaintiff declined to do. The purpose of sec. 1330 is to protect municipal corporations from suits until they have been advised of the claims and had opportunity to consider them. That purpose seems to have been fully accomplished here, for not only did the city defend plaintiff's previous suit on these same coupons, but it has defended this suit, which was brought on its written obligation in the form of coupons of its own bonds, through three courts, merely because, as the evidence shows, the

city insisted that the owner of its bonds accept 4 per cent interest instead of 5½ per cent as contracted.

In the interest of fair dealing, a narrow and restricted construction should not be placed on the words "proper authorities" when the spirit and purpose of the act have been substantially met. *Machinery Co. v. Sellers*, 197 N. C., 30, 147 S. E., 674.

I am authorized to say BARNHILL, J., concurs in this dissenting opinion.

EDITH DYER v. JOHN W. DYER.

(Filed 15 December, 1937.)

1. Divorce § 13—Absolute divorce upon two years separation does not affect decree for subsistence under C. S., 1667.

A consent decree for subsistence entered in the wife's action under C. S., 1667, is not affected by a subsequent decree for absolute divorce entered in the husband's action under C. S., 1659 (a), upon the ground of two years separation, since the decree for subsistence comes within the proviso of C. S., 1663, even though the proviso refers only to decrees for absolute divorce under C. S., 1659, on the ground of ten years separation, the effect of C. S., 1659 (a), being merely to shorten the time from ten years, as required by C. S., 1659, to two years, and the two statutes being construed *in pari materia*, and the proviso of C. S., 1663, being broad enough to cover judgments or decrees under C. S., 1659 (a).

2. Same—Decree for subsistence under C. S., 1667, is a decree awarding "alimony" within proviso of C. S., 1663.

A consent decree for subsistence entered in the wife's action for alimony without divorce under C. S., 1667, is a decree awarding "alimony" within the meaning of the proviso of C. S., 1663, it being apparent from a study of the original titles of the public laws relating to the subject, ch. 193, Public Laws of 1871-72; ch. 24, Public Laws of 1919; ch. 52, Public Laws of 1923, that the Legislature used the word "alimony" in its broad rather than its technical sense, and that the word "alimony" as used in the proviso of C. S., 1663, is not confined to actions by the wife for divorce from bed and board, and the decree for subsistence, under C. S., 1667, is not affected by a subsequent decree of absolute divorce upon the ground of two years separation under C. S., 1659 (a).

3. Statutes § 5a—

Where the meaning of a statute is in doubt, reference may be had to the title and context as legislative declarations of the purpose of the act.

4. Same—

The intent and spirit of a statute is controlling in its construction.

5. Divorce § 14—

A consent decree for subsistence entered in the wife's action under C. S., 1667, "pending further orders of this Court," is binding so long as no "further orders" are made, and the husband may be attached for contempt for willful disobedience of the order, C. S., 978 (4).

APPEAL by defendant from *Armstrong, J.*, at May-June Civil Term, 1937, of GUILFORD.

Proceeding heard upon rule directing defendant to appear and show cause why he should not be held in contempt for willful disobedience of order of the court entered by consent, requiring him to pay to plaintiff stipulated subsistence.

The court below found facts substantially as follows: Plaintiff and defendant are residents of Guilford County, North Carolina. Plaintiff instituted this action in April, 1934, against the defendant, her husband, to have allotted and paid reasonable subsistence and counsel fees, under C. S., 1667.

On 27 April, 1934, a judgment by consent of the parties was entered by Clement, Judge of Superior Court, requiring defendant to pay to plaintiff, "pending the further orders of this court," $75.00 per month under circumstances which now exist for her reasonable subsistence. After being cited and found in contempt several times in refusing to comply with the said consent order, defendant paid all installments through 31 March, 1937. In each instance for which citation was so made defendant was permitted to absolve himself by making payments then in arrears.

On 10 February, 1936, upon motion by defendant, finding as a fact there existed no good cause why the judgment of 27 April, 1934, be modified, or the allowance therein be decreased, Rousseau, Judge of Superior Court, signed judgment refusing to reduce the monthly payments required thereunder, and confirmed and continued the judgment in full force and effect.

Defendant has willfully failed and refused to comply with the provisions of said judgment of 27 April, 1934, for payments as required therein for April, May, and June, 1937.

In February, 1937, while plaintiff was on a visit to Louisville, Kentucky, defendant instituted an action against plaintiff for divorce in the Superior Court of New Hanover County, North Carolina, upon the ground of two years separation, published notice of summons and obtained a decree of absolute divorce—the validity of which was not passed upon in this action.

The court below being of opinion that the said consent judgment of 27 April, 1934, comes within the proviso of sec. 1663, and is still subsisting, adjudged defendant guilty of contempt in willfully failing to

comply with the order of the court. The court further adjudged that defendant be confined in the common jail of Guilford County until he has made the payments required under the judgment of 27 April, 1934, and until he complies with the orders of the court, or is otherwise discharged according to law.

From judgment signed, defendant appealed to the Supreme Court, and assigned error.

R. T. Pickens for plaintiff, appellee.
C. N. Cox and Gold, McAnally & Gold for defendant, appellant.

WINBORNE, J. Conceding, but not deciding, that the judgment of absolute divorce upon ground of two years separation in his action is valid, is defendant thereafter subject to attachment for contempt for willful disobedience of order (C. S., 978 [4]) to pay his wife subsistence theretofore entered by his consent in her action therefor without divorce, under C. S., 1667? We hold that he is.

If the consent order in favor of the wife in her action is not subject to nullification by a decree of absolute divorce on ground of separation, then it remains as an order of the court with which the defendant must comply.

The proviso in C. S., 1663, is the determinative factor. Pertinent parts of that section read: "A decree for absolute divorce upon the ground of separation for ten successive years as provided in C. S., 1659, shall not impair or destroy the right of the wife to receive alimony under any judgment or decree of the court rendered before the commencement of the proceeding for absolute divorce."

C. S., 1659 (a), authorizing absolute divorce after separation for two years was construed by the Court in *Howell v. Howell,* 206 N. C., 672, 147 S. E., 921, to automatically reduce the time from ten years, in C. S., 1663, to two years. The Court there held that "the two are cognate statutes, dealing with similar questions and are to be construed *in pari materia.*" In like manner construing the proviso of C. S., 1663, and C. S., 1667, the former is broad enough to cover judgments or decrees under the latter.

The defendant contends, however, that the word "alimony" as used in the said proviso has a technical, rather than a broad, meaning, and limits and confines the provisions thereof to judgments in actions brought by the wife against the husband for divorce from bed and board. With this we do not agree.

Manifestly the Legislature, in dealing with the subject of alimony to meet various situations, intended to protect the faithful wife in her right to be supported and provided for by the husband. The words "alimony"

and "subsistence" have a kindred meaning. In Webster's New International Dictionary Unabridged "alimony" is defined: "Maintenance, means of living, an allowance made to a woman for her support out of income of her husband." "Subsistence" is defined: "Means of support, provisions, or that which procures provisions, livelihood, . . ." Each is appropriate for use in dealing with the subject of support for the wife.

"Alimony in its strict sense is confined to an allowance made to a wife who is legally separated or divorced from her husband, but in many jurisdictions courts have authority to make an allowance to a wife who is living separate and apart from her husband, without being legally separated or divorced; and this allowance has come to be known as alimony, although it is often called separate maintenance." 19 C. J., 203.

If the meaning of the statute were in doubt, reference may be had to the title and context as legislative declarations of the purpose of the act. *S. v. Woolard,* 119 N. C., 779, 25 S. E., 719; *Machinery Co. v. Sellers,* 197 N. C., 30, 147 S. E., 674. It is interesting to note pertinent acts of the Legislature which afford clarifying information.

Chapter 193, Public Laws 1871-72, is the basis for sections of the Consolidated Statutes relating to alimony. As published in the bound volume of Public Laws of the session of the General Assembly 1871-72, that act contains sections bearing headings as follows: *"Sec. 37. Alimony on divorce from bed and board."* The language in the body of the section is the same as C. S., 1665. *"Sec. 38. Alimony pendente lite."* The language there is substantially the same as C. S., 1666. *"Sec. 39. When wife not seeking for divorce is entitled to alimony."* The language there is basically the language of C. S., 1667. By further reference to the original bill in manuscript form, among the records in the archives in the office of the Secretary of State, it is found that the headings to the sections above were incorporated in the bill as enacted by the General Assembly, and are in no respect the work of subsequent editing.

In chapter 24, Public Laws 1919, entitled "An act to amend section 1567 of the Revisal of 1905, in reference to alimony or support," the section as it now appears, C. S., 1667, was substituted, beginning with the words: "Alimony without divorce, when. If any husband shall separate himself," etc.

In chapter 52, Public Laws 1923, entitled "An act to amend section 1667 of the Consolidated Statutes, relating to alimony without divorce," the word "alimony" appears. The section reads: "Provided, that in all applications for *alimony* under this section it shall be competent for the husband to plead adultery of the wife, . . . and the issue be found against her by the judge, he shall make no order allowing her any sum whatever as *alimony* . . ."

Thus it is clear that the Legislature, in enacting the original sections, and all along the line, used the word "alimony" in its broad rather than technical meaning.

"The heart of the statute is the intention of the law-making body," *Stacy, C. J.*, in *Trust Co. v. Hood, Comr.*, 206 N. C., 268, 173 S. E., 601.

"It has been said that the letter of the law is its body; the spirit, the soul; and the construction of the former should never be so rigid and technical as to destroy the latter." *Adams, J.*, in *Machinery Co. v. Sellers, supra.*

The judgment for subsistence was by the act of the parties given binding effect "pending further orders of this Court." The law in this State as to the effect of such consent decree is settled. *Ellis v. Ellis*, 193 N. C., 216, 136 S. E., 350, and numerous cases therein cited.

We are not inadvertent to the cases of *Cram v. Cram*, 116 N. C., 288, 21 S. E., 197, and *Anderson v. Anderson*, 183 N. C., 139, 110 S. E., 863. They are not in conflict with the decision on this record.

So long as in this action no "further orders" are made, nullifying the provisions of the consent decree, its provisions are binding.

The judgment is

Affirmed.

ATLAS SUPPLY COMPANY ET AL. v. A. J. MAXWELL, COMMISSIONER.

(Filed 15 December, 1937.)

1. Taxation § 30—Sale of plumbing and heating equipment to plumbing and heating contractors is retail sale taxable at 3 per cent.

The sale of plumbing and heating equipment to plumbing and heating contractors, to be used by them locally in erecting, constructing, improving, or repairing plumbing and heating systems in buildings and structures, is a retail sale of such equipment within the meaning of the Revenue Act of 1937, Art. V, sec. E, ch. 127, and is taxable at 3 per cent of the value of the equipment, since the plumbing and heating contractors purchase the equipment, not for resale as tangible personal property, but for use in producing the finished job, sec. 404 of the Revenue Act.

2. Taxation § 23—

That a certain construction of a taxing statute would yield the State more revenue is not germane in its interpretation.

3. Same—

A regulation issued by the Commissioner of Revenue in regard to the levy of sales tax, Revenue Act of 1937, sec. 405, may not be successfully

attacked on the ground that the regulation is repugnant to previous regulations under prior statutes, the authority to issue regulations being "to prevent abuse with respect to existing regulations."

4. Statutes § 5a—

The heart of a statute is the intention of the Legislature.

APPEAL by plaintiffs from *Sinclair, J.*, at September Term, 1937, of WAKE.

Proceeding under Declaratory Judgment Act, ch. 102, Public Laws 1931, to determine validity of regulation promulgated by Commissioner of Revenue under sales tax provisions of Emergency Revenue Act of 1937, effective 1 July, 1937, as applied to certain transactions or types of business carried on by the plaintiffs.

The plaintiffs are local dealers in heating and plumbing equipment, materials, and supplies, and, as such, are engaged in selling their wares and merchandise (1) to merchants for resale, and (2) to plumbing and heating contractors to be used by them locally in erecting, constructing, improving, altering, or repairing plumbing and heating systems in buildings and structures of various kinds under lump-sum contracts.

The precise question submitted to the Court for decision is whether the second class of sales made by plaintiffs to plumbing and heating contractors to be used by them in fulfilling lump-sum contracts is subject to the 3 per cent sales tax.

The trial court held that, upon the facts agreed and appearing of record, the sales in question were subject to the 3 per cent tax, and from this ruling plaintiffs appeal, assigning errors.

Ehringhaus, Royall, Gosney & Smith for plaintiffs, appellants.

Attorney-General Seawell and Assistant Attorneys-General McMullan and Bruton for defendant, appellee.

STACY, C. J. Under the Emergency Revenue Act of 1937, Article V, section E, of chapter 127, Public Laws 1937, "wholesale" and "retail" merchants are required to pay a sales tax, as a license or privilege tax, upon the sale within this State of tangible personal property, the rate upon sales at wholesale being 1/20 of 1 per cent and the rate upon sales at retail being 3 per cent of the value of the merchandise sold.

It is further provided in the act that "the sale of any article of merchandise by a 'wholesale merchant' to any one other than a merchant for resale" shall be taxable at the retail rate, and the Commissioner of Revenue is authorized to promulgate appropriate regulations defining transactions carrying the different rates. Sec. 405.

Pursuant to this statutory authority, the Commissioner of Revenue has issued regulation No. 85, classifying the transactions here in question

as subject to the retail rate. The correctness of this regulation is challenged by the plaintiffs. They contend that the transactions should be denominated sales at wholesale, and, therefore, entitled to the lesser rate.

The act contains its own glossary or definition of terms. Sec. 404. The pertinent ones follow:

1. The words "wholesale merchant" shall mean every person who engages in the business of buying any articles of commerce and selling same to merchants for resale.

2. The words "retail merchant" shall mean every person who engages in the business of buying or acquiring, by consignment or otherwise, any article of commerce and selling same at retail.

3. The word "merchant" shall include any individual, firm, or corporation, domestic or foreign, estate or trust, subject to the tax herein imposed.

4. The word "retail" shall mean the sale of any article of commerce in any quantity or quantities for any use or purpose on the part of the purchaser other than for resale.

5. The word "sale" shall mean any transfer of the ownership or title of tangible personal property for any kind of consideration, regardless of the name that may be given to such transaction.

It may be conceded that plaintiffs are "wholesale merchants" within the meaning of the act in question, and that sales made by them to merchants for resale are properly taxable at the wholesale rate. And there is no denial that ordinarily heating and plumbing contractors are not regarded as merchants. It is the contention of the plaintiffs, however, that under the definition of the word "sale" as "any transfer of the ownership or title of tangible personal property," such contractors engaged in fulfilling lump-sum contracts are properly denominated merchants within the meaning of the act, for they buy heating and plumbing materials, incorporate them in heating and plumbing systems, and transfer title thereto to the owners of the buildings. The argument is ingenious, and finds support among the authorities. *Blome Co. v. Ames,* 365 Ill., 456, 6 N. E. (2d), 841; *Bradley Supply Co. v. Ames,* 359 Ill., 162, 194 N. E., 272; *Mason Lbr. Co. v. Lee,* 126 Fla., 371, 171 So., 332.

We are unable to accept plaintiffs' view as the proper interpretation of the statute. "Some play must be allowed for the joints of the machine"—*Mr. Justice Holmes* in *M. T. & K. Ry. Co. v. May,* 194 U. S., 267. A manufacturer buys raw materials, uses them in producing the finished product which he sells, but it would hardly be contended that he buys the raw materials for resale. Certainly not in the ordinary acceptation of the term. They are to be used for manufacturing purposes. *Boyer-Campbell Co. v. Fry,* 271 Mich., 282, 260 N. W., 165. So it is with heating and plumbing contractors who buy materials and supplies

for use in fulfilling lump-sum contracts. They purchase the materials and supplies, not for resale as tangible personal property, but for use in producing the turn-key job. There is no resale of the materials and supplies, as such, either actual or intended, within the meaning of the act. 23 R. C. L., 1233.

Speaking to a similar contention made under the Maryland statute in the case of *S. v. Christhilf,* 170 Md., 586, 185 Atl., 456, *Sloan, J.,* delivering the opinion of the Court, said: ". . . we cannot agree with the view that there is a transfer of title to so many feet of lumber, kegs of nails, thousands of brick, perches of stone, cubic yards of concrete, or other items of materials entering into a lump-sum contract, for a complete job or structure, which, when erected on the customer's land, is as much real property as the land itself and is by no sort of definition or reasoning 'tangible personal property.' *State v. J. Watts Kearny & Sons,* 181 La., 554, 160 So., 77."

Other arguments, more or less plausible, were advanced by the plaintiffs on the hearing and in brief, but it is concluded the sum of the matter should be an affirmance of the judgment below. That a contrary holding would yield the State two taxes instead of one, and hence more revenue, cannot avail as a criterion of construction. Nor is it fatal to the challenged regulation that it differs from a previous one issued under prior statutes, or that it may even represent a *volte face* in the matter. The authorization to issue the regulation was "to prevent abuse with respect to existing regulations." Sec. 405. This reveals the legislative intent. The heart of a statute is the intention of the law-making body. *Trust Co. v. Hood, Comr.,* 206 N. C., 268, 173 S. E., 601.

The judgment appears to be correct.

Affirmed.

CHARLIE WALKER v. J. D. WILKINS, INC., AND LUMBERMEN'S MUTUAL CASUALTY COMPANY.

(Filed 15 December, 1937.)

1. Master and Servant § 40e—Injury caused by tornado does not arise out of employment.

The evidence tended to show that claimant was in the plant of his employer when it was struck by a tornado, that claimant was injured as a result of the partial collapse of the building, and that many persons in the path of the tornado were injured. *Held:* The evidence sustains the finding of the Industrial Commission that the accident resulting in the injury did not arise out of the employment, there being no causal relation between the employment and the accident. N. C. Code, 8081 (i), subsec. (f).

2. Master and Servant § 55d—

An award of the Industrial Commission, which is sustained by its findings of fact supported by evidence, is conclusive on appeal to the Superior Court. N. C. Code, 8081 (ppp).

APPEAL by plaintiff from *Armstrong, J.,* at May Term, 1937, of GUILFORD. Affirmed.

This is a proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act.

The proceeding was first heard by Commissioner Jurney at Greensboro, N. C., on 15 June, 1936.

At this hearing it was admitted for the purposes of the record that the plaintiff, as an employee, and the defendant J. D. Wilkins, Inc., as an employer, were both subject to the provisions of the North Carolina Workmen's Compensation Act, at the date of plaintiff's injury, to wit: 2 April, 1936, and that the defendant Lumbermen's Mutual Casualty Company was at said date the insurance carrier for the defendant employer.

Upon his finding that on 2 April, 1936, the plaintiff suffered an injury by accident which arose out of and in the course of his employment, Commissioner Jurney made an award, requiring the defendants to pay the plaintiff compensation for his injury in accordance with the provisions of the North Carolina Workmen's Compensation Act.

At the request of the defendants, the award of Commissioner Jurney was reviewed by the Full Commission at Raleigh, N. C., on 6 January, 1937.

Upon such review, the Full Commission found that the injury which was suffered by the plaintiff on 2 April, 1936, was not the result of an accident which arose out of and in the course of his employment, and accordingly made an award setting aside and vacating the award of Commissioner Jurney and denying compensation to the plaintiff for his injury.

On plaintiff's appeal from the award of the Full Commission to the judge of the Superior Court of Guilford County, the award of the Full Commission was affirmed. Plaintiff appealed to the Supreme Court, assigning error in the judgment affirming the award of the Full Commission.

York & Boyd for plaintiff.
Henderson & Henderson for defendants.

CONNOR, J. About 7:12 p.m., on 2 April, 1936, while the plaintiff Charlie Walker was at work at the plant of his employer, the defendant J. D. Wilkins, Inc., which is located on West Lee Street in the city of

Greensboro, N. C., a tornado suddenly and with terrific force struck the plant and partially demolished the building in which the plaintiff was at work. The tornado lasted not to exceed five minutes, and caused damages to many buildings which were located in the vicinity of the building in which the plaintiff was at work. Many persons who were in the path of the tornado were injured. Several died as the result of their injuries. The plaintiff, while he was in the building, suffered an injury.

In support of his contention that his injury is compensable under the provisions of the North Carolina Workmen's Compensation Act, for that said injury was by accident which arose out of and in the course of his employment (chapter 120, Public Laws of North Carolina, 1929, section 2 [f], N. C. Code of 1935, section 8081 [i], subsec. [f]), at the hearing of this proceeding by Commissioner Jurney, the plaintiff offered evidence as follows:

Charlie Walker, the plaintiff, testified as follows:

"My name is Charlie Walker. I live in Greensboro, N. C. I am employed by the defendant J. D. Wilkins, Inc., and have been so employed for eight years. I do ornamental rail work, and at times operate a milling machine.

"I was at work at the Wilkins plant about 7 o'clock p.m., on 2 April, 1936. My brother, J. L. Walker, and my foreman, R. P. Strunks, were also at work at the plant. The tornado struck the building in which we were at work. Part of the roof and the walls of the building fell down. Timbers flew about in the building. Something struck me and knocked me down. I do not know what struck me. It was a part of the building. I fell to the floor in some water from the sprinkler system. I was rescued within a few minutes by my brother and was taken by him to the hospital. My right leg was injured, about an inch and a half above the ankle. I was struck by something that knocked me down.

"The building in which I was at work is located on West Lee Street. The building was constructed of steel and wood and brick. The walls were brick. It was a substantial building, modern and up-to-date."

R. P. Strunks, the foreman of the plaintiff, testified as follows:

"I was employed by J. D. Wilkins, Inc., on 2 April, 1936, as foreman. I had charge of the employees and assigned them to their work in the plant. On 2 April, 1936, we had a rush job. When the tornado struck the building in which we were at work the plaintiff Charlie Walker was at work at a machine in the building. I don't know what happened when the tornado struck the building. Timbers and steel were flying about in the building. When Charlie Walker was struck and injured, he had left the machine at which he was at work, and was running for safety. He did not get out of the building. He did not have time."

J. L. Walker, a brother of the plaintiff, testified as follows:

"I was employed by J. D. Wilkins, Inc., on 2 April, 1936, and was working at its plant on West Lee Street in the city of Greensboro, N. C., at about 7 o'clock p.m. When I saw the tornado coming, I started to shut the double door. I got under the stairway, and was not injured. After he was struck and fell to the floor, I picked up my brother, Charlie Walker, and took him to the hospital. There was a good deal of debris and timbers on the floor near him, and a pile of brick from the chimney. I did not see any timbers on him. Charlie Walker had left the machine at which he had been working before he was injured. He was trying to get to a place of safety when he was struck and injured."

From the evidence offered by the plaintiff at the hearing of this proceeding, the North Carolina Industrial Commission, upon its review of the award made by Commissioner Jurney, found that the injury which was suffered by the plaintiff on 2 April, 1936, was not by accident which arose out of and in the course of his employment, and accordingly set aside and vacated the award of Commissioner Jurney on the facts found by him, and made its award denying compensation.

On his appeal to this Court, the plaintiff contends that there is error in the judgment of the Superior Court affirming the award of the North Carolina Industrial Commission in this proceeding. This contention cannot be sustained.

The award of the North Carolina Industrial Commission is sustained by its findings of fact, which are supported by the evidence set out in the record, and were therefore conclusive on the judge of the Superior Court, chapter 120, Public Laws of North Carolina, 1929, section 60, N. C. Code of 1935, section 8081 (ppp).

In *Ridout v. Rose's Stores, Inc.*, 205 N. C., 423, 171 S. E., 642, it was said by the late *Justice Adams:*

"The Workmen's Compensation Act defines 'injury' and 'personal injury' as injury by accident arising out of and in the course of the employment—the words 'out of' referring to the origin or cause of the accident, and the words 'in the course of' to the time, place, and circumstances under which the accident occurred."

In the instant case, there was no evidence tending to show that the accident which resulted in injury to the plaintiff was incidental to or was caused by any condition pertaining to his employment. All the evidence was to the contrary.

There was no causal relation between the employment and the accident by which the plaintiff was injured. For this reason it cannot be held that the accident arose out of the employment. *Canter v. Board of Education,* 201 N. C., 836, 160 S. E., 925.

The judgment of the Superior Court is

Affirmed.

STATE v. WAYNE DELK.

(Filed 15 December, 1937.)

1. **Criminal Law § 54b: Larceny § 8—**

Where defendant is charged with larceny of different articles of personalty in separate counts, a verdict of guilty of larceny of one of the articles of personalty constitutes an acquittal of the count charging larceny of the other article of personalty.

2. **Larceny §§ 1, 6—Where defendant takes personalty with consent of owner, he is not guilty of larceny in the absence of fraud, etc.**

Evidence that prosecuting witness gave defendant a wrist watch to wear for the night and return in the morning, and that defendant left that night and did not return the watch until several days later is insufficient to be submitted to the jury on a charge of larceny of the watch, since the evidence shows that defendant took the watch with the consent of the prosecuting witness and did not obtain possession of same by any artifice, trick, connivance, or fraud, and negatives felonious intent on the part of defendant at the time of obtaining possession, and whether defendant had a latter formed felonious intent is immaterial, since such subsequent intent cannot affect the character of the original taking.

3. **Larceny § 6—**

All elements of larceny must be established by sufficient competent evidence, and evidence that raises a mere suspicion, conjecture, or possibility is insufficient to be submitted to the jury.

APPEAL by defendant from *Phillips, J.,* and a jury, at September Term, 1937, of GUILFORD. Reversed.

The defendant was tried on a bill of indictment charging him with the larceny of (1) a Gruen wrist watch; (2) $63.75 in money, the property of one Tom Allen. There were counts also for receiving said property knowing same to have been stolen. The defendant pleaded not guilty to the indictment.

Tom Allen, the prosecuting witness, testified, in part, in regard to the watch: "He was dressed. About an hour after we arrived he informed me he was sick. He had gone to bed. I had gone to bed. I had a watch. I had taken the watch off to wind it and I laid it on my dresser and he wanted to try it on that night. It was a wrist watch, and he said he would give it back the next morning. He did not give it back next morning. I got it back Wednesday afternoon. I was in my room when he said he wanted to try it on, and he went to bed in the same room. It was something like an hour after we got home when he left, maybe an hour and a half. I think I had been dozing and he was sitting on the side of the bed and I asked what was the matter, and he said he was sick. He dressed after that. . . . Q. When did you

miss the watch. Ans.: I let him put the watch on that night. I did not tell him he could not take it away. Q. Did you know he was taking it away? Ans.: I never thought about it at that time. Yes, I knowed he was taking it because he put it on. I did not see him have it when he left, I just know he put it on. I did not see him have it when he left, I just know he put it on when he went to bed. . . . In consequence of some call I went there, to Archdale. Yes, he gave me the watch then. He had it. (Cross-examination): I let him have the watch myself when I taken it off to wind it; he said he would give it back to me the next morning. Yes, I let him have it, and he said he would give it back to me next morning. . . . Yes, he came out to the car at the service station there and gave me my watch back."

The defendant testified, in part: "Mr. Allen was not asleep when I got up the first time; he had been asleep. I had been in bed before I got up, not over thirty minutes. Before that he gave me the watch, took off the watch, and I told him to let me look at it, and he handed it to me and I tried it on my arm. I had been planning on buying me one and started to take the watch off and he said, 'Just give it back to me next morning.' So I left that night with the watch on my arm and forgot about it. I did not realize I had the watch on until after I left and did not want to go back then, so I called him up on Monday and he came down and I gave him the watch back." On cross-examination the defendant admitted that he had been charged and convicted on some three other offenses.

The jury found defendant guilty of larceny of the watch, and the court below pronounced judgment on the verdict. The defendant 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.

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

Gaston A. Johnson and D. H. Parsons for defendant.

CLARKSON, J. From the finding of the jury there was an acquittal of the defendant on the charge of larceny of the $63.75 in money.

In *S. v. Fisher,* 162 N. C., 550 (553), speaking to the subject, we find: "It is conceded, as we understand, that the special verdict was returned upon the second count, and there is no verdict upon the first count. It was held in *S. v. Taylor,* 84 N. C., 773, that 'where the jury find a defendant guilty of one count, and say nothing in their verdict concerning other counts, it will be equivalent to a verdict of acquittal as to them.'" *S. v. Hampton,* 210 N. C., 283 (284).

At the close of the evidence for the State, and at the close of all the evidence, the defendant made motions in the court below for judgment as of nonsuit. C. S., 4643. The court below overruled the motions, and in this we think there was error.

We see no evidence that defendant obtained or concealed possession of the watch by any artifice, trick, connivance, or fraud. It may be wise to quote fully from *Pearson, C. J.*, on the subject of larceny in *S. v. Deal*, 64 N. C., 270 (273): "If one takes the property of another, it is a mere trespass, for which an action lies; if *manu forti*, the owner being present, it is a forcible trespass, for which an action lies, and also an indictment. If the taking be with a felonious intent, the act is larceny, either stealing or robbery. So it turns upon the felonious intent, and the question is what is meant by a felonious intent. A prominent feature of it is that the act be done in a way showing an intention to 'evade the law,' that is, not to let the owner know who took his property, and against whom to bring his action, or who is to be indicted. If one takes property slyly—by stealth—he steals; if he takes the property forcibly, under a mask, or with his face blacked as a disguise, or when he supposes the owner cannot identify him, as on the highway, he commits robbery. So the prominent feature of a felonious intent is 'an attempt to evade justice.' Such is the doctrine laid down by Foster as the common law, and such I know was the opinion of *Chief Justice Henderson*, whose power of reflection exceeded that of any man who ever had a seat on this bench, unless *Judge Haywood* be considered his equal in this respect. *Judge Henderson* used to ask: 'What is the difference between trespass and larceny?' Reply: 'Felonious intent.' 'What is meant by a felonious intent?' Reply: 'An intent to conceal from the owner who took his property, so that he may not know against whom to bring his action or whom to indict.' If a man takes my property openly and above board, I know whom to sue, and if force is used, I can also have him indicted. So, such acts are not apt to occur, and the public needs no special protection against them. Beccaria on Crimes. But where there is an attempt to do the thing slyly, or do it by force under circumstances of disguise, the community needs protection, and these acts are treated as being done with a felonious intent, and are punished accordingly. *Id.*"

In *S. v. Kirkland*, 178 N. C., 810 (813), it is said: "In 17 R. C. L., 5, one of the latest authorities, and reliable, defines larceny: 'As the felonious taking by trespass and carrying away of the goods of another without the consent of the latter, and with the felonious intent permanently to deprive the owner of his property and to convert it to his, the taker's own use,' a definition following the decisions in our State, and which we approve with the interpretation that the intent to convert

to one's own use is met by showing an intent to deprive the owner of his property permanently for the use of the taker, although he might have in mind to benefit another." *S. v. Adams,* 115 N. C., 775.

In *S. v. Holder,* 188 N. C., 561 (563), we find: "To constitute the crime of larceny there must be an original, felonious intent, general or special, at the time of the taking. If such intent be present, no subsequent act or explanation can change the felonious character of the original act. But if the requisite intent be not present, the taking is only a trespass, and it cannot be made a felony by any subsequent misconduct or bad faith on the part of the taker. *S. v. Arkle,* 116 N. C., 1031."

The prosecuting witness' testimony as above set forth was to the effect that he let defendant have the watch, knew he had it, and defendant promised to return it the next morning, and the watch was returned within a few days. The evidence negatives a felonious intent and was not sufficient to have been submitted to the jury. All the elements of larceny must be established by sufficient competent evidence. Evidence that raises a mere suspicion, conjecture, and possibility is insufficient foundation for a verdict and should not be left to a jury.

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

Reversed.

MRS. MARY MAUNEY v. LUZIER'S, INC.

(Filed 15 December, 1937.)

1. Process § 7d—Person regularly employed in making collections in this State is agent of foreign corporation for purpose of service of process.

In this action against a foreign corporation, it appeared from the facts found, supported by affidavits, that process was served on a person regularly employed in this State by defendant to receive and forward to defendant orders and service charges obtained and collected by defendant's soliciting agent, and to receive the total purchase price for goods sold by defendant in this State, in accordance with defendant's method of doing business herein. *Held:* The findings support the court's conclusion of law that the person upon whom process was served was defendant's local agent for the purpose of service of process under C. S., 483 (1).

2. Same—

Where process is served on an agent regularly engaged in this State in receiving and collecting money for a foreign corporation, the validity of such service under C. S., 483 (1), is not affected by C. S., 1137, when it does not appear that defendant had designated a resident process agent in accord with the latter statute.

3. Same—

Where process is served on a foreign corporation by service under C. S., 483 (1), on its agent regularly employed in collecting money for it in this State, whether the corporation has complied with C. S., 1181, is immaterial on the question of the validity of such service.

4. Same—

Where the court finds that process was served on an agent regularly employed by defendant foreign corporation to collect money for it in this State, and finds facts in regard to the corporation's method of doing business in this State, the failure to find specifically that the corporation was engaged in business in this State is not fatal.

APPEAL by defendant from *Armstrong, J.*, at April Term, 1937, of GUILFORD. Affirmed.

Mrs. Mary Mauney instituted her action against Luzier's, Inc., a Missouri corporation, to recover damages for an injury alleged to have resulted from the use of certain cosmetics manufactured, sold and distributed by the defendant. The summons was served upon one C. C. Beck as agent of the defendant. In apt time defendant entered special appearance and moved to strike out the alleged service of summons, for the reason that the defendant did not transact business in North Carolina so as to be amenable to the jurisdiction of this Court, and for that the said C. C. Beck was not its local agent for the purpose of collecting or receiving money for it.

The court, after considering the affidavits filed on behalf of both parties, found the facts to be that the plaintiff is a citizen and resident of Guilford County, North Carolina; that the defendant is a corporation, organized and existing by virtue of the laws of the State of Missouri, with its principal office in Kansas City in said state, and that summons was served on C. C. Beck as agent of the defendant.

The court further found: "That C. C. Beck was, at the time of the service of summons in this action, in contemplation of sec. 483, subsec. 1, of the North Carolina Code of 1935, a local agent for the purpose of said section upon whom summons could be served, which said service of summons upon the said C. C. Beck, as agent of Luzier's, Inc., was good, valid, and binding service. That the orders given by the plaintiff, Mrs. Mary Mauney, to Mrs. Maude Kennedy, were put on order blanks of Luzier's, Inc., Kansas City, Missouri, a copy of which order blanks is attached to the affidavit of Mrs. Mary Mauney, plaintiff in this action, and filed herein, on which order blanks appeared the name of Mrs. Maude Kennedy as representative, and the name of C. C. Beck, 'Your Manager,' and on which order blanks appeared the following: 'A cash deposit is required on all orders. All orders are subject to a 10 per cent service charge—Mail order promptly—Do not

hold.' That on said order blanks appeared the following: 'Service charge covers: Increased Income Tax—Increased Postal Rates—Abandoned Delivery Charge—Excise Taxes and Emergency Expenses.' That said 10 per cent service charge, for the purposes on said order blanks specified, was collected by Mrs. Maude Kennedy from the plaintiff in Greensboro, North Carolina, at the time said orders were taken, forwarded to C. C. Beck, her manager, who resides in Charlotte, N. C., and in turn forwarded by C. C. Beck to Luzier's, Inc., thereby making and constituting C. C. Beck a local agent of Luzier's, Inc., in North Carolina, for the purpose of receiving and collecting money for and on behalf of said Luzier's, Inc., under and by virtue of sec. 483, subsec. 1, of the North Carolina Code of 1935. That in addition to said service charge collected upon the terms set forth in said order blanks of Luzier's, Inc., the total purchase price of purchases made by the said plaintiff in this action from the defendant in this action, Luzier's, Inc., was paid unto the said C. C. Beck, and that this course of dealing was in effect and in use by Luzier's, Inc., the defendant in this action, on the date of service of summons in this action on C. C. Beck, agent of Luzier's, Inc."

Thereupon it was adjudged that the service of process on the defendant was legal and valid and defendant's motion to dismiss was denied. Defendant appealed.

King & King for plaintiff, appellee.
Sapp & Sapp for defendant, appellant.

DEVIN, J. The question presented by this appeal is whether the facts found by the court below are sufficient to sustain the judgment that the service of process on the defendant was in all respects legal and valid.

The pertinent provisions of the statute, C. S., 483 (1), prescribing the method of service of process on corporations, resident and nonresident, require that the summons be served upon an officer of the corporation or "managing or local agent thereof. Any person receiving or collecting money in this State for a corporation of this or any other state or government is a local agent for the purpose of this section. Such service can be made in respect to a foreign corporation only when it has property, or the cause of action arose, or the plaintiff resides, in this State."

This statute was construed by this Court in *Whitehurst v. Kerr,* 153 N. C., 76, 68 S. E., 913, and it was there held that the service on the managing local agent of a foreign corporation was valid when (1) the corporation had property in the State, or (2) when the cause of action arose therein, or (3) when the plaintiff resides in the State.

And with further reference to the definition of the words "local agent," the Court, in that case, used this language: "In defining the term 'agent' it is not the descriptive name employed, but the nature of the business and the extent of the authority given and exercised which is determinative, and the word does not properly extend to a subordinate employee without discretion, but must be one regularly employed, having some charge or measure of control over the business entrusted to him or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served upon him."

This statute, C. S., 483 (1), has been many times considered by this Court and the general principle stated in *Whitehurst v. Kerr, supra,* approved. *Lunceford v. Association,* 190 N. C., 314, 129 S. E., 805; *Lumber Co. v. Finance Co.,* 204 N. C., 285, 168 S. E., 219; *Steele v. Tel. Co.,* 206 N. C., 220, 173 S. E., 583.

In the case at bar it appears from the facts found, supported by affidavits, that the defendant's method of handling its business was that the defendant's representative or soliciting agent took the order of the customer, with a cash deposit of ten per cent service charge, and forwarded the order and cash to C. C. Beck, the representative's manager, in Charlotte, North Carolina, who in turn forwarded the same to the defendant's home office, and that in addition to the service charge the total purchase price of goods was paid to C. C. Beck for the defendant. Illustrating the extent of defendant's business in the State, it may be noted that it is stated in plaintiff's affidavit that the volume of sales by defendant in North Carolina amounts to between $150,000 to $250,000 annually, and that C. C. Beck received a compensation of $12,000 to $15,000 per annum.

To constitute one a local agent of a nonresident corporation, as defined by the North Carolina statute, requires something more than the mere solicitation of orders and the shipment of goods in fulfillment of those orders. *Peoples Tob. Co. v. Am. Tob. Co.,* 246 U. S., 79; *Int. Harvester Co. v. Ky.,* 234 U. S., 579; *Riverside Cotton Mills v. Menefee,* 237 U. S., 189; *Tignor v. Balfour,* 167 Va., 58, 187 S. E., 468. The fact that the agent within the State is engaged regularly in making collections for the goods sold is to be taken as the distinguishing fact. *Hilton v. Northwestern Expanded Metal Co.,* 16 F. (2), 821.

In *Brown v. Coal Co.,* 208 N. C., 50, 178 S. E., 858, cited by appellant, it was found that the defendant corporation had no agent in the State and was not doing business in the State.

If the court below has correctly found that the plaintiff has procured service of summons on an agent of the defendant who was regularly engaged in receiving and collecting money for it in this State in accord

with C. S., 483 (1), the validity of this service would not be affected by the provisions of C. S., 1137, since it does not appear that the defendant has designated a resident process agent in accord with that statute. Whether defendant has complied with C. S., 1181, is immaterial in so far as this plaintiff's action is concerned, if, as found as a fact by the court below, the defendant has a local agent collecting and receiving money for it, upon whom service was properly had.

The failure of the court below to find specifically that the defendant was doing business in the State does not afford the defendant ground for complaint, since the court found the facts as to the method and course of dealing of defendant with its customers and representatives.

We conclude that the court below has correctly ruled and that the judgment must be

Affirmed.

MRS. M. N. HEDGECOCK v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 15 December, 1937.)

1. Insurance § 37—

Where the beneficiary of a life policy introduces in evidence the policy and the admissions in insurer's answer that it issued the policy, that insured was dead, and that plaintiff beneficiary had filed proper proof of death, plaintiff establishes a *prima facie* case.

2. Insurance § 37—Statements contained in certificates executed by parties other than plaintiff are not binding on plaintiff.

Where the certificate of the coroner-physician, filed by the beneficiary as part of the proof of death, states that insured committed suicide, which statement is denied by the beneficiary in her attached letter, the beneficiary is not bound by the statement in the certificate not executed by her, and such statement does not constitute evidence offered by her in support of the affirmative defense of suicide set up by insurer in the beneficiary's action on the policy.

3. Trial § 22c—

Where plaintiff makes out a *prima facie* case, a nonsuit may not be granted upon defendant's evidence in support of an affirmative defense, a nonsuit upon an affirmative defense being permissible only if plaintiff's own evidence establishes such defense as a matter of law.

4. Insurance § 37—Insurer is not entitled to nonsuit upon affirmative defense unless plaintiff beneficiary's own evidence establishes it.

Where plaintiff beneficiary makes out a *prima facie* case, and defendant insurer sets up the affirmative defense that insured committed suicide, and that therefore no recovery could be had under the relative provision of the policy, and insurer introduces evidence in support of its defense, but

no evidence in regard thereto is introduced by plaintiff, it is error for the court to grant insurer's motion to nonsuit, since a motion to nonsuit may not be allowed in favor of a party upon whom rests the burden of proof.

APPEAL by plaintiff from *Harding, J.*, at August Term, 1937, of GUILFORD. New trial.

This is an action instituted by the plaintiff against the defendant to recover $2,000, the face amount of a policy of insurance issued by the defendant 15 May, 1934, on the life of Marshall Nicholis Hedgecock. The plaintiff was named beneficiary in the policy. The insured died 29 September, 1934, from the effects of a bullet wound in the head.

The defendant admitted the issuance of the policy, the death of the insured, the proper filing of proof of death by the beneficiary, set up the affirmative defense that the insured came to his death from a self-inflicted wound and denied liability by reason thereof. At the conclusion of all the evidence defendant's motion to dismiss as of nonsuit was allowed and judgment was entered accordingly. Plaintiff excepted and appealed.

Frazier & Frazier for plaintiff, appellant.
Smith, Wharton & Hudgins for defendant, appellee.

BARNHILL, J. At the trial of this cause the plaintiff offered the admissions contained in defendant's answer and the policy of insurance and rested. This made out a *prima facie* case for the plaintiff.

The defendant then proceeded to offer evidence tending to sustain its affirmative defense under the terms of the policy, which provides: "In case of self-destruction committed, whether sane or insane, within two full years from the date hereof, the extent of recovery hereunder shall be the premiums paid."

The defendant's evidence tended to show that the insured was a car foreman employed by the Southern Railway Company; that he was found dead about 7:15 a. m., 29 September, 1934, in a small office used by him on the Pomona yards of the Southern Railway in the city of Greensboro; that there was a bullet wound in the right side of the head with the point of exit on the left side; that the office was closed; that there was blood on the desk and papers at which the deceased had apparently been sitting; that there was a note found on the desk, in the handwriting of the deceased, the wording of which indicated a suicidal intent. Those who found the body, other than one Dempsey, and the officers who later went to the scene of the death found no pistol or other weapon; the witness Dempsey testified that he found a pistol lying near the body and recognized it as one he had loaned the deceased; that

thereupon he took the pistol, concealed it about his person and carried it home without saying anything to any of the others about having found it. When asked about the pistol he first denied that he loaned the deceased a weapon, but testified that he did in fact lend him a pistol and that the one he found was his. He further testified that he loaned the deceased a Smith & Wesson, whereas the one offered in evidence was a Colt.

As a part of the proof of death the plaintiff filed her certificate, in which it was stated that the cause of death was a bullet wound in the head. She also filed a physician's certificate signed by W. W. Harvey, M.D., in which it was stated that the cause of death was suicide. Dr. Harvey likewise signed a certificate of death, which was filed with the State Registrar. In this certificate it was likewise stated that the cause of death was suicide and that the deceased shot himself through the head with a pistol. These certificates were offered in evidence by the defendant.

The defendant having admitted the issuance of the policy, the death of the insured and due proof of death, the burden of proof rested upon the defendant to establish its affirmative defense. That this was the only real matter at issue was recognized by the defendant. The record discloses that counsel for the defendant stated in open court that the sole issue in the case is whether he did or did not commit suicide.

The statements contained in the certificates executed by parties other than the plaintiff are not binding upon her. The physician was required to file a certificate with the State Registrar, and the plaintiff was required to file a certificate as a part of the proof of death, but these statements are not conclusive as to her cause of action. When the proof of death and certificates were filed with the defendant they were accompanied by, or attached to, a letter in which it is stated: "The beneficiary takes issue with the verdict of the coroner's jury. There was little or no evidence submitted to such jury, and such evidence as was submitted does not bear out the suicide theory." In filing proof of death under the terms of the policy in the manner required by the defendant the plaintiff did not adopt or become bound by the statements of the coroner-physician. *Spruill v. Ins. Co.*, 120 N. C., 141, is not in point. In that case the beneficiary filed a proof of loss, in which she stated that the deceased died by his own hand. At the trial this statement on her part was not contradicted. Even so, in that case there was a directed verdict against the plaintiff and not a judgment of nonsuit.

A judgment of nonsuit is permissible against one upon whom the *onus* of proof rests when there is no evidence or a mere scintilla of evidence, but a judgment of nonsuit is never permissible in favor of the

party having the burden of proof upon evidence offered by him. *Clark, C. J.*, in *Wharton v. Ins. Co.*, 178 N. C., 135, citing *Spruill v. Ins. Co.*, 120 N. C., 141, says: "The burden of proof being on the defendant to prove its defense the court could not adjudge that an affirmative defense is proven, for that involves the credibility of the witnesses, which is a matter for the jury."

Where an insurance company interposes the defense of suicide by the insured to avoid recovery by the plaintiff in his action on a life insurance policy the burden of proof is on the defendant to show by the greater weight of the evidence the fact of suicide, and a nonsuit upon the evidence will not be allowed. The weight of the evidence must be with the party who has the burden of proof, or else he cannot succeed, and the jury is the sole judge of the weight and credibility of the testimony. *Baker v. Ins. Co.*, 168 N. C., 87; *Thaxton v. Ins. Co.*, 143 N. C., 34; *Chaffin v. Mfg. Co.*, 135 N. C., 95; *Parker v. Ins. Co.*, 188 N. C., 405.

There is but one exception to this rule. When the plaintiff offers evidence sufficient to constitute a *prima facie* case in an action in which the defendant has set up an affirmative defense, and the evidence of the plaintiff establishes the truth of the affirmative defense as a matter of law, a judgment of nonsuit may be entered. This more frequently occurs in actions in which the defendant pleads contributory negligence. But when the evidence is conflicting, or when the only evidence offered on the affirmative defense is that of the party upon whom the *onus* of proof rests, the cause must be submitted to the jury. In such instances a judgment of nonsuit may not be substituted for a directed verdict.

The plaintiff herein offered no testimony tending to show that the deceased came to his death from a self-inflicted wound. All of the evidence tending to support the defendant's allegations of affirmative defense was offered by the defendant.

The defendant's cause rests largely upon the evidence of the witness Dempsey, whose statements were conflicting. The plaintiff has the right to have this testimony submitted to a jury to determine the weight and credibility of the evidence. The court below in effect found that the affirmative defense had been established by the testimony. This finding rests exclusively with the jury.

The cause is remanded to the end that there may be a

New trial.

MERCHANTS OIL COMPANY, A CORPORATION, v. MECKLENBURG COUNTY, HENRY W. HARKEY, CHAIRMAN, AND J. A. SHERRILL, ROBERT F. DUNN, E. J. PRICE, ARTHUR H. WEARN, COUNTY COMMISSIONERS OF MECKLENBURG COUNTY, NORTH CAROLINA.

(Filed 15 December, 1937.)

1. Landlord and Tenant § 15c—Where lessee does not give notice of intention to renew as required by lease he loses right to renew.

The lease in question provided that the lessee might renew for a term of three years upon condition that the lessee give notice in writing of such intention, on or before a stipulated date, such notice to constitute an agreement to pay the stipulated rent for the additional period and to perform all obligations upon the part of the lessee as set forth in the lease. The trial court found, upon supporting evidence, that lessee failed to give notice of intention to renew within the time stipulated, but did give notice subsequent to the expiration of the stipulated time. *Held:* Upon the facts found, lessee, by failing to give the notice containing the agreements stipulated in the lease within the time prescribed, lost his right to extend the lease.

2. Landlord and Tenant § 2: Evidence § 39—

Conversations, statements, and negotiations prior to the execution of the written contract are merged therein, and the parties are bound by the terms of the writing.

3. Landlord and Tenant § 2: Contracts § 8—

The fact that a lease contract is prepared by lessor cannot have the effect of modifying its plain provisions when the lessee signs the contract, and there is no evidence that his signature was obtained by fraud or misrepresentation.

4. Landlord and Tenant § 15c—

The fact that lessor suffered no damage by failure of lessee to give notice of intention to renew within the time stipulated in the lease does not constitute a waiver nor supply the requirement of notice as prescribed in the contract.

5. Public Officers § 3—

Public officers leasing public property may not waive a provision of the lease under which the lease may be terminated when the property may be leased to others for a higher rental.

6. Landlord and Tenant § 2—

By agreeing to a sublease of the property stipulating that the sublease should not in any way alter the terms of the lease, the landlord reserves his rights under the lease, and his agreement to the sublease cannot constitute a waiver by him of any of its terms.

7. Injunctions § 2—Injunction will not lie in favor of lessee to prevent lessor from interfering with possession or from leasing to another.

Injunction will not lie at the instance of a lessee to enjoin lessor from leasing the property to another or to enjoin lessor from interfering with

lessee's possession, since, if lessee has not forfeited his lease, another lease by the owners to a third person could not affect his rights under his lease, and since lessee can set up all rights under the lease in any action in ejectment lessor might institute, and has therefore an adequate remedy at law.

APPEAL by plaintiff from *Rousseau, J.*, at March Regular Civil Term, 1937, of MECKLENBURG. Affirmed.

This is a civil action instituted by the plaintiff against the defendants, in which the plaintiff seeks to enjoin and restrain the defendant from: "(a) Executing or delivering any lease agreement for or to Myers Automobile Service Company, or any other person, covering the premises described in the complaint, or (b) instituting evictment or ejectment proceedings, or any other action, against Merchants Oil Company, or (c) doing any other act or thing whatsoever in any way interfering with the occupation, use and enjoyment by the plaintiff of the premises described in the complaint, or (d) in any way or manner interfering with the operation of plaintiff's business on the premises described in the complaint."

At the time of the institution of the action a temporary restraining order and notice to show cause was issued. Upon the hearing on the notice to show cause why the restraining order should not be continued until the hearing, judgment was entered denying plaintiff's prayer for injunction and dissolving the temporary restraining order. The plaintiff excepted and appealed.

Fred B. Helms and Wm. F. Mulliss for plaintiff, appellant.
Henry E. Fisher and J. Clyde Stancill for defendants, appellees.

BARNHILL, J. On 7 January, 1935, Mecklenburg County leased to the plaintiff the old courthouse lot in the city of Charlotte, located at the southeastern intersection of South Tryon and East Third Streets, for a period of two years for the sum of $10,200, payable in monthly installments of $425.00 each. The lease contained a provision granting to the lessee the option to renew said lease for an additional term of three years, beginning 1 February, 1937, provided and on condition that the lessee shall notify the lessor of its election to so renew said lease by delivering a written notice to that effect, executed in its behalf by its president and its secretary and with its corporate seal affixed thereto, to the chairman or clerk of the board of commissioners of said county, at the courthouse on or before 30 November, 1936, such notice to constitute an agreement on the part of the lessee to pay to the lessor the rental for such additional term and to perform all the obligations upon the part

of the lessee as set forth in the lease. For the additional term the lessees were to pay the sum of $16,200 in monthly installments of $450.00 each.

On 23 August, 1936, the plaintiff subleased said premises to the Sinclair Refining Company for a period of one year. In compliance with the requirement of the Sinclair Oil Company the plaintiff procured the landowner's consent to said sublease in the following words: "The undersigned, owner (herein referred to in the singular number whether one or more) of the premises hereinabove described, hereby consents to the subletting of same in accordance with the above and foregoing agreement. It is understood that nothing contained herein shall in any way alter the lease between Mecklenburg County and the Merchants Oil Company."

The plaintiff failed and neglected to give notice to the defendant that it desired to exercise its option to renew its lease for an additional period of three years, as stipulated in its contract. This was a condition precedent and the plaintiff thereby lost its right to extend the lease. *Rountree v. Cohn-Bock Co.*, 158 N. C., 153; *Bateman v. Lumber Co.*, 154 N. C., 248; 2 Story, Eq. Juris., secs. 1302, 1306; *Donovan v. Niles*, 246 Mass., 106. Such notice, dated 15 December, 1936, was delivered to the defendant on or about 24 December, 1936. This, however, was not executed in strict compliance with the terms of the lease and in no event meets the requirements of the contract.

The plaintiff having failed to renew its lease as provided in its contract, the defendants gave the plaintiff notice to vacate said premises and advertised for bids thereon, and thereafter leased said premises to the Myers Automobile Service Company for a term of two years at the rental of $18,060, payable in monthly installments of $752.50. This lease contained an option agreement to renew for a period of three years for the sum of $27,954, payable in monthly installments of $776.50 each. This lease likewise provides that it is to become effective when the lessee is put in possession of the leased premises.

There is much evidence in the record in respect to conversations between agents of the plaintiff and the individual defendants and as to statements made prior to the execution of the lease to the plaintiff. These conversations, statements and negotiations culminated in a written contract, and the plaintiff is bound by the written word. The plaintiff also undertook to show that the lease was prepared by counsel for the defendants, but there is no evidence or suggestion that plaintiff's signature thereto was obtained by fraud or misrepresentation. It must now abide by the terms of its contract. The plaintiff likewise undertook to show and offered evidence to the effect that the defendants have suffered no damage by reason of plaintiff's failure to give the notice required in its lease. Even so, this would not constitute a waiver of the

terms of the contract, nor supply the requirement of the notice of plaintiff's intention and desire to exercise its option. It is well to note, however, that if the individual defendants, who occupy positions of trust, should seek to evade the provisions of this contract, or willingly forego the rights of the county thereunder, they would thereby continue the plaintiff in possession of the premises at a rental of $450.00 per month, when they now have a lease for said premises at $752.50 per month. The defendants have no right in the discharge of their official duties to so deal with public property.

The facts were fully found by the court below and the facts found are supported by plenary evidence. As to the lease, the court found that the plaintiff did not give written notice in compliance with the lease agreement, and that the defendants did not at any time waive the giving of such notice. Upon the facts found and the conclusions of law arrived at thereon, the court was of the opinion that the plaintiff has an adequate remedy at law and is not entitled to a continuance of the restraining order until the hearing of the case on its merits. In this we must concur.

All the evidence seems to be to the effect that the notice was not given as required by the lease. There is no evidence of any waiver of said notice by the defendants. In the landowner's consent signed by the chairman of the board of commissioners of the defendant county, it is provided: "It is understood that nothing contained herein shall in any way alter the lease between Mecklenburg County and the Merchants Oil Company." This is a reservation of rights and not a waiver.

If there had been no forfeiture of the lease, as asserted by the plaintiff, the plaintiff could have set up all the matters alleged in his complaint in defense to any action of ejectment the defendants might institute. If it had a valid lease the execution of another lease by the defendants to a third party would not affect plaintiff's rights. It is a well established rule of law that where a party has an adequate remedy at law a court of equity will not intervene in his behalf.

Whether the plaintiff, by instituting this action and having the facts found against it, has lost its right to set up any defense to an action in ejectment is a question not now before us for decision.

The assignments of error by the plaintiff are without merit. The judgment below is

Affirmed.

HENRY A. MEACHAM v. LARUS & BROTHERS COMPANY, AND H. S. BIVENS.

(Filed 15 December, 1937.)

1. Judgments § 32—Ordinarily, only parties and privies are estopped by judgment.

The four occupants of an automobile involved in a collision instituted, respectively, separate actions against the driver and the owner of the other car involved in the collision. Upon the trial of one of the actions, all the occupants of the car being witnesses, a nonsuit was entered in favor of the defendant owner and the issue of negligence was answered by the jury in favor of the defendant driver. In the present action, defendants filed an amended answer alleging the disposition of the action tried, which allegations were admitted by the present plaintiff, and defendants moved to dismiss this action on the ground defendants should not be required to defend the several actions involving the same facts, and that plaintiff was barred or estopped by the judgment in the action tried. *Held:* The present plaintiff was neither a party nor a privy in the action tried, and a different set of facts might be developed in the present action, either by additional evidence or by the estimate placed upon the evidence by the jury, and the motion to dismiss should have been denied.

2. Same: Estoppel § 6a—

An estoppel must be mutual, and where one party is not estopped by a prior judgment, the adverse party cannot be estopped thereby.

APPEAL by defendants from *Harding, J.*, at November Term, 1937, of GUILFORD. Affirmed.

Silas B. Casey and Walser & Wright for plaintiff, appellee.
Sapp & Sapp for defendants, appellants.

SCHENCK, J. This is a civil action, instituted in the municipal court of the city of High Point, to recover damages for personal injuries to the plaintiff, alleged to have been proximately caused by the negligence of the defendants. The allegations of the complaint are to the effect that the plaintiff was a passenger in an automobile owned and operated by one A. R. Martin, and that an automobile owned by the corporate defendant and operated by the individual defendant negligently collided with the Martin automobile upon the public highway and thereby injured the plaintiff. The answer denied the negligent operation of the automobile driven by the defendant Bivens, and entered the alternative plea of contributory negligence of the plaintiff, alleging that the Martin automobile was being operated in a joint enterprise of the plaintiff and others, including the driver thereof.

The defendants, by leave of court, filed an "Amendment to Answer" wherein they set up and allege that there were three other cases instituted against the defendants by one Sedberry, one Alsobrook, and one Proctor, respectively, wherein the allegations and facts were practically the same as in this case, and that the Sedberry case had been tried and that upon a demurrer to the evidence a nonsuit had been entered as to the corporate defendant and a judgment in favor of the individual defendant entered upon the issue as to his negligence having been answered in his favor, and that at the trial of the Sedberry case the plaintiff in this case, Meacham, as well as the plaintiffs in the Alsobrook and Proctor cases were present and testified as witnesses, and that Sedberry was represented by the same attorneys as represent Meacham, and Alsobrook, and Proctor, and that said attorneys resisted motion to consolidate for the purpose of trial the four cases of Sedberry, Alsobrook, Proctor, and Meacham; and defendants aver that they ought not to be required to defend more than once the same cause of action, and that the plaintiff ought not to be allowed to maintain this action for the reasons specified in the "Amendment to Answer."

The plaintiffs demurred to the "Amendment to Answer" upon the ground that it was not sufficient to sustain either the plea of *res judicata* or estoppel. This demurrer was overruled. The defendants thereupon moved the court to dismiss the actions of Meacham, Alsobrook, and Proctor upon the allegations in the "Amendment to Answer," the facts alleged therein being admitted, and the court allowed the motion and dismissed the actions of Meacham, Alsobrook, and Proctor. From this judgment dismissing the several actions, the plaintiffs therein appealed to the Superior Court, assigning as error the judgment of dismissal.

The cases came on for trial before Harding, J., at the November Term, 1937, of Guilford Superior Court, when and where the judgment of the municipal court of the city of High Point was reversed, and the several cases were remanded to the municipal court for trial. From this judgment the defendants appealed to the Supreme Court, assigning as error the judgment of the Superior Court.

It is stipulated that only the record in the Meacham case need be brought to the Supreme Court, and that the plaintiffs in the cases of Alsobrook and Proctor will be bound by the judgment in the Meacham case.

The question presented for our consideration is clearly stated in appellants' brief as follows: "Is the plaintiff, by reason of the facts admitted and appearing in the record, bound and estopped by the judgment and findings of the jury in the case of 'Sedberry *v.* Larus & Brothers Co. and H. S. Bivens,' and is said judgment *res judicata* as to the negligence of the defendant H. S. Bivens, as between the plaintiff and defendant here?" The answer is "No."

The plaintiff Meacham was not a party to the Sedberry case and had no legal interest in any judgment that might be rendered therein. Neither was there any privity in estate, in blood, or in law, existing between the plaintiff and Sedberry. Ordinarily, the rule is that only parties and privies are bound by a judgment. *Bennett v. Holmes,* 18 N. C., 486; *Simpson v. Cureton,* 97 N. C., 112; *Hines v. Moye,* 125 N. C., 8. No estoppel is created by a judgment against one not a party or privy to the record by participation in the trial of the action. *Falls v. Gamble,* 66 N. C., 455; *LeRoy v. Steamboat Co.,* 165 N. C., 109.

An estoppel must be mutual, *Peebles v. Pate,* 90 N. C., 348, and one who is not bound by an estoppel cannot take advantage of it, *LeRoy v. Steamboat Co., supra.* It is hardly supposed that had the issue as to the defendant Bivens' negligence been answered in favor of the plaintiff in Sedberry's case, that the plaintiff Meacham could be heard to say that such answer was *res judicata* in the trial of his action. It may be, as was said in *Hipp v. DuPont,* 182 N. C., 9, that upon the trial of the Meacham case an entirely different set of facts as to the manner in which the collision between the two automobiles occurred might be developed, either by additional evidence or by the estimate placed upon the evidence by the jury.

There is nothing in the record to bring this action within certain exceptions to the general rule that only parties and privies are bound by judgments. The judgment in the Sedberry case is not one *in rem* as in *Bank v. McCaskill,* 174 N. C., 362, and as in most of the cases wherein an exception to the general rule has prevailed.

The judgment of the Superior Court is

Affirmed.

STATE v. GEORGE STEVENSON.

(Filed 15 December, 1937.)

1. Criminal Law § 33—

A confession is competent only when it is voluntary, and a confession is voluntary in law when, and only when, it is in fact voluntarily made.

2. Same—Confession in this case held involuntary and incompetent.

The evidence tended to show that defendant started to make some statement while in jail and was told by an officer that there was no use in his lying, that the officer already had more than enough evidence for a conviction, and that they "were going to take him down there"; and that thereafter, while defendant was being taken to a doctor, he made the confession sought to be introduced in evidence. *Held:* The admission of the confession in evidence was error, since the circumstances revealed by the testimony show that it was involuntary and incompetent.

3. Same—

S. v. Whitener, 191 N. C., 659, cited as stating the correct procedure for determining the voluntariness of an alleged confession.

4. Criminal Law § 81d—

Where a new trial is awarded on one exception, other exceptions need not be considered.

APPEAL by defendant from *Frizzelle, J.*, at September Term, 1937, of COLUMBUS.

Criminal prosecution, tried upon indictment charging defendant with burglary in the first degree. C. S., 4232.

The defendant pleaded not guilty.

In the course of the trial below and during the examination of State's witness, W. H. Bullard, an officer, the solicitor for the State proposed to offer in evidence a written statement, dated "8/3/37," purporting to be signed by and a confession of the defendant, in which, among other things, it is stated: ". . . I went into the house. . . . This is a true and voluntary statement made of my own free will and accord." Counsel for defendant objected, and in the absence of the jury, stated to the court that the defendant had said to him that his sole purpose in signing the confession was that he was in fear of being lynched, and he wanted to get back; that he was drunk the night of the alleged crime and that he does not know what happened. Counsel further stated to the court that he would like to examine the defendant, that he was willing to have him sworn and examined in the absence of the jury, solely for that purpose. The defendant was not examined. But the witness Bullard was examined with the view of eliciting the facts as to the circumstances under which the statement was made. The witness stated that Corporal Pridgen wrote the statement just as defendant had "told it," and that the "statement was free, voluntary, and of his own free will and accord." Continuing, the witness said: "Corporal Pridgen and me brought him back up in the front room of the jail. No one else was there except we three. I do not think he was asked whether or not he would sign the confession until we got him in and told him to come on with the truth about it. . . . I came back over here the next morning and went up in the jail, and he began to tell me something else, and I told him 'There is no use you beginning to tell a lie to me this morning, I have already got too much evidence to convict you. We are going to take you down there.' I took him up to Dr. Johnson's with the wound in his arm. We got out there and George said, 'Well, I want to tell the truth about it.' Then, of course, just voluntarily then, he told what he has told. We did have him out of jail then." The court ruled that the alleged confession was freely and voluntarily

made and, therefore, admissible. "To the ruling of the court, without examination of the defendant, as requested and urged by defendant's counsel, the defendant excepted." The statement was introduced in evidence. Defendant excepted.

Verdict: Guilty of burglary in the first degree.

Judgment: Death by asphyxiation.

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

Dwight McEwen for defendant, appellant.

WINBORNE, J. We are of opinion that the alleged confession, having been made under the circumstances described by the officers, was involuntary and incompetent. The admission of it in evidence is error. *S. v. Anderson,* 208 N. C., 771, at 777 and 783; *S. v. Myers,* 202 N. C., 351, 162 S. E., 764; *S. v. Livingston,* 202 N. C., 809, 164 S. E., 337; *S. v. Grier,* 203 N. C., 586, 166 S. E., 595; *S. v. Gosnell,* 208 N. C., 401, 181 S. E., 323; *S. v. Moore,* 210 N. C., 686, 188 S. E., 421.

The factual situation here is very similar to that in *S. v. Anderson, supra,* where a new trial was granted the defendant Overman. There the Court stated: "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 flattery of hope or by the torture of fear comes in such questionable shape as to merit no consideration," citing *S. v. Livingston, supra. S. v. Patrick,* 48 N. C., 443.

"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. Anderson, supra,* citing *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187.

While it is not necessary, in view of the turn of this appeal, to consider the exception to the procedure followed in determining the voluntariness of the alleged confession, it is appropriate to refer to *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603, where the subject is fully discussed.

As the case goes back for a new trial for the error described, other exceptions upon which defendant relies need not be considered. *Shoemake v. Refining Co.,* 208 N. C., 124, 179 S. E., 334; *Callahan v. Roberts, ante,* 223; *Warren v. Ins. Co., ante,* 354.

For error stated, defendant is entitled to

New trial.

LAURIE MOSELEY, JR., v. W. A. KNOTT AND J. S. SHACKELFORD.

(Filed 15 December, 1937.)

1. Wills § 34—

A devise to the "heirs" of a person will be construed to be to his "children" in the absence of a contrary intention expressed in the instrument. C. S., 1739.

2. Wills § 33c—Remaindermen are to be determined as of date of the termination of the life estate.

The devise in this case was to testator's daughter-in-law for life, remainder over to the children of testator's son, the life tenant's husband. The daughter-in-law died leaving one child of the marriage her surviving, and her husband subsequently remarried. *Held:* The takers of the remainder are to be determined as of the date of the death of the life tenant and the termination of the life estate, and only those *in esse* as of that time are entitled to take, and the child of the life tenant takes a fee simple in the property upon her death to the exclusion of any children her husband may have by his second wife.

APPEAL by defendants from *Cranmer, J.*, at November Term, 1937, of LENOIR. Affirmed.

This was a controversy without action submitted upon agreed statement of facts to determine the title to certain described land, the subject of contract of sale by plaintiff to defendants.

From judgment that plaintiff was owner of the land in fee and that his deed therefor to defendants would convey a good title, defendants appealed.

Wallace & White for plaintiff.
R. A. Whitaker for defendants.

DEVIN, J. The determination of the question presented by this appeal involves the construction of the ninth item of the will of E. T. Moseley, from whom it is admitted the title descended. This item is expressed in the following language:

"I give and devise to my beloved daughter-in-law, Kate Vanstory Moseley, wife of my beloved son, Laury Moseley, for and during the term of her natural life, a certain tract or parcel of land (describing it), to have and to hold to her, the said Kate Vanstory Moseley, for and during the term of her natural life, and at her death to go to the heirs of my beloved son, Laury Moseley, share and share alike. It being my desire and wish, however, that my beloved son, Laury Moseley, shall have charge of this farm, or tracts of land, and the management thereof, during the life estate created herein."

It was admitted that one child only was born to Kate Vanstory Moseley and Laury Moseley, the plaintiff, Laurie Moseley, Jr., and that he was living at the time of the execution of the will of E. T. Moseley, his grandfather, in 1925. In 1927 Kate Vanstory Moseley died, leaving surviving her husband, Laury Moseley, Sr., and the plaintiff, Laurie Moseley, Jr., the only child of Laury Moseley, Sr., and herself. Since the death of Kate Vanstory Moseley, Laury Moseley, Sr., has married again, but no other child has been born to him.

Section 1739 of the Consolidated Statutes contains the following rule of construction: "A limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be the children of such person unless a contrary intention appear by the deed or will."

Interpreting the ninth item of the will in accord with the rule set forth in this statute, the devise, to take effect at the termination of the life estate of Kate Vanstory Moseley, "to the heirs" of Laury Moseley (who was then and still is living), must be construed to mean his children. This brings us to the consideration of the question whether those who take under the will in remainder as child or children of Laury Moseley, Sr., are to be determined at the death of Kate Vanstory Moseley, or whether this class would be enlarged to include any children who might hereafter be born to Laury Moseley, Sr., by a subsequent marriage.

The uniform holding of the court upon these and similar facts is that when the life estate terminates, the person or persons who answer the description take the property. So that at the death of Kate Vanstory Moseley, immediately the law called the roll of the class, that is the children of Laury Moseley, Sr., and the only one who could answer was the plaintiff, and he alone was entitled to take. *Bell v. Gillam,* 200 N. C., 411, 157 S. E., 60; *Trust Co. v. Stevenson,* 196 N. C., 29, 144 S. E., 370; *Fulton v. Waddell,* 191 N. C., 688, 132 S. E., 669; *Baugham v. Trust Co.,* 181 N. C., 406, 107 S. E., 431; *Cooley v. Lee,* 170 N. C., 18, 86 S. E., 720; *Cullens v. Cullens,* 161 N. C., 344, 77 S. E., 228; *Wise v. Leonhardt,* 128 N. C., 289, 38 S. E., 892; *Knight v. Knight,* 56 N. C., 167.

In *Knight v. Knight, supra,* the land was devised to one Barlow for life, remainder to the children of Louisa Knight. Children were born to Louisa Knight both before and after the death of the life tenant. It was held that only the children who were *in esse* at the time the life estate terminated could take. "The call for the owners of the ultimate estate is not made until the first estate falls in, and all who answer the description at that time are entitled. The children of Mrs. Knight born after the death of Barlow are excluded."

In *Cullens v. Cullens,* 161 N. C., 344, 77 S. E., 228, it was said: "We think it well settled that when land is conveyed to a woman and her children they take as tenants in common, and only those born at the date of the deed take."

In *Cooley v. Lee,* 170 N. C., 18, 86 S. E., 720, where there was a devise to the heirs of a living person, subject to a life estate in another, it was said, "The devise, being to a class, under various decisions in our State, will include all who are members of the class and fill the description at the time the particular estate terminates."

The holding in *Fulton v. Waddell,* 191 N. C., 688, 132 S. E., 669, is to the effect that when the remainder is limited to a class the class is to be ascertained at the termination of the life estate, citing *Bowen v. Hackney,* 136 N. C., 187, and *Witty v. Witty,* 184 N. C., 375. And in *Trust Co. v. Stevenson,* 196 N. C., 29, 144 S. E., 370, *Brogden, J.,* in a concurring opinion succinctly states the rule that when an ultimate estate in expectancy is limited to a class of persons, and there are persons *in esse* answering the description when the contingency happens, the law immediately calls the roll of the class and those who answer alone can take. In *Bell v. Gillam,* 200 N. C., 411, 157 S. E., 60, it was said: "When the particular estate comes to an end all of the class who have an interest are immediately determined."

For these reasons we conclude that the judge below correctly ruled that Laurie Moseley, Jr., had an indefeasible title to the land, and upon tender of proper deed therefor he was entitled to recover of defendants the agreed purchase price.

Judgment is affirmed.

GUILFORD COUNTY v. ESTATES ADMINISTRATION, INC., ADMINISTRATOR OF G. A. GRIMSLEY, AND THE HEIRS AT LAW OF G. A. GRIMSLEY.

(Filed 15 December, 1937.)

1. **Taxation § 40b: Venue § 3—**

The foreclosure of a tax sale certificate is a remedy in the nature of an action to foreclose a mortgage, C. S., 8037, and must be instituted in the county where the land, or some part thereof, is situated, C. S., 463.

2. **Same: Venue § 1—Action against administrator to foreclose tax sale certificate must be instituted in county where land is situated.**

An action against an administrator to foreclose a tax sale certificate on lands of the estate must be instituted in the county in which the land, or some part thereof, is situated, C. S., 8037, 463, and the provisions of C. S., 465, that an action against an administrator must be instituted in

the county in which the bond was given, being in irreconcilable conflict in such instance, must give way to the latter enacted provisions of C. S., 8037.

3. Statutes § 10—

Where two statutes are in irreconcilable conflict, the statute which was first enacted must give way to the latter enacted statute to the extent of the conflict, the last expression of the legislative will in the matter being the law.

APPEAL by defendant Estates Administration, Inc., administrator of G. A. Grimsley, from *Harding, J.*, at August Term, 1937, of GUILFORD. Affirmed.

B. L. Fentress and D. Newton Farnell, Jr., for plaintiff, appellee.
Vaughn & Graham and Winfield Blackwell for defendant, appellant.

SCHENCK, J. This is an action instituted by Guilford County, as purchaser of two certain sheriff's certificates of sale for taxes of real estate in Guilford County in the name of G. A. Grimsley, to have such real estate sold for the satisfaction of the sums due it upon such certificates, under the provisions of C. S., 8036 and 8037.

The appellant, Estates Administration, Inc., administrator of G. A. Grimsley, under C. S., 470, in apt time, before answering, made a special appearance in writing and demanded the removal of the case for trial from Guilford County to Forsyth County, alleging that it was entitled to such removal under the provisions of C. S., 465, since the action was against it as an administrator in its official capacity, and that it and the surety on its bond are residents of Forsyth County, and that it qualified as such administrator in Forsyth County. The appellant's motion for removal was denied by the clerk of the Superior Court, and upon appeal to the judge at term the judgment of denial was affirmed, and appeal was taken to the Supreme Court, wherein the denial of the motion for removal was assigned as error.

C. S., 8037, provides that "Such relief (judgment for holders of tax sale certificates for the sale of real estate) shall be afforded only in an action in the nature of an action to foreclose a mortgage, which action shall be commenced as herein provided. Such action shall be governed in all respects as near as may be by the rules governing actions to foreclose a mortgage."

C. S., 463, provides that actions for the "foreclosure of a mortgage of real property" . . . "must be tried in the county in which the subject of the action, or some part thereof, is situated."

Construing C. S., 8037, and C. S., 463, together it is clear that an action to enforce the lien given to the purchaser of the tax certificates

must be tried in the county where the land, or some part thereof, is situated. It is likewise clear that this construction brings about in this case an irreconcilable conflict with C. S., 465, which provides that "all actions . . . against 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." Under the provisions of the two former statutes, when read together, this action "must be tried" in Guilford County where the land is situated, and under the provisions of the latter statute it "must be instituted" in Forsyth County where the administrator qualified and resides.

C. S., 8037, was enacted in 1927, and C. S., 465, was enacted in 1868. The former enactment, being subsequent to and in irreconcilable conflict with the latter enactment, the former must prevail.

"Every affirmative statute is a repeal by implication of a prior affirmative statute, so far as it is contrary to it, for the maxim is *Leges posteriores priores contrarias abrogant* (later laws abrogate prior laws that are contrary to them). *S. v. Woodside,* 31 N. C., 500; Black's Law Dictionary." *S. v. Kelly,* 186 N. C., 365.

"The two statutes, being utterly inconsistent, cannot stand together. That being so, the last enactment must prevail to the extent that they are repugnant." *Swindell v. Belhaven,* 173 N. C., 1.

"It is a well recognized principle of statutory construction that when there are two acts of the Legislature applicable to the same subject, their provisions are to be reconciled if this can be done by fair and reasonable intendment; but, to the extent that they are necessarily repugnant, the latter shall prevail. The position is stated in substantially these terms by *Associate Justice Field* in *U. S. v. Tynen,* 78 U. S., 92, as follows: 'Where there are two acts on the same subject, the rule is to give effect to both, if possible; but if the two acts are repugnant in any of their provisions, the latter act, and without any repealing clause, operates to the extent of the repugnancy as a repeal of the first'; and in Sedgwick on Statutory Construction, p. 125, quoting from *Ely v. Bliss,* 5 Beavan, it is said: 'If two inconsistent acts be passed at different times, the last is to be obeyed, and if obedience cannot be observed without derogation from the first, it is the first that must give way.'" *Bramham v. Durham,* 171 N. C., 196.

Under the subject "Statutes," subhead "Conflicting Provisions," 59 C. J., par. 596, p. 999, reads: "In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last in point of time or order of arrangement prevails."

The judgment of the Superior Court is in accord with the provisions of C. S., 8037, and the authorities cited, and is therefore affirmed.

Affirmed.

NELSON W. WELLS v. MRS. W. S. WEST.

(Filed 15 December, 1937.)

1. Courts § 2d—

The jurisdiction of the Superior Court upon appeal from a judgment of a justice of the peace is derivative, and where the justice's court has no jurisdiction, the Superior Court acquires none by appeal.

2. Actions § 7: Innkeepers § 3—Proprietor's wrongfully permitting third person to take property from rented room is a tort.

Evidence that plaintiff rented a room in defendant's lodging house, that thereafter plaintiff told defendant to let no one have his accordion kept in the room, to which defendant agreed, and that some time later defendant permitted a third person to take the accordion on the pretext that plaintiff had sent him for it, *is held* to establish a cause of action in tort, if at all, and not an action based upon the violation of any duty founded upon contract, the proprietor of the lodging house not being a bailee of the property, and there being no binding agreement on the part of the proprietor not to let anyone have the accordion, the statements in regard thereto having been made some time after the conclusion of negotiations for renting the room.

3. Justices of the Peace § 3—Where action for more than $50 is founded solely in tort, justice of the peace has no jurisdiction.

Where the evidence in an action against the proprietor of a lodging house tends to show that the proprietor wrongfully permitted a third person to take plaintiff's personal property, valued at more than fifty dollars, out of the room rented by plaintiff, the action is founded solely in tort, and the justice's court has no jurisdiction, and the rule that where an injury results from breach of some contractual duty, plaintiff may waive the tort and sue on the contract, has no application.

4. Bailment § 1: Innkeepers § 3—Proprietor of lodging house is not bailee of personal property left in rented room.

A proprietor of a lodging house is not a bailee of personal property left in the room rented by the owner of the personalty, even though the proprietor has access to the room for janitor and maid service, there being no such delivery of possession of the personalty necessary to establish the relationship, and this result is not affected by the statutory lien given by C. S., 2461.

APPEAL by plaintiff from *Phillips, J.*, at October Term, 1937, of GUILFORD. Affirmed.

This was an action instituted by plaintiff in the court of a justice of the peace "for the nonpayment of the sum of $200.00 due by breach of contract of bailment." The sum sued for was the value of an accordion left in plaintiff's room at defendant's lodging house, which it was alleged defendant had negligently and in breach of contract of bailment permitted to be fraudulently taken by a third person.

From a judgment by the justice of the peace for $50.00 only, plaintiff appealed to the Superior Court.

In the trial *de novo* in Superior Court plaintiff offered evidence tending to show that he rented a room from defendant into which he moved his personal belongings, including an accordion; that he told her about the accordion and asked if it was all right for him to practice; that six weeks to two months after he moved in he told her not to let any one have the accordion, and she said she would not let any one have it; that subsequently on 8 July, 1937, he was informed by the defendant that she had permitted a man calling himself Ward to remove the accordion from the house on the fraudulent pretext that plaintiff had sent him for it; that the accordion has been thereby lost and not recovered, and that the market value of same was $225.00 to $250.00.

At the close of plaintiff's testimony the trial judge allowed the motion to dismiss for want of jurisdiction. From judgment dismissing the action plaintiff appealed to the Supreme Court.

Schoch & Schoch for plaintiff, appellant.
Gold, McAnally & Gold for defendant, appellee.

DEVIN, J. The action having been begun in the court of a justice of the peace, upon appeal therefrom the jurisdiction of the Superior Court was derivative only. Therefore the sole question presented is whether the justice of the peace had jurisdiction of the cause of action for the recovery of $200.00 damages based on the evidence presented by the plaintiff in support thereof.

Under the evidence shown by the record plaintiff could maintain his action against the defendant for the loss of his accordion (if at all) only on the ground of a negligent or wrongful act on the part of the defendant, a *tort* as defined in *Elmore v. R. R.*, 191 N. C., 182, 131 S. E., 633, and as the justice's jurisdiction in actions of *tort* is limited to those cases wherein the sum demanded does not exceed $50.00, the Superior Court was without jurisdiction.

But plaintiff invokes the well established principle that where the matter out of which the cause of action arises has in it elements of both contract and tort, the plaintiff may waive the tort and sue in contract, and contends that he has done so in this case.

The rule is stated in 2 R. C. L., 753, as follows: "When a contractual relationship exists between persons, and at the same time a duty is superimposed by or arises out of the circumstances surrounding or attending the transaction, the violation of which duty constitutes a *tort*, the *tort* may be waived and *assumpsit* maintained for the reason that the

relation of the parties out of which the duty violated grows has its inception in contract."

However, the evidence in the case at bar does not disclose a contractual obligation on the part of the defendant with respect to the plaintiff's accordion. The contract for the rental of the room contained no stipulation about the musical instrument, and it was some two months later that in response to plaintiff's request defendant said she would not let any one have it. The elements of a binding obligation are absent.

Plaintiff, however, contends that by virtue of having placed personal property, with defendant's consent, in his rented room in her house the relationship of bailor and bailee resulted, and that an action for a breach of duty on the part of the bailee, though based on negligence, was one in which he could elect to waive the *tort* and sue on contract.

But the law of bailment is not applicable to the facts disclosed in this case. The property was not placed in possession of defendant nor was custody thereof accepted by her. It was at all times in the room rented by plaintiff in the house of defendant, and there was neither actual nor constructive possession of the accordion delivered to her. That defendant had access to the room for the purpose of maid service would not constitute possession of plaintiff's personal property placed by him in the room. Defendant was not an innkeeper and was not an insurer of plaintiff's property. *Holstein v. Phillips,* 146 N. C., 366, 59 S. E., 1037.

In *Hanes v. Shapiro,* 168 N. C., 24, 81 S. E., 1003, will be found a full discussion of the law of bailment. The generally accepted definition of a bailment is that it is "a delivery of goods in trust upon a contract, express or implied, that the trust shall be duly executed and the goods restored by the bailee as soon as the purposes of the bailment shall be answered." 2 Kent Comm., 559. To constitute a bailment there must be a delivery by the bailor and acceptance by the bailee of the subject matter of the bailment. It must be placed in the bailee's possession, actual or constructive. 6 Am. Juris., 191.

"There must be such a full transfer, actual or constructive, of the property to the bailee as to exclude the possession of the owner and all other persons and give the bailee for the time being the sole custody and control thereof." 6 Am. Juris., 192.

The rental of a room, and the deposit therein by the tenant of certain personal property, though the landlord had access to the room for janitor or maid service, would not constitute such a delivery of the personal property as to constitute the landlord a bailee. *Broaddus v. Commercial Nat. Bank,* 113 Okla., 10, 42 A. L. R., 1331.

The principles of the law of bailment, as they apply to an action for negligent breach of duty arising under the implied contract of bailment,

are not affected by the statutory lien given by C. S., 2461, to innkeepers and lodging house keepers.

For these reasons we conclude that the court below has correctly held that the Superior Court was without jurisdiction, and the judgment dismissing the action is

Affirmed.

STATE v. DAN PATTERSON.

(Filed 15 December, 1937.)

1. **Homicide § 25—Conflicting evidence as to identity of defendant as perpetrator of crime held properly submitted to the jury.**

   In this homicide prosecution defendant contended that he did not fire the fatal shot, but admitted deceased was killed with a pistol. All the witnesses, both for the State and for defendant, who testified they were present at the time, testified that the fatal shot was fired by another, and that deceased so stated immediately after the fatal shooting, but there was competent testimony as to dying declarations by deceased identifying defendant as the perpetrator of the crime. *Held:* The conflicting competent evidence was properly submitted to the jury.

2. **Homicide § 27b: Criminal Law § 53c—Charge held for error in placing burden on defendant to prove his innocence.**

   In this homicide prosecution the court charged the jury that they might return one of three verdicts, as they found "from the evidence beyond a reasonable doubt, first, guilty of murder in the second degree; second, guilty of manslaughter; third, not guilty." *Held:* The instruction is erroneous in charging the jury that they could not return a verdict of not guilty unless so satisfied from the evidence beyond a reasonable doubt, and although in other portions of the charge the court correctly placed the burden of proof, the error *is held* prejudicial in view of all the evidence in the case.

APPEAL by defendant from *Armstrong, J.*, at July Term, 1937, of RICHMOND. New trial.

The defendant was tried on an indictment for the murder of Crawford Little. He was convicted of manslaughter.

From judgment that he be confined in the State's Prison for a term of not less than two or more than five years the defendant appealed to the Supreme Court, assigning errors in the trial.

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

Jones & Jones for defendant.

CONNOR, J. At the trial of this action it was admitted by the defendant that the death of the deceased was the result of a wound inflicted upon him by a pistol shot on Saturday night, 22 August, 1936, at the home of Tom Lett LeGrand, in Richmond County, North Carolina. This admission was entered in the record. The defendant by his plea of not guilty denied that he fired the pistol which inflicted the fatal wound.

There was no evidence at the trial tending to show that the defendant shot the deceased except the testimony of witnesses tending to show statements by the deceased several days after he was shot, which were admitted by the court as dying declarations of the deceased, tending to show that the defendant shot the deceased. All the witnesses, both for the State and for the defendant, who testified that they were present when the deceased was shot, testified that he was shot by one V. Z. Pankey with whom the deceased had had a quarrel immediately before he was shot and that the deceased had so stated immediately after he was shot and subsequently at the hospital. The credibility of both the testimony of the witnesses as to the dying declarations and of said declarations by the deceased was sharply impeached by evidence offered by the defendant. The evidence, however, was competent and was properly submitted to the jury as tending to show that the defendant shot the deceased, as contended by the State.

In its charge the court instructed the jury as follows:

"Gentlemen of the jury, you will see in this case that you may return one of three verdicts, as you so find from the evidence and beyond a reasonable doubt; first, guilty of murder in the second degree; second, guilty of manslaughter; third, not guilty."

The defendant having duly excepted to this instruction, on his appeal to this Court assigns same as error, in that the jury was instructed by the court that they could not return a verdict of "Not guilty" unless they were satisfied beyond a reasonable doubt that he is not guilty.

There was error in the instruction, and although the court had properly instructed the jury on other portions of its charge, with respect to the burden of proof, we think, in view of all the evidence in this case, this error was prejudicial to the defendant. *S. v. Morgan,* 136 N. C., 628, 48 S. E., 670.

For the error in the charge the defendant is entitled to a new trial. It is so ordered.

New trial.

ARTHUR SMITH v. THE STANFIELD HOSIERY MILL, INC.

(Filed 15 December, 1937.)

Trial § 33—Statement of contentions not based upon evidence introduced at the trial constitutes reversible error.

Where the court, in stating the contentions of a party, states a contention not supported by proper allegation of the complaint, and a contention based upon evidence excluded by the court, an exception thereto must be sustained, since it places before the jury evidence and contentions which appellant has had no opportunity to controvert, and such error is not a correctible inadvertence, since to have called the matter to the court's attention would have emphasized the error.

APPEAL by defendant from *Warlick, J.*, at February Term, 1937, of STANLY.

Civil action to restrain nuisance, later converted into an action to recover permanent damages.

In the operation of defendant's hosiery mill, dyestuffs are emptied from its vats into Rock Hole Creek, which flows through plaintiff's lands two miles from defendant's mill. The case is not unlike *Nance v. Fertilizer Co.*, 200 N. C., 702, 158 S. E., 486.

Over objection, plaintiff was allowed to testify that his cows gave less milk "since the dyestuffs were emptied into the creek than they did before that time." The court admitted the evidence with the statement that he would strike it out unless later made competent.

In charging the jury, the court stated: The plaintiff alleges that the waters became contaminated; "that they (the dyestuffs) were deleterious and poisonous," etc. (Exception.) And further: Plaintiff contends that the cows were forced from necessity to drink the water; that it affected their milk, their milk-giving qualities; and "that the calves were born with something wrong with them, that they were unable to stand or walk and born blind." (Exception.)

The jury answered the controverted issues in favor of the plaintiff and assessed the damages at $350.00. From judgment thereon the defendant appeals, assigning errors.

O. J. Sikes, G. H. Morton, and Hartsell & Hartsell for plaintiff, appellee.

Brown & Brown and R. L. Smith & Sons for defendant, appellant.

STACY, C. J. We need not pause to inquire whether error was committed in the admission of evidence, which the court stated would be stricken out unless its competency later appeared, for, upon the record

as presented it would seem that the summation of the complaint, "the dyestuffs were deleterious and poisonous," when no such allegation appears therein, and the recitation of the contention, "the calves were born with something wrong with them, they were unable to stand or walk and born blind," when there was no evidence to support such a contention, brings the case within the principle announced in *S. v. Love,* 187 N. C., 32, 121 S. E., 20, to the effect that where, by the action of the court, evidence material to the issue, which has been excluded, is placed before the jury, without opportunity to answer it or in any way to meet it, necessitates a new trial.

Evidence relative to the condition of the young calves was heard by the judge in the absence of the jury, and excluded as being incompetent, so we were told on the argument, yet in delivering his charge to the jury, the judge gives this excluded evidence as the basis of one of plaintiff's contentions. The testimony undoubtedly found lodgement in the court's mind, and to have called the matter to his attention, as a correctible inadvertence, would only have served to emphasize the error. *Bank v. McArthur,* 168 N. C., 48, 84 S. E., 39; *Medlin v. Board of Education,* 167 N. C., 239, 83 S. E., 483; *Speed v. Perry, ibid.,* 122, 83 S. E., 176; *S. v. Whaley,* 191 N. C., 387, 132 S. E., 6; *S. v. Cook,* 162 N. C., 586, 77 S. E., 759; *S. v. Dick,* 60 N. C., 440. Where the judge himself fails to disregard incompetent evidence, or to eradicate it from his own mind, it would seem to be asking rather much to require a higher standard of the jury. Its harmful effect is obvious. *Credit Corp. v. Boushall,* 193 N. C., 605, 137 S. E., 721; *Morton v. Water Co.,* 169 N. C., 468, 86 S. E., 294.

For the error, as indicated, the defendant is entitled to another hearing. It is so ordered.

New trial.

CHESTER M. MARSH v. BENNETT COLLEGE FOR WOMEN AND ÆTNA LIFE INSURANCE COMPANY.

(Filed 15 December, 1937.)

1. Master and Servant § 40c—

Award denying compensation for injuries suffered as result of tornado, upon finding that accident causing injury did not arise out of and in the course of the employment, affirmed on authority of *Walker v. Wilkins, Inc., ante,* 627.

2. Master and Servant § 55d—

Findings of fact of the Industrial Commission in proceedings for compensation are conclusive when supported by evidence.

MARSH *v.* BENNETT COLLEGE.

APPEAL by plaintiff from *Armstrong, J.*, at May Term, 1937, of GUILFORD. Affirmed.

This is a proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act.

The proceeding was first heard by Commissioner Jurney, at Greensboro, N. C., on 15 June, 1936.

At this hearing it was admitted for the purposes of the record that the plaintiff, as an employee, and the defendant Bennett College for Women, as an employer, were both subject to the provisions of the North Carolina Workmen's Compensation Act at the date of plaintiff's injury, to wit: 2 April, 1936, and that the defendant Ætna Life Insurance Company was the insurance carrier of the defendant employer.

Upon his finding that on 2 April, 1936, the plaintiff suffered an injury by accident which arose out of and in the course of his employment, Commissioner Jurney made an award requiring the defendants to pay the plaintiff compensation for his injury in accordance with the provisions of the North Carolina Workmen's Compensation Act.

At the request of the defendants, the award of Commissioner Jurney was reviewed by the Full Commission, at Raleigh, N. C., on 6 January, 1937.

Upon such review, the Full Commission found that the accident which caused the injury suffered by the plaintiff on 2 April, 1936, did not arise out of and in the course of his employment, and accordingly made an award setting aside and vacating the award of Commissioner Jurney, and denying compensation to the plaintiff for his injury.

On plaintiff's appeal from the award of the Full Commission to the judge of the Superior Court of Guilford County, the award of the Full Commission was affirmed. Plaintiff appealed to the Supreme Court, assigning error in the judgment affirming the award of the Full Commission.

York & Boyd for plaintiff.
Sapp & Sapp and Norman Block for defendants.

CONNOR, J. The facts in this case are substantially the same as those in *Walker v. Wilkins, Inc., ante,* 627.

The question of law presented by this appeal is identical with the question of law presented by the appeal in that case.

There is no error in the judgment of the Superior Court in this case affirming the award of the North Carolina Industrial Commission denying plaintiff compensation, on its finding that his injury was not by accident which arose out of and in the course of his employment.

The judgment is affirmed. See *Walker v. Wilkins, Inc., ante,* 627.

The briefs filed in this Court on the appeal in *Walker v. Wilkins, Inc., supra,* and in this appeal have been carefully considered. The numerous cases from other jurisdictions, cited in these briefs in support of the respective contentions of the appellant and of the appellee in each appeal, in which questions involving the liability of an employer to his employee, under Workmen's Compensation Acts for the injury resulting from a tornado or other similar cause, are discussed and decided, have been carefully examined.

This court, however, has consistently recognized and applied the statutory provision that findings of fact made by the North Carolina Industrial Commission in a proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act, are conclusive upon the courts of this State, where such findings are supported by evidence, and has uniformly affirmed judgments of the Superior Courts affirming awards of the Industrial Commission in such cases. See *Wimbish v. Detective Co.,* 202 N. C., 800, 164 S. E., 344. The opinion in that case by the late *Justice Brogden* has been frequently cited and uniformly approved. Accordingly, the judgment in this case is

Affirmed.

RUTH E. LUDWICK, ADMINISTRATRIX, v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 15 December, 1937.)

Appeal and Error § 40b—

Judgment of the Superior Court reversing the order of the municipal court granting defendant's motion to strike out allegations of the complaint as being evidentiary, is affirmed on authority of *Poovey v. Hickory,* 210 N. C., 630.

APPEAL by plaintiff from *Armstrong, J.,* at June Term, 1937, of GUILFORD.

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 cause of action arises out of a collision between an automobile, in which her intestate was riding as a guest, and defendants' passenger train at a crossing in the city of High Point.

The circumstances under which the collision occurred, according to plaintiff's allegations, are detailed in paragraph five of the complaint.

The allegations of this paragraph are denied in the answer, and, following the denial, the defendants set out the facts as they understand them.

There was a motion to strike out the defendants' recital of the facts as being "evidentiary, irrelevant, and incompetent." This motion was allowed in the municipal court of the city of High Point and reversed on appeal to the Superior Court of Guilford County.

From this latter ruling, plaintiff appeals, assigning error.

Lovelace & Kirkman and Charles L. Coggin for plaintiff.
W. T. Joyner and Roberson, Haworth & Reese for defendants.

PER CURIAM. Affirmed on authority of *Poovey v. Hickory,* 210 N. C., 630, 188 S. E., 78; *Scott v. Bryan, ibid.,* 478, 187 S. E., 756; *Hardy v. Dahl,* 209 N. C., 746, 184 S. E., 480; *McDonald v. Zimmerman,* 206 N. C., 746, 175 S. E., 92. The Court will not undertake to chart the course of the trial, or to delimit the hearing, upon attenuate questions of pleading. *Pemberton v. Greensboro,* 205 N. C., 599, 172 S. E., 196; *S. c.,* 203 N. C., 514, 166 S. E., 396.

Affirmed.

CAROLINA TRANSPORTATION & DISTRIBUTING COMPANY AND WOLFE & CRANE COMPANY v. AMERICAN ALLIANCE INSURANCE COMPANY.

(Filed 15 December, 1937.)

Appeal and Error § 2—Judgment appealed from held not final judgment, and appeal is dismissed as premature.

In this action on a policy of indemnity insurance, insurer's appeal from judgment of the Superior Court affirming the judgment of the municipal court in insured's favor, with the modification that an issue as to the amount of the recovery be submitted to a jury, *is held* premature and is dismissed.

APPEAL by defendant from *Armstrong, J.,* at March Term, 1937, of GUILFORD. Appeal dismissed.

Roberson, Haworth & Reese for plaintiffs, appellees.
Smith, Wharton & Hudgins for defendant, appellant.

PER CURIAM. This was an action brought in the municipal court of the city of High Point on an insurance policy issued by the defendant to the transportation company insuring the insured, *inter alia,* against loss by reason of legal liability as a carrier for loss of goods.

On motion of the plaintiffs, judgment on the pleadings was rendered in the municipal court to the effect that the plaintiffs were entitled to

recover of the defendant the sum of $3,197.10, with interest. To this judgment the defendant excepted and appealed to the Superior Court.

The Superior Court affirmed the judgment of the municipal court with the modification that an issue as to the amount of the recovery should have been submitted to a jury, and remanded the case to the municipal court that such an issue might there be submitted. To this judgment the defendant excepted and appealed to the Supreme Court.

The judgment from which the defendant appeals to this Court is not a final judgment, and for that reason the appeal is premature, and must be dismissed. *Smith v. Matthews,* 203 N. C., 218, and cases there cited.

Appeal dismissed.

THE CORBITT COMPANY v. JOHN P. NUTT CORPORATION, CAROLINA MOTOR SERVICE, INC., W. C. MILLER, ABRAHAM HILLMAN, AND W. R. CROSBY.

(Filed 15 December, 1937.)

Appeal and Error § 37c—

The findings of fact by the referee, approved by the trial court, are conclusive on appeal when supported by evidence.

APPEAL by defendant John P. Nutt Corporation from *Grady, J.,* at May Term, 1937, of NEW HANOVER. Affirmed.

This was an action to recover the balance due for certain motor trucks, and for parts and repairs thereto, sold by plaintiff to Carolina Motor Service, Inc., which debt it was alleged defendant John P. Nutt Corporation had assumed, upon taking over all the assets and property of the Carolina Motor Service, Inc.

By consent, the cause was referred to Marsden Bellamy, Esq., to hear the evidence and report his findings of fact and conclusions of law to the court. The referee reported his findings of fact that John P. Nutt Corporation, in consideration of receiving the property of the Carolina Motor Service, Inc., agreed orally and in writing to pay plaintiff's claims, and that of certain other creditors, and that the balance of plaintiff's debt, $4,262.22, was now due by the defendant. The referee concluded that plaintiff was entitled to judgment therefor.

Upon exceptions duly filed, the cause was heard in the Superior Court and judgment rendered overruling all of defendant's exceptions to the report, and adopting and affirming the findings of fact and conclusions of law of the referee. The defendant John P. Nutt Corporation appealed.

C. C. Holmes and I. C. Wright for plaintiff, appellee.

Stevens & Burgwin for defendant John P. Nutt Corporation, appellant.

PER CURIAM. An examination of the record and the evidence produced before the referee leads us to the conclusion that there was evidence to support the findings of fact by the referee. These findings having been adopted and approved by the judge below, his ruling thereon is conclusive upon this Court. *Mineral Co. v. Young,* 211 N. C., 387; *Anderson v. McRae,* 211 N. C., 197.

The judgment is

Affirmed.

HATTIE A. COX v. L. B. JENKINS.

(Filed 15 December, 1937.)

1. Process § 15—

Complaint *held* sufficient to state cause of action for abuse of process under authority of *Ledford v. Smith, ante,* 447.

2. Pleadings § 15—

A demurrer for failure of the complaint to state a cause of action must be overruled if the complaint, liberally construed, C. S., 535, is sufficient to state any cause of action.

3. Pleadings § 27—

If defendant desires a more certain and definite statement of the cause of action alleged, the proper remedy is a motion under C. S., 537.

APPEAL by defendant from *Hamilton, Special Judge,* at August Term, 1937, of LENOIR. Affirmed.

This is an action for abuse of process, etc., brought by plaintiff against defendant, alleging damages. The defendant demurred to the complaint. The demurrer was overruled by the court below. Defendant excepted, assigned error, and appealed to the Supreme Court.

Allen & Allen and Albion Dunn for plaintiff.

Wallace & White, John G. Dawson, R. A. Whitaker, and J. A. Jones for defendant.

PER CURIAM. We think the court below properly overruled the demurrer of defendant. We will not analyze the complaint in detail, as the defendant must answer and a trial will be had. We think the allega-

tions sufficient, at least, to base a cause of action on for abuse of process. *Ledford v. Smith, ante,* 447.

While the complaint was lengthy, yet under our liberal practice (C. S., 535), if it sets forth one good cause of action it cannot be overthrown by demurrer. The general rule is that, if there is any cause of action stated in the complaint, however inartificially expressed, the demurrer will be overruled. If the defendant desired a more certain and definite statement of the alleged cause of action, the proper remedy was a motion to "require the pleading to be made definite and certain by amendment." N. C. Code, 1935 (Michie), sec. 537.

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

Affirmed.

STATE v. LONNIE CONNER.

(Filed 15 December, 1937.)

1. Receiving Stolen Goods § 6—

Circumstantial evidence in this case *held* sufficient to be submitted to the jury on the charge of receiving stolen goods.

2. Criminal Law § 54b—

The indictment charged larceny and receiving, but the case was submitted to the jury on the second count only and the evidence and trial were confined solely to the second count. The jury returned a verdict of guilty. *Held:* It will be presumed that the verdict followed the trial, and the verdict sustains a judgment on the second count.

APPEAL by defendant from *Warlick, J.,* at July Criminal Term, 1937, of GASTON.

Criminal prosecution for larceny and for receiving stolen goods, knowing same to have been stolen.

On separate indictments, each charging two counts, (1) larceny, and (2) receiving stolen goods, C. S., 4250, consolidated for the purpose of trial, John Bell, Roscoe Gary, Will Stover, Charlie Rowe, and Lonnie Conner, respectively, were tried.

John Bell pleaded guilty. The other four pleaded not guilty. As to Rowe and Conner the case was submitted to the jury only on the second count.

On trial the evidence for the State tended to show that: In May, 1937, Maxwell Brothers and Morris, who operated a furniture store in Gastonia, missed numerous articles of household and kitchen furniture and

goods of value of about $2,500. Among the employees of the store at that time were John Bell, a white man, as delivery man, and Roscoe Gary and Will Stover, colored men, as helpers. When confronted by the manager, Bell admitted his guilt and implicated Gary and Stover in the stealing of the missing articles, which had been taken from time to time when making deliveries on orders for the store. The articles were sold and the money divided between the three. A part of the stolen goods, a living room suite, 2 wool rugs, an occasional table, and 2 linoleum rugs, worth $273.00, were found in the possession of the defendant Lonnie Conner.

Bell testified: "I took some stolen goods to Lonnie Conner and he paid me some money and gave me a little liquor. I did not tell him I had stole it. . . . I do not remember how much Lonnie Conner paid me for the goods he bought. He paid me at different times around $30.00 or $35.00. . . . I sold Lonnie a rug and a radio. He paid me $6.00 at one time for this. I did not talk to Lonnie about the goods after this. I was only a delivery man. I have known Lonnie Conner about a year and a half."

At the time the furniture was found in his possession, Conner stated to the sheriff and deputy sheriff and in the presence of Bell that he did not buy any furniture from John Bell.

The defendant offered testimony tending to show that: He did not buy from John Bell any of the stolen articles found in his possession, but that he had bought some furniture from the furniture salesman of Maxwell Brothers and Morris; that his wife was sick in bed and he took the salesman in to see her and she arranged for the furniture to be displayed, and if she liked it she would trade in her old furniture for it; that when it was delivered she accepted it and paid $104.50 for it; that the name of the salesman was Mr. Glenn, who is now in Charlotte, and defendant had tried to find him.

Mrs. Lonnie Conner testified in corroboration of her husband as to purchasing furniture from a Mr. Glenn at $104.50; that she did not buy the furniture from Mr. Bell; that Conner was not at home the day the furniture was delivered; and that she did not know the furniture came from Maxwell Brothers and Morris until her husband had her identify the boy sent up from the station.

Defendant further offered testimony tending to show that the linoleum rugs found in his possession were bought from Schrum Furniture Company. This Mr. Schrum corroborated.

In rebuttal, the State offered evidence tending to show that: John Bell did not deliver any furniture to Mrs. Conner; that he had never seen her before she came to court; that there was no Glenn Furniture Company salesman; that Maxwell Brothers and Morris did not have a

salesman named Glenn; and that the furniture was delivered to a room at the filling station.

The sheriff and deputy sheriff testified that Mrs. Conner did not make any statement about buying the furniture from a man named Glenn; that she stated she was sick in bed, and that she had traded the living room suite.

The manager of Maxwell Brothers and Morris store testified that he talked with Mrs. Conner; that she made no statement about buying furniture from a Mr. Glenn; but said she was sick and did not know who brought the furniture into the house when it was delivered. She said nothing about paying for it, and did not seem to know anything about it at all.

Verdict: Guilty.

Judgment: Twelve months in the common jail of Gaston County, to be assigned to work on the public roads of the State under the direction of the State Highway and Public Works Commission.

Defendant appeals to Supreme Court, and assigns error.

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

P. C. Froneberger and Cherry & Hollowell for defendant, appellant.

PER CURIAM. Tested by the well settled decisions of this Court, the evidence revealed in the present case is of sufficient probative force to be submitted to and for consideration of the jury, and to sustain the verdict. C. S., 4250. *S. v. Wilson,* 176 N. C., 751, 97 S. E., 496; *S. v. Stathos,* 208 N. C., 456, 181 S. E., 273.

Objection to the form of the verdict is untenable. In *S. v. May,* 132 N. C., 1020, 43 S. E., 819, based on bill charging two counts, *Douglas, J.,* said: "It is evident from the record that the defendant was tried on the first count alone. As far as we can see, the entire evidence, judge's charge, and the argument of counsel referred only to that count, and we must, therefore, presume that the verdict followed the trial."

In *S. v. Gregory,* 153 N. C., 646, 69 S. E., 674, it is said: "The verdict should be taken in connection with the issue being tried, the evidence and the charge of the court."

The instant case was submitted to the jury only on the second count.

We have considered all other exceptions. We find

No error.

JOHN McLEOD v. LEXINGTON COCA-COLA BOTTLING COMPANY.

(Filed 15 December, 1937.)

Food § 16—Evidence of foreign substances in other kinds of drinks bottled by defendant does not show negligence in bottling ginger ale causing injury.

Plaintiff's evidence tended to show that he was injured by drinking foreign, deleterious substances in a bottle of ginger ale bottled by defendant, and that about the same time, foreign, deleterious substances were found in bottles of Coca-Cola and other "bottled drinks" prepared by defendant. *Held:* The evidence does not show that like products manufactured by defendant under substantially the same conditions contained foreign, deleterious substances, and defendant's motion to nonsuit was properly granted.

APPEAL by plaintiff from *Sink, J.*, at May Term, 1937, of DAVIDSON.

Action to recover damages for alleged actionable negligence.

Plaintiff alleged and offered evidence tending to show that while operating a cafe in the city of Lexington, North Carolina, he bought "bottled drinks" from the defendant every morning; that on 27 January, 1937, he bought a crate of 24 bottles of ginger ale; that the same was delivered to him from a truck by Roy Wallace, who works for the defendant; that later during the day Mr. Beck and Walt Warner were in the cafe. Beck bought a "Dr. Pepper," and at the same time plaintiff drank a part of the ginger ale from one of the bottles purchased by him that morning, and found in it a large green fly covered with fungus; that the bottle had not been opened or tampered with; that after drinking he became violently sick and has continued to suffer therefrom. Plaintiff further offered testimony tending to show that about this same time when people bought and drank "bottled drinks" in his cafe, he found a fly and match stems. He testified: "I turned these bottles in which I found these substances in to Roy Wallace, who works for the defendant company. The defendant replaced them with other bottles—full bottles"; that he had opened "bottled drinks" three or four times and found foreign substances in them.

Plaintiff further offered evidence tending to show that in "September a year ago" in a bottle of Coca-Cola purchased from the defendant a green fly was found; and in March, 1937, in a bottle of Coca-Cola, likewise purchased from the defendant, there was found a fungus mass.

Plaintiff offered in evidence a portion of the answer reading: "The defendant does not deny that it sold to the plaintiff *bottled soda water* about the time therein set out."

From judgment as of nonsuit at the close of plaintiff's evidence, plaintiff appealed to the Supreme Court and assigned error.

Phillips & Bower for plaintiff, appellant.
Don A. Walser for defendant, appellee.

PER CURIAM. Taking the testimony in the light most favorable to the plaintiff, there is failure of proof requisite in cases of this character as set forth in *Enloe v. Bottling Co.*, 208 N. C., 305, 180 S. E., 582, and cases therein cited. The bottled drink in question was "ginger ale." There is no evidence tending to show that in like products manufactured under substantially the same conditions and sold by the defendant "at about the same time" contained foreign or deleterious substances. *Perry v. Bottling Co.*, 196 N. C., 175, 145 S. E., 14; *Enloe v. Bottling Co., supra; Blackwell v. Bottling Co.*, 208 N. C., 751, 182 S. E., 469; *Collins v. Bottling Co.*, 209 N. C., 821, 184 S. E., 834.

The judgment below is

Affirmed.

W. I. ANDERSON & COMPANY v. AMERICAN MUTUAL LIABILITY INSURANCE COMPANY OF BOSTON.

(Filed 15 December, 1937.)

1. Insurance § 47—

Where insurer denies that the truck involved in the collision was covered by the policy, and refuses to defend the action by the injured party against insured, insured is entitled to recover of insurer the amount reasonably expended in defending the action upon the jury's verdict establishing that the truck was insured under the policy.

2. Insurance § 43—

Motor and serial numbers on a truck insured are merely one method of identifying the truck, and repair of the truck and change of the numbers does not convert it into a new truck, and the identity of the truck as the truck insured was properly submitted to and determined by the jury under the evidence in this case.

3. Insurance § 50—

Error, if any, in the admission of the policy with some of the riders only, *held* cured by the later admission of all the riders.

4. Same—

Insurer denied that the truck involved in a collision was covered by the policy, and insured defended the suit for damages instituted by the injured person, and then instituted this action against insurer. *Held:* Evidence that insured gave notice to insurer of the claims and that insured was reasonably required to pay the amount claimed in settlement, is competent.

APPEAL by defendant from *Armstrong, J.*, at 31 May Term, 1937, of GUILFORD. No error.

This is an action instituted by the plaintiff against the defendant to recover the sum of $2,323.20, paid by plaintiff in settlement of claims for damages for bodily injuries resulting from the negligent operation by plaintiff's agent of a certain truck alleged by plaintiff to be covered by, and embraced in, a liability insurance policy issued by the defendant to the plaintiff. When the original suits were instituted the defendant denied liability, assigning as its reason therefor that the truck involved in said collision was not embraced within the terms of its policy. As a result the plaintiff was required to defend said actions and finally effected a settlement thereof, necessitating the expenditure of $2,323.20.

This case has heretofore been before this Court and is reported in 211, at page 23. The facts are therein fully set out.

Appropriate issues were submitted to the jury and were answered by the jury in favor of the plaintiff. From judgment thereon the defendant appealed.

Frazier & Frazier for plaintiff, appellee.
Sapp & Sapp for defendant, appellant.

PER CURIAM. As stated by the Court in its opinion on the former appeal herein, the rights of the parties in this controversy rest upon the identity of the truck being operated by plaintiff's agent at the time of the collision out of which the claims for damages arose. The jury, upon competent evidence, has determined that the said truck was covered by the liability policy issued by the defendant. That being true, the plaintiff is entitled to recover of the defendant the amount it was reasonably required to spend by virtue of the failure of the defendant to defend suits instituted against the plaintiff for damages growing out of the negligent operation of said truck. As stated by *Clarkson, J.*, speaking for the Court on the former appeal: "If the car in the collision was GMC 2-T truck, 1927, Serial No. 50574, Motor No. 1991549, on which plaintiff had liability insurance in defendant company, the matter of identification was for the jury to determine." The mere repair of the truck did not convert it into a new truck, nor did the change of the motor and serial numbers have that effect. The identity of numbers merely constituted one method of identification. All of the evidence shows that this truck was GMC 2-T truck, 1927, owned by the plaintiff at the time of the issuance of the policy, and that it was the truck which was embraced in the schedule of cars and trucks covered by the policy.

The plaintiff offered in evidence the original policy and only such riders or endorsements as it considered material. If it was error for the court to admit in evidence the policy without all the riders or endorsements, this error, if it be error, was later cured by admission of all of the riders.

In making out its case it was necessary for the plaintiff to show that it gave notice to the defendant of the claims made against it and to show that it was reasonably required to pay the amount claimed in settlement of the suits instituted against it. A number of the exceptions are directed to evidence to this effect. They cannot be sustained. Exception is likewise made to questions which were leading in their nature. Whether such questions should be permitted rested within the sound discretion of the presiding judge.

We have examined all the other exceptions and assignments of error contained in the record and we can find in none of them sufficient merit to justify a new trial.

The jury has found by its verdict that the defendant insured the truck set out and described in the complaint, and that the plaintiff was reasonably required to expend the amount claimed by it herein in settlement of suits instituted for damages resulting from the negligent operation of the said truck. Under the verdict of the jury, judgment was properly rendered against the defendant.

In the record we find

No error.

FANNIE CAMERON v. GROVER CAMERON, J. A. PHILLIPS, AND THE ATLANTIC JOINT STOCK LAND BANK OF RALEIGH (ORIGINAL PARTY DEFENDANT); AND E. T. HARDY (ADDITIONAL PARTY DEFENDANT).

(Filed 15 December, 1937.)

1. Deeds § 2a—

Evidence of mental incapacity of grantor *held* sufficient to be submitted to the jury in this action to have deed declared null and void.

2. Limitation of Actions § 3—

An heir's right of action to set aside a deed executed by the ancestor for mental incapacity accrues upon the death of the ancestor, and the action is not barred if instituted within three years from the date of his death.

APPEAL by defendant J. A. Phillips from *Cowper, Special Judge,* and a jury, at February Term, 1937, of MOORE. No error.

The judgment, which is as follows, indicates the controversy:

"This cause coming on to be heard and being heard before the undersigned judge and a jury, and the following issues having been submitted to and answered by the jury as follows:

"(1) Was N. A. Cameron without sufficient mental capacity to make and execute the alleged deed from N. A. Cameron to Grover Cameron, dated 16 December, 1924? Answer: 'Yes.'

"(2) Did J. A. Phillips coöperate and conspire with Grover Cameron to secure the execution of the deed from N. A. Cameron to Grover Cameron, knowing that the said N. A. Cameron was at the time without sufficient mental capacity to execute such deed? Answer: 'Yes.'

"(3) Is the plaintiff's alleged cause of action barred by the three-year statute of limitations as to J. A. Phillips, as alleged in the answer? Answer: 'No.'

"Judgment of nonsuit was heretofore entered by order of the court as to E. T. Hardy and Atlantic Joint Stock Land Bank. It is now, on motion of counsel for plaintiff, considered, adjudged, and decreed:

"(1) That the deed purporting to have been executed 16 December, 1924, by N. A. Cameron to Grover Cameron, recorded in the office of the register of deeds for Moore County, in Book of Deeds No. 94, at page 179, is null and void, and that the same be canceled of record, to which end the clerk of this court shall write on the margin of said record in the office of the register of deeds the following: 'This deed declared null and void by decree of the Superior Court, February Term, 1937, in action of "Fannie Cameron *v.* J. A. Phillips and Grover Cameron," Judgment Docket No. .....' The clerk shall fill in the judgment docket number of this decree and sign the said writing.

"(2) That the plaintiff Fannie Cameron, except as hereinafter adjudged, is the owner in fee simple of an undivided one-half interest in the land described in the complaint herein, free and clear of all claim or claims of lien or other interest or encumbrances in any way founded upon or growing out of the said purported deed of N. A. Cameron to Grover Cameron, which is herein declared null and void. As to the title to the other moiety of said land adjudication thereof is reserved till the coming in of the referee's report hereinafter provided for. Said land described as follows: Lying and being in Greenwood Township, Moore County, North Carolina, adjoining the lands of B. F. Cameron heirs, W. H. Core, Mrs. Furman Douglas, Loula Harrington, *et al.* Beginning on bank of stony branch southwest side of two sweetgums and two pine pointers, running S. 30 E. 1908 chains to a stake two blackjack and hickory pointers; thence S. 54½ E. 3.42 chains to a stake 3 blackjacks and dead pine pointers; thence N. 3 E. 23.50 chains to a stake in channel of branch, B. F. Cameron's corner of 82 acres; thence down the channel of said branch to the beginning, containing eighty-seven (87) acres, more or less.

"(3) The court adjudges that any amounts, if any, paid by J. A. Phillips to or which inured to the advantage of N. A. Cameron, shall be repaid to him, if not recouped by the claims of the plaintiff against said J. A. Phillips in this cause, and such are valid claims against the estate of N. A. Cameron, deceased.

"(4) Certain issues arising on the pleadings between the plaintiff and defendants Grover Cameron, E. T. Hardy, and J. A. Phillips, having been reserved and not submitted to the jury, it is further considered, ordered, and adjudged that J. Vance Rowe, Esq., be and he is hereby appointed referee to take and state an account and report promptly to the court in reference to: (a) All taxes, if any, paid by J. A. Phillips, defendant, on the land embraced in the said deed of N. A. Cameron to Grover Cameron while it, or any part of it, was in possession or occupancy of said defendant Phillips; (b) the reasonable value of all the rents, issues, and profits received by said J. A. Phillips, or anyone for him, from said land at any time after 11 April, 1929, and the value of any timber taken from said land by him or by any person or corporation under his authority or direction, the value of such timber taken or removed as is mentioned and referred to in said defendants' undertaking in the restraining order or injunction given in this cause, to be stated separately. While plaintiff denies that N. A. Cameron received any consideration for the alleged deed, or that there is any liability on her part for any alleged improvements made on said premises by said defendants Phillips or Cameron, the referee will hear evidence and report the facts on said disputed items to be later passed on by the court when the referee's report is filed, as other disputes with reference to other matters retained by the court for hearing.

"It is further considered, ordered, and adjudged that the plaintiff recover of defendants J. A. Phillips and Grover Cameron the costs of this action, to be taxed by the clerk. This decree is not intended to adjudicate any matters arising among and between the defendants. This cause is retained for further orders.

G. V. COWPER,
Judge Presiding."

The defendants 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.

Mosley G. Boyette and Seawell & Seawell for plaintiff.
W. R. Clegg and J. H. Scott for defendants.

PER CURIAM. The defendants introduced no evidence, and at the close of plaintiff's evidence made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The motion was allowed as to E. T. Hardy and the Atlantic Joint Stock Land Bank, and overruled as to Grover Cameron and J. A. Phillips. In this we see no error.

It will serve no good purpose to set forth the evidence, as it was plenary to sustain the verdict. The allegations in the complaint were

definite and sufficient to submit the issues, which were determinative of the controversy. Defendants did not except to the issues and tender others. The demurrer *ore tenus,* motion for judgment *non obstante veredicto,* the motion for a new trial made by defendants cannot be sustained. The exceptions and assignments of error to the admission and answers of certain witnesses cannot be sustained—to say the least, they were not prejudicial. We think the court below in the long and careful charge set forth the law applicable to the facts, and exceptions and assignments of error made by defendants to the charge cannot be sustained.

All the evidence indicated that N. A. Cameron was *non compos mentis* from the time he was stricken with paralysis, on 5 April, 1919, until he died, on 11 April, 1929. Plaintiff testified: "He was paralyzed 5 April, 1919, and I discovered his mental and physical condition was bad after he was paralyzed." The evidence to this effect was overwhelming—from 16 December, 1924, when the alleged deed was made. The action was brought by plaintiff, a daughter of N. A. Cameron, within three years after the death of N. A. Cameron; therefore, the action was not barred by the three-year statute of limitations.

The defendant J. A. Phillips, with serious charges against him, introduced no evidence on the trial to disprove them. We see no new or novel proposition of law involved in the case. On the evidence it was a matter for the jury to determine, and they have found the facts in favor of plaintiff. The court below fully protected the defendant J. A. Phillips in the judgment. We see on the whole record no prejudicial or reversible error.

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

No error.

H. L. VOLLERS COMPANY, A CORPORATION, v. L. D. TODD, ADMINISTRATOR OF ESTATE OF E. A. TODD; L. D. TODD, INDIVIDUALLY; A. F. TODD AND ATHALIA (ATHELYE) TODD, AS SURETIES; A. F. TODD AND ATHALIA (ATHELYE) TODD, INDIVIDUALLY; MARY ALMA KERMON, AND COOPERATIVE BUILDING & LOAN ASSOCIATION.

(Filed 15 December, 1937.)

Pleadings §§ 2, 16—Action to set aside deed as being fraudulent as to creditors held improperly joined with action against grantor's administrator for maladministration of estate.

The complaint in this action alleged facts constituting a cause of action to set aside a deed as being fraudulent as to creditors, C. S., 1005, which deed was executed by the grantor approximately two years prior to his

death, and a cause of action against the administrator of the grantor and the sureties on his bond for the maladministration of the estate and to surcharge and falsify the final account of the administrator. *Held:* Defendants' demurrers for misjoinder of parties and causes were properly sustained, since the two causes are unrelated and do not arise out of one and the same transaction or series of transactions forming one course of dealing and all tending to one end, and since only the administrator and his sureties are necessary or proper parties in the action for maladministration, and the sureties are neither necessary or proper parties in the action to set aside, even granting the other defendants are necessary or proper parties in that action.

APPEAL by plaintiff from *Pless, J.*, at April Term, 1937, of NEW HANOVER. Affirmed.

This is a civil action instituted by the plaintiff to falsify and surcharge the final account of the defendant administrator and for the maladministration of the estate of E. A. Todd, deceased. The plaintiff also sets out a cause of action under C. S., 1005, and seeks to set aside certain deeds and conveyances as cited in the complaint. The original conveyance attacked was executed by E. A. Todd, the deceased, in 1928, two years prior to his death. The defendants interposed demurrers for that there is a misjoinder of parties and causes of action. The several demurrers were sustained and the action was dismissed. To the judgment entered dismissing the action the plaintiff excepted and appealed.

McNorton & McIntire for plaintiff, appellant.

Robert M. Kermon for defendants, appellees, L. D. Todd, individually; A. F. Todd and wife, Athalia Todd, individually, and Mary Alma Kermon.

C. D. Hogue for defendant, appellee, Coöperative Building & Loan Association.

PER CURIAM. While the complaint does not allege two causes of action, each separate and apart from the other, as required by the Rules of Practice (200 N. C., 826, Rule 20, subsection 2), but alleges all of the facts as if they constituted one cause of action, it in fact states two separate and distinct causes.

1. It alleges that L. D. Todd, administrator of the estate of E. A. Todd, has filed a false final account, has deducted commissions to which he is not entitled, has failed to make a fair and equal distribution of assets of the estate according to the priorities provided by statute, but that on the other hand he has made payments to unsecured creditors without making a ratable payment upon the claim of the plaintiff; and that the said administrator has disposed of the property of the estate to relatives at a grossly inadequate price, and that he has otherwise failed to properly discharge his duties as administrator.

2. The complaint likewise alleges that E. A. Todd (who died in 1930), on 1 December, 1928, executed and delivered a deed to his real estate to his son, Albert F. Todd, and wife, Athalia (Athelye) Todd, and that this conveyance was made without consideration with intent to hinder and delay this plaintiff and his other creditors, and without reserving sufficient property to pay his then existing debts. It then proceeds to allege that thereafter Albert F. Todd and wife conveyed said lands to R. M. Kermon and wife, Annie M. Kermon, trustees; that R. M. Kermon and wife, trustees, leased a portion of said property to the Texas Company; that R. M. Kermon and wife, trustees, and A. F. Todd and wife, and L. D. Todd executed a trust deed to C. D. Hogue, trustee for the Coöperative Building & Loan Association, and that thereafter R. M. Kermon and wife, trustees, conveyed said property to L. D. Todd and A. F. Todd and wife; that later A. F. Todd and wife and L. D. Todd executed a mortgage upon said property to Mary Alma Kermon.

The complaint then further alleges that all of the foregoing conveyances were made with full knowledge that the original conveyance from E. A. Todd was made and executed with the fraudulent intent to hinder and delay his creditors, of whom the plaintiff was then one.

In the first cause of action L. D. Todd, administrator, and A. F. Todd and Athalia (Athelye) Todd, as sureties upon the administrator's bond, are the only necessary and proper parties. The other defendants herein have no interest in said controversy and are improper parties as to said cause of action. As to the second cause of action, all of the defendants except the sureties upon the administrator's bond are, perhaps, necessary and proper parties.

The two causes of action are unrelated and the facts alleged do not state one cause of action arising out of one and the same transaction, or a series of transactions forming one course of dealing and all tending to one end. The allegations do not constitute one connected story, which can be told as a whole. The deed of E. A. Todd dated in 1928 was executed approximately two years prior to his death. That and succeeding transactions in respect to said land alleged in the complaint are entirely distinct and wholly unconnected with any acts of maladministration or *devastavit* on the part of the administrator of the estate of E. A. Todd. *Leach v. Page,* 211 N. C., 622; *Bank v. Jones,* 211 N. C., 317; *Barkley v. Realty Co.,* 211 N. C., 540; and *Daniels v. Duck Island, ante,* 90, and cases cited, are not in point. This case falls within the line of decisions represented by *Pearson v. Westbrook,* 206 N. C., 910, and cases there cited.

There is a misjoinder of parties and causes of action, and the demurrers interposed by the several defendants were properly sustained. The judgment below is

Affirmed.

JOHN R. DAVIS v. R. L. PITTMAN AND W. T. PARKER.

(Filed 15 December, 1937.)

Physicians and Surgeons § 15e—

Evidence *held* insufficient to be submitted to the jury on plaintiff's contention that his condition was due to X-ray treatment administered by defendant physician's alleged agent, the evidence tending to show that plaintiff's condition was chronic and existed prior to the treatment, and there being no evidence of a causal connection between the treatment and the condition.

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

APPEAL by plaintiff from *Barnhill, J.*, at April Term, 1937, of BLADEN. Affirmed.

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

The plaintiff alleged: "That the defendants were guilty of negligence in that they carelessly and negligently applied an overdose or overexposure of X-ray treatment to the plaintiff, and that (a) their use of the X-ray or X-ray instrumentality was not in proper manner; (b) that the defendants were employed, and retained careless and negligent agents, assistants, or substitutes directed to treat the plaintiff; (c) they negligently committed the care and treatment of the plaintiff to a negligent, careless, and incompetent person, the said person being a nurse, agent, employee, and substitute of the defendants; (d) that the defendants, after having contracted and agreed for the treatment of the plaintiff, and to attend to the treatment connected therewith in a careful and approved manner, negligently turned the plaintiff over to careless and incompetent agents and employees."

The defendants denied the allegations of the complaint.

Plaintiff alleged: "That the defendants R. L. Pittman and W. T. Parker are now and were at the times hereinafter mentioned . . . physicians and surgeons engaged in the practice of their profession in the city of Fayetteville, North Carolina." That he had, about 1 December, 1934, consulted defendant W. T. Parker, a physician, about a growth behind his right ear, known as keloid, and was advised that it should be removed by X-ray treatment. That the defendant Parker "directed the plaintiff to go to a Miss Sykes, who was located in the said Pittman Hospital, for X-ray treatment, the said Miss Sykes being then an agent of the defendants and employed by them to render X-ray and other treatment to their patients. Pursuant to the direction of the said W. T. Parker, the plaintiff went to the said Miss Sykes and was given X-ray treatment for the removal of the keloid for which he was being

treated, and thereafter he was directed by the said Miss Sykes and the defendant W. T. Parker to return to Fayetteville two or three months later for another treatment in the same matter."

In answer defendant Parker says: "That except for the one consultation during the year 1934, and possibly one other time two or three years prior thereto, this defendant has never prescribed for or treated the plaintiff as his patient. And the relation of physician and patient, since 1934, has never existed between the plaintiff and this defendant; and if the X-ray treatments were ever administered by Miss Sykes, or any other person, on the plaintiff, it was done at the plaintiff's own request, and not upon the recommendation or prescription of this defendant."

Plaintiff, on cross-examination, testified: "It was in the fall of 1934, when I consulted Dr. Parker, and I did not consult him in December, 1931. That is my best recollection. I did not consult him in 1931. In 1911, Dr. Pittman, or Dr. Highsmith, operated on my neck for a keloid. I was next treated for it at Johns Hopkins in Baltimore, a year or two later. I was there about a week and they cut the thing out. I have had a scar there since. It did not open and close up until I had X-ray treatments. After my operation the keloid came back. It is a ridge sort of like your finger and is just a hard place. After I was treated in Baltimore I was again treated by Dr. Pittman several times. Dr. Pittman administered X-ray treatment about 20 years ago. It was in 1934 that Miss Sykes administered the treatments. She gave me two treatments. I felt no pain at all when the treatments were administered, and it was about six weeks before I began to feel any pain."

Dr. Nash, a witness for plaintiff, testified: "I have never seen an X-ray burn, as very few folks have them. I have treated Mr. John R. Davis, during the last two years, for an ulcer back of his ear. It was an ulcer mastoid. A keloid is an over-growth of scar tissue, connective tissue, usually it occurs in a scar and the scar just grows, over-grows, usually beyond the surface of the skin. I have had experience with burns. They are generally recognized first, second, and third. First, just a little irritation of the skin; second, where the skin is destroyed; third, where the skin subcutaneous and muscles are destroyed. I first examined Mr. Davis about 18 or 20 months ago, and found an ulcer, very much as it is now. The fact that he has had this ulcer for 18 or 20 months makes it chronic, and it is impossible to tell how long it will remain without healing. I know Dr. W. T. Parker. He has a splendid reputation as a skillful surgeon and physician."

At the close of plaintiff's evidence, the defendants in the court below made a motion for judgment as in case of nonsuit. C. S., 567. The motion was granted, the plaintiff excepted, assigned error, and appealed to the Supreme Court.

H. H. Clark for plaintiff.
Rose & Lyon for defendants.

PER CURIAM. The plaintiff does not contend that there is liability on the part of the defendant Dr. R. L. Pittman, but the plaintiff contends that the court was in error in sustaining defendant's motion to nonsuit as to Dr. W. T. Parker at the close of the plaintiff's evidence. We see no error in the ruling of the court below.

In *Pendergraft v. Royster,* 203 N. C., 384 (393), it is written: "The general rule is to the effect that there is in malpractice actions no presumption of negligence from error of judgment in the diagnosis by a doctor of the patient's illness, or in the treatment prescribed in the failure to successfully effect a remedy or to accomplish as good results as someone else might have done. A doctor is neither a warrantor of cures nor an insurer." *Connor v. Hayworth,* 206 N. C., 721.

We see no sufficient evidence to be submitted to the jury. Taking the history of plaintiff's trouble, as given by himself on cross-examination and the testimony of Dr. Nash, his physician, we see no substantial injury, if injury at all, caused by the X-ray operator (if she was an agent of defendant Parker). Dr. Nash, 18 or 20 months before the trial, found an ulcer very much as it was at the time of the trial—it was chronic. It was ulcer mastoid. The allegations of plaintiff are not supported by proof. There is no sufficient probative evidence that plaintiff's condition was caused from the X-ray treatment complained of.

The evidence to be submitted to the jury must be more than conjectural or speculative. There must be evidence from which a jury might reasonably and properly conclude that there was negligence.

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

Affirmed.

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

ROBERT LEROY DUKE v. THE GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LTD.

(Filed 15 December, 1937.)

Insurance §§ 38, 41—Evidence held to warrant recovery for confining illness.

Judgment for recovery of benefits for confining illness rather than non-confining illness upon evidence tending to show insured was totally incapacitated for the period covered by the policy and was confined to his

home except for visits to his physician for treatment, which he made by automobile or trolley car, upheld on authority of *Thompson v. Accident Assn.*, 209 N. C., 678.

APPEAL by defendant from *Harding, J.*, at August Term, 1937, of GUILFORD. Affirmed.

This was an action to recover benefits under a health insurance policy which contained provisions for the payment of a certain amount on account of illness necessitating that insured be continuously confined within the house, and a lesser amount for nonconfining illness. The plaintiff alleged he was entitled to the benefits for confining illness, and the defendant contended he was restricted to those payable for nonconfining illness.

The case was heard upon an agreed statement of the facts. In the statement it was admitted that plaintiff became ill with ptomaine poisoning and was incapacitated and rendered unfit for every duty during the period covered by the provisions of the policy. The plaintiff was confined to his home and visited by physicians there, except on occasions when he was told by the doctors to come to their offices for treatment and examinations by certain laboratory equipment. On each such occasion plaintiff rode in an automobile, or, when unable to obtain an automobile, in a trolley car, walking three blocks to the car.

Judgment was rendered for plaintiff for the amount payable for confining illness, and defendant appealed.

Charles T. Hagan, Jr., for plaintiff, appellee.
Smith, Wharton & Hudgins for defendant, appellant.

PER CURIAM. The facts agreed bring this case within the decision of this Court in *Thompson v. Accident Association,* 209 N. C., 678, 184 S. E., 695, and *Hines v. Casualty Co.*, 172 N. C., 225, 90 S. E., 131. In the *Thompson case, supra,* it was said, *Schenck, J.,* speaking for the Court: "The purpose of the provision relative to the insured's being continuously confined within doors was to describe the character and extent of his illness, rather than to prescribe a limitation upon his conduct."

Upon the authority of these cases the judgment is

Affirmed.

TOWN OF WEAVERVILLE v. GRAHAM K. HOBBS, COMMISSIONER OF THE WORLD WAR VETERANS LOAN FUND OF NORTH CAROLINA.

(Filed 5 January, 1938.)

Taxation § 19—Property acquired by State and held for benefit of Veterans Loan Fund is exempt from taxation.

A loan from the North Carolina Veterans Loan Fund was secured by a deed of trust, and upon default, the deed of trust was foreclosed and the property transferred to the State by trustee's deed, and the property was thereafter held by the State for the benefit of the fund, and rented, and the income therefrom used and applied exclusively for this purpose. Ch. 155, Public Laws of 1925, as amended. *Held:* The property is exempt from taxation by the municipality in which the land lies, by operation of Art. V, sec. 5, of the Constitution of the State, since the property is owned by the State and used by it for the governmental purpose of assisting World War Veterans in the acquisition of homes, and it being immaterial whether the property is directly used for this purpose or rented and the income therefrom used and applied exclusively for this purpose. *Andrews v. Clay County*, 200 N. C., 280, cited and approved. *Board of Financial Control v. Henderson County*, 208 N. C., 569; *Benson v. Johnston County*, 209 N. C., 751; and *R. R. v. Comrs. of Carteret*, 75 N. C., 474, cited and distinguished. Ch. 445, sec. 2, Public Laws of 1933, and ch. 371, sec. 2, Public Laws of 1935, *held* inapplicable as referring to inheritance and estate taxes.

CONNOR, J., concurring.

STACY, C. J., dissenting.

SCHENCK, J., concurs in this dissent.

CLARKSON, J., dissenting.

APPEAL by plaintiff from *Johnston, J.*, at September Term, 1937, of BUNCOMBE. Affirmed.

This was a controversy without action, submitted upon the following agreed statement of facts:

"1. That the town of Weaverville is a municipal corporation, created and existing under and by virtue of the laws of North Carolina, and is located within Buncombe County in said State.

"2. That Graham K. Hobbs is Commissioner of the North Carolina World War Veterans Loan Fund.

"3. That prior to and on 20 August, 1928, C. E. Hornaday and wife, Louise M. Hornaday, were owners in fee simple of the following described piece, parcel, or lot of real estate, located within the limits of the town of Weaverville: (Description omitted.)

"4. That on said date C. E. Hornaday and wife, Louise M. Hornaday, procured a loan of $3,000 from the North Carolina World War Veterans Loan Fund, and on said date, for the purpose of securing said loan of

money, executed and delivered to the Citizens National Bank of Raleigh, trustee, a deed of trust, conveying the above described piece, parcel, or lot of land, which deed of trust is recorded in the office of the register of deeds for Buncombe County, North Carolina, in Deed of Trust Book 300, on page 101.

"5. That on 30 December, 1932, after default by the said C. E. Hornaday and wife, Louise M. Hornaday, in the terms, conditions, and stipulations contained in said deed of trust, the property was foreclosed by the North Carolina Bank & Trust Company, successor trustee, and was conveyed by the said successor trustee to the State of North Carolina by a trustee's deed, which is duly recorded in the office of the register of deeds for Buncombe County, North Carolina, in Deed Book 456, on page 5. That the State of North Carolina is now the owner of said property, the same being held by the said State for the use and benefit of the World War Veterans Loan Fund, created under chapter 155, Public Laws of 1925, as amended by chapter 97, Public Laws of 1927, chapter 298, Public Laws of 1929, chapter 55, Public Laws of 1933, chapter 438, Public Laws of 1935.

"6. That immediately after the foreclosure of the herein described real estate, the defendant paid all taxes due to the town of Weaverville which had been assessed and which had accrued against C. E. Hornaday and wife, the former owners of said property, for the year 1932, and prior years. That for the year 1933, and subsequent years, the State of North Carolina and the defendant, and his predecessors in office, have not listed the said real property for taxation in Buncombe County, contending that said property, while owned by the State of North Carolina, for the purposes aforesaid, was totally exempt from all *ad valorem* taxation by the said county and the town of Weaverville. That said property has not been listed or assessed for taxation by Buncombe County or by the town of Weaverville for the years 1933, 1934, 1935, and 1936, the said property should have been listed and assessed for taxation by Buncombe County at a valuation of $2,000, and the town of Weaverville was entitled to list and assess the property for taxation for each of said years at a valuation of $2,000, and subjected to tax at rates levied by said town of Weaverville for each of said years as follows: 1933—$1.00; 1934—$1.00; 1935—$1.18; 1936—$1.20; for each $100.00 value of said property, and in the event it is determined herein that said property was subject to taxation for the said years, the defendant is indebted to the plaintiff town of Weaverville, for taxes for all of said years, the total sum of $87.50, which said amount is the net sum of said taxes, without addition thereto of penalties and interest. .

"7. That located on said lot of land is a five-room dwelling that is, and has been from time to time since said property was acquired by the State

of North Carolina, for the use and benefit of the World War Veterans Loan Fund, rented to private parties, and that the defendant has from time to time collected rents on said property since the same was conveyed to the State of North Carolina on 30 December, 1932, all of which rent so collected has been held and applied by the State of North Carolina for the exclusive use and benefit of the World War Veterans Loan Fund hereinbefore mentioned."

CONTENTIONS OF THE PARTIES.

"1. The plaintiff contends that under the facts herein stipulated and agreed upon, the property of the defendant herein described is not exempt from taxation.

"2. The defendant contends that the property herein described is exempted from taxation.

"That if from the foregoing statement of facts and contentions of the parties, the court is of the opinion that the said property is exempt from taxation by the plaintiff town of Weaverville for the years 1933, 1934, 1935, and 1936, the court shall so adjudge and declare; but if the court is of the opinion that said property is subject to taxation by the town of Weaverville for the years 1933, 1934, 1935, and 1936, the court shall adjudge and declare that the said property shall be listed for taxation by the board of commissioners of Buncombe County, North Carolina, for said years at the valuation hereinbefore recited, and that the tax shall be assessed on said property amounting to the total sum hereinbefore recited, without addition of penalties or costs, to be divided among said years in accordance with the amounts determined from the rates of tax levied in each of said years by the plaintiff, the town of Weaverville."

Upon these facts, the court below adjudged that the described property was exempt from taxation by the plaintiff. The plaintiff appealed.

Edward L. Loftin for plaintiff, appellant.

Attorney-General Seawell and Assistant Attorneys-General McMullan and Bruton for defendant.

DEVIN, J. This appeal presents for review the ruling of the court below that, upon the facts stipulated and agreed by the parties, the property described is exempt from taxation by the town of Weaverville.

The statement of agreed facts contains this admission: "That the State of North Carolina is now the owner of said property, the same being held by the said State for the use and benefit of the World War Veterans Loan Fund." The title to the property was conveyed by deed to the State of North Carolina, and is now so held. The act of the General Assembly of North Carolina which created this fund and made

provision for its administration (ch. 155, Public Laws of 1925) was considered by this Court in *Hinton v. State Treasurer,* 193 N. C., 496, 137 S. E., 669, and it was there held, *Clarkson, J.,* speaking for the Court, that the act was for a public purpose of the State, and that the issue of the bonds of the State and the pledge of its taxing power therefor were constitutional and valid.

The Constitution of North Carolina contains this mandatory provision, Art. V, sec. 5: "Property belonging to the State, or to municipal corporations, shall be exempt from taxation."

The fund created and set apart by the State, under the Act of 1925, for the worthy purpose of assisting World War veterans in the acquisition of homes, belongs to the State. The mortgages and deeds of trust, representing loans made pursuant to the statute, belong to the State, and equally real property acquired by the State by reason of the foreclosure of one of its deeds of trust, and conveyed by deed to the State, belongs to the State, and therefore comes directly within the letter and the purpose of the constitutional prohibition against taxation of "property belonging to the State." Whether the real property, the subject of this controversy, is used directly by the State, or the rents derived therefrom are held and applied by the State as additions to the State's Veteran Loan Fund, is immaterial since its use is exclusively for governmental purposes. The rents from such property, while owned by the State, would be in the same category with interest collected on outstanding loans.

In *Andrews v. Clay County,* 200 N. C., 280, 156 S. E., 855, *Connor, J.,* writing the opinion of the Court, uses this language: "The provision in the first clause of section 5 of Article V of the Constitution of North Carolina, by which property belonging to or owned by a municipal corporation, is exempt from taxation, is self-executing, and by its own force, without the aid of legislation, exempts such property from taxation by the State or by the political subdivision of the State in which it is located, because of its ownership, and without regard to the purpose for which such property was acquired and held by the corporation. With respect to such property, when lawfully acquired and held by statutory authority, new or additional conditions cannot be imposed by the General Assembly as prerequisites for its exemption from taxation. 37 Cyc., p. 886. The language of the constitutional provision is so clear and unambiguous that there is no room for judicial construction. The fact that social, economic, and political conditions in this State have undergone great changes since the adoption of our present Constitution, resulting in an enlargement of the functions of municipal corporations to meet the requirements of changed conditions, would not justify a construction of this provision which would in effect result in its amendment by the courts and not by the people.

"If required to adopt the construction of the sections of the machinery acts relied on by the defendants in the instant case, in support of their contention that by virtue of said sections property belonging to or owned by a municipal corporation is not exempt from taxation by the State or by the political subdivision of the State in which such property is located, unless such property is held wholly and exclusively for a public purpose, we should hold that said sections of the machinery acts, in so far as they have that effect, are unconstitutional and void."

The facts upon which the decision of this Court in *Board of Financial Control v. Henderson County,* 208 N. C., 569, 181 S. E., 636, and *Benson v. Johnston County,* 209 N. C., 751, 185 S. E., 6, were based, are distinguishable from those in the case at bar. Chapter 445, Acts of 1933, sec. 2, and chapter 371, Acts of 1935, sec. 2 (codified in Michie's North Carolina Code as section 7880 [2]), refer to inheritance and estate taxes imposed by the State.

In *R. R. v. Comrs. of Carteret,* 75 N. C., 474, cited by plaintiff, it was held that Art. V, sec. 5, of the Constitution did not exempt the physical property of the Atlantic and North Carolina Railroad Company from taxation, although the State of North Carolina owned a majority of the capital stock of the corporation. The decision in that case was addressed to a question materially different from the one presented here.

In 101 A. L. R., 783, where the case of *Board of Financial Control v. Henderson County, supra,* is reported, will be found annotations collecting authorities from other jurisdictions on this subject.

We conclude that the learned judge who heard this case below has correctly decided the question presented, and that the judgment must be Affirmed.

CONNOR, J., concurring: Is property owned by or belonging to the State of North Carolina subject to taxation by the county, city, or town in which such property is located?

This is the question presented by this appeal. The answer is found in section 5 of Article V of the Constitution of North Carolina, which is as follows:

"Property belonging to the State or to municipal corporations shall be exempt from taxation."

There is no ambiguity in this language. Its meaning is plain. The language is clear and is not subject to judicial construction in order that a policy with respect to taxation in conflict with its provisions may be sustained. Property belonging to the State is exempt from taxation, because of its ownership, without regard to the purpose for which it was acquired or for which it is owned by the State.

I do not think that the suggestion that the interpretation of section 5 of Article V of the Constitution in the opinion of this Court in *Andrews v. Clay County,* 200 N. C., 280, is *obiter dicta,* can be successfully maintained. The decision in that case was not overruled in *Board of Financial Control v. Henderson County,* 208 N. C., 569, or in *Benson v. Johnston County,* 209 N. C., 751, nor was the interpretation of section 5 of Article V of the Constitution in the opinion in that case disapproved by this Court. The cases were distinguished, whether rightly so or not, need not now be discussed.

I concur in the opinion of the Court in the instant case that the judgment of the Superior Court should be affirmed.

STACY, C. J., dissenting: It was held in the *Carteret County case,* 75 N. C., 474, decided in 1876, that when "the State steps down from her sovereignty and embarks with individuals in business enterprises," its property so employed is not exempt from taxation under Art. V, section 5, of the Constitution. The present decision runs counter to this interpretation and abandons the doctrine there announced. Note, 3 A. L. R., 1439.

The statutory exemption, it seems to me, affords no encouragement or support for this reversal of interpretation and abandonment of the State's long-established policy. By correct interpretation, the legislative intent fully accords with the rule and practice heretofore adopted and declared by the Court.

Nor is the *dictum* in the *Clay County case,* 200 N. C., 280, 156 S. E., 855, in any way controlling. The property there considered was clearly held and used for a public purpose. Moreover, this *dictum* was not followed in the *Henderson County case,* 208 N. C., 569, 181 S. E., 636, or the *Johnston County case,* 209 N. C., 751, 185 S. E., 6.

My vote is for a reversal.

SCHENCK, J., concurs in this dissent.

CLARKSON, J., dissenting: I cannot agree with the majority opinion. Art. V, sec. 5, of the Constitution of North Carolina, is as follows: "Property belonging to the State, or to municipal corporations, shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable, or religious purposes; also, wearing apparel, arms for muster, household and kitchen furniture, the mechanical and agricultural implements of mechanics and farmers; libraries and scientific instruments, or any other personal property, to a value not exceeding three hundred dollars." N. C. Code 1935 (Michie), section 7880 (2), reads as follows: "The

following property shall be exempt from taxation under this article: (a) 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. To be sure, this section applies to inheritance tax, but it indicates the construction the General Assembly put on it as to the meaning of Art. V, sec. 5, of the Constitution.

Section 7880 (177) is as follows: "Whenever in any law or act of incorporation, granted either under the general law or by special act, there is any limitation or exemption of taxation, the same is hereby repealed, and all the property and effects of all such corporations, *other than the bonds of this State, and of the United States Government,* shall be liable to taxation, *except property belonging to the United States and to the municipal corporations,* and property held for the benefit of churches, religious societies, charitable, educational, literary, or benevolent institutions or orders, and also cemeteries: Provided, *that no property whatever,* held or used for investment, speculation, *or rent shall be exempt, other than bonds of this State and of the United States Government,* unless said rent or the interest on or income from such investment shall be used exclusively for religious, charitable, educational, or benevolent purposes, or the interest upon the bonded indebtedness of said religious, charitable, or benevolent institutions." (Italics mine.)

Under subchapter (2), "Assessment and Listing for Taxes," is section 7871 (17), which is as follows: "The following real property, and no other, shall be exempted from taxation: (1) Real property, if directly or indirectly owned by the United States or this State, however held, and real property lawfully owned and held by counties, cities, townships, or school districts, *used wholly and exclusively for public or school purposes,"* etc. (Italics mine.)

The exemption of Federal and State property is stated in the same sentence with that of local governments without even a period or a semicolon separating the provision as to Federal and State government property from that dealing with the property of local units. Apparently, the phrase "used wholly and exclusively for public or school purposes" was intended to apply equally to the property of the Federal, State, and local governments. Certainly there is no clear indication that the General Assembly intended to create two distinct classes of exemptions. The phrase "however held" does not affect this interpretation; at most, it is merely a clarifying phrase to insure the exemption of State and Federal property which comes within the exempted class, but is held by some agency or instrumentality in trust for the benefit of one of the governments. Under the rules of construction, exemption provisions are to be construed strictly against the exemption and all doubts are to be

resolved against the exemption. However, it does not appear necessary to rely on this rule here, as it is not to be supposed that the General Assembly intended to lay down two rules with respect to the exemption of governmental property. The contrary view would result in a holding to the effect that the General Assembly laid down a more liberal rule for the Federal and State governments than for the local governments, and to this extent discriminated against the latter. The reasoning of such a view is not convincing.

These acts of the General Assembly clearly indicate that the constitutional exemption applies to property "used wholly and exclusively for public or school purposes." When Art. V, sec. 5, of the Constitution was adopted in 1868, the State and municipalities owned property solely for public or school purposes. We must construe the Constitution with the setting which existed when it was adopted and in the light of that day. In the Constitution of the State of North Carolina annotated by Connor & Cheshire, it was so construed (p. 277): "II. Property of the State. The provision of this section, exempting from taxation property belonging to the State, does not embrace the interest of the State in business enterprises, such as railroads and the like, but applies to the property of the State held for State purposes. *R. R. v. Comrs.*, 75 N. C., 474."

The majority opinion relies largely on the *obiter dicta* in *Andrews v. Clay County*, 200 N. C., 280. This *dicta* was disapproved in *Board of Financial Control v. Henderson County*, 208 N. C., 569 (571-2).

In *Benson v. Johnston County*, 209 N. C., 751 (755), speaking of the *Henderson County case, supra*, it is said: "We distinguished the case of *Andrews v. Clay County*, 200 N. C., 280, and said at p. 574: 'The town of Andrews was operating a municipal electric plant—a public use or purpose. *Fawcett v. Mount Airy*, 134 N. C., 125. A necessary expense—Const. of N. C., Art. VII, sec. 7; *Webb v. Port Commission*, 205 N. C., 663 (673); *Mfg. Co. v. Aluminum Co.*, 207 N. C., 52 (59). The purpose for which the land was used in the *Andrews case, supra*, being for a public purpose or use, is distinguishable from the present case, where the use was private, for business purposes.'" The interpretation of the Constitution was first considered in *R. R. v. Comrs. of Carteret*, 75 N. C., 474 (476). It is there said: "But where the State steps down from her sovereignty and embarks with individuals in business enterprises, the same considerations do not prevail. . . . At any rate, we do not think the exemption in the Constitution embraces the interest of the State in business enterprises, but applies to the property of the State held for State purposes."

In interpreting the Constitution there are several factors to be kept constantly in mind: (1) *Only one class of property is exempted from*

taxation by the Constitution. It is "property belonging to the State or to a municipal corporation," and the General Assembly has said "used wholly and exclusively for public or school purposes." Beyond this class *mandatorily* exempted, there is a second class which the General Assembly is *permitted* to exempt. There can be no other exemptions. The General Assembly "has no power to make other exemptions. It is impliedly forbidden to do so." *Loan Association v. Commissioners,* 115 N. C., 410 (413). (2) *The general rule is that all property in the State is liable to taxation.* "The general rule established by the Constitution is that all property in this State is liable to taxation, and shall be taxed in accordance with a uniform rule. Exemption of specific property, because of its ownership by the State or by municipal corporations, or because of the purposes for which it is held and used, is exceptional." *Hospital v. Rowan County,* 205 N. C., 8 (10). (3) *Provisions exempting property from taxation are to be strictly construed against the exemption.* The accepted rule of construction applicable to exemptions in that they "should be construed strictly, when there is room for construction, against exemption and in favor of taxation." *Hospital v. Rowan County, supra,* citing *Trustees v. Avery County,* 184 N. C., 469; *United Brethren v. Comrs.,* 115 N. C., 489. Because of this rule of strict construction, if the Court has any doubts as to the applicability of an exemption, "they should be resolved in favor of liability to taxation." *United Brethren v. Comrs., supra,* (497). "No exemptions should be made or upheld unless clearly coming within the constitutional provision, . . ." *Southern Assembly v. Palmer,* 166 N. C., 75 (82). The United States Supreme Court has laid down an even stronger rule, as follows: No claim of exemption from taxation can be sustained *unless established beyond all doubt.* (Italics mine.) *Railroad v. Supervisors,* 93 U. S., 595; *Railroad v. Guffey,* 120 U. S., 569.

In *Village of Watkins Glen v. Hager, County Treasurer,* 252 N. Y. S., 146, 140 Misc., 816, which cited the *Carteret County case, supra,* as one of many cases to the effect that the exemption of property from taxation applies only when the property is "actually devoted to a public use, or to some purpose or function of government." The note in 3 A. L. R., 1439, at pp. 1441, 1442, cites the *Carteret County case, supra,* in support of the same principle; and the United States Supreme Court, in *Power & Light Co. v. Seattle,* 291 U. S., 619 (636), 34 S. C. Rep., 542 (550), 78 L. Ed., 1025 (1036), likewise cited the *Carteret County case, supra,* as authority for this position. It seems clear that not only this Court but other courts and text-writers generally regarded the principle of the *Carteret County case, supra,* as controlling in this State until the *dicta* (already referred to above) in *Andrews v. Clay County, supra.* My view here is that this Court should be bound by the principle of the

earlier case rather than follow the *dicta* in the *Clay County case, supra,* which has been disapproved and will result in confusion when there are two opposing lines of decisions on the same proposition in the same jurisdiction.

As between State and local governments the problem is much the same as between the Federal and state governments; concerning the latter, *Justice Stone,* in *Metcalf & Eddy v. Mitchell,* 269 U. S., 514, 523-24, wrote that the limitation upon the taxing power of each, so far as it affects the other, "must receive a practical construction which permits both to function with the minimum interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it." This statement is quoted with approval by *Chief Justice Hughes* in the recent case of *James v. Dravo Contracting Co.,* Supreme Court Law Ed. Advance Opinions, Vol. 82, No. 5, p. 125.

Since *Chief Justice Marshall,* in 1819, laid down the fundamental that "the power to tax involves the power to destroy" (*Marbury v. Madison,* 4 Wheaton, 316, 431), we have come to recognize another truth—the power to exempt from taxation also involves the power to destroy. Used by governments as a shield, it operates as a subsidy of governmental excursions into the field of private enterprise thus placing the private competitor, who bears his share of taxes, at such a disadvantage that he is fortunate if he is able to survive.

That only the property of the State, or a municipality, devoted to a public purpose and use, should be tax-exempt is supported by the strongest reasons. The Supreme Court of the United States has noted "A very large proportion of the property within the states is employed in the execution of the powers of the government," and if we too liberally "exempt from the liability to contribute to the revenue of the states it is manifest the state governments would be paralyzed." *Railroad Co. v. Penniston,* 18 Wall., 5 (33). Again, in *Willcuts v. Bunn,* 282 U. S., 216, at p. 225, *Chief Justice Hughes* observed, "The power to tax is no less essential than the power to borrow money, . . . it is not necessary to cripple the former by extending the constitutional exemption to those subjects which fall within the general application of nondiscriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government."

A judicial policy of strictly delimiting governmental exemptions appeals to every sense of fairness and justice. It is settled that property of governments used in the discharge of necessary governmental functions are exempted from taxation; even if it were considered wise to alter this policy (and such is not suggested), this Court could not do so.

However, there is abundant authority, recent as well as early, to the effect that property of state and municipal governments not dedicated to public uses and purposes should bear its proportionate share of the tax burden.

As to property which the General Assembly is permitted to exempt from taxation it has long been settled that the exemption is not controlled by the mere determination of ownership, but turns upon the use to which the property itself is put. *Loan Association v. Commissioners,* 115 N. C., 410; *United Brethren v. Comrs.,* 115 N. C., 489; *Davis v. Salisbury,* 161 N. C., 56; *Corporation Commission v. Construction Co.,* 160 N. C., 582 (588).

To assume that past leaders foresaw, and provided in detail for the solution of, our every problem is to credit them with a clairvoyance for which the most inspired leadership does not contend; to assume that we can foretell, and provide rigid rules for all the difficulties of posterity would assume a position of which no learned judge today would be guilty. Our primary duty is to face the compelling demands of today and in the light of those demands to achieve, as far as may be, what *Justice Cordozo* has poetically called "that symmetry that men call Justice, the adaption of the rule of life to the symmetry they call Divine."

"A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used," says *Mr. Justice Holmes* in *Towne v. Eisner,* 245 U. S., 418. *Cole v. Fibre Co.,* 200 N. C., 484 (489).

The Constitution, Art. V, sec. 5, should be construed in the present day situation. We have millions of acres of land in North Carolina taken off the tax books for governmental purposes, public highways, schools, parks, etc. We have millions of dollars loaned in this State by the H. O. L. C. on land and millions of dollars loaned in this State by the building and loan associations, corporations, and individuals that lend on land. This decision would mean that the H. O. L. C. would have rental property that it purchased at foreclosure sales, the land free of tax, and the building and loan and others would have to pay taxes. This is not justice. It creates favoritism and special privileges, which the law abhors. The property in the present case was purchased by the Commissioner of the World War Veterans Loan Fund of North Carolina, it is being rented, and there is no good reason under the Constitution and statutes of the State, in law or in equity, why it should be exempt from taxes. Our government is founded on equal rights to all and special privileges to none.

It may be that land purchased by the HOLC can be taxed, U. S. C. A., Vol. 13, sec. 1433.

MRS. MABEL A. YORK v. C. V. YORK.

(Filed 5 January, 1938.)

1. Husband and Wife § 6—

In this State a wife has the right to bring an action for actionable negligence against her husband.

2. Automobiles § 20b—

The negligence of the driver will not be imputed to a guest in the car unless the guest is the owner of the car and has some kind of control over the driver, or unless they are engaged in a joint enterprise or joint adventure.

3. Trial § 22b—

On a motion to nonsuit, the evidence which makes for plaintiff's claim 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. C. S., 567.

4. Automobiles §§ 17, 18g—Evidence that skidding was the result of negligence held sufficient to be submitted to the jury.

Evidence that defendant drove his car 55 to 60 miles per hour on a wet highway into a sharp curve, that the tires of the car were worn smooth, and that the car skidded, resulting in the injury in suit, *is held* sufficient to be submitted to the jury, it being for the jury to determine whether the skidding was the result of defendant's alleged negligence in operating the car and negligence in failing to equip his car with safe tires.

5. Automobiles § 22—Evidence held not sufficient to require submission of issue of contributory negligence of guest in car.

In this action by a wife against her husband to recover for injuries sustained when the car driven by her husband skidded on a curve, there was no evidence that the wife knew or had reasonable ground to believe that the tires on the car were worn smooth, and no evidence that the parties were engaged in a joint enterprise, or that the wife had any control over the operation of the car. There was some evidence that the wife remonstrated and asked her husband to slow down the speed of the car. *Held:* There was no sufficient evidence of contributory negligence on the part of the wife requiring the submission of the issue to the jury.

6. Appeal and Error § 39d—Exclusion of impeaching evidence held not prejudicial where effect thereof was obtained by cross-examination.

The witness made a written statement shortly after the accident in suit. On cross-examination she testified that she did not remember a statement therein contradictory to her examination in chief, but stated she did not deny having made such statement in the writing. *Held:* The refusal of the trial court to permit defendant's counsel to have the witness read the statement for the purpose of impeaching the witness is not prejudicial error, since the identical impeaching evidence was obtained on the cross-examination.

7. Appeal and Error § 6a—

An exception to remarks of counsel on the argument must be taken at the time in order for an assignment of error based thereon to be considered on appeal.

8. Trial § 7—Whether counsel should be permitted to comment on failure of party to take stand to refute personal charges held for court.

In this action the method by which an insurance adjuster obtained written statements offered in evidence was attacked, and the trial court permitted plaintiff's counsel, over defendant's objection, to comment on the failure of the adjuster to take the stand. *Held:* The failure of the adjuster to take the stand and rebut the charges as to his methods was a circumstance to be considered by the jury, even though he was not a party, and whether the comment should be permitted was within the sound discretion of the trial court.

9. Automobiles § 18h—Instruction in regard to legal effect of speed in excess of 45 miles per hour held not prejudicial in this case.

An instruction that the jury might find, but were not required to find, that a speed in excess of forty-five miles an hour was unlawful, but that if they should find such speed was unlawful it would constitute negligence *per se*, N. C. Code, 2621 (46), *is held* not prejudicial under the evidence in this case tending to show special hazards in that defendant was driving into a curve on wet pavement with worn, slick tires, at a speed in excess of forty-five miles per hour.

10. Evidence § 47—

The admission of testimony of certain physicians as to plaintiff's injuries *held* not error under authority of *Keith v. Gregg*, 210 N. C., 802.

BARNHILL, J., dissenting.

STACY, C. J., and WINBORNE, J., concur in dissent.

APPEAL by defendant from *Pless, J.*, and a jury, at March Civil Term, 1937, of WAKE. No error.

This is an action for actionable negligence brought by plaintiff against defendant to recover damages. The defendant denied negligence and set up the plea of contributory negligence. The plaintiff and defendant are husband and wife, have been married to each other for 34 years and have five children.

The defendant had an engagement in Charlotte, N. C., on 3 June, 1935, about 12:30 p. m., to have a contract signed, and left Raleigh about 9 o'clock—about a half hour late—in his car taking the plaintiff, his wife, who was riding with him on the front seat, and their daughter Mabel, who was riding on the rear seat. The plaintiff testified, in part: "It was cloudy later on and it was cloudy when we left Albemarle. It was not raining when we left Albemarle. I can't recall exactly at what place we first saw signs of rain after we left Albemarle. We saw the rain coming in front of us. I was able to tell that the rain was approaching us. Q. At what speed was your husband driving his auto-

mobile at the time you were traveling from Albemarle and saw the rain approaching? Ans.: I would say 55 or 60 miles an hour. The road curved a little to the left and then to the right and straightened out. . . . Q. Have you got any estimate in your mind? Ans.: The rain was only for such a minute, a shower, we must have been right near the curve or right at it when the rain struck us. Q. Did your husband, when the rain struck you, slow up at any degree at all? Ans.: No. Q. I believe you say it was 55 or 60 miles an hour? Ans.: Yes. Q. And he did not slow up? Ans.: No. Q. Did the car go around the first curve to the left? Ans.: It went partly around and then he tried to straighten—I thought we were going over that embankment—and he got it straightened and went over the embankment on the other side. Q. You were in the midst of the first curve when what happened to the car? Ans.: When it went to straighten out. Q. After passing the first curve? Ans.: Yes. I don't recall his slowing his car at all while we went around the first curve. The car skidded when we were going around the first curve. When we got to the second curve the car went over the embankment on the right. It first went to the left and then to the right. I would not know how close the car was to the curve when the rain struck. Mabel called attention to the rain coming. My husband could hear her. I couldn't say how long that was before reaching the curve. I don't recall my husband's making any comment at that time. When the car went off the road the last thing I remember was hearing that horrible sound of the motor and the next thing was I was being pulled out of the car." The plaintiff was permanently injured. Several physicians testified to this effect. The plaintiff's testimony, in substance, was corroborated by her daughter, Mabel York.

Mabel York testified, in part: "Q. State whether or not after you left Albemarle and before the injury there was any conversation between your mother and yourself on the one hand and your father on the other? Q. Was there a conversation? Ans.: Yes. Q. What was said? Ans.: Mother told daddy to slow down and he didn't."

P. A. Kelly testified, in part: "Yes, I recall an occasion in that year, in December, 1933, when Mr. York purchased some tires for his Terraplane automobile. They were Kelly-Register tires, 6600 610. Yes, they were all four tires. The approximate mileage of the Terraplane automobile was 8,000 miles at the time that I put these tires on. I saw the car in October, 1934, ten months after I sold them. We sold the tires in December, 1933, and he had 13,000 miles on the Register tires then. He was driving on them at that time. At that time I was working at Rogers Tire Company. Q. Did you have any conversation with Mr. York at that time about the tires? Ans.: Well, this particular time Mr. York came in and filled up with gas and oil and also checked his

tires and battery. In other words, checked the car, and I called Mr. York's attention that his tires were getting slick—told him they were getting slick and I would like to sell him U. S. Royals. Q. What was the condition of the tires? Ans.: The fabric wasn't showing, but—That was in October, 1934. He had those tires in March, 1935. About every week Mr. York would come and have something done. He would leave the car and get it later, or his son would. Q. Did you have any further conversation with him during that period about the condition of the tires? Ans.: Yes, sir. He bought a battery from me in March, 1935, and I said, 'You still got those tires, but you are almost to the fabric and I don't believe I would take any more chances.' He said, 'I don't know whether I like your tires, I will probably see you, but I can't buy the tires now.' Q. You told Mr. York that you didn't believe you would take any more chances with the tires? What did he say? Ans.: Well, he said, 'I know you are right, but I am not in a position to buy the tires now.' (Cross-examination.) Yes, I made an examination of these tires. I checked them to see if the fabric was showing. The fabric wasn't showing but the tires were slick. I could stand and look at that tread and tell there was no nonskid on it. I can look at a tire and tell if it is slick, but I cannot tell if it is just down to the strip. Now if it was gone through the fabric I can see it from standing on the side. I could tell they were slick and the nonskid was gone."

C. V. York, Jr., testified, in part: "I was familiar with this automobile which was in this wreck, was turned over on 3 June, 1935. Kelly-Springfield tires were on the car at the time it was brought back from the wreck. They were put on the car in January, 1934. They were purchased from the Carolina Service Corporation. Mr. Kelly sold them. They were the same tires on it at the time of the wreck. . . . Q. Do you know how many miles those tires had been from the time they were purchased until the time of the wreck? Ans.: 24,000 miles."

C. K. Wishon testified, in part: "I recall that some time in the month of June, 1935, Mr. C. V. York, Jr., brought in an automobile of his father's. I examined the automobile. Q. I wish you would state to the court and the jury the condition of the tires? Ans.: The tires were practically worn out. Q. Will you describe their condition as nearly as you can? Ans.: Well, the tires were worn to the breakers in most of them and the tread worn off and part of them worn down to the breaker strippings." The defendant introduced no evidence.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff, Mrs. Mabel A. York, injured by the negligence of the defendant, C. V. York, as alleged in the complaint? Ans.: 'Yes.'

"2. What amount, if any, is the plaintiff entitled to recover of the defendant? Ans.: '$12,000.' "

The court below rendered judgment on the verdict. 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.

Charles U. Harris and Ehringhaus, Royall, Gosney & Smith for plaintiff.

Murray Allen and Smith, Leach & Anderson for defendant.

CLARKSON, J. In this jurisdiction a wife has the right to bring an action for actionable negligence against her husband. *Roberts v. Roberts,* 185 N. C., 566 (567); *Shirley v. Ayers,* 201 N. C., 51 (55); *Jernigan v. Jernigan,* 207 N. C., 831.

In *Harper v. R. R.,* 211 N. C., 398 (402), citing many authorities, it is said: "It is well settled in this jurisdiction that negligence on the part of a driver of a car will not ordinarily be imputed to another occupant unless such other occupant is the owner of the car and has some kind of control over the driver. They must be engaged in a joint enterprise or joint venture. Automobile driver's negligence is not, as a general rule, imputable to a passenger or guest."

The defendant introduced no evidence. At the close of plaintiff's evidence the defendant in the court below made a motion for judgment as in case of nonsuit. C. S., 567. The court below overruled the motion and in this we can see no error. The evidence which makes for plaintiff's claim, or tends to support her cause of action, is to be taken in its most favorable light for the plaintiff, and she is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

It is alleged in the complaint, and we think the evidence sustains the allegations: "That defendant negligently and carelessly drove his automobile at a high and dangerous speed; that he continued to negligently and carelessly drive his automobile at a high and dangerous speed in the face of and into a fast approaching storm and rain and into a sharp curve in the road. That he negligently and carelessly failed to equip his automobile with tires that were safe to drive, and did negligently drive his automobile with tires that were unsafe."

In *Waller v. Hipp,* 208 N. C., 117 (120), it is said: "There was evidence from which the jury could find that the skidding of the automobile was the result of the negligence of the defendant in driving an automobile with tires which he knew were worn out and slick, on a highway which was wet and slippery, at a rate of speed which, although not ordinarily unlawful under all the circumstances shown by the evidence. C. S., 2621 (45)." *Butner v. Whitlow,* 201 N. C., 749; *Norfleet v. Hall,* 204 N. C., 573; *Taylor v. Rierson,* 210 N. C., 185 (188-9).

The defendant in his answer denied negligence and set up the defense: "That the accident referred to was unforeseeable and unavoidable, but that if the defendant was in any manner negligent in the premises, which is again denied, then and in that event the plaintiff was also negligent in that she permitted, allowed, and acquiesced in the operation and driving of the said automobile in the manner in which it was driven at the time of said accident, with full knowledge of and opportunity of knowing the condition of said automobile, and that in making the said trip and in driving said automobile the defendant was acting in the joint interests and for the mutual benefit and pleasure of the plaintiff and the defendant; that if the defendant was negligent in the premises, which is specifically denied, then the said negligence of the plaintiff contributed to and was a proximate cause of said accident, which contributory negligence of the plaintiff is hereby pleaded as an additional defense to and in bar of this action."

There was no sufficient evidence to show that plaintiff knew, or by the exercise of due care had reasonable ground to believe, that the tires were slick and worn out. Plaintiff testified, on cross-examination by defendant, "I don't know anything about the condition the car was in." There was no evidence of a joint enterprise or that plaintiff had any control over the car which defendant was driving. *Charnock v. Refrigerating Co.*, 202 N. C., 105 (106). Plaintiff was a passenger or guest in the car. There was no sufficient evidence to submit an issue of contributory negligence to the jury. Mabel York testified, in part: "Mother told daddy to slow down and he didn't." We do not think any of these defenses can be sustained under the facts and circumstances of this case.

Mabel York was recalled. An "adjuster," a Mr. Greene, on 2 July, 1935, shortly after the accident, had gone to her and gotten a statement from her. On cross-examination she testified, in part: "Q. You don't now recall having said that Mr. York slowed down? Ans.: No, I don't. Q. You don't deny that you said it at that time, do you? Ans.: No. Q. Miss York, I wish you would please read to the jury the statement which you admit you signed and which bears the date of 2 July, 1935, relative to the time, place, and manner in which this accident occurred and the conversation between yourself and your mother at the time? Objection by plaintiff; sustained; exception. If permitted to answer the foregoing question the witness would have answered and read the statement as follows: (Statement set forth.) (By plaintiff's counsel): We repeat that we have no objection to defendant's offering the statement in evidence. (By defendant's counsel): I repeat, plaintiff's counsel says he has no objection to our offering the statement, and I repeat that we have no objection to his offering writing of his witness

signed by her. (By the court): The court rules that either side may introduce the statement, and that it is apparent that neither side is going to. (Redirect examination.) I was at home alone when I signed it." In the statement she says: "It was raining heavily in front of us and that father reduced his speed." The statement would have shown exactly what was elicited on the prior cross-examination that she did not deny about putting in the statement about her father "slowed down." This made the written statement immaterial.

In Lockhart's N. C. Handbook of Evidence (2nd Ed.), part of sec. 276, citing authorities, is the following: "That documents containing substantive evidence could not be introduced while cross-examining a witness when an opportunity was given to introduce the document at the proper time, that new substantive evidence could not thus be brought out if opportunity was given to introduce it at another time, and that impeaching evidence brought out on cross-examination must be confined to its impeaching effect and not be used as substantive evidence."

The defendant contends that certain remarks on the argument by plaintiff's attorney to the jury were improper and prejudicial. The record discloses: "No exception was taken at the trial by defendant, but in its case on appeal defendant excepts." It is well settled that the exception must be entered at the time. C. S., 643; *Borden v. Power Co.,* 174 N. C., 72 (73); *Rawls v. Lupton,* 193 N. C., 428 (431). "(By Mr. Royall): I was just referring to Mr. Greene. I think it is perfectly proper—'Gentlemen, they did not put on the man that took the statement. Didn't put him on the stand.' Defendant objects; objection overruled; defendant excepts." The argument was perfectly legitimate, at least in the sound discretion of the court below. The "adjuster," although not a party to the action in obtaining the statements and what it contained, was inquired into by defendant. The charge made as to the method of obtaining the statements and not refuted by him was a "pregnant circumstance."

In criminal cases the defendant is competent, but not compellable to testify. N. C. Code, 1933 (Michie), sec. 1799. In civil cases the failure of the defendant to take the stand to testify as to facts peculiarly within his knowledge and directly affecting him is "a pregnant circumstance" for the jury's consideration. *Hudson v. Jordan,* 108 N. C., 10 (12). As pointed out in *Goodman v. Sapp,* 102 N. C., 477, the earlier cases declared that "the mere fact that a party, plaintiff or defendant, did not testify in his own behalf was not the proper subject of comment," but that case held that this must be left ordinarily to the sound discretion of the trial judge. However since the *Hudson case, supra,* the principle of that case has been frequently approved. In *Powell v. Strickland,* 163 N. C., 394 (402), it is pointed out that the

jury should presume nothing against him from the bare failure of a party in a civil action to testify, but "when he is called upon to explain, the case is different." In *In re Hinton,* 180 N. C., at p. 212, *Walker, J.,* declares: "We are at a loss to conceive why propounders did not take the witness stand and refute the personal charges made against them unless they knew them to be true and unanswerable, or felt that they could not overcome the evidence of their truth offered by the caveators, or did not wish to undergo the ordeal of a severe cross-examination, which might disclose to the jury how unfeelingly they had treated the caveators who, because of their helpless and hopeless condition, were entitled to their care and protection instead of being the victim of their cupidity. There can be no wonder that the verdict was against them. Evidence of this kind was competent for the jury to consider, for when one can easily disprove a charge by testimony within his control, and which he can then produce, and fails to do it, it is some proof that he cannot refute the charge." The rule of the *Hudson case, supra,* has been repeatedly approved and followed in recent cases decided by this Court. See *Walker v. Walker,* 201 N. C., 183 (184); *Puckett v. Dyer,* 203 N. C., 684 (690); *Maxwell v. Distributing Co.,* 204 N. C., 309 (316).

N. C. Code, *supra,* sec. 2621 (46), in part is as follows: "(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: . . . (4) Forty-five miles per hour under other conditions."

The court below charged: "Now, gentlemen of the jury, if the plaintiff shall have satisfied you by the greater weight of the evidence that the defendant was operating his car at a speed in excess of 45 miles an hour upon the occasion in question, the court instructs you that that is evidence from which you may, but are not required to, find that he was violating the law. If you shall not so find, then, gentlemen, that would not constitute negligence in so far as that feature of the case is concerned, but if you should so find, then the court instructs you that would constitute negligence *per se.*"

Under the facts and circumstances of this case we can see no prejudicial error in the charge. From the evidence, under the conditions then existing and the speed under the hazard existing, over 45 miles an hour is unlawful and therefore negligence *per se.*

In *Albritton v. Hill,* 190 N. C., 429 (430), we find: "This and other evidence which we need not set out in detail (C. S., 2316), tended to show a breach of more than one statute. A breach of either is negli-

gence *per se;* the causal relation between the alleged negligence and the injury being, of course, a question for the jury. . . . (Citing authorities.) In reference to concurrent negligence we have held that where two proximate causes contribute to an injury the defendant is liable if his negligent act brought about one of such causes. *Mangum v. R. R.,* 188 N. C., 689; *Hinnant v. Power Co.,* 187 N. C., 288; *White v. Realty Co.,* 182 N. C., 536; *Wood v. Public Corporation,* 174 N. C., 697; *Harton v. Telephone Co.,* 141 N. C., 455."

The objections and assignments of error as to the answers of certain physicians who gave their opinion as to plaintiff's injuries cannot be sustained. *Keith v. Gregg,* 210 N. C., 802 (808).

There are numerous exceptions and assignments of error made on the trial and to the charge which cannot be sustained. We have examined defendant's brief and additional authorities, but the law is well settled in this State in matters of this kind. On the whole record we find no prejudicial or reversible error. The charge given covered every aspect of the case and the law applicable to the facts, and complied with C. S., 564. We repeat, as said in *Davis v. Long,* 189 N. C., 129 (137): "The case is not complicated as to the law or facts. The jurors are presumed to be men of 'good moral character and sufficient intelligence.' They could easily understand the law as applied to the facts."

In the judgment of the court below we find

No error.

BARNHILL, J., dissenting: Plaintiff was injured while riding as a passenger on the automobile of the defendant, going from Raleigh to Charlotte, the accident occurring on the westerly side of Albemarle. Plaintiff alleges that the defendant drove his automobile at a high and dangerous speed; that he continued to drive the same at a high and dangerous speed in the face of and into a fast approaching storm and rain, and into a sharp curve in the road, and that his automobile was equipped with tires that were unsafe. She bases her right to recover upon evidence which she contends sustains these allegations.

She testified that the defendant, after leaving Raleigh and until the accident, drove his car at a rate of speed of 55 or 60 miles an hour; that after leaving Albemarle she observed a rapidly approaching rain or storm; that after the rain came the defendant continued to operate his car at said rate of speed without slowing down for a period of a couple of minutes, and into a sharp curve. At the rate of speed she testified he was going he drove his automobile from one to two miles upon wet pavement and in a rain storm without slowing down. And yet she states that she did not protest or object or call his attention to

the approaching storm. She does say that she and her daughter, who was on the rear seat, discussed the storm.

Upon this evidence was it not the duty of the judge to submit an issue to the jury on the defendant's plea of contributory negligence?

There is a wide variety of rules applicable to the conduct of a guest in an automobile. At one extreme is the requirement that the guest must exercise the same care as the driver. *Read v. N. Y. Cent. & H. R. R. Co.*, 219 N. Y., 660, 114 N. E., 1081. At the other extreme is the rule that the guest must remain silent. *Alost v. Wood and Drayage Co., Inc.*, 10 La. App., 57, 120 So., 791; *Telling Belle Vernon Co. v. Krenz*, 34 Ohio App., 499, 171 N. E., 357; *Schlosstein v. Bernstein*, 293 Pa., 245; 142 Atl., 324. Between the two extremes lies the majority view—that a guest is bound to use ordinary care under the circumstances. 9 N. C. Law Review, 99; 11 *ibid.*, 349, 350, and cases cited to this effect in these notes.

The cases in this State indicating the duty of a passenger are quite limited. The doctrine of contributory negligence as applied to guests in automobiles appears to have been lifted from the older law of master and servant, and was first treated in this State as "imputed negligence" in cases in which the guest had some degree of control over the driver of the automobile. *Pusey v. R. R.*, 181 N. C., 137, 142, and cases cited. But since there are relatively few instances in which the guest has any real control over the driver, it was necessary to adopt a broader rule. This was first done in *King v. Pope*, 202 N. C., 554, in which the opinion quoted from Huddy, Automobile Law, Vol. 5-6, 9th Ed. (1931), at p. 265, approving a statement to the effect that the duty of the guest to remonstrate against excessive speed exists, but as it is not an absolute one, it usually presents a question for the jury. That case also quoted at length from *Krause v. Hall*, 195 Wis., 565, 217 N. W., at p. 292, which recognizes the duty to protest, but points out that since protests can appeal only to the driver's sense of courtesy and are likely to arouse his displeasure, whether a person in the exercise of ordinary prudence would have continued to remain in the car or insisted upon leaving the car is usually a matter for the jury. The *King case, supra*, for the first time, numbered North Carolina among those states following the moderate or middle-ground rule—that a guest is bound to exercise that degree of care which would be exercised by a person of ordinary prudence under the circumstances. The trial judge in that case laid down this rule, and the Court in the opinion approved it. The same rule applies here as in other negligence cases. In *Norfleet v. Hall*, 204 N. C., 573, the opinion declared it to be "conceded" that, under certain circumstances, a guest has the duty of protesting against excessive speed, and upon failing to do so is barred from recovery. Thus we find the funda-

mental rule accepted in North Carolina, but it is significant that the Court, as yet, applies it with reluctance, as indicated by the fact that in both of these cases in which the rule has been laid down the opinions declared that the rule did not apply (in the *King case, supra,* it was intimated that the duty did not exist where the driver's negligence is willful and wanton, and in the *Norfleet case, supra,* it was noted that the guest did not have sufficient time to protest). Accordingly, we have a rule established but as yet without the essential distinctions and refinements of a mature rule of law; naturally the Court has been cautious in applying such a rule.

Our Court has not yet indicated whether a distinction is to be noted between the duty to warn against a *generally dangerous condition* (*i.e.,* excessive speed, wet pavement) and the duty to point out a *perceived danger* (*i.e.,* approaching train, sudden cloudburst). *Justice Brogden,* in his dissent in the *Norfleet case, supra,* vigorously assaulted the entire philosophy of our contributory negligence rule as being too lenient upon the gratuitous guest and too severe upon the driver, declaring in his usual laconic and colorful fashion that to permit a "thumb-rider" to recover from a driver transporting him as a courtesy was equivalent to saying that "a person can recover damages for being bitten by his own dog." *Norfleet v. Hall, supra,* at p. 580. There is tremendous force in his observations. Assuming, however, that the rule to which he objected is now established, there is yet the possibility of determining fine points and hair-line distinctions *against* the gratuitous guest and *in favor of* the neighborly driver. The law should not encourage individuals to sue their relatives, their neighbors, and kindly friends when they are overtaken by mere accidents.

"The law is well settled by authorities too numerous to cite that a gratuitous guest cannot recover for his host's negligent operation of an automobile, if conscious of apparent danger or faced with such conditions and circumstances as would herald danger to a reasonably prudent man, he fails opportunely to protest or acquiesces therein." *Dale v. Jaeger,* 44 Idaho, 576, 258 Pac., 1081, 1082. "Where possible danger is reasonably manifest to an invited guest, and she sits by without warning or protest to the driver and permits herself to be driven carelessly to her own injury, she becomes a coadventurer in the risk, and is thereby barred of recovery." *Clise v. Prunty,* 108 W. Va., 635, 152 S. E., 201, 203. To the same effect see Cyclopedia of Automobile Law, Huddy, 9th Ed., Vol. 5-6, sec. 140; Cyclopedia of Automobile Law and Practice, Blashfield, Perm. Ed., secs. 2413, 2414; Automobiles, Berry, 7th Ed., 5, 171, 172, and numerous cases cited in these texts.

Usually the law embodies the playing rules of good sportsmanship. If I am correct in interpreting the everyday social and business ethics

of our times, there was evidence indicating that the plaintiff, herself at fault, here violated the rules of good sportsmanship by charging her husband with negligence when, in my opinion, she likewise violated the mandates of the law. According to her testimony they were both "offside," but he alone suffers the penalty.

In this case the driver was occupied at the wheel while driving at a high rate of speed. The guest saw the sudden cloudburst as it approached. The evidence is conflicting as to whether she warned him at all, and it is even more doubtful that the warning protest, if given, was vigorous and insistent. She was satisfied to trust her husband's judgment, though she saw impending danger possibly unknown to him. Why should the court be "more solicitous of her welfare than she was" for her own safety? If she was silent she acquiesced in his negligence. If she spoke, it is for the jury to say whether her words amounted to a protest sufficient to free her from the natural liability for passive acceptance of another's negligence. It is conceded that it is her duty to warn the driver of generally dangerous conditions; if the danger is a sudden one perceived by her and possibly not perceived by the driver, the duty to warn the driver is even stronger, and it becomes even more imperative that there be ample proof of her protest. Here there was a duty upon her to protest, and the evidence that she discharged this duty is weak in two respects: (1) There is conflicting evidence as to whether she entered any protest, and (2) if she did protest, her language is not given and the force with which it was uttered is not described.

This is a case in which a wife is suing her husband. It is not difficult to read between the lines and ascertain that while the parties to this action contemplate that the recovery will remain in the family, they do not anticipate that the judgment will be paid by a member of the family. If, in fact, liability is sought to be placed upon another who is not a party to the suit, that party is entitled to have the case tried in accord with the law and to have every legitimate defense presented to the jury. In my opinion the evidence is such as to require the submission of an issue of contributory negligence. For that reason there should be a new trial.

STACY, C. J., and WINBORNE, J., concur in dissent.

W. L. SEYMOUR v. THE PEOPLES BANK.

(Filed 5 January, 1938.)

1. Bills and Notes § 2b—

Where the name of the maker of the instrument is forged, the instrument is neither a bill nor a check, since the statute provides that a forged signature is wholly inoperative, C. S., 3003.

2. Bills and Notes § 12b—

Where the name of the maker of a check is forged, the drawee bank cannot be held to have accepted same by holding same for more than twenty-four hours, C. S., 3118, 3119, not being applicable to forged instruments, but the bank has a reasonable time in which to protest the instrument as being a forgery.

3. Same: Bills and Notes § 10b—Endorser held liable on forged check protested by drawee bank within reasonable time.

Plaintiff was an accommodation endorser for the payee of the check. The check was deposited in a bank for collection, and upon receipt of the check by the drawee bank on Monday, it advised the purported maker by letter that his checking account was insufficient to pay same and asked him to present his savings account book if he desired the check to be paid from that account. Heavy snows delayed the mail so that the purported maker did not receive the letter until late Wednesday, and did not go to the bank until Thursday, when he declared the check a forgery, and the drawee bank protested same and returned it to the bank of deposit, which charged it to the endorser's account. *Held:* The endorser is not entitled to recover the amount of the check from the drawee bank, since the drawee bank had a reasonable time within which to protest same, and under the circumstances it did protest same within a reasonable time, C. S., 3118, 3119, not being applicable to forged instruments.

APPEAL by defendant from *Parker, J.*, and a jury, at April Term, 1937, of PERSON. Reversed.

This is a civil action brought by plaintiff against the defendant to recover $195.00 and interest at the rate of 6 per cent per annum from 20 February, 1936. The action was commenced in a justice of the peace court and no pleadings were filed. Judgment was rendered in the justice's court for plaintiff, and defendant appealed to the Superior Court.

The testimony of plaintiff, W. L. Seymour, was in part as follows: "I have lived in South Boston, Virginia, for nineteen years. I have had business transactions with Mr. Whitt and consider him a man of a reasonable amount of worth. I have handled funds for him in settling an estate of his uncle—the heirs employed me as agent to sell some property and my negotiations were mostly with Mr. D. E. Whitt. All of my negotiations with him were satisfactory. In the course of my transactions with Mr. Whitt I saw him sign several deeds and con-

tracts and checks making distribution of funds coming into my hands from sale of property. The instrument you hand me as plaintiff's Exhibit 'A' is a check dated 13 February, 1936, drawn on The Peoples Bank of Roxboro, payable to A. B. Coyne, with D. E. Whitt's name at the bottom. On the back it is endorsed by A. B. Coyne and myself. The circumstances under which I endorsed it are: On the morning of 13 February I came down to my office at the usual hour and stepped out a few minutes; when I came back a young man who appeared to be 24 or 25 years old, nice appearance, was sitting over by the radiator; the weather was right cold, and he got up and introduced himself to me and told me his name was A. B. Coyne and said, 'I've been over in North Carolina visiting Mr. D. E. Whitt; Mr. Whitt's son and myself are in school together and are good friends and Mr. Whitt is also a friend of mine, and when I came up here the weather has gotten so bad that the roads have gotten almost impassable (that was about the time of the heavy snows), and I just couldn't get my automobile away from there and so I sold it to Mr. Whitt and he gave me this check for $195.00 and told me to come to your office, that he knew you knew him.' I told him I did know Mr. Whitt, and he wanted me to endorse the check he showed me or to cash it for him, he said he was on his way back to Richmond; he said he walked and got out to Virginia, but he couldn't get to Roxboro on account of the bad roads, and I looked at the check, and having seen Mr. Whitt's signature and seeing that it looked perfectly all right, I, without any hesitation, told him that Mr. Whitt's check was good and I didn't hesitate to honor his check for any reasonable amount; in fact, I had some money on hand at that time belonging to them. In the course of my conversation with the young man he discussed some of the business transactions I had had with Mr. Whitt and was thoroughly acquainted with practically every transaction I had had with Mr. Whitt during the entire time. I thoroughly satisfied myself with the genuineness of the writing and endorsed the check for the young man and he took it to the bank I do business with in South Boston. This happened on 13 February, 1936. The next time I heard from the check or thought about it was Monday, 24 February, 1936. The assistant cashier of the bank at South Boston called me in the bank and said, 'Seymour, I have some grief for you. I came down to the bank Saturday, 22 February—the bank was closed that day—and opened the mail and found this check you endorsed in the mail returned to us through the Federal Reserve Bank.' The check had been protested on 20 February, 1936, and returned to my bank. *My bank charged it to my account because I was an endorser, and my account paid it.* I have not been able to locate Mr. Coyne since then and have not collected any part of the check from Mr. Coyne or any other person."

Plaintiff introduced, as his Exhibit "A," the check, in words and figures as follows:

"Roxboro, N. C., 13 February, 1936.

THE PEOPLES BANK—66-232

Pay to the order of A. B. Coyne.....$195.00

One hundred and ninety-five and no/100 dollars for used car.

(S) D. E. WHITT."

Stamped across the face as follows: "Forgery. Protested for non-payment. J. B. Riggsbee, N. P. 2-20-1936."

Endorsed across the back as follows: "A. B. Coyne, W. L. Seymour."

Other endorsements of banks in rubber stamp showing check sent by South Boston bank to Federal Reserve in Richmond, Va., and by Federal Reserve to The Peoples Bank at Roxboro, N. C.

D. E. Whitt testified, in part: "I live in Holloway's Township and am acquainted with Mr. Seymour. I have had business transactions with him. I am a customer of The Peoples Bank of Roxboro, North Carolina. I received the letter you hand me marked plaintiff's Exhibit 'B.' The letter is written on the stationery of The Peoples Bank of Roxboro, North Carolina, and is addressed to me. It is signed at the bottom by D. S. Brooks. The date of the letter is 17 February, 1936. I don't know just what date I received it. We didn't get any mail on the 18th and 19th, I think it was. I received it on Wednesday of that week, about 4 or 5 o'clock, late in the afternoon. I knew that the bank was closed and I didn't come until the next morning. *I went to the bank the next morning and it was not my check and I didn't know anything about it at all, and I asked Mr. Brooks to let me see it and they did.*"

Plaintiff introduced as plaintiff's Exhibit "B" the letter, in words and figures as follows:

"THE PEOPLES BANK

"Roxboro, N. C., 17 February, 1936.

"MR. D. E. WHITT,
Virgilina, Virginia.

"DEAR SIR:—Your checking account will not pay the check of $195.00 presented today, and no doubt you would like for this to be paid from your savings account. If this is correct please present your book tomorrow that we may make entry on same.

D. S. BROOKS, *Cashier.*"

On cross-examination D. E. Whitt testified: "The roads at that time were in awful condition and had been during the week preceding. Along about 13 February the roads were so awful it was practically impossible

to get along. I get my mail from R. F. D., Virgilina, Route 4. The letter I received was dated 17 February and I received it on Wednesday. In due course I would have gotten the letter some time Tuesday, but I didn't get it until late Wednesday afternoon on account of the bad roads. It snowed and rained and it was so bad the mail man couldn't get around, and we didn't get any mail on Monday and Tuesday of this week. After I got the letter from Mr. Brooks I went immediately, the next morning, to the bank. I knew the bank was closed that afternoon and it was needless for me to go until the next morning. *When the check was presented to me I pronounced it a forgery. I just knew somebody had forged the check, and for that reason I refused to pay it. It is not my signature on that check.*"

At the close of plaintiff's evidence the defendant in the court below made a motion for judgment as in case of nonsuit. C. S., 567. The motion was denied, and defendant excepted and assigned error. The defendant offered no evidence, and the trial judge submitted one issue to the jury. The issue submitted to the jury and their answer thereto was as follows: "In what amount, if any, is the defendant indebted to the plaintiff? Ans.: '$195.00 and interest thereon at the rate of 6 per cent from 20 February, 1936, until paid.'"

The court below gave the following charge: "Gentlemen of the jury, if you find the facts to be as all the evidence in this case tends to show and by its greater weight, the court instructs you to answer the issue, 'In what amount, if any, is the defendant indebted to the plaintiff?' $195.00 with interest. You may retire and make up your verdict."

In apt time the defendant, through its counsel, requested the court to instruct the jury as follows: "That forgery of the signature of the original drawer of the check and that the check is a forgery, being admitted by the plaintiff, that secs. 3118 and 3119 of the Consolidated Statutes of North Carolina do not apply, and that under the circumstances the defendant was not bound to voluntarily return the forged paper within twenty-four hours, and that the rule of reasonable time under the circumstances applies." The request for said instruction was refused by the court and the defendant excepted. The court below rendered judgment on the verdict. The defendant assigned errors to the foregoing exceptions and appealed to the Supreme Court.

F. C. Owen for plaintiff.
York & Boyd and W. D. Merritt for defendant.

CLARKSON, J. The question involved: Is the plaintiff, who has paid the cashing bank the amount of a forged check, which the plaintiff endorsed for the accommodation of a transient stranger, without knowl-

edge of the forgery, and without requiring identification of the stranger or getting his address, entitled to recover the amount of the check from the drawee bank to which it was sent through usual banking channels for payment because the drawee bank held said check for more than twenty-four hours in order to communicate with the alleged drawer who had a savings account, but not a checking account, with sufficient balance to pay the check, when the drawee bank acted in good faith and returned the check unpaid immediately after discovering the forgery, and within three days from the receipt of said check? On the record we do not think plaintiff is entitled to recover.

We cite the following negotiable instrument laws as bearing on this controversy:

N. C. Code, 1935 (Michie), sec. 3003. "Effect of forged signature. When a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to retain the instrument or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under such signature unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

Sec. 3043. "Liability of acceptor. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance, and admits (1) existence of the drawer, the genuineness of his signature and his capacity and authority to draw the instrument, and (2) the existence of the payee and his then capacity to endorse."

Sec. 3114. "Acceptance defined; how made. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money."

Sec. 3118. "Time allowed drawee to accept. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill, but the acceptance, if given, dates as of the day of presentation."

Sec. 3119. "Liability of drawee retaining or destroying bill. Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same."

Sec. 3167. "Check defined. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided the provisions of this chapter that are applicable to a bill of exchange payable on demand apply to a check."

Sec. 3169. "Effect of certification of check. Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance."

Sec. 3170. "Effect where holder of check procures it to be certified. Where the holder of a check procures it to be accepted or certified the drawer and all endorsers are discharged from liability thereon."

On this record there is no dispute that the written instrument, purporting to be a check endorsed by plaintiff for the accommodation of A. B. Coyne, was a forgery.

A forged paper is neither a bill nor a check, and secs. 3118 and 3119, *supra,* do not apply. Sec. 3003, *supra,* provides that "when a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative." The written instrument, under the statute, is "wholly inoperative," and secs. 3118 and 3119 do not apply.

The twenty-four hour limit does not apply, but the rule of reasonable time, under all the facts and circumstances, would apply. We think the time was reasonable and there was no negligence shown to hold defendant bank liable. The forged instrument was received on Monday, 17 February, 1936, by defendant bank, and protested on Thursday, 20 February, 1936.

The able brief of plaintiff cites authorities which we do not think are applicable. We think the statute, sec. 3003, *supra,* controls this action. We do not think the defendant bank by its conduct accepted the instrument in question. As far as we have examined the authorities, the matter in controversy has not been decided heretofore by this Court. No direct authorities have been cited in the learned briefs of the litigants. We think the construction which we put on the statutes is the logic of the situation.

In *Keel v. Wynne,* 210 N. C., 427 (429), we said: "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, 1935 (Michie), sec. 3003."

For the reasons given the judgment of the court below is

Reversed.

DOGGETT LUMBER COMPANY v. PRESTON M. PERRY AND HIS WIFE, EFFIE L. PERRY, ET AL.

(Filed 5 January, 1938.)

1. Trial §§ 23, 24—

Discrepancies and contradictions in plaintiff's own evidence do not warrant the granting of defendants' motion to nonsuit, but ordinarily the evidence should be submitted to the jury when, viewed in the light most favorable to plaintiff, it is sufficient in any aspect to support plaintiff's cause of action.

2. Laborers' and Materialmen's Liens § 4: Election of Remedies § 5— Materialman asserting lien under C. S., 2437, is estopped from asserting lien under C. S., 2433.

Conceding that plaintiff's evidence established that plaintiff materialman entered into a contract for the sale of material direct to defendant owner, the evidence also established that after plaintiff learned that the dwelling had been constructed under contract for a turnkey job, plaintiff gave notice as a subcontractor and thereby asserted a lien on the property under C. S., 2437. *Held:* By electing to assert a lien as a subcontractor under C. S., 2437, plaintiff is estopped from thereafter asserting a lien as a contractor or material furnisher under C. S., 2433, and plaintiff is entitled to recover of defendant only the amount due the contractor by the owner on the date notice was given as a subcontractor or material furnisher to the contractor.

APPEAL by plaintiff from *Olive, Special Judge,* at June Special Term, 1937, of MECKLENBURG. Affirmed.

This is an action to recover of the defendants Preston M. Perry and his wife, Effie L. Perry, the sum of $2,095.28, with interest on said sum from 9 November, 1936, for lumber and building material which was sold and delivered by the plaintiff to the defendants and used by the defendants in the construction of a house on a lot owned by them and located in the city of Charlotte, N. C., for judgment that plaintiff has a lien as provided by statute on the house and lot described in the complaint for the sum of $2,095.28, and that said house and lot be sold by a commissioner to be appointed by the court for the satisfaction of said lien.

In their answer the defendants deny that the plaintiff sold and delivered to them or to either of them the lumber and building material described in the complaint. They allege that the plaintiff sold and delivered the said lumber and building material to W. M. Wood, who used the same in the construction of a house for the defendants on the lot described in the complaint, in performance of his contract with the defendants. They further allege that the plaintiff sold and delivered the said lumber and building materials to the said W. M. Wood as a sub-

contractor, and thereafter notified the defendants that the said W. M. Wood had failed to pay the plaintiff for said lumber and building material, and demanded that the defendants retain from the sum due by them to the said W. M. Wood, under their contract with him for the construction of said house, the amount due by the said W. M. Wood to the plaintiff for said lumber and building material. They further allege that at the date of said notice and demand the defendants were indebted to the said W. M. Wood, under their contract with him for the construction of said house, in the sum of $1,257.16.

In their answer and at the trial, in accordance with the provisions of C. S., 896, the defendants tendered to the plaintiff, in full settlement of the amount due by them to the plaintiff on account of the lumber and building material sold and delivered by the plaintiff to W. M. Wood, and used by the said W. M. Wood in the construction of the house on defendants' lot described in the complaint, a judgment in favor of the plaintiff and against the defendants for the sum of $1,257.16. The plaintiff in open court declined to accept said judgment as tendered by the defendants. The tender was accordingly withdrawn under the provisions of the statute.

At the trial the plaintiff offered in evidence the record of a notice and claim of lien which was filed by the plaintiff in the office of the clerk of the Superior Court of Mecklenburg County on 30 November, 1936, and duly recorded in said office in Book of Liens No. 5, at p. 99, and which is as follows:

"To Whom It May Concern:

"Take notice that the Doggett Lumber Company, a corporation above named, does hereby claim a mechanics', laborers', and material furnisher's lien against the above named Preston M. Perry and his wife, Effie L. Perry, W. M. Wood, and W. R. Cuthbertson, trustee, defendants, and upon the property belonging to the said defendants, or in which the defendants have an interest, the said property being hereinafter more fully described, under, by virtue of and in pursuance to the Constitution and laws of the State of North Carolina, and the said claimant shows:

"1. That the name and residence of the above named corporation, which claims, gives notice of and files this lien, is Doggett Lumber Company, West Park Avenue, Charlotte, North Carolina.

"2. That the names of the persons against whom and upon whose property this lien is hereby asserted, claimed and filed, are Preston M. Perry and his wife, Effie L. Perry, W. M. Wood, and W. R. Cuthbertson, trustee, of Charlotte, Mecklenburg County, North Carolina.

"3. That the property of the said Preston M. Perry and his wife, Effie L. Perry, W. M. Wood, and W. R. Cuthbertson, trustee, upon

which this lien is claimed, asserted, and filed, is in Mecklenburg County, North Carolina, and is more particularly described as follows:

" 'Being Lot 14 in Block II, as shown on map recorded in Book 332, at p. 96, in the Mecklenburg registry, the said lot fronting fifty feet on West Kingston Avenue in the city of Charlotte.'

"4. That the materials on account of which this lien is claimed and filed were furnished to and for the above named Preston M. Perry and his wife, Effie L. Perry, by the Doggett Lumber Company under and pursuant to the terms of an agreement, the same being an entire and indivisible contract made and entered into by the said Doggett Lumber Company and the said Preston M. Perry and his wife, Effie L. Perry, and likewise by the said Doggett Lumber Company with the above named W. M. Wood, as agent for Preston M. Perry and his wife, Effie L. Perry, on or about 10 August, 1936, the said Preston M. Perry and his wife, Effie L. Perry being then the owners of the property herein above described; that by the terms of said agreement the claimant, Doggett Lumber Company, contracted and agreed to furnish certain material and cash required for the construction and completion of a dwelling house upon the aforesaid property, and the said Preston M. Perry and his wife, Effie L. Perry, contracted and agreed to pay for said materials.

"A full and detailed description and list of the materials and funds so furnished, together with the dates of the furnishing of the various items and the values and cost thereof is hereto attached, marked Exhibit A, and is by reference made a part hereof. All of the said materials and funds were used in the building of the aforesaid dwelling house upon the above described property, pursuant to the aforesaid contract and agreement. The claimant began to furnish the said materials and funds on or about 10 August, 1936, and completed the furnishing of the same on or about 9 November, 1936.

"5. That, as claimant is informed and believes, the defendant W. R. Cuthbertson, trustee, is the trustee named in a deed of trust from Preston M. Perry and his wife, Effie L. Perry, dated 8 August, 1936, and recorded in Book 891, at p. 165, in the office of the register of deeds of Mecklenburg County, which said deed of trust constitutes a lien upon the above described real estate; that by reason of the lien of said deed of trust upon the above described real estate the said W. R. Cuthbertson, trustee, is made a party defendant herein.

"6. The amount of the indebtedness due to the claimant, the Doggett Lumber Company, by reason of the matters and things herein set forth, is $2,095.28, with interest on said sum at the rate of six per cent per annum from 9 November, 1936, until paid."

The above notice and claim was duly verified by A. W. Doggett, the secretary and general manager of the Doggett Lumber Company. Attached to said notice and claim is an affidavit signed by G. O. Doggett, president of the Doggett Lumber Company, to the effect that Preston M. Perry and his wife, Effie L. Perry, are indebted to the Doggett Lumber Company in the sum of $2,095.28 for lumber and building material sold and delivered to them by said company and used by them in the construction of the house described in the complaint, as shown by the itemized statement of account which is attached to said affidavit.

Lee Grier, who is employed by the Doggett Lumber Company as its general cashier and credit man, as a witness for the plaintiff, testified as follows:

"On or about 8 August, 1936, I called the defendant Preston M. Perry on the telephone. I had talked with W. M. Wood in regard to building a house for Mr. Perry. In consequence of what Mr. Wood had said to me I called Mr. Perry on the telephone and asked him to come by my office. I told him that I wanted to talk with him about selling the lumber for the house which Mr. Wood was going to build for him.

"The next day, 9 August, 1936, Mr. Perry came to my office and told me that he was ready to start his house, and that he wanted to make arrangements for getting the lumber to his lot. I have authority to make sales for the Doggett Lumber Company. Mr. Doggett passes finally on credits.

"Mr. Perry said he wanted to make satisfactory arrangements to get the lumber delivered at his lot. I asked him about his money arrangements to pay for the lumber. He told me that he had made arrangements by which he could get the money to pay for the lumber when the house was completed, and that the money would then be available to pay Doggett Lumber Company for lumber and building materials used in the construction of his house. At that time I did not know that Mr. Wood had a contract with Mr. Perry to build his house for him as a turnkey job. Mr. Perry said nothing to me about his contract with Mr. Wood. We sold the lumber and building materials required for the construction of his house to Mr. Perry that day, and thereafter delivered the same at his lot upon the orders of Mr. Wood.

"We charged the lumber and building materials which we delivered at Mr. Perry's lot on our books to 'W. M. Wood—Perry job. West Kingston Avenue.' This was in accordance with our custom, and not because we had sold the lumber and building material used in the construction of Mr. Perry's house to W. M. Wood. We sold the lumber and building material to Mr. Perry. He told us to deliver on the order of Mr. Wood, which we did.

"After we had delivered the lumber and building material shown on the itemized statement we learned that Mr. Wood had contracted to build the house for Mr. Perry as a turnkey job. This was some time early in November, 1936. Mr. Wood had not paid us for the lumber and building material which we had delivered at Mr. Perry's lot, upon Mr. Wood's order, and which Mr. Wood had used in the construction of the house.

"On 25 November, 1936, we sent to Mr. Perry a notice as follows:

" 'NORTH CAROLINA—Mecklenburg County.

" 'A. W. Doggett, being first duly sworn, deposes and says that he is secretary and manager of the Doggett Lumber Company, a corporation, with its principal place of business in the city of Charlotte, Mecklenburg County, North Carolina; that as such he is authorized to make this affidavit, notice, and proof of claim; that between 10 August, 1936, and 4 November, 1936, the Doggett Lumber Company furnished and delivered to W. M. Wood materials, cash, and merchandise as per the itemized statement hereto attached, marked Exhibit A, and made a part hereof, the said materials, cash, and merchandise so furnished amounting to $2,103.76, of which $2,095.28 is still due and owing by the said W. M. Wood to the Doggett Lumber Company, with interest at the rate of six per cent per year from 4 November, 1936, until paid; that the said sum is due over and above all credits, set-offs and counterclaims; that the said materials, cash, and merchandise were used by the said W. M. Wood in erecting a dwelling house upon the property of Preston M. Perry and his wife, Effie L. Perry, on West Kingston Avenue in the city of Charlotte, North Carolina, the said lot being the lot on which the said Preston M. Perry and his wife, Effie L. Perry, are now building or have just completed the building of a new dwelling house thereon; that the said W. M. Wood built the said dwelling house on the aforesaid lot of land for the said Preston M. Perry and his wife, Effie L. Perry; that the said Preston M. Perry and his wife, Effie L. Perry, are now indebted to the said W. M. Wood on account of the erection of the said house on the said lot in an amount in excess of the balance hereinbefore mentioned due by the said W. M. Wood to the Doggett Lumber Company, and that the Doggett Lumber Company is giving this notice and is hereby notifying the said Preston M. Perry and his wife, Effie L. Perry, to deduct the above mentioned balance due to the Doggett Lumber Company by the said W. M. Wood from the amount due by the said Preston M. Perry and his wife, Effie L. Perry, to the said W. M. Wood; and the said Doggett Lumber Company hereby notifies the said Preston M. Perry and his wife, Effie L. Perry, that it will look to them and hold them liable to it for the aforesaid balance of $2,095.28, together with interest from 4 November, 1936, until paid.' "

The foregoing notice was signed and duly verified by A. W. Doggett.

At the conclusion of the foregoing evidence for the plaintiff the defendants moved for judgment as of nonsuit. The motion was allowed, and plaintiff duly excepted.

From judgment dismissing the action as of nonsuit the plaintiff appealed to the Supreme Court, assigning error in the judgment.

Guthrie, Pierce & Blakeney for plaintiff.
Taliaferro & Clarkson for defendants.

CONNOR, J. For the purposes of this appeal it may be conceded, without deciding, that the testimony of Lee Grier, offered as evidence for the plaintiff at the trial of this action, viewed in the light most favorable to the plaintiff, in accordance with the rule applicable to a motion for judgment as of nonsuit under the statute, C. S., 567, was sufficient to support the allegations of the complaint that the plaintiff sold and delivered to the defendants the lumber and building material described in the complaint and used in the construction of the house on the lot owned by the defendants, and that the defendants promised and agreed to pay plaintiff for said lumber and building materials.

Notwithstanding apparent inconsistencies and even contradictions in the evidence for the plaintiff, where the evidence in any aspect is sufficient to support the contentions of the plaintiff, it should ordinarily be submitted to the jury, and in such case it is error to dismiss the action by judgment as of nonsuit on motion of the defendant. *Moore v. Ins. Co.*, 193 N. C., 539, 137 S. E., 580.

However, in this case, the evidence for the plaintiff shows that after the plaintiff had learned that the house described in the complaint had been constructed by W. M. Wood for the defendants under a contract for a turnkey job, with full knowledge of all the terms and provisions of said contract, the plaintiff elected to give notice as a subcontractor to the defendants as owners of the property of its claim against W. M. Wood for the lumber and building material, which it had sold and delivered to the said W. M. Wood, and which the said W. M. Wood had used in the performance of his contract with the defendants. This notice was given to the defendants on 25 November, 1936. The plaintiff thereby asserted a lien on the property of the defendants as a subcontractor under the provisions of C. S., 2437. By giving the notice it sought to enforce said lien in accordance with the provisions of C. S., 2438.

After the plaintiff had given defendants notice of its claim of a lien on their property as a subcontractor it learned that the amount due by the defendants to W. M. Wood, as contractor at the date of the

notice, was not sufficient to pay its claim in full. Thereafter, to wit, on 30 November, 1936, the plaintiff undertook to assert a lien on defendant's property as a contractor or furnisher of materials under C. S., 2433, by filing notice and claim under the provisions of C. S., 2469. Having elected to file a notice of a lien as a subcontractor under the provisions of C. S., 2437, the plaintiff was estopped from asserting a lien under C. S., 2433.

In *Baker v. Edwards,* 176 N. C., 229, 97 S. E., 16, it is said by *Walker, J.:*

"An election of remedies is defined as the choosing between two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts, and it is said in the Scottish law to be based on the principle that a man shall not be allowed to approbate or reprobate. His taking the one or making use of it will exclude or bar the prosecution of the other. The doctrine is generally regarded as being an application of the law of estoppel upon the theory that a party cannot, in the assertion or prosecution of his rights, occupy inconsistent positions."

This principle is applicable to the facts shown by the evidence for the plaintiff in the instant case. Accordingly the judgment dismissing the action as of nonsuit is

Affirmed.

I. G. PREDDY, ADMINISTRATOR OF LEHMON PREDDY, DECEASED, v. J. T. BRITT AND LEGH R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 5 January, 1938.)

1. Trial § 22b—

Upon motion to nonsuit, the evidence which supports plaintiff's cause of action should be considered in the light most favorable to him, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. Railroads § 9—In this action to recover for death of intestate killed in crossing accident, held: case was properly submitted to jury.

The evidence in this case favorable to plaintiff tended to show that intestate was driving his car twelve or fifteen miles per hour at night across a grade crossing when the car was struck by a train approaching the crossing 60 miles per hour without ringing the bell or blowing the whistle, and that by reason of a curve and cut and obstructions along the track, approaching trains could not be seen from the highway until the driver of a car was within a short distance of the track. *Held:* The evidence warrants the submission of the case to the jury on the issues of

negligence and contributory negligence, whether intestate was guilty of contributory negligence in failing to stop before attempting to cross the tracks, being for the determination of the jury upon the evidence.

3. Torts § 8a—Evidence held properly submitted to the jury on the issue of whether release was obtained by fraud.

Evidence that the consideration for the release signed by plaintiff administrator was grossly inadequate in relation to reasonable compensation for intestate's death and was obtained by defendant's claim agent knowing the administrator's financial necessities and distress, *held* properly submitted to the jury on the issue of whether the release was obtained by fraud.

4. Torts § 8d—

Where a release is set aside for fraud, the consideration for the release should be deducted from the amount awarded by the jury in damages.

DEVIN, BARNHILL, and WINBORNE, JJ., dissent.

APPEAL by defendants from *Sinclair, J.*, and a jury, at September Term, 1937, of FRANKLIN. Modified and affirmed.

This is an action for actionable negligence, alleging damage. The defendants in their answer denied the material allegations of the complaint alleging actionable negligence, and set up contributory negligence and a release in the sum of $220.80 signed by the administrator in bar of the action. The release, in part, is as follows: "I now have or may hereafter have, or which my heirs, executors, administrators or assigns may hereafter have, for or by reason of all injuries and damages of whatsoever nature and the results of such injuries and damages received by the said Lehmon Preddy, deceased, on or about 29 April, 1934, at or near Franklinton, N. C. This release to cover injuries to the said Lehmon Preddy on 28 April, 1934, and the death of the said Lehmon Preddy on 29 April, 1934." The plaintiff, in reply, set up fully the allegations constituting fraud in procuring the release.

The evidence was to the effect that the defendant's railroad crossed a public State highway and ran across same about north and south. Approaching the track from the east, going west towards Franklinton, a driver of a car on the highway could not see a train approaching for some distance on account of a house and cut there. At about 16 feet from the track you could see about 100 feet; one has to look mighty close over the shoulder to see a train 50 feet from the track looking east. There is a cut 18 feet deep and high enough to cover the engine. To see an approaching train you would have to be the length of an automobile, practically on the track, to see to the south. A two-story house, about 50 yards distance, also obscures the approach of a train. A driver coming in within 15 feet has to turn his head over, has to twist his head back to see at all down the track. It is about 100 yards from

the crossing to where the cut starts. One would have to turn his head over his shoulder to see the train even at 15 feet.

Mrs. Flora Preddy, witness for plaintiff, testified: "I am the wife of Robert Preddy, who is the brother of the boy who was killed. On 28 April, 1934, I was living about 200 yards from the crossing, on the west side of the railroad track, on the Franklinton side. On that night about 8:30 I was in my back yard. While I was standing there I saw an automobile approaching the railroad track coming from the east and driving toward the west. That was the automobile that I later saw the train hit. I found out the next day that it was my brother-in-law, Lehmon Preddy. Lehmon's automobile was about 30 feet from the railroad iron when I first saw it.

"At that time one of the Seaboard trains was coming from the south. That train was about 75 yards from the crossing when I saw the automobile. It was still in the cut at that time—still in the cut while Mr. Preddy's automobile was 30 feet from the first rail. Mr. Preddy was driving his automobile about 12 or 15 miles an hour. The train was running the fastest I ever saw—about 60 or 70 miles per hour. The train did not slow down. It did not blow any whistle or ring any bell. I saw the train strike the automobile. The wreck fell on the west side. That train was running about 60 miles an hour when it hit that automobile. It slowed down afterward, but it didn't until it hit. (Cross-examination.) The automobile I saw was hit by the train, when I saw it is was running 12 or 15 miles an hour, and from the time I saw it until the train struck it it continued to run, and of course ran right in front of the train, and as it ran in front of the train the train hit it and knocked it up the track. When I saw the automobile it was about 30 feet from the crossing, and at that time the train was coming out of the cut about 75 yards away."

Charlie Burwell, witness for plaintiff, testified, in part: "On the night of 28 April, 1934, I was living near the Williams or Winfree crossing. About 8:30 that night I was in my kitchen, facing the railroad. Just before that wreck the engineer or the employees in charge of the train that struck that automobile did not blow a whistle or ring a bell. . . . I found Mr. Lehmon Preddy there. I helped pick him up and carry him to the doctor. I think they took him to the hospital that night. He died. I found him on the left-hand side, the west side of the railroad. When I picked him up he was about 15 feet from the track on the left side. A piece here and a piece there, the automobile was torn all to pieces. The wreckage was on the west side. I looked at the train after the crash. The best I can estimate it was running about 60 miles an hour. It ran down the track a quarter of a mile before it finally stopped. I held this boy's head in my lap while

carrying him to the doctor. I did not smell a drop of whiskey or alcoholic beverage on his breath."

D. C. Hicks testified, in part: "I would say it was a dangerous crossing."

Plaintiff introduced the mortuary tables as set forth in the statutes, showing an expectancy of 42.9 years.

Henry Cash testified, in part: "I have driven over it. I couldn't say how many times, but several times. You can't see down the railroad until you get mighty near on it. There's a fill down there and you have to get almost on the track before you can see down it. I have been there when a train was passing."

Defendant introduced evidence which was contrary to that of plaintiff, also photographs and survey of the situation where the collision occurred. There was evidence, pro and con, on the allegation of fraud in the release.

The issues submitted to the jury and their answers thereto were as follows:

"1. Was the execution of the release by the plaintiff procured by the fraud of the defendants as alleged in plaintiff's reply? Ans.: 'Yes.'

"2. Was the plaintiff's intestate killed by the negligence of the defendants as alleged in the complaint? Ans.: 'Yes.'

"3. Was the plaintiff's intestate guilty of contributory negligence as alleged in the answer? Ans.: 'No.'

"4. What damages, if any, is plaintiff entitled to recover of the defendants? Ans.: '$1,000.'"

The court rendered judgment for plaintiff on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and other necessary facts will be set forth in the opinion.

E. C. Bulluck, W. L. Lumpkin, and Thos. W. Ruffin for plaintiff.
Murray Allen and Edward F. Griffin for defendants.

CLARKSON, J. 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 overruled these motions and in this we can see no error.

The evidence which makes for plaintiff's claim, or tends to support his cause of action, is to be taken in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. We think the plaintiff's evidence fully sustains his contentions and allegations in his complaint.

Plaintiff's evidence was to the effect that the crossing was a public highway and was dangerous. That the view of the railroad train, as plaintiff's intestate drove on the track, was obscured by a house and an 18-foot cut, high enough to cover an engine coming out of it. To see an approaching train coming from the direction in which it was, an automobile must be about 16 feet from the track, about the length of an automobile, practically on the track. Henry Cash testified: "You can't see down the railroad until you get mighty near on it. There's a fill down there and you have to get almost on the track before you can see down it." The freight train approaching the highway was running about 60 miles an hour and blew no whistle and rang no bell. The plaintiff's intestate was driving about 12 or 15 miles an hour. The collision was at night, 8:30 o'clock p. m.

The facts in this case are stronger for plaintiff than those in *Moseley v. R. R.*, 197 N. C., 628. We think the court below was fully warranted in submitting the case to the jury under the Moseley and other cases in this jurisdiction. The *Moseley case, supra,* in many respects, may be said to be on "all-fours" with the present case. *Butner v. R. R.*, 199 N. C., 695; *Moore v. R. R.*, 201 N. C., 26.

A similar case is *Lincoln v. R. R.*, 207 N. C., 787, written by *Stacy, C. J.*, for the Court. The facts were: "Plaintiff's intestate was killed 10 January, 1933, at a railroad crossing near Washington, N. C., in a collision between the automobile or truck in which he was riding and a train operated by the defendant. It appears from the plaintiff's evidence that the train approached the crossing at a speed of 45 or 50 miles an hour without signals or warning of any kind, and that plaintiff's intestate's view was obstructed so that he could not see the oncoming train until he was within 4 or 5 feet of the track. Other witnesses said he could have seen the train 20 or 25 feet from the track. He drove upon the track and was hit by the train. . . . (P. 789.) Applying these principles to the facts of the instant case, it would seem that the motion to nonsuit should have been overruled. There was error in sustaining it. Speaking to a similar situation in *Harris v. R. R.*, 199 N. C., 798, 156 S. E., 102, it was said: 'The law in this State does not impose upon the driver of a motor vehicle, on his approach to a public crossing, the duty, under all circumstances, to stop his vehicle before driving on the crossing. Whether under all the circumstances, as the evidence tends to show, and as the jury may find from the evidence, the failure of the driver to stop, as well as to look and listen for an approaching train at a railroad crossing, was negligence on his part is ordinarily a question involving matters of fact as well as of law, and must be determined by the jury under proper instructions from the

court. This principle has statutory recognition in this State.' See, also, *Keller v. R. R.* and *Davis v. R. R.*, 205 N. C., 269, 171 S. E., 73, and cases there cited." *Harper v. R. R.*, 211 N. C., 398 (405-6).

On applying the law applicable to the facts the court below was so thorough and accurate that defendants took no exceptions to same.

The defendants set up a release. Plaintiff answered alleging fraud. The issue submitted to the jury was: "Was the execution of the release by the plaintiff procured by the fraud of the defendants as alleged in plaintiff's reply? Ans.: 'Yes.'" The evidence on this issue was plenary to have been submitted to the jury. The court below, on this aspect, to which there was no exceptions, charged the jury: "If the jury should find from the evidence, and by its greater weight, that plaintiff's intestate was killed through the negligence of the defendants, as alleged in the complaint, and should further find by clear, strong, and convincing evidence that a reasonable compensation for plaintiff's intestate's death was worth a sum considerably in excess of the amount which the defendants paid to plaintiff administrator for said release, and that the amount or sum of money so paid by the defendants to the plaintiff administrator was so grossly inadequate as to what would be reasonable compensation to the plaintiff administrator for the death of his intestate as would cause a reasonable, fair-minded person to say that the sum so paid plaintiff administrator was so small in comparison to the amount the plaintiff administrator was actually entitled to receive that it amounted to practically nothing, then the jury should consider such facts in determining whether the release was obtained by the claim agent, knowing the plaintiff administrator's financial necessities and distress, by fraud, and if they should reach such conclusion from such fact alone, then the jury should answer the first issue 'Yes.'" The court had theretofore charged what constituted fraud. *Butler v. Fertilizer Works*, 195 N. C., 409. At the time judgment was tendered and before it was signed by the court the defendants moved the court that the sum of $220.80, being the amount of consideration recited in the release and which was paid plaintiff on 3 May, 1934, be deducted from the amount awarded by the jury in its answer to the issue of damages. The court declined to deduct the said sum, with interest, or any part of either from the amount awarded by the jury as damages. The defendant excepted and assigned error. We think the court below was in error. The release was set aside, and although this money went to bury the plaintiff's intestate and for funeral expenses, yet in good morals and law it should be deducted from the recovery.

In *Holland v. Utilities Co.*, 208 N. C., 289 (292), we find: "Both reason and justice decree that there should be collected no double com-

pensation, or even over-compensation, for any injury, however many sources of compensation there may be." *Smith v. Thompson,* 210 N. C., 672 (677).

For the reason given the judgment of the court below is modified. In the trial we find no prejudicial or reversible error.

Modified and affirmed.

DEVIN, BARNHILL, and WINBORNE, JJ., dissent.

STATE v. PHILLIP RAY AND OTIS CHASE.

(Filed 5 January, 1938.)

1. **Criminal Law §§ 48b, 81c—Where evidence competent for one purpose is properly restricted by court, its admission is not prejudicial.**

Questions asked defendants' witnesses on cross-examination tended to impeach the witnesses and also to discredit defendants, who did not go upon the stand. The trial court cautioned the jury that the evidence could be considered only for the purpose of impeaching the witnesses, if it did so, and should not be considered as evidence against the defendants. *Held:* The fact that the jury heard the words discrediting defendants cannot be held prejudicial, since under our rules, where evidence is competent for one purpose and not for another, and its admission is properly restricted by the trial court upon request, it must be presumed that the jurors are men of character and intelligence sufficient to understand and comply with the instructions of the court.

2. **Homicide § 20: Criminal Law § 29b—**

Evidence that defendant was arrested for shooting at deceased a week before the encounter in which defendant fatally shot deceased, *held* properly admitted, the prior offense being connected with the offense charged in the bill, and being competent to show the relations between the parties, and intent and malice on the part of defendant.

3. **Criminal Law §§ 51, 81c—Court's instruction in regard to improper remarks of counsel held sufficient in this case.**

Counsel for the prosecution in the argument to the jury remarked upon the physical appearance of one of defendants. The court immediately stated, in the hearing of the jury, that the remark was improper. *Held:* The failure of the court to instruct the jury that they should not consider the remark cannot be held prejudicial, the defendant being in the immediate view and presence of the jury, and there being no request that the court further caution or instruct the jury in regard to the remark.

4. **Same—Held: Court sufficiently instructed jury in regard to remark of counsel upon failure of defendants to take the stand.**

Counsel for the prosecution in the argument to the jury remarked upon defendants' failure to testify in their own behalf. The court stated in the

jury's hearing that the remark was improper, and instructed them in the charge that the failure of defendants to testify should not be considered against them. No further or additional caution or instruction was asked by defendants. *Held:* An exception to the remark cannot be sustained.

5. Criminal Law § 52b—

On a motion to nonsuit, the evidence must be considered in the light most favorable to the State.

6. Homicide § 25—Evidence that defendant aided and abetted codefendant in perpetration of murder held sufficient for jury.

The evidence favorable to the State tended to show that defendants were cousins and close companions, that the defendant who fatally shot deceased also shot at deceased a week before the fatal encounter, that the other defendant was present at that time, knew of his expressed intent to kill deceased, and accompanied him on several occasions during the week when he was apparently looking for deceased, and on the day of the homicide accompanied him, both fully armed, for several hours in apparently following deceased, and that after his codefendant and deceased started firing at each other, he attempted to take up a position to the side or rear of deceased until stopped by an order from deceased, and that after the shooting he and his codefendant went to the home of the codefendant. *Held:* The evidence was sufficient to be submitted to the jury upon the question of the defendant's guilt as an aider and abettor in the commission of the crime.

7. Homicide § 2: Criminal Law § 8—

One who is present, aiding and abetting, counseling and encouraging another in the commission of a crime, is guilty as a principal.

APPEAL by defendants from *Alley, J.*, at August Term, 1937, of YANCEY. No error.

The defendants were charged with the murder of one James O. Higgins.

Verdict: Guilty of murder in the second degree.

The circumstances of the homicide, according to the evidence offered by the State, were substantially these:

The deceased was instantly killed by a pistol shot fired by the defendant Ray. This occurred on the streets of the town of Burnsville on Saturday, 8 May, 1937. For some reason, not disclosed by the record, there was ill feeling on the part of defendant Ray toward the deceased. On the preceding Saturday, 1 May, at about the same place, there had occurred an altercation between them, in the course of which defendant Ray had fired several shots at the deceased (then apparently unarmed), who dodged behind a car and escaped injury except for a slight abrasion on the hand. At that time Ray said to deceased, "I will kill you," and the next day and at other times during the week made threats against him.

Defendant Chase was present with Ray on the occasion of the first encounter, but it does not appear that he said or did anything at that time. Chase and Ray are first cousins and live near each other in Burnsville. The deceased lived a short distance from town.

There was evidence tending to show that during the time between the preceding Saturday and the day on which the fatal shooting occurred Ray and Chase were constantly together, riding usually in Ray's automobile; that on two occasions, when passing on the road a truck in which deceased usually rode to his work with a highway force, the two defendants stopped and looked in the truck. The deceased was not in the truck on either occasion. Also during that week the two defendants were seen parked in a car near a place on a road where deceased had recently worked. It was further testified by the widow of deceased that some time Wednesday night preceding the homicide she heard, just outside the home where she and deceased were sleeping, voices of two men recognized as those of the defendants, and that some one struck the side of the house and the porch roof heavy blows.

From the record of the evidence before us the immediate circumstances of the homicide appear to be as follows:

On Saturday afternoon, 8 May, the deceased was standing on Main Street in Burnsville, and the defendants in an automobile drove up to the curb near him. Later when deceased was at another place on the street the defendant Ray, alone, drove up to the curb in a few feet of him, then backed off and shortly returned with Chase in the car with him and stopped at the same place. There is no evidence that any words passed between them at that time. A short time later deceased, riding in an automobile with a friend, about the town, met and passed the defendants also riding in an automobile. The automobile in which deceased was riding returned to Main Street and was parked near the intersection of Academy Street, and deceased stopped to talk to a man in a car parked alongside, when the two defendants appeared walking on the sidewalk of Main Street and passed by the place where deceased was standing. Deceased then went upon the sidewalk near the intersection, at the corner of a building, and the defendants stopped in the middle of the intersecting street. The evidence is conflicting as to who spoke first, but hot words soon passed between deceased and Ray, with reference to the occurrence of the preceding Saturday and indicating that both were presently armed and not unwilling to shoot it out. When this talk began Ray, still facing deceased, moved up Academy Street, and defendant Chase moved out across Main Street and towards deceased's side and rear as he stood facing Ray. Deceased then noticed Chase's movement and said to him, "Don't try to get behind me," and Chase replied, "I am not going to." Chase stopped about

the center of the street and does not appear to have said or done anything thereafter before the shooting took place. Ray was then ten or twelve feet from the deceased, and Chase was fourteen or fifteen feet from Ray, according to a State's witness. At this juncture two persons who were present went up to both the deceased and Ray and sought to prevent further difficulty, but their efforts for peace were unavailing, and Ray drew his pistol and fired. Deceased drew his pistol, but it snapped or failed to fire, and he was jerked back around the corner of the building out of the line of fire from Ray by a bystander, but the deceased pulled away from the man and came out beyond the corner and fired at Ray, holding his pistol in both hands. Ray continued to fire and deceased fell with a bullet through his brain. In all, four or five shots were fired.

After deceased fell Ray ran up the street, and a few moments later Chase, in Ray's automobile, was seen driving rapidly toward Ray's home. When Chase was arrested twenty or thirty minutes later in front of his own home the officer found on his person a loaded pistol inside his belt under his coat.

The defendants on the other hand offered evidence tending to show that the deceased was the aggressor, and contended that Ray's shooting was in self-defense. Neither of the defendants went upon the stand as witnesses.

All the elements of felonious slaying, as well as defendant's contention of self-defense, were fully and correctly presented to the jury in the charge of the court.

There was a verdict of guilty of murder in the second degree as to both defendants, and from judgment imposing prison sentence defendants appealed.

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

R. L. Whitmire, Charles Hutchins, Watson, Founts & Watson for defendants.

DEVIN, J. The appeal presents two questions:

1. Was there error in the admission of incompetent testimony, or in other rulings of the court, sufficient to require a new trial?

2. Was there evidence sufficient to be submitted to the jury of the guilt of defendant Chase?

1. The defendants contend that in the cross-examination of two of defendants' witnesses questions tending to impeach the witnesses were so framed as to discredit and prejudice the defendants in the eyes of the jury. The witness Honeycutt was asked if he and the two defendants were not "caught in a hotel in Asheville with a crooked woman,"

and the witness Briggs, who is a justice of the peace, was asked if he had not turned the defendants loose every time they were brought before him on any charge, and if he had not turned defendant Ray loose on a charge of felony when witness knew of his own knowledge he was guilty. To this the last named witness replied that he had not done so.

In each instance the court cautioned the jury that this evidence could be considered only for the purpose of impeaching the witness, if it did do so, and that they should not consider it as evidence against the defendants.

This evidence was competent for the purpose of impeaching the witness, though incompetent to discredit the defendants. In this situation involving contradictory rules, to avoid improper use of the evidence, it has been uniformly held that correction lies in the instructions of the presiding judge, when so requested, in order to prevent misunderstanding by the jury and to remove prejudice against the defendant. Wigmore on Ev., sec. 13, and cases cited; *Cooper v. R. R.*, 163 N. C., 150, 79 S. E., 418. It is a well recognized rule of procedure that when evidence competent for one purpose only and not for another is offered it is incumbent upon the objecting party to request the court to restrict the consideration of the jury to that aspect of the evidence which is competent. Rule 21 of this Court; Lockhart on Ev., sec. 19; *Roberson v. Stokes*, 181 N. C., 59, 106 S. E., 151.

Whether impressions received by jurors from the words spoken can be effaced by a mental effort, under the direction of the court, may provoke debate in the realm of psychology, but our system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so. *Wilson v. Mfg. Co.*, 120 N. C., 94, 26 S. E., 629.

The evidence that the defendant Ray was arrested for shooting at the deceased on the Saturday preceding the homicide was connected with the criminal offense charged in the bill, and was competent to show the relations between the parties and intent and malice on the part of the defendant. *S. v. Miller*, 189 N. C., 695, 128 S. E., 1; *S. v. Stancill*, 178 N. C., 683, 100 S. E., 241; Underhill's Crim. Ev. (4th Ed.), pp. 1103, 1107.

The defendants also noted exception to a remark of counsel assisting the prosecution, in addressing the jury, that one of the defendants "has the hardest face I ever looked into." It appears from the record that the court immediately stated in the presence of the jury that the remark of counsel was improper. The defendants, however, contend that the court's failure to instruct the jury not to consider the remark was prejudicial error (*S. v. Murdock*, 183 N. C., 779, 111 S. E., 610), but

we are unable to hold that the jury was misled or influenced by this improper reference to what counsel thought of the physical appearance of one of the defendants who was then in the immediate view and presence of the jury, nor does it appear that the defendants requested the court to caution the jury further. Also, in the argument to the jury by one of counsel for the prosecution, some reference was made to the failure of the defendants to go upon the witness stand, and, upon objection by defendants, the court stated at the time that the remark was improper and in his charge carefully instructed the jury not to consider that fact to the prejudice of the defendants. No further or additional caution or instruction was asked by defendants.

The assignments of error on these grounds cannot be sustained.

We have examined the other exceptions to the rulings of the court and find them without substantial merit.

2. Was the evidence against the defendant Chase of sufficient probative force to warrant its submission to the jury? This defendant in apt time moved for judgment as of nonsuit, and now upon appeal assigns as error the denial of his motion.

All the evidence showed the defendant Ray shot and killed the deceased, and that defendant Chase, though present, did not join in the fatal shooting. The guilt of Chase was predicated upon the view that he was present aiding and abetting Ray, giving him assistance and encouragement, or that the killing was the result of the pursuit of a common design and purpose participated in by both. Is the evidence sufficient to support that view?

Here it appears from the evidence, considered in its most favorable light for the State, as we must do on a motion for nonsuit, that, from the close relationship and association of the two defendants, Chase was fully aware of the attitude of Ray toward the deceased, was present when Ray shot at him the preceding Saturday, heard Ray's expression of his intent to kill him, knew of his purpose to attack him when opportunity arose, accompanied him on several different occasions during the week when they were apparently looking for deceased, and on the day of the homicide was armed and accompanied Ray for several hours in apparently following deceased about the streets of the town, and by his presence gave aid and encouragement to Ray's unlawful purpose.

Just before the shooting began, Chase's movement in the street affords ground for the permissible inference that he was attempting to take a position to the side or rear of the deceased, which would have enabled him to be of assistance to Ray if required. Chase's action evidently led the deceased to so conclude, hence his warning to Chase not to try to get behind him. After the fatal shooting Ray ran one way and Chase drove Ray's car another, but both ways led to Ray's home.

While the defendant's evidence tended to warrant a more favorable aspect of Chase's conduct, the circumstances disclosed by the State's evidence consisted of more than a mere conjecture or suspicion of guilt (*S. v. Prince,* 182 N. C., 788, 108 S. E., 330), and constituted evidence of sufficiently definite probative value to justify its submission to the jury under appropriate instructions from the court. *S. v. McLeod,* 198 N. C., 649, 152 S. E., 895.

The principle is well established that one who, being present, gives aid and comfort, counsel or encouragement to another, in the commission of a crime, is guilty as a principal. *S. v. Cloninger,* 149 N. C., 567, 63 S. E., 154; *S. v. Hart,* 186 N. C., 582, 120 S. E., 345; *S. v. Dail,* 191 N. C., 234, 131 S. E., 574; *S. v. Gosnell,* 208 N. C., 401, 181 S. E., 323.

From a consideration of the entire record, including the full and accurate charge of the court, we conclude that in the trial there was

No error.

MARY PEARSON v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 5 January, 1938.)

1. Insurance § 32c—Termination of employment as used in group policy refers to status of parties rather than contract of employment.

The provision of a group policy that insurance of any employee should terminate upon termination of the employment, except that the employer might elect that employees temporarily laid off, on leave of absence, disabled, or pensioned should be considered in the employment, *is held* to refer to the *status* of the parties rather than any contractual relation, and to cover employees employed from day to day without any contract of employment for any specified period, and when an employee is temporarily laid off, on leave of absence, disabled, or pensioned, the employer, although he might terminate his contractual relationship, may not terminate his *status* as an employee within the meaning of the policy without notice to the employee.

2. Same—Where act of employee terminates employment, he is not entitled to notice of cancellation of certificate under group policy.

The employer had a general rule, of which the employees had actual knowledge, that the employment of any employee should automatically terminate upon sentence of such employee to imprisonment. The employee in question was sentenced to imprisonment, and notice thereof given the employer, and the employee's name was thereupon stricken from the pay roll. *Held:* The employee was not entitled to notice of the termination of the employment and the cancellation of his certificate under a group policy.

3. Same—Provision that employee might convert certificate into life policy does not extend certificate after termination of employment.

The provision of the certificate and the group policy that an employee insured thereunder might obtain an ordinary life policy upon application within thirty-one days after termination of the certificate upon termination of the employment, does not have the effect of continuing the certificate in force for thirty-one days after termination of the employment when the employee does not exercise the option by applying for the life policy or by paying the premiums.

APPEAL by plaintiff from *Hill, Special Judge,* at April Term, 1937, of FORSYTH. Affirmed.

This is a civil action instituted by the plaintiff to recover the sum of $500.00, the face value of a certificate of insurance issued to Edward C. Pearson under a group life insurance policy issued by the defendant to the R. J. Reynolds Tobacco Company. The plaintiff is the beneficiary named in the certificate. There was a judgment of nonsuit entered at the conclusion of all the evidence to which the plaintiff excepted and appealed.

John D. Slawter and Richmond Rucker for plaintiff, appellant.
Manly, Hendren & Womble for defendant, appellee.

PER CURIAM. There is no substantial controversy about the facts in this case. The defendant issued to the R. J. Reynolds Tobacco Company its group life insurance policy with total and permanent disability provisions, insuring the lives of the employees of said tobacco company. The deceased, Edward C. Pearson, son of the plaintiff, worked continuously for the R. J. Reynolds Tobacco Company from 3 December, 1929, through 17 July, 1936, save and except when he was temporarily absent from his employment for a few days at various times during said period. A certificate of insurance dated 3 December, 1929, was issued to him in the sum of $500.00, payable to the plaintiff as beneficiary upon the death of the said Edward C. Pearson. This certificate was issued subject to the terms and conditions of the master policy.

Edward C. Pearson, the employee, was, on 20 July, 1936, convicted in municipal court of the city of Winston-Salem on the charge of operating a motor vehicle upon the public highways of the State while under the influence of intoxicating liquors. He was on said date committed to jail, to be assigned to work the public roads of said county for a term of six months. On 23 July, 1936, while serving said sentence he died suddenly as the result of sunstroke.

The contract of insurance was entered into by and between the R. J. Reynolds Tobacco Company and the defendant and the said tobacco company paid the premium therefor annually. In turn

the said tobacco company had an arrangement with its insured employees by the terms of which each employee paid monthly a proportionate part of the premium of said master policy in part reimbursement for the amount expended by said company for said insurance. The deceased paid his installment for the month of July, 1936.

It is agreed that on the morning of 20 July, 1936, said employee did not report for work and his wife informed his foreman that said employee had been arrested and was to be tried on that morning. Later, on the same date, the wife of the deceased advised his foreman that said employee had been convicted and committed to the roads to serve a term of six months. The evidence discloses that thereupon the name of the deceased was erased from the roll of employees of the said tobacco company and that in due course it was reported to the insurance company that he had been dropped from said roll and was no longer an employee of said company. The tobacco company gave the deceased no notice that it had dropped him from the pay roll.

Under the terms of the group policy the insurance of any employee automatically ceased upon termination of his employment with the employer in the classes of employees insured under the policy, without regard to the cause of such termination, "except that the employer may elect that all employees who, while insured hereunder, are temporarily laid off or given leave of absence, or are disabled or retired on pension, shall be considered to be in the employment of the employer during such period, subject to the conditions contained in the total and permanent disability provisions hereof."

The plaintiff contends that it was the duty of the employer to notify the insured under said certificate of the fact that he had been dropped from the pay roll of said company, and that he continued to be an employee within the meaning of the master policy and the certificate until and unless such notice was given. Upon the facts appearing in this record this position cannot be sustained.

It may be conceded that the word "employment" as used in the phrase, "termination of his employment," in the group policy of insurance may be interpreted to refer to the *status* of the employee rather than to any actual contractual relationship existing between the employer and the employee. The policy included employees who were working on a day to day basis without any contract for any specified period of employment. It is well said that such an employee occupies a *status* rather than a contractual relationship. The policy clearly does not use the word "employment" in the sense of a legal contract of employment. It is so drawn as to include employees working under a hiring wholly indefinite as to the term of its continuance. The employment might, therefore, be terminated at any time at the will of the employee or that

of the employer. Nor does the contract apply to employees only when they are actually employed from day to day. This is apparent from the provision that if an employee "is temporarily absent, or is temporarily laid off or is given leave of absence," the employment need not be considered terminated. The word as here used is intended to indicate a continuous right to the stated benefit until the contract relation is terminated by the withdrawal of the employee or discharge by the employer, with notice to the other party. As the situation presented is one rather of the *status* of the employee in relation to his employer than of a contract of employment, the right of the employer at any time at its will to discontinue its contractual relationship to the employee is not conclusive that it might to the same extent terminate his *status* as an employee under the policy without notice to the employee. There is, therefore, sound authority for the position that when an employee is temporarily absent from his employment or is temporarily laid off, or is absent on leave, his relationship as an employee under the terms of the policy cannot be terminated by the employer without notice to the employee. *Deese v. Ins. Co.*, 204 N. C., 214; *Porter v. Assurance Society* (Mo.), 71 S. W. (2nd), 766; *Emerick v. Ins. Co.*, 120 Conn., 60, 105 A. L. R., 413.

The law as declared in these and other similar cases will not avail the plaintiff in the instant case. The decisions in those cases were not based upon the same factual situation. The employee may discontinue his *status* as such by his own act. When he does so there is no necessity of a notice from the employer and none is required. Whether the employer, when the employee discontinues the relationship, must recognize and act upon the changed condition by removing the name of the employee from his pay roll before the rights of the employee under the certificate of insurance are terminated is not presented. For, here, the employer did in fact promptly remove the name of the deceased from its pay roll and notified the insurance company thereof.

Did the deceased employee discontinue his employment with the R. J. Reynolds Tobacco Company so as to terminate his rights under the certificate of insurance? This proposition must be answered in the affirmative.

The evidence discloses that the employer had a general rule that the employment of any one of its employees should automatically terminate upon the sentence of such employee to imprisonment. The deceased employee was advised of this rule on a former occasion when he was arrested and put under a suspended sentence. When he was convicted and committed to the roads to serve the sentence imposed he knew that under the terms of his employment the same automatically ended when he received his sentence. Aside from this, the employee, however in-

voluntarily his act may have been, entered into another employment which would, for the term of six months, require of him his full time, both day and night. He could not serve two masters. He knew that he could no longer answer the call of his former employer and that by his own act his *status* as an employee of the tobacco company had been terminated. Under these circumstances no duty rested upon the employer to notify him that the relationship had been discontinued.

Both the certificate of insurance and the master policy include a provision to the effect that in case of the termination of the employment for any reason whatsoever, while insured thereunder, the employee shall be entitled to have issued to him by the society, without further evidence of insurability, upon application made to the society, and upon the payment within 31 days after such termination of the premium applicable to the class of risk to which he belongs and to the form and amount of the policy at his then attained age, a policy of life insurance in any one of the forms customarily issued by the society, except term insurance, in an amount equal to the amount of his protection under the policy and certificate at the time of such termination of employment. This provision does not extend the insurance 31 days after the termination of employment. It grants the insured employee a privilege or option under certain conditions therein stipulated. The insured did not exercise this option or privilege by applying for such policy or by paying the required premium. The plaintiff, therefore, has no claim against the defendant by reason of the terms of this provision.

The deceased employee having, by his own act, terminated his *status* as an employee of the R. J. Reynolds Tobacco Company, and the employer having recognized, accepted, and acted upon such termination, the defendant is in no wise liable to the plaintiff upon the certificate sued upon. The judgment of nonsuit is

Affirmed.

IN THE MATTER OF ROSA LEE BARNES.

(Filed 5 January, 1938.)

1. Statutes § 7—

As a general rule, statutes framed in the present tense will be construed to apply not only to conditions existing at the time of their enactment, but also to conditions arising thereafter.

2. Courts § 7—Municipal and general county courts in same municipality are given concurrent jurisdiction of offenses less than felonies.

A general county court was established in a municipality of the county under ch. 216, sec. 13, Public Laws of 1923. (C. S., 1608 m.) Thereafter

a municipal recorder's court was established in the same municipality under ch. 277, Public Laws of 1919. (C. S., 1541 *et seq.*) The statutes conferring jurisdiction on the courts respectively provided that each court should have exclusive original jurisdiction of offenses below the grade of felony as defined by law. Both courts were established after the enactment of ch. 85, sec. 1 (5), Public-Local Laws, Extra Session 1924, which provides that where general county courts are established under ch. 216, Laws of 1923, in municipalities having special or municipal courts, the jurisdiction of the general county court should be concurrent with that of the special court. *Held:* The amendment of 1924 is prospective in effect and applies to general county courts then in existence or thereafter created, and to such courts even though the municipal court is established after the general county court, and a conviction in the municipal court may not be successfully attacked on the ground that the statute giving it jurisdiction over misdemeanors was repealed by the later statute prescribing the jurisdiction of the general county court.

3. Courts § 6: Public Officers § 4b—Effect of accepting another public office in contravention of Constitution is to vacate first office.

The jurisdiction of a judge of a municipal recorder's court to impose sentence cannot be successfully attacked on the ground that at the time the recorder was appointed he was mayor of the municipality and therefore held two offices in contravention of Art. XIV, sec. 7, of the State Constitution, since even if it be granted that the statute permitting a mayor to be appointed recorder (sec. 2, ch. 32, Public Laws of 1923, C. S., 1537) confers upon the mayor when chosen recorder other than *ex officio* duties, the acceptance of the office of recorder would vacate the office of mayor, but would not affect the office of recorder.

THIS is a review by writ of *certiorari* of a judgment refusing to release the petitioner, Rosa Lee Barnes, upon a writ of *habeas corpus*, entered by *Williams, J.*, 20 October, 1937, at Tarboro. From WILSON. Affirmed.

Connor & Connor, Thomas J. Moore, and Luke Lamb for petitioner, appellant.

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

SCHENCK, J. The petitioner was, on 27 September, 1937, tried, convicted, and sentenced to imprisonment for six months by the municipal recorder's court of the town of Wilson, upon a warrant charging her with a violation of section 13, chapter 49, Public Laws 1937, in that she had in her possession alcoholic beverages upon which the taxes imposed by the laws of Congress of the United States and by the laws of the State had not been paid, the punishment for such offense being fixed by the statute as a fine and imprisonment in the discretion of the court.

The municipal recorder's court of the town of Wilson was, in the year 1937, created by an election under the provisions of chapter 277, Public Laws 1919 (Article 18, chapter 27, sections 1536 *et seq.* of Con-

solidated Statutes), and began to function as such court prior to 10 September, 1937.

Section 4, chapter 277, Public Laws 1919 (C. S., 1541), reads:

"The said court (municipal recorder's) shall have the following jurisdiction within the following named territory:

. . . . . .

"(c) Exclusive, original jurisdiction of all other criminal offenses committed within the corporate limits of such municipality and outside, but within a radius of two miles (changed to five miles by section 3, chapter 32, Public Laws 1925) thereof, which are below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors."

There is in Wilson County, in which the town of Wilson is situated, a general county court, which was duly created in the year 1924 under the provisions of chapter 216, Public Laws of 1923 (Article 24, chapter 27, sections 1608 [f] *et seq.* of Consolidated Statutes).

Sec 13, chapter 216, of the Public Laws 1923 (C. S., 1608 [m]), reads:

"The general county court, herein provided for, shall have the following jurisdiction in criminal actions within the county:

. . . . . .

"(4) . . . shall have exclusive original jurisdiction of all other criminal offenses committed in the county below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors."

Section 25, chapter 216, Public Laws 1923, reads:

"All laws and clauses of laws in conflict with this act are hereby repealed."

It is the contention of the petitioner that since the provisions of the Act of 1919 and those of the Act of 1923, conferring jurisdiction on the municipal court and on the general county court, respectively, are in apparent conflict, as both courts are given exclusive original jurisdiction of criminal offenses below the grade of felony within the territorial jurisdiction of the municipal recorder's court, and since the subsequent act contains a general repealing clause, the municipal court was deprived of its jurisdiction of petty misdemeanors of the class in which the offense of which the petitioner was convicted falls. This contention may have been made with considerable force but for an amendment to chapter 216, Public Laws 1923, which was made by section 1, subsection 5, chapter 85, Public-Local Laws, Extra Session 1924, C. S., 1608 (m), and reads:

"5. In counties in which there is a special court or courts for cities and towns, the jurisdiction of the general county court in criminal actions shall be concurrent with the jurisdiction conferred upon such special courts."

This amendment was enacted the same year, but prior to the creation of the general county court of Wilson County.

It is argued by the petitioner, however, that if this amendment of 1924 preserves the jurisdiction of any municipal courts created under chapter 277, Public Laws 1919, in counties wherein general county courts are created under chapter 216, Public Laws 1923, it only preserves the jurisdiction of such municipal courts as existed at the time of the passage of the Act of 1923 or of the amendment thereto. This argument is based upon the use of the word "is" in the amendment, it being argued that since the present tense of the verb "to be" appears therein, the amendment can only refer to the then existing courts for cities and towns. With this argument we cannot agree.

"Where a statute is expressed in general terms and in words of the present tense, it will as a general rule be construed to apply not only to things and conditions existing at its passage, but will also be given a prospective interpretation, by which it will apply to such as come into existence thereafter." 59 C. J., 1105.

We are of the opinion, and so hold, that when the amendment of 1924 is construed *in pari materia* with both chapter 216, Public Laws 1923, and chapter 277, Public Laws 1919, it has a prospective purpose and means that when general county courts exist or are created in counties where special courts for cities and towns shall be, or shall have been created, or are in contemporaneous existence, their jurisdiction shall be as defined in the amendment, that is, concurrent with the jurisdiction conferred upon such special courts. This construction avoids any conflict between the statutes conferring jurisdiction upon general county courts and municipal recorder's courts, respectively, and continues intact the jurisdiction of the municipal recorder's court of Wilson of that class of offenses in which the offense of which the petitioner was convicted falls.

The petitioner also contends that Charles B. McLean, who, as recorder of the municipal recorder's court of the town of Wilson, imposed judgment upon her, was without jurisdiction to impose such judgment for the reason that he could not legally act as recorder of such court, since at the time he was chosen and assumed the duties of recorder he was mayor of the town of Wilson, and was barred from holding the two offices by Article XIV, section 7, of the Constitution of North Carolina.

Chapter 277, Public Laws 1919 (C. S., 1537), was amended by section 2, chapter 32, Public Acts of 1925, by the addition of the following: "Provided further, the recorder may also be the mayor of the municipality," and McLean was duly chosen recorder. If this statute, as amended, did more than confer upon the mayor, when chosen recorder, other *ex officio* duties not inconsistent with those already exercised, and

thereby created another office, then it might be argued that the office of mayor was vacated by the acceptance of the office of recorder, but the office of recorder was not vacated. McLean was first mayor and then recorder. One holding an "office or place of trust or profit" by accepting another such office or place, in contravention of the Constitution, vacates the first office or place and not the second. *Whitehead v. Pittman,* 165 N. C., 89. However, the *status* of McLean as it relates to the office of mayor of the town of Wilson is not before us and we do not pass thereupon. All that we decide is that Charles B. McLean was the legally constituted recorder of the municipal recorder's court of the town of Wilson, and as such had jurisdiction to impose the judgment upon the petitioner.

The judgment of Judge Williams is

Affirmed.

STATE v. TOM LINNEY (ALIAS BUFFALO) AND T. J. JEFFERSON.

(Filed 5 January, 1938.)

1. Criminal Law §§ 56, 77b—Failure of record to show selection of grand jury held not ground for motion in arrest of judgment.

The record showed the organization of the court, the names of the jurors summoned for the term, and the names of the foreman and seventeen other grand jurors drawn therefrom, that the grand jury was impaneled, sworn, and charged, and that it duly returned a true bill over the signature of the foreman, showing the endorsement of the names of the State's witnesses sworn and examined. *Held:* A motion in arrest of judgment for that the record failed to show the selection of the grand jury, is properly denied, there being no defect affirmatively appearing on the face of the record sufficient to support a motion in arrest of judgment.

2. Indictment § 2—

The procedure to present the contention that the grand jury was improperly drawn is by a motion to quash, upon proper averment and proof, before arraignment and plea, and not by a motion in arrest of judgment after verdict.

3. Homicide § 27h—Instruction submitting both murder in perpetration of robbery and with premeditation and deliberation held not error.

The indictment charged defendants did willfully, deliberately, and premeditatedly murder deceased while in the act of robbing deceased. The court instructed the jury on both phases of murder in the first degree as though the indictment contained separate counts. *Held:* The instruction under the indictment and evidence was not erroneous, nor may defendants complain, since under the charge of willful, deliberate, and premeditated murder the court instructed the jury that a verdict of murder in the second degree would be permissible, while under the other count the

verdict would be restricted to murder in the first degree or not guilty, and under the instructions the defendants had all phases of the case arising on the evidence presented to the jury.

4. Homicide § 14: Indictment § 11: Criminal Law § 56—Informalities and refinements in indictment may be properly disregarded.

This joint indictment of two defendants for murder charged that defendants "of his malice aforethought" committed the act. *Held:* The use of the word "his" instead of "their" is insufficient ground for arresting the judgment, informalities and refinements being disregarded if the indictment is sufficient to inform defendants of the charge against them and to enable them to prepare their defense, and to protect them from another prosecution. C. S., 4623.

5. Homicide § 14—

A charge that defendants committed murder "in the act of robbing" their victim, is equivalent to a charge of murder "in the perpetration or attempt to perpetrate a robbery."

APPEAL by defendants from *Hill, J.*, at June Term, 1937, of FORSYTH. No error.

The defendants were charged in the bill of indictment with the murder of one Herman W. Fogleman. The State's evidence tended to show that on the evening of 5 April, 1937, the deceased, an insurance collector, had parked his automobile on a street in a Negro section of the city of Winston-Salem, and had gone into a nearby house; that as deceased returned from the house to his automobile a man identified as defendant Linney stepped from an alley and struck him on the head with a pistol and fired two shots and deceased fell to the ground on his side; that thereupon another man identified as defendant Jefferson stepped out of the same alley and fired three shots into the deceased, lying on the ground, pushed him into a mud hole, pulled something from his side, and that then both defendants stepped back in the alley and ran. Deceased was dead when the officers arrived.

The defendants denied guilt and offered evidence tending to show that each of them was elsewhere at the time, and that they were not and could not have been the persons guilty of slaying the deceased.

The jury returned a verdict of guilty of murder in the first degree as to both defendants, and from judgment pronouncing sentence of death, defendants appealed.

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

Phin Horton, S. E. Edwards, and T. Hardin Jewett, for defendants.

DEVIN, J. The appellants contest the validity of the trial and judgment below on three grounds.

1. They assign as error the denial of their motion in arrest of judgment on the ground that the minute docket failed to show the selection of the grand jury in the manner prescribed by the statute. However, the record before us shows the organization of the court, the names of the jurors summoned for the term, the names of the foreman and seventeen other grand jurors drawn therefrom, "then and there impaneled, sworn, and charged," as such, and that during the term the grand jury duly returned into open court a true bill of indictment against the defendants for murder, in the form set out *verbatim* in the record, the bill showing the endorsement of the names of the State's witnesses sworn and examined, and the statement over the signature of the foreman of the grand jury that it was a true bill.

If the grand jury were improperly drawn, of which there is no suggestion, advantage of that fact should have been taken by motion to quash, upon proper averment and proof, before arraignment and plea.

There was no such defect appearing affirmatively on the face of the record as would entitle the defendants to have the judgment arrested and their motion was properly denied. *S. v. Bordeaux,* 93 N. C., 560; *S. v. Efird,* 186 N. C., 482, 119 S. E., 881; *S. v. Grace,* 196 N. C., 280, 145 S. E., 399; *S. v. McKnight,* 196 N. C., 259, 145 S. E., 281; *S. v. Bittings,* 206 N. C., 798, 175 S. E., 299; *S. v. Puckett,* 211 N. C., 66.

2. The defendants contend that the court erred in treating the bill, and so charging the jury, in effect, as if it contained two counts, and that since the bill charged a murder committed in the perpetration or attempt to perpetrate a robbery, the allegations in the bill of willfulness, deliberation, and premeditation were improperly submitted to the jury.

The bill of indictment set out the crime charged in the following language:

"The jurors for the State upon their oath do present, that Tom Linney, *alias* Buffalo, and T. J. Jefferson, late of Forsyth County, on 5 April, A.D. 1937, with force and arms, at and in the aforesaid county, did unlawfully, willfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, did kill and murder Herman W. Fogleman, while in the act of robbing the said Herman W. Fogleman, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

The statute (C. S., 4200) dividing the crime of murder into two degrees defines murder in the first degree, among other things, as one "perpetrated . . . by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any . . . robbery."

The submission by the trial court, under a correct charge, of both these phases of murder in the first degree may not be held for error. *S. v.*

Hunt, 128 N. C., 584, 38 S. E., 473; *S. v. Gilchrist,* 113 N. C., 673, 18 S. E., 319; *S. v. Puckett,* 211 N. C., 66. The defendants cannot complain of the court's action, since under the charge of a willful, deliberate, and premeditated murder, a verdict of second degree murder would have been permissible, and the jury was so instructed in this case, while under a bill confining the charge to murder committed in the perpetration of a robbery, the verdict properly would be restricted to murder in the first degree or not guilty. *S. v. Myers,* 202 N. C., 351, 162 S. E., 764; *S. v. Donnell,* 202 N. C., 782, 164 S. E., 352.

The manner in which the court framed his instructions to the jury in defining the elements of first degree murder, as charged in the bill of indictment, was in all respects fair to the defendants and presented the case clearly to the jury.

3. The defendants contend that there was error in the charge occasioned by the use, in the joint bill of indictment, of the word "his," in reference to malice, instead of "their"; and that the bill charged murder "in the act of robbing," instead of charging that it was committed in the perpetration or attempt to perpetrate a robbery.

In *S. v. Carter,* 1 N. C., 406, where an indictment for murder contained the word "brest," instead of "breast," in describing the location of the wound, it was held by a majority of the Court of Conference that the omission of the letter "a" was sufficient ground for arresting the judgment. But a contrary view was expressed in *S. v. Molier,* 12 N. C., 263, and ever since the Act of 1811, now C. S., 4623, informalities and refinements in the language of the bill may be properly disregarded, if the criminal offense be sufficiently described to inform the defendant of the charge against him, and to enable him to make his defense, and protect him from another prosecution for the same criminal act. *S. v. Moses,* 13 N. C., 452; *S. v. Williams,* 210 N. C., 159, 185 S. E., 661; *S. v. Puckett,* 211 N. C., 66; *S. v. Anderson,* 208 N. C., 771.

That the murder was charged to have been committed while in the act of robbing the deceased was equivalent to alleging that it was committed in the perpetration of the robbery. The primary meaning of the word "perpetrate" is "to do, or perform."

There was no evidence of manslaughter, and the only issue in the trial was the identity of the defendants as the perpetrators of the crime charged. Under a fair and correct charge the jury has found that the defendants were the two who robbed and murdered the deceased.

In the trial we find

No error.

HUBERT SATTERFIELD ET AL. v. PEARL STEWART ET AL.

(Filed 5 January, 1938.)

1. Wills § 33c—Devise held to vest remainder in testator's daughters at the time of the death of the testator.

Testator devised the property in question to his wife and three daughters, the land to remain undivided during the wife's life, and if at the wife's death any of the daughters should be unmarried, the land to remain undivided as their home as long as they remained single, with further provision that upon the marriage or death of the three daughters, then the place should be sold and the proceeds divided equally among them, their heirs and assigns. *Held:* The remainders to each of the daughters vested upon the death of the testator, and were not contingent upon their surviving until the marriage or death of their sisters, and upon the death of testator's wife, their right of possession became absolute, subject to the right of unmarried daughters to have the land remain undivided, and the provision for the sale of the land upon the death of testator's wife and the marriage or death of all three daughters, cannot be held to delay the vesting of the remainders in the daughters.

2. Same—

The law favors the early vesting of title, and in the absence of a clear purpose to the contrary, title vests at the death of the testator.

3. Wills § 35—

The right of a devisee in common to have the land remain undivided so long as she should remain single, is a personal right which she may waive or surrender.

4. Wills § 46—Vested remaindermen may exchange quitclaim deeds among themselves so as to hold their respective interests in severalty.

Where devisees take a vested remainder in common, subject only to the right of one devisee to have the land remain undivided so long as she remained single, the remaindermen may exchange quitclaim deeds among themselves so that they may hold their respective interests in severalty, and the personal right of the devisee to have the land remain undivided is surrendered by executing the quitclaim deeds.

APPEAL by plaintiffs from *Bone, J.*, at October Term, 1937, of ORANGE. Affirmed.

Graham & Eskridge for plaintiffs, appellants.

Bonner D. Sawyer and Brooks, McLendon & Holderness for defendants, appellees.

SCHENCK, J. This was an action heard upon an agreed statement of facts, wherein the plaintiffs seek an injunction against the defendants committing waste upon a certain tract of land.

The defendant Pearl Stewart claims title to the lands in controversy by virtue of a deed to her from Ara McDade Satterfield and her husband, J. D. Satterfield. Ara McDade Satterfield claimed title to said land by virtue of quitclaim deeds from her sisters, Corinna McDade and Ida McDade Chandler and her husband, S. T. Chandler, and the will of her late father, A. J. McDade.

The will of A. J. McDade contains the following:

"Item 2. I give and devise to my wife, Cornelia McDade, and daughters, Corinna McDade, Ara McDade and Ida McDade, all of the tract of land whereon I now live (after the lot in Item 1 is cut off to Fletcher McDade.) This tract contains about 240 acres, including the Burch place, the same to remain undivided during the term of the natural life of my wife, Cornelia, and if at her death anyone of my daughters, Corinna McDade, Ara McDade and Ida McDade, should be unmarried, then said place shall still remain undivided as their home as long as they remain single. But after the death of my wife Cornelia McDade, and the marriage or death of my daughters, Corinna McDade, Ara McDade and Ida McDade, then said place shall be sold and divided equally among them, their heirs and assigns."

The land in controversy is a part of the land described in the foregoing item of the will of A. J. McDade. Cornelia McDade, widow of A. J. McDade, died prior to December, 1926. Corinna McDade has never married. Ida McDade married S. T. Chandler and Ara McDade married J. D. Satterfield. The plaintiffs are the children of Ara McDade Satterfield, who died in 1932.

In December, 1926, Corinna McDade (unmarried), Ara McDade Satterfield, and Ida McDade Chandler agreed to discontinue the use of the land referred to in Item 2 of their father's will as a home for themselves, or any of them, and to divide the same so that each of the sisters might enjoy the use of that part of the land allotted to them individually as their sole and separate property, and in accord with said agreement exchanged quitclaim deeds among themselves, conveying to each a one-third of the land, said deeds being joined in by the husbands of Ara and Ida, respectively.

In March, 1930, Ara McDade Satterfield and her husband, J. D. Satterfield, made a deed to Pearl Stewart for the one-third of the land quitclaimed to her by her sisters.

It is the contention of the plaintiffs that their mother, Ara McDade Satterfield, and her sisters took only contingent remainders in the land described in Item 2 of the will of A. J. McDade—the contingency being that they lived until all three of them were married—and were without power to divide the land among themselves, and the quitclaim deeds

exchanged among the sisters passed no title, and, therefore, the deed of their late mother, Ara McDade Satterfield, and her husband to Pearl Stewart was void; and that they, the plaintiffs, as children of their deceased mother, are contingent remaindermen under the will of A. J. McDade, and that their title would become vested should they live until the marriage or death of Corinna McDade.

It is the contention of the defendants that under Item 2 of the will of A. J. McDade his three daughters, Corinna, Ara, and Ida, took vested remainders, to be enjoyed after the life estate of their mother, the wife of the testator, and that upon the death of their mother their right of possession became absolute, subject to the right of Corinna, who has never married, to have the land remain undivided as a home so long as she remained single.

With the contention of the defendants we agree. The law favors an early vesting of title and, unless there is expressed a clear purpose to the contrary, the title vests at the death of the testator. *Witty v. Witty,* 184 N. C., 375.

Since the daughters of A. J. McDade, Corinna, Ara, and Ida, took vested remainders, they were empowered to convey valid titles among themselves, so they could hold their respective interests in severalty, and since Ara McDade Satterfield, by virtue of the quitclaim deeds exchanged by her and her sisters, held her interest in the land in severalty, her deed conveyed to Pearl Stewart a fee simple title thereto.

The right of Corinna, who is unmarried, to have the land remain undivided as a home so long as she remained single was a personal right, which she surrendered by executing the quitclaim deeds exchanged by the sisters. *Sides v. Sides,* 178 N. C., 554.

The provision that the land should be sold after the death of the life tenant and upon the death or marriage of the three daughters, and the proceeds divided equally among said daughters, their heirs and assigns, cannot be held to delay the vesting of the title in said daughters. *Witty v. Witty, supra.*

The trial judge was of the opinion that Pearl Stewart was the owner in fee simple of the land described in the deed from Ara McDade Satterfield and her husband, and that the action should be dismissed at the cost of the plaintiffs, and so adjudged. We concur with the opinion of his Honor, and his judgment is therefore

Affirmed.

STATE v. MARVIN HANFORD.

(Filed 5 January, 1938.)

1. **Intoxicating Liquor § 9c—Evidence that liquor was found in defendant's home in room rented to third person held insufficient for jury.**

Evidence that fifteen gallons of intoxicating liquor were found in defendant's home in a room rented by defendant to a third person, without evidence that defendant had any control over the whiskey in the room or knew that it was there is insufficient to be submitted to the jury on a charge of having possession of intoxicating liquor for the purpose of sale, and the action is remanded for judgment as of nonsuit. C. S., 4643.

2. **Constitutional Law § 14: Criminal Law § 43—Evidence of result of search of premises embraced in warrant before alteration is competent.**

Where an officer alters a search warrant by inserting another name in addition to the name appearing in the warrant when issued, but searches only the room rented by the person whose name originally appeared in the warrant, the search does not exceed the authority under the valid warrant, and evidence of the results of such search is competent. Ch. 339, sec. 6½, Public Laws of 1937.

APPEAL by defendant from *Sink, J.*, at October Special Term, 1937, of ALAMANCE. Reversed.

The defendant was tried at the October Special Term, 1937, of the Superior Court of Alamance County on a criminal warrant which was issued by a justice of the peace of said county on a duly verified complaint that "on or about 3 July, 1937, Marvin Hanford willfully and feloniously did have in his possession, illegally, fifteen (15) gallons of intoxicating liquor for the purpose of sale, contrary to the form of the statute and against the peace and dignity of the State."

He was first tried and convicted on said warrant in the general county court of Alamance County. He appealed from the judgment of the general county court to the Superior Court of Alamance County, in which court the action was tried *de novo,* as provided by statute.

At the close of the evidence for the State, the defendant moved for judgment dismissing the action as of nonsuit. The motion was denied, and defendant excepted. No evidence was introduced by the defendant.

The evidence was submitted to the jury, who returned a verdict that the defendant is "guilty of having whiskey in his possession for the purpose of sale."

From judgment on the verdict the defendant appealed to the Supreme Court, assigning errors in the trial and in the judgment.

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

John J. Henderson for defendant.

CONNOR, J. On 3 July, 1937, on the complaint of a police officer of Alamance County, which was duly verified, a justice of the peace of said county issued a search warrant by which the said officer was authorized to search the premises of one Lacey Scott, located on a public road, near the town of Burlington, in said county, for intoxicating liquor alleged to be in the possession of the said Lacey Scott on said premises. After the said warrant had been issued, and before it was served, the officer, without notice to the justice of the peace and without his authority, inserted in both the complaint and the warrant the name of the defendant Marvin Hanford. The name of Lacey Scott, which appeared in the complaint and in the warrant when the warrant was issued by the justice of the peace, was not erased from either the complaint or the warrant.

The officer went to the home of the defendant Marvin Hanford, and after advising him and Lacey Scott, both of whom were at defendant's home, that he had the warrant, authorizing him to search their premises, the officer proceeded to search the house of the defendant Marvin Hanford, and a room in said house, which was occupied by Lacey Scott.

In a back room in defendant's house the officer found fifteen gallons of whiskey and twenty empty cases. This room was occupied by Lacey Scott, to whom the defendant Marvin Hanford had rented the room. The doors to the room were closed, but were not locked, at the time of the search. Both Lacey Scott and the defendant Marvin Hanford told the officer that the whiskey was the property of Lacey Scott. There was no evidence tending to show that the defendant Marvin Hanford had any control over the whiskey found in Lacey Scott's room, or that he knew that the whiskey was in the room. In the absence of such evidence, there was error in the refusal of the court to allow defendant's motion for judgment dismissing the action as of nonsuit.

There was no evidence tending to show that the officer searched the premises of the defendant Marvin Hanford, under the search warrant in his possession at the time he went to defendant's home. He searched only the premises of Lacey Scott, as he was authorized to do under a valid search warrant. The evidence tending to show the results of such search was not incompetent under the provisions of section 6½ of chapter 339, Public Laws of North Carolina, 1937. The evidence was competent, but not sufficient to show that the whiskey found in the room which the defendant had rented to Lacey Scott was in the possession of the defendant.

The action is remanded to the Superior Court of Alamance County for judgment in accordance with this opinion. C. S., 4643. The judgment is

Reversed.

STATE v. J. CLYDE RAY.

(Filed 5 January, 1938.)

1. Criminal Law § 63—

The Superior Court has the power in proper instances to suspend judgments and executions of judgments upon just and reasonable terms, and to impose sentence and execute a judgment upon determination that the conditions imposed had been breached.

2. Same—Defendant consenting to terms upon which execution is suspended may not complain of execution of sentence upon breach of terms.

Defendant charged with embezzlement entered a plea of forcible trespass, and thereupon prayer for judgment was continued upon condition that he pay certain sums into court at stated intervals, and at a subsequent term it was determined that he had not complied with the previous order, and sentence was imposed with provision that it be suspended upon substantially the same conditions. Thereafter, the judge of the Superior Court, at term, found that defendant had breached the terms upon which sentence was suspended, and adjudged that the sentence be executed. *Held:* Defendant, having pleaded guilty of the misdemeanor, and having consented, or at least having offered no objection to the conditions upon which the prayer for judgment was continued and the execution of the judgment suspended, respectively, cannot complain of the order that the sentence be executed upon his breach of the conditions.

3. Criminal Law § 56—

Where defendant, charged with a felony, enters a plea of guilty of a misdemeanor which is accepted by the State, his motion in arrest of judgment for defect in the indictment charging the felony cannot be sustained, the sentence being based upon his voluntary plea and not upon the indictment for a felony.

4. Attorney and Client § 12—

Where an attorney, charged with embezzlement, pleads guilty of forcible trespass and consents to the revocation of his license, he may not thereafter object to the revocation on the ground he had not been convicted of, or pleaded guilty to a felony.

APPEAL by defendant from *Bone, J.*, at August Term, 1937, of ORANGE. Affirmed.

The defendant, under indictment for embezzlement, at the August Term, 1935, of the Superior Court of Orange County, tendered a plea of guilty of forcible trespass which was accepted by the State. Henry A. Grady, Judge presiding, thereupon entered order "that prayer for judgment be continued on condition that defendant pay into the clerk's office for the benefit of the heirs of John Malone, deceased, the sum of $500.00 at the August Term, 1936, $500.00 at the August Term, 1937, $2,000 at the August Term, 1938, and one-third costs at each August Term for three years."

STATE *v.* RAY.

At the August Term, 1936, Clawson Williams, Judge presiding, entered an order in which it was recited that it was admitted by the defendant in open court that he had not paid the money as required by the order of Judge Grady at the August Term, 1935, that the money he was required to repay represented funds he had wrongfully withheld and expended, and that he voluntarily consented that his license to practice law be revoked, and it was thereupon adjudged that defendant be sentenced to jail for not less than twenty-three nor more than twenty-four months, the prison sentence to be suspended upon condition that defendant pay into the office of the clerk $500.00 and one-third costs on or before 7 September, 1936, and $500.00 and one-third costs on or before August Term, 1937, and $2,000 and one-third costs on or before August Term, 1938, *capias* and commitment to issue upon breach of the conditions named, upon motion of the solicitor and finding by the judge holding the courts of the district that defendant had not complied with the conditions on which the sentence was suspended.

At the August Term, 1937, upon motion of the solicitor, Walter J. Bone, Judge presiding, made the following findings: "Upon the evidence and the admission of the defendant in open court, through his counsel, the court finds as a fact that the terms and conditions upon which the sentence heretofore imposed at the August Term, 1936, of this court was suspended, have been breached in that the defendant has failed to pay into the office of the clerk of the Superior Court of Orange County the sum of $500.00 and one-third of costs which he was required by the terms of the aforesaid judgment and sentence to pay." It was thereupon adjudged that execution and commitment be issued on the judgment rendered at the August Term, 1936, and that defendant be committed to serve said sentence.

From the judgment of Bone, J., at August Term, 1937, defendant appealed.

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

R. O. Everett and S. M. Gattis, Jr., for defendant.

DEVIN, J. The records of this Court disclose that the appellant was twice tried upon bills of indictment charging embezzlement, and that in each instance, upon appeal, a new trial was awarded. (*S. v. Ray,* 206 N. C., 736, 175 S. E., 109; *S. v. Ray,* 207 N. C., 642, 178 S. E., 224.) Subsequently, it appears that at the August Term, 1935, the defendant, with the consent of the solicitor for the State, and the approval of the court, entered a plea of guilty of forcible trespass, and that prayer for

judgment thereon was, upon certain conditions, continued to August Term, 1936. At the August Term, 1936, it was found by the court that these conditions had not been complied with, and thereupon sentence was imposed, with the provision, however, that the sentence be suspended upon substantially the same conditions as those previously named, that is that he make certain payments in September, 1936, and certain other payments on or before August Term, 1937. At August Term, 1937, it was found by the court that defendant had breached the conditions upon which the execution of the sentence had been suspended, and it was adjudged that the jail sentence imposed by the previous judgment be put into execution. To the last mentioned judgment, rendered at August Term, 1937, defendant excepted and appealed.

The power of the Superior Court to continue the prayer for judgment and to suspend the execution of a judgment, upon conditions, in proper cases and upon terms that are reasonable and just, and thereafter, upon determination that the conditions had been breached, to impose sentence and execute the judgment, has been upheld by this Court in numerous cases. *S. v. Hilton,* 151 N. C., 687, 65 S. E., 1011; *S. v. Everitt,* 164 N. C., 399, 79 S. E., 274; *S. v. Burnett,* 174 N. C., 796, 93 S. E., 473; *S. v. Hardin,* 183 N. C., 815, 112 S. E., 593; *S. v. Shepherd,* 187 N. C., 609, 122 S. E., 467; *S. v. Edwards,* 192 N. C., 321, 135 S. E., 37; *Berman v. U. S.,* 82 Law Ed. (U. S.), 212.

The defendant, having pleaded guilty of a misdemeanor, and having consented, or, at least, offered no objection to the conditions upon which the prayer for judgment was continued, in the one instance, and the execution of sentence suspended in the other, is in no position now to complain. *S. v. Crook,* 115 N. C., 760, 20 S. E., 513.

The defendant's motion in arrest of judgment, on account of defect in the bill of indictment for embezzlement, cannot be sustained, since he was neither tried nor sentenced under that bill nor for that offense. He entered a plea of guilty of a misdemeanor and this plea was accepted by the State and approved by the court, and it was upon this voluntary plea that the judgment appealed from was based. The defendant was represented by counsel and it is presumed that his rights were protected.

Nor can the defendant complain of the revocation of his license to practice law. It was found by the court that this was done with the defendant's consent.

Upon a careful consideration of the record, we conclude that the judgment must be

Affirmed.

MOSES SHAPIRO, ADMINISTRATOR OF THE ESTATE OF BRANTLEY MOSS, DECEASED, v. CITY OF WINSTON-SALEM AND MASTEN HAWKES.

(Filed 5 January, 1938.)

Municipal Corporations § 13—City held not liable for injury inflicted by its truck driver while working on W. P. A. project.

Defendant municipality sponsored a W. P. A. project for municipal park improvement and agreed to contribute a stated sum of money, and trucks and drivers for the equivalent of 400 hours, and the city retained sufficient supervision to assure that the work was done as provided in the plans and specifications furnished by the city, but the entire work was under the control of the Works Progress Administration, and its employees had exclusive control over, and directed the workers in the performance of their job, including the city truck drivers while engaged on the project. A truck driver, furnished and paid by the city, inflicted a negligent injury while operating the city's truck on the project. *Held:* The truck driver was not, at the time, an employee of the city within the meaning of the doctrine of *respondeat superior*, and the city not being liable for the injury under the doctrine, it is not necessary to determine whether the improvement of the park was a governmental function so as to absolve the city of liability in any event.

APPEAL by plaintiff from *Clement, J.*, at September Term, 1937, of FORSYTH. Affirmed.

This is a civil action, instituted by the plaintiff to recover damages for the alleged wrongful death of his intestate, Brantley Moss. The Works Progress Administration, an agency of the Federal Government, adopted as one of its projects the improvement of Hanes Park, which is a public park and playground owned by the city of Winston-Salem. Within the park is located an elementary school, the high school gymnasium, baseball diamond, a football field, a race track, bridges and walks, and other park improvements. It is used to a large extent as a playground connected with the elementary school and the Richard J. Reynolds High School. The W. P. A. project provided for improvements to the tennis courts and race track, three bridges, the planting of shrubbery, improvements to the football and baseball fields, improvement of about two miles of walks and paths, the terracing and improvement of a small creek and other open drains and the raising of the level of some of the land.

The city of Winston-Salem was the sponsor for the project and agreed to contribute $1,200 to the total cost of the project. As a part of its contribution the city agreed to contribute 50 truck days of eight hours each; that is to say, it agreed to furnish a truck and driver, or trucks and drivers, for an equivalent of 400 hours.

The entire work was under the control of the Works Progress Administration organization, there being an area engineer, a general foreman, and other subofficials in charge. The work was being done, however, in accord with plans and specifications furnished by the city, and city officials exercised that degree of supervision necessary to assure the city that the work was being done as provided in the plans and specifications. The city officials exercised no control over the employees doing the work. Employees furnished by it worked under the supervision and direction of the W. P. A. officials.

The defendant Masten Hawkes, an employee of the city and upon its pay roll, on 16 March, 1936, was sent with a city truck by an official of the city of Winston-Salem to report to the W. P. A. officer in charge of the project to work in compliance with the agreement of the city to furnish "50 truck days." He proceeded to work in connection with the project under the supervision and direction of the officials of the Works Progress Administration. During the course of his work he backed a truck into and against plaintiff's intestate, inflicting fatal injuries. The evidence is amply sufficient to sustain a finding that the death of plaintiff's intestate was caused by the negligence of Hawkes.

At the conclusion of all the evidence, the city of Winston-Salem renewed its motion to dismiss as of nonsuit. Thereupon the plaintiff submitted to a judgment of voluntary nonsuit as to Masten Hawkes and the court allowed the motion of the city. Judgment of involuntary nonsuit was entered as to the city of Winston-Salem, to which the plaintiff excepted and appealed.

Hoyle C. Ripple for plaintiff, appellant.

Ratcliff, Hudson & Ferrell for defendant city of Winston-Salem, appellee.

BARNHILL, J. It may be that if necessary the Court would take judicial notice of the plan under which a duly constituted agency of the Federal Government operates. In this case, however, it is not necessary for us to do so. The record sufficiently discloses the plan under which the Works Progress Administration was improving Hanes Park, which belongs to the city of Winston-Salem. The uncontradicted evidence discloses that the defendant Masten Hawkes was on the pay roll of the city of Winston-Salem at the time of the occurrence complained of, which resulted in the death of the plaintiff's intestate. It also discloses, however, that at said time he was working under the supervision, control and direction of the officials of the Works Progress Administration, and that the city was without authority to give him orders or direction as to the manner or method in which he should perform the work then

being done. While the truck being operated by him was likewise the property of the city, the evidence also discloses that this truck was at the time in the custody of the W. P. A. and was being used under its direction. Under these circumstances the doctrine of *respondeat superior* as between the defendant Hawkes and the city of Winston-Salem does not apply. While it was an unfortunate occurrence, the city is in nowise liable in damages for the death of plaintiff's intestate.

As we are of the opinion that Masten Hawkes was not the servant of the city of Winston-Salem at the time he caused the death of plaintiff's intestate in the sense that would impose liability upon the city, it is unnecessary for us to discuss the question presented as to whether the improvement of Hanes Park was a governmental function such as would absolve the city in any event.

The judgment below is

Affirmed.

J. D. RAGAN v. MAGNOLIA RAGAN.

(Filed 5 January, 1938.)

1. **Appeal and Error § 20b—**

Where it is patent that the judgment as certified used the word "defendant" where the word "plaintiff" was intended, resulting in an inconsistent and meaningless judgment, it is the duty of the trial court to correct the record to speak the truth, either on application or *ex mero motu*.

2. **Appeal and Error § 3a—**

Where by error the judgment of the court directs "defendant" to pay money into court for the benefit of defendant, plaintiff is not the injured party on the record as certified, and his appeal will be dismissed. C. S., 632.

3. **Pleadings § 23: Divorce § 5—**

Where appeal from an order granting alimony *pendente lite* is dismissed, defendant may thereafter apply for permission to amend her answer setting up a cross action for divorce *a mensa et thoro* to meet plaintiff's objection to the verification. C. S., 1661.

APPEAL by plaintiff from *Williams, J.*, at September Term, 1937, of DURHAM.

Action for absolute divorce, and cross action for divorce *a mensa et thoro* and for alimony *pendente lite*.

The complaint, duly verified, alleged that plaintiff and defendant were married in June, 1935; that a few days thereafter defendant abandoned

plaintiff without just cause and "has been guilty of adulterous relations with numerous persons whose names are at present unknown to plaintiff."

Defendant filed answer in which she denied the material allegations of the complaint except the fact of her marriage to plaintiff on 24 June, 1935; and set up cross action for divorce from bed and board from the plaintiff on the ground of "cruel and inhuman treatment" by plaintiff, of acts and conduct of plaintiff which "made her life burdensome and unbearable" and of being "maliciously turned out of her home" by plaintiff. Defendant further alleged that "she has no property or income sufficient for her livelihood and to aid her in defending her action and protecting her good name"; and that plaintiff has considerable property and income ample to support defendant and defray the expenses of her action. Upon these allegations she prayed that plaintiff's action be dismissed, that she be granted decree of divorce from bed and board; and that she be allowed reasonable attorney's fees and other expenses in defending her action and alimony *pendente lite*. The answer is verified as provided in C. S., 529, and not in conformity with C. S., 1661.

After notice, the motion of defendant for alimony *pendente lite* was heard by the presiding judge who, upon hearing the evidence presented by affidavits and pleadings, "finds the facts to be, for the purpose of this motion, substantially as set out in the defendant's answer and cross action, as alleged therein, as fully as if incorporated herein in detail"; and that the plaintiff owns property of the assessed value of $3,000, which is its reasonable value, subject to mortgage of $125.00. Upon these findings of fact, the court rendered the following judgment: "It is therefore considered, ordered, and adjudged by the court that the *defendant* pay into the office of the clerk of the Superior Court of Durham County the sum of $75.00 on or before 1 October, 1937, $50.00 of said amount for Messrs. McDonald and Bennett, attorneys for the *defendant*, and $25.00 for the use of the *defendant* and her benefit, and that thereafter, on the first day of each month the *defendant* shall pay into the office of the clerk of the Superior Court of Durham County the sum of $15.00 per month pending the final trial and determination of this action."

From judgment as signed the plaintiff appealed to the Supreme Court, and assigned error.

J. W. Barbee for plaintiff, appellant.
Bennett & McDonald for defendant, appellee.

WINBORNE, J. The judgment below, as certified to this Court, is wholly inconsistent with the findings of fact, and is meaningless. The

defendant, who is the moving party, is ordered to pay the allowance to herself. Patently the word "defendant" as it first appears therein was inadvertently and erroneously used for the word "plaintiff." However, be that as it may, it is the duty of the court below, and not ours, on application, or *ex mero motu,* to correct the record to speak the truth, and to make entries *nunc pro tunc* that were certainly intended to be made, but omitted by mistake, accident, or inadvertence of the court. Such authority is essential. *Wall v. Covington,* 83 N. C., 144; *Strickland v. Strickland,* 95 N. C., 471; *Cook v. Moore,* 100 N. C., 294, 6 S. E., 795; *Brooks v. Stephens,* 100 N. C., 297, 6 S. E., 81; *Durham v. Cotton Mills,* 144 N. C., 705, 57 S. E., 465; *S. v. Brown,* 203 N. C., 513, 166 S. E., 396.

On the face of the judgment, the plaintiff is not the party aggrieved—and is not, therefore, entitled to appeal. C. S., 632.

The defendant may find it expedient to apply to the court for permission to amend her answer and the verification thereof to meet objections made on this appeal. *Moore v. Moore,* 130 N. C., 333, 41 S. E., 943; *Martin v. Martin,* 130 N. C., 28, 40 S. E., 822; *Nichols v. Nichols,* 128 N. C., 108, 38 S. E., 296; C. S., 1661.

The appeal will be

Dismissed.

P. E. YOUNG v. S. I. LEVIN.

(Filed 5 January, 1938.)

1. Damages § 10—Charge held erroneous as including for jury's consideration elements of damage not supported by allegation or evidence.

The only allegations and evidence on the issue of damages were to the effect that at the time of the assault complained of, plaintiff was suffering from a disease and that the assault greatly aggravated plaintiff's condition and that plaintiff's health had been damaged thereby in a large sum. *Held:* A charge that the jury might consider plaintiff's mental and physical pain and medical and hospital expenses on the issue of actual damage is error, such elements of damage not being supported by allegation or evidence.

2. Appeal and Error § 39e—

Where a charge erroneously includes for the jury's consideration elements of damage not supported by allegation or evidence, a new trial will be awarded, since it may not be determined on appeal whether the verdict was affected by the error.

APPEAL by defendant from *Hill, Special Judge,* at May Term, 1937, of ALAMANCE. New trial.

This is a civil action to recover damages for personal injuries alleged to have been proximately caused by an unlawful assault upon the plaintiff by the defendant.

The plaintiff's evidence tended to show that on 6 September, 1935, the plaintiff went to a building owned by the defendant to remove scales which belonged to the plaintiff, that in removing the scales plaintiff overlooked and left in the building a draft rod, a part of the scales, that plaintiff returned to the defendant's office to procure the draft rod, and when he notified defendant he had come for the rod defendant informed him he could not have the rod until he (plaintiff) had repaired the opening left in the floor of the building from which the scales had been taken, that an argument ensued between the plaintiff and defendant, and that defendant seized plaintiff about the throat and choked him; that a skin disease, known as psoriasis, from which the plaintiff was suffering, was greatly aggravated by the assault, and that the plaintiff was thereby hindered and stopped in his work, and required to expend money for treatment.

The defendant's evidence tended to show that he was in lawful possession of the draft rod, and that he did no more than was reasonably necessary to defend and maintain such possession, and only touched the coattail of the plaintiff in making such defense, and in no way injured the plaintiff.

The issues were answered in favor of the plaintiff, and from judgment in accord with the verdict, the defendant appealed, assigning errors.

John J. Henderson for plaintiff, appellee.
Louis C. Allen for defendant, appellant.

SCHENCK, J. The defendant's eleventh exceptive assignment of error is to the following excerpt from the charge:

"The court instructs you if the plaintiff is entitled to recover actual damages in this case, he would be entitled to recover such sum as you find from the evidence, and by its greater weight, represents actual or compensatory damages sustained by him in consequence of and as the proximate result of defendant's wrongful, unlawful conduct. In a case of this nature these damages are understood to embrace and include a fair and reasonable compensation for any physical injury, if plaintiff has sustained any such injury, a fair and reasonable compensation for mental and physical pain and suffering, if plaintiff has sustained any such; and doctors, hospital, and medical expenses, if the plaintiff has sustained any such, and at the time of the injuries complained of in the action being tried if the plaintiff was suffering from a previous injury or a previous disease, and that injury or that disease was aggravated and

increased by the defendant's wrongful conduct in the action being considered by the jury, then the jury would have the right to take into consideration such increased or aggravated condition, and allow a fair or reasonable compensation for that, . . ."

This assignment of error must be sustained, since there is neither allegation of nor evidence tending to prove that the plaintiff endured any mental pain or suffering, or sustained any expense of doctors or hospitals as the result of the alleged assault. *Smith v. R. R.*, 126 N. C., 712, and cases there cited.

The only element of actual damages alleged is, "That in the condition aforesaid (suffering from psoriasis) the vicious attack made upon this plaintiff by the defendant resulted in severe, serious, and permanent injury, in that it greatly aggravated, accentuated, and accelerated plaintiff's condition," and the general allegation, "That by reason of the assault hereinbefore set forth, plaintiff's health has been damaged as hereinbefore set out in the sum of at least $5,000."

The only evidence of actual damage is the plaintiff's testimony as follows: "This occurrence there in Mr. Levin's office aggravated my condition. I don't know how to explain its effect on my nervous system. Fear and excitement will make it spread. I was much better in 1935, due to the treatments. Since this assault, I have had a very hard time to control the condition. I have not been able to control it. My condition has gotten very much worse. It is very itching. You can see all these scars and eruptions. About eighty per cent of my body is involved by this disease. At the time of this occurrence only about thirty per cent of my body was involved. Since the time of this occurrence my nervous condition has been so bad that I have found it hard to carry on my business and the treatment to my disease is not effective. By reason of that I have been hindered or stopped in my work. I have been required to expend money for treatment."

The foregoing allegations and evidence do not sustain the charge that plaintiff could recover for mental suffering, or for expenses of doctors or hospitals.

While, as was said in *Worley v. Logging Co.*, 157 N. C., 490, wherein it was held error to charge the jury that they could consider as an element of damage loss of mental powers of the plaintiff when there was no evidence of such loss, it may be doubtful that the verdict was affected thereby, we cannot say it was not, and under the authorities in this State the instruction was erroneous.

For the error assigned there must be a

New trial.

STATE v. HOLMES PETERSON.

(Filed 5 January, 1938.)

1. Automobiles § 32e—Evidence held to sustain conviction of second degree murder resulting from reckless operation of truck.

Evidence that defendant, while intoxicated, drove a truck at an excessive speed, ran off the highway, through a yard fence and parallel to the highway for a distance of 122 feet, knocking down a five-inch maple, an eight-inch telephone pole, a nine-inch guy pole, and hit deceased, causing fatal injuries, *is held* sufficient to sustain a conviction of second degree murder.

2. Automobiles § 32d—

Testimony of speed of truck a quarter of a mile from the scene of the accident held competent on authority of *S. v. Leonard*, 195 N. C., 242.

3. Criminal Law § 44c—Failure of defendant to deny accusation of drunken driving held competent as implied admission.

Testimony that defendant was accused immediately after the fatal accident with driving while drunk and that he failed to make satisfactory answer or denial *held* competent as an implied admission, and testimony of declarations later made by defendant which were not responsive to the accusation and were not addressed to the accuser, cannot *be held* competent as a denial of the accusation.

4. Criminal Law § 81c—Error must be prejudicial in order to entitle defendant to a new trial.

In this appeal from a conviction of second degree murder resulting from the reckless operation of a truck, which was driven off the highway for some distance and struck deceased while she was standing in her yard, defendant excepted to the exclusion of testimony that after the accident he asked to telephone officers about an automobile which he contended ran him off the road, causing the accident. There was plenary evidence that defendant was driving drunk and at an excessive speed. *Held:* The exclusion of the testimony cannot be held for reversible error, since the testimony, without more, does not show that the fatal accident was not the result of defendant's culpable negligence even if he were forced off the road, and therefore could not have affected the verdict.

APPEAL by defendant from *Alley, J.*, at August Term, 1937, of YANCEY.

Criminal prosecution, tried upon indictment charging the defendant with the murder of Mrs. S. J. Brown.

The evidence on behalf of the State tends to show that on the afternoon of 24 April, 1937, the defendant was driving a Chevrolet lumber truck on Highway No. 69, traveling west from Burnsville; that as he approached the home of Stonewall Brown, and about ¼ mile therefrom, he was driving at the rate of 75 miles an hour (objection; exception);

that 122 feet east of the Brown home the truck left the highway, and when it came to a stop, the yard fence in front of the house was knocked down, two or three posts were uprooted, one 5-inch maple tree (in yard), one 8-inch telephone pole, and one 9-inch guy pole were cut down, the truck was wrecked, and Mrs. Brown was killed. The width of the road at this point is 23 feet, including shoulders; the fence in front of the Brown home was 13 feet from the hard surface. The body of the deceased was found 52 feet from the front gate in the ditch line behind the truck. It is further in evidence that the defendant was drunk, or under the influence of intoxicating liquor; that three whiskey bottles were found at the scene—two of them at the truck and one of these had about two inches of whiskey in it.

Just after the wreck, Gus McFalls saw the defendant standing in the road. He inquired of him, "Who did this?" His answer was, "I was driving the truck." McFalls then said to the defendant: "You are drunk, aren't you? I can smell liquor on you." His reply was, "Whiskey nothing," and that is all he said.

The defendant sought to show that he asked some of the Brown children if they had a telephone, that he wanted to call the officers and have them get the automobile that drove him off the road. (Objection sustained.)

Two young men were riding with the defendant in the truck, and they both testified that the defendant was not driving at an excessive rate of speed; that he was not drunk, though he had been drinking during the course of the day; and that just prior to the wreck an approaching car driven at a high rate of speed crowded the defendant's truck off the highway.

The defendant was not examined as a witness at the trial.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's Prison for a term of 7 years.

The defendant appeals, assigning errors.

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

Charles Hutchins, E. L. Briggs, and Bill Atkins for defendant.

STACY, C. J. This case is controlled by the decision in *S. v. Trott,* 190 N. C., 674, 130 S. E., 627, where a conviction of second degree murder, resulting from the reckless operation of an automobile, was upheld, and *S. v. Leonard,* 195 N. C., 242, 141 S. E., 736, where the verdict was guilty of manslaughter.

The *Leonard case, supra,* is direct authority for the admission of the evidence tending to show the speed of the truck a quarter of a mile from

the scene of the wreck. Its excessive speed at the time of the crash is demonstrated by the mute evidence of destruction and death. Likewise, the evidence of intoxication is plenary.

The defendant says he was not permitted to show an effort on his part to telephone the officers about the automobile which drove him off the road. It is uncertain from the record whether this evidence was before the jury or not, but if excluded, the exception is without merit. *S. v. Wilson,* 205 N. C., 376, 171 S. E., 338. The request, if made, was not a part of the conversation which the defendant had with the witness Gus McFalls. *S. v. Portee,* 200 N. C., 142, 156 S. E., 783. Nor does it tend to show a justifiable homicide. *S. v. Edwards,* 211 N. C., 555, 191 S. E., 1, cited by defendant, is inapplicable. *Non constat* that the defendant could not have avoided the injury even if he were crowded off the road. This evidence, without more, would not have affected the verdict. The foundation for the application of a new trial is the allegation of prejudice arising from error. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604.

The remaining exceptions are equally untenable. They have all been examined; none is of sufficient moment to warrant a disturbance of the trial.

The verdict and judgment will be upheld.

No error.

W. E. BULLOCK v. THE NORFOLK & WESTERN RAILWAY COMPANY.

(Filed 5 January, 1938.)

1. Railroads § 9—

Evidence that defendant railroad company failed to give timely warning of the approach of its train to a grade crossing on its main line by signals or lowering the gates maintained at the crossing, or otherwise, is sufficient to be submitted to the jury on the issue of negligence.

2. Same—

Where the gates maintained by a railroad company at a grade crossing are raised, the traveling public may assume that the crossing is clear and that they may enter the crossing in safety.

3. Same—Pedestrian struck at crossing held barred by contributory negligence in failing to look in direction from which train approached.

Plaintiff entered a grade crossing on foot while the gates were raised, but was watching a shifting engine on one of the fourteen tracks, when he stepped on the main line track and was struck by defendant's train approaching the crossing from the opposite direction without ringing the bell or giving any signal. Plaintiff testified that he could have seen the

train which struck him in time to have avoided injury if he had looked in the direction from which it approached. *Held:* Plaintiff's contributory negligence bars recovery as a matter of law, plaintiff being required to use reasonable care for his own safety notwithstanding the gates were raised at the time he entered the crossing.

APPEAL by plaintiff from *Parker, J.*, at February Term, 1937, of DURHAM. Affirmed.

This is an action to recover damages for personal injuries which the plaintiff suffered when he was struck by a train owned and operated by the defendant on a grade crossing in the city of Durham.

At the close of all the evidence the defendant moved for judgment as of nonsuit. The motion was allowed, and the plaintiff duly excepted.

From judgment dismissing the action as of nonsuit the plaintiff appealed to the Supreme Court, assigning error in the judgment.

Jos. R. Patton, Jr., and John C. Harmon, Jr., for plaintiff.
Whitwell W. Coxe and Guthrie & Guthrie for defendant.

CONNOR, J. It is conceded that there was evidence at the trial of this action which was sufficient to show that the plaintiff was injured by the negligence of the defendant as alleged in the complaint. *Johnson v. R. R.*, 205 N. C., 127, 170 S. E., 120.

At the time the plaintiff entered upon the crossing the gates which the defendant maintained at the crossing as required by an ordinance of the city of Durham were raised. For this reason the plaintiff was justified in assuming that he could cross defendant's tracks in safety. *Oldham v. R. R.*, 210 N. C., 642, 188 S. E., 106. The evidence for the plaintiff tended to show that the defendant failed to give timely warning, by signals or otherwise, of the approach of its train on its main line to the crossing. This evidence was sufficient to show that the defendant was negligent as alleged in the complaint.

However, plaintiff knew that he would be required to pass over fourteen tracks of the defendant before he could reach a place of safety. Under these circumstances he was required to use reasonable care for his own safety while on the crossing, notwithstanding the gates were raised at the time he entered the crossing. He testified that if he had looked to his right before he stepped on the main line he could have seen defendant's train approaching the crossing and could have avoided his injuries. As he stepped on the main line he was looking to his left, observing a switch engine which was standing on a sidetrack beyond the main line. He did not see the train which struck him until just before it hit him. If he had looked in the direction from which the train approached the crossing he could have seen it, notwithstanding the cars which were standing on the sidetracks to the east of the main line.

By his failure to look to his right, before he stepped on the main line, plaintiff by his own negligence contributed to his injuries, and for that reason he cannot recover on this action damages for the injuries which he suffered when he was struck by defendant's train on its main line at the crossing. *Rimmer v. R. R.*, 208 N. C., 198, 179 S. E., 753.

There is no error in the judgment dismissing the action.

Affirmed.

G. W. TICKLE v. FRANK P. HOBGOOD, ADMINISTRATOR, ET AL.

(Filed 5 January, 1938.)

1. Appeal and Error §§ 37b, 40c—

An application for a bill of particulars, C. S., 534, or a motion to require a pleading to be made more definite and certain, C. S., 537, is addressed to the discretion of the trial court, and his ruling thereon in the exercise of such discretion is ordinarily not reviewable, but it is error for the trial court to rule thereon as a matter of law without the exercise of discretion.

2. Pleadings § 27—

An application for a bill of particulars or a motion to require a pleading to be made more definite and certain is addressed to the discretion of the trial court, and it is error for the trial court to rule thereon as a matter of law without the exercise of discretion.

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

APPEAL by defendant from *Barnhill, J.*, at March Special Term, 1937, of ALAMANCE.

Civil action by ultimate consumer to recover of manufacturer or bottler damages resulting from drinking bottled beverage containing noxious substance.

Plaintiff alleges that on 9 May, 1936, he purchased a bottle of coca-cola, manufactured and placed on the market by the defendant, which contained some deleterious substance; that he became ill from drinking part of its contents, and that he thereby sustained great injury and damage.

Anticipating that the plaintiff would attempt to show other instances of deleterious substances discovered in like products, manufactured under substantially similar circumstances and sold by the defendant "at about the same time," *Enloe v. Bottling Co.*, 208 N. C., 305, 180 S. E., 582, the defendant seasonably asked for a bill of particulars of any such instances which the plaintiff proposed to show and rely upon to make out his case.

The court, "being of opinion that the defendant is not entitled to the order prayed for," overruled defendant's motion "as a matter of law and without exercise of the discretion vested in the court."

From the foregoing disposition of defendant's motion he appeals, assigning error.

Dameron & Young for plaintiff, appellee.
J. Dolph Long and R. M. Robinson for defendant, appellants.

STACY, C. J. An application for a bill of particulars under C. S., 534, or a motion to require a pleading to be made more definite and certain under 537, is addressed to the sound discretion of the trial court, and his ruling thereon, made in the exercise of such discretion, is not reviewable on appeal, except perhaps in extreme cases. *Temple v. Tel. Co.*, 205 N. C., 441, 171 S. E., 630; *S. v. Bryant*, 111 N. C., 693, 16 S. E., 326. Where however, as here, the court denies the motion as a matter of law, without the exercise of discretion, the defendant is entitled to have the application reconsidered and passed upon as a discretionary matter. *Townsend v. Williams*, 117 N. C., 330, 23 S. E., 461; *S. v. Fuller*, 114 N. C., 885, 19 S. E., 797. For procedure in criminal cases see C. S., 4613; *S. v. Wadford*, 194 N. C., 336, 139 S. E., 608.

Error.

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

UNEMPLOYMENT COMPENSATION COMMISSION ET AL. V. O. T. KIRBY ET AL.

(Filed 5 January, 1938.)

Courts § 2b—Where statute creating state commission does not provide for appeal from its decisions, no appeal lies.

The Superior Court has no jurisdiction to hear an appeal from the determination by the Unemployment Compensation Commission of the liability of an employer for contributions under the act, ch. 1, Public Laws, Extra Session 1936, since the act does not authorize an appeal, but the Superior Court is without authority to dismiss the proceeding, but should only dismiss the appeal. Whether the Unemployment Compensation Commission is authorized to conduct hearing and to determine liability of employers for contributions, *quære.*

APPEAL by plaintiff from *Bone, J.*, at October Term, 1937, of PERSON.

Proceeding before Unemployment Compensation Commission to determine liability of respondents for contributions under ch. 1, Public Laws, Extra Session 1936.

From finding and determination that respondents are subject to the provisions of the act (amounts not in dispute, if liability exists), the respondents appealed to the Superior Court of Person County.

His Honor held that he was without jurisdiction to entertain the appeal (as no appeal in such cases is provided in the act, and the parties have not agreed that the attempted appeal may be treated as return to *certiorari*) and dismissed the proceeding, taxing each side with one-half the costs.

From this ruling the Unemployment Compensation Commission appeals, assigning error.

Adrian J. Newton, general counsel, and J. C. B. Ehringhaus, Jr., assistant counsel for plaintiff, appellant.

No counsel appearing for defendant.

STACY, C. J. Whether the Unemployment Compensation Commission is authorized to conduct hearings and to determine the liability of employers for contributions under ch. 1, Public Laws, Extra Session 1936, is not before us for decision. Conceding, without deciding, that such authority exists, the statute is silent upon the subject of any appeal from such determination. His Honor, therefore, was correct in holding that he was without jurisdiction to entertain the appeal. His reasoning is sound, but he inadvertently went beyond his authority in dismissing the proceeding. He should have dismissed the appeal and left it there.

The cases cited by appellant, *Higdon v. Light Co.*, 207 N. C., 39, 175 S. E., 710, and *S. v. Carroll*, 194 N. C., 37, 138 S. E., 339, are inapplicable, as they deal with statutes providing for appeal without prescribing the procedure. Here no appeal is authorized.

Modified and affirmed.

WILL WEILL ET AL. v. C. L. WEILL ET AL.

(Filed 5 January, 1938.)

1. Wills § 33c—Remainder over to a class after life estate held to vest upon death of testator.

The will in question provided that testator's wife should have the income from his property, real and personal, for life, and at her death all her indebtedness should be paid, and the property divided equally

among testator's sister and brothers, or their heirs. *Held:* The remainder over to the class vests upon the death of testator and not upon the death of the life tenant.

2. Same—

The law favors the early vesting of estates, and as a general rule a remainder over to a class after a life estate vests immediately upon the death of the testator, unless a contrary intent appears from the will.

APPEAL by defendants from *Grady, J.*, at November-December Term, 1937, of WAYNE.

Civil action for construction of will and declaratory judgment, submitted as controversy without action on agreed statement of facts.

From judgment sustaining contention of plaintiffs the defendants appeal.

Langston, Allen & Taylor for plaintiffs, appellees.
D. C. Humphrey for defendants, appellants.

STACY, C. J. On the hearing the questions in difference and the matters to be determined were properly made to depend upon the construction of the following clause in the will of Vance M. Weill, late of Wayne County:

"I will to my wife, Julia C. Weill, to have all the net income from all of my real and personal property her lifetime and at her death, after all her indebtedness is paid, all of my estate shall be divided among my sister and brothers equally or their airs."

The record states that Vance M. Weill died on 19 December, 1936, leaving him surviving his widow, Julia C. Weill, six brothers and one sister, and three nieces and one nephew, children of a deceased brother, all parties to the present proceeding.

The matters submitted for determination turn upon whether the remainders created in the above clause of the will are vested or contingent.

The plaintiffs say they are vested, *i.e.*, at the death of the testator the law called the roll of "sister and brothers . . . or their airs," and those from the class who then answered take the estate by way of remainder, only the enjoyment being postponed until the death of the life tenant. *Richardson v. Richardson,* 152 N. C., 705, 68 S. E., 217; *Power Co. v. Haywood,* 186 N. C., 313, 119 S. E., 500. This is questioned by the defendants. The trial court held that the remainders are vested and that the trust agreement, so predicated, is a permissible use of the property, all the interested parties being signatory thereto. With this construction and declaration of the rights of the parties we agree. *Trust Co. v. Lindsay,* 210 N. C., 652, 188 S. E., 94.

The general rule is that a limitation by way of remainder to a class, following a bequest of the same property for life, vests immediately upon the death of the testator unless a contrary intent appear from the will. *Witty v. Witty,* 184 N. C., 375, 114 S. E., 482; *Baugham v. Trust Co.,* 181 N. C., 406, 107 S. E., 431; *Bowen v. Hackney,* 136 N. C., 187, 48 S. E., 633. The law favors the early vesting of estates. *Westfeldt v. Reynolds,* 191 N. C., 802, 133 S. E., 168; *Goode v. Hearne,* 180 N. C., 475, 105 S. E., 5; *Bank v. Murray,* 175 N. C., 62, 94 S. E., 665.

No question is presented by the plaintiffs *inter se,* or between the sister and brothers of the testator on the one hand, and his nieces and nephew on the other. It is agreed that as among the plaintiffs, if the remainders be vested, the division shall be *per stirpes. Fulton v. Waddell,* 191 N. C., 688, 132 S. E., 669; *Bowen v. Hackney, supra.*

Upon the record as presented no reason appears for disturbing the judgment.

Affirmed.

STATE v. HENRY MOSLEY.

(Filed 5 January, 1938.)

Criminal Law § 77e: Homicide § 28—Case remanded for correction of record to show proper verdict of jury in this homicide prosecution.

The record disclosed that the jury, in this homicide prosecution, returned a verdict simply of "guilty," and in settling the case on appeal the trial court found that the clerk inadvertently failed to record the question by the court, "Guilty of what?" and the answer by the jury, "Guilty of murder in the first degree." It did not appear that the judge's findings were made in open court and in the presence of the defendant, or that the record was corrected to speak the truth. *Held:* The case is remanded on motion of the State for a correction of the record.

APPEAL by defendant from *Harding, J.,* at May Term, 1937, of FORSYTH.

Criminal prosecution tried upon indictment charging the defendant with the murder of Clarence Black.

Verdict: Guilty.

Judgment: Death by asphyxiation.

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

Phin Horton, Jr., John C. Wallace, and Richmond Rucker for defendant, appellant.

WINBORNE, J. The record on appeal discloses that the verdict as recorded is simply "Guilty." However, in settling the case on appeal, the judge below finds as facts that when the jury announced its verdict of guilty the court said to the jury, "Guilty of what?" That the jurors answered for their verdict: "Guilty of murder in the first degree," and that the clerk in writing the minutes inadvertently left out the said question and answer. Nevertheless it does not appear that the said findings of fact were made in open court, that the defendant was present in person, or that the records have been corrected to speak the truth.

Motion of the State to remand the cause for correction of the record will be allowed in accordance with *S. v. Brown,* 203 N. C., 513, 166 S. E., 396.

Remanded.

STATE v. JAMES SERMONS.

(Filed 5 January, 1938.)

Criminal Law § 80—

Where defendant, convicted of a capital felony and allowed to appeal *in forma pauperis,* fails to make out and serve his statement of case on appeal within the time allowed, he loses his right to bring up the "case on appeal" and the appeal will be dismissed on motion of the Attorney-General after an examination of the record proper discloses no error on its face.

MOTION by State to docket and dismiss appeal.

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

No counsel for defendant.

STACY, C. J. At the September Term, 1937, of Forsyth Superior Court, the defendant herein, James Sermons, was tried upon an indictment charging him with the murder of one Carlile Miller, which resulted in a conviction of murder in the first degree and sentence of death by asphyxiation. From the judgment thus entered the prisoner gave notice of appeal to the Supreme Court and was allowed 40 days within which to make out and serve statement of case on appeal, and the solicitor was given 30 days thereafter to prepare and file exceptions or countercase, but nothing has been done towards perfecting the appeal, *albeit* the prisoner was allowed to appeal *in forma pauperis,* and the time for serving statement of case on appeal has now expired. *S. v. Brown,* 206 N. C., 747, 175 S. E., 116.

Having lost his right to bring up the "case on appeal," *S. v. Moore,* 210 N. C., 686, the prisoner is in no position to resist the motion of the Attorney-General to docket and dismiss. *S. v. Johnson,* 205 N. C., 610, 172, S. E., 219; *S. v. Rector,* 203 N. C., 9, 164 S. E., 339. As is customary in capital cases, however, we have examined the record to see that no error appears upon the face thereof, such errors, if any, being cognizable *sua sponte. S. v. Robinson, ante,* 536.

We have discovered no defect on the face of the record proper. *S. v. Edney,* 202 N. C., 706, 164 S. E., 23; *S. v. Hamlet,* 206 N. C., 568, 174 S. E., 451.

Motion allowed. Appeal dismissed.

D. T. BAILEY, Z. L. TALTON, AND J. E. WOODALL v. CAROLINA POWER & LIGHT COMPANY, JOHNSTON COUNTY ELECTRIC MEMBERSHIP CORPORATION, J. W. WOODARD, SNEAD SANDERS, A. J. WHITLEY, JR., AND G. T. SCOTT, INDIVIDUALLY, AND AS DIRECTORS OF THE JOHNSTON COUNTY ELECTRIC MEMBERSHIP CORPORATION.

(Filed 2 February, 1938.)

1. Electricity § 11: Parties § 1: Contracts § 19—Nonmembers may not challenge validity of acts of directors of electric membership corporation.

This action was instituted to restrain a private power company and an electric membership corporation formed under the provisions of ch. 291, Public Laws of 1935, from entering into a contract under which the private company agreed to construct certain rural electric lines, and the membership corporation agreed not to construct parallel and competing lines. The trial court found, upon supporting evidence, that plaintiffs were not members of the electric membership corporation. *Held:* By express provision of sec. 11, ch. 291, Public Laws of 1935, no person, although a member of the community proposed to be serviced by an electric membership corporation, is entitled to service from such corporation unless he is a member thereof, and since plaintiffs therefore have no rights or interests which might be affected by the management, acts or conduct of the affairs of the membership corporation, they are without standing in court and may not maintain this action challenging the validity of acts of the directors of the corporation, nor does the fact that plaintiffs are eligible and might hereafter become members and maintain an action under the principle announced in *Gorrell v. Water Supply Co.,* 124 N. C., 328, affect this result, since they have no rights or interest in the management of the corporation until they are members.

2. Appeal and Error § 40a—Immaterial findings may be stricken from the record.

Where certain findings of fact are sufficient to sustain the judgment dismissing the action for that plaintiffs have no standing in court and

are not entitled to maintain the action, other findings in regard to the motives of defendants in agreeing to do the act sought to be restrained, are immaterial and should be stricken from the record.

APPEALS by plaintiffs and by defendants from *Grady, J.*, at Chambers, in the town of Clinton, N. C., on 20 August, 1937. Affirmed in plaintiffs' appeal; modified in defendants' appeal.

This is an action for judgment restraining and enjoining the defendants Carolina Power & Light Company and Johnston County Electric Membership Corporation from consummating or performing an agreement, in writing, which was entered into by and between said defendants on 8 July, 1937, on the ground (1) that said agreement, by reason of its provisions, is in violation of certain statutes declaring the public policy of this State with respect to such agreements, and is for that reason unlawful and void; and (2) that said agreement, if consummated and performed by said defendants, will wrongfully and unlawfully deprive the plaintiffs and other residents of certain rural communities of Johnston County, North Carolina, of their right to have electric service furnished to them by the defendant Johnston County Electric Membership Corporation, in accordance with the provisions of its charter or certificate of incorporation, if and when they shall desire such service.

The action was begun in the Superior Court of Johnston County on 7 August, 1937. It was heard by consent of the parties by Judge Grady at his chambers in the town of Clinton, N. C., on 20 August, 1937, on an order duly served on the defendants to show cause why a temporary restraining order made in the action should not be continued until the final hearing.

At this hearing Judge Grady found the facts as set out in the judgment which he rendered as follows:

"1. Summons was issued herein on 7 August, 1937, and was duly served on all the defendants, who have appeared and filed answers to the complaint filed in the action by the plaintiffs.

"2. The plaintiffs are farmers, residing in rural sections of Johnston County. The Carolina Power & Light Company is a corporation and as such is engaged in the business of manufacturing and selling electric energy, with its principal office in the city of Raleigh, N. C.; Johnston County Electric Membership Corporation is a corporation created under and by virtue of the provisions of chapters 288 and 291, Public Laws of North Carolina, 1935; the defendants J. W. Woodard, Snead Sanders, A. J. Whitley, Jr., and W. T. Scott are residents of Johnston County, and constitute a majority of the board of directors of the Johnston County Electric Membership Corporation.

"3. On 27 May, 1936, pursuant to letters received by and personal appeals made to them, a number of rural citizens of Johnston County

met in the office of S. C. Oliver, county farm agent, there being present at said meeting from 42 to 55 persons; 51 projects for the electrification of rural districts of Johnston County were represented at said meeting. J. W. Woodard, A. F. Holt, Jr., Dr. Wade H. Atkinson, A. J. Whitley, Jr., Ira C. Whitley, Snead Sanders, and Cheater Barbour were duly elected as directors of a corporation to be formed for the electrification of the several rural sections of the county represented at said meeting. Said directors met immediately after the meeting and elected J. W. Woodard as chairman and A. F. Holt, Jr., as secretary of the board. All three of the plaintiffs were present at said meeting.

"4. At a meeting of the board of directors held on 27 May, 1936, it was ordered that a corporation be formed under the law to be known as the Electric Membership Corporation of Johnston County. Full authority was requested and given to them for such corporate organization by the North Carolina Rural Electrification Authority, and thereafter a certificate of incorporation was issued by the Secretary of State and duly recorded in Johnston County. Said permit was issued on 16 June, 1936, and the Certificate of Incorporation was issued from the office of the Secretary of State on the same day. It is recorded in Corporation Book No. 3, at page 231, of Johnston County.

"5. On 23 June, 1936, a construction loan contract was entered into between the Federal Rural Electrification Administration and the Johnston County Electric Membership Corporation, under which the United States Government was to lend the sum of $80,000.00 for the construction of the first part of the Johnston County project, consisting of approximately three hundred miles of electric lines.

"On 14 August, 1936, the Federal Rural Electrification Authority at Washington City increased its offer to lend to $310,000.00; and a mortgage was executed by the Johnston County Electric Membership Corporation to the Federal Government to secure said loan, which mortgage is recorded in Book 361, at page 226, of Johnston County registry, which record is made a part of this finding of fact.

"This contract with the Federal Rural Electrification Authority was made for the benefit of something like 1,500 citizens residing in the rural and unelectrified portions of Johnston County and parts of Wake County and other territory referred to in the minutes of the board of directors of the Johnston County Electric Membership Corporation.

"6. On 21 September, 1936, the Johnston County Electric Membership Corporation entered into a contract with the Thompson Electrical Company of Raleigh for the construction of the first section of the project of the Johnston County Electric Membership Corporation, consisting of seventy-seven miles of electric lines; and this contract was approved by the Federal Rural Electrification Authority.

"7. In June, 1936, the Carolina Power & Light Company began the construction of electric lines in Johnston County, paralleling those intended to be constructed by the Johnston County Electric Membership Corporation.

"Suits were instituted in the Superior Courts of this State, one by the Johnston County Electric Membership Corporation against the Carolina Power & Light Company and one by the Carolina Power & Light Company against the Johnston County Electric Membership Corporation.

"The court is of the opinion that these two suits, and their final outcome, have nothing to do with the rights of the parties in this action; but in case the facts may be deemed material, the records in said two causes are hereby referred to and made a part hereof as fully as if set out in detail.

"8. On 8 July, 1937, the defendants' board of directors, without requesting authority therefor from the 40 or 50 men who originally elected them, accepted a proposition from the Carolina Power & Light Company, the said proposition and acceptance being as follows:

" 'RALEIGH, N. C., 8 July, 1937.

" 'THE JOHNSTON COUNTY ELECTRIC
MEMBERSHIP CORPORATION,
SMITHFIELD, N. C.

" 'DEAR SIR: As a compromise of the controversy between you and the Carolina Power & Light Company as to providing rural electrification in Johnston County, we offer to you, for your consideration and acceptance, the following as conditions of settlement:

" '1. The Carolina Power & Light Company shall immediately resume the construction of rural electric distribution lines in Johnston County, and shall diligently pursue such construction until it has completed and placed in operation 325 miles of such lines, which shall include the 221 miles of lines on company's present program, and 104 miles which shall be selected and located by a majority of the board of directors of the Johnston County Electric Membership Corporation as now constituted, and shall be the lines which in their judgment are most desirable and feasible. Rights of way for such 104 miles shall be furnished to the company without cost. The 325 miles of line as provided for herein shall not include the lines built prior to 1936, but shall be in addition thereto. Such 325 miles are to be completed during 1937. In addition, the company agrees to make a canvass of any other lines in Johnston County in which the majority of the directors may be interested and agrees to construct such of these rural electric lines as may be found to be feasible, or justified; the rights of way shall be furnished to the company without cost.

" 'Should the company and the directors fail to agree as to the feasibility of any such lines, then a third party, some engineer, or experienced person agreeable to both parties, is to be selected to act as arbitrator and determine the feasibility of such lines.

" '2. The Carolina Power & Light Company shall pay an amount sufficient to reimburse the Johnston County Electric Membership Corporation and its directors for all expenditures heretofore made for administrative and other expenses of the corporation and for the expenses of the board of directors heretofore incurred in work in behalf of the corporation, and for any further expenses or costs incurred in the administration of said corporation or in closing up the same, including expenses and costs of any kind, for which the said membership corporation shall be legally liable to the Thompson Electrical Company, Spoon & Lewis, Engineers, or the Federal Rural Electrification Administration at Washington, D. C., provided that the amount of reimbursement for all expenditures and costs of every kind by the Membership Corporation and/or its directors shall in no event exceed the sum of $15,000.00.

" 'It is agreed that the aforesaid sum of $15,000.00 shall be deposited as hereinafter stated by the Carolina Power & Light Company in the First & Citizens Bank & Trust Company at Smithfield, N. C., to the account of R. E. Batten, trustee for the Johnston County Electric Membership Corporation. The said money shall be disbursed by the bank upon the order of the said trustee in payment of lawful obligations of the Membership Corporation which are approved by a majority of the board of directors of said corporation as said board is now constituted. When all such obligations are paid, after approval by a majority of the said board of directors as aforesaid, a statement thereof shall be furnished to the Carolina Power & Light Company, and if the aggregate amount of such obligations be less than $15,000.00, the balance of the amount deposited to the credit of R. E. Batten, trustee, as aforesaid, shall be returned to the Carolina Power & Light Company.

" '3. The deposit of the aforesaid sum of $15,000.00 in the First & Citizens Bank & Trust Company at Smithfield, N. C., to the credit of R. E. Batten, trustee, for the Membership Corporation, shall be made by the Carolina Power & Light Company immediately after the Membership Corporation duly accepts the terms and provisions of this letter, as the agreement between the parties, and the acceptance is evidenced by the signing of this letter in the name of the Membership Corporation by its president duly authorized in the space provided for such acceptance at the bottom of this letter, and the original of this letter so accepted is returned to the Carolina Power & Light Company.

" 'The aforesaid sum of $15,000.00, when deposited, shall not be subject to disbursement upon the order of the trustee, until after the action

instituted by the Membership Corporation in the Superior Court of Johnston County against the Carolina Power & Light Company has been nonsuited by appropriate judgment and the temporary injunction therein issued has been duly dissolved.

" '4. In consideration of the agreement of the Carolina Power & Light Company to construct rural lines as set forth in paragraph 1 hereof, and in consideration of the aforesaid sum of $15,000.00, to be deposited in the First & Citizens Bank & Trust Company at Smithfield, N. C., to the credit of R. G. Batten, trustee, for the Membership Corporation, the Membership Corporation hereby agrees and binds itself not to construct or operate any rural electric lines or other facilities paralleling or duplicating any of the lines and facilities of the Carolina Power & Light Company as the same are now constructed and operated, or as any other lines may be constructed and operated by the Carolina Power & Light Company within any territory in which the Johnston County Electric Membership Corporation may be authorized to engage in business. The said Membership Corporation hereby waives, in favor of Carolina Power & Light Company, any right which it has or claims to have to construct and operate rural electric lines or other facilities within the same territory or along the same roads or highways where the Carolina Power & Light Company now has or may hereafter build and operate such lines or facilities.

" '5. At the time that the deposit of the aforesaid sum of $15,000.00 is made in the First & Citizens Bank & Trust Company at Smithfield, N. C., a copy of this letter duly signed in behalf of both the parties to this agreement shall be filed with the said Bank & Trust Company.

" 'If you agree to the terms and provisions of settlement as set forth in this letter, please have the same signed in your name by your president, duly authorized, and return the original of this letter to the Carolina Power & Light Company as constituting the agreement between us.

Yours truly,

CAROLINA POWER & LIGHT COMPANY,

By.....

President.'

" 'We accept the terms and provisions of the foregoing letter and hereby agree to same.

JOHNSTON COUNTY ELECTRIC MEMBERSHIP CORPORATION,

By.....

President.'

"The purpose of the Carolina Power & Light Company in making said offer and in taking over the entire project under contemplation by

the Johnston County Electric Membership Corporation was to acquire a monopoly of the business in which it was engaged in the rural districts of Johnston and other counties; and it did have that effect as a matter of fact.

"On 3 August, 1937, the Federal Rural Electrification Administration refused to authorize the acceptance of the proposal referred to in the eighth finding of fact.

"9. Neither of the plaintiffs, at the time this action was commenced, was a member of the Johnston County Electric Membership Corporation. Neither had complied with the provisions of its certificate of incorporation, or of its by-laws, so as to become a member of said corporation.

"After the contract was entered into between the Johnston County Electric Membership Corporation and the Carolina Power & Light Company on 8 July, 1937, the plaintiffs attempted to file with the directors of said corporation applications and checks in order that they might be elected to membership in said corporation as provided by its certificate of incorporation and by-laws; but the said directors refused to act upon said applications.

"10. The action of the board of directors of the Johnston County Electric Membership Corporation, or of a majority of said board, in selling out, lock, stock and barrel, to the Carolina Power & Light Company, was a plain breach of faith on their part, and a violation of the trust imposed in them by the men who elected them at the meeting held in the office of the county farm agent, at Smithfield, on 27 May, 1936. The whole transaction, it seems to the court, was tainted with *mala fides,* and if any harm had followed, which could be corrected by a court of equity, an injunction might lie.

"11. But under the contract between the two defendant corporations, the plaintiffs have not been injured at all. In fact, they are getting exactly what they wanted—electric energy in the rural districts of Johnston County; and it does not appear that the tolls will be any larger than they would have been if the Johnston County Electric Membership Corporation had proceeded to build electric lines as originally contemplated. In fact, it appears that the defendant Carolina Power & Light Company intends and is actually promising and obligating itself to construct a greater mileage of electric lines in the rural districts of Johnston County than was contemplated in the original plan of the Johnston County Electric Membership Corporation. Rates are to be fixed by the State Utility Commissioner; and the court is unable to see where, how, or when the plaintiffs have been damaged.

"The Johnston County Electric Membership Corporation was, by its charter, a nonprofit sharing corporation. The only advantage to be

reaped by its members was the receipt of electric energy; and they are getting that through the contract which the plaintiffs now seek to have set aside. At most, this is a case of *injuria absque damno.*

"12. The defendants filed with the court certain papers which purport to have been signed by 35 of the men who made up the meeting in the office of the county farm agent, at Smithfield, N. C., on 27 May, 1936, in which they ratified the action of the Johnston County Electric Membership Corporation in selling out to the Carolina Power & Light Company; but the papers are not dated; counsel for plaintiffs asked counsel for defendants when and where the papers were signed; no answer to this inquiry has been given by counsel for defendants. It is apparent to the court that the papers were signed after this action was begun; there is no evidence, however, tending to show the date on which they were signed.

"Various other facts might be found by the court, as required by counsel; but as it appears most certain that the plaintiffs have no standing in a court of equity, the finding of other facts is not necessary.

"Upon the facts as found, it is now considered, ordered and adjudged by the court that the injunction prayed for in the complaint be and the same is denied; and that this action be and the same is dismissed at the cost of the plaintiffs and the sureties on their prosecution bond.

"This 20 August, 1937.

HENRY A. GRADY,
Judge Presiding."

To the foregoing judgment both plaintiffs and defendants excepted and appealed to the Supreme Court, assigning errors as set out in the record.

I. M. Bailey and E. J. Wellons for plaintiffs.

A. Y. Arledge, Abell & Shepard, Pou & Emanuel, and W. H. Weatherspoon for defendant Carolina Power & Light Company.

Paul D. Grady, R. E. Batten, G. A. Martin, and L. R. Varser for defendants Johnston County Electric Membership Corporation and J. W. Woodard, Snead Sanders, A. J. Whitley, Jr., and W. T. Scott, individually, and as directors of said corporation.

CONNOR, J. The Johnston County Electric Membership Corporation was organized under and pursuant to the provisions of chapter 291, Public Laws of North Carolina, 1935. The execution of its certificate of incorporation was authorized in accordance with the provisions of said chapter 291, Public Laws of North Carolina, 1935, and of chapter 288, Public Laws of North Carolina, 1935.

The provisions of chapter 291, Public Laws of North Carolina, 1935, with respect to the organization of an electric membership corporation are as follows:

"Sec. 3. When any number of persons residing in the community not served, or inadequately served, with electrical energy desire to secure electrical energy for their community and desire to form corporations to be known as electric membership corporations for said purpose, they shall file application with the North Carolina Rural Electrification Authority for permission to form such corporation.

"Sec. 4. Whenever any such application is made by as many as five members of the community, the North Carolina Rural Electrification Authority shall cause a survey of said territory to be made, and if, in its opinion, the proposal is feasible, shall issue to said community a privilege for the formation of a corporation as hereinafter set out. Whenever an application has been filed by any community with the North Carolina Rural Electrification Authority, and its application for formation of an electric membership corporation has been approved, the same may be formed as hereinafter provided.

"Sec. 5. *Formation authorized.* Any number of natural persons not less than three may, by executing, filing and recording a certificate as hereinafter provided, form a corporation not organized for pecuniary profit, for the purpose of promoting and encouraging the fullest possible use of electric energy in the rural sections of the State by making electric energy available to inhabitants of the State at the lowest cost consistent with sound economy and prudent management of the business of such corporations. Whenever an electric membership corporation is formed in the manner herein provided, all property owned by the said corporation and used exclusively for the purpose of said corporation shall be held in the same manner and subject to the same taxes and assessments as property owned by any county or municipality of the State, so long as said property is owned by said electric membership corporation and is used for the purpose for which said corporation was formed.

"Sec. 6. The certificate of incorporation shall be entitled and endorsed 'Certificate of Incorporation of ..... Electric Membership Corporation' (the blank space being filled in with the name of the corporation), and shall state:

"(a) The name of the corporation, which name shall be such as to distinguish it from any other corporation.

"(b) A reasonable description of the territory in which its operations are principally to be conducted.

"(c) The location of its principal office, and the post office thereof.

"(d) The maximum number of directors, not less than three.

"(e) The names and post office addresses of the directors, not less than three, who are to manage the affairs of the corporation, for the first year of its existence, or until their successors are chosen.

"(f) The period, if any, limited for the duration of the corporation. If the duration of the corporation is to be perpetual, this fact should be stated.

"(g) The terms and conditions upon which members of the corporation shall be admitted.

"(h) The certificate of incorporation may also contain any provision, not contrary to law, which the incorporators may choose to insert for the regulation of its business, and for the conduct of the affairs of the corporation; and any provisions creating, defining, limiting, or regulating the powers of the corporation, its directors and members.

"Sec. 7. *Execution and filing of certificate of incorporation.* The natural persons executing the certificate of incorporation shall be residents of the territory in which the principal operations of the corporation are to be conducted, who are desirous of using electric energy to be furnished by the corporation.

"The certificate of incorporation shall be acknowledged by the subscribers before an officer qualified to administer oaths. When so acknowledged, the certificate may be filed in the office of the Secretary of State, who shall forthwith prepare a certified copy or copies thereof, and forward one to the clerk of the Superior Court in each county in which a portion of the territory of the corporation is located, who shall forthwith file such certified copy or copies in their respective offices and record the same as other certificates of incorporation are recorded. As soon as the provisions of this section have been complied with, the proposed corporation described in the certificate so filed shall be and constitute a body corporate."

It is provided in section 8 of said chapter that "each corporation formed hereunder shall have a board of directors, and the powers of a corporation shall be vested in and exercised by a majority of the directors in office. The directors of the corporation, other than those named in its certificate of incorporation, shall be elected annually by the members entitled to vote. The directors must be members and shall not be entitled to compensation for their services. The board shall elect annually from its own number a president and a secretary."

It is provided in section 9 of said chapter that the board of directors of a corporation organized under and pursuant to its provisions "shall have power to do all things necessary or convenient in conducting the business of the corporation, including, but not limited to, (a) the power to adopt and amend by-laws for the management and regulation of the affairs of the corporation.

"The by-laws of a corporation may make provisions, not inconsistent with law, or its certificate of incorporation, regulating the admission, withdrawal, suspension or expulsion of members; the transfer of membership; the fees and dues of members, and the termination of membership on nonpayment of dues or otherwise; the number, times, and manner of choosing, qualifications, terms of office, official designations, powers, duties and compensation of officers; defining a vacancy in the board, or in any office and the manner of filling it; the number of members, not less than a majority, to constitute a quorum at meetings, the date of the annual meeting, and the giving notice thereof and the holding of special meeting and the giving notice thereof, the terms and conditions upon which the corporation is to render service to its members; the disposition of the revenues, and receipts of the corporation; regular and special meetings of the board, and the giving notice thereof.

"(b) To appoint agents and employees and to fix their compensation and the compensation of the officers of the corporation.

"(c) To execute instruments.

"(d) To delegate to one or more of the directors or to the agents and employees of the corporation such powers and duties as it may deem proper.

"(e) To make its own rules and regulations as to procedure."

It is provided in section 10 of said chapter "that the corporate purpose of each corporation formed hereunder shall be to render service to its members only, and no person shall become or remain a member unless such person shall use energy supplied by such corporation and shall have complied with the terms and conditions in respect to membership, contained in the by-laws of such corporation."

By virtue of the provisions of chapter 291, Public Laws of North Carolina, 1935, no person, although he is a member of the community for which and a resident of the territory in which an electric membership corporation organized under and pursuant to the provisions of said chapter, is authorized to construct and operate lines and other facilities for the transmission and distribution of electric energy, is entitled to service from such corporation, unless he is or shall become a member of such corporation, in accordance with the provisions of its certificate of incorporation or by-laws. It is so expressly provided by section 11 of said chapter. This provision is consistent with all the provisions of said chapter with respect to the organization and business of such corporations. Such person, therefore, until he becomes a member of the corporation, has no legal right which is or may be affected by the organization of the corporation, or by the management of its business, or the conduct of its affairs by its board of directors. For that reason, such person cannot maintain an action in which the validity of any action of the

board of directors of the corporation in the management of its business or in the conduct of its affairs, is challenged, on the ground that such action was unlawful or has unlawfully deprived him of a legal right.

No person, although he is a member of the community for which and a resident of the territory in which an electric membership corporation organized under and pursuant to the provisions of chapter 291, Public Laws of North Carolina, 1935, is authorized to construct and operate lines and other facilities for the transmission and distribution of electric energy, is entitled to service by such corporation because he attended meetings of members of the community and residents of the territory, at which proceedings were had preliminary to the organization of the corporation, unless after the organization of the corporation he has become a member of the corporation in accordance with the provisions of its certificate of incorporation and by-laws. Such person, until he becomes a member of the corporation, has no rights which are or may be affected by the organization of the corporation, or by the management of its business or the conduct of its affairs by its board of directors. It cannot be held that such person is a beneficiary of the corporation, because he may be eligible to membership in the corporation and for that reason may maintain an action in which the validity of an act of the board of directors of the corporation is challenged, on the principle of *Gorrell v. Water Supply Co.*, 124 N. C., 328, 32 S. E., 720.

In the instant case, the court found that neither of the plaintiffs was a member of the Johnston County Electric Membership Corporation at the commencement of their action on 7 August, 1937. This finding of fact is supported by all the evidence, with none to the contrary. For this reason, there is no error in the judgment dismissing the action. No right of the plaintiffs or of either of them has been affected, wrongfully or otherwise, by the act of the board of directors of the Johnston County Electric Membership Corporation in accepting the proposition of the Carolina Power & Light Company, contained in the letter, dated 8 July, 1937. See *Alabama Power Company v. Harold L. Ickes, as Federal Emergency Administrator of Public Works,* decided at October Term, 1937, of the Supreme Court of the United States. In that case it was held that as no legal or equitable right of the plaintiff had been invaded by the defendant by his official acts, as alleged in the bill of complaint, the plaintiff was without standing in the Court to challenge the validity of said official acts. Accordingly, the judgment dismissing the bill of complaint was affirmed.

On their appeal to this Court, the defendants contend that findings of fact made by the court, and set out in the judgment, with respect to the motives of the defendants in entering into the agreement in writing dated 8 July, 1937, and with respect to the validity of said agreement,

are not supported by the evidence. These findings of fact are immaterial, and should be stricken from the record. It is not without significance that no member of the Johnston County Electric Membership Corporation, or other person whose rights, legal or equitable, may be affected by the agreement entered into by and between the Carolina Power & Light Company and the Johnston County Electric Membership Corporation, has joined the plaintiffs in this action, although invited to do so. The record in this appeal discloses that this action was instituted by the plaintiffs upon assurance that they would not be called upon to bear any part of the expenses incurred in maintaining it.

On the facts set out in paragraph 9 of the judgment, the action was properly dismissed. For this reason the judgment as modified in accordance with this opinion is

Affirmed.

NANCY FLAKE, BY HER NEXT FRIEND, MRS. W. F. FLAKE, v. THE GREENSBORO NEWS COMPANY, NORTH CAROLINA THEATRES, INC., L. MELTS, TRADING AND DOING BUSINESS UNDER THE STYLE AND FIRM NAME OF "MELTS BAKERY," ANTON SCIBILIA AND NICK BOILA, TRADING AND DOING BUSINESS UNDER THE STYLE AND FIRM NAME OF "FOLIES DE PAREE."

(Filed 2 February, 1938.)

1. Libel and Slander § 1—Classes of libel defined.

The three classes of libel are (1) publications obviously defamatory which are termed libels *per se*, (2) publications susceptible of two interpretations, one defamatory and the other not, and (3) publications not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances, which are termed libels *per quod*.

2. Libel and Slander § 2—

When an unauthorized publication is libelous *per se*, malice and damage are presumed as a matter of law, even though no actual pecuniary loss is in fact suffered, and no proof of injury is required.

3. Libel and Slander § 4—

When an unauthorized publication is susceptible of two interpretations, one libelous and the other not, it is for the jury to determine under the circumstances whether the publication is defamatory and was so understood by those who saw it.

4. Libel and Slander § 3—

In publications which are libelous *per quod*, the innuendo and special damages must be alleged and proved.

5. Libel and Slander § 2—

Caricatures or other signs written or printed, as well as written words, may be libelous and actionable *per se*.

6. Same—Matter is libelous per se if, standing alone, it tends to expose plaintiff to hatred, contempt, ridicule, or aversion.

An unauthorized publication is libelous *per se* when, standing alone and stripped of any innuendo, it is susceptible of but one meaning, which would tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned or avoided, and it is not necessary that the words charge the commission of a crime or the violation of law, or impute moral turpitude or immoral conduct.

7. Same—

In determining whether a publication is libelous *per se*, the courts will consider the publication in the sense in which it would be naturally understood by ordinary men, and not as it might be understood by those of morbid imaginations or supersensitiveness.

8. Same—

An unauthorized publication is libelous *per se* if it charges a person with having committed an infamous crime, or with having an infectious disease, or tends to subject him to ridicule, contempt or disgrace, or tends to injure him in his trade or profession.

9. Libel and Slander § 5—

The publication of a libelous picture of plaintiff is sufficient to support a cause of action, and it is immaterial that the printed words tend to identify the picture as that of another person.

10. Libel and Slander § 2—Publication of picture of plaintiff as disclosed by evidence held not to constitute libel per se.

The evidence disclosed that by mistake the picture of plaintiff dressed in a bathing suit was published in a newspaper advertisement instead of the intended picture of a member of a vaudeville troupe, that the accompanying printing indicated that the person in the picture was a member of the troupe which was to stage a performance in the city, and that she recommended the bread manufactured by one of defendants for the preservation of a slim figure and for energy, and described her under the name of a member of the troupe as an "exotic red-haired Venus." *Held:* The publication is not libelous *per se*, since neither the representation that plaintiff recommended a legitimate article of merchandise constituting an item of daily food, nor that she was a member of a troupe engaged in a legitimate and well recognized type of professional entertainment, tends to disgrace and degrade plaintiff, or to hold her up to public hatred, contempt, ridicule or aversion, it not being alleged or contended that there was any libel through distortion of the photograph.

11. Damages § 1—

The law seeks to compensate for damage to the person, reputation or property, and mere hurt and embarrassment are not subjects of compensatory damages.

12. Libel and Slander §§ 3, 13—When plaintiff offers no evidence of special damage, she may not recover for libel per quod.

When the publication complained of is not libelous *per se* and plaintiff does not allege or prove special damage or that a libelous construction was placed on the publication by those who saw it, defendants' motions to nonsuit should be granted, and it is unnecessary to consider whether

the publication was libelous *per quod* upon plaintiff's allegation and evidence tending to establish that the publication was libelous when considered in connection with other facts and circumstances.

13. Civil Rights § 1—

In a strict sense, there are no property rights, but only individual civil rights and individual rights relating to property.

14. Civil Rights § 2—

The constitutional right of free speech and of a free press is involved in determining to what extent a newspaper may publish the picture of an individual.

15. Same—Plaintiff held entitled to nominal damages upon showing that her photograph was used in advertisement without authorization.

The unauthorized use of a photograph in a newspaper advertisement or other commercial enterprise gives rise to a right of action entitling plaintiff to nominal damages at least, and to injunctive relief when the wrong is persisted in, but where the evidence establishes such unauthorized use of plaintiff's photograph by mistake and without malice, and that defendants desisted and apologized upon learning of the mistake, without evidence of special damage, plaintiff is entitled to nominal damages only.

APPEAL by defendants from *Hill, Special Judge,* at 12 April Term, 1937, of FORSYTH.

This is a civil action to recover damages which the plaintiff alleges she sustained as the result of the publication of her photograph or likeness in connection with an advertisement in the *Greensboro Daily News,* published by the defendant Greensboro News Company.

No summons was served on the defendants Anton Scibilia and Nick Boila, trading under the firm name of "Folies de Paree," and they are not parties hereto. Folies de Paree was a vaudeville or stage show and advertised its performance through a system of "tie up" advertising. Under this system some merchant and the local theatre joined in the advertisement and it advertises both the product or the merchandise of the merchant and the theatre performance. Pursuant to this plan, the agent of the "Folies de Paree" solicited the defendant L. Melts, who conducted a bakery in Greensboro under the name of "Melts Bakery," and the defendant North Carolina Theatres, Inc., to join in such an advertisement and as a result a two-column advertisement was published in the *Greensboro Daily News,* issue of 11 March, 1936. In the right portion of the advertisement there was a cut from the plaintiff's photograph showing her standing and wearing a bathing suit. To the left was the following wording, so arranged as to make four distinct statements, as follows:

"Keep that SYLPH-LIKE FIGURE by eating more of Melts' Rye and Whole Wheat Bread, says Mlle. Sally Payne, exotic red-haired Venus—

"'Folies de Paree' sparkling Parisian Revue, Stage Production, NATIONAL THEATRE two days only, March 11 and 12.

"'Melts' Rye and Whole Wheat Bread will give you the necessary energy, pep and vitality without adding extra weight,' says Miss Payne. Melts Bakery, 314 N. Elm St., 1829 Spring Garden St.

"'Ask for Melts' Bread—Melts in Your Mouth.'"

In publishing this advertisement the photograph or mat made therefrom was used without the consent of the plaintiff and was used by mistake—the defendants intending to use a cut of Sally Payne, the leading lady of Folies de Paree.

The mistake having been called to the attention of the defendant Greensboro News Company, it immediately published a full explanation of the mistake and an apology.

The plaintiff does not contend that her likeness was in anywise caricatured or distorted, but alleges that its use as a part of said advertisement tended to connect her with and represent that she was a member of Folies de Paree, which was a "theatrical troupe organized in the city of Chicago and composed of the cheapest class of chorus girls, who receive a salary, as the plaintiff is informed, believes and alleges, of less than $20.00 per week; that said show is a low type of vaudeville entertainment, the girls appearing in same being selected without regard to any qualifications, except appearance; that the girls appearing in said show have no special talent, training nor experience; that said show was a sensual performance, or sex parade."

Plaintiff having, as she contends, shown talent as a radio entertainer, started a course of instructions leading to this career when she was thirteen years of age. She became vocalist for Frank Dailey's Orchestra, program of which, including plaintiff's numbers, was broadcast over the Columbia Broadcasting System, at Station WABC. She had made numerous phonograph records and had recently appeared as a member of an orchestra in Winston-Salem, Sedgefield, Laurinburg, and Durham. She posed for the published photograph and other photographs in the private studios of the Columbia Broadcasting System. She had two pictures made while wearing a bathing suit and the others in conventional dress. These pictures, including those in bathing suit, were used by the Columbia Broadcasting System in giving publicity to her in her performance. She had never been a member of a vaudeville troupe or on the stage except as soloist with her orchestra.

The record does not disclose just how the mistake occurred or how the Greensboro News Company came in possession of the plaintiff's photograph, whether the News Company had the photograph in its files in connection with the plaintiff's campaign for publicity, or it was furnished by Folies de Paree. In this connection the plaintiff testified that mats were made from these photographs (referring to the photographs

taken in the studios of Columbia Broadcasting Company and including two photographs of her while she was dressed in bathing suit), and that "they were sent to very many places and very many people. They were used to give me publicity and were sent out with my entire consent and approval. I was not compelled by anyone to pose for this photograph, but I did try to coöperate. I posed for this photograph of my own free will and accord."

In one of the photographs she is dressed in a bathing suit and is in a standing position. This is the one published by the defendants. In another she is dressed in a bathing suit and is in a recumbent position. She further testified that she never sang while dressed in a bathing suit, but that these photographs were made purely for publicity purposes. At the time of the publication plaintiff was in New York and was unemployed. She first learned of the publication through a letter from her mother.

The bathing suit photograph of plaintiff in recumbent position was published with her entire consent and approval in the magazine "Popular Songs," with the following cut line: "Nifty Nancy Flake, in this fetching attire, proves that singers who have what it takes can be equally alluring flirting with the high seas or the high C's." The photograph was published in other magazines and newspapers with similar cut lines with plaintiff's entire approval.

There was no evidence as to the pay or qualifications of the chorines in the show, but there was evidence that during the show they were as scantily dressed as the plaintiff and that some "dirty" jokes were told.

In the trial below issues were submitted to and answered by the jury as follows:

"1. Did the defendants, or any of them, and if so, which defendant or defendants, wrongfully and unlawfully publish or caused to be published of and concerning the plaintiff the matters set forth in paragraph 8 of plaintiff's complaint, as alleged? A. 'Yes, as to all defendants.'

"2. If so, was such publication, in the light of surrounding facts and circumstances, calculated to bring and did it bring the plaintiff into public ridicule and contempt, as alleged? A. 'Yes.'

"3. What damages, if any, is the plaintiff entitled to recover? A. '$6,500.'"

Judgment was entered in accord with the verdict and the defendants excepted and appealed.

Slawter & Wall and Parrish & Deal for plaintiff, appellee.

Hobgood & Ward, Douglass & Douglass, Kenneth M. Brim, John J. Ingle, Fred S. Hutchins, and Francis I. Anderson for defendants, appellants.

BARNHILL, J. While the complaint does not undertake to state two separate and distinct causes of action, it in fact alleges two causes of action and was so interpreted and treated by the court below. The plaintiff alleges that the publication was libelous and also that it violated plaintiff's alleged right of privacy.

Libels may be divided into three classes: (1) Publications which are obviously defamatory and which are termed libels *per se;* (2) publications which are susceptible of two reasonable interpretations, one of which is defamatory and the other is not, and (3) publications which are not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances. This type of libel is termed libel *per quod.*

When an unauthorized publication is libelous *per se,* malice and damage are presumed from the fact of publication and no proof is required as to any resulting injury. The law presumes that general damages actually, proximately and necessarily result from an unauthorized publication which is libelous *per se* and they are not required to be proved by evidence since they arise by inference of law, and are allowed whenever the immediate tendency of the publication is to impair plaintiff's reputation, although no actual pecuniary loss has in fact resulted. 36 C. J., 1150; *Baker v. Winslow,* 184 N. C., 1; *Fields v. Bynum,* 156 N. C., 413; *New York Evening Post Co. v. Chaloner,* 265 Fed., 204.

In an action upon a publication coming within the second class, that is, a publication which is susceptible of two interpretations, one of which is defamatory, it is for the jury to determine under the circumstances whether the publication is defamatory and was so understood by those who saw it. *Wright v. Credit Co., ante,* 87; *McCall v. Sustair,* 157 N. C., 179, also at 161 N. C., 213; *Vincent v. Pace,* 178 N. C., 421; *Lewis v. Carr,* 178 N. C., 578; *Lucas v. Nichols,* 52 N. C., 32.

In publications which are libelous *per quod* the innuendo and special damages must be alleged and proved. *Oates v. Trust Co.,* 205 N. C., 14; *Walker v. Tucker,* 220 Ky., 362; 53 A. L. R., 547; 17 R. C. L., 264; L. R. A., 1916-B, 915.

As the complaint is insufficient to bring the publication under consideration within either the second or the third class—that is, it is not alleged that said publication is susceptible of two meanings, one defamatory, and that the defamatory meaning was intended and was so understood by the public; and there is no allegation or proof of special damages—we must determine whether the publication is defamatory *per se.* If it is not, the defendants were entitled to judgment of nonsuit as to plaintiff's cause of action upon the publication as a libel.

A libel *per se* is a malicious publication expressed in writing, printing, pictures, caricatures, signs, or other devices, which upon its face and

without aid of extrinsic proof is injurious and defamatory, tending either to blacken the memory of one dead or the reputation of one who is alive and expose him to public hatred, contempt or ridicule. *Simmons v. Morse,* 51 N. C., 6; *Brown v. Lumber Co.,* 167 N. C., 9; Ann. Cases, 1916-E, 631; 36 C. J., 1143. In its most general and comprehensive sense it may be said that any publication that is injurious to the reputation of another is a libel. 36 C. J., 1143.

It may be stated as a general proposition that defamatory matter written or printed, or in the form of caricatures or other signs, may be libelous and actionable *per se,* that is, actionable without any allegations of special damage, if they tend to expose plaintiff to public hatred, contempt, ridicule, aversion or disgrace and to induce an evil opinion of him in the minds of right thinking persons and to deprive him of their friendly intercourse and society. 36 C. J., 1162; *White v. Nichols,* 3 How., 266, 11 L. Ed., 591; *Peterson v. Western Union Telegraph Co.,* 33 L. R. A., 302; *Kelly v. Independent Publishing Co.,* 38 L. R. A., N. S., 1160, Ann. Cas., 1913-D, 1063; *Hall v. Hall,* 179 N. C., 571, 103 S. E., 136; *Simmons v. Morse, supra; Orband v. Kalamazoo Telegraph Co.,* 136 N. W. (Mich.), 380, Ann. Cas., 1914-A, 1124.

In order to be libelous *per se* it is not essential that the words should involve an imputation of crime, or otherwise impute the violation of some law, or moral turpitude, or immoral conduct. *Hedgepeth v. Coleman,* 183 N. C., 309, 111 S. E., 517, 24 A. L. R., 232; *Paul v. Auction Co.,* 181 N. C., 1; *Hall v. Hall, supra; Brown v. Lumber Co., supra,* Ann. Cas., 1916-E, 631; L. R. A., 1915-E, 275. But defamatory words to be libelous *per se* must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided. The imputation must be one tending to affect a party in a society whose standard of opinion the court can recognize. 36 C. J., 1164; *Walsh v. Pulitzer Publishing Co.,* 157 S. W. (Mo.), 326; Ann. Cas., 1914-C, 985; *Crashley v. Press Pub. Co.,* 179 N. Y., 27, 71 N. E., 258.

The general rule is that publications are to be taken in the sense which is most obvious and natural and according to the ideas that they are calculated to convey to those who see them. The principle of common sense requires that courts shall understand them as other people would. The question always is how would ordinary men naturally understand the publication. *Brown v. Lumber Co., supra.* The fact that supersensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein is not sufficient to make it libelous. *Brown v. Lumber Co., supra; Reid v. Providence Journal Co.,* 20 R. I., 120.

In determining whether the article is libelous *per se* the article alone must be construed, stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The article must be defamatory on its face "within the four corners thereof." *Key v. Armstrong, B. & Co.,* 5 A. L. R., 1349; *Oklahoma Publishing Co. v. Kendall,* 221 Pac., 762; *Phoenix Printing Co. v. Robertson,* 195 Pac., 487.

In speaking to the subject in *Shaw Cleaners & Dyers, Inc., v. Des Moines Press Club,* 86 A. L. R., 839, it is said: "In determining whether language is libelous *per se,* it must be viewed, stripped of any pleaded innuendo. The meaning of the phrase *'per se'* is 'taken alone, in itself, by itself.' Words which are libelous *per se* do not need an innuendo, and, conversely, words which need an innuendo are not libelous *per se.* . . . An innuendo cannot extend the sense of the expressions in the alleged libel beyond their own meaning."

The decisions in this jurisdiction, as well as others, clearly establish that a publication is libelous *per se,* or actionable *per se,* if, when considered alone without innuendo: (1) It charges that a person has committed an infamous crime; (2) it charges a person with having an infectious disease; (3) it tends to subject one to ridicule, contempt, or disgrace, or (4) it tends to impeach one in his trade or profession. *Shipp v. M'Craw,* 7 N. C., 463; *Sparrow v. Maynard,* 53 N. C., 195; *Barnes v. Crawford,* 115 N. C., 76; *Deese v. Collins,* 191 N. C., 749; *Lay v. Gazette Publishing Co.,* 209 N. C., 134; *Dudley v. Robinson,* 24 N. C., 141; *Ramsey v. Cheek,* 109 N. C., 270; *Logan v. Hodges,* 146 N. C., 38, 14 Ann. Cas., 103; *Jones v. Brinkley,* 174 N. C., 23; *Pentuff v. Park,* 194 N. C., 146, 53 A. L. R., 626; *Broadway v. Cope,* 208 N. C., 85; *Ivie v. King,* 167 N. C., 174; *Stevenson v. Northington,* 204 N. C., 690; *Ramsey v. Cheek,* 109 N. C., 270; *Osborn v. Leach,* 135 N. C., 628, 66 L. R. A., 648; *Lewis v. Carr,* 178 N. C., 578; *Carter v. King,* 174 N. C., 549; *Hedgepeth v. Coleman, supra; Hall v. Hall, supra; Paul v. Auction Co.,* 181 N. C., 1.

That a likeness of the plaintiff was used and the reference in the printed article would tend to identify her as another person is immaterial. Thus, in *Desando v. New York Herald Co.,* 85 N. Y. Supp., 111, it is held that a publication of a photograph in connection with an article which is libelous and which refers specifically to the photograph which accompanies it, entitles the person whose photograph is so published to maintain an action for libel, although another person's name is printed beneath the photograph and the article states facts tending to show that it was not the person referred to. See, also, *Morrison v. Smith,* 117 N. Y., 366, 69 N. E., 725; *Farley v. Evening Chronicle Publishing Co.,* 87 S. W., 565.

Construing the publication under consideration in accord with the rules laid down in the foregoing cited cases, and many others in this and other jurisdictions, we are led to the conclusion that it is not libelous *per se.*

As the publication is not libelous *per se,* there is no presumption of resulting damages. In this connection it is well to note that the only evidence of damage offered is included in the testimony of the plaintiff as follows: "The paper was sent to me by my mother while I was in New York. She sent the paper and wrote to me about it. At first, when I looked at the ad, I couldn't make out what it was all about, because at that time I was out of work. I wasn't with any band at the time and naturally my mother knew that and I thought perhaps she had gotten the idea I had joined this show and naturally it was quite an embarrassment. I just can't explain it to you—I really can't. It hurt me to think my picture would be published in connection with a show of this kind, because I have done all radio work and I have tried my best to accomplish something for my father and mother because it is through them and only through them that I have been able to realize my ambitions and naturally, when my picture appeared in the advertisement, it was—I was more hurt than embarrassed and naturally I wrote my mother and explained it to her. . . . After I saw this picture in the *Greensboro News* I wondered if a lot of people who saw me in the theatre would not see this picture in the *Greensboro Daily News* and probably think I was in a show like that."

The law seeks to compensate for damage to the person, the reputation or the property of an individual. It cannot and does not undertake to compensate for mere hurt or embarrassment alone.

Plaintiff does not allege or complain that there is any libel through the distortion of her photograph. In fact, she says it is a very good likeness, easily recognizable by her friends and acquaintances. What then does the publication say of and concerning the plaintiff when interpreted in its obvious and natural sense? (1) It represents her as saying that she has a sylph-like figure, which is, or may be, retained by eating more of Melts' rye and whole wheat bread. (2) It represents that she is Sally Payne, an exotic red-haired Venus; Venus being the goddess of beauty. (3) That she is a member of Folies de Paree, a sparkling Parisian revue stage production, which is to appear at the National Theatre two days only, 11 and 12 March. And (4) that she endorses and recommends Melts' rye and whole wheat bread and that it will give the necessary energy, pep and vitality without adding extra weight.

It cannot be said that either one of these representations tends to disgrace and degrade the plaintiff, or to hold her up to public hatred, contempt or ridicule or cause her to be shunned or avoided. Plaintiff's

principal complaint is concerning the inferential representation that she is a member of Folies de Paree, a sparkling Parisian revue stage production. "A revue is a kind of burlesque or musical comedy in which recent events, esp. plays of the past year, are reviewed by imitations of their salient features and chief actors; also, loosely, a medley of songs, tableaux vivants, and chorus dances, with light skits." Webster's New International Dictionary, 2nd Ed. To recommend a legitimate article of merchandise and an item of daily food is not likely to subject one to ridicule or contempt. Vaudevilles and revues are recognized methods of furnishing public entertainment. We consider that it would be a strained and unreasonable interpretation of the law and the facts to hold that the mere representation that a person is a member of a legitimate and well recognized type of professional entertainment will subject that person to public hatred or obloquy. To do so would in effect hold that such type of entertainment is disreputable and those connected therewith are persons of ill-repute. This would constitute an unwarranted reflection upon and condemnation of many young ladies who earn their living in this manner. It may be that some connected with such groups are not all they should be, but such is the case in all other professions and callings. We do not feel that such a wholesale condemnation of any group is warranted by the language of this publication, nor can we conclude that there is any probability that any citizen other than the most morbid would so interpret it.

Apparently the plaintiff recognized that this publication was not subject to the interpretation that it was libelous *per se*. The complaint alleges to some extent the innuendo upon which she relies to make it so and she went to considerable length in offering evidence in an effort to establish that the publication when considered in connection with other facts and circumstances could reasonably be construed as a libelous article. That was the theory of the trial below.

As the plaintiff does not allege or attempt to prove any special damages and does not allege or attempt to prove that a libelous construction was placed upon the publication by those who saw it, and it not being libelous *per se*, it is unnecessary for us to further discuss libel *per quod* or to determine whether the publication under consideration is sufficient to constitute such a libel.

Peck v. Tribune Co., 214 U. S., 185, 53 L. Ed., 960, relied on by plaintiff, presents a different factual situation which distinguishes that case from this. There a cut of Mrs. Peck was used, although under another name, as here, but the article of merchandise she was represented as approving and recommending was a certain brand of liquor. It was held that the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community

and that it was libelous. In this we concur. In *Sydney v. Publishing Corp.*, 242 N. Y., 208, 44 A. L. R., 1419, the plaintiff, a married woman, was represented in a newspaper article as being the latest ladylove of Fatty Arbuckle. That and accompanying comments were such as to make the article libelous *per se*. In *Burton v. Crowell Publishing Co.*, 2 Cir., 82 F, 2d, 154, 155, stressfully relied upon by the plaintiff, the picture of the plaintiff in that case was so caricatured as to expose the plaintiff to overwhelming ridicule. In that connection the Court said: "The contrast between the drawn and serious face and the accompanying fantastic and lewd deformity was so extravagant that though utterly unfair, it in fact made of the plaintiff a preposterously ridiculous spectacle and the obvious mistake only added to the amusement." We have examined the other authorities cited by plaintiff and find distinguishing features in each of the cited cases.

The defendants were entitled to a judgment of nonsuit on the cause of action for alleged libel.

Plaintiff's second cause of action is based upon the right of privacy, so termed. It is clear that the first issue, when considered in connection with the charge of the court, was submitted upon the theory of this cause of action.

Strictly speaking, there are no property rights. All rights are individual. A person has a right to the possession, control, use and disposition of property. This right is as personal as the right to individual liberty, free speech or any other like right possessed by a citizen. The individual right which relates to property is loosely termed a property right. Some of the cases dealing with the "right of privacy" treat it as a species of property right.

The question of the existence of this right is a relatively new field in legal jurisprudence. In respect to it the courts are plowing new ground and before the field is fully developed unquestionably perplexing and harassing stumps and runners will be encountered.

In determining to what extent a newspaper may publish the features of an individual under any given circumstances necessarily involves a consideration of the constitutional right of free speech and of a free press. People do not live in seclusion. When a person goes upon the street or highway or into any other public place he exhibits his features to public inspection. Is a newspaper violating any right of the individual, or doing more than exercising the right of a free press, when it publishes a correct image of such features? Must a distinction be drawn between those in private life and those in public office or public life, and if so, when does a person cease to be a private citizen and become a public character? If a newspaper may publish the features of an individual in connection with an article that is laudatory, does it not also

possess the right to publish the same in connection with an article that is critical in its nature so long as it speaks the truth? If the people are entitled to know what their Governor, or their President, or other public servant, is doing and saying, is it reasonable to hold that they are not entitled as a matter of course to ascertain and know through the newspapers his physical features and appearance? These and many other questions which may hereafter arise, in connection with this type of litigation, are not now before us for decision.

So far as we have been able to ascertain, no court has yet held that it constitutes a tort for a newspaper to publish an image of an individual when such publication is not libelous, except when such publication involves the breach of a trust, the violation of a contract, or when the photograph is used in connection with some commercial enterprise, and we are presently called upon to decide only the right of an individual to prohibit the unauthorized use of an image of her features and figure in connection with and as a part of an advertisement.

Seemingly, the first time this subject was called to public attention in America was through an article in the Harvard Law Review, Vol. 4, p. 193, published in 1890. In this article the existence of the right of privacy, as that term is ordinarily understood, was maintained. This article was followed by one published in Northwestern Law Review, Vol. 3, p. 1, in which the right of privacy was refuted. Without going into an extensive discussion of the origin and progress of this doctrine, the attention of those interested therein is directed to the case of *Roberson v. Rochester Folding Box Co.*, 171 N. Y., 538, 59 L. R. A., 478, in which *Parker, C. J.*, reviews all of the cases dealing with the subject, both English and American, to that date. The decision reverses the judgment of the court below in which an injunction was issued restraining the defendant from using the photograph of the plaintiff in connection with and as a part of an advertisement of flour, and denies the existence in the law of a right of privacy "founded upon the claim that a man has the right to pass through this world . . . without having his picture published, his business enterprises discussed, . . . or his eccentricities commented upon, . . . whether the comment be favorable or otherwise." In this case there is a strong and logical dissent by *Gray, J.*, concurred in by *Bartlett* and *Haight, JJ.* The subject is likewise dealt with at length in *Pavesich v. New England Life Insurance Co.*, 69 L. R. A., 101. All former decisions are likewise fully discussed in this opinion, in which the Court holds that the unauthorized publication of plaintiff's photograph in connection with an advertising enterprise gives rise to a cause of action. In the opinion *Coble, J.*, quoting at length and with approval from the dissenting opinion of *Gray, J.*, in *Roberson v. Rochester Folding Box Co., supra,* said in part: "Instan-

taneous photography is a modern invention, and affords the means of securing a portraiture of an individual's face and form *in invitum* their owner. While, so far forth as it merely does that, although a species of aggression, I concede it to be an irremediable and irrepressible feature of the social evolution. But if it is to be permitted that the portraiture may be put to commercial or other use for gain by the publication of prints therefrom, then an act of invasion of the individual's privacy results, possibly more formidable and more painful in its consequences than an actual bodily assault might be. Security of person is as necessary as the security of property; and for that complete personal security which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain. The proposition is, to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement as a method of attracting widespread public attention to their wares; and that she must submit to the mortifying notoriety, without the right to invoke the exercise of the preventive power of a court of equity. . . .

"I think that this plaintiff has the same property in the right to be protected against the use of her face for defendants' commercial purposes as she would have if they were publishing her literary compositions. The right would be conceded if she had sat for her photograph; but if her face or her portraiture has a value, the value is hers exclusively, until the use be granted away to the public. Any other principle of decision, in my opinion, is as repugnant to equity as it is shocking to reason. . . .

"It would be, in my opinion, an extraordinary view, which, while conceding the right of a person to be protected against the unauthorized circulation of an unpublished lecture, letter, drawing, or other ideal property, yet would deny the same protection to a person whose portrait was unauthorizedly obtained and made use of for commercial purposes. . . . Whether, as incidental to that equitable relief, she would be able to recover only nominal damages, is not material, for the issuance of the injunction does not, in such a case, depend upon the amount of the damages in dollars and cents."

We are of the opinion that the reasoning in the *Pavesich case, supra,* is sound and establishes the correctness of the conclusion that the unauthorized use of one's photograph in connection with an advertisement or other commercial enterprise gives rise to a cause of action which would entitle the plaintiff, without the allegation and proof of special damages, to a judgment for nominal damages, and to injunctive relief, if and when the wrong is persisted in by the offending parties.

One of the accepted and popular methods of advertising in the present day is to procure and publish the endorsement of the article being advertised by some well-known person whose name supposedly will lend force to the advertisement. If it be conceded that the name of a person is a valuable asset in connection with an advertising enterprise, then it must likewise be conceded that his face or features are likewise of value. Neither can be used for such a purpose without the consent of the owner without giving rise to a cause of action.

We conclude, therefore, that there was error in the judgment below and that the motion of the defendants for a judgment of nonsuit should have been sustained as to plaintiff's cause of action sounding in libel and that there should be a new trial on the cause of action alleging the unauthorized use of the image of plaintiff's features and person in connection with said advertisement. Upon the present record, from which it appears that said photograph was used by mistake and without malice and that the defendants immediately desisted from the use thereof upon the discovery of the mistake and made due apology therefor, the plaintiff would be entitled to a judgment for nominal damages only. As the defendants have not and did not persist in the wrong complained of, the right to injunctive relief is not here involved.

New trial.

L. E. O'BRIANT, MAYE H. O'BRIANT, EARLE J. O'BRIANT, JESSIE O'BRIANT, R. D. O'BRIANT, AND NEFFIE O'BRIANT BRADSHER v. MRS. E. FRANK LEE.

(Filed 2 February, 1938.)

1. Mortgages § 2—Absolute deed and contract by grantee to reconvey at option of grantors do not constitute equitable mortgage as matter of law.

Plaintiffs alleged that they executed to defendant a deed in fee simple, absolute on its face, and that contemporaneously therewith defendant executed a contract to reconvey at the option of defendants upon the payment of a certain sum of money within a specified time. Defendant denied the allegation in the complaint that the transaction was intended to convey title as security for a loan of money. *Held:* The transaction alleged does not constitute an equitable mortgage as a matter of law, and plaintiffs' motion for judgment on the pleadings was correctly denied. Instances in which the grantor is obligated to redeem the land by paying the amount of the debt, or the consideration of the deed, distinguished from instances in which the grantor is given an optional right to a reconveyance, upon the payment of a sum of money, but in which he does not bind himself to pay the money and take a reconveyance.

2. Same—Plaintiff must prove by greater weight of evidence that parties intended that deed and contract to reconvey should constitute mortgage.

Plaintiffs alleged and contended that the parties intended that the absolute deed executed by plaintiffs to defendant and defendant's contract to reconvey at the option of plaintiffs upon the payment of a certain sum of money within a stipulated time, should constitute a mortgage. Defendant denied the allegation and contended to the contrary. *Held:* The action was not to reform or correct a written instrument, but the pleadings raised only an issue of fact as to the intention of the parties, and plaintiffs have the burden of proving the issue by the greater weight or preponderance of the evidence, and an instruction placing the burden on plaintiffs to prove the issue by clear, strong and convincing proof is reversible error.

STACY, C. J., dissenting.

APPEAL by plaintiffs from *Hamilton, Special Judge,* at September Term, 1937, of DURHAM. New trial.

This is an action to have a deed executed by the plaintiffs and conveying to the defendant in fee simple the land described in the complaint, and a contract in writing executed by the defendant, contemporaneously with the execution and delivery of said deed, by which the defendant agreed to reconvey to the plaintiffs the said land, in accordance with the stipulations set out in said contract, adjudged a mortgage from the plaintiffs to the defendant to secure a loan of money to the plaintiffs by the defendant, at the date of the said deed and contract; and for an accounting between the plaintiffs and the defendant, to determine the amount now due by the plaintiffs to the defendant on account of said loan, to the end that plaintiffs may redeem the land described in the complaint from said mortgage by paying to the defendant the said amount.

The action was begun in the Superior Court of Durham County on 6 April, 1935.

It is alleged in the complaint that on or about 2 December, 1933, the plaintiffs applied to the defendant for a loan of $7,000, and offered to secure the payment of said loan by a mortgage on the land described in the complaint; that the defendant agreed to make and did make said loan to the plaintiffs, but instead of accepting a mortgage from the plaintiffs to secure the payment of said loan, in accordance with their offer, the defendant required the plaintiffs to convey to her by a deed absolute in form the land described in the complaint, and executed contemporaneously with the execution and delivery of said deed a contract in writing by which the defendant agreed to reconvey to the plaintiffs the land which was conveyed to her by the plaintiffs in said deed, upon the payment by the plaintiffs to her, on or before 2 December, 1934, of the sum of $7,000, with interest on said sum at the rate of six per centum per annum.

It is further alleged in the complaint that it was the purpose and intention of both the plaintiffs and the defendant that the transaction between them should be a loan of money by the defendant to the plaintiffs, and that said loan should be secured by the deed from the plaintiffs to the defendant, and the contract executed by the defendant for the reconveyance by her to the plaintiffs of the land described in the deed and that said deed and contract should constitute, in law and in equity, a mortgage on the land described in the complaint.

In her answer to the complaint, the defendant denies that she agreed to make or did make a loan to the plaintiffs of the sum of $7,000. She alleges that the only contract or agreement between her and the plaintiffs with respect to the land described in the complaint is contained in the deed executed by the plaintiffs by which they conveyed to her in fee simple the land described therein, and the contract executed by her by which she agreed to reconvey the said land to the plaintiffs, in accordance with the terms and provisions of said contract. She denies that it was the purpose or intention of the plaintiffs and the defendant that the relation of debtors and creditor should be created between them. She denies that the relation of mortgagors and mortgagee was created between the plaintiffs and the defendant as the result of the transaction between them with respect to the land described in the complaint. She alleges that plaintiffs having failed to exercise their option under her contract with them, with respect to said land, the said contract is now null and void.

When the action was called for trial, the plaintiffs moved for judgment on the pleadings in accordance with the prayer of their complaint. The motion was denied and plaintiffs duly excepted.

At the trial, the plaintiffs offered in evidence:

(1) A deed from the plaintiffs to the defendant, dated 21 November, 1933, and duly recorded in the office of the register of deeds of Durham County, on 21 December, 1933, in Book 109, at page 505.

By this deed the plaintiffs conveyed to the defendant, in fee simple, the land described in the complaint. The consideration recited in said deed is the sum of ten dollars, and other valuable considerations. Attached to said deed are revenue stamps in the sum of $7.00.

(2) A contract executed by the defendant, dated 21 December, 1933, and duly recorded in the office of the register of deeds of Durham County, on 21 December, 1933, in Book 109, at page 596. This contract is as follows:

"North Carolina—Durham County.

"*Know all men by these presents,* That whereas Mrs. E. Frank Lee, party of the first part, hereinafter known as the grantor, has purchased

from L. E. O'Briant and wife, Maye H. O'Briant, Earle J. O'Briant and wife, Jessie O'Briant, R. D. O'Briant and Neffie O'B. Bradsher, parties of the second part, hereinafter known as the grantees, certain property located on the south side of East Main Street, in the city of Durham, known as No. 118 East Main Street, and being more particularly described in the deed from the parties of the second part herein above named, to Mrs. E. Frank Lee, dated 21 November, 1933, and recorded in Book 109, at page 505, registry of Durham County;

"And whereas, the grantors in said deed desire the privilege or option of repurchasing said property at any time on or before the 2nd day of December, 1934;

"And whereas, it is the desire of the party of the first part to give the said L. E. O'Briant and wife, Maye H. O'Briant, Earle J. O'Briant and wife, Jessie O'Briant, and R. D. O'Briant and Neffie O'Briant Bradsher the privilege of repurchasing said property at any time on or before the 2nd day of December, 1934, but not afterwards;

"Now, therefore, in consideration of the premises, and the further sum of one dollar, the receipt of which is hereby fully acknowledged, the party of the first part does agree for herself, her heirs, administrators and assigns, that on or before the 2nd day of December, 1934, she or they will convey to L. E. O'Briant and wife, Maye H. O'Briant, Earle J. O'Briant and wife, Jessie E. O'Briant, R. D. O'Briant and Neffie O'B. Bradsher the said property, provided the above named parties have fully complied with all of the following terms:

"(1) That the parties of the second part pay in cash to Mrs. E. Frank Lee the sum of seven thousand ($7,000) dollars, with interest thereon from the 2nd day of December, 1933, at the rate of six per centum per annum on or before the 2nd day of December, 1934.

"(2) That in addition to the above named sum the parties of the second part will pay to Mrs. E. Frank Lee the sum of twelve hundred ($1,200) dollars, which shall be paid in twelve (12) equal monthly installments, the first payment to become due and payable on or before the 5th day of December, 1933, and each and every succeeding payment thereafter shall become due and payable on the 1st day of each succeeding month.

"If the parties of the second part shall become as much as thirty (30) days in arrears in making any such payment, then the party of the first part shall be under no obligation to reconvey the property under the terms of this option, and this agreement shall be void. Should the parties of the second part desire to exercise this option before the 2nd day of December, 1934, the entire twelve hundred ($1,200) dollars provided for in this section shall become due and payable. However, any interest due on any of the items required to be paid by the parties of the second part may be offset by this item of twelve hundred ($1,200) dollars.

"(3) That the parties of the second part repay to the grantor any sums advanced for insurance, taxes or expenses for necessary upkeep and repairs on the property, together with interest from the date of such advancements or payments at the rate of six per centum per annum. Included in the above shall be the repayment to the grantor of the cost and expenses of the examination of the title to the property by attorneys selected by the grantor.

"The failure on the part of the grantees to pay all of the items listed above and to comply with all the conditions herein set out shall relieve the grantor from the necessity for conveying said property to the grantees, and in the event of such failure this agreement shall be null and void, and Mrs. E. Frank Lee shall be at liberty to dispose of the land to any other person, or to use it as she may desire, in the same manner as if this agreement had never been made; otherwise, this agreement to remain in full force and effect. This agreement, if not fully complied with, shall be null and void after 2 December, 1934.

"Witness my hand and seal, this the 21st day of December, 1933.

MRS. E. FRANK LEE. (Seal.)"

L. E. O'Briant, one the plaintiffs, testified in their behalf as follows:

"The deed executed by the plaintiffs, conveying to the defendant the land described in the complaint, and the contract executed by the defendant by which she agreed to reconvey to the plaintiffs the said land, in accordance with the terms and provisions of her contract, were both delivered on 21 December, 1933, in the office of plaintiffs' attorney. Upon the delivery of the deed and contract, the defendant, Mrs. Lee, delivered to the plaintiffs her check for $7,000. This closed the transaction.

"Prior to this time, I had applied to Mrs. Lee for a loan of $7,000 to the plaintiffs. They needed this sum of money to redeem the land described in the complaint from a mortgage which the plaintiffs had given on the land to the Guaranty Bond & Mortgage Corporation. The land had been sold under this mortgage but the sale had not been completed.

"After I had made two or three visits to Mrs. Lee, she agreed to make the loan to the plaintiffs. We offered to give her a mortgage on the property described in the complaint to secure the loan. This property is located on East Main Street, in the city of Durham, and is about half a block from the courthouse. It is business property and consists of a lot fronting on East Main Street 21.9 feet and running back from the street 67 feet, and a brick building of two stories. There are two store rooms on the first floor of the building. The property is worth $25,000. The amount required to redeem the property from the mortgage to the

Guaranty Bond & Mortgage Corporation was about $6,800. This amount was paid by the plaintiffs out of the loan made to them by the defendant of $7,000.

"I have been in possession of the property since the date of the deed from the plaintiffs to the defendant, in accordance with the provisions of defendant's contract. The title to the property, at the date of the deed, was in L. E. O'Briant, Earle J. O'Briant, R. D. O'Briant, and Neffie O'Briant Bradsher. I paid to Mrs. Lee the sum of $100.00 per month until the appointment by the receiver in this action by the court. Since the appointment of the receiver, I have paid same to him.

"The deed and the contract, which were prepared in accordance to the requirements of the defendant, were delivered in the office of the defendant's attorney. The attorney for the plaintiffs in the transaction was present, when the papers were delivered. Both attorneys approved the papers. They were executed and delivered upon their advice. I knew that the deed was an ordinary deed of conveyance, and that it conveyed the property to the defendant in fee simple. It was my purpose in executing the deed and in accepting the contract for the reconveyance of the property to the plaintiffs, to secure a loan from the defendants to the plaintiffs in the sum of $7,000. I accepted the contract, because the plaintiffs needed the money to save their property. Mrs. Lee knew the situation of the plaintiffs. I did not like the way the papers were written, but had to have the money. Mrs. Lee refused to accept a mortgage from the plaintiffs.

"I did not tender Mrs. Lee the amount due on the loan prior to 2 December, 1934, nor did I request her to reconvey the property to the plaintiffs in accordance with her contract prior to said date. This action was begun by the plaintiffs against Mrs. Lee on 6 April, 1935."

Evidence was offered by the plaintiffs tending to show that the property described in the complaint was worth, in December, 1933, from $17,000 to $25,000.

Mrs. E. Frank Lee, the defendant, in her own behalf, testified as follows:

"I know Mr. L. E. O'Briant. The first time I had a conversation with him with respect to the property described in the complaint was early in 1933. He came to see me at my home in the city of Durham. He wanted to borrow money from me to pay off a mortgage on his property. He offered me a mortgage on the property to secure the loan. I told him that I was not interested in a mortgage, that he had not paid the taxes on the property for several years, was behind in the interest, and had paid nothing on the principal of his debt secured by the mortgage then on the property. I declined to make him a loan on the property, at that time.

"After the lapse of about a year, he came to see me again. He told me that the mortgage company was foreclosing the mortgage and he was about to lose his property. He asked me if I would be interested in buying the property. I told him that I would talk with my attorney about the matter. I later did so, and told Mr. O'Briant to see my attorney. He did so, with the result that I bought the property from the plaintiffs and signed the contract by which I gave them an option to repurchase the property. I signed the contract offered in evidence by the plaintiffs. The deed which they executed and the contract which I executed contains the only agreements between us with respect to the property described in the complaint. I refused to lend the plaintiffs the sum of $7,000, or any sum.

"In addition to the sum of $7,000, which I paid the plaintiffs for the property, I have paid taxes on the property, which were due and unpaid when I bought the property from the plaintiffs, amounting to the sum of $2,816.47. Mr. O'Briant has been in possession of the property since the date of my deed. He was in possession under my contract until the appointment of a receiver in this action. He paid me as rent for the property $100.00 per month. He was in possession for sixteen months and paid me in all $1,500. He now owes me $100.00—one month's rent.

"The plaintiffs did not request me to reconvey the property to them, or offer me any sum of money for such reconveyance prior to the commencement of this action."

The only issue submitted to the jury for their consideration was as follows:

"Was the execution and delivery of the deed executed by the plaintiffs and the agreement executed by the defendant intended as a security for the loan of money, as alleged? Answer: ....."

With respect to this issue, the court, in its charge, instructed the jury as follows: "The court instructs you, gentlemen of the jury, that the burden of this issue is on the plaintiffs, L. E. O'Briant and others, and that before you can answer this issue 'Yes,' you must be satisfied, not merely by the greater weight or preponderance of the evidence, but the plaintiffs must have offered evidence which is clear, strong, and convincing, such as leaves no fair doubt that a security was intended and not a deed.

"The court instructs you that if in and after your deliberations your minds are in such a condition that you are not altogether satisfied as to what was actually intended, it will be your duty to answer this issue 'No,' and say by that answer that the paper writing remains as on its face it purports to be, a deed.

"The court instructs you that if there is merely a greater weight or a preponderance of evidence in favor of the plaintiffs, that alone would not be sufficient to justify your answering the issue in favor of the plaintiffs unless and until that evidence has been presented to you and constitutes evidence, clear, strong, and convincing."

The plaintiffs in apt time duly excepted to the foregoing instructions. The jury answered the issue "No."

From judgment in accordance with the verdict, and admissions at the trial, the plaintiffs appealed to the Supreme Court, assigning as error the refusal of their motion for judgment on the pleadings and the instructions of the court in its charge to the jury.

Bennett & McDonald and James R. Patton for plaintiffs.
Hedrick & Hall and L. P. McLendon for defendant.

CONNOR, J. It does not appear on the face of the pleadings in this action that the relation of creditor and debtors existed between the defendant and the plaintiffs at the date of the delivery of the deed executed by the plaintiffs, conveying the land described in the complaint to the defendant, and of the contract executed by the defendant by which she agreed, at the option of the plaintiffs, to reconvey to them the said land, upon their payment to her of certain sums of money, in accordance with the terms and provisions of said contract, nor does it so appear on the face of the deed and contract, which are by reference made a part of the pleadings, and which for the purposes of this action must be construed as if they were one instrument. The allegation to that effect in the complaint is denied in the answer. An issue of fact is thus raised on the pleadings for the jury.

For this reason there was no error in the refusal of the court to allow the motion of the plaintiffs for judgment on the pleadings in accordance with the prayer of their complaint. Such refusal is in accord with the law as stated in 41 C. J., section 81 (3), at page 321, as follows:

"When the grantor in an absolute deed at the same time takes back from the grantee a written contract giving the former a certain length of time in which to redeem the premises by paying the amount of the debt, or the consideration for the deed, and binding the latter to reconvey on such redemption, the two papers together constitute a mortgage. And the effect of the transaction is not altered by the fact that the contract specifically limits the time for redemption, and makes the time an essential element in the right to redeem. But if the contract leaves it entirely optional with the grantor to redeem or not, and does not bind him to effect a redemption according to the agreement, it is rather to be held a conditional sale than a mortgage."

This statement of the law applicable to plaintiffs' assignment of error with respect to the refusal of the court to allow their motion for judgment on the pleadings is supported by numerous cases cited in the notes, among others *Porter v. White,* 128 N. C., 42, 58 S. E., 24. See, also, *Robinson v. Willoughby,* 65 N. C., 520, where it was held that when a debtor conveys land to a creditor by deed absolute in form, and at the same time gives his note for the amount of his debt, and takes from his grantee a bond for title upon his payment of the note, such transaction is a mortgage. Where, however, there is no relation of creditor and debtor between a grantor and a grantee in a deed absolute in form, and the grantee contemporaneously with the delivery of the deed, agrees in writing to reconvey to the grantor the land conveyed to him by the deed, upon the payment to him of a certain sum of money by his grantor, such transaction will not be held a mortgage as a matter of law or equity. "The mere execution of a deed absolute on its face and of a bond for a reconveyance of the premises upon certain conditions, does not of itself stamp the transaction as a mortgage. That character attaches to it only when it was intended as a form of security for a debt or a loan, and if it is shown that the parties intended an absolute sale of the property, with a mere right to repurchase, that intention must govern. Such intention may be manifested on the face of the papers or inferred from circumstances. If the agreement for reconveyance expressly recites that the transaction is not intended as a mortgage, this is conclusive. In the absence of such a declaration, the test must be found in the character of the consideration. If it is a debt which the grantor is bound to pay, which the grantee might collect by proper proceedings, and for which the deed for the land is to stand as security, the transaction is a mortgage; but if it is entirely optional with the grantor to pay the money and receive a reconveyance, he has not the rights of a mortgagor, but only the privilege of repurchasing the property." 41 C. J., section 87, page 325.

The contention of the plaintiffs on their appeal to this Court from the judgment of the Superior Court in this action that there was error in the instructions of the trial court to the jury with respect to the character of the evidence and the degree of proof which the law requires to justify an affirmative answer by the jury to the issue submitted by the court, must be sustained.

In *Williams v. Building & Loan Association,* 207 N. C., 362, 177 S. E., 176, it is said by *Schenck, J.:*

"In this jurisdiction there are three degrees of proof required of the party upon whom the *onus probandi* rests. First, in ordinary civil actions, the burden is to satisfy the jury by the greater weight of the evidence; and, second, in certain cases of an equitable nature, such as

where it is sought to reform a written instrument, or prove the terms of a lost will, or to impeach the probate of a married woman's deed, the burden is to establish the contention by clear, strong and cogent proof; third, in criminal actions the burden is to show the guilt of the accused beyond a reasonable doubt. *Ellett v. Ellett,* 157 N. C., 161, 72 S. E., 861; *Montgomery v. Lewis,* 187 N. C., 577, 122 S. E., 374. The first phrase, 'greater weight of the evidence,' has been universally explained by 'the preponderance of the evidence,' *Supply Co. v. Conoly,* 204 N. C., 677, 169 S. E., 415; the second phrase, 'clear, strong and cogent proof,' by evidence which 'should fully convince,' *Lumber Co. v. Leonard,* 145 N. C., 339, 59 S. E., 134; and the third phrase, 'beyond a reasonable doubt,' by 'to a moral certainty,' *S. v. Schoolfield,* 184 N. C., 721, 114 S. E., 466."

In *Ricks v. Brooks,* 179 N. C., 204, 102 S. E., 207, it is said by *Walker, J.:*

"We may as well state in the beginning that this is not an action for the correction of a deed, or for its reformation, and the doctrine as to the quantity of proof required in such a case does not apply, and the contention of the defendant in this respect cannot be sustained.

"In an action for reformation it must be alleged and shown, by evidence clear, strong and convincing, that the instrument sought to be corrected failed to express the true agreement of the parties, because of a mistake common to both parties, or because of the mistake of one party induced by the fraud or inequitable conduct of the other party, and that by reason of ignorance, mistake, fraud or undue advantage something material has been inserted, or omitted, contrary to such agreement, and the intention of the parties. *Ray v. Patterson,* 170 N. C., 226, 87 S. E., 212; *Newton v. Clark,* 174 N. C., 393, 93 S. E., 951. But this rule does not apply when the purpose is not to reform, but to set aside the instrument for fraud, undue influence or upon other equitable ground. *Poe v. Smith,* 172 N. C., 67, 89 S. E., 1003, and *Boone v. Lee,* 175 N. C., 383, 95 S. E., 659, citing *Harding v. Long,* 103 N. C., 1, 9 S. E., 445."

The instant action is not of an equitable nature, it is not to reform or correct a written instrument, upon the ground that by reason of mistake of the draftsman, or of one of the parties induced by the fraud of the other, the instrument fails to express the true intention of the parties. There is no allegation in the complaint nor was there any contention at the trial to that effect. It is alleged in the complaint and was contended by the plaintiffs at the trial that the true intention of the parties to the deed and to the contract was that both should constitute a mortgage securing a loan made contemporaneously with the execution of both instruments by the defendant to the plaintiffs. This allegation was denied in the answer.

The issue raised by this allegation and denial was submitted to the jury. It involves only a question of fact, to wit, the true intention of the parties. The burden of the issue was on the plaintiffs to satisfy the jury of the truth of their allegation, by the greater weight or preponderance of the evidence. No greater degree of proof was required of them. There was error in the instructions to the contrary.

For this error the plaintiffs are entitled to a new trial. It is so ordered.

New trial.

STACY, C. J., dissents on the ground that any error committed in the trial of the cause was harmless, as the intention of the parties is a matter for the court—the agreement being in writing; and, on the undisputed facts, the plaintiffs are not entitled to recover. *King v. Davis*, 190 N. C., 737, 130 S. E., 707; *Barkley v. Realty Co.*, 170 N. C., 481, 87 S. E., 219.

C. T. H. CORPORATION v. A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 2 February, 1938.)

1. Statutes § 5a—

Where a statute uses words having a well known sense in the law, the words will be given that sense in construing the statute.

2. Taxation § 27—Term "doing business" in this State defined.

The words "doing business" in this State, as used in statutes imposing a corporate franchise tax, are to be broadly construed, and while an isolated business transaction is not sufficient to bring a corporation within the meaning of such statutes, a corporation comes within the statutes if it transacts within the State a substantial part of the business it was organized to perform.

3. Same—Plaintiff corporation held "doing business" in this State within meaning of statutes levying franchise tax.

The agreed statement of facts disclosed that plaintiff corporation, in accordance with the purpose of its organization, domesticated in this State and purchased land at foreclosure sales of mortgages held by a mortgage company, that it maintained an office and process agent in this State, but did not maintain an office here for the transaction of its business, but rented the properties purchased by it through local rental agencies, and constantly sent its officers and agents into the State on its business incident to the properties in this State to which it held title, and that the business transactions in this State incident to its properties were numerous and involved large sums of money, and constituted a sub-

stantial part of the business for which it was organized. *Held:* Plaintiff corporation was "doing business" in this State within the meaning of sec. 211 of the Revenue Acts of 1933 and 1935, imposing a corporate franchise tax on foreign corporations doing business in this State.

4. Same—Findings held to disclose that plaintiff corporation was engaged in business in this State for profit and not solely as liquidating agent.

A domesticated corporation cannot successfully maintain that its activities in this State were carried on solely for the purpose of liquidating the assets of another corporation without profit to itself and that therefore it was not "doing business" in this State within the meaning of statutes imposing a corporate franchise tax, when the agreed facts disclose that it purchased large numbers of tracts of land in this State at foreclosure sales of mortgages held by a mortgage company, then in receivership, paying for same by notes, secured by a deed of trust, payable solely from the proceeds derived from renting and selling the properties, with provision that upon sale or foreclosure the domesticated corporation should be entitled to any surplus over the amount necessary to discharge the mortgage note on the property, since the findings disclose that the domesticated corporation in liquidating the assets of the mortgage corporation was attempting to do so at a profit to itself.

5. Same—

The ownership of property for the purpose of computing the amount of corporate franchise taxes means the ownership of any valuable right in property, and not necessarily the ownership of the fee simple.

6. Same—Plaintiff corporation held the owner of lands in this State for purpose of computing corporate franchise tax.

A mortgage corporation became insolvent and its assets were transferred to a trustee for the benefit of bondholders. Plaintiff corporation was organized to purchase property at foreclosure sales of the mortgages, executing notes therefor in the amount invested in the property by the mortgage corporation which was secured by its bonds, the plaintiff's notes, secured by deeds of trust, being payable solely from sums derived from renting or sale of the properties, with provision giving plaintiff corporation power to rent, lease or sell the properties, with further provision that plaintiff corporation should be entitled to all sums derived from the liquidation of the assets over and above the amount necessary to discharge the collateral bonds of the mortgage corporation. *Held:* The properties purchased by plaintiff corporation in this State under the agreement were owned by it for the purpose of computing plaintiff's corporate franchise tax, and plaintiff's contention that it held title to said properties only as agent or trustee for the liquidation of the assets of the mortgage corporation is untenable.

APPEAL by plaintiff from *Sinclair, J.*, at September Civil Term, 1937, of WAKE.

Action for the recovery of franchise tax paid under protest, and alleged to have been illegally assessed.

Plaintiff, a corporation chartered 6 December, 1932, under the laws of the Commonwealth of Virginia and authorized to carry on the busi-

ness of buying, selling and otherwise dealing in real estate, on 7 December, 1932, filed in office of the Secretary of State of North Carolina a copy of its charter, duly attested, and otherwise fully complied with the laws of this State for domestication of a foreign corporation to do business in this State, and has not withdrawn such domestication proceedings, and thereunder was authorized and empowered as a foreign corporation to do business in this State for the years 1934 and 1935.

For franchise tax purposes plaintiff duly filed verified reports: (a) For 1934 in compliance with sec. 211 of Revenue Act of 1933, and (b) for 1935 in compliance with sec. 211 of the Revenue Act of 1935, in which the total assessed value of properties owned by it in North Carolina were stated to be (c) for 1 April, 1934, the sum of $368,172, and (d) for 1 April, 1935, the sum of $423,013. Franchise tax of $552.26, on basis of report for 1934, was assessed by defendant against and paid by plaintiff without protest on 25 June, 1935.

In consequence of a conference between representatives of plaintiff and defendant, plaintiff requested that it be allowed to file, and on 14 August, 1935, did file, a corrected return, duly verified, for each of the years 1934 and 1935, in which the total assessed value of its properties located in North Carolina, real estate only, is stated to be (1) $426,603 for 1934, situated in 26 towns and cities, and (2) $645,925, book or investment value $651,839.17, for 1935, situated in 28 towns and cities. On these returns franchise tax was assessed by defendant: (a) For 1934 in the amount of $639.90, or $87.64 in excess of the $552.26 theretofore assessed against and paid by plaintiff; (b) for 1935, in the amount of $1,140.72. On 11 May, 1936, the plaintiff paid to the defendant, under protest, the said balance for 1934, and all of the assessment for 1935, made due demand for refund and, upon refusal thereof, and after the lapse of the required period allowed by statute for repayment, instituted this action.

Further agreed facts are:

"7. That the Nolting First Mortgage Corporation, a Virginia corporation, for a number of years was engaged in the mortgage and loan business, which consisted of lending money on real estate, taking therefor real estate notes secured by deeds of trust of mortgages. Holding these notes as collateral, the corporation would then issue its own collateral first mortgage bonds which were sold to the public. The bonds were direct obligations of the corporation; they were issued in series and each series was secured by certain of the real estate notes hereinabove referred to.

"8. The business of the Nolting First Mortgage Corporation was materially affected by the depression and during the month of May, 1932, the corporation found that it would not be able to meet its col-

lateral trust bonds maturing on 1 June, because of the decrease in collections from underlying collateral. The corporation notified all of its bondholders of the situation and suggested that a bondholder's protective committee be formed to act for all of the bondholders. A committee was appointed by the bondholders and a program for the liquidation of the corporation was adopted. Pursuant to this program, a collateral trust agreement and a voting trust agreement, both dated 1 June, 1932, were executed. A printed copy of these agreements are attached hereto, marked 'Exhibit A.'

"9. Pursuant to the terms of the voting trust agreement, the entire management and control of the Nolting First Mortgage Corporation was vested in five voting trustees named therein. Under the terms of the collateral trust agreement the holders of Nolting First Mortgage Corporation collateral trust bonds deposited their bonds with the State-Planters Bank and Trust Company as trustee and received therefor new bonds dated 1 June, 1932. To secure this new issue of bonds the Nolting First Mortgage Corporation transferred all collateral held by it to the trustee as security for the bonds surrendered. The Nolting First Mortgage Corporation thereupon discontinued its regular business of negotiating mortgage loans, and since 1 June, 1932, it has confined its activities exclusively to the liquidation of the aforesaid mortgage notes. The *status* of the corporation with respect to these limited activities is that of agent for the collateral trust bondholders.

"10. The total principal amount of first mortgage notes held by Nolting First Mortgage Corporation as of 1 June, 1932, aggregated approximately $8,407,044, of which it is estimated that approximately $3,796,000 was secured by real estate located in the State of North Carolina."

In the Collateral Trust Agreement, Exhibit A, the parties are Nolting First Mortgage Corporation, called corporation, and Home Mortgage Corporation, to State-Planters Bank & Trust Company, trustee. The agreement provides *inter alia* "Art. VIII, sec. 1, If and when the principal of and on all the bonds of all series issued hereunder have been paid, or the corporation shall have deposited with the trustee for their benefit, the whole amount due on all the bonds of all series for principal and interest, and shall have fully performed every other obligation herein imposed on it, then the deposited collateral applicable to all series issued hereunder, and then remaining in the hands of the trustee, shall revert to the corporation, or its assigns."

The defendant, while admitting the statement of facts contained in paragraphs 7, 8, 9, and 10, denies that the same was relevant or material to the determination of the questions of law arising upon the other agreed facts set out herein.

Further agreed facts are: The issued capital stock of the plaintiff corporation was five shares of the par value of $1.00 each. Stock certificates were issued to five directors of the Nolting First Mortgage Corporation, which were endorsed by them and returned to the Nolting First Mortgage Corporation and delivered by that corporation to the trustees under the collateral trust agreement dated 1 June, 1932. At a meeting of the stockholders of said corporation approving its by-laws at the organization meeting on 7 December, 1932, a resolution was adopted which in part provided as follows: ". . . That the purpose of its incorporation is that it may, in the event of foreclosure under any mortgage or deed of trust securing the payment of any part of the deposited collateral securing any bonds or series of bonds issued under the collateral trust agreement of 1 June, 1932, . . . acquire legal title" to such properties and hold the same for account of such bonds or series of bonds of the Nolting First Mortgage Corporation hereinbefore referred to. The officers and directors of the Nolting First Mortgage Corporation were the same as the officers and directors of the plaintiff corporation. In North Carolina the C. T. H. Corporation has acquired title to property from trustees at foreclosure sales when mortgage notes on such properties were held as collateral for collateral trust notes issued under the collateral trust agreement of 1 June, 1932, hereinbefore referred to.

In the granting clause in form of deed used in thus taking title, "C. T. H. Corporation, its successors and assigns," are named as grantees. In the *habendum* the following words are used: "To have and to hold . . . unto C. T. H. Corporation, its successors and assigns, in as full and ample manner as the said . . . trustees . . . are authorized and empowered to convey the same: In trust, nevertheless, to be held, managed, sold or otherwise disposed of, by the said party of the second part, as trustee for the lawful owners and holders of Nolting First Mortgage Corporation Bonds or Series '.....' as their several interests may appear." Then there follows in minute descriptive detail an enumeration of all inclusive powers, authority, and rights of the C. T. H. Corporation with reference thereto, including the power "to deal with said real estate as if it were, and in every way exercise with respect thereto all the powers of, the fee simple owners thereof, in its own right."

All of the activities of the plaintiff corporation in the State of North Carolina for the years 1934 and 1935 were in connection with said properties and in accordance with the terms and provisions of the deeds so made to it. During said years the plaintiff corporation, acting under said conveyances, has held the said properties in trust and has managed, sold, and otherwise disposed of the same as trustee for the lawful

holders and owners of the particular Nolting First Mortgage Corporation collateral trust series secured by the said property as their several interests appeared.

Coincident with taking title to the said properties, the plaintiff corporation delivered to the Nolting First Mortgage Corporation, which in turn delivered to the trustee under the collateral trust agreement dated 1 June, 1932, a mortgage note in the amount of the investment of the collateral trust series in the particular property, and same was secured by deed of trust.

The form of note referred to is payable to bearer and contains provisions for payment "out of excess of income from the real estate upon which this note is secured over and above the expenses of holding, maintaining, and operating same, and/or of the net proceeds realized from the sale thereof, . . . but the maker shall not be liable to pay this note, either as to principal or interest, except to the extent of such excess income from and/or net proceeds of the sale of said real estate as may come into its hands." It is signed in the name of C. T. H. Corporation, by..... This notation appears thereon: "This note must be kept for release deed."

In the form of deed of trust referred to the "C. T. H. Corporation" and not "C. T. H. Corporation, Trustee," is the grantor. The note secured thereby is described as above set forth. It contains provision that in the event of sale the trustee "shall pay the surplus, if any remain, to the party of the first part, its successors, or assigns"; and also the further provision "that if the said C. T. H. Corporation, its successors or assigns, shall pay off said note and discharge fully the trusts herein declared before such sale, or the same shall be done by a sale of part of said lands, then so much of said lands as may not have been sold, and are not required to meet any of said trusts, shall be reconveyed to said C. T. H. Corporation, its successors and/or assigns, at its, or their, own proper cost or the title thereto be revested in it, or them, according to the provisions of law."

During the tax years in question plaintiffs did not have any officers or employees on a fixed salary or wage stationed in the State of North Carolina, but its officers and employees did, from time to time, come into the State of North Carolina on its business incident to the properties to which it held title, as hereinbefore stated. The real estate, held as aforesaid, was rented through rental or real estate agents throughout the State of North Carolina, who were regularly engaged in said business as rental or real estate agents. The rents were collected for the plaintiff on a commission basis and paid over by such agents to the Nolting First Mortgage Corporation, to be held and disbursed by it under the terms of the Collateral Trust Agreement of 1 June, 1932, hereinbefore mentioned.

In the application to the Secretary of State of North Carolina for domestication, plaintiff stated that: "(2) The location of the registered office is at No. 906 Main St., Richmond, Va., and the location of the principal office in North Carolina is at Asheville (Jackson Bldg.), North Carolina, Buncombe County, and Kester Walton is the agent upon whom process may be served." Since its domestication plaintiff has maintained said office and process agent within this State, but did not during the tax years in controversy maintain any office in the State of North Carolina in which the business and affairs of the plaintiff corporation were conducted and carried on, except as hereinbefore stated.

Upon the foregoing findings of fact the court below concluded as a matter of law that plaintiff was doing business in this State and is liable for franchise tax for the years in question as assessed by defendant.

From judgment in accordance therewith, plaintiff appealed to the Supreme Court and assigned error.

Murray Allen and J. Vaughan Gary for plaintiff, appellant.

Attorney-General Seawell and Assistant Attorneys-General McMullan and Bruton for defendant, appellee.

WINBORNE, J. Two questions arise upon the decision below on the agreed facts presented on this appeal: (1) Was the plaintiff doing business in this State in the years 1934 and 1935 within the meaning of, and liable for franchise tax under, sec. 211 of the Revenue Acts of 1933 and 1935? (2) Is the real estate held by plaintiff, as described, "property in this State of" the plaintiff within the meaning of subsection 2 of sec. 211 of the Revenue Acts of 1933 and 1935 providing a basis for imposing a franchise tax? The court below ruled affirmatively as to each. This is in harmony with our views.

The Revenue Act of 1933 imposes a franchise tax upon "every foreign corporation doing business in this State and owning or using any part, or all, of its capital or plant in this State as of 1 April." Sec. 211, ch. 445, Public Laws 1933. The Revenue Act of 1935 imposes a like tax upon "every foreign corporation permitted to do business in this State and owning or using any part, or all, of its capital or plant in this State." Sec. 211, ch. 371, Public Laws 1935. The two sections differ only in descriptive phrases, "doing business" in the first, and "permitted to do business" in the second. Therefore, it is necessary first to determine the meaning of the words "doing business." On the view we take this as determinative of this phase of the controversy.

The rule applicable to the construction of statutes is that when they make use of words of definite and well known sense in the law, they are received and expounded in the same sense in the statute. *Asbury v.*

Albemarle, 162 N. C., 247, 78 S. E., 146; *Borders v. Cline, ante,* 472, 194 S. E., 826.

"'Business' is that which occupies time, attention and labor of man for purposes of livelihood or profit," Bouvier's Law Dictionary. "It is a very comprehensive term, which embraces everything about which a person can be employed." Black's Law Dictionary.

The phrase "doing business in the State" has been the subject of consideration in several decisions of this Court with respect to the statute relating to service of process on foreign corporations. In *Timber Co. v. Ins. Co.,* 192 N. C., 115, 133 S. E., 524, *Connor, J.,* said: "No all-embracing rule as to what is 'doing business' has been laid down. The question is one of fact, and must be determined largely according to the facts of each individual case, rather than by the application of fixed, definite, and precise rules."

In *Commercial Trust Co. v. Gaines,* 193 N. C., 233, 136 S. E., 609, *Connor, J.,* said: "It has been generally held that a foreign corporation cannot be held to be doing business in a state, and therefore subject to its laws, unless it shall be found as a fact that such corporation has entered the state in which it is alleged to be doing business, and there transacted, by its officers, agents or other persons authorized to act for it, the business in which it is authorized to engaged by the state under whose laws it was created and organized. The presence within the state of such officers, agents or other persons, engaged in the transactions of the corporation's business with citizens of the state, is generally held as determinative of the question as to whether the corporation is doing business in the state," citing *Timber Co. v. Ins. Co., supra,* and other cases.

In *Ruark v. Trust Co.,* 206 N. C., 564, 174 S. E., 441, the defendant, a foreign corporation with no process officer or agent in the State, having been named as trustee in more than a hundred deeds of trust creating liens on property situate in North Carolina under which it was vested with title to the property described therein, and was authorized to take possession thereof, collect the rents and foreclose in case of default, had exercised the power of sale in a number of the deeds of trust, reported the same to the court and sent its agents into the State for the purpose of investigating and looking after the properties in its capacity as trustee, *Stacy, C. J.,* speaking to the question: "Is the defendant doing business in this State, or does it have property here so as to render it amenable to process under C. S., 1137?," said: "A similar fact situation appeared in *Reich v. Mortgage Corp.,* 204 N. C., 790, 168 S. E., 814, where the ruling that defendant owns property and is doing business in this State was upheld as a matter of course. The same conclusion seems to be well supported in the instant case (citing authorities). The

expression 'doing business in this State' as used in C. S., 1137, means engaging in, carrying on, or exercising in this State, some of the things, or some of the functions, for which the corporation was created." 14-A C. J., 1270. See, also, 12 R. C. L., 71.

A broader meaning is to be given the words "doing business" as used in a tax statute. Fletcher Cyclopedia Corporations, Vol. 18, p. 691, sec. 8804. An isolated sale or other business transaction is not sufficient to bring the corporation within that meaning. It is sufficient, however, "if a substantial part of its regular business is carried on." 37 Cyc., 859. The facts in the present case tend to show that plaintiff was doing in North Carolina a substantial part of the business for which it was organized.

The plaintiff contends, however, that it has not maintained an organization for the purpose of profit or gain, but, on the contrary, it was organized solely for the purpose of liquidating collateral bonds of Nolting First Mortgage Corporation, and that its activities have consisted of holding the legal title to properties purchased at foreclosure sales when mortgage notes on such properties were held as security for collateral trust bonds, and that, therefore, it was not "doing business in this State." It relies upon the decisions of the Supreme Court of the United States in *Zonne v. Minneapolis Syndicate,* 220 U. S., 187; *McCoach v. R. R.,* 228 U. S., 295; and *U. S. v. Emery, Bird, Thayer Realty Co.,* 237 U. S., 28. These cases relate to a statute (36 Statutes at Large, ch. 6, sec. 38) which imposes special excise tax on corporation, . . . organized for profit . . . and engaged in business . . . with respect to the carrying on or doing business by such corporation." They are distinguishable from the instant case. In the case of *Von Baumbach v. Land Co.,* 242 U. S., 503, *Justice Day* reviews the decisions of the Supreme Court of the United States in these corporation tax cases, distinguishing those cases above holding that the corporations were not doing business, from those holding to the contrary, beginning with the case *Flint v. Stone Tracy Co.,* 220 U. S., 107. He states: "It is evident, from what this Court has said in dealing with the former cases, that the decision in each instance must depend upon the particular facts before the Court. The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that *status,* and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activites as are essential to those purposes."

In the instant case the plaintiff is distinct entity, separate and apart from the Nolting First Mortgage Corporation. It has voluntarily filed

its charter and become regularly domesticated with authority and power for itself as such to carry on real estate business in this State. It bought at trustees' sales real properties located in 28 towns and cities of the book or investment value of more than $650,000, and of assessed value of approximately that amount, as shown by its 1935 report, duly verified. It has given notes for the purchase price on parcels of property so purchased and secured same by deeds of trust, both in form tending to show activities in "holding, maintaining and operating same" with the view of ultimately discharging the indebtedness evidenced by the note, and realizing a surplus over and above the purchase price—a profit to it. It has leased its properties and sent its officers and employees into the State on business incident to its properties so purchased. Its business is not limited to an isolated case. The cases are numerous. The volume is large.

Plaintiff further contends that if it be liable for the franchise tax for the years in question, the recovery should be limited to $10.00 per year. It contends that "the entire capital consists of five shares of stock of the par value of $1 each and it has no surplus or undivided profits." The assessments are made under (1) that portion of subsection 2 of sec. 211 of ch. 445, Public Laws 1933 (Revenue Act of 1933), which reads: "The proportion of capital stock, surplus and undivided profits allocated for franchise taxation under this section shall in no case be less than the total assessed value of real and personal property in this State of each such foreign corporation;" and (2) that portion of subsection 2 of sec. 211 of ch. 371, Public Laws of 1935 (Revenue Act of 1935), which is *verbatim* of the above subsection of the 1933 act, with the following addition: "Not less than its investment and/or actual book value of real and personal property in this State."

Each statute further provides that "The tax imposed . . . shall in no case be less than ten dollars." The defendant, in assessing the franchise tax against the plaintiff for the years 1934 and 1935, used as the basis for determining the tax the assessed values of the real property in the State of North Carolina as were shown in the verified reports, as amended, filed by the plaintiff.

We, therefore, come to consider the second question:

Applying the rules of construction hereinabove stated to the words "property in this State of" as used in the portion of subsection 2, sec. 211 of the Revenue Acts of 1933 and 1935, does the real estate held by plaintiff come within their meaning? Webster defines "property" to be "the exclusive right to possess, enjoy, or dispose of a thing; ownership. In a broad sense, any valuable right or interest considered primarily as a source or element of wealth. In a narrower sense, 'property' implies exclusive ownership of things; as where a man owns a piece of land or a

horse. In a broader sense, 'property' includes in the modern legal systems practically all valuable rights."

This Court, in *Vann v. Edwards,* 135 N. C., 661, 47 S. E., 784, in an opinion by *Walker, J.,* speaking to the separate property of a married woman, said: "The word 'property' is of very broad signification. It is defined as rightful dominion over external objects; ownership; the unrestricted and exclusive right to a thing; the right to dispose of the substance of a thing in every legal way, to possess it, to use it and to exclude every one else from interfering with it. Property is the highest right a man can have to anything, being used for that right which one has to lands or tenements, goods or chattels, which no way depends on another man's courtesy. A right imparting to the owner a power of indefinite user, capable of being transmitted to universal successors by way of descent, and imparting to the owner the right of disposition," quoted and cited in part in *Stedman v. Winston-Salem,* 204 N. C., 204, 167 S. E., 813.

Webster defines "of" as "indicating the possessive relationship; belonging or pertaining to; or connected with." "Property of" does not necessarily mean ownership in fee simple. It means the ownership of any valuable right in property.

The facts in the present case tend to show conveyances to the plaintiff of property over and in which it is vested with power and authority tantamount to ownership in fee simple. An analysis of the enumerated powers makes it well nigh impossible to conceive of any right of control or ownership that has not been expressed. Then, too, the plaintiff has executed notes for the purchase price and has secured those notes with deeds of trust in the form usually used in real estate transactions for conveying property to which the grantor has fee simple title, with provision for revesting of title upon payment of the indebtedness. The plaintiff, through its proper officers, also has filed with the defendant reports duly verified in which it is stated that the property in question is owned by the plaintiff.

While the transactions have been ingeniously devised and executed, the facts lead us to the conclusion that the real estate comes within the purview of the statute. The plaintiff, when it domesticated, must have contemplated as much. It was of the same mind when it filed reports for franchise tax purposes.

The judgment below will be

Affirmed.

CARL W. DUNLAP v. CAROLINA POWER & LIGHT COMPANY.

(Filed 2 February, 1938.)

1. Waters and Watercourses § 1—

The grantee of land bounded by a nonnavigable river or creek has riparian rights in such waters to the center thereof.

2. Same—Each riparian owner has right to use of waters equal to rights of other riparian owners in like circumstances.

Riparian rights of landowners along a nonnavigable stream is a right inseparably attached to the soil itself, and each has an equal and common right to the reasonable use of the water for any purpose which does not materially affect the rights of others, the right of each to such use being the same as the right of other riparian owners in like circumstances, but what is a reasonable use for farming cannot be compared with what is a reasonable use for manufacturing or power purposes.

3. Waters and Watercourses § 3—

A lower riparian owner has a cause of action against an upper proprietor for any pollution or substantial diversion of the waters of the stream.

4. Waters and Watercourses § 2—Right of riparian owner to natural, undiminished flow of stream is qualified by rights of other proprietors to reasonable use of waters.

The right of a riparian owner to the natural flow of water without diminution in quantity or retardation or acceleration of the natural flow is qualified by the rights of other proprietors to the reasonable use of the waters, which use includes the right to use same for manufacturing or power purposes as well as domestic and agricultural purposes when in conformity with the size of the stream and the needs of the community, qualified only by the requirement that it must be enjoyed with reference to similar rights of other riparian owners.

5. Same—Riparian owner using stream for power purposes has the right to diminish flow to extent reasonably necessary for this purpose.

Where a riparian owner is rightfully using the waters of a stream for power purposes, he is entitled to diminish, retard or accelerate the natural flow of water to the extent reasonably necessary in the lawful and beneficial use of the stream for this purpose, subject only to the like rights of lower proprietors, and a lower riparian owner is not entitled to damages for annoyance or inconvenience resulting from changes in the rate of flow from such reasonable use, but may insist only that the waters shall not be unreasonably withheld or let down by the power dam or withheld for an unreasonable length of time.

6. Same—

The burden rests upon a lower proprietor to allege and prove unlawful, wrongful or unreasonable use of the waters of a stream by an upper proprietor.

7. Same—What constitutes reasonable use is ordinarily a question for the jury.

What constitutes reasonable use of the waters of a nonnavigable stream by an upper proprietor is a question of fact for the jury to determine in accordance with the nature and size of the stream, the object, importance, nature and necessity of the use, and the manner and occasion of its exercise, and it is only when there is no evidence tending to show an unreasonable use that the question is one for the court.

8. Same—Evidence held insufficient to show unreasonable use of waters of stream by power company.

The evidence favorable to plaintiff tended to show that defendant power company customarily closed the gates of its dam at night to pond water for power purposes, and opened the floodgates in the morning for operation, resulting in substantial decrease in the flow of the stream at night, and an accelerated flow of the stream in the morning until it was normal, and that plaintiff's land overflowed more frequently during freshet and flood than formerly, resulting in damage. There was no evidence that the waters were turned into the stream in excessive amounts, and no evidence of a causal connection between the more frequent flooding of plaintiff's land and the operation of defendant's dam. *Held:* Defendant's motion to nonsuit on this cause of action was properly allowed, since the retardation of the waters only between operating hours cannot be held an unreasonable use, and since the evidence fails to show any unreasonable use of the waters by plaintiff resulting in damage to plaintiff's riparian rights.

9. Eminent Domain § 2—Allegations and evidence held sufficient to be submitted to jury on question of power company's taking of property as result of injury to land from operation of dam.

Plaintiff's allegation and evidence were to the effect that by reason of the situation of his land at the convergence of two streams, the alternate diminution and acceleration of the flow of water resulting from the operation of defendant's power dam on one of the streams, caused the bank between the streams owned by plaintiff to be constantly washed and eroded away. *Held:* Plaintiff is entitled to have his cause of action to recover the damages sustained in the washing away of the bank submitted to the jury on the theory that, by reason of the peculiar location of plaintiff's property, the operation of the dam resulted in a taking of plaintiff's property without just compensation, and such right of action exists even though the operation of the dam by defendant was well within its riparian rights.

APPEAL by plaintiff from *Rousseau, J.*, at September Term, 1936, of ANSON.

This is a civil action instituted by the plaintiff, a lower riparian owner, against the defendant, an upper riparian owner, to recover damages for the alleged unlawful and wrongful use of the waters of Yadkin River by the defendant and for compensation for damages to his lands, which the plaintiff alleges in effect amounts to a taking without just compensation.

Plaintiff owns a tract of land bordering on Rocky River and Yadkin River at the confluence of the two streams; the stream from the point of confluence of these two rivers to the ocean being known as Pee Dee River. The defendant has constructed a concrete dam across Yadkin River about four miles above plaintiff's land and has erected a hydroelectric generating plant adjacent to said dam, the dam and plant being known as the Tillery Hydroelectric Generating Station. The defendant, as a public utility corporation, has been operating said plant since 1928 for the generation of electricity for distribution and sale. The plaintiff alleges that the erection of said dam and the operation of said plant prevents the flow of said streams by his farm in the customary manner according to the prior natural and usual flow; that by the operation of the plant of the defendant the water of Yadkin River is at times impounded to such an extent as to cause the Pee Dee River to become dry and without water therein and that at other times the waters are discharged from the dam in such manner and to such an extent as to raise the level of the water of Pee Dee River to ordinary flood stage, which has the effect of backing the water of Rocky River up in the channel and causing such water to break through and cut sluices over the lands of the plaintiff until such water of Rocky River flows to the Pee Dee River through the artificial sluices or channels so cut rather than through the regular channel of Rocky River; that great channels have been cut across his lands in which pools of stagnant water form and cause mosquitoes and other insects and vermin to breed; that by reason of the construction and maintenance of said plant by the defendants the waters of Yadkin River do not flow to and enrich plaintiff's lands in a natural manner, but at times flow by and over them in greatly augmented quantities, causing the banks of the stream to break and wash away and it creates an unhealthful condition for him and his tenants and which interferes with the passage of the waters of the rivers through the fixed channel of said stream and deprives him of the pleasure and profit in the pursuit of fishing and the other ordinary uses of said water and results in material damage to the banks of the stream which are a part of his property, and also so damages his land that he can now harvest only one crop out of about every six planted, whereas theretofore he could harvest three out of every four planted.

At the conclusion of the plaintiff's evidence the court, on motion of the defendant, entered a judgment of nonsuit, to which the plaintiff excepted and appealed.

A. M. Stack, W. L. Marshall, Jr., Mark Squires, and W. H. Strickland for plaintiff, appellant.

Taylor & Thomas, Robinson, Pruette & Caudle, and A. Y. Arledge for defendant, appellee.

BARNHILL, J. The plaintiff does not allege, except by inference, that the plant of the defendant is operated in a negligent or careless manner. If the complaint be construed as alleging a cause of action based on negligence the same is not sustained by the evidence, for there is no evidence of any negligent operation by the defendant. Nor does the plaintiff allege any improper or negligent or unskillful design or construction of defendant's plant, nor is there any allegation that defendant's plant is in excess of the size and capacity of the stream. This limits our consideration to two questions: (1) Is the defendant wrongfully interfering with or impairing plaintiff's rights as a riparian owner in the waters of Yadkin River? And, (2) does the operation of defendant's plant result in a taking in whole, or in part, of plaintiff's property without just compensation? Yadkin, or Pee Dee River, is a non-navigable stream. *S. v. Glen,* 52 N. C., 321; *Cornelius v. Glen,* 52 N. C., 512. Therefore, for the purpose of determining the riparian rights of the plaintiff it must be deemed that he owns to the center of the stream. Where a grant calls for a corner in the bank of a stream and then with its meanders to another corner, by implication of law the grant extends to the middle of the river and confers ownership for certain purposes as appurtenant to the land granted, although the land not having been paid for is still the property of the State. *Cornelius v. Glen, supra.* A grant of land, bounded in terms by a river or creek not navigable, carries the land to the grantee *usque ad filum aquae,* to the middle or thread of the stream. *Williams v. Buchanan,* 23 N. C., 535. *Parker v. Griswold,* 17 Conn., 288, 42 A. D., 739, is to the same effect. So, in determining the plaintiff's rights, he is to be deemed a riparian owner, possessing the rights of such in the waters of Yadkin or Pee Dee River to the center thereof.

A lower riparian owner has the right to use the water of a stream as it comes upon his land in its natural state for any purpose to which it may be applied without material injury to the just rights of others. This right is inseparably annexed to the soil itself. *Durham v. Cotton Mills,* 141 N. C., 615; *R. R. v. Light & Power Co.,* 169 N. C., 481; *Smith v. Morganton,* 187 N. C., 803.

In some of the cases defining the rights of a riparian owner, the terms "like use," "like situation," "like owners," and "like," are used. These terms, of course, mean that the use of one farmer shall be judged by the use of another farmer, one manufacturer by the customs and use of another manufacturer. The use by any particular person must be the same as the neighboring proprietor in like circumstances. We cannot compare the uses of a farmer with those of a power producer. To construe the term "other like owners" strictly, as the term is seemingly but not actually used in some of the decisions, would virtually nullify the

law of riparian ownership and riparian rights. To so construe it would mean that a stream not theretofore used for water power purposes could never be so used, because the person who first undertook to avail himself of the water power capabilities of a stream would find that he was not making use thereof as other like owners. Such construction, when applied to a stream used largely for water power purposes, would likewise for all practical purposes destroy any use of the stream by farmers or others similarly situated.

Applying the law that a riparian landowner is entitled to have the waters of a stream to continue to flow by his lands in its usual channel, and in its normal quantity, it has become a well established principle of law in this and most of the other jurisdictions that any substantial diversion of waters or the pollution of waters of a stream gives rise to a cause of action in behalf of all riparian owners affected thereby. In some of the western states where the land is arid and irrigation is essential the rule against the diversion of the waters of a stream has been modified. Neither a diversion or a pollution of the waters of Yadkin River is alleged and the cited authorities are not pertinent in so far as they deal with these particular phases of riparian ownership.

The right of a riparian owner to the use of water flowing by his premises in a natural stream and as an incident to his ownership of the soil and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity, has been recognized and dealt with by the courts for time immemorial. While it has never been said that one who possesses lands bordering upon a nonnavigable stream actually owns the running water, it has always been recognized that he has the right to a reasonable use of it as it passes his land. And so, the doctrine of reasonable use has become fully developed and is recognized by this and all other jurisdictions.

The right of a riparian owner to make a reasonable use of the waters, so long as he does not divert or pollute it, is recognized by the plaintiff and many of the authorities cited in his brief are made to turn upon the question of reasonable use.

The "reasonable use" doctrine was recognized in *Pugh v. Wheeler,* 19 N. C., 50, in which *Ruffin, C. J.,* referring to the use of water of a stream to propel machinery, says: "But the owners of the land may have those uses of it; and as they are beneficial uses—beneficial, not only as sources of private gain, but therein also of public utility—it is reasonable, and ought therefore to be lawful, that the owners of the land should, as such, be entitled to the advantage of all those profitable uses of the water, which do not affect it as the aliment provided by nature to nourish animal life. We conceive, therefore, that it is the clear doctrine of the common law, that all the owners of land through which a

stream, not navigable, runs, may apply it to the purposes of profit." See *Smith v. Morganton,* 187 N. C., 803.

The right of a riparian proprietor to the natural flow of a stream running through or along his land in its accustomed channel undiminished in quantity and unimpaired in quality, is qualified by the right of other riparian owners to make a reasonable use of such water as it passes through or along their lands. In determining the rights of a lower riparian owner, the question is whether the upper riparian proprietor is engaged in a reasonable exercise of his right to use the stream as it flows by or through his land, whether with or without retaining the water for a time, or obstructing temporarily the accustomed flow. Every riparian owner has a property right to the reasonable use of running water for manufacturing purposes as well as for domestic and agricultural purposes conformable to the uses and needs of the community, qualified only by the requirement that it must be enjoyed with reference to the similar rights of other riparian owners. A lower riparian owner has the right only to insist that the waters shall not be unreasonably withheld or let down by the owner above or withheld for an unreasonable length of time. The upper riparian owner has no right by virtue of his position unreasonably to interfere with the natural flow of the stream so as to give the riparian proprietors below a great deal more than the usual quantity of water during a part of the year, or at stated periods, and little or none during the remainder of the year or during intervals of unreasonable length. The statement that riparian proprietors are entitled to the natural flow of the water of the stream without diminution or obstruction and that no proprietor can diminish the quantity of water, which will otherwise descend to the proprietor below, are statements that are rather broader than they should be to accurately represent the law. A better statement is one which includes the element of reasonable use by each of the proprietors, although it has been said that it is impossible to lay down a general rule in all cases. The rule that the upper proprietor has no right to use the water to the prejudice of the proprietor below him, or that he cannot lawfully diminish the quantity is too broad, for it would give the lower proprietor superior advantages over the upper and in many cases give him in effect a monopoly of the stream.

A riparian proprietor has a right to make all the use he can of the stream so long as he does not pollute it or divert it from its natural channel and abstract so much as to prevent other people from having equal enjoyment with himself, or does not use the same in such an unreasonable manner as to materially damage or destroy the rights of other riparian owners. The rights of riparian owners in a running stream above and below are equal; each has a right to the reasonable use and enjoyment of the water, and each has a right to the natural flow

of the stream subject to such disturbance and consequent inconvenience and annoyance as may result to him from a reasonable use of the waters by others. There may be a diminution in quantity or a retardation or acceleration of the natural flow indispensable for the general valuable use of the water perfectly consistent with the existence of the common right and this may be done so long as the retardation and acceleration is reasonably necessary in the lawful and beneficial use of the stream. The diminution, retardation or acceleration not positively and sensibly injurious by diminishing the value of the common right is an implied easement in the right of using the stream. The right to use necessarily implies a right to exercise a degree of control over the water and to some extent to diminish its volume. And the water may be detained long enough to accumulate a sufficient head for manufacturing purposes before it is let down to the next user. However, the person detaining water must act in a reasonable manner and not let it off in unreasonable quantities.

What constitutes a reasonable use is a question of fact having regard to the subject matter and the use; the occasion and manner of its application; its object and extent and necessity; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party and the extent of the injury caused by it to the other.

The mere erection of a dam and the use of the water in driving wheels or providing power must necessarily derange its steady, constant and natural flow and substitute a different manner as to the time and mode of holding it up and letting it down, but the water can be retained for the purpose of the upper mill if it is not diverted from the stream and the storing of water in a pond or reservoir for power purposes is not actionable if it is retained no longer than is reasonably necessary. The upper proprietor may hold back the water a reasonable time to raise a pond or reservoir, although the effect is to deprive the lower owner of the use of the water to a certain extent. He may hold the water back and let it down in such manner as is necessary for the use of his manufacturing enterprises if the enterprise is adapted to the character of the stream and the use is reasonable and the lower proprietor will not be of automobiles. One of plaintiff's witnesses testified in the trial that of the water.

The statements that a riparian owner "has no right to use the water to the prejudice of the proprietor below him" and that he cannot "diminish the quantity which would descend to the proprietor below" and that "he must so use the water as not materially to affect the application of the water below, or materially to diminish its quantity," are used in cases in which the diversion or pollution of water is being discussed.

ERRATUM FOR VOL. 212.

Dunlap v. Light Co., 212 N. C., at page 820, eighth line from bottom, should read:

heard to complain on account of the incidental irregularity in the flow

In the cases involving the right to the profitable use of the waters of a stream it seems to be almost universally held that such interruption in the flow of the stream as is necessary and unavoidable in the reasonable and proper use of the mill privilege above cannot be the subject of an action. So it is said in *Dumont v. Kellogg,* 18 A. R., 102: "It is, therefore, not a diminution in the quantity of the water alone, or an alteration in its flow, or either or both of these circumstances combined with injury, that will give a right of action, if in view of all the circumstances and having regard to equality of right in others, that which has been done and which causes the injury is not unreasonable. In other words, the injury that is incidental to a reasonable enjoyment of the common right can demand no redress."

For cases dealing with the doctrine of reasonable use and the principles herein enounced see *Pugh v. Wheeler,* 19 N. C., 50; *McLaughlin v. Mfg. Co.,* 103 N. C., 100; *Adams v. R. R.,* 110 N. C., 326; *Durham v. Cotton Mills,* 141 N. C., 615; *Rouse v. Kinston,* 188 N. C., 1; *Harris v. R. R.,* 153 N. C., 542; *Mizell v. McGowan,* 129 N. C., 93, reported in 85 A. S. R., 705; *Barcliff v. R. R.,* 168 N. C., 268; *Dumont v. Kellogg,* 18 A. R., 102; *Salliotte v. Bridge Co.,* 65 L. R. A., 620; *Meyer v. Richmond,* 43 L. Ed., 374; *Gehlen Bros. v. Knorr,* 36 L. R. A., 697; *Stratton v. Mt. Hermon School,* 216 Mass., 83; 67 C. J., 700.

As the defendant committed no wrong against the plaintiff in respect to his riparian rights so long as the defendant used the waters of Yadkin River in a lawful manner, the burden rests upon the plaintiff to show an unlawful, wrongful or unreasonable use thereof to his damage and hurt. Ordinarily, this presents a question of fact if there is any evidence to sustain the allegation. When, however, there is no evidence tending to show an unreasonable use it is a question for the court.

Viewing all of the evidence in the light most favorable to the plaintiff, we are of the opinion that plaintiff has failed to offer any evidence tending to show that the defendant is making an unreasonable use of the waters of Yadkin River to the hurt and damage of plaintiff's riparian rights. While the plaintiff offered evidence tending to show that defendant's floodgates were closed at night, resulting in a substantial decrease in the water in the channel of Yadkin River, and that in the morning the floodgates were open for the purpose of operation, resulting in an accelerated flow of the water until the stream was at normal, there is no evidence that water was turned into the stream in excessive amounts and the detention or retardation thereof only between operating hours could not be held for an unreasonable use.

The plaintiff likewise offered evidence tending to show that at the present time his land overflows more frequently during periods of freshet or flood, and that when the high water begins to recede it does so much

more rapidly than heretofore, preventing the settlement of enriching silt on his land and washing away and eroding the top soil of his property, thereby destroying the value thereof. We are, however, unable to find any evidence in the record which we feel tends to show that such condition grows out of, or is caused by, the use of the waters of Yadkin River by the defendant.

We are of the opinion, therefore, that the judgment of nonsuit as to plaintiff's cause of action based upon allegations of damage to his riparian rights was properly allowed.

But this case presents for consideration another alleged cause of action, that is, the plaintiff alleges that by reason of the peculiar location of his lands at the confluence of Rocky River and Yadkin River, connected with the manner of operation of defendant's plant, the defendant has in effect taken his property in part at least, without just compensation. In respect to this there is evidence tending to show that when the defendant ceases operation at the end of the day it closes its floodgates; that this results in a diminution of the water in the channel of Yadkin River below defendant's dam; that the diminution of the water in the channel of Yadkin River causes the water in Rocky River to likewise diminish in quantity; that when the defendant begins operation in the morning and opens its floodgates, at first and until the channel of the Yadkin River reaches its normal stage, the flow of the water is accelerated and proceeds down the channel of Yadkin River in a bank at times several feet high; that when this bank of water reaches the point of confluence of Yadkin River and Rocky River, by reason of its quantity and accelerated speed, it strikes the bank which forms a part of the property of the plaintiff and flows back up the channel of Rocky River instead of following its usual channel, and that when the water of Yadkin River reaches its normal stage the water in Rocky River flows back down the channel of that river. The plaintiff has offered evidence likewise tending to show that this unusual movement of the water in the early portion of the weekdays is wearing away and gradually eroding the river bank of his property.

Whether this results in any considerable damage to the plaintiff's property is not for us to determine. The evidence tends to show that in this respect, to some extent at least, by reason of the peculiar location of the plaintiff's land not common to other lower riparian owners the defendant is taking or appropriating the property of the plaintiff without compensation. If these facts are established to the satisfaction of the jury the defendant is indebted to the plaintiff for the reasonable value of the land taken, or the damage so done, without regard to the reasonableness of the use it is making of the waters of Yadkin River in the operation of its plant. It cannot take the property of the plaintiff

without just compensation, even though it is a result of a reasonable use of its own property. To this extent the plaintiff is entitled to a new trial.

We conclude, therefore, that the plaintiff is entitled to a new trial to the end only that appropriate issues may be submitted to the jury to determine the truth of the plaintiff's evidence in respect to the damage to the banks of his land and the loss, if any, he has sustained by reason thereof.

New trial.

NORA CLODFELTER v. PHILLIP WELLS.

(Filed 2 February, 1938.)

1. **Automobiles § 22—**

An action by a guest to recover of the driver for injuries received in an accident is grounded on negligence, with the burden on the guest to affirmatively prove the allegations of the complaint.

2. **Automobiles §§ 17, 18g, 22—Res ipsa loquitur does not apply to skidding of automobile on highway.**

In this action by a guest in an automobile to recover for injuries received when the automobile in which she was riding zig-zagged on a straight highway, ran off the road and turned over, plaintiff's evidence disclosed that the highway was wet, that there was no traffic, but that the driver had not had adequate sleep the night before. The evidence showed, however, that at the time of the accident the driver was apparently alert, and told the occupants to keep steady and he would straighten the car out, and there was no evidence as to the speed of the car or of defect in the automobile or tires. *Held:* The evidence fails to support the allegations of the complaint that the driver failed to keep a proper lookout and was driving at an excessive speed in a reckless manner, and the doctrine of *res ipsa loquitur* not being applicable to the mere skidding of an automobile on the highway, plaintiff's evidence is insufficient to be submitted to the jury on the issue of the driver's negligence.

3. **Courts § 11—Matters of procedure, which include rules for submission of the evidence to the jury, are governed by lex fori.**

In an action instituted in this State to recover on a transitory cause of action arising in another state, the substantive laws of the state wherein the cause arose govern, but matters of procedure, which include methods of proof, production of evidence, as well as the rules for the submission of the evidence to the jury, are governed by the laws of this State.

4. **Automobiles § 19—Evidence held to show that plaintiff was not "guest without payment" within meaning of South Carolina statute.**

Evidence that members of a party riding in an automobile under an agreement with the driver that they should furnish the lunch and divide expenses of gasoline and oil, *held* sufficient to support plaintiff guest's

contention that they were not "guests without payment" within the meaning of a South Carolina statute requiring such guests to prove an accident was intentional or was caused by reckless disregard of rights of others in order to recover. S. C. Code, 5908.

5. Negligence § 19c—

Ordinarily, the doctrine of *res ipsa loquitur* does not apply when all the facts causing the injury are known and testified to by the witnesses, and the doctrine does not apply to the skidding of an automobile on the highway.

6. Automobiles § 17—Evidence held to show that accident was caused by skidding.

Skidding of an automobile is the slipping sideways of the wheels of the car, resulting in the inability of the driver to control the movement of the car, and plaintiff may not successfully contend that the accident was not caused by skidding when his own evidence discloses that the car zig-zagged across the highway on wet pavement and ran off the road into a ditch, especially when one of plaintiff's own witnesses testifies that the car seemed to be skidding.

CLARKSON, J., dissenting.

APPEAL by plaintiff from *Hill, Special Judge,* at September Term, 1937, of MECKLENBURG. Affirmed.

This was an action for damages for a personal injury alleged to have been caused by the defendant's negligent operation of an automobile in which plaintiff was a passenger.

The plaintiff alleged in her complaint that the defendant drove the automobile, in which she and others were riding, off the highway, in the State of South Carolina, and caused it to overturn in a ditch, resulting in her injury, and that this was due to the negligence of the defendant "in that while driving at an excessive rate of speed on a perfectly straight highway, in the daytime, and with no traffic or obstruction of any kind in front of him, he drove his car in such a reckless and negligent manner, without keeping a lookout to see that he kept it on the pavement, that said automobile ran off the hard-surface highway and turned completely over in the adjacent ditch."

The plaintiff further alleged that there was an agreement between the defendant and those riding in the automobile for the payment of the expenses of the trip.

The defendant denied all allegations of negligence.

The evidence offered by the plaintiff showed the material facts of the occurrence to be as follows:

One K. W. Selden testified that in March, 1935, he and plaintiff were employed by the Parks Cramer Company in Charlotte, North Carolina, and that he and his wife and the plaintiff desiring to go to Charleston, South Carolina, he made the following agreement with the defendant:

"I entered into an agreement with the defendant to carry my party down to Charleston and back. The agreement was that Mrs. Selden and I were to furnish the lunch; Mr. Wells was to furnish the automobile, and we would divide the expense—the gas and oil." The defendant's sister was also in the party. They left Charlotte about 4 a.m., and the defendant said he had been out the night before and had only been in bed an hour and a half. This witness further testified the accident occurred about three miles south of Camden, South Carolina, and he described what happened in the following language: "As we passed through Camden we had run into a little shower, and we ran out of the shower and hit the concrete road, which was wet. I was watching the road and the speedometer, and all of a sudden the car started that way, to my right. I was sitting in the front seat with the driver. The car went to my right, then it cut across to the left, then cut across to the right, and went off the highway and turned over. I don't know how many times it turned over, but I think it was one and a half times. We landed with the wheels in the air. The road was level and straight. My best recollection is that it was the standard width. . . . When the car cut to the left the second time, he (defendant) made the remark, 'Keep steady,' or 'Keep your seats, I'll straighten out in a few minutes,' or something similar to that; just the exact words, I don't remember."

The plaintiff Nora Clodfelter testified as to the accident as follows: "I am the plaintiff in this action. I was in the party that Mr. Selden has been describing. I was riding in the rear seat with Mrs. Selden and Miss Wells. Mr. Selden was sitting right in front of me, in the front seat, beside Mr. Wells, the driver. I did not observe anything happen before the car got off the road. We were just talking, as usual, and the car began swerving, and it was just an instant until we went off the road, and I do not know that anything happened just in that time."

Plaintiff further testified that they were going on a pleasure trip to Charleston to see the Magnolia Gardens and spend the day there.

Mrs. K. W. Selden testified she was riding in the back seat of the car, on the left, and plaintiff on the right, with Miss Hazel Wells between them. "It happened so quickly—the car, just all of a sudden, started going first to one side and then to the other, without any warning. It went to the right, then to the left, and then to the right, and turned over. The car did not get off the hard-surface until it turned over. . . . The car suddenly started going this way, zig-zagging first to the right and then to the left, and then to the right. Q. And it seemed to be skidding? A. Yes. And the roads were wet. . . . I did not notice that the driver of the car had any difficulty in controlling it on the way down to where the accident happened."

At the conclusion of plaintiff's evidence, defendant's motion for judgment of nonsuit was allowed, and plaintiff appealed.

Cansler & Cansler for plaintiff.
Tillett, Tillett & Kennedy and H. B. Campbell for defendant.

DEVIN, J. The plaintiff's action is grounded on negligence, with the burden imposed upon her of affirmatively proving the allegations of her complaint. It is apparent that she has failed to offer sufficient evidence to entitle her to have her case submitted to the jury, unless the fact of the accident itself affords some evidence of negligence, or is sufficient to require the submission of the case to the jury under the doctrine of *res ipsa loquitur.*

Neither of the allegations of negligence in the complaint was supported by any evidence. There was no evidence of excessive speed (*York v. York, ante,* 695), nor even of the rate of speed, though plaintiff's witness, who was seated beside the driver, testified he was looking at the speedometer. There was no evidence of failure to exercise due care in the operation of the car, or to keep a proper lookout. There was no other traffic, the road was straight, of standard width, paved. There was no defect in the automobile or its tires. It had rained at intervals and the road was wet. All the facts of the occurrence and of the conduct of the defendant were testified to by the plaintiff and two other witnesses who were with her in the car at the time. The suggestion that defendant had not had adequate sleep the previous night is met by plaintiff's evidence that he was apparently alert at the time of the accident and said before the car ran off the road, "Keep steady, I'll straighten out."

The accident occurred in the State of South Carolina, and therefore the question of defendant's liability for negligence must be determined by the law of that State. *Wise v. Hollowell,* 205 N. C., 286, 171 S. E., 82. It is elementary that matters of substantive law are controlled by the law of the place—the *lex loci*—but that matters of procedure are governed by the law of the forum—the *lex fori.* Wigmore on Evi., sec. 5. Under this principle the methods by which the parties may prove the truth of their assertions, the production of evidence, as well as the rules for the submission of the evidence to the jury, are matters of procedure, and hence governed by the law of the forum. 5 R. C. L., sec. 136; 12 C. J., 485; 3 Beale Conflict of Laws, sec. 377.1 *et seq.* So that whether the evidence offered was sufficient to require its submission to the jury under the doctrine of *res ipsa loquitur* was a matter to be determined in accordance with the law prevailing in this jurisdiction. *Harrison v. R. R.,* 168 N. C., 382, 84 S. E., 519; 11 Am. Jur., sec. 203; 78 A. L. R., 883; 89 A. L. R., 1278.

The statute law of South Carolina relative to liability for injury to guests resulting from the operation of an automobile contains this

provision: "No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such automobile, its owner or operator, for injury, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others." South Carolina Code, sec. 5908.

The defendant calls attention to this statute and contends that in any event the burden was on the plaintiff to show, in respect to a gratuitous guest, that the injury complained of was intentionally inflicted or was the result of heedless or reckless disregard of the rights of others. *Wright v. Pettus,* 209 N. C., 732, 184 S. E., 494; *Wise v. Hollowell, supra.* But the plaintiff's evidence is susceptible of reasonable inferences favorable to her contention that there was a sufficiently definite agreement on the part of the defendant to transport Selden's party (including plaintiff) to Charleston and back for the consideration of furnishing the lunch and dividing the expense of gasoline and oil. The question of what constitutes a "guest without payment" for transportation in an automobile, within the meaning of the above quoted statute, does not seem to have been considered by the South Carolina Court. However, it is stated in *Fulghum v. Bleakley,* 177 S. C., 286, 181 S. E., 30, that the South Carolina statute is an exact copy of a statute in force in the State of Connecticut, and the construction put upon it by the Supreme Court of the latter state supports plaintiff's contention on this point. *Kruy v. Smith,* 108 Conn., 628; *Russell v. Parlee,* 115 Conn., 687; *Gage v. Chapin Motors,* 115 Conn., 546; *Chaplowe v. Powsner,* 119 Conn., 188. The same conclusion is reached in *McGuire v. Armstrong,* 268 Mich., 152, 255 N. W., 745, where the word "guest" in a similar statute is construed. See, also, *Campbell v. Casualty Co., ante,* 65. Other cases on the subject will be found collected in 95 A. L. R., 1180.

Coming back to the determinative question presented by the appeal, whether the doctrine of *res ipsa loquitur* applies to the facts of this case, it seems to have been definitely settled in North Carolina that this principle does not apply to the skidding of an automobile resulting in injury to a passenger. It was so held in *Springs v. Doll,* 197 N. C., 240, 148 S. E., 251, and reaffirmed in *Butner v. Whitlow,* 201 N. C., 749, 161 S. E., 389, and *Waller v. Hipp,* 208 N. C., 117, 179 S. E., 428.

The applicability of *res ipsa loquitur* to particular cases has been many times discussed in the decisions of this Court, ever since *Judge Gaston,* in *Ellis v. R. R.,* 24 N. C., 138, first applied the rule, and the doctrine does not now require restatement or further elaboration. *Womble v. Grocery Co.,* 135 N. C., 474, 47 S. E., 493; *Stewart v. Carpet Co.,*

138 N. C., 60, 50 S. E., 562; *Ross v. Cotton Mills,* 140 N. C., 115, 52 S. E., 121; *Perry v. Mfg. Co.,* 176 N. C., 68, 97 S. E., 162; *White v. Hines,* 182 N. C., 275, 109 S. E., 31; *Bryant v. Construction Co.,* 197 N. C., 639, 150 S. E., 122; *Armstrong v. Spinning Co.,* 205 N. C., 553, 172 S. E., 313; *Wilson v. Perkins,* 211 N. C., 110; *Sweeney v. Erving,* 228 U. S., 233; *Weston v. Hillyer,* 160 S. C., 541, 159 S. E., 390; 45 C. J., sec. 768. The application of the rule to injury resulting from the use of machinery or complicated tools or apparatus has been extended to a variety of situations where the cause of the injury is inaccessible to the party injured, but accessible to the party having exclusive control or management of the instrumentality, but ordinarily it does not apply when all the facts causing the accident are known and testified to by the witnesses at the trial. *Baldwin v. Smitherman,* 171 N. C., 772, 88 S. E., 854. The general rule stated in Huddy on Automobiles, sec. 373, is quoted with approval in *Springs v. Doll, supra,* as follows: "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." And in *Linden v. Miller,* 172 Wis., 20, 177 N. W., 909, it was said: "Skidding may occur without fault, and when it does occur it may likewise continue without fault for a considerable space and time. It means partial or complete loss of control of the car under circumstances not necessarily implying negligence. Hence, plaintiff's claim that the doctrine of *res ipsa loquitur* applies to the present situation is not well founded. In order to make the doctrine *res ipsa loquitur* apply, it must be held that skidding itself implies negligence. This it does not do. It is a well known physical fact that cars skid on greasy or slippery roads without fault either on account of the manner of handling the car or on account of its being there."

The contention that the facts here do not present a case of skidding is untenable. There is no other reasonable conclusion to be reached but that the wheels of the automobile slipped sideways on the pavement, resulting in inability of the driver to control the movement of the car. This is the meaning of the word "skidding" as applied to the operation of automobiles. One of plaintiff's witnesses testified in the trial that the car seemed to be skidding.

Upon consideration of the record before us, we conclude that the principle of *res ipsa loquitur* does not apply to the facts disclosed, and that there being no evidence of negligence, the judgment of nonsuit was properly entered.

Affirmed.

CLARKSON, J., dissenting: Conceding that the principle of *res ipsa loquitur* does not apply, yet I think there was sufficient evidence to be

submitted to the jury on the principle that the injury to plaintiff was caused by the negligence of defendant. I think there was evidence to show that in operating the car there was "heedlessness or his reckless disregard of the rights of others," causing the injury. The operator ran into a shower—the road was wet. "The car went to the right, then it cut across to the left, then cut across to the right, and went off the highway and turned over." It turned over one and a half times and landed with the wheels in the air, indicating that it was being operated at a high and dangerous rate of speed and in a heedless and reckless manner. At least this was evidence for the jury to consider on the issue of negligence. The car "zig-zagged" first to the right and then to the left and then again to the right—it was skidding on the wet road. The evidence was sufficient to be submitted to the jury as to defendant's negligence and also as to whether plaintiff was a guest under the South Carolina statute, in which state plaintiff was injured.

I think that such an interpretation should be given to evidence of this kind, so that a jury should pass on the facts and not this Court. It is necessary, in the preservation of life and limb, that the drivers of cars should be held to an accountability in their driving under such evidence here disclosed. Last year we had 1,123 killed and 7,990 injured in automobile wrecks in 7,413 accidents in North Carolina. Over 40,000 were killed in the nation in automobile wrecks. In one year more were killed in this nation than were killed in the World War. This wreckage is left for the taxpayers and others to care for. It is a matter of common knowledge that premiums are paid to liability companies for the protection of guests in cars, under well settled law in this State, who are injured when there is negligence on the part of the driver. I think the judgment of nonsuit should be reversed.

MILDRED MERRIMON v. POSTAL TELEGRAPH & CABLE COMPANY.

(Filed 22 September, 1937.)

APPEAL by plaintiff from *Pless, J.*, at January Term, 1937, of BUNCOMBE.

Civil action to recover damages from alleged breach of verbal contract for permanent employment.

Defendant denied that contract was made, and, among numerous defenses, pleaded the three-year statute of limitations.

On verdict determining the issue on the plea adversely to plaintiff, judgment was rendered, from which plaintiff appealed to the Supreme Court, and assigned error.

Don C. Young for plaintiff, appellant.
Alfred S. Barnard for defendant, appellee.

PER CURIAM. The plaintiff, having based her cause upon verbal contract, failed to carry the burden against the plea of the statute of limitations. In the judgment below, we find

No error.

FRED C. GOTT, JR., v. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

(Filed 22 September, 1937.)

APPEAL by plaintiff and defendant from *Clement, J.*, at July Term, 1937, of BUNCOMBE.

Civil action to recover on oral contract.

The case has been tried twice. At the close of plaintiff's evidence, at the first trial, judgment as of nonsuit was entered in the general county court, which was reversed on appeal to the Superior Court. Defendant appealed to the Supreme Court, and the judgment of the Superior Court was affirmed at Fall Term, 1936, by reason of a two to two division of the Court, as reported in 210 N. C., 832, 187 S. E., 572.

On the second trial, the evidence tends to show that the plaintiff, while working for the defendant in October, 1930, became disabled from disease; that the defendant voluntarily paid the expense of his care and treatment in tubercular sanatoria for more than two years under a plan set up, maintained, and exclusively controlled by the defendant at its own expense, without cost to its employees, for the benefit of its disabled employees; that the plaintiff acquired no rights in the plan; that the defendant retained the discretionary right to allow, to continue, or to discontinue allowances for disability, and that defendant in its discretion discontinued allowances. The evidence fails to show any contract as alleged.

The record fails to disclose any evidence offered or any finding made by the court that the evidence on this second trial was substantially identical with the evidence on the former trial, and that the merits are identical.

In the general county court verdict and judgment were rendered in favor of the plaintiff. On appeal by defendant, the Superior Court rendered judgment overruling all exceptions taken, except those relating to motions for judgment as of nonsuit, and reversed the judgment of the general county court on the motion for nonsuit at the close of all the evidence. From the judgment of the Superior Court both plaintiff and defendant appealed to the Supreme Court, and assigned error.

Don C. Young for plaintiff.

C. H. Gover, Wm. T. Covington, Jr., and Hugh L. Lobdell for defendant.

PER CURIAM. The plaintiff bases his action upon an alleged oral contract. There is no evidence to support it, and his action fails.

Finding no error on plaintiff's appeal, defendant's appeal is not considered.

On plaintiff's appeal, Affirmed.

On defendant's appeal, Dismissed.

STATE v. MACK FARMER.

(Filed 22 September, 1937.)

APPEAL by defendant from *Sink, J.*, at March Term, 1937, of BUNCOMBE. No error.

Defendant was charged with the unlawful possession of intoxicating liquor. The evidence tended to show that defendant and his wife operated a cafe in Asheville, North Carolina, known as Mack's Cafe, and that on the occasion when the officers visited the place they found in the kitchen one-half gallon of whiskey, another half-gallon partly filled, and a cream pitcher full of whiskey. There were several pint bottles, crocks, several half-gallon fruit jars, and a funnel. The defendant was behind the counter in the front room waiting on customers, about five steps from the kitchen. One woman was lying on a bed. There was a man in the kitchen apparently intoxicated. Defendant and his wife said they owned and operated the place. Mrs. Farmer claimed the whiskey. A witness for the State testified: "Mack wanted to come over first and claim the whiskey and she would not permit him. She said it was her whiskey, so I brought both over (arrested both)."

Defendant's wife was charged in a separate warrant with the unlawful possession of intoxicating liquor and was tried at same time as her husband, and convicted, but did not appeal. She testified that the whiskey was hers. Defendant Mack Farmer did not go upon the stand.

Verdict: Guilty as to Mack Farmer, and from judgment imposing sentence he appealed.

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

Pritchard & James for defendants.

PER CURIAM. The only exceptions noted by the defendant relate to the judge's charge. The charge, while not elaborate, was in substantial accord with the rule laid down in *S. v. Rigsbee,* 211 N. C., 128, and *S. v. Hardy,* 209 N. C., 83, and considered in connection with the evidence offered, gave the appellant no just ground for complaint.

No error.

E. V. SAUNDERS v. M. K. FEARING ET AL.

(Filed 22 September, 1937.)

APPEAL by plaintiff from *Williams, J.,* at May Term, 1937, of DARE.

Civil action to recover damages for personal injury alleged to have been caused by the wrongful act, neglect, or default of the defendant.

Plaintiff was injured on 1 July, 1933, while working for the defendant in its electric plant in the town of Manteo, Dare County.

Upon denial of liability and issues joined, the jury answered the issue of negligence in favor of the defendant.

From judgment on the verdict denying recovery, the plaintiff appeals, assigning errors.

D. L. Russell and George J. Spence for plaintiff, appellant.

Martin Kellogg, Jr., and Worth & Horner for defendants, appellees.

PER CURIAM. The controversy on trial narrowed itself to an issue of fact, determinable alone by the jury. This the triers have resolved in favor of the defendant. The record is barren of any exceptive assignment of error predicable of a new trial, hence the verdict and judgment will be upheld.

No error.

ELLEN BRASWELL v. TOWN OF WILSON.

(Filed 13 October, 1937.)

Appeal and Error § 38—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by defendant from *Frizzelle, J.*, at June Term, 1937, of WILSON. Affirmed.

This is an action by the plaintiff against the defendant to recover damages for personal injuries alleged to have been caused by the negligence of the defendant in which the defendant denied its negligence and entered the alternative plea of contributory negligence in bar of recovery. The issues of negligence, contributory negligence, and damage were answered in favor of the plaintiff and from judgment on the verdict the defendant appealed, assigning errors.

T. T. Thorne for plaintiff, appellee.
Finch, Rand & Finch and W. A. Lucas for defendant, appellant.

PER CURIAM. The Court being evenly divided in opinion, *Barnhill, J.*, not sitting, the judgment of the Superior Court is affirmed and stands as the decision of this action without becoming a precedent. *Nebel v. Nebel,* 201 N. C., 840; *McMahan v. Basinger,* 211 N. C., 747.

Affirmed.

FRED SANDLIN, BY HIS NEXT FRIEND, R. K. SANDLIN, v. HENRY JARMAN.

(Filed 24 November, 1937.)

APPEAL by plaintiff from *Sinclair, J.*, at April Term, 1937, of ONSLOW.

Civil action to recover damages alleged to have been caused by the negligence of the defendant when the automobile driven by plaintiff collided with defendant's truck, which was standing on the highway in the nighttime, without lights, and in violation of law.

Upon denial of liability and issues joined, the jury answered the issue of negligence in favor of the defendant.

From judgment on the verdict, plaintiff appeals, assigning errors.

J. A. Jones and Wallace & White for plaintiff, appellant.
Summersill & Summersill for defendant, appellee.

PER CURIAM. Upon a controverted issue of fact, the jury has responded in favor of the defendant. The court's charge to the jury is challenged in several particulars, but none of the exceptions are regarded of sufficient moment to work a new trial. No new question of law is presented by any of the assignments of error. The verdict and judgment will be upheld.

No error.

DR. FRANK H. ROBINSON v. BILTMORE DAIRY FARMS, INC., AND CHARLES LANE.

(Filed 24 November, 1937.)

APPEAL by plaintiff from *Ervin, Special Judge,* and a jury, at 22 February, 1937, Extra Civil Term, of MECKLENBURG. No error.

This is an action for actionable negligence, brought by plaintiff against defendants. The issues submitted to the jury and their answers thereto were as follows:

"1. Was the plaintiff Dr. Frank H. Robinson injured in his person and property by the negligence of the defendants Biltmore Dairy Farms, Inc., and Charles Lane, as alleged in the complaint? Ans.: 'No.'

"2. If so, did the plaintiff Dr. Frank H. Robinson, by his own negligence, contribute to his injury, as alleged in the answer? Ans.: .....

"3. What damages, if any, is the plaintiff Dr. Frank H. Robinson entitled to recover of the defendants Biltmore Dairy Farms, Inc., and Charles Lane for injury to his person? Ans.: .....

"4. What damages, if any, is the plaintiff Dr. Frank H. Robinson entitled to recover of the defendants Biltmore Dairy Farms, Inc., and Charles Lane, for injury to his property? Ans.: ....."

On the verdict the court below rendered judgment for defendants. The plaintiff made certain exceptions and assignments of error and appealed to the Supreme Court.

W. K. Covington, G. T. Carswell, and Joe W. Ervin for plaintiff.
Robinson & Jones for defendants.

PER CURIAM. From the argument of counsel and on the entire record, we can find no prejudicial or reversible error. The jury has answered the issue in favor of defendants. The court below, in an able and clear charge (consisting of 36 pages), gave the law applicable to the facts. In the judgment of the court below we find

No error.

C. C. DISHER CHEVROLET COMPANY v. R. C. JOHNSON.

(Filed 5 January, 1938.)

APPEAL by plaintiff from *Hill, Judge,* at March Term, 1937, of FORSYTH. Affirmed.

This was an action to recover the possession of an automobile, tried in the Forsyth County Court, resulting in judgment for defendant upon the verdict of the jury that plaintiff was not the owner of the automobile sued for. Upon appeal to the Superior Court, all of plaintiff's assignments of error were overruled, and the judgment of the county court affirmed. From the judgment of the Superior Court, plaintiff appealed to the Supreme Court, preserving its exceptions and assignments of error in the county court.

Parrish & Deal and Buford T. Henderson for plaintiff.
Elledge & Wells for defendant.

PER CURIAM. The record discloses that the controversy resolved itself into one of fact, and that the issues raised by the pleadings were properly submitted to the jury. There was no exception to the judge's charge, and we have examined the exceptions to the court's rulings on matters of evidence and find therein no prejudicial error. No new questions of law are presented, and we see no sufficient reason to disturb the result of the trial.

Judgment affirmed.

WILLIAM M. PIATT v. TOWN OF HILLSBORO.

(Filed 5 January, 1938.)

APPEAL by plaintiff from *Parker, J.,* at June Term, 1937, of ORANGE.

Civil action for breach of contract.

Plaintiff alleges that in 1926 he was engaged by the town of Hillsboro to design and supervise the construction of a proposed municipal waterworks and sewerage system, his compensation to be 6% of the cost; $300 to be due and payable upon completion of preliminary surveys, and balance as the work progressed. Plaintiff further alleges that he was paid the first item of $300, and nothing more; that other engineers have been engaged to complete the work for which he was employed, and that the estimated balance due under his contract is $7,688.48.

Defendant denies that plaintiff holds any valid contract such as he alleges; admits that he was paid $300 for a preliminary survey in 1926, and avers that the project was then abandoned as too expensive.

Later, in 1935, under different circumstances and with the aid of the Public Works Administration, the defendant again proposed to install a municipal waterworks and sewerage system. Plaintiff was not awarded the engineering contract for this new project; whereupon he sues upon an alleged contract made with him in 1926.

The validity of plaintiff's contract being denied, an issue as to its due execution and existence was submitted to the jury and answered in favor of the defendant. From judgment thereon, plaintiff appeals, assigning errors.

J. L. Morehead and Graham & Eskridge for plaintiff, appellant.
Bonner D. Sawyer for defendant, appellee.

PER CURIAM. Plaintiff seeks to recover upon the principle announced in *White Co. v. Hickory,* 195 N. C., 42, 141 S. E., 494. But as the jury has found that he holds no valid contract with the defendant, his action fails. *Realty Co. v. Charlotte,* 198 N. C., 564, 152 S. E., 686. This ends the matter, even though the issues submitted, over objection, may not meet with entire approval.

The result will not be disturbed.

No error.

GIRLIE SLATE, ADMINISTRATRIX OF ESTATE OF ELMER ALBERT SLATE, DECEASED, v. CLYDE O. SAPP.

(Filed 2 February, 1938.)

APPEAL by plaintiff from *Harding, J.,* at May Term, 1937, of FORSYTH.

Action instituted 5 October, 1936, to recover for wrongful death.

The uncontroverted facts are: Elmer Albert Slate died on 7 August, 1936, as a result of a wound in the upper part of the left shoulder ranging down, inflicted by a gun in the hands of and fired by the defendant. Girlie Slate is the duly appointed and qualified administratrix of Elmer Albert Slate. At the time of his death, and for several months prior thereto, Elmer Slate had been working on the farm with, and residing in the home of, the defendant. The home, a dwelling, is two stories in front and one story in the back. The front door opens into a

hallway from which a door leads into a room on each side. The stairway to the second floor is located on the left of the hallway, just back of the door to the left front room, and 4 feet from the front door. The defendant, his wife and small child, slept in the right front room, and Elmer Slate slept in the room above. There is a porch on the front and a walkway leading to the road, 45 or 50 feet away. There is a window in the front of the room in which defendant slept opening on to the porch. The front door was partly glass.

Plaintiff alleged and contended that on the night of 7 August, 1936, about 9 o'clock, plaintiff's intestate had gone out of the house to the front yard and as he was returning and entering the front door to go up the stairway to his room, the defendant carelessly, negligently, willfully, and in reckless disregard of the life of the intestate, shot and killed him; that defendant was negligent in failing to make proper inquiry to ascertain the identity of the intestate; that he failed to exercise the care of a reasonably prudent person under the circumstances in that, knowing that the intestate was accustomed to use the front door in going to and from his room, and after observing intestate, he failed to call out to him in an audible tone; in that he failed to strike a match or light a lamp; and in that he became unduly alarmed and acted too hastily. The plaintiff offered testimony tending to show that intestate was shot as he entered the front door; that the defendant admitted that he shot the intestate, and that upon being asked on the second day thereafter, while the intestate was a corpse, "What did you kill him for?" he replied: "The Lord had me kill him."

The defendant in his answer denied the material allegations of the complaint, and alleged and offered evidence tending to show that on the night in question the intestate and defendant and his family retired about 8 o'clock; that a rain and windstorm came up about 9 o'clock, and the defendant went upstairs and called to the intestate to pull down the window; that at that time intestate was in bed; that defendant then went back to his room and to bed; that later, about midnight, he was awakened by his wife, who informed him that someone was at the window on the porch; that he then got up and went out in the hall to the front door and saw a person going down the walkway toward the road; that this person turned and came back toward the house, and on seeing him coming, defendant secured his gun and as the person came into the door he called to him to "Stop—halt"; that on receiving no answer and seeing the person creeping toward him, he fired; that he thought the person was a burglar; that he had no reason to think that the intestate was out in the yard; and that if intestate was a sleep-walker, he had no knowledge of it.

The case was submitted to the jury on the following issues:

"1. Was the death of the plaintiff's intestate caused by the wrongful acts of the defendant, as alleged in the complaint?

"2. If so, did the defendant willfully and maliciously cause the death of plaintiff's intestate, as alleged in the complaint?

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

The jury answered the first issue "No."

From judgment on the verdict plaintiff appealed to the Supreme Court, and assigned error.

John D. Slawter and Richmond Rucker for plaintiff, appellant.
No counsel contra.

PER CURIAM. The record fails to disclose reversible error. Exceptions to portions of the charge are untenable. When read as a whole, the charge fairly presents the case to the jury. Defendant's version of the circumstances under which the intestate came to his untimely death was accepted by the jury. However regrettable the occurrence be, the verdict finds the defendant without fault.

We have considered all exceptions.

In the trial we find

No error.

DISPOSITION OF APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

Batton v. Atlantic Coast Line Railroad Company, 212 N. C., 256, petition for writ of *certiorari* denied.

AMENDMENTS TO RULES OF PRACTICE IN SUPREME COURT

The Rules of Practice in the Supreme Court are hereby amended, effective from and after 14 October, 1937, as follows:

Rule 5 is amended by striking out the words "First, Second, Third, and Fourth," appearing in the proviso, lines 14 and 15, and inserting in lieu thereof "First, Second, Third, Eighteenth, Nineteenth, Twentieth, and Twenty-first."

Rule 19 is amended by striking out the word "Seven," appearing in line 1, subsection 7, and inserting in lieu thereof the word "Nine."

Rule 22 is amended by striking out the word "Seven," appearing in lines 10 and 14, and inserting in lieu thereof the words "Nine legible."

Rule 26 is amended by adding at the end of the first paragraph these words: "Provided, statement of such cost is given the Clerk before the case is decided."

Rule 44 is amended by striking out the word "Two," appearing in line 7, subsection 3, and inserting in lieu thereof the word "Three."

Approved 14 October, 1937.

(Signed) WINBORNE, J., *For the Court.*

AMENDMENTS TO ORGANIZATION OF THE NORTH CAROLINA STATE BAR

Be It Resolved by the Council of The North Carolina State Bar, that section 1, Article V, of the Certificate of Organization of The North Carolina State Bar, as amended on the 5th day of October, 1934, be amended to read as follows:

ARTICLE V.

Meetings of The North Carolina State Bar.

SECTION 1. *Annual Meetings.* The annual meetings of The North Carolina State Bar, beginning with the year 1937, shall be held in the city of Raleigh, on the fourth Friday in October.

NORTH CAROLINA—WAKE COUNTY.

I, Henry M. London, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Certificate of Organization of The North Carolina State Bar was adopted at the regular meeting of the Council on the 16th day of July, 1937, by unanimous vote of the Council. Given under my hand and the seal of The North Carolina State Bar, this the 25th day of August, 1937.

(Seal.) HENRY M. LONDON,
Secretary-Treasurer of The North Carolina State Bar.

After examining the foregoing amendment to the Certificate of Organization of The North Carolina State Bar, it is my opinion that the amendment complies with a permissible interpretation of chapter 210, Public Laws 1933. This 31st day of August, 1937.

W. P. STACY,
Chief Justice.

Upon the foregoing certificate of the Chief Justice, it is ordered that the foregoing amendment to the certificate of Organization of The North Carolina State Bar be spread upon the minutes of the Supreme Court, and that it be published in the forthcoming volume of the Reports, as provided by the act incorporating The North Carolina State Bar. This 31st day of August, 1937.

J. W. WINBORNE, *For the Court.*

AMENDMENTS TO ORGANIZATION OF THE NORTH CAROLINA STATE BAR.

Be It Resolved, by the Council of The North Carolina State Bar, that Article X, of the Certificate of Organization of The North Carolina State Bar, be and the same is hereby amended by substituting therefor the following Canons of Ethics as adopted by the American Bar Association with certain amendments thereto heretofore adopted by said Council:

ARTICLE X.

Canons of Ethics and Rules of Professional Conduct.

No code or set of rules can be framed which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

1. The Duty of the Lawyer to the Courts.

It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such case, but not otherwise, such charges should be encouraged and the person making them should be protected.

2. The Selection of Judges.

It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selections of Judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

3. Attempts to Exert Personal Influence on the Court.

Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special

personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

4. When Counsel for an Indigent Prisoner.

A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

5. The Defense or Prosecution of Those Accused of Crime.

It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaking such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

6. Adverse Influences and Conflicting Interests.

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

7. Professional Colleagues and Conflicts of Opinion.

A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline asso-

ciation as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to coöperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the employment of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

8. Advising Upon the Merits of a Client's Cause.

A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

9. Negotiations With Opposite Party.

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should be undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

10. Acquiring Interest in Litigation.

The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

11. Dealing With Trust Property.

The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.

Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him.

12. Fixing the Amount of the Fee.

In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

13. Contingent Fee.

A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.

14. Suing a Client for a Fee.

Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

15. How Far a Lawyer May Go in Supporting a Client's Cause.

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

16. Restraining Clients from Improprieties.

A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

17. Ill-Feeling and Personalities Between Advocates.

Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward

suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

18. Treatment of Witnesses and Litigants.

A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

19. Appearance of Lawyers as Witness for His Client.

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

20. Newspaper Discussion of Pending Litigation.

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

21. Punctuality and Expedition.

It is the duty of the lawyer not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

22. Candor and Fairness.

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argu-

ment of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

23. Attitude Toward Jury.

All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

24. Right of Lawyer to Control the Incidents of the Trial.

As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

25. Taking Technical Advantage of Opposite Counsel; Agreements With Him.

A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely

notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

26. Professional Advocacy Other Than Before Courts.

A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

27. Advertising, Direct or Indirect.

The customary use of simple professional cards is permissible. Publication in approved law lists and legal directories, in a manner consistent with the standard of conduct imposed by these Canons, of brief biographical data is permissible. This may include only a statement of the lawyer's name and the names of his professional associates, addresses, telephone numbers, cable addresses, special branches of the profession practiced, date and place of birth and admission to the Bar, schools attended with dates of graduation and degrees received, public offices and posts of honor held, Bar and other association memberships and, with their consent, the names of clients regularly represented. This does not permit solicitation of professional employment by circulars, or advertisements, or by personal communications or interviews not warranted by personal relations. It is unprofessional to endeavor to procure professional employment through touters of any kind. Indirect advertisements for professional employment, such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible.

28. Stirring Up Litigation, Directly or Through Agents.

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt

up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital *attachés* or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred.

29. Upholding the Honor of the Profession.

Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

30. Justifiable and Unjustifiable Litigations.

The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

31. Responsibility for Litigation.

No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring

into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

32. The Lawyer's Duty in Its Last Analysis.

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

33. Partnerships—Names.

Partnerships among lawyers for the practice of their profession are very common and are not to be condemned. In the formation of partnerships and the use of partnership names care should be taken not to violate any law, custom, or rule of court locally applicable. Where partnerships are formed between lawyers who are not all admitted to practice in the courts of the State, care should be taken to avoid any misleading name or representation which would create a false impression as to the professional position or privileges of the member not locally admitted. In the formation of partnerships for the practice of law, no person should be admitted or held out as a practitioner or member who is not a member of the legal profession duly authorized to practice, and amenable to professional discipline. In the selection and use of a firm name, no false, misleading, assumed or trade name should be used. The continued use of the name of a deceased or former partner, when permissible by local custom, is not unethical, but care should be taken that no imposition or deception is practiced through this

use. When a member of the firm, on becoming a judge, is precluded from practicing law, his name should not be continued in the firm name.

Partnerships between lawyers and members of other professions or nonprofessional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law.

34. Division of Fees.

No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.

35. Intermediaries.

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries.

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

36. Retirement From Judicial Position or Public Employment.

A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity.

A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ.

37. Confidences of a Client.

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that his obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

38. Compensation, Commissions and Rebates.

A lawyer should accept no compensation, commission, rebates or other advantages from others without the knowledge and consent of his client after full disclosure.

39. Witnesses.

(Not adopted.)

40. Newspapers.

A lawyer may with propriety write articles for publication in which he gives information upon the law; but he should not accept employment from such publications to advise inquirers in respect to their individual rights.

41. Discovery of Imposition and Deception.

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

42. Expenses.

A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

43. Approved Law Lists.

It shall be improper for a lawyer to permit his name to be published after January 1, 1939, in a law list that is not approved by the American Bar Association.

44. Withdrawal From Employment as Attorney or Counsel.

The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The lawyer should not throw up

the unfinished task to the detriment of his client except for reasons of honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney's remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement or obligation as to fees or expenses, the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer. So also when a lawyer discovers that his client has no case and the client is determined to continue it; or even if the lawyer finds himself incapable of conducting the case effectively. Sundry other instances may arise in which withdrawal is to be justified. Upon withdrawing from a case after a retainer has been paid, the attorney should refund such part of the retainer as has not been clearly earned.

45. Specialists.

The canons of the American Bar Association apply to all branches of the legal profession; specialists in particular branches are not to be considered as exempt from the application of these principles.

46. Notice of Specialized Legal Service.

Where a lawyer is engaged in rendering a specialized legal service directly and only to other lawyers, a brief, dignified notice of that fact, couched in language indicating that it is addressed to lawyers, inserted in legal periodicals and like publications, when it will afford convenient and beneficial information to lawyers desiring to obtain such service, is not improper.

47. Aiding the Unauthorized Practice of Law.

No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.

ADDITIONAL CANONS ADOPTED BY COUNCIL.

A. It shall be deemed unethical and unprofessional for a member of The North Carolina State Bar, who is now or who may hereafter become a partner of any judge of any court inferior to the Superior Court, to practice his profession in the court of any such judge, during the existence of such copartnership.

B. It shall be deemed unethical and unprofessional for a member of The North Carolina State Bar, who is now or who may hereafter become a partner of a solicitor or prosecuting attorney of any court of the State of North Carolina, to practice his profession in any criminal court of such solicitor or prosecuting attorney.

C. It shall be deemed unethical and unprofessional for any attorney who is, or has been, a prosecuting officer in any court inferior to the Supreme Court, or in any Federal Court, to accept professional employment in any matter of a civil or criminal nature growing out of any matter or thing which is or may have been in any way connected with the office of such prosecuting officer during his incumbency.

NORTH CAROLINA—WAKE COUNTY.

I, Henry M. London, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Certificate of Organization of The North Carolina State Bar was adopted at the regular meeting of the Council on the 14th day of January, 1938, by unanimous vote of the Council. Given under my hand and the seal of The North Carolina State Bar, this the 2nd day of February, 1938.

(Seal.) HENRY M. LONDON,
Secretary-Treasurer of The North Carolina State Bar.

After examining the foregoing amendment to the Certificate of Organization of The North Carolina State Bar, it is my opinion that the amendment complies with a permissible interpretation of Chapter 210, Public Laws 1933. This the 2nd day of February, 1938.

W. P. STACY,
Chief Justice.

Upon the foregoing certificate of the Chief Justice, it is ordered that the foregoing amendment to the Certificate of Organization of The North Carolina State Bar be spread upon the minutes of the Supreme Court, and that it be published in the forthcoming volume of the Reports as provided by the act incorporating The North Carolina State Bar. This 2nd day of February, 1938.

J. W. WINBORNE, *J.*,
For the Court.

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Statute of Frauds—See Frauds, Statute of.
Statute of Limitations—See Limitation of Actions; acquisition of easements by prescription see Easements; life of judgment lien see

Judgments § 21; time within which action to restrain bond issue must be instituted see Taxation § 38a.
Stolen Goods, Receiving—See Receiving Stolen Goods.
Stores—Liability of store for injury to customer see Negligence § 4d.
Streams—Riparian rights see Waters and Water Courses; erosion of bank resulting from operation of dam see Eminent Domain § 2.
Street Assessments—See Municipal Corporations § 34.
Streets and Sidewalks—Liability for injuries caused by defects in, see Municipal Corporations § 14.
"Subsistence"—See *Dyer v. Dyer*, 620.
Sudden Peril—See Negligence § 2.
Summary Ejectment—Parties see Ejectment § 5.
Summons—See Process.
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Surcharge and Falsify Account—See Executors and Administrators § 31.
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"Surprise and Excusable Neglect"—Setting aside judgments for, see Judgments § 23.
Suspended Judgments and Executions—See Criminal Law § 63.
Tax Sales—See Taxation § 40b.
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Tenants in Common—Adverse possession by, see Adverse Possession § 4a; after parol partition tenant is sole owner within meaning of fire policy see Insurance § 22d, paragraph 3; partition of lands see Partition; right of devisee in common to have land remain undivided in accordance with terms of will see Wills §§ 35, 46.
Theory of Trial—See *Dent v. Mica Co.*, 241.
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Timber—Conversion of standing timber into personalty see *Walston v. Lowry*, 23.
Topsoil — Acquisition by Highway Commission by condemnation see Eminent Domain § 6.
Torts—Release from liability see Torts; particular torts see Negligence, Trespass; torts committed by persons in particular relationships see Master and Servant, Municipal Corporations, Corporations, Innkeepers; negligence in operation of automobiles see Automobiles; distinction between actions in tort and on contract see *Wells v. West*, 656.
Town Clerk—Town commissioner may not be appointed town clerk with additional salary see *Carolina Beach v. Mintz*, 578.
Transactions with Decedent or Lunatic—Competency of evidence of, see Evidence § 32.
Trespass—See Trespass; enjoining continuing trespass see Injunctions § 6.
"Unconditional Ownership"—See Insurance § 22d.
Unemployment Compensation Commission—Appeals from, see Courts § 2b.
Unjust Enrichment—See Money Received.
Unlawful Contract—Party may not recover when it must make out cause by showing contract against monopoly statute, *Shoe Co. v. Department Store*, 75.
Unregistered Deed—Rights of parties under see Deeds § 10b; unregistered deeds as color of title see *Glass v. Shoe Co.*, 70.
Verdict—See Trial § 37, Criminal Law § 54b; directed verdict see Trial § 27; verdict in particular actions see Assault and Battery § 11, Automobiles § 18i, Homicide § 28, Larceny § 8, Reformation of Instruments §11; conformity of judgment to verdict see Criminal Law § 60, Judgments § 17b; motions to set aside see Trial § 49.
Vested Estates—See Wills § 33c.
Ward—See Guardian and Ward.
Warrant—Search warrants, alteration after issuance see Constitutional Law § 14a.
Wharfs—Construction so as to interfere with adjacent owner's riparian rights see *O'Neal v. Rollinson*, 83.
Words Actionable Per Quod—See Libel and Slander § 3.

Words Actionable Per Se—See Libel and Slander § 2.
Workmen's Compensation Act—See Master and Servant, Title VII.
WPA Workers—Liability of city for negligent injuries inflicted by, see *Shapiro v. Winston-Salem*, 751.
Wrongful Death—See Death.

ABATEMENT AND REVIVAL.

§ 11. Actions for Negligent Injury Causing Death.

Parent's right of action to recover for loss of services of child abates upon death of child. *White v. Charlotte*, 539.

ABORTION.

§ 8. Sufficiency of Evidence.

Evidence held sufficient for jury on issue of defendant's guilt of advising and procuring criminal abortion. *S. v. Baker*, 233.

ACTIONS.

(Joinder of actions see Pleadings § 2.)

§ 4. Civil Action Based upon Unlawful Act.

The courts of a state will not lend their aid to the enforcement of a contract which violates its positive legislation. *Shoe Co. v. Department Store*, 75.

Party may not recover when it must make out its case by showing illegal contract. *Ibid.*

§ 7. Distinction Between Actions in Tort and on Contract.

Since proprietor of rooming house is not bailee of personal property left in a room rented, an action by the renter of the room to recover for his property which the proprietor allowed a third person to take from the room is founded in tort, if cause is alleged at all, and not on contract. *Wells v. West*, 656.

ADVERSE POSSESSION.

(Acquisition of easements by prescription see Easements § 3.)

I. Nature and Requisites of Title by Adverse Possession
2. Presumption of Title out of the State
3. Actual, Hostile, and Exclusive Possession in General
4. Hostile Character of Possession as Affected by Relationship between the Parties
a. Tenants in Common
5. Known and Visible Lines and Boundaries
6. Continuity of Possession
8. Lappage
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a. What Constitutes Color of Title
13. Time Necessary to Ripen Title by Adverse Possession
f. Possession within Twenty Years Before Institution of Action
III. Actions
16. Pleadings
17. Presumptions and Burden of Proof
18. Competency and Relevancy of Evidence
19. Sufficiency of Evidence

§ 2. Presumption of Title Out of the State.

Where the State is not a party, title is conclusively presumed to be out of the State, C. S., 426. *Berry v. Coppersmith*, 50.

§ 3. Actual, Hostile, and Exclusive Possession in General.

Possession, to be adverse, must be evidenced by acts of dominion in making the ordinary use and taking the ordinary profits of which the land is susceptible in its present state, and so repeated as to show they are done in the character of owner and not merely of an occasional trespasser. *Berry v. Coppersmith*, 50.

§ 4a. Adverse Possession by Tenants in Common.

Where tenants in common, pursuant to parol partition, take possession in severalty, law will presume ouster, and pleadings in this case *held* sufficient to raise issue of adverse possession by tenant in common. *Martin v. Bundy*, 437.

ADVERSE POSSESSION—*Continued.*

§ 5. Known and Visible Lines and Boundaries.

Adverse possession must be under known and visible lines and boundaries. *Berry v. Coppersmith*, 50.

§ 6. Continuity of Possession.

Adverse possession need not be unceasing, but claimant must show that he has, from time to time, continuously subjected the land for the required period to the use of which it is naturally susceptible. *Berry v. Coppersmith*, 50.

§ 8. Lappage.

Where the descriptions in plaintiff's and defendants' respective chains of title embrace in part the same land, and the defendants, claiming under the elder title, have no actual possession of the lappage, title to the entire lappage is perfected in plaintiff if he establishes adverse possession of a part of the lappage for seven years under color. *Berry v. Coppersmith*, 50.

§ 9a. What Constitutes Color of Title.

Where grantee in unregistered deed conveys by registered deed, registered deed is color of title. *Glass v. Shoe Co.*, 70.

§ 13f. Possession Within Twenty Years Before Institution of Action.

Where a person claiming under color establishes adverse possession for seven years by himself or by those under whom he claims, seizin follows the title, and nothing else appearing, he thereafter has constructive possession sufficient to satisfy the statute, and is not required to show actual possession within twenty years before the institution of the action. C. S., 429. *Berry v. Coppersmith*, 50.

§ 16. Pleadings.

Where it is alleged that defendant's predecessor in title went into possession of the *locus in quo* pursuant to a parol partition between him and his cotenants in common, and that each tenant thereafter held his share so allotted in severalty and hostilely to his cotenants for more than twenty years, the allegations are sufficient to raise the issue of title by adverse possession in the tenant in common, C. S., 430, and it is error for the trial court to disregard the plea of title by adverse possession and refuse to submit the case to the jury. *Martin v. Bundy*, 439.

§ 17. Presumptions and Burden of Proof.

The burden is on the party claiming by adverse possession to show the required possession for the statutory period by the preponderance of the evidence. *Berry v. Coppersmith*, 50.

§ 18. Competency and Relevancy of Evidence.

Where plaintiff claims by adverse possession under color of title, it is competent for his witnesses to testify that predecessors in plaintiff's chain of title were respectively in possession, "possession" being used in the layman's sense of actual possession as a matter of fact, and the witnesses testifying on direct and cross examination of the acts of possession tending to substantiate the fact of possession. *Berry v. Coppersmith*, 50.

§ 19. Sufficiency of Evidence.

Where it is established that the land in controversy is swamp land, valuable only for timber, evidence that plaintiff, claiming under known and visible lines and boundaries under color, from time to time cut and sold timber from the tract for over seven years, is sufficient to take the case to the jury. *Berry v. Coppersmith*, 50.

ANIMALS.

§ 2. Liability for Damage Inflicted by Domestic Animals.

Ch. 116, sec. 7, Public Laws of 1919, does not impose liability on a county in its corporate capacity for damages to person or property caused by dogs, a claim for such damage, when established under the statute, being payable only on order of the board of commissioners, and then only from moneys derived from the tax on dogs therein imposed, and *mandamus* will not lie against the county to compel payment of such damage upon allegation that its board of commissioners arbitrarily refused to appoint a jury to investigate the claim as required by the statute, plaintiff's remedy on the allegation being against the board of commissioners to compel them to act as required by the statute. *McAlister v. Yancey County*, 208.

APPEAL AND ERROR.

(Appeals in criminal prosecutions see Criminal Law, Title XII; appeals to Superior Courts see Courts § 2; appeals from Industrial Commission see Master and Servant § 55.)

I. Nature and Grounds of Appellate Jurisdiction
1. In General
2. Judgments Appealable: Premature Appeals
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II. Presentation and Preservation in Lower Court of Grounds of Review
6a. Time of Taking Objections and Exceptions
8. Theory of Trial
III. Requisites and Proceedings for Appeal
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XI. Review
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38. Presumptions and Burden of Showing Error
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41. Questions Necessary to Determination of Cause
XIV. Determination and Disposition of Cause
47a. New Trial for Newly Discovered Evidence
49. Force and Effect of Decisions of Supreme Court

§ 1. Nature and Grounds of Appellate Jurisdiction in General.

Where statute under which proceeding is begun does not provide for appeal, no appeal may be taken. *In re Sylvant*, 343; *Compensation Com. v. Kirby*, 763.

§ 2. Judgments Appealable: Premature Appeals.

An appeal from an order denying defendants' motion to vacate an attachment is premature where the trial court allows plaintiff to amend his complaint and affidavits, since what amendments, if any, will be made and their effect upon defendants' motion cannot be determined. *Meekins v. Game Preserves*, 96.

In this action on a policy of indemnity insurance, insurer's appeal from judgment of the Superior Court affirming the judgment of the municipal court in insured's favor, with the modification that an issue as to the amount of the recovery be submitted to a jury, *is held* premature and is dismissed. *Distributing Co. v. Ins. Co.*, 665.

§ 3a. Parties Who May Appeal.

Where by error the judgment of the court directs defendant to pay money into court for the benefit of defendant, plaintiff is not the injured party on the record as certified, and his appeal will be dismissed. C. S., 632. *Ragan v. Ragan*, 753.

APPEAL AND ERROR—*Continued.*

§ 6a. Time of Taking Objections and Exceptions. (To statement of contentions see Trial § 33.)

Exception to remarks of counsel must be taken at the time in order for assignment of error to be considered. *York v. York*, 695.

§ 8. Theory of Trial.

Where a party contends in the Superior Court that no contract existed between him and the adverse party at the time, he may not contend on appeal to the Supreme Court that the contract alleged is not binding or enforceable, since the appeal will follow the theory of trial in the lower court. *Dent v. Mica Co.*, 241.

§ 10b. Filing and Service of Case on Appeal.

The allowance by the judge of the Superior Court of appellee's motion to strike out appellant's purported statement of case on appeal is without error upon the court's finding that the statement of case on appeal was not filed within the time allowed. *Parrish v. Hartman*, 248.

§ 20b. Correction of Record.

Where it is patent that the judgment as certified used the word "defendant" where the word "plaintiff" was intended, resulting in an inconsistent and meaningless judgment, it is the duty of the trial court to correct the record to speak the truth, either on application or *ex mero motu*. *Ragan v. Ragan*, 753.

§ 21. Matters Not Appearing of Record Deemed Without Error.

Where charge is not in record it is presumed correct. *Ledford v. Smith*, 447.

§ 31b. For Failure to Make Out and Serve Statement of Case on Appeal.

Failure to have a statement of case on appeal does not *ipso facto* work a dismissal, but the Supreme Court may review the record proper for errors appearing upon its face. *Parrish v. Hartman*, 248.

§ 37b. Matters in Discretion of Lower Court.

A motion for change of venue for convenience of witnesses and to promote the ends of justice is addressed to the sound discretion of the trial judge, and his action thereon is not reviewable upon appeal except upon abuse of discretion. *Howard v. Coach Co.*, 201.

Application for bill of particulars is addressed to discretion of trial court, and court's ruling thereon is ordinarily not reviewable. *Tickle v. Hobgood*, 762.

Motion for bill of particulars is addressed to discretion of trial court, and his disposition of the motion is not ordinarily reviewable. *Tickle v. Hobgood*, 762.

§ 37c. Findings of Fact.

Findings of fact by a referee approved by the judge are conclusive on appeal when supported by any competent evidence. *Smith v. Land Bank*, 79; *Dent v. Mica Co.*, 241; *Corbitt Co. v. Nutt Corp.*, 666.

The findings of fact in regard to residence of plaintiff upon defendant's motion to remove are conclusive on appeal when supported by competent evidence. *Howard v. Coach Co.*, 201.

Findings of court upon appeal from referee in compulsory reference where right to jury trial is not preserved, are conclusive when supported by evidence. *Gurganus v. McLaurhorn*, 397.

§ 38. Presumptions and Burden of Showing Error.

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent. *Braswell v. Wilson*, 833.

APPEAL AND ERROR—*Continued.*

§ 39a. Prejudicial and Harmless Error in General.

Error in admission or exclusion of evidence must be material to entitle appellant to new trial. *Gurganus v. McLawhorn*, 397.

§ 39d. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Where plaintiffs establish twenty years adverse possession, error in admitting evidence of color of title is immaterial. *Owens v. Lumber Co.*, 133.

Admission of testimony *held* harmless in view of other competent evidence and contentions. *Ibid.*

The admission of certain testimony over objection cannot be held prejudicial when other testimony of like effect is admitted without objection. *Leonard v. Ins. Co.*, 151.

Exclusion of impeaching evidence *held* not prejudicial where effect thereof was obtained by cross-examination. *York v. York*, 695.

§ 39e. Harmless and Prejudicial Error in Instructions in General.

Where a charge erroneously includes for the jury's consideration elements of damage not supported by allegation or evidence, a new trial will be awarded, since it may not be determined on appeal whether the verdict was affected by error. *Young v. Levin*, 755.

Instruction that speed in excess of 45 miles per hour constituted negligence *per se held* not prejudicial error in view of evidence that car was being driven around curve on wet pavement. *York v. York*, 695.

§ 39g. Harmless and Prejudicial Error in Placing of Burden of Proof.

Burden of proof is substantial right, and erroneous placing of burden of proof entitles appellant to new trial. *Williams v. Ins. Co.*, 516.

§ 40a. Review of Judgments on Findings.

Upon appeal from judgment supported by findings of fact of the referee approved by the judge, the Supreme Court must determine only whether there was any evidence to support the findings. *Smith v. Land Bank*, 79.

Where the findings of fact of the referee are supported by evidence and are approved by the trial court, judgment in accordance with correct conclusions of law based on the facts will be affirmed. *Dent v. Mica Co.*, 241.

Where certain findings of fact are sufficient to sustain the judgment dismissing the action for that plaintiffs have no standing in court and are not entitled to maintain the action, other findings in regard to the motives of defendants in agreeing to do the act sought to be restrained, are immaterial and should be stricken from the record. *Bailey v. Light Co.*, 768.

§ 40b. Review of Orders on Motions to Strike Out.

The refusal of a motion to strike out certain allegations will not be held prejudicial when all evidence relating to such allegations is excluded at the trial. *In re West*, 189.

Judgment denying motion to strike out *held* not prejudicial, as matter may be best determined by trial court by rulings on evidence. *Ladwick v. R. R.*, 664.

§ 40c. Review of Orders Upon Motion for Bill of Particulars.

An application for a bill of particulars, C. S., 534, or a motion to require a pleading to be made more definite and certain, C. S., 537, is addressed to the discretion of the trial court, and his ruling thereon in the exercise of such discretion is ordinarily not reviewable, but it is error for the trial court to rule thereon as a matter of law without the exercise of discretion. *Tickle v. Hobgood*, 762.

APPEAL AND ERROR—*Continued.*

§ 40e. Review of Judgments on Motions to Nonsuit.

Even though the evidence relied on by the trial court in refusing defendant's motion to nonsuit is held incompetent on appeal, the motion will not be allowed, since, if the evidence had been excluded upon the trial, defendant might then have sustained his case with other evidence. *Midgett v. Nelson*, 41.

§ 41. Questions Necessary to Determination of Cause.

Where the rights of the parties are determined by the decision on one question of law, other questions discussed in the briefs need not be decided. *Shoe Co. v. Department Store*, 75.

Where it is decided on appeal that the judgment of nonsuit was properly entered for want of evidence of actionable negligence, other exceptions need not be considered. *Callahan v. Roberts*, 223.

§ 47a. New Trial for Newly Discovered Evidence.

Motion in Supreme Court for new trial for newly discovered evidence allowed in this case. *Liverman v. Vann*, 177.

§ 49. Force and Effect of Decisions of Supreme Court.

A decision of the Supreme Court is authority only as to matters therein decided. *In re West*, 189.

APPEARANCE.

§ 1. Special Appearance.

Special appearance and motion to dismiss for want of valid service is proper procedure. *Denton v. Vassiliades*, 513.

ARBITRATION AND AWARDS.

§ 1. Nature, Requisites and Validity of Remedy.

The Uniform Arbitration Act, ch. 94, Public Laws of 1927, N. C. Code, 898 (a) (x), does not exclude the common-law remedy of arbitration, but is cumulative and concurrent thereto, and the act does not prevent the parties to a controversy from contracting by parol to submit their differences to arbitration in cases where a parol agreement on the subject matter would be enforceable, and an award reached under the parol agreement to arbitrate will not be invalidated by reason of failure to follow in all respects the method and procedure prescribed by the statute. *Copney v. Parks*, 217.

ASSAULT AND BATTERY.

§ 11. Verdict and Judgment.

Where jury returns verdict of simple assault, court may not impose imprisonment for more than thirty days. *S. v. Palmer*, 10.

ATTORNEY AND CLIENT.

§ 9b. Persons Liable for Fees.

In this action by attorneys against husband and wife to recover fees for professional services, the evidence favorable to plaintiffs tended to show that the husband had deeded land to the wife subject to a mortgage, that plaintiffs' services were rendered in an action against the husband alone to foreclose the mortgage, and that the wife knew of the action and that it had been advantageously settled by compromise, and that there was no contract made directly between the wife and plaintiffs. *Held:* The evidence is insufficient to be submitted to the jury on the question of the wife's authorization of the employment of plaintiffs for her or on an implied contract by her to pay plaintiffs, and the wife's motion to nonsuit should have been allowed. *Young v. Lucas*, 194.

ATTORNEY AND CLIENT—*Continued.*

Allegations that plaintiff attorney was employed by certain taxpayers of a municipality, and succeeded in having a judgment obtained against the municipality in the action reversed on appeal, to the municipality's great benefit, are insufficient to support an action against the municipality for the services rendered upon implied contract, nor would plaintiff be entitled to a lien for his services. *Auten v. Asheville*, 380.

§ 12. Disbarment Procedure and Proceedings.

An attorney may be disbarred by judicial or statutory procedure. *In re West*, 189.

This State requires as high a standard of conduct for attorneys as is elsewhere required, but the right to practice may not be revoked without due process of law. *Ibid.*

In disbarment proceedings had in conformity with the legislative method, ch. 210, Public Laws of 1933, respondent's exception on the ground that the proceedings deprived him of his right to trial by jury is untenable when the matters in issue are determined by a jury upon his appeal to the Superior Court. *Ibid.*

A respondent in disbarment proceedings had in conformity with the legislative method cannot successfully contend upon appeal to the Superior Court that all proceedings prior to the time of trial in the Superior Court were void as being without warrant of law when he participated therein, without objection, since the proceedings are civil in nature rather than criminal, and the objection being based upon a constitutional right which may be waived by express consent, failure to assert same in apt time, or by conduct inconsistent with a purpose to insist upon it. *Ibid.*

In a legislative disbarment proceeding, a motion to strike from the complaint allegations relating to matters occurring prior to the effective date of ch. 210, Public Laws of 1933, is too late when not made until after the jury has been impaneled. C. S., 537. *Ibid.*

The *Parker case*, 209 N. C., 693, is not authority for eliminating offenses committed prior to 1 July, 1933, the effective date of the act incorporating the State Bar. *Ibid.*

A demurrer to the evidence bearing upon certain charges in disbarment is correctly overruled when there is more than a scintilla of evidence supporting the charges even though the evidence relating thereto is conflicting. *Ibid.*

Where attorney charged with embezzlement enters plea of guilty of misdemeanor and consents to revocation of license, he may not thereafter complain of such revocation. *S. v. Ray*, 748.

AUTOMOBILES.

III. Operation and Law of the Road
8. Due care in Operation in General
12. Speed
a. Speed in General
e. Boulevards
17. Skidding
18. Actions to Recover for Negligent Injury
c. Contributory Negligence
d. Concurring and Intervening Negligence
g. Sufficiency of Evidence and Nonsuit
h. Instructions
i. Issues and Verdict
IV. Guests and Passengers
19. Right of Action for Injuries in General
20b. Imputed Negligence
22. Actions by Guests and Passengers
V. Liability of Owner for Driver's Negligence
24c. Competency and Sufficiency of Evidence on Issue of Employer's Liability
VII. Criminal Responsibility
32. Murder and Manslaughter Prosecutions.
d. Competency and Relevancy of Evidence in Prosecutions for Murder or Manslaughter
e. Sufficiency of Evidence and Nonsuit in Murder or Manslaughter Prosecutions

AUTOMOBILES—*Continued.*

§ 8. Due Care in Operation in General.

Instruction on question of judgment required of motorist confronted with emergency *held* without error. *Bullock v. Williams*, 113.

Violation of ordinance requiring motorists to stop before entering through street intersection is negligence *per se*. *Pearson v. Luther*, 412.

§ 12a. Speed in General.

The statutes prescribe certain maximum limits of speed, but a motorist must at all times operate a vehicle with due regard to the width, traffic, and condition of the highway. *Klingenberg v. Raleigh*, 549.

Instruction that speed in excess of 45 miles per hour would constitute negligence *per se held* not prejudicial error in view of fact that car was being driven around curve on wet pavement. *York v. York*, 695.

§ 12c. Boulevards.

While the failure to stop before attempting to cross a through street intersection in violation of a municipal ordinance is negligence *per se*, a vehicle traveling along the through street does not have the right of way at the intersection if a vehicle from the cross street is already in the intersection before the vehicle traveling along the through street is near enough the intersection to constitute an immediate hazard. *Pearson v. Luther*, 412.

§ 17. Skidding.

Evidence that defendant drove his car 55 to 60 miles per hour on a wet highway into a sharp curve, that the tires of the car were worn smooth, and that the car skidded, resulting in the injury in suit, *is held* sufficient to be submitted to the jury, it being for the jury to determine whether the skidding was the result of defendant's alleged negligence in operating the car and negligence in failing to equip his car with safe tires. *York v. York*, 695.

Res ipsa loquitur does not apply to skidding of automobile on highway. *Clodfelter v. Wells*, 823.

Skidding of an automobile is the slipping sideways of the wheels of the car, resulting in the inability of the driver to control the movement of the car, and plaintiff may not successfully contend that the accident was not caused by skidding when his own evidence discloses that the car zig-zagged across the highway on wet pavement and ran off the road into a ditch, especially when one of plaintiff's own witnesses testifies that the car seemed to be skidding. *Ibid.*

§ 18c. Contributory Negligence.

Contributory negligence in failing to stop at through street intersection *held* for jury and not to constitute bar as matter of law. *Pearson v. Luther*, 412.

§ 18d. Concurring and Intervening Negligence.

Where one driver negligently hits pedestrian, and second driver negligently runs over her while lying prostrate in street, both drivers are jointly liable. *Lewis v. Hunter*, 504.

§ 18g. Sufficiency of Evidence and Nonsuit.

Where there is evidence that intestate was injured and killed as a result of the negligent operation of his automobile by one of defendants, and conflicting evidence on the question of intestate's contributory negligence, the defendant's motion to nonsuit is properly denied. *Lewis v. Hunter*, 504.

Evidence that skidding was result of negligence *held* sufficient to be submitted to the jury. *York v. York*, 695.

Evidence *held* insufficient to show that skidding was result of negligence. *Clodfelter v. Wells*, 823.

AUTOMOBILES—*Continued.*

§ 18h. Instructions.

Where there is no allegation or evidence that defendant driver failed to give a warning signal required of him by the statute under the circumstances, it is error for the court to charge the law requiring the giving of such signal, since the court is required to charge the law arising upon the evidence. C. S., 564. *Farrow v. White*, 376.

Instruction in regard to negligence and proximate cause in entering through street intersection *held* without error. *Pearson v. Luther*, 412.

Instruction in regard to legal effect of speed in excess of 45 miles per hour *held* not prejudicial. *York v. York*, 695.

§ 18i. Issues and Verdict.

Failure to submit separate issues as to negligence of defendants charged as joint tort-feasors *held* not error. *Lewis v. Hunter*, 504.

§ 19. Guests' Right of Action for Injuries in General.

Evidence that members of a party riding in an automobile under an agreement with the driver that they should furnish the lunch and divide expenses of gasoline and oil, *held* sufficient to support plaintiff guests' contention that they were not "guests without payment" within the meaning of a South Carolina statute requiring such guests to prove an accident was intentional or was caused by reckless disregard of rights of others in order to recover. S. C. Code, 5908. *Clodfelter v. Wells*, 823.

§ 20b. Imputed Negligence.

Negligence of driver will not be imputed to guest unless guest has some control over driver, or they are engaged in joint enterprise. *York v. York*, 695.

§ 22. Actions by Guests and Passengers.

Charge, construed as a whole, *held* not objectionable as putting burden on issue of negligence on defendant. *Bullock v. Williams*, 113.

Evidence *held* not sufficient to require submission of issue of contributory negligence of guest in car. *York v. York*, 695.

An action by a guest to recover of the driver for injuries received in an accident is grounded on negligence, with the burden on the guest to affirmatively prove the allegations of the complaint. *Clodfelter v. Wells*, 823.

In this action by a guest in an automobile to recover for injuries received when the automobile in which she was riding zig-zagged on a straight highway, ran off the road and turned over, plaintiff's evidence disclosed that the highway was wet, that there was no traffic, but that the driver had not had adequate sleep the night before. The evidence showed, however, that at the time of the accident the driver was apparently alert, and told the occupants to keep steady and he would straighten the car out, and there was no evidence as to the speed of the car or of defect in the automobile or tires. *Held:* The evidence fails to support the allegations of the complaint that the driver failed to keep a proper lookout and was driving at an excessive speed in a reckless manner, and the doctrine of *res ipsa loquitur* not being applicable to the mere skidding of an automobile on the highway, plaintiff's evidence is insufficient to be submitted to the jury on the issue of the driver's negligence. *Ibid.*

§ 24c. Competency and Sufficiency of Evidence on Issue of Employer's Liability.

Evidence failing to show the ownership of the truck involved in the collision, and failing to show that at the time the driver of the truck was engaged in the performance of his duties and was employed in the particular transaction by the defendant sought to be held upon the principle of *respondeat*

AUTOMOBILES—*Continued.*

superior, is insufficient to overrule such defendant's motion to nonsuit. *Liverman v. Cline*, 43.

Owner's motion to nonsuit held properly granted upon evidence tending to show that employee driving the car at the time of the collision was driving for his own pleasure without the owner's permission, and contrary to its instructions, without evidence on the part of the plaintiff tending to show that at such time the employee was driving its automobile in the performance of the duties of his employment. *Puckett v. Dyer*, 203 N. C., 684, cited and distinguished. *Swicegood v. Swift & Co.*, 396.

§ 32d. Competency and Relevancy of Evidence in Prosecutions for Murder or Manslaughter.

Testimony of speed of truck a quarter of a mile from accident *held* competent. *S. v. Peterson*, 758.

§ 32e. Sufficiency of Evidence and Nonsuit in Murder or Manslaughter Prosecutions.

Evidence *held* to sustain conviction of second degree murder resulting from reckless operation of truck. *S. v. Peterson*, 758.

BAILMENT.

§ 1. Nature, Requisites and Validity.

A proprietor of a lodging house is not a bailee of personal property left in the room rented by the owner of the personalty, even though the proprietor has access to the room for janitor and maid service, there being no such delivery of possession of the personalty necessary to establish the relationship, and this result is not affected by the statutory lien given by C. S., 2461. *Wells v. West*, 656.

BANKS AND BANKING.

§ 13. Office and Duties of Statutory Receiver in General.

A receiver of a State bank is an officer of the court, and the fund he administers is *in custodia legis*, but he is not a public officer, nor an agent of the bank nor a trustee within the meaning of the embezzlement statute. *S. v. Whitehurst*, 300.

§ 18. Claims and Priorities.

Action against Commissioner of Banks to recover balance of claim after crediting dividends paid thereon as common claim, upon contention that claim should have been paid in full as preferred claim, *held* properly nonsuited when action was not instituted until after filing of final, statutory report by Commissioner. *Windley v. Lupton*, 167.

§ 19. Distribution of Assets and Final Settlement.

Funds in hands of liquidator representing amounts allocated to unproven claims are properly turned over to Secretary of State as Escheat Officer, and such funds are subject solely to rights of those creditors who failed to prove claims, and such funds are not subject to claims of other creditors of the bank. *Windley v. Lupton*, 167.

BASTARDS.

§ 1. Nature, Validity and Construction of Bastardy Statute.

Willful failure and refusal to support illegitimate child constitutes continuing offense. *S. v. Johnson*, 566.

BILLS AND NOTES.

§ 2b. Forgeries.

Where the name of the maker of the instrument is forged, the instrument is neither a bill nor a check, since the statute provides that a forged signature is wholly inoperative, C. S., 3003. *Seymour v. Bank*, 707.

§ 9b. Makers and Parties Primarily Liable.

Person signing note on its face is presumed to be maker. *Bank v. Jonas*, 395.

§ 10b. Endorsers and Persons Secondarily Liable.

Endorser *held* liable on forged check protested by drawee bank within reasonable time. *Seymour v. Bank*, 707.

§ 12b. Acceptance.

Where the name of the maker of a check is forged, the drawee bank cannot be held to have accepted same by holding same for more than twenty-four hours, C. S., 3118, 3119, not being applicable to forged instruments, but the bank has a reasonable time in which to protest the instrument as being a forgery. *Seymour v. Bank*, 707.

BOUNDARIES.

§ 2. Conclusiveness of Description and Admissibility of Parol or Extrinsic Evidence.

Where the parties have a survey made or go upon the land and agree upon a definite, marked line as the boundary of the tract to be conveyed, the line as so established contemporaneously with the execution of the deed will prevail over a different description in the deed. *Yopp v. Aman*, 479.

§ 3. General Reputation.

Testimony of plaintiffs' witnesses to the effect that they knew the general reputation of the beginning corner of the tract of land in dispute as "a double chestnut in the Rocky Knob Gap," and that they had known of such general reputation 25 to 50 years prior to the institution of the action, *held* competent and properly admitted in evidence to establish the corner as contended for by plaintiffs, the testimony meeting all the requirements of the rule. *Owens v. Lumber Co.*, 133.

§ 4. Declarations.

Testimony of declarations by plaintiff, incompetent because of plaintiff's interest at the time, *held* not prejudicial in view of other testimony of like declarations by plaintiff admitted without objection, and of plenary competent evidence of boundary as contended for by plaintiff. *Owens v. Lumber Co.*, 133.

§ 8. Evidence in Proceedings to Establish Dividing Line.

Evidence that parties went on land and agreed upon definite boundary, and that different description was put in subsequent deed by mutual mistake, *held* sufficient for jury. *Yopp v. Aman*, 479.

BURGLARY.

§. 1. Burglary in the First Degree.

Burglary in the first degree is an unlawful and intentional breaking and entry into a dwelling house presently occupied, in the nighttime, with intent to commit the felony charged in the bill of indictment, and proof of each of these essential elements is required for a conviction. *S. v. Madden*, 56.

§ 9. Sufficiency of Evidence.

Circumstantial evidence in this case *held* insufficient to establish unlawful breaking and entry. *S. v. Madden*, 56.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 6. Laches and Waiver of Rights.

Plaintiffs purchased a tract of land and to secure the purchase price executed a deed of trust on the land conveyed and on other lands belonging to plaintiffs. Plaintiffs instituted this action to set aside their deed of trust on the ground that when defendant sold them the tract he misrepresented that same was free of encumbrance. The action was instituted six years after the purchase of the tract by plaintiffs and three years after foreclosure by defendant of the deed of trust sought to be set aside. *Held:* The facts were of record and ascertainable by the exercise of due care, and plaintiffs are barred by their laches from maintaining the action. *Jones v. Stewart*, 228.

CARRIERS.

§ 15. Relationship of Carrier and Passenger.

An employee riding a pass given as compensation for services rendered is a passenger for hire. *Campbell v. Casualty Co.*, 65.

§ 21a. Degree of Care and Liability to Passengers in General.

A carrier owes the same degree of care to a gratuitous passenger as it owes to a passenger for hire. *Campbell v. Casualty Co.*, 65.

CIVIL RIGHTS.

(Guaranteed by Constitution see Constitutional Law IV.)

§ 1. Personal Civil Rights in General.

In a strict sense, there are no property rights, but only individual civil rights and individual rights relating to property. *Flake v. News Co.*, 780.

§ 2. Right of Personal Privacy.

The constitutional right of free speech and of a free press is involved in determining to what extent a newspaper may publish the picture of an individual. *Flake v. News Co.*, 780.

The unauthorized use of a photograph in a newspaper advertisement or other commercial enterprise gives rise to a right of action entitling plaintiff to nominal damages at least, and to injunctive relief when the wrong is persisted in, but where the evidence establishes such unauthorized use of plaintiff's photograph by mistake and without malice, and that defendants desisted and apologized upon learning of the mistake, without evidence of special damage, plaintiff is entitled to nominal damages only. *Ibid.*

CLERKS OF COURT.

§ 6. Powers and Jurisdiction in Regard to Estates of Minors and Incompetents.

Where it appears that one of the minor children of a deceased person was not made a party plaintiff in an action to recover on the bond of their guardian, it is the duty of the clerk, as probate judge, to take such action as is necessary to protect the interest of such infant. *Adams v. Adams*, 337.

§ 7. Powers and Jurisdiction as Judge of Juvenile Court.

The statute creating juvenile courts in the several counties of this State is valid, N. C. Code, 5039, 5062, and the statute confers jurisdiction on the courts to place children under its jurisdiction in public and private institutions in proper instances, N. C. Code, 5047 (4), 5053. *Winner v. Brice*, 294.

Juvenile court has jurisdiction of child in improper environment whose custody is in controversy. *Ibid.*

CLERKS OF COURT—*Continued.*

Person having knowledge of facts sufficient to confer jurisdiction upon juvenile court may file petition. *Ibid.*

Respondents served with notice may not complain that no summons or notice was served on children whose custody is sought. *Ibid.*

CONSPIRACY.

§ 2. Civil Actions.

Complaint must state facts from which agreement may be inferred and stipulate specific unlawful acts agreed upon. *Kirby v. Reynolds*, 271.

Complaint *held* insufficient to state cause of action for conspiracy between defendants to obtain discharge of plaintiff. *Ibid.*

CONSTITUTIONAL LAW.

III. Governmental Branches and Powers
4. Legislative
6. Judicial
a. Duty to Declare and Construe the Law
IV. Police Power of the State
10. Morals and Public Welfare
V. Personal, Civil, and Political Rights, Privileges, Immunities and Class Legislation (Civil rights in general see Civil Rights).
14. Right to Security in Person and Property
a. Searches and Seizures
c. Imprisonment for Debt
VI. Due Process of Law: Law of the Land
15. Nature and Scope of Mandate
a. In General
d. Waiver
17. Right to Jury Trial
XI. Constitutional Guarantees in Trial of Persons Accused of Crime
33. Due Process of Law in Criminal Prosecutions

§ 4. Legislative.

Legislature retains control over agencies for maintenance of constitutional school term. *Moore v. Board of Education*, 499.

It is the exclusive province of the Legislature to alter the law. *Lewis v. Hunter*, 504; *S. v. Whitehurst*, 300.

§ 6a. Duty to Declare and Construe the Law.

It is the duty of the courts to declare the law as written. *S. v. Whitehurst*, 300.

Legislature may grant right of action against municipality for negligence in exercise of governmental function, but such right may not be given by judicial decision. *Lewis v. Hunter*, 504.

§ 10. Morals and Public Welfare.

Workmen's Compensation Act is constitutional as valid exercise of police power. *Lee v. Enka Corp.*, 455.

§ 14a. Searches and Seizures.

Where an officer alters a search warrant by inserting another name in addition to the name appearing in the warrant when issued, but searches only the room rented by the person whose name originally appeared in the warrant, the search does not exceed the authority under the valid warrant, and evidence of the results of such search is competent. Ch. 339, sec. 6½, Public Laws of 1937. *S. v. Hanford*, 746.

§ 14c. Imprisonment for Debt.

Constitutional provision against imprisonment for debt applies to actions *ex contractu* and not actions in tort. *Ledford v. Smith*, 447.

§ 15a. Nature and Scope of Due Process Clause in General.

This State requires as high a standard of conduct for attorneys as is elsewhere required, but the right to practice may not be revoked without due process of law. *In re West*, 189.

CONSTITUTIONAL LAW—*Continued.*

§ 15d. Waiver.

In civil proceedings a constitutional right may be waived by express consent, failure to assert same in apt time, or by conduct inconsistent with a purpose to insist upon it. *In re West*, 189.

§ 17. Right to Jury Trial.

In disbarment proceedings had in conformity with the legislative method, ch. 210, Public Laws of 1933, respondent's exception on the ground that the proceedings deprived him of his right to trial by jury is untenable when the matters in issue are determined by a jury upon his appeal to the Superior Court. *In re West*, 189.

§ 33. Due Process of Law in Criminal Prosecutions.

Defendants' motion in arrest of judgment on the ground that only persons of the white race sat in the trial jury, *is held* properly denied upon the trial court's findings that names of those qualified of the white and Negro races were in the jury box, that there was no racial discrimination, and that the trial jurors were all accepted by defendants and the jury duly sworn and impaneled without objection or challenge by defendants. *S. v. Bell*, 20.

CONTEMPT OF COURT.

§ 2b. Willful Disobedience of Court Order.

A judgment debtor, fixed with knowledge as a party upon whom notice was served, is guilty of contempt of court in willfully preventing the receiver from taking possession of the property in conformity with a lawful order of the court, even though the order may be erroneous, if no appeal therefrom was perfected by him, C. S., 978. *Nobles v. Roberson*, 334.

Husband may be attached for contempt for willful disobedience of order for subsistence under C. S., 1667. *Dyer v. Dyer*, 620.

CONTRACTS.

§ 7a. Contracts in Restraint of Trade.

Agreement that retailer should sell products upon condition that he not sell like products of competitors is unlawful. *Shoe Co. v. Department Store*, 75.

The courts of a state will not lend their aid to the enforcement of a contract which violates its positive legislation. *Ibid.*

§ 7f. Contracts Relating to Public Officers and Administration of Public Affairs.

The commissioners of a town may not lawfully elect one of their number clerk of the town, and contract to pay him for his services as such clerk, since such election and contract are void as being against public policy. *Carolina Beach v. Mintz*, 578.

§ 8. General Rules of Construction.

The courts will generally adopt that construction given the agreement by the parties themselves before differences between them. *Hughes v. Long*, 236.

Where the language of a contract is clear and unambiguous, the courts are bound thereby and the contract must be enforced as written. *Home Owners Loan Corp. v. Ford*, 324.

Fact that contract is prepared by lessor cannot modify its plain provisions when there is no evidence that signature of lessee was obtained by fraud or misrepresentation. *Oil Co. v. Mecklenburg County*, 642.

CONTRACTS—*Continued.*

§ 19. Parties Who May Sue.

Since nonmembers are not entitled to service from electric membership corporation, even though they live in territory to be served, they may not seek to restrain the electric membership corporation from making contract with power company relating to power lines. *Bailey v. Light Co.*, 768.

§ 21. Pleadings.

Complaint alleging substance of contract declared on is good as against demurrer without setting out agreement in full. *Sossamon v. Cemetery, Inc.*, 535.

CONTRIBUTION.

§ 1. Nature and Grounds of Remedy.

Each of the nine children of the grantor accepted deeds specifying that the grantee should pay one-ninth of the amount of a debt of the grantor remaining unpaid at his death, which debt was secured by a mortgage on only two of the nine tracts. The mortgage was foreclosed and the land sold, and this action was instituted by the children who were deeded the mortgaged tracts against other of the children whose land was unencumbered. *Held:* Plaintiffs, who had lost their lands by foreclosure, are entitled to recover of each of defendants who failed to pay his part of the debt made a charge on his land one-ninth of the amount of the mortgage indebtedness under the doctrine of equitable contribution. *Raynor v. Raynor*, 181.

CORPORATIONS.

(Electric membership corporations see Electricity.)

§ 20. Representation of Corporation by Officers and Agents.

The term "general manager" implies general authority to conduct and control the business of the corporation within his charge as its principal officer, and to act for the corporation in emergencies, but does not include implied authority to punish for past offenses or to commit an assault from personal ill will or malice outside the scope of the employment. *Snow v. DeButts*, 120.

§ 25. Torts of Corporations.

The fact that the general manager of a corporation assaulted plaintiff on property of the corporation does not alone impose liability therefor on the corporation when plaintiff was present not as an employee or prospective customer, but for his own convenience. *Snow v. DeButts*, 120.

COURTS.

(Supreme Court—appellate jurisdiction see Appeal and Error, Criminal Law, Title XII; duty to construe the law see Constitutional Law § 6a; justices of the peace see Justices of the Peace; clerks of court see Clerks of Court § 7.)

I. Superior Courts
1. Original Jurisdiction
c. Objections to, and Determination of Jurisdiction
2. Appellate Jurisdiction
a. Appeals from County, Municipal, and Recorders' Courts
b. Appeals from State Commissions
c. Appeals from Clerks of Court
d. Appeals from Justices of the Peace
3. Motions and Hearings after Orders of Judgments of Another Superior Court Judge

II. County, Municipal, and Recorders' Courts
6. Judges and Officers
7. Jurisdiction

III. Jurisdiction of State and Federal Courts
10. Administration of Federal Acts by State Courts

COURTS—*Continued.*

§ 1c. Objections to and Determination of Jurisdiction.

Failure to take objection by answer to the jurisdiction of the court does not waive the right to object to the jurisdiction, since there can be no waiver of jurisdiction, and objection thereto may be made at any time. *Miller v. Roberts*, 126.

Evidence is competent on trial in Superior Court to show that parties are subject to Workmen's Compensation Act. *Ibid.*

Conflicting evidence as to fact determining jurisdiction of Industrial Commission *held* properly submitted to jury. *Young v. Mica Co.*, 243.

§ 2a. Appeals from County, Municipal and Recorders' Courts.

Upon appeal from judgment of a recorder's court dismissing the action for want of jurisdiction for that the amount demanded on the two causes of action alleged exceeded the jurisdictional amount of the court, the Superior Court may allow plaintiff to withdraw one cause of action and proceed to trial upon the other. *Baer v. McCall*, 389.

§ 2b. Appeals from State Commissions. (Appeals from Industrial Commission see Master and Servant § 55.)

Where statute creating State commission does not provide for appeal from its decisions, no appeal lies. *Compensation Com. v. Kirby*, 763.

§ 2c. Appeals from Clerks of Court.

Where statute under which proceeding is begun does not provide for appeal, no appeal may be taken. *In re Sylivant*, 343.

§ 2d. Appeals from Justices of the Peace.

The jurisdiction of the Superior Court upon appeal from a judgment of a justice of the peace is derivative, and where the justice's court has no jurisdiction, the Superior Court acquires none by appeal. *Wells v. West*, 565.

§ 3. Motions and Hearings After Orders or Judgments of Another Superior Court Judge.

Where the resident judge, while not holding courts in the district, approves the clerk's order allowing attorneys' fees in a special proceeding, another judge subsequently holding court in the county may hear an appeal from the clerk's order, the appeal not being from one Superior Court judge to another, since the order of approval is void for want of jurisdiction. *Collins v. Wooten*, 359.

§ 6. Judges and Officers.

Jurisdiction of recorder may not be successfully attacked on ground that at the time of being appointed recorder he held office of mayor. *In re Barnes*, 735.

§ 7. Jurisdiction of County, Municipal and Recorders' Courts.

Where plaintiff declares on two causes of action which together exceed the jurisdictional amount of the recorder's court, he may, upon defendant's motion to dismiss for want of jurisdiction, withdraw one count, and it is error for the recorder's court to refuse to allow such withdrawal and dismiss the action for want of jurisdiction. *Baer v. McCall*, 389.

Municipal and general county courts in same municipality are given concurrent jurisdiction of offenses less than felonies. *In re Barnes*, 735.

§ 10. Administration of Federal Acts by State Courts.

In an action governed by the Federal Employers' Liability Act, instituted in the courts of this State, the Federal decisions are controlling in the construction and operation of the act, but the rules of practice and procedure of this State will be followed. *Batton v. R. R.*, 256.

CRIMINAL LAW.

(Particular crimes see particular titles of crimes.)

III. Parties and Offenses
8. Principals, Aiders and Abettors
VI. Former Jeopardy
23. Same Offense
VII. Evidence
29b. Evidence of guilt of Other Offenses
32a. Circumstantial Evidence in General
33. Confessions
34c. Silence as Implied Admission of Guilt
38. Demonstrative Evidence—Maps and Photographs
40. Character Evidence as Substantive Proof
41e. Corroborative Evidence
42. Hearsay Evidence
43. Evidence Obtained by Unlawful Means
VIII. Trial
44. Time of Trial and Continuance
48b. Evidence Competent for Restricted Purpose
51. Argument and Conduct of Counsel
52b. Nonsuit
53. Instructions
c. Instructions on Burden of Proof
e. Requests for Instructions
g. Constructions of Instructions
54b. Form, Sufficiency, and Effect of Verdict
56. Motions in Arrest of Judgment
X. Judgment and Sentence
60. Conformity to Verdict
Suspended Judgments and Executions
XII. Appeal in Criminal Prosecutions
73a. Filing and Service of Case on Appeal
77. The Record Proper
b. Form and Requisites of Transcript
c. Matters not Appearing of Record Deemed without Error
e. Correction of Record
79. Briefs
80. Prosecution of Appeals and Dismissal
81. Review
a. Matters Reviewable
c. Prejudicial and Harmless Error
d. Questions Necessary to Determination of Cause

§ 8. Principals, Aiders and Abettors.

One present aiding and abetting commission of crime is guilty as principal. *S. v. Ray*, 725; *S. v. Casey*, 352.

§ 23. Same Offense.

The prosecution of a defendant for a breach of the criminal law constituting a continuing offense is a bar to a subsequent prosecution for such breach during any time up to the institution of the first prosecution, but does not bar a subsequent prosecution for such breach after the institution of the first prosecution. *S. v. Johnson*, 566.

Prosecution for willful failure to support illegitimate child is not bar to subsequent prosecution for such failure after the first prosecution was instituted. *S. v. Johnson*, 566.

§ 29b. Evidence of Guilt of Other Offenses.

Evidence that defendant was arrested for shooting at deceased a week before the encounter in which defendant fatally shot deceased, *held* properly admitted, the prior offense being connected with the offense charged in the bill, and being competent to show the relations between the parties, and intent and malice on the part of defendant. *S. v. Ray*, 725.

§ 32a. Circumstantial Evidence in General.

While circumstantial evidence is an accepted instrumentality in establishing the commission of a crime or any essential element thereof, the circumstances proved must be consistent with each other and with the hypothesis that accused is guilty, and must exclude to a moral certainty the hypothesis that accused is innocent, and circumstantial evidence which supports a reasonable hypothesis of innocence is insufficient as a matter of law to sustain a conviction. *S. v. Madden*, 56.

§ 33. Confessions.

Evidence *held* to support ruling that confession was voluntary and competent. *S. v. Perry*, 533; *S. v. Caldwell*, 484.

Mere presence of officers does not render confession involuntary. *S. v. Caldwell*, 484.

A confession is competent only when it is voluntary, and a confession is voluntary in law when, and only when, it is in fact voluntarily made. *S. v. Stevenson*, 648.

The evidence tended to show that defendant started to make some statement while in jail and was told by an officer that there was no use in his lying, that the officer already had more than enough evidence for a conviction, and that they "were going to take him down there"; and that thereafter, while defendant was being taken to a doctor, he made the confession sought to be introduced in evidence. *Held:* The admission of the confession in evidence was error, since the circumstances revealed by the testimony show that it was involuntary and incompetent. *Ibid.*

§ 34c. Silence as Implied Admission of Guilt.

Failure of defendant to deny accusation of drunken driving *held* competent as implied admission. *S. v. Peterson*, 758.

§ 38. Demonstrative Evidence.

The admission of maps and photographs of the scene of the homicide solely for the purpose of permitting the witnesses to explain their testimony, and not as substantive evidence, is not error. *S. v. Perry*, 533.

§ 40. Character Evidence as Substantive Proof.

While a character witness may testify of his own accord as to defendant's reputation for particular traits of character, defendant may not elicit such testimony by direct question, the witness being competent only to prove the general character of defendant. *S. v. Sentelle*, 386.

§ 41e. Corroborative Evidence.

Testimony of subsequent declarations may be competent as corroborative of dying declaration. *S. v. Bell*, 20.

§ 42. Hearsay Evidence.

A question, asked on cross-examination of a State's witness, whether a third person, who did not testify at the trial, had not made a certain statement on the night of defendant's arrest, is properly excluded as hearsay, and this result is not altered by the fact that the solicitor, upon the argument of defendant's motion for a continuance, stated he would admit such third person would so testify if present in court, where it is not made to appear that defendant accepted this offer, or that the admission was excluded from the evidence at the trial. *S. v. Sentelle*, 386.

§ 43. Evidence Obtained by Unlawful Means.

Evidence of result of search of premises embraced in warrant before alteration is competent. *S. v. Hanford*, 746.

§ 44. Time of Trial and Continuance.

A motion for a continuance, made on the ground of absence of a material witness, is addressed to the sound discretion of the trial court, and his decision thereon is not reviewable in the absence of abuse of discretion. *S. v. Sentelle*, 386.

§ 48b. Evidence Competent for Restricted Purpose.

Where evidence is competent as against one defendant only, an exception of the other defendant to its general admission cannot be sustained in the absence of a request by him at the time that its purpose be restricted. *S. v. Casey*, 352.

Where evidence competent for one purpose is properly restricted by court, its admission cannot be held prejudicial. *S. v. Ray*, 725.

§ 51. Argument and Conduct of Counsel.

Counsel for the prosecution in the argument to the jury remarked upon the physical appearance of one of defendants. The court immediately stated, in the hearing of the jury, that the remark was improper. *Held:* The failure of the court to instruct the jury that they should not consider the remark

cannot be held prejudicial, the defendant being in the immediate view and presence of the jury, and there being no request that the court further caution or instruct the jury in regard to the remark. *S. v. Ray*, 725.

Held: Court sufficiently instructed jury in regard to remark of counsel upon failure of defendants to take the stand. *Ibid.*

§ 52b. Nonsuit.

Circumstantial evidence is insufficient as matter of law if it fails to exclude to moral certainty hypothesis of innocence. *S. v. Madden*, 56.

Evidence which tends to prove the fact in issue, or which conduces to that conclusion as a fairly logical and legitimate deduction, and which raises more than a mere suspicion or conjecture of guilt, is sufficient to be submitted to the jury, it being for the jury to say whether they are convinced beyond a reasonable doubt of the fact of guilt. *S. v. Baker*, 233.

On motion to nonsuit, all evidence must be considered in light most favorable to State. *S. v. Ray*, 725.

§ 53c. Instructions on Burden of Proof.

Charge *held* for error as placing burden on defendant to prove innocence. *S. v. Patterson*, 659.

§ 53e. Requests for Instructions.

Defendant desiring more detailed and specific instructions on any phase of the case or elaboration on a subordinate feature must aptly tender requests therefor. *S. v. Palmer*, 10.

§ 53g. Construction of Instructions.

Charge of court will be construed contextually as a whole. *S. v. Elmore*, 531.

§ 54b. Form, Sufficiency and Effect of Verdict.

Where defendant is charged in two counts, a verdict of guilty on one count amounts to an acquittal on the other. *S. v. Delk*, 631.

Where case is submitted on one count only, and verdict of guilty will be presumed to follow the trial and will sustain a judgment on the count submitted. *S. v. Conner*, 668.

§ 56. Motions in Arrest of Judgment.

Findings *held* to support refusal of motion in arrest for that only white men sat on jury. *S. v. Bell*, 20.

The trial court's findings on the question of racial discrimination in selecting the trial jury are conclusive upon defendants' motions in arrest of judgment, made after verdict, when the findings are supported by evidence. *Ibid.*

Where defendant, charged with a felony, enters a plea of guilty of a misdemeanor which is accepted by the State, his motion in arrest of judgment for defect in the indictment charging the felony cannot be sustained, the sentence being based upon his voluntary plea and not upon the indictment for a felony. *S. v. Ray*, 748.

Failure of record to show selection of grand jury *held* not ground for arrest of judgment. *S. v. Linney*, 739.

This joint indictment of two defendants for murder charged that defendants "of his malice aforethought" committed the act. *Held:* The use of the word "his" instead of "their" is insufficient ground for arresting the judgment. *Ibid.*

§ 60. Conformity to Verdict.

The jury convicted appealing defendant of simple assault, but in imposing judgment the court found as a fact that said simple assault inflicted serious injury, and imposed a sentence of four months on the roads. *Held:* The jury

CRIMINAL LAW—*Continued.*

alone were the triers of fact, and the court was without power to make the additional finding and to impose the heavier sentence. *S. v. Palmer*, 10.

§ 63. Suspended Judgments and Executions.

The Superior Court has the power in proper instances to suspend judgment and executions of judgments upon just and reasonable terms, and to impose sentence and execute a judgment upon determination that the conditions imposed had been breached. *S. v. Ray*, 748.

Defendant consenting to terms upon which execution is suspended may not complain of execution of sentence upon breach of terms. *S. v. Ray*, 748.

§ 73a. Filing and Service of Case on Appeal.

Where defendant, convicted of a capital felony and allowed to appeal *in forma pauperis*, fails to make out and serve his statement of case on appeal within the time allowed, he loses his right to bring up the "case on appeal" and the appeal will be dismissed on motion of the Attorney-General after an examination of the record proper discloses no error on its face. *S. v. Sermons*, 767.

§ 77b. Form and Requisites of Transcript.

The record showed the organization of the court, the names of the jurors summoned for the term, and the names of the foreman and seventeen other grand jurors drawn therefrom, that the grand jury was impaneled, sworn, and charged, and that it duly returned a true bill over the signature of the foreman, showing the endorsement of the names of the State's witnesses sworn and examined. *Held:* A motion in arrest of judgment for that the record failed to show the selection of the grand jury, is properly denied, there being no defect affirmatively appearing on the face of the record sufficient to support a motion in arrest of judgment. *S. v. Linney*, 739.

§ 77c. Matters Not Appearing of Record Deemed Without Error.

Where charge is not in the record, it is presumed correct. *S. v. Caldwell*, 484.

§ 77e. Correction of Record.

Case remanded for correction of record to show proper verdict in this homicide prosecution. *S. v. Mosley*, 766.

§ 79. Briefs.

Failure of defendant to file briefs works abandonment of assignments of error, except those appearing on face of record, which are cognizable *ex mero motu*. *S. v. Robinson*, 536.

§ 80. Prosecution of Appeals and Dismissal.

Motion to dismiss for failure to file briefs allowed in this capital case, no error appearing on record or statement of case. *S. v. Robinson*, 536.

Appeal dismissed on motion of Attorney-General, no error appearing on face of record, and defendant having lost right to bring up "case on appeal" by failing to serve same within time allowed. *S. v. Sermons*, 767.

§ 81a. Matters Reviewable.

The trial court's findings on the question of racial discrimination in selecting the trial jury are conclusive upon defendants' motions in arrest of judgment, made after verdict, when the findings are supported by evidence. *S. v. Bell*, 20.

The trial judge has the discretionary power to issue a writ of *venire facias*, C. S., 2338, instead of directing the jurors to be drawn from the jury box, and the court's action in issuing the writ is not reviewable in the absence of abuse of discretion. *S. v. Casey*, 352.

CRIMINAL LAW—*Continued.*

A motion for a continuance, made on the ground of absence of a material witness, is addressed to the sound discretion of the trial court, and his decision thereon is not reviewable in the absence of abuse of discretion. *S. v. Sentelle*, 386.

Finding of trial court that confession was voluntary is not reviewable when supported by evidence. *S. v. Caldwell*, 484; *S. v. Perry*, 533.

§ 81c. Prejudicial and Harmless Error.

Error must be prejudicial in order to entitle defendant to new trial. *S. v. Peterson*, 758.

Defendants have no cause for complaint on the ground that part of the subsequent testimony amplified the dying declaration when the amplification is favorable to their contentions rather than to those of the State. *S. v. Bell*, 20.

Improper remarks of counsel *held* not prejudicial where court instructed jury they were improper, and no request for additional instructions were requested. *S. v. Ray*, 725.

Where evidence competent for one purpose only is properly restricted, its admission cannot be held prejudicial. *S. v. Ray*, 725.

§ 81d. Questions Necessary to Determination of Cause.

Where new trial is awarded on one exception, other exceptions need not be considered. *S. v. Stevenson*, 648.

CURTESY.

§ 1. Nature and Essentials of Estate.

Where the court finds that a wife died intestate seized in fee of certain lands, and left her surviving her husband and a child by such husband, the husband is entitled to an estate by the curtesy in the lands. C. S., 2519. *Stockton v. Maney*, 231.

§ 3. Respective Rights of Tenant and Remaindermen.

Nothing else appearing, a policy of fire insurance which a tenant by the curtesy procures to be issued to him, insures only his interest in the dwelling insured, and upon its destruction by fire, the life tenant is entitled to the entire proceeds of the policy, and the remainderman has no interest in other property bought by the life tenant with the proceeds thereof. *Stockton v. Maney*, 231.

DAMAGES.

(Measure of damages for particular injuries see particular title of actions.)

§ 1. Nature and Scope of Compensatory Damage.

While ordinarily fright and nervousness alone may not be made an element of damage, if such fright and nervousness is caused by defendant's negligence, and results in impairment of health and loss of bodily power, the injury is a proper subject of compensatory damages. *Sparks v. Products Corp.*, 211.

The law seeks to compensate for damage to the person, reputation or property, and mere hurt and embarrassment are not subjects of compensatory damages. *Flake v. News Co.*, 780.

§ 10. Necessity and Sufficiency of Pleading.

The only allegations and evidence on the issue of damages were to the effect that at the time of the assault complained of, plaintiff was suffering from a disease and that the assault greatly aggravated plaintiff's condition and that plaintiff's health had been damaged thereby in a large sum. *Held:* A charge that the jury might consider plaintiff's mental and physical pain and medical

DAMAGES—*Continued.*

and hospital expenses on the issue of actual damage is error, such elements of damage not being supported by allegation or evidence. *Young v. Levin*, 755.

§ 11. Relevancy and Competency of Evidence.

Nonexpert witnesses with knowledge, and a witness found by the court to be an expert may testify, on question of damages, as to the value of the land immediately before and after the trespass complained of. *Owens v. Lumber Co.*, 133.

DEATH.

§ 3. Grounds and Conditions Precedent to Cause of Action for Wrongful Death.

Action for negligent injury resulting in death accrues to administrator alone, and parent may not maintain action for such injury to child. *White v. Charlotte*, 539.

DEDICATION.

§ 1. In General.

Provision in a deed for an alleyway along the side of the property conveyed does not constitute a dedication of such alleyway across other property of the grantor in the same block which other property does not touch the property conveyed, although the alleyway is later extended to such other property by deed of the owner of the intermediate property. *Hemphill v. Board of Aldermen*, 185.

DEEDS.

(Deed and contract to reconvey as constituting mortgage see Mortgages § 2; contracts to convey see Vendor and Purchaser: boundaries see Boundaries; reformation of instruments see Reformation of Instruments.)

§ 2a. Competency of Grantor.

Evidence of mental incapacity of grantor *held* sufficient to be submitted to the jury. *Cameron v. Cameron*, 674.

§ 7. Requisites and Sufficiency of Registration.

Where the owner of lands deeds same to a wife, according to the language of the registered instrument, and the husband alone executes a purchase money deed of trust on the lands which is registered prior to registration of the deed in fee to the wife, the records are insufficient to show that the husband had any interest in the land. *Smith v. Turnage-Winslow Co.*, 312.

§ 10b. Rights of Parties Under Unregistered Deeds.

While an unregistered deed is good as between the parties, it does not convey the complete title and is ineffectual as against subsequent grantees under registered deeds and creditors of the grantor, C. S., 3309. *Glass v. Shoe Co.*, 70.

Where grantee in unregistered deed conveys by registered deed, registered deed is color of title. *Ibid.*

Ordinarily, a person interested in a transaction involving title to land may rely upon the public records, and a grantee, mortgagee, or trustee for value in registered instruments takes title conveyed in such instruments free from claims arising from prior unregistered instruments, and no notice, however full and formal, will supply want of registration. C. S., 3309, 3311. *Smith v. Turnage-Winslow Co.*, 310.

Purchase money deed of trust from husband on lands deeded to wife *held* ineffective as against purchaser from wife. *Ibid.*

DEEDS—*Continued.*

§ 14b. Conditions Concurrent and Subsequent.

Grantee accepting deed directing payment of debt becomes personally liable, and charge constitutes equitable lien. *Raynor v. Raynor*, 181.

DESCENT AND DISTRIBUTION.

§ 13. Encumbrances and Debts of the Estate. (Sale of property to make assets see Executors and Administrators § 13a.)

Where a widow, qualifying as administratrix of her husband, files report denominated "final account," showing payment of all debts except a mortgage indebtedness, which she therein assumes to pay, she continues in a position of trust in relation to the heirs, the estate not having been finally settled, and her dower interest being a life estate, she could acquire no title adverse to the heirs as remaindermen, and if she should buy in the property at the foreclosure sale of the mortgage, she would hold title in trust for herself and children as heirs, and the records of administration and her report would be notice to the world of her position. *Creech v. Wilder*, 162.

Where parties take as heirs of their father and not as remaindermen under will of grandfather, they take land subject to mortgage executed by their father. *Merritt v. Inscoe*, 526.

Heirs have no personal liability for debts of the estate, but take the realty subject only to the right of the personal representative to sell same if necessary to pay debts of the estate, C. S., 59, 60, and heirs, by making personal appearance in an action against the estate for the recovery of money, in which attachment is issued against the lands of the estate, are not estopped to deny plaintiff's contention that the attachment gives priority to his judgment. *Price v. Askins*, 583.

DIVORCE.

§ 5. Pleadings.

Where appeal from an order granting alimony *pendente lite* is dismissed, defendant may thereafter apply for permission to amend her answer setting up a cross action for divorce *a mensa et thoro* to meet plaintiff's objection to the verification. C. S., 1661. *Ragan v. Ragan*, 753.

§ 13. Alimony Without Divorce.

In the husband's suit for divorce, in which the wife files answer demanding alimony *pendente lite* and alimony without divorce, it is error for the court, upon the hearing for alimony *pendente lite*, C. S., 1666, to issue an order for alimony without divorce under C. S., 1667. *Adams v. Adams*, 373.

Absolute divorce on ground of two years separation does not affect consent decree for subsistence under C. S., 1667, the matter being within the proviso of C. S., 1663. *Dyer v. Dyer*, 620.

§ 14. Enforcing Payment of Alimony.

A consent decree for subsistence entered in the wife's action under C. S., 1667, "pending further orders of this Court," is binding so long as no "further orders" are made, and the husband may be attached for contempt for willful disobedience of the order, C. S., 978 (4). *Dyer v. Dyer*, 620.

DRAINAGE DISTRICTS.

§ 2. Officers, Agents and Government.

Where once of three drainage commissioners dies, the two surviving have authority, until the election and qualification of their successors, to levy an additional assessment against the lands of the district necessary to discharge the obligations of the district, C. S., 5339 (4). *Bank v. King*, 349.

DRAINAGE DISTRICTS—*Continued.*

§ 9. Additional Assessments.

Lands of drainage district are liable to assessments necessary to repay money properly used for benefit of district. *Bank v. King*, 349.

EASEMENTS.

§ 3. Creation of Easements by Prescription.

To establish an easement by prescription, there must be a continuous and uninterrupted use or enjoyment of a defined easement for twenty years adverse to, and not by permission of, the owner of the soil, of which the owner has knowledge and acquiesces in. *Hemphill v. Board of Aldermen*, 185.

In order for the public to acquire an easement for a road or alley by prescription, the right of way must be substantially defined, and in addition to adverse user for the required period, the right of way must be worked and kept in order by public authority. *Ibid.*

Evidence *held* insufficient to establish public right to alleyway by prescription. *Ibid.*

EJECTMENT.

§ 5. Parties in Summary Ejectment.

In summary ejectment brought by rental agent, court may allow amendment making owner party plaintiff, and permit rental agent to remain in case. *Rental Co. v. Justice*, 523.

§ 13. Competency and Relevancy of Evidence in Ejectment to Try Title.

In this proceeding in partition defendants pleaded sole seizin, and alleged that the common ancestor under whom plaintiffs claimed had deeded the land to them prior to his death. Plaintiffs introduced the deed in evidence for the purpose of attack, and offered evidence of mental incapacity of the grantor, which evidence was excluded because plaintiffs had not filed a reply alleging its invalidity. *Held:* The exclusion of the evidence was erroneous, defendants having given notice in their answer that they relied upon the deed in question to establish their title, and plaintiffs being entitled, therefore, to anticipate defendant by introducing the deed for the purpose of attack. *Higgins v. Higgins*, 219.

ELECTION OF REMEDIES.

§ 5. Between Statutory Remedies Ex Contractu.

Materialman asserting lien under C. S., 2437, is estopped from asserting lien under C. S., 2433. *Lumber Co. v. Perry*, 713.

ELECTRICITY.

§ 11. Electric Membership Corporations.

Nonmembers may not challenge validity of acts of directors of electric membership corporation. *Bailey v. Light Co.*, 768.

EMBEZZLEMENT.

§ 1. Nature and Scope of Offense.

The embezzlement statute, C. S., 4268, being a penal statute creating a new offense, cannot be extended by construction to include persons not within the classes of persons therein defined as being subject to its provisions. *S. v. Whitehurst*, 300.

Bank receiver does not come within purview of embezzlement statute. *Ibid.*

EMBEZZLEMENT—*Continued.*

§ 5. Indictment.

Where an indictment of a bank receiver for embezzlement is drawn under C. S., 4268, it is unnecessary to determine whether an indictment under other of the cognate statutes, C. S., 4269 to 4276, could be sustained. *S. v. Whitehurst*, 300.

EMINENT DOMAIN.

§ 2. Acts Constituting Taking of Property.

Plaintiff's allegation and evidence were to the effect that by reason of the situation of his land at the convergence of two streams, the alternate diminution and acceleration of the flow of water resulting from the operation of defendant's power dam on one of the streams, caused the bank between the streams owned by plaintiff to be constantly washed and eroded away. *Held:* Plaintiff is entitled to have his cause of action to recover the damages sustained in the washing away of the bank submitted to the jury on the theory that, by reason of the peculiar location of plaintiff's property, the operation of the dam resulted in a taking of plaintiff's property without just compensation, and such right of action exists even though the operation of the dam by defendant was well within its riparian rights. *Dunlap v. Light Co.*, 814.

§ 6. Delegation of Power to State Boards and Commissions.

The State Highway and Public Works Commission is authorized by ch. 2, sec. 22, Public Laws of 1921 (N. C. Code, 3846 [bb]), to acquire by condemnation top soil deemed necessary and suitable for road construction, "top soil" being included in the generic term "earth," and its power to acquire top soil is not limited to lands contiguous to the highway upon which it is to be used. *Highway Com. v. Basket*, 221.

ESCHEAT.

§ 1. Nature, Right and Title of State in General.

Funds apportioned to unproven claims in liquidation of a bank escheat to the State upon final liquidation, subject solely to rights of those creditors who failed to prove claims, and such funds are not subject to claims of other creditors of the bank. *Windley v. Lupton*, 167.

ESTOPPEL.

§ 4. Operation and Effect of Estoppel by Record.

A party admitting in his pleadings the existence of a certain public alleyway cannot deny the existence of such alleyway upon the trial or appeal. *Hemphill v. Board of Aldermen*, 185.

§ 6a. Equitable Estoppel in General.

An estoppel must be mutual, and where one party is not estopped by a prior judgment, the adverse party cannot be estopped thereby. *Meacham v. Larus Bros. Co.*, 646.

§ 6c. Estoppel by Silence.

Evidence *held* to require submission to jury of question of estoppel by silence. *Oil Co. v. Jenkins*, 140.

§ 6g. Estoppel of Married Women.

Married woman may be estopped when her acts have placed parties so that they may not be placed *in statu quo* and amount to constructive fraud. *Martin v. Bundy*, 437.

EVIDENCE.

(Evidence in criminal prosecutions see Criminal Law, Title VII, and particular titles of crimes; evidence in particular actions see particular titles of actions.)

I. Judicial Notice
2. Of Judicial, Legislative, and Executive Acts
II. Burden of Proof
6. In General
7. To Establish Cause of Action
8. Defenses
VII. Competency of Evidence in General
29. Evidence at Former Trial or Proceedings
30. Demonstrative Evidence; Photographs
32. Transactions or Communications with Decedent or Lunatic
VIII. Documentary Evidence
33. State Documents and Records (statutes see supra s 2)
X. Parol or Extrinsic Evidence Affecting Writings
39. In General
XI. Hearsay Evidence
43a. Declarations in General
XII. Expert and Opinion Evidence
46. Subjects of Opinion Evidence by Nonexperts
47. Subjects of Expert Testimony
49. Invasion of Province of Jury

§ 2. Judicial Notice of Judicial, Legislative and Executive Acts.

Our courts will take judicial notice of a public statute of the State, which therefore need not be pleaded, and the North Carolina Workmen's Compensation Act is a public statute. *Miller v. Roberts*, 126.

§ 6. Burden of Proof in General.

The burden of proof is a substantial right. *Williams v. Ins. Co.*, 516.

While the burden of going forward with the evidence to avoid the hazard of an adverse verdict may shift from side to side, according to the nature and strength of the proofs offered in support or denial of the main fact in issue, the burden of proof on the issue rests constantly throughout the trial upon the party, plaintiff or defendant, who asserts and must establish affirmative thereof in order to prevail. *Williams v. Ins. Co.*, 516.

§ 7. To Establish Cause of Action.

Action to have deed and contract to reconvey declared a mortgage is not an action for reformation, and burden is on plaintiff to establish intent by greater weight of and not by clear, strong and convincing proof. *O'Briant v. Lee*, 793.

§ 8. Defenses.

The defendant has the burden of establishing all affirmative defenses, and what are affirmative defenses may be determined from the pleadings in most cases, and in others by presumptions arising from the evidence adduced on the hearing or from admissions made during the trial. *Williams v. Ins. Co.*, 516.

§ 29. Evidence at Former Trial or Proceedings.

Record of testimony in former action involving same auto accident *held* incompetent in subsequent action brought by different plaintiff, who was not party to prior action. *McLean v. Scheiber*, 544.

§ 30. Demonstrative Evidence.

Photographs *held* properly admitted in evidence for purpose of allowing witness to explain her testimony. *Pearson v. Luther*, 412. Where there is testimony that scene of accident had changed before photographs were taken, trial court may exclude them. *Ibid.*

§ 32. Transaction or Communications with Decedent or Lunatic.

The fact that a witness is the father of one of the parties does not constitute such witness an interested party within the meaning of C. S., 1795, relating to communications or transactions with a decedent. *Walston v. Lowry*, 23.

In husband's action against estate wherein statute of frauds is pleaded in bar of right to recover on oral contract to devise, wife may testify as to transactions between husband and decedent upon right to recovery upon *quantum meruit* for services. *Price v. Askins*, 583.

EVIDENCE—*Continued.*

§ 33. State Documents and Records.

The certificate of the Insurance Commissioner, authenticating copy of bond of Assistant Fish Commissioner, contained statements relative to coverage and amount of the bond not appearing in the bond, which upon this certificate was offered in evidence. *Held:* The certificate was incompetent to prove the facts and conclusions stated in the certificate not appearing in the bond. *Midgett v. Nelson*, 41.

§ 39. Parol or Extrinsic Evidence Affecting Writings in General.

All prior negotiations are merged in the written contract, and ordinarily parol or extrinsic evidence is incompetent to contradict, vary, modify, or add to the written agreement. *Home Owners Loan Corp. v. Ford*, 324.

Where lease provides for extension only by written agreement, evidence of parol extension is incompetent. *Stewart v. Thrower*, 541.

All prior negotiations are merged in the written contract and its terms are binding. *Oil Co. v. Mecklenburg County*, 642.

§ 43a. Declarations in General.

Testimony of a bailor as to declarations of the bailee at the time which tend to show the purpose and terms of the bailment is not incompetent as hearsay. *Hunt v. Casualty Co.*, 28.

§ 46. Subjects of Opinion Evidence by Nonexperts.

A nonexpert witness who has knowledge, acquired in some approved manner, of the handwriting of the person in question is competent to testify as to the genuineness or falsity of the handwriting in dispute. *Owens v. Lumber Co.*, 133.

Nonexpert witness, with knowledge of the circumstances, may testify as to value of land before and after trespass. *Ibid.*

Nonexpert witnesses with knowledge of insured may give opinion testimony as to insured's ability to engage in work, in an action on a disability clause in a life insurance policy. *Leonard v. Ins. Co.*, 151.

§ 47. Subjects of Expert Testimony.

Expert witness may testify as to value of land before and after trespass. *Owens v. Lumber Co.*, 133.

The admission of testimony of certain physicians as to plaintiff's injuries *held* not error under authority of *Keith v. Gregg*, 210 N. C., 802. *York v. York*, 695.

§ 49. Invasion of Province of Jury.

Under the facts and circumstances of this case, nonexpert opinion evidence as to insured's ability to engage in work *held* not to impinge rule that witnesses may not give opinion on the exact question presented for the jury's determination. *Leonard v. Ins. Co.*, 151.

EXECUTION.

§ 12. Title and Claims of Third Persons.

A husband owns and has the right to dispose of all the income, rents and profits, products, etc., accruing from an estate held by entirety so that execution against him may be levied thereon to the exclusion of any claim of the wife. *Lewis v. Pate*, 253.

§ 20. Title and Rights of Purchaser Where Land is Subject to Mortgage.

Where the judgment debtor has his homestead allotted in lands owned by him subject to a mortgage or deed of trust, and the balance of the land, after allotment of the homestead, is sold under valid execution, the purchaser at

EXECUTION—*Continued.*

the execution sale takes title to that portion sold subject to the lien of the mortgage or deed of trust, and in effect becames a comortgagor with the judgment debtor. *Miller v. Little*, 612.

§ 25. Nature and Grounds for Execution Against the Person.

Execution against the person may be issued upon verdict in plaintiff's favor in action for abuse of process. *Ledford v. Smith*, 447.

EXECUTORS AND ADMINISTRATORS.

(Construction and operation of wills see Wills; descent see Descent and Distribution.)

IV. Sales and Conveyances under Order of Court
13. Absolute Sales
a. Nature and Grounds of Remedy
c. Conduct and Validity of Sale and Confirmation
V. Allowance and Payment of Claims
15. Claims against and Liabilities of Estate
d. Claims for Personal Services Rendered Deceased
i. Mortgages against Property of Estate
16. Priorities
20. Judgments, Liens, and Execution
VII. Accounting and Settlement
26. Final Account and Settlement
29. Costs, Commissions, and Attorneys' Fees
VIII. Liabilities of Executors and Administrators
31. Actions to Surcharge and Falsify Account

§ 13a. Nature and Grounds of Remedy.

Where personalty is insufficient to pay all debts of the estate, including mortgage indebtedness, it is the duty of the personal representative to apply to the courts, without undue delay, for sale of the realty to make assets. *Creech v. Wilder*, 162.

Devisees under will *held* entitled to file cross action to surcharge and falsify executor's account to prevent sale of lands to make assets. *Gurganus v. McLawhorn*, 397.

§ 13c. Conduct and Validity of Sale and Confirmation.

An administrator or executor cannot purchase property at his own sale, even in good faith for a fair price, without the sanction or ratification of those interested. *Gurganus v. McLawhorn*, 397.

§ 15d. Claims for Personal Service Rendered Deceased.

In an action to recover for breach of an oral contract to convey in consideration of services rendered, and to recover upon *quantum meruit* for such services, defendants may not defeat recovery by pleading the statute of frauds, but plaintiff is entitled to recover for the value of such services requested and rendered, and evidence of the contract, performance by plaintiff, and breach by intestate is sufficient to take the case to the jury. *Price v. Askins*, 583.

The issues submitted in this action to recover for services rendered decedent upon *quantum meruit are held* sufficient to present all phases of the controversy, and defendants' objection thereto is untenable. *Ibid.*

§ 15i. Mortgages Against Property of Estate.

Where a widow, qualifying as administratrix of her husband, files report denominated "final account," showing payment of all debts except a mortgage indebtedness, which she therein assumes to pay, she continues in a position of trust in relation to the heirs, the estate not having been finally settled, and her dower interest being a life estate, she could acquire no title adverse to the heirs as remaindermen, and if she should buy in the property at the foreclosure sale of the mortgage, she would hold title in trust for herself and children as heirs, and the records of administration and her report would be notice to the world of her position. *Creech v. Wilder*, 162.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 16. Priorities.

This action against an estate to recover the value of services rendered deceased upon his request was instituted by attachment against the lands of the estate in this State, the decedent having died in another State and an administrator having been there appointed. Thereafter, the ancillary administrator in this State and the heirs at law were made parties and entered appearance. *Held:* Judgment in plaintiff's favor rendered in the action does not have priority by reason of the appearance of the heirs or the attachment, C. S., 102, 62, since the estate alone is liable for the judgment, and the judgment merely establishes plaintiff's claim and his right to participate in the distribution of the assets of the estate in accordance with priorities fixed by statute, C. S., 93. *Price v. Askins*, 584.

§ 20. Judgments, Liens and Execution.

After the docketing of the judgment the judgment debtor conveyed the property. After the death of the judgment debtor, execution was issued, and the judgment creditor instituted this action to compel the sheriff to sell the land under the execution, the judgment debtor having left no estate, real or personal, and therefore no administrator having been appointed. *Held:* The execution issued after the death of the judgment debtor was not warranted by law, and a sale thereunder would be void. C. S., 74-77. *Flynn v. Rumley*, 25.

§ 26. Final Account and Settlement.

Where the personalty is insufficient to pay all debts of the estate, it is the duty of the administrator to make application, without undue delay, for sale of the real estate to make assets, C. S., 74, and a report showing all debts paid except a mortgage indebtedness cannot constitute a final account, since the duties and obligations of administration continue until all debts are paid or all assets exhausted. C. S., 105. *Creech v. Wilder*, 162.

§ 29. Costs, Commissions and Attorneys' Fees.

Beneficiaries of an estate have a right to have a Superior Court judge, having jurisdiction, hear and determine their appeal from the clerk's order allowing attorneys' fees for services rendered in connection with the sale of lands to make assets and sale for division. *Collins v. Wooten*, 359.

§ 31. Actions to Surcharge and Falsify Account.

In proceeding to sell land to make assets, heirs may set up action against executor to surcharge and falsify account. *Gurganus v. McLaurhorn*, 397.

FOOD.

§ 16. Sufficiency of Evidence.

Evidence that plaintiff was injured by slivers of glass in a soft drink bottled by defendant, and that foreign and deleterious substances were found in other drinks bottled by defendant at about the same time, is sufficient to take the case to the jury on the issue of negligence. *Breece v. Bottling Co.*, 388.

Plaintiff's evidence tended to show that he was injured by drinking foreign, deleterious substances in a bottle of ginger ale bottled by defendant, and that about the same time, foreign, deleterious substances were found in bottles of Coca-Cola and other "bottled drinks" prepared by defendant. *Held:* The evidence does not show that like products manufactured by defendant under substantially the same conditions contained foreign, deleterious substances, and defendant's motion to nonsuit was properly granted. *McLeod v. Bottling Co.*, 671.

FRAUDS, STATUTE OF.

§ 3. Necessity for and Sufficiency of Pleadings of Statutes in General.

General denial of contract alleged is sufficient pleading of statute. *Price v. Askins*, 583.

§ 5. Application of Statute Relating to Promise to Answer for Debt or Default of Another.

Where the party promising to pay a debt receives a new and original consideration from the debtor for his promise, the statute of frauds, C. S., 987, does not apply. *Daniels v. Duck Island*, 90.

§ 9. Contracts Relating to Realty in General.

A contract of the owner of land to sell at a stipulated price all logs which the owner should cut from the tract is not a contract affecting realty within the meaning of C. S., 988, since the cutting and delivery of the logs would constitute a conversion of the standing timber from real property into personalty. *Walston v. Lowry*, 23.

Oral contract to devise is void under statute of frauds. *Price v. Askins*, 583.

§ 13. Parties and Pleadings in Actions Affecting Realty.

Parol partition by tenants in common is conclusive as to strangers. *Roberts v. Ins. Co.*, 1.

FRAUDULENT CONVEYANCES.

§ 10. Presumptions and Burden of Proof.

Minor children are not creditors of their father for their past support furnished them by another, and for which their personal estate was not invaded, and a conveyance executed by him prior to the institution of their action may not be set aside by them under C. S., 1005. *Bryant v. Bryant*, 6.

§ 12. Sufficiency of Evidence.

In this action by minor children against their father for support and to set aside a conveyance executed by him prior to the institution of the action, the evidence *is held* insufficient to be submitted to the jury on the issue of actual fraud in the execution of the instrument, or that the grantee knew and participated in the alleged fraud. *Bryant v. Bryant*, 6.

GUARDIAN AND WARD.

§ 23. Bonds and Sureties Liable.

Surety on bond of original guardian is not liable for default of successor guardian. *Adams v. Adams*, 337.

HIGHWAYS.

§ 13. Establishment and Maintenance of Neighborhood Public Roads.

A proceeding to establish cartways over the lands of others in Haywood County should be instituted before the board of county commissioners, Public-Local Laws 1923, sec. 12, ch. 119, and not before the clerk, Public Laws 1931, sec. 1, ch. 448 (N. C. Code, 3835), and the clerk of the Superior Court of that county has no jurisdiction of a proceeding for this relief instituted before him. *Rogers v. Davis*, 35.

HOMESTEAD.

§ 5. Property in Which Right May Be Asserted.

A judgment debtor is entitled to have his homestead allotted in an equity of redemption, but the homestead should be allotted therein without regard to the mortgage encumbrance and as if it did not exist. *Miller v. Little*, 612.

HOMESTEAD—*Continued.*

A judgment debtor, upon foreclosure of a mortgage or deed of trust on his lands, resulting in a surplus over the mortgage debt, is entitled to have his homestead allotted in such surplus. *Ibid.*

Where homestead is allotted in encumbered lands and rest of land sold under execution, upon later foreclosure of entire tract, judgment debtor is not entitled to homestead in entire surplus, but is entitled only to have the surplus after foreclosure divided between him and the judgment debtor in proportion to their respective interests in the land. *Ibid.*

§ 6. Debts Against Which Right May Be Asserted.

A tenant in common is not entitled to allotment of homestead as against execution for his pro rata share of the costs of the partition proceedings in which his part of the land was allotted to him in severalty. *Sansom v. Johnson*, 383.

§ 8. Waiver and Abandonment.

A tenant in common does not waive her right to homestead exemption by joining in a petition for sale of the lands for partition, but is entitled to have her share of the proceeds of sale within the amount of the exemption held for her benefit, and the net income therefrom paid to her until the termination of her homestead rights. *Smith v. Eakes*, 382.

HOMICIDE.

(In driving automobile see Automobiles § 32.)

I. Homicide in General
2. Parties and Offenses
III. Murder in the Second Degree
5. Definition
IV. Manslaughter
V. Justifiable and Excusable Homicide
11. Self-Defense
VI. Indictment and Pleas
14. Requisites and Sufficiency of Indictment
VII. Evidence
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27. Instructions
a. Form and Sufficiency in General
b. On Presumptions and Burden of Proof
g. On Question of Parties and Offenses
h. Form and Sufficiency of Instructions on Less Degrees of the Crime and Defenses
28. Verdict

§ 2. Parties and Offenses.

Defendant present and aiding and abetting commission of crime is equally guilty with actual perpetrator. *S. v. Casey*, 352; *S. v. Ray*, 725.

§ 5. Definition of Murder in Second Degree. (In driving automobile see Automobiles § 32.)

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *S. v. Terrell*, 145.

§ 7. Manslaughter in General.

Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *S. v. Terrell*, 145.

If a person uses excessive force or unnecessary violence in defending himself, he is guilty of manslaughter at least. *Ibid.*

§ 11. Self-Defense.

The right to kill in self-defense rests upon necessity, real or apparent, and ordinarily it is for the jury to determine, from the evidence, the existence or absence of such necessity. *S. v. Reynolds*, 37.

The right to kill in self-defense rests upon necessity, real or apparent, and one may kill in self-defense when he reasonably believes that such action is necessary to save himself from death or great bodily harm, the reasonableness of his belief to be determined by the jury upon the facts and circumstances

HOMICIDE—*Continued.*

as they appeared to him at the time, but language alone, however abusive, is not sufficient, it being required that defendant be the subject of an actual or threatened assault. *S. v. Terrell*, 145.

If a person uses excessive force or unnecessary violence in defending himself, he is guilty of manslaughter at least. *Ibid.*

Whether defendant had reasonable ground to believe he was in danger of life or great bodily harm is for jury. *S. v. Elmore*, 531.

§ 14. Requisites and Sufficiency of Indictment.

Joint indictment of two defendants for murder, charging that defendants "of *his* malice aforethought" committed the crime, *held* not to support motion in arrest, informalities being disregarded. *S. v. Linney*, 739.

A charge that defendants committed murder "in the act of robbing" their victim, is equivalent to a charge of murder "in the perpetration or attempt to perpetrate a robbery." *Ibid.*

§ 16. Presumptions and Burden of Proof.

Where an intentional killing of a human being with a deadly weapon is admitted or proven, the law implies malice, and nothing else appearing, the crime is murder in the second degree, with the burden on defendant to show to the satisfaction of the jury matters in mitigation or excuse. *S. v. Terrell*, 145.

§ 17. Competency and Relevancy of Evidence in General.

Testimony of subsequent declarations may be competent as corroborative of dying declaration. *S. v. Bell*, 20.

§ 18. Dying Declarations.

Declarant's statement, "I am bleeding inside and I am going to die," made a few hours before death ensued, *is held* a sufficient predicate for the admission of testimony of his dying declarations. *S. v. Bell*, 20.

A statement by a person fatally wounded that "'If you don't do something for me, I am going to die right now," is insufficient predicate for the admission of his subsequent declarations as dying declarations, since the statement does not show an unqualified belief by him that he was going to die. *S. v. Casey*, 352.

§ 20. Evidence of Motive and Malice.

In a prosecution for homicide, testimony of a witness that she was going with deceased and one of defendants, is competent, as against the defendant identified, for the purpose of showing motive. *S. v. Casey*, 352.

Evidence that defendant shot at deceased a week before fatal encounter *held* competent. *S. v. Ray*, 725.

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence of premeditation and deliberation *held* sufficient to be submitted to jury on charge of first degree murder. *S. v. Bell*, 20.

Evidence *held* sufficient to be submitted to jury on question of defendant's guilt of murder in the first degree. *S. v. Perry*, 533; *S. v. Robinson*, 536.

Evidence that defendant aided and abetted codefendant in perpetration of murder *held* sufficient for jury. *S. v. Ray*, 725.

Evidence *held* sufficient to be submitted to jury on question of defendant's guilt of manslaughter, the question of self-defense being for the jury. *S. v. Reynolds*, 37.

In this homicide prosecution defendant contended that he did not fire the fatal shot, but admitted deceased was killed with a pistol. All the witnesses, both for the State and for defendant, who testified they were present at the time, testified that the fatal shot was fired by another, and that deceased so

HOMICIDE—*Continued.*

stated immediately after the fatal shooting, but there was competent testimony as to dying declarations by deceased identifying defendant as the perpetrator of the crime. *Held:* The conflicting competent evidence was properly submitted to the jury. *S. v. Patterson*, 659.

§ 27a. Form and Sufficiency in General.

Instruction submitting both murder in perpetration of robbery and with premeditation and deliberation *held* not error. *S. v. Linney*, 739.

§ 27b. On Presumptions and Burden of Proof.

In this homicide prosecution the court charged the jury that they might return one of three verdicts, as they found "from the evidence beyond a reasonable doubt, first, guilty of murder in the second degree; second, guilty of manslaughter; third, not guilty." *Held:* The instruction is erroneous in charging the jury that they could not return a verdict of not guilty unless so satisfied from the evidence beyond a reasonable doubt, and although in other portions of the charge the court correctly placed the burden of proof, the error *is held* prejudicial in view of all the evidence in the case. *S. v. Patterson*, 659.

§ 27g. On Question of Parties and Offenses.

Where the State contends on its evidence that one defendant killed deceased and the other defendant aided and abetted the commission of the crime, and such other defendant contends that, while present, he did nothing to aid or abet, the defendant charged with aiding and abetting may be acquitted, or may be found guilty of the same degree of the crime as the other defendant, but the two defendants cannot be found guilty of different degrees of the crime, and a charge and statement to the jury to this effect is not error. *S. v. Casey*, 352.

§ 27h. Form and Sufficiency of Instructions on Less Degrees of the Crime and Defenses.

Evidence *held* sufficient to be submitted to the jury on defendant's plea of self-defense, and court's failure to submit this phase of the case to the jury constituted reversible error. *S. v. Terrell*, 145.

Charge of court upon question of conviction of less degree of crime charged *held* without error. *S. v. Perry*, 533; *S. v. Elmore*, 531.

§ 28. Verdict.

The record disclosed that the jury, in this homicide prosecution, returned a verdict simply of "guilty," and in settling the case on appeal the trial court found that the clerk inadvertently failed to record the question by the court, "Guilty of what?" and the answer by the jury, "Guilty of murder in the first degree." It did not appear that the judge's findings were made in open court and in the presence of the defendant, or that the record was corrected to speak the truth. *Held:* The case is remanded on motion of the State for a correction of the record. *S. v. Mosley*, 766.

HUSBAND AND WIFE.

§ 4a. Contracts and Conveyances of Wife in General.

By virtue of C. S., 2507, a married woman may make contracts affecting her personal and real property as though she were unmarried, except that her privy examination must be taken and her husband's written consent had to conveyances of her real property, and the requirements of C. S., 2515, must be met in contracts between her and her husband affecting her real property or the *corpus* of her personal property. N. C. Constitution, Art. X, sec. 6. *Martin v. Bundy*, 437.

HUSBAND AND WIFE—*Continued.*

§ 6. Right to Maintain Action Against Spouse.

In this State wife may sue husband for negligent injury. *York v. York*, 695.

§ 12. Nature and Incidents of Estate by Entireties.

A husband owns and has the right to dispose of all the income, rents and profits, products, etc., accruing from an estate held by entirety so that execution against him may be levied thereon to the exclusion of any claim of the wife. *Lewis v. Pate*, 253.

INDICTMENT.

(Indictment for homicide see Homicide § 14.)

§ 2. Duly Constituted Grand Jury.

Procedure to present contention that grand jury was improperly drawn is by motion to quash and not by motion in arrest of judgment. *S. v. Linney*, 739.

§ 10. Identification of Defendant.

The indictment charged defendant with killing one "Oakes Clement" while the correct spelling should have been "Okes Clement." *Held:* The variance is immaterial, as it is a plain case of *idem sonans*. *S. v. Reynolds*, 37.

§ 11. Definiteness and Sufficiency in General.

Refinements and informalities will be disregarded. *S. v. Linney*, 739.

INJUNCTIONS.

§ 2. Inadequacy of Legal Remedy.

Injunction will not lie at the instance of a lessee to enjoin lessor from leasing the property to another or to enjoin lessor from interfering with lessee's possession, since, if lessee has not forfeited his lease, another lease by the owners to a third person could not affect his rights under his lease, and since lessee can set up all rights under the lease in any action in ejectment lessor might institute, and has therefore an adequate remedy at law. *Oil Co. v. Mecklenburg County*, 642.

§ 6. Trespass.

Injunction will lie to compel removal of part of structure which constitutes continuing trespass. *O'Neal v. Rollinson*, 83.

§ 7. Crimes.

Injunction will not lie to enjoin violation of criminal statute. *Matthews v. Lawrence*, 537.

INNKEEPERS.

§ 3. Duties and Liabilities to Guest.

Proprietor of lodging house is not bailee of personal property left in rented room. *Wells v. West*, 656.

Evidence that plaintiff rented a room in defendant's lodging house, that thereafter plaintiff told defendant to let no one have his accordion kept in the room, to which defendant agreed, and that some time later defendant permitted a third person to take the accordion on the pretext that plaintiff had sent him for it, *is held* to establish a cause of action in tort, if at all, and not an action based upon the violation of any duty founded upon contract, the proprietor of the lodging house not being a bailee of the property, and there being no binding agreement on the part of the proprietor not to let anyone have the accordion, the statements in regard thereto having been made some time after the conclusion of negotiations for renting the room. *Ibid.*

INSANE PERSONS.

§ 4. Hearings, Judgment and Appeal.

In this proceeding for the appointment of a guardian for respondent on the ground that he was incompetent for "want of understanding to manage his own affairs," C. S., 2285, respondent *held* entitled to a new trial for that the court, although giving the respective contentions of the parties upon the issue, failed to define the legal meaning of the term or instruct the jury as to the standard of mental capacity recognized by the law. *In re Worsley*, 320.

Petitioner, who had been adjudged *non compos mentis* under C. S., 2285, filed this petition under C. S., 2287, to have herself adjudged no longer insane, and prayed for the discharge of her guardian and the possession of her property. Upon the finding of the jury she was adjudged no longer insane and the prayers of her petition granted. Her guardian appealed to the Superior Court. *Held:* The appeal should have been dismissed, since C. S., 2287, does not provide for appeal. Whether the clerk's order could be reviewed by the Superior Court pursuant to a writ of *certiorari*, and whether the clerk's order was void *ab initio* on the ground that the person adjudged insane cannot file a petition under C. S., 2287, *held* not presented for decision, but *semble*, the clerk's order was voidable and not void, and it was error for the Superior Court to dismiss the proceeding. *In re Sylivant*, 343.

INSURANCE.

IV. The Contract in General
13. Construction and Operations in General
V. Fire Insurance
17. Insurable Interest
22d. Avoidance or Forfeiture of Policy for Breach of Representation or Warranty of Sole Ownership
24d. Persons Entitled to Payment
VI. Life Insurance
28. Conditions Subsequent or Limiting Liability
30c. Evidence and Proof of Payment of Premiums
31. Avoidance or Forfeiture of Policy for Misrepresentations or Fraud
a. Policies Issued without Medical Examination
b. Policies Issued upon Medical Examination
32c. Cancellation of Certificates under Group Insurance
33. Reinstatement of Policies
34. Disability Clauses
a. Construction, Operation, and Sufficiency of Evidence of Disability
e. Instructions in Actions on Disability Clauses
36b. Persons Entitled to Payment of Proceeds of Contract in Mutual Benefit Associations
37. Actions on Life Policies
VII. Double Indemnity, Accident, and Health Insurance (Disability clauses see supra s 34)
38b. Amount of Recovery under Accident and Health Policies
41. Actions on Accident and Health Policies and Double Indemnity Clauses
VIII. Insurance against Liability for Personal Injury or Property Damage
43. Vehicles Insured
44. Provisions Limiting Liability or Constituting Conditions Precedent Thereto
49. Defense of Action by Insurer
50. Actions on Liability Policies

§ 13. Construction and Operation of Policies in General.

An insurance policy, having been written by insurer, will be liberally construed in favor of insured, but its plain, unambiguous terms must be given effect. *Roberts v. Ins. Co.*, 1.

§ 17. Insurable Interest.

A tenant by the curtesy has an insurable interest in buildings and structures on the lands. *Stockton v. Maney*, 231.

§ 22d. Avoidance or Forfeiture of Policy for Breach of Representation or Warranty of Sole Ownership.

The requirement of "unconditional and sole ownership" in a policy of fire insurance in the standard form as required by C. S., 6437, is statutory as well as contractual. *Roberts v. Ins. Co.*, 1.

The provisions in a policy of fire insurance that insured have sole and unconditional ownership of the property will not be construed technically to the prejudice of the policyholder, but rationally to protect insurer from ex-

traordinary risks, and the provision of the policy is satisfied if insured is in exclusive possession of the entire estate under claim of right, without assertion of adverse title by another, and insurer has not been misled and its rights in no way adversely affected. *Ibid.*

Where tenants in common divide the land by parol partition and each goes into possession of his share, claiming same in severalty, each has sole and unconditional ownership of his share within the meaning of the provision in the standard form fire insurance policy. *Ibid.*

§ 24d. Persons Entitled to Payment.

Nothing else appearing, a policy of fire insurance which a tenant by the curtesy procures to be issued to him, insures only his interest in the dwelling insured, and upon its destruction by fire, the life tenant is entitled to the entire proceeds of the policy, and the remainderman has no interest in other property bought by the life tenant with the proceeds thereof. *Stockton v. Maney*, 231.

§ 28. Conditions Subsequent or Limiting Liability.

Where plaintiff beneficiary makes out a *prima facie* case, and defendant insurer sets up the affirmative defense that insured committed suicide, and that therefore no recovery could be had under the relative provision of the policy, and insurer introduces evidence in support of its defense, but no evidence in regard thereto is introduced by plaintiff, it is error for the court to grant insurer's motion to nonsuit, since a motion to nonsuit may not be allowed in favor of a party upon whom rests the burden of proof. *Hedgecock v. Ins. Co.*, 639.

§ 30c. Evidence and Proof of Payment.

Where a policy in the hands of the beneficiary recites that the first annual premium is to be paid before delivery, insurer may not show that the policy was delivered upon payment of an initial semiannual premium for the purpose of declaring a forfeiture for nonpayment of the second semiannual premium, the recitation in the policy being conclusive, in the absence of fraud, on the question of forfeiture, although it is only *prima facie* evidence of payment and rebuttable on the question of the recovery of the balance of the premium. *Williamson v. Ins. Co.*, 377.

Burden of proving that policy had not lapsed for nonpayment of premiums is on plaintiff beneficiary. *Williams v. Ins. Co.*, 516.

§ 31a. Policies Issued Without Medical Examination.

C. S., 6460, does not apply to reinstatement without medical examination of policy issued after medical examination. *Petty v. Ins. Co.*, 157.

Where application denominates answers declarations in lieu of medical examination, such answers come within purview of C. S., 6460. *Pugh v. Ins. Co.*, 372.

§ 31b. Policies Issued Upon Medical Examination.

The policy in suit was issued for less than $5,000 after medical examination of insured. After it had lapsed for nonpayment of premiums, it was reinstated on written application of insured without a medical examination. *Held:* Although the policy was reinstated without a medical examination, the original policy was issued after medical examination, and C. S., 6460, has no application, and insurer is not required to show fraud, but is entitled to cancellation of the policy upon a showing of material misrepresentations in the application for reinstatement. *Petty v. Ins. Co.*, 157.

A statement in an application for reinstatement of an insurance policy that applicant, in the year previous, had not had any injury, sickness, or ailment

of any kind, and had not required the services of a physician, being a statement of fact within the knowledge of applicant, is a material representation as a matter of law. C. S., 6289. *Ibid.*

§ 32c. Cancellation of Certificates Under Group Insurance.

Termination of employment as used in group policy refers to *status* of parties rather than contract of employment, but where act of employee terminates employment he is not entitled to notice of cancellation of certificate. *Pearson v. Assurance Society*, 731.

§ 33. Reinstatement of Policies.

The reinstatement of a policy of insurance in accordance with its terms has the effect of continuing in force the original contract, and does not constitute a new contract. *Petty v. Ins. Co.*, 157.

Where a policy of insurance requires a written application as a condition precedent to reinstatement, a false statement therein, which is material as a matter of law, prevents the reinstatement issued in reliance on the application from being effective in law. *Ibid.*

§ 34a. Construction, Operation and Sufficiency of Evidence of Disability.

Total disability, within the meaning of a disability clause in a life insurance policy, is such disability as prevents insured from performing with reasonable continuity the reasonable and essential duties of his usual employment, or of any other occupation which he is reasonably qualified physically and mentally to pursue, under all the circumstances, and the ability to do odd jobs of a comparatively trifling nature does not preclude recovery. *Leonard v. Ins. Co.*, 151.

Evidence that insured was near-sighted *held* competent to show inability to pursue other occupations. *Ibid.*

§ 34c. Instructions in Action on Disability Clauses.

In this action on a disability clause in a life insurance policy, a juror, in response to an inquiry from the court, stated he understood from the instructions that insured would be disabled if he could not perform the work of his usual occupation. The court stated that this was substantially correct, but the court then charged the jury correctly on this aspect of the case. *Held:* Not error. *Leonard v. Ins. Co.*, 151.

§ 36b. Persons entitled to Payment of Proceeds of Contracts in Mutual Benefit Associations.

Wife of insured *held* his "legal dependent" and entitled to proceeds of mutual benefit insurance contract under terms of the contract, notwithstanding a memorandum signed by insured stating he wished his funeral benefit insurance paid to his daughter, as he considered her his legal dependent. *Junior Order v. Tate*, 305.

Where two rival claimants for the proceeds of a life insurance contract threaten suit, a suit instituted by insurer to determine which is lawfully entitled thereto, cannot constitute a waiver or ratification of an attempted change of beneficiary by insured prior to his death. *Ibid.*

§ 37. Actions on Life Policies.

Where the beneficiary of a life policy introduces in evidence the policy and the admissions in insurer's answer that it issued the policy, that insured was dead, and that plaintiff beneficiary had filed proper proof of death, plaintiff establishes a *prima facie* case. *Hedgecock v. Ins. Co.*, 638.

Where the certificate of the coroner-physician, filed by the beneficiary as part of the proof of death, states that insured committed suicide, which statement is denied by the beneficiary in her attached letter, the beneficiary is not bound by the statement in the certificate not executed by her, and such state-

INSURANCE—*Continued.*

ment does not constitute evidence offered by her in support of the affirmative defense of suicide set up by insurer in the beneficiary's action on the policy. *Ibid.*

Insurer is not entitled to nonsuit upon affirmative defense unless plaintiff beneficiary's own evidence establishes it. *Ibid.*

Burden of proving that policy had not lapsed for nonpayment of premiums is on plaintiff beneficiary. *Williams v. Ins. Co.*, 516.

Evidence that insured was near-sighted *held* competent to show inability to pursue other occupations. *Leonard v. Ins. Co.*, 151.

§ 38b. Amount of Recovery Under Accident and Health Policies.

Evidence *held* to warrant recovery for confining illness. *Duke v. Assurance Corp.*, 682.

§ 41. Actions on Accident and Health Policies and Double Indemnity Clauses.

The double indemnity clause in this policy of insurance provided that the benefits under this clause should be null and void if insured's death should result from injuries inflicted intentionally by another person. *Held:* Insurer has the burden of proving facts bringing the case within the proviso. *Warren v. Ins. Co.*, 354.

In action on double indemnity clause, instruction *held* erroneous as requiring insurer to prove third person intentionally killed insured. *Ibid.*

§ 43. Vehicles Insured.

Assured operated buses largely in another State and had no franchise in this State, but its buses were used in North Carolina on routes assigned another company, controlled by the same interests, which did have a franchise in this State. The policy taken out by assured had an endorsement attached thereto expressly providing insurance on its buses covered by the policy while engaged in the transportation of passengers for compensation in North Carolina. Plaintiff was injured while riding on a bus of assured in North Carolina. *Held:* Insurer will not be heard to deny liability on the ground that assured had no franchise to operate buses in North Carolina. *Campbell v. Casualty Co.*, 65.

Repair to truck *held* not to make it a new truck or destroy its identity as truck insured. *Anderson & Co. v. Ins. Co.*, 672.

§ 44. Provisions Limiting Liability or Constituting Conditions Precedent Thereto.

Evidence *held* to show that driver was proprietor of repair shop within noncoverage provision of liability policy. *Hunt v. Casualty Co.*, 28.

Employee riding pass *held* not within clause excluding employees while operating, maintaining, or using vehicle. *Campbell v. Casualty Co.*, 65.

Employee riding pass *held* not within clause excluding liability to employees in course of trade or business of assured. *Ibid.*

Policy *held* not to cover injury intentionally inflicted by person driving car with owner's permission, and former verdict in action against insured, properly interpreted, *held* not to estop insurer from setting up defense. *Jackson v. Casualty Co.*, 546.

§ 49. Defense of Action by Insurer.

Insurer defending action and paying its counsel and the judgments may not be held liable for fees of additional counsel employed by insured. *McCabe v. Assurance Corp.*, 18.

Insured forced to defend action upon denial by insurer that truck was covered by policy is entitled to recover reasonable amount necessary to defend action. *Anderson & Co. v. Ins. Co.*, 672.

INSURANCE—*Continued.*

§ 50. Actions on Liability Policies.

Evidence that insured gave notice of accident to insurer, and that insured was reasonably required to pay amount claimed to third person injured, *held* competent. Error, if any, in failing to introduce all riders in evidence *held* cured by their subsequent introduction. *Anderson & Co. v. Ins. Co.*, 672.

INTOXICATING LIQUOR.

§ 4b. Constructive Possession.

Evidence that liquor was found in defendant's home in room rented to third person *held* insufficient to be submitted to jury. *S. v. Hanford*, 746.

JUDGES.

§ 2a. Rights, Powers and Duties of Regular Judges.

The constitutional requirement that a judge shall reside in the district for which he is elected confers no jurisdiction, and the resident judge, while not holding the courts of his district by assignment, exchange, or special commission, has jurisdiction of matters pending in his district only when expressly conferred by statute. *Collins v. Wooten*, 359.

JUDGMENTS.

III. Judgments by Default
9. Judgments by Default Final
VI. Judgments on Trial of Issues
17b. Conformity to Verdict and Pleadings
VII. Docketing and Lien
19c. Docketing, Notice, and Lien
21. Life of Judgment Lien
VIII. Validity, Attack, and Setting Aside
22. Procedure: Direct and Collateral Attack
23. For Surprise, Inadvertance, and Excusable Neglect
26. Want of Jurisdiction
IX. Conclusiveness of Judgment
29. Parties Concluded
X. Operation of Judgments as Bar to Subsequent Action
32. In General
XI. Assignment
37. Rights and Remedies of Assignee
XIII. Payment and Discharge
43. Rights and Remedies of Judgment Creditor (Right to issue execution see Execution)

§ 9. Judgments by Default Final.

Judgment on agreed statement of facts may not be rendered by default final as against those defendants failing to file answer. *Merritt v. Inscoe*, 526.

§ 17b. Conformity to Verdict and Pleadings.

Where the verdict establishes defendant's indebtedness to plaintiff, but does not award interest, a judgment for the indebtedness with interest from the date the indebtedness was incurred is in excess of the verdict and will be modified to conform to the verdict. *Parrish v. Hartman*, 248.

While the trial court has the power to set aside a verdict when he is of the opinion that it is not supported by the evidence or is against the weight of the evidence, C. S., 591, he has no power to change or modify a verdict because in his opinion the jury made an error in computing the amount returned in their answer, and a new trial will be awarded upon appeal from a judgment rendered on the verdict as modified by the court. *Edwards v. Upchurch*, 249.

It is within the province of the jury to allow interest, and where the verdict does not allow interest the judgment may not be enlarged to include interest. *Davis v. Doggett*, 589.

§ 19c. Docketing, Notice and Lien.

Judgment was obtained against a single woman, but was docketed after her marriage and indexed in her maiden name. Thereafter she acquired property, which she subsequently sold to defendant. Defendant had knowledge of her maiden name, but failed to inform his lawyer who investigated the title. *Held:* Defendant having knowledge of the name of his grantor before her

marriage, took with notice of the prior judgment, since a search of the records under her maiden name would have disclosed the judgment, and the failure of defendant to impart his knowledge to his attorney cannot affect the rights of the parties. C. S., 613, 614. *Henry v. Sanders*, 239.

§ 21. Life of Judgment Lien.

An invalid allotment of homestead does not arrest the running of the statute of limitations, and the lien of judgments are lost after the lapse of ten years, notwithstanding the invalid allotment of homestead to the judgment debtor. *Sansom v. Johnson*, 383.

§ 22. Procedure: Direct and Collateral Attack.

Where order appointing receiver is not void or irregular, sole remedy is by appeal. *Nobles v. Roberson*, 334.

§ 23. For Surprise, Inadvertence and Excusable Neglect.

A denial of a motion to set aside a judgment under C. S., 600, will not be disturbed on appeal when there is neither allegation nor finding of a meritorious defense, and the Supreme Court will not consider affidavits for the purpose of finding facts in motions of this sort. *Cayton v. Clark*, 374.

Where the court finds that defendant in claim and delivery proceedings was in court when his attorney was allowed to withdraw from the case, and was told he would have to employ other counsel, and the case continued to the next term, the refusal of the motion made by himself and the surety on his replevin bond to set aside the judgment taken at the next succeeding term on the ground of mistake, surprise, and excusable neglect is properly refused. C. S., 600. *Baer v. McCall*, 389.

§ 26. Want of Jurisdiction.

A judgment rendered by the clerk on a petition filed before him over which he has no jurisdiction, is void, and the proceeding will be dismissed on appeal. *Rogers v. Davis*, 35.

An order entered by a resident judge while not holding courts in his district is void for want of jurisdiction and may be treated as a nullity. *Collins v. Wooten*, 359.

§ 29. Parties Concluded.

An insurer having entire control of the defense of an action against insured is bound by the judgment, even though it is not a party to the suit, and may not assert in a subsequent action that the injured person was not a passenger for hire when this issue is adversely determined against it in the former action. *Campbell v. Casualty Co.*, 65.

Ordinarily only parties and their privies are concluded by judgment. *Meacham v. Larus Bros. Co.*, 646.

§ 32. Operation of Judgments as Bar to Subsequent Actions in General.

The four occupants of an automobile involved in a collision instituted, respectively, separate actions against the driver and the owner of the other car involved in the collision. Upon the trial of one of the actions, all the occupants of the car being witnesses, a nonsuit was entered in favor of the defendant owner and the issue of negligence was answered by the jury in favor of the defendant driver. In the present action, defendants filed an amended answer alleging the disposition of the action tried, which allegations were admitted by the present plaintiff, and defendants moved to dismiss this action on the ground defendants should not be required to defend the several actions involving the same facts, and that plaintiff was barred or estopped by the judgment in the action tried. *Held:* The present plaintiff was neither a party nor a privy in the action tried, and a different set of facts might be developed in the present action, either by additional evidence or by the esti-

JUDGMENTS—*Continued.*

mate placed upon the evidence by the jury, and the motion to dismiss should have been denied. *Meacham v. Larus Bros. Co.*, 646.

§ 37. Rights and Remedies of Assignee.

Prior assignee of judgment takes title unaffected by second assignment, even though second assignment is first recorded. *In re Wallace*, 490.

§ 43. Rights and Remedies of Judgment Creditor.

Where the judgment debtor conveys realty after the docketing of the judgment and thereafter dies without assets, real or personal, requiring the appointment of an administrator, the judgment creditor may maintain an action in the Superior Court against the grantee of the judgment debtor to foreclose his statutory lien, but he is not entitled to execution against the land. *Flynn v. Rumley*, 25.

JURY.

§ 3. Challenges to the Poll.

Defendants' motion in arrest of judgment on the ground that only persons of the white race sat in the trial jury, *is held* properly denied upon the trial court's findings that names of those qualified of the white and Negro races were in the jury box, that there was no racial discrimination, and that the trial jurors were all accepted by defendants and the jury duly sworn and impaneled without objection or challenge by defendants. *S. v. Bell*, 20.

§ 8. Jury Polls and Special Venires.

The trial judge has the discretionary power to issue a writ of *venire facias*, C. S., 2338, instead of directing the jurors to be drawn from the jury box, and the court's action in issuing the writ is not reviewable in the absence of abuse of discretion. *S. v. Casey*, 352.

JUSTICES OF THE PEACE.

§ 3. Civil Jurisdiction. (Appellate jurisdiction of Superior Court see Courts § 2d.)

Where the evidence in an action against the proprietor of a lodging house tends to show that the proprietor wrongfully permitted a third person to take plaintiff's personal property, valued at more than fifty dollars, out of the room rented by plaintiff, the action is founded solely in tort, and the justice's court has no jurisdiction, and the rule that where an injury results from breach of some contractual duty, plaintiff may waive the tort and sue on the contract, has no application. *Wells v. West*, 656.

LABORERS' AND MATERIALMEN'S LIENS.

§ 4. Proceedings to Perfect in General.

Materialman asserting lien under C. S., 2437, is estopped from thereafter asserting lien under C. S., 2433. *Lumber Co. v. Perry*, 713.

§ 5a. Notice and Filing of Claim.

In an action against the owner to enforce a materialman's lien, a demurrer should be sustained when the complaint fails to allege that at the time of giving notice there was money due the contractor by the owner, the statutory lien being available only before the owner shall have paid the contractor. C. S., 2437, 2438, 2442. *Dixon v. Ipock*, 363.

While the burden of proof is upon the owner to show that at the time of notice to him there was nothing due by him to the contractor, where the evidence affirmatively shows that there was nothing due, the owner's motion to nonsuit is properly granted. *Ibid.*

LANDLORD AND TENANT.

§ 2. Form, Requisites and Validity of Leases in General.

Lease until owner should tear down property is void for uncertainty of duration, or at most creates tenancy at will. *Rental Co. v. Justice*, 523.

§ 7. General Rules of Construction.

Conversations, statements, and negotiations prior to the execution of the written contract are merged therein, and the parties are bound by the terms of the writing. *Oil Co. v. Mecklenburg County*, 642.

The fact that a lease contract is prepared by lessor cannot have the effect of modifying its plain provisions when the lessee signs the contract, and there is no evidence that his signature was obtained by fraud of misrepresentation. *Ibid.*

By agreeing to a sublease of the property stipulating that the sublease should not in any way alter the terms of the lease, the landlord reserves his rights under the lease, and his agreement to the sublease cannot constitute a waiver by him of any of its terms. *Ibid.*

§ 15c. Renewals and Extensions.

After sale of leased lands and notice to lessee by purchaser, lessor has no authority to extend lease. *Stewart v. Thrower*, 541.

The fact that lessor suffered no damage by failure of lessee to give notice of intention to renew within the time stipulated in the lease does not constitute a waiver nor supply the requirement of notice as prescribed in the contract. *Oil Co. v. Mecklenburg County*, 642.

Where lessee does not give notice of intention to renew as required by lease, he loses right to renew under the lease. *Ibid.*

§ 17. Termination by Consent of Parties.

Parties *held* not to have intended cancellation of sublease on undisputed facts of this case. *Hughes v. Long*, 236.

§ 19. Notice.

Tenant at will is entitled to reasonable notice; tenant from month to month is entitled to seven days notice. *Rental Co. v. Justice*, 523.

LARCENY.

§ 1. Elements of the Crime.

Where defendant takes personalty with consent of owner, he is not guilty of larceny in absence of fraud, etc. *S. v. Delk*, 631.

§ 6. Sufficiency of Evidence and Nonsuit.

All elements of larceny must be established by sufficient competent evidence, and evidence that raises a mere suspicion, conjecture, or possibility is insufficient to be submitted to the jury. *S. v. Delk*, 631.

§ 8. Verdict and Judgment.

Where defendant is charged with larceny of different articles of personalty in separate counts, a verdict of guilty of larceny of one of the articles of personalty constitutes an acquittal of the count charging larceny of the other article of personalty. *S. v. Delk*, 631.

LIBEL AND SLANDER.

I. Nature and Essentials of Cause of Action
1. In General
2. Words Actionable Per Se
3. Words Actionable Per Quod
4. Words Susceptible of Two Interpretations
5. Publication
III. Actions
10. Pleadings and Evidence

LIBEL AND SLANDER—*Continued.*

§ 1. Nature and Essentials of Cause of Action in General.

The three classes of libel are (1) publications obviously defamatory which are termed libels *per se*, (2) publications susceptible of two interpretations, one defamatory and the other not, and (3) publications not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances, which are termed libels *per quod*. *Flake v. News Co.*, 780.

§ 2. Words Actionable Per Se.

In determining whether a publication is libelous *per se*, the courts will consider the publication in the sense in which it would be naturally understood by ordinary men, and not as it might be understood by those of morbid imaginations or supersensitiveness. *Flake v. News Co.*, 780.

An unauthorized publication is libelous *per se* if it charges a person with having committed an infamous crime, or with having an infectious disease, or tends to subject him to ridicule, contempt or disgrace, or tends to injure him in his trade or profession. *Ibid.*

Caricatures or other signs written or printed, as well as written words, may be libelous and actionable *per se*. *Ibid.*

An unauthorized publication is libelous *per se* when, standing alone and stripped of any innuendo, it is susceptible of but one meaning, which would tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned or avoided, and it is not necessary that the words charge the commission of a crime or the violation of law, or impute moral turpitude or immoral conduct. *Ibid.*

When an unauthorized publication is libelous *per se*, malice and damage are presumed as a matter of law, even though no actual pecuniary loss is in fact suffered, and no proof of injury is required. *Ibid.*

The evidence disclosed that by mistake the picture of plaintiff dressed in a bathing suit was published in a newspaper advertisement instead of the intended picture of a member of a vaudeville troupe, that the accompanying printing indicated that the person in the picture was a member of the troupe which was to stage a performance in the city, and that she recommended the bread manufactured by one of defendants for the preservation of a slim figure and for energy, and described her under the name of a member of the troupe as an "exotic red-haired Venus." *Held:* The publication is not libelous *per se*. *Ibid.*

Charge that plaintiff was dishonest and obtained goods without paying for them *held* not actionable *per se*. *Ringgold v. Land*, 369.

§ 3. Words Actionable Per Quod.

Allegations that defendant, in the presence of others, charged plaintiff with being dishonest and with getting goods and then not paying for them, and that defendant used other abusive and insulting language, are insufficient to charge words actionable *per se*, since words are actionable *per se* only when they charge a crime or indictable offense involving moral turpitude, or punishable by imprisonment. *Ringgold v. Land*, 369.

In publications which are libelous *per quod*, the innuendo and special damages must be alleged and proved. *Flake v. News Co.*, 780.

§ 4. Words Susceptible of Two Interpretations.

Where words are susceptible of two meanings, only one of which is defamatory, plaintiff must allege and prove defamation. *Wright v. Credit Co.*, 87.

When an unauthorized publication is susceptible of two interpretations, one libelous and the other not, it is for the jury to determine under the circumstances whether the publication is defamatory and was so understood by those who saw it. *Flake v. News Co.*, 780.

LIBEL AND SLANDER—*Continued.*

§ 5. Publication.

The publication of a libelous picture of plaintiff is sufficient to support a cause of action, and it is immaterial that the printed words tend to identify the picture as that of another person. *Flake v. News Co.*, 780.

§ 10. Pleadings and Evidence.

Where words are not actionable *per se*, but are susceptible of two interpretations, one of which is defamatory, plaintiff must allege and prove defamation. *Wright v. Credit Co.*, 87.

Held: Complaint alleging words actionable *per quod* without allegation of special damages is demurrable. *Ringgold v. Land*, 369.

When the publication complained of is not libelous *per se* and plaintiff does not allege or prove special damage or that a libelous construction was placed on the publication by those who saw it, defendants' motions to nonsuit are properly granted, and it is unnecessary to consider whether the publication was libelous *per quod* upon plaintiff's allegation and evidence tending to establish that the publication was libelous when considered in connection with other facts and circumstances. *Flake v. News Co.*, 780.

LIFE ESTATES.

§ 9f. Acquisition of Outstanding Title by Life Tenant.

A life tenant, including a widow having a dower estate, may not acquire title adverse to the remaindermen by purchase at the foreclosure of a mortgage on the lands, but holds title so acquired in trust for herself and the heirs. *Creech v. Wilder*, 162.

LIMITATION OF ACTIONS.

(Adverse possession of realty see Adverse Possession; acquisition of easements by prescription see Easements § 3; life of judgment lien see Judgments § 21.)

I. Statutes of Limitation
1. Nature, Construction, and Application in General
2. Limitations Applicable to Particular Actions
a. Actions Barred in Ten Years
f. Actions Barred in Two Years

II. Computation of Period of Limitation
3. Accrual of Right of Action

IV. Actions
16. Burden of Proof
18. Sufficiency of Evidence, Nonsuit, and Directed Verdict

(Life of judgment lien see Judgments § 21.)

§ 1. Nature, Construction and Application in General.

Statutes of limitation never apply to the sovereign unless expressly named therein. *Asheboro v. Morris*, 331.

Where a municipality elects to enforce the lien against land for paving assessments by action under C. S., 7990, no statute of limitations is applicable, and the pleadings in this action are *held* sufficient to bring the action within the procedure under this statute. *Ibid.*

§ 2a. Actions Barred in Ten Years.

Instrument having word "seal" printed in brackets after signature of maker is a sealed instrument not barred until ten years in absence of evidence that maker did not intend to adopt symbol as his seal. *Allsbrook v. Walston*, 225; *Bank v. Jonas*, 394.

§ 2f. Actions Barred in Two Years.

An action by a municipality to foreclose a certificate of sale of land for paving assessments is not barred until after twenty-four months from the

LIMITATION OF ACTIONS—*Continued.*

date of the certificate, C. S., 8037, and where the action is instituted within that time, and kept alive by the issuance of *alias* summons, the plea of the statute is bad. *Ashcboro v. Morris*, 331.

§ 3. Accrual of Right of Action.

Heir's right of action to set aside deed executed by ancestor for mental incapacity accrues upon death of ancestor. *Cameron v. Cameron*, 674.

Action for damages for wrongful foreclosure accrues upon conveyance of property by *cestui* who bought property at sale. *Davis v. Doggett*, 589.

§ 16. Burden of Proof.

Where defendant pleads the statute of limitations, the burden is on plaintiff to show that the claim is not barred. *Allsbrook v. Walston*, 225.

§ 18. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Introduction in evidence of instrument having word "seal" printed after signature of maker is sufficient to show sealed instrument in absence of evidence by maker that he did not intend to adopt symbol as his seal, and directed verdict that instrument was not barred by three-year statute is without error. *Allsbrook v. Walston*, 225.

The introduction in evidence of a note appearing on its face to be under seal, with deed of trust securing same referring to the note as a bond, without evidence on the part of the maker that he did not intend to adopt the seal appearing upon the note, is sufficient to support a directed verdict that the note is not barred by the three-year statute under the presumption arising from the evidence that the note was under seal. *Bank v. Jonas*, 394.

Where a wife signs a note with her husband on its face, she is presumed to be a maker, and where she does not offer evidence tending to rebut this presumption, or allege that she signed the note as surety, introduction in evidence of the note under seal is sufficient to support a directed verdict that the action on the note was not barred as to either by the three-year statute. *Ibid.*

MANDAMUS.

§ 1. Nature and Grounds of Remedy.

Ch. 116, sec. 7, Public Laws of 1919, does not impose liability on a county in its corporate capacity for damages to person or property caused by dogs, a claim for such damage, when established under the statute, being payable only on order of the board of commissioners, and then only from moneys derived from the tax on dogs therein imposed, and *mandamus* will not lie against the county to compel payment of such damage upon allegation that its board of commissioners arbitrarily refused to appoint a jury to investigate the claim as required by the statute, plaintiff's remedy on the allegations being against the board of commissioners to compel them to act as required by the statute. *McAlister v. Yancey County*, 208.

§ 2b. Discretionary Duty.

County has discretionary power to assume debt of school district and *mandamus* will not lie to compel such assumption when county has not assumed debt of other districts. *East Spencer v. Rowan County*, 425.

MASTER AND SERVANT.

I. The Relation
7d. Liability of Third Person for Interference with Relationship
II. Compensation of Employee
9. Remedies of Employee against Employer
III. Employer's Liability for Injuries to Employee
11. Nature and Extent of Liability
12. Employees of Independent Contractor
14a. Tools, Machinery, and Appliances and Safe Place to Work
17. Assumption of Risk

MASTER AND SERVANT—*Continued.*

IV. Liability for Injury to Third Persons
21b. Course of employment: Scope of Authority (In driving automobile see Automobiles § 24c)
22. Independent Contractors
23. Negligence or Wrongful Act of Servant
V. Federal Employers' Liability Act
25. To what Cases the Federal Act Applies
26. Construction; Decisions of Federal Courts Controlling
27. Negligence of Railroad Employer
28. Assumption of Risk
VII. Workmen's Compensation Act
36. Validity of Compensation Act
37. Nature and Construction of Compensation Act in General
38. Industries, Concerns, and Employers Subject to the Act
39. Who are Employees within Meaning of the Act
40. Injuries Compensable
a. Injuries Compensable in General
b. Diseases
d. Whether Injury Results from "Accident"
e. Whether Accident "Arises out of the Employment"
f. Whether Accident "Arises in the Course of the Employment"
41. Amount of Recovery
42. Change of Condition and Review of Award by the Commission
49. Original Jurisdiction of Commission and Superior Courts, and Exclusiveness of Remedy under the Act
52. Hearings and Evidence Before the Commission
55. Appeal and Review of Award
d. Matters Reviewable
g. Disposition of Cause in Superior Court on Appeal

§ 7d. Liability of Third Person for Interference With Relationship.

Employee at will may not maintain action against third person for procuring employer to demand resignation. *Kirby v. Reynolds*, 271.

§ 9. Remedies of Employee Against Employer.

Evidence *held* sufficient to support finding that plaintiff was to receive commissions on all sales of real estate made in his district, although defendant introduced written statement signed by plaintiff stating plaintiff was to receive commissions only on sales actually made by him, the conflicting evidence being for the trier of facts. *Smith v. Land Bank*, 79.

§ 11. Nature and Extent of Liability.

Evidence tending to show that the alleged employer suggested to plaintiff, as he was being lowered into a well he was employed in digging with block and tackle, that he take his foot out of a hook and place it on a block, and that as plaintiff did so his hand slipped on the rope he was holding and his foot slipped from the block, resulting in his fall to his injury, *is held* to show that the injuries were the result of an unavoidable accident and not caused by negligence. *Wiley v. Olmstead*, 98.

Evidence that plaintiff was hurt while pushing lumber off a stack in the course of his employment when the measuring stick of a fellow employee struck him in the eye, *is held* insufficient to be submitted to the jury on the issue of the employer's negligence in an action instituted in the Superior Court, negligence not being presumed from the mere fact of injury. *Callahan v. Roberts*, 223.

§ 12. Employees of Independent Contractor.

Contract in this case *held* to constitute person agreeing to perform the work an independent contractor, and defendant could not be held liable for injury sustained by employee of the contractor in the performance of the work. *Teague v. R. R.*, 33.

§ 14a. Tools, Machinery and Appliances and Safe Place to Work in General.

The evidence tended to show that plaintiff, in the course of his employment working with a crew putting new crossties under defendant's tracks, was required to step across rails which had been jacked up in order to take out the old ties and replace them, that as he was walking across the jacked-up tracks holding one end of a crosstie, the rail dropped down on his foot, mashing it, and that the rail fell because the "jack was not under it right." Plain-

MASTER AND SERVANT—*Continued.*

tiff alleged that the "track was carelessly and negligently jacked up so that the jack was not under the rail as far as it should have been" for safety. *Held:* Under the allegations, the evidence, viewed in the light most favorable to plaintiff, was sufficient to have been submitted to the jury. *Loftin v. R. R.*, 595.

§ 17. Assumption of Risk.

Plaintiff's evidence tended to show that as he was walking across a track in the scope of his employment, the track, which had been jacked up in order to replace the crossties, fell and injured plaintiff's foot. *Held:* Defendant's contention that upon plaintiff's own evidence, plaintiff assumed the risk as a matter of law, cannot be sustained, since the evidence does not justify the court in holding that the danger was so obvious and imminent that plaintiff realized, or by the exercise of due care could have realized the danger. *Loftin v. R. R.*, 595.

§ 21b. Course of Employment: Scope of Authority. (Of agent see Principal and Agent § 10.)

Respondeat superior applies only when relation of master and servant is shown to exist as to the specific transaction. *Liverman v. Cline*, 43.

§ 22. Independent Contractors.

The owner of a truck agreed to furnish his truck with driver and helper and gas to deliver a truck load of tobacco sticks for defendant, a part of the load to be delivered at several places. At the place of the first delivery, defendant directed the driver as to the places where the balance of the load was to be delivered. Plaintiff, on invitation of the driver, rode on the truck from one place of delivery to another, and was injured as the truck was leaving the last place of delivery. *Held:* Defendant was interested only in the delivery of the tobacco sticks and exercised no control over the operation of the truck, and cannot be held liable by plaintiff. *Bass v. Wholesale Corp.*, 252.

§ 23. Negligence or Wrongful Act of Servant.

Where a nonsuit is entered as to one defendant for that the evidence failed to show negligence on his part, the other defendant, sought to be held on the principle of *respondeat superior*, is also entitled to dismissal, and plaintiff may not contend that the dismissal was erroneous solely as to the alleged employer. *Whitehead v. Elks*, 97.

Evidence *held* insufficient to show that loss by theft resulted from wrongful trespass by defendant's employee. *Catoe v. Baker*, 520.

§ 25. To what Cases the Federal Act Applies.

Where it is admitted or established by verdict of a jury that a railroad employee was injured while engaged in his duties in interstate commerce, the action to recover for such injuries is governed by the Federal Employers' Liability Act. *Batton v. R. R.*, 256.

§ 26. Construction: Decisions of Federal Courts Controlling.

In an action governed by the Federal Employers' Liability Act, instituted in the courts of this State, the Federal decisions are controlling in the construction and operation of the act, but the rules of practice and procedure of this State will be followed. *Batton v. R. R.*, 256.

The Federal Employers' Liability Act, being a humane and remedial statute, should be liberally construed. *Ibid.*

§ 27. Negligence of Railroad Employer.

In an action under the Federal Employers' Liability Act, the evidence will be considered in the light most favorable to plaintiff employee, and he is

MASTER AND SERVANT—*Continued.*

entitled to every reasonable inference therefrom and every reasonable intendment thereon. *Batton v. R. R.*, 256.

Evidence *held* sufficient to be submitted to the jury on issue of negligence of railroad employer. *Ibid.*

§ 28. Assumption of Risk.

Employee does not assume risk of injury from negligence of employer. *Batton v. R. R.*, 256.

Question of assumption of risks *held* for jury upon the evidence in this case. *Ibid.*

Defendant's exception to a portion of the charge on the question of assumption of risk is not sustained in this case, the charge on the issue being without prejudicial error when construed as a whole. *Ibid.*

§ 36. Validity of Compensation Act.

Compensation Act is valid. *Lee v. American Enka Corp.*, 455.

§ 37. Nature and Construction of Compensation Act in General.

The North Carolina Workmen's Compensation Act is a general statute. *Miller v. Roberts*, 126.

The purpose of the Workmen's Compensation Act is to afford employees an expeditious remedy to recover for injuries compensable under the act without regard to whether such injuries were caused by the negligence of the employer. *Lee v. American Enka Corp.*, 455.

Compensation Act should be liberally construed to effectuate intent of Legislature. *Borders v. Cline*, 472; *Doggett v. Warehouse Co.*, 599.

§ 38. Industries, Concerns, and Employers Subject to the Act.

All employers and employees not coming within those specifically excepted from the operation of the Workmen's Compensation Act by sec. 14 of the act, are conclusively presumed to have accepted the provisions of the act and are bound thereby unless they give notice to the contrary in writing or print in apt time to the Industrial Commission. N. C. Code, 8081 (k), and where the facts admitted or agreed establish that defendant employer regularly employed more than five employees in its manufacturing plant, and that no notice of an election not to be bound by the act was given by defendant employer or plaintiff employee, the parties are bound by its provisions. *Lee v. American Enka Corp.*, 455.

§ 39. Who Are Employees Within Meaning of the Act.

Deputies sheriff are not employees of sheriff within meaning of Compensation Act. *Borders v. Cline*, 472.

Deputies sheriff are not employees of the county, nor of the sheriff, within meaning of Compensation Act. *Styers v. Forsyth County*, 558.

§ 40a. Injuries Compensable in General.

An accidental injury is compensable under the Workmen's Compensation Act only if the accident arises out of and in the course of employment, which is one resulting from a risk involved in the employment or incident to it, and which occurs while the employee is engaged in a duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business. *Hildebrand v. Furniture Co.*, 100.

Under the Compensation Act injuries by accident arising out of and in the course of the employment are compensable regardless of whether the accident was the result of the employer's negligence, but injuries not resulting from an accident arising out of and in the course of the employment, and diseases which do not result naturally and unavoidably from an accident are not compensable. *Lee v. American Enka Corp.*, 455.

MASTER AND SERVANT—*Continued.*

§ 40b. Diseases.

Evidence *held* sufficient to support finding that disease resulted naturally and unavoidably from accident. *Doggett v. Warehouse Co.*, 599.

§ 40d. Whether Injury Results from "Accident."

Death of a fireman from heart failure brought on by excitement and exhaustion in fighting a fire, is not the result of an accident within the meaning of the Workmen's Compensation Act, C. S., 8081 (f), heat, smoke, excitement, and physical exertion being the ordinary and expected incidents of the employment. *Neely v. Statesville*, 365.

§ 40e. Whether Accident "Arises Out of the Employment."

Injury caused by tornado does not arise out of employment. *Walker v. Wilkins, Inc.*, 627; *Marsh v. Bennett College*, 662.

§ 40f. Whether Accident "Arises in the Course of Employment."

Evidence *held* insufficient to support finding that accident arose in course of employment. *Hildebrand v. Furniture Co.*, 100.

§ 41. Amount of Recovery.

Where partially disabled employee obtains other work, he is entitled only to 60 per cent of difference between new wage and wage before disability. *Smith v. Swift & Co.*, 608.

§ 42. Change of Condition and Review of Award by Commission.

Where partially disabled employee obtains another job, the conditions are "changed" within meaning of this section without showing change in physical condition of employee. *Smith v. Swift & Co.*, 608.

§ 49. Original Jurisdiction of Commission and Superior Courts, and Exclusiveness of Remedy Under the Compensation Act.

Held: The evidence, considered in the light most favorable to plaintiff, raises the presumption that the parties are subject to the Compensation Act, C. S., 8081 (i), (a), (m), (k), and tends to show absence of notice of nonacceptance by the employer, C. S., 8081 (l), and supports the court's judgment granting defendants' motion to nonsuit for that the Industrial Commission has exclusive jurisdiction, C. S., 8081 (r). *Miller v. Roberts*, 126.

Where cause alleged is governed by Compensation Act, joinder of transferee of property of employer does not prevent nonsuit. *Ibid.*

Where, in an action instituted in the Superior Court, the jury finds upon conflicting evidence that defendant employer regularly employed less than five employees, there being no contention that the employer and employees had voluntarily elected to be bound by the Compensation Act, C. S., 8081 (u), (b), judgment overruling defendant's plea to dismiss on the ground that the action was within the exclusive jurisdiction of the Industrial Commission is without error. *Young v. Mica Co.*, 243.

An award by the Industrial Commission to the widow of an employee excludes all other rights and remedies, and the administrator of the employee may not maintain an action against the employer for wrongful death, and the fact that the injury resulted from negligence in the violation by the employer of a criminal statute does not alter this result. C. S., 8081 (r). *Bright v. Motor Lines*, 384.

Compensation Act excludes right of action at common law for injuries which are not compensable under the act. *Lee v. American Enka Corp.*, 455.

§ 52. Hearings and Evidence Before the Commission.

In determining whether an injury is compensable, the Industrial Commission should consider the evidence before it in the light most favorable to

MASTER AND SERVANT—*Continued.*

claimant, and claimant is entitled to every reasonable intendment thereon and every reasonable inference therefrom. *Hildebrand v. Furniture Co.*, 100; *Doggett v. Warehouse Co.*, 599.

§ 55d. Matters Reviewable.

The findings of fact of the Industrial Commission are conclusive on appeal only when supported by evidence, and the Superior Court has jurisdiction on appeal to review the evidence to determine as a matter of law whether there was any evidence tending to support the findings. *Hildebrand v. Furniture Co.*, 100.

Finding that disease resulted naturally and unavoidably from accident *held* conclusive when supported by evidence. *Doggett v. Warehouse Co.*, 599.

Failure of Industrial Commission to reduce partial disability benefits upon reëmployment of claimant is error of law and reviewable. *Smith v. Swift & Co.*, 608.

Finding that injury did not result from accident which arose out of employment *held* conclusive when supported by evidence. *Walker v. Wilkins, Inc.*, 627; *Marsh v. Bennett College*, 662.

§ 55g. Disposition of Cause in Superior Court.

While Superior Court may remand proceedings for necessary findings, it is error to remand for immaterial findings when appeal may be determined by review of conclusions of law. *Rankin v. Mfg. Co.*, 357.

MONEY RECEIVED.

§ 1. Nature and Essentials of Right of Action.

Where a vendor denies any extension of the option sued on, and pleads the statute of frauds, he will not be permitted to retain moneys paid on the purchase price after the expiration of the option. *Grant v. Brown*, 39.

MONOPOLIES.

§ 2. Agreements and Combinations Unlawful.

An agreement that a retailer should handle the products of a certain manufacturer upon condition that the retailer should not sell like products of other manufacturers within the same price range *is held* prohibited by C. S., 2563 (2), and unenforceable in our courts, and does not fall within C. S., 2563 (6), permitting, in the absence of an intent to stifle competition, a contract granting the seller an exclusive agency for a product within a certain territory. *Shoe Co. v. Department Store*, 75.

§ 3b. Rights and Remedies as Between Parties to Contract.

Plaintiff sued on an open account, and defendant admitted the account and set up a counterclaim, alleging that plaintiff had breached its contract granting defendant exclusive agency for the sale of plaintiff's product, but defendant's evidence established an unlawful agreement under which defendant was to sell plaintiff's product upon condition that defendant was not to sell the products of plaintiff's competitors, C. S., 2563 (2). Defendant contended that such unlawful agreement was unenforceable by the plaintiff only, for that the statute placed a penalty upon the seller and not upon the buyer. *Held:* In order for defendant to establish its counterclaim it had to make out its case by showing the illegal contract, and the courts will not hear it in establishing such case. *Shoe Co. v. Department Store*, 75.

MORTGAGES.

(Cancellation for fraud see Cancellation of Instruments)

I. Nature and Essentials
2. Equitable Mortgages and Liens
IV. Estates, Rights and Duties of Parties
18. Trustees
VI. Transfer of Mortgaged Property or of Equity of Redemption
23b. Debt Assumption Agreements
VIII. Foreclosure
30a. Right to Foreclose and Defenses in General
32a. Execution of Power of Sale in General
32b. Advertisement and Notice
34c. Assignment of Bid
35. Parties Who May Purchase
a. Mortgagees or Trustees
b. Parties in Fiduciary Relationships
39. Attack of Foreclosure
c. Waiver of Right to Attack and Estoppel
d. Election between Action for Damages and Suit to Set Aside
e. Actions for Damages
f. Actions to Set Aside

§ 2. Equitable Mortgages and Liens.

The owner of land divided it into nine tracts and deeded one tract to each of his nine children, reserving a life estate. Only the tracts conveyed to two of the children were encumbered, but the deed to each of the children provided that the grantee therein should pay one-ninth of the mortgage indebtedness remaining unpaid upon the death of the grantor. Each child accepted his deed and went into possession. *Held:* By accepting the deed each grantee became personally liable for one-ninth part of the mortgage indebtedness remaining unpaid upon the death of the grantor, even though the tract conveyed to him was not included in the mortgage, and such liability constitutes a specific charge against the land in the nature of an equitable lien thereon, in accordance with the intent of the grantor as disclosed by the language used, construed in the light of the attendant facts. *Raynor v. Raynor*, 181.

Absolute deed and contract by grantee to reconvey at option of grantors do not constitute equitable mortgage as matter of law. *O'Briant v. Lee*, 793.

Plaintiffs alleged and contended that the parties intended that the absolute deed executed by plaintiffs to defendant and defendant's contract to reconvey at the option of plaintiffs upon the payment of a certain sum of money within a stipulated time, should constitute a mortgage. Defendant denied the allegation and contended to the contrary. *Held:* The action was not to reform or correct a written instrument, but the pleadings raised only an issue of fact as to the intention of the parties, and plaintiffs have the burden of proving the issue by the greater weight or preponderance of the evidence, and an instruction placing the burden on plaintiffs to prove the issue by clear, strong and convincing proof is reversible error. *Ibid.*

§ 18. Trustees.

Where instrument does not empower trustee to sell, such power may not be implied from its other provisions. *Realty Co. v. Lewis*, 45.

§ 23b. Debt Assumption Agreements.

Where a grantee in a deed assumes and agrees to pay off the mortgage debt against the property as a part of the consideration for the conveyance of the lands, the grantee becomes personally liable to the mortgagor and to the mortgagee, but such liability is limited, as to both of them, by stipulations in the debt assumption contract. *Meredith v. Lee*, 327.

Liability of grantee to mortgagee *held* discharged under limitation in debt assumption contract upon payment of one-half of mortgage debt. *Ibid.*

§ 30a. Right to Foreclose and Defenses in General.

An outstanding indebtedness is essential to support a trustee's deed, and where the note is paid in full prior to foreclosure, the trustee's deed conveys no title to the purchaser. *Crook v. Warren*, 93.

MORTGAGES—*Continued.*

§ 32a. Execution of Power of Sale in General.

The power of sale contained in a mortgage or deed of trust will be strictly construed, and the power of sale must be clearly set forth and the contract as written must prevail. *Realty Co. v. Lewis*, 45.

Where instrument does not empower trustee to sell, such power may not be implied from its other provisions. *Ibid.*

§ 32b. Advertisement and Notice.

Agreement to give trustors actual notice of foreclosure, made after execution of instrument, is void for want of consideration. *Davis v. Doggett*, 589.

§ 34c. Assignment of Bid.

While the last and highest bidder at a sale under a mortgage acquires no title until the expiration of the ten-day period, C. S., 2591, he is a preferred bidder and may assign his bid, but his assignee takes only such interest as he had. *Creech v. Wilder*, 162.

§ 35a. Right of Mortgagee or Trustee to Bid in Property.

Where person conducting sale bids in property as agent of *cestui*, trustors may treat sale as nullity. *Davis v. Doggett*, 589.

§ 35b. Parties in Fiduciary Relation to Owners of Equity.

Where the last and highest bidder at a mortgage sale is in a position of trust in relation to the owners of the equity, so that if deed were made to her she would hold for their benefit, the assignee of her bid takes in the same relationship and holds the title in trust. *Creech v. Wilder*, 162.

§ 39c. Waiver of Right to Attack and Estoppel.

Conflicting evidence on issue of waiver and estoppel of trustors bringing action for damages for wrongful foreclosure, *held* properly submitted to the jury. *Davis v. Doggett*, 589.

§ 39d. Election Between Action for Damages and Suit to Set Aside.

Where purchaser at sale transfers land to innocent purchaser for value, trustors are remitted to action for damages for wrongful foreclosure. *Davis v. Doggett*, 589.

§ 39e. Actions for Damages for Wrongful Foreclosure.

Admission that purchaser obtained title precludes action for damages on ground that note was fully paid at time of sale. *Crook v. Warren*, 93.

Action for damages for wrongful foreclosure *held* not to accrue until conveyance by *cestui* to third person. *Davis v. Doggett*, 589.

In an action for damages for wrongful foreclosure, the submission of an issue as to whether defendant *cestui*, who bought the property at the sale, transferred to innocent purchasers for value, is not error when the issue is raised by conflicting evidence. *Ibid.*

§ 39f. Actions to Set Aside.

Where a foreclosure is attacked for fraud for that the last and highest bidder was in a position of trust in relation to the owners of the equity, evidence of gross inadequacy of purchase price is competent on the issue of fraud, and evidence of the rental value is also competent on and relevant to equitable adjustment between the parties. *Creech v. Wilder*, 162.

The *cestui que trust* bid in the property at the foreclosure sale of the deed of trust, and brought suit in ejectment against the trustor. The trustor admitted the execution of the notes and deed of trust and the record evidence established default in payment. The trustor relied solely upon alleged agreements with the *cestui* prior to the execution of the instrument, without alleging fraud or mistake. *Held:* The evidence of the alleged parol agree-

MORTGAGES—*Continued.*

ments was properly excluded, and the sole issues presented were the title of plaintiff purchaser and its right to possession, and whether defendants were in unlawful possession, and plaintiff is entitled to peremptory instructions under the evidence. *Home Owners' Loan Corp. v. Ford*, 324.

MUNICIPAL CORPORATIONS.

(Municipal courts see Courts.)

III. Government, Officers and Agents
11. Officers and Agents
d. Civil Liability for Wrongful Acts or Omissions
g. Compensation
IV. Torts of Municipal Corporations
12. Exercise of Governmental and Corporate Powers
13. Liability for Acts or Omissions of Officers or Employees
14. Defects or Obstructions in Streets or Sidewalks
17. Condition and Use of Parks and Other Public Places
VIII. Public Improvements
34. Enforcement of Liens
XI. Claims and Actions against Municipal Corporations
46. Notice of Claim and Demand of Payment

§ 11d. Civil Liability for Wrongful Acts or Omissions.

A person accepting office may not challenge the constitutionality of the statute under which he was elected in an action against him for official misconduct, or in an action to recover money received by him by virtue of his office, even though the statute under which he was elected is unconstitutional in prescribing ownership of property as a qualification of electors. *Carolina Beach v. Mintz*, 578.

Sums of money received by a municipal commissioner in excess of his compensation as fixed by statute may be recovered by the municipality in an action against him and his bondsman, nor may recovery be defeated upon the ground that he was elected clerk by the board of commissioners, since such contract is void, nor upon the principal of *quantum meruit* for services rendered as such clerk. *Ibid.*

§ 11g. Compensation.

A municipal officer is not entitled to receive any compensation for the performance of his duties as prescribed by statute in excess of the compensation stipulated in the statute. *Carolina Beach v. Mintz*, 578.

The commissioners of a town may not lawfully elect one of their number clerk of the town, and contract to pay him for his services as such clerk, since such election and contract are void as being against public policy, nor may he claim compensation for acting as clerk upon the principal of *quantum meruit*. *Ibid.*

§ 12. Exercise of Governmental and Corporate Powers in General.

Municipality is not liable for negligent operation of police car, since its operation is governmental function. *Lewis v. Hunter*, 504.

While municipalities may be held liable for injuries resulting from negligence in the construction of streets, and for negligence in failing to exercise due care to keep them in reasonable repair, a municipality may not be held liable for danger inherent in the original plan of construction of a street, either adopted by the municipality or ratified by it after its construction, since the adoption of a plan of construction is an exercise of a legislative, *quasi*-judicial, and discretionary function of the city. *Klingenberg v. Raleigh*, 549.

Where a city constructs valley gutters across a street to take care of surface water, its later replacement of the original asphalt with cement and a lessening of the depth of the gutters will not be held a departure from the original plan of construction. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

§ 13. Liability for Acts or Omissions of Officers or Employees.

City *held* not liable for injury inflicted by its truck driver while working on WPA project, the truck driver not being an employee of the city in the performance of the work. *Shapiro v. Winston-Salem*, 751.

§ 14. Defects or Obstructions in Streets or Sidewalks.

Municipalities are required to use due care to keep streets and sidewalks in reasonably safe condition for purpose for which they were constructed, and pedestrian may presume sidewalks are reasonably safe for pedestrians, *Bell v. Raleigh*, 518, but may not assume that streets are kept in reasonably safe condition for pedestrians. *Oliver v. Raleigh*, 465.

Recovery for injuries caused by defect in sidewalk *held* not barred by contributory negligence as matter of law. *Bell v. Raleigh*, 518.

A pedestrian stepping into a street other than at an intersection is required to use a higher degree of care for his own safety than when walking along the sidewalk, since he may not presume that the municipality has kept the street, at such place, in reasonably safe condition for pedestrians. *Oliver v. Raleigh*, 465.

Evidence *held* to show contributory negligence on part of pedestrian injured in fall on street, barring recovery as matter of law. *Ibid.*

Municipality may not be held liable for injury caused by danger inherent in plan of construction of streets. *Klingenberg v. Raleigh*, 549.

§ 17. Condition and Use of Parks and Other Public Places.

Judgment of nonsuit affirmed on authority of *White v. Charlotte*, 211 N. C., 186. *White v. Charlotte*, 539.

§ 34. Enforcement of Liens.

An action to enforce the lien against property for paving assessments is not barred in three years from maturity of the installments, since C. S., 441 (10), relates to individuals and not to the sovereign power. *Asheboro v. Morris*, 331.

An action by a municipality to foreclose a certificate of sale of land for paving assessments is not barred until after twenty-four months from the date of the certificate, C. S., 8037, and where the action is instituted within that time, and kept alive by the issuance of *alias* summons, the plea of the statute is bad. *Ibid.*

Where a municipality elects to enforce the lien against land for paving assessments by action under C. S., 7990, no statute of limitations is applicable, and the pleadings in this action are *held* sufficient to bring the action within the procedure under this statute. *Ibid.*

In this suit to foreclose lien for street assessments, defendants offered in evidence receipts issued by the clerk of the town acknowledging payment in full. Plaintiff municipality offered evidence that the receipts were given by the clerk without authority, in exchange for notes, which transaction did not constitute payment, C. S., 7977. *Held:* Defendants did not admit that the receipts were given in exchange for notes, and the introduction of the receipts in evidence established *prima facie* payment entitling defendants to the submission of the issue to the jury, under appropriate instructions, and a directed verdict for plaintiff municipality is error. *Taylorsville v. Moose*, 379.

§ 46. Notice of Claim and Demand of Payment.

Allegation that claimant had made demand for payment of municipal interest coupons at full value on city manager under Plan D *held* insufficient allegation of demand upon "proper municipal authorities" as required by C. S., 1330. *Nevins v. Lexington*, 616.

NEGLIGENCE.

(Negligence of railroad companies see Railroads § 9, of municipal corporations see Municipal Corporations, Title IV; negligence in operation of automobiles see Automobiles, Titles III, IV, V; negligent injury to servant see Master and Servant, Title III; negligent injury of third person by servant see Master and Servant, Title IV; negligence in processing food see Food.)

I. Acts or Omissions Constituting Negligence
2. Sudden Peril and Emergencies
3. Dangerous Substances and Instrumentalities
4. Condition and Use of Lands and Buildings
d. Invitees
II. Proximate Cause
6. Joint and Concurrent Negligence
10. Last Clear Chance
III. Contributory Negligence
11. Of Persons Injured in General
IV. Actions
17. Burden of Proof
19. Sufficiency of Evidence and Nonsuit
a. On Issue of Negligence
b. On Issue of Contributory Negligence
c. Res Ipsa Loquitur
d. Nonsuit for Intervening Negligence
20. Instructions

§ 2. Sudden Peril and Emergencies.

An instruction that the law does not require a person to exercise the same degree of judgment in a sudden emergency as in ordinary conditions, but only that he exercise that degree of care which an ordinary prudent man, confronted by similar circumstances, would exercise, *is held* without error. *Bullock v. Williams*, 113.

§ 3. Dangerous Substances and Instrumentalities.

The operator of a mine is liable for damage caused by negligence in the use of unsafe or unnecessarily violent explosive material, or by the careless management of materials in common use. *Sparks v. Products Corp.*, 211.

In an action to recover for damage caused by mining operations, the evidence may render it competent and material for the jury to consider whether it was defendant's custom to give notice before setting off a blast, and whether such notice was given before the explosion causing injury. *Ibid.*

Evidence that defendant mining company's agent discovered that dynamite had been put in a blasting hole without his knowledge or direction, and that without investigating the other blasting holes that had been drilled, he further loaded, wired, and fired them, without notice to nearby property owners, and that the explosion therefrom was exceptionally violent and caused large rock to be thrown through the roof of plaintiffs' house, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence. *Ibid.*

§ 4d. Invitees.

Evidence that plaintiff, a customer in a store, was struck and injured while standing with her back to a row of shelves, by a sack of flour which fell from a shelf about eight or ten feet high when an employee attempted, with the aid of a hooked stick, to pull a sack of flour off the shelf for another customer, without warning plaintiff, *is held* sufficient to take the case to the jury on the issue of negligence, and defendant store company's motion to nonsuit and request for peremptory instructions were properly refused. *Proper v. Tea Co.*, 393.

§ 6. Joint and Concurrent Negligence.

Where one driver negligently hits pedestrian and second driver negligently runs over her while lying prostrate on street, both are liable as joint tortfeasors. *Lewis v. Hunter*, 504.

§ 10. Last Clear Chance.

Where issue of contributory negligence is answered in negative, affirmative answer to issue of last clear chance becomes harmless surplusage. *Lewis v. Hunter*, 504.

NEGLIGENCE—*Continued.*

§ 11. Contributory Negligence in General.

It is not necessary that contributory negligence be the sole proximate cause of the injury in order to bar recovery, it being sufficient for this purpose if it is one of the proximate causes. *Lee v. R. R.*, 340.

Contributory negligence is negligence on the part of plaintiff concurring and coöperating with defendant's negligence to produce the injury, and negligence and contributory negligence do not essentially differ. *Pearson v. Luther*, 412.

§ 17. Burden of Proof.

Burden of proving negligence is on plaintiff, burden of proving contributory negligence is on defendant. *Pearson v. Luther*, 412.

§ 19a. On Issue of Negligence.

Evidence *held* sufficient for jury on issue of negligence in mining operations. *Sparks v. Products Corp.*, 211.

§ 19b. On Issue of Contributory Negligence.

Defendant is entitled to a nonsuit on the ground of contributory negligence where plaintiff's own evidence establishes contributory negligence, but contributory negligence must be a proximate cause of the injury to bar recovery, and where more than one inference can be drawn from the evidence as to whether plaintiff was guilty of contributory negligence, or whether such contributory negligence was a proximate cause of the injury, the issue is for the jury. *Pearson v. Luther*, 412.

§ 19c. Res Ipsa Loquitur.

Ordinarily, the doctrine of *res ipsa loquitur* does not apply when all the facts causing the injury are known and testified to by the witnesses, and the doctrine does not apply to the skidding of an automobile on the highway. *Clodfelter v. Wells*, 823.

§ 19d. Nonsuit for Intervening Negligence.

Motion to nonsuit on ground of intervening negligence of codefendant is properly refused where evidence shows injury was result of concurrent negligence. *Lewis v. Hunter*, 504.

§ 20. Instructions.

Charge, construed as whole, *held* not objectionable as putting burden on issue of negligence on defendant. *Bullock v. Williams*, 113.

PARENT AND CHILD.

§ 5. Liability of Parent for Support of Minor Children.

Minor children may not maintain action against father for past support furnished by another. *Bryant v. Bryant*, 6.

Minor children may maintain action against their father to compel him to provide for their future support. *Ibid.*

§ 8. Injuries to Child.

Parent's right of action for loss of services of child abates upon death of child, the sole remedy in such case being action for wrongful death by administrator, C. S., 160, the father's right to share in the recovery being a matter between him and the administrator. *White v. Charlotte*, 539.

PARTIES.

(Misjoinder of parties and causes see Pleadings § 2.)

§ 1. Parties Who May or Must Sue.

Nonmembers may not maintain action to restrain electric membership corporation from making contract with power company relating to power lines,

PARTIES—*Continued.*

since nonmembers are not entitled to service from electric membership corporation, and are therefore unaffected by its contracts and have no standing in court. *Bailey v. Light Co.*, 768.

PARTITION.

§ 1. Right to Partition.

Devisees in common may exchange deeds so that each may hold their share in severalty, and provision of the will giving one of the devisees the right to have the land remain undivided so long as she remained single is a right she may waive by executing the deeds. *Satterfield v. Stewart*, 743.

§ 5. Procedure, Hearings and Evidence.

Where defendant in partition proceedings denies the allegations in the petition that petitioner is a tenant in common with defendants and seized of an undivided fee simple interest in the land, but does not plead sole seizin, petitioner is not required to prove title as in an action in ejectment, and petitioner's record evidence, C. S., 1763, *is held* sufficient to be submitted to the jury upon the sole issue of whether petitioner is a tenant in common with defendants in the land. *Talley v. Murchison*, 205.

Where defendants in partition proceedings filed answer pleading sole seizin, the proceeding becomes in effect an action of ejectment. *Higgins v. Higgins*, 219.

In such case plaintiff may attack deed set up in answer without alleging its invalidity. *Ibid.*

§ 6. Decrees: Actual Partition or Sale.

The court found that a partition of the land could not be made without injury to the parties, and that sale of the land would be more advantageous to them than division, and ordered the lands sold for partition, C. S., 3233. *Held:* The findings supported by competent evidence sustained the order of sale for partition. *Talley v. Murchison*, 205.

§ 9. Parol Partitions.

Where tenants in common have the land surveyed pursuant to a parol partition, and a plat made thereof, and divided, and each goes into possession of the part allotted to him, claiming same in severalty, the partition is good as among the tenants unless the statute of frauds be invoked and relied on as a defense, and as strangers may not take advantage of the statute, as to them each tenant is the sole and unconditional owner of his part. *Roberts v. Ins. Co.*, 1.

§ 13. Operation and Effect of Partition by Parties.

Deeds executed by tenants in common among themselves to effect partition are not deeds of bargain and sale and do not convey title. *Martin v. Bundy*, 437.

PAYMENT.

§ 11. Sufficiency of Evidence of Payment.

Introduction of receipts in evidence establishes *prima facie* payment, taking issue to the jury. *Taylorsville v. Moose*, 379.

PHYSICIANS AND SURGEONS.

§ 15c. Sufficiency of Evidence of Negligence or Malpractice.

Evidence *held* sufficient to overrule nonsuit on question of negligence of physician in permitting plaintiff to leave hospital in serious physical condition. *Gower v. Davidian*, 172.

PHYSICIANS AND SURGEONS—*Continued.*

§ 15f. Causal Connection Between Treatment and Injury and Measure of Damages.

Evidence *held* insufficient to show causal connection between injury and negligence of physician. *Gower v. Davidian*, 172.

Evidence *held* insufficient to show causal connection between treatment and physical condition complained of. *Davis v. Pittman*, 680.

PLEADINGS.

(In particular actions see particular titles of actions.)

I. The Complaint
2. Joinder of Causes
IV. Demurrers
15. For Failure of Complaint to State Cause of Action
16. For Misjoinder of Parties and Causes
19. Time of Filing Demurrer and Waiver of Right
20. Office and Effect of Demurrer
V. Amendment of Pleadings
22. Allowance of Amendment by Court
23. Amendment after Decision on Appeal
VII. Motions Relating to Pleadings
27. Motions for Bill of Particulars or that Allegations be Made Definite and Certain
29. Motions to Strike Out

§ 2. Joinder of Causes.

This action was instituted by creditors of a corporation to set aside a deed of the corporation to a third person and a deed of trust executed by such third person, upon allegations that the corporation's deed was void as to creditors, and against another individual, a kinsman of the grantee in the deed, upon allegation that he agreed to pay the indebtedness of the corporation upon consideration of the cancellation and delivery to him of notes held by the stockholders, which notes were secured by the real estate owned by the corporation. *Held:* Properly joined. *Daniels v. Duck Island*, 90.

Separate and distinct causes of action by different plaintiffs against different defendants may not be joined. *Wilkesboro v. Jordan*, 197.

Action to set aside deed as being fraudulent as to creditors *held* improperly joined with action against grantor's administrator for maladministration of of estate. *Vollers Co. v. Todd*, 677.

§ 15. For Failure of Complaint to State Cause of Action.

Upon a demurrer to the complaint on the ground that it fails to state a cause of action, C. S., 511 (6), the pleadings will be liberally construed in favor of the pleader with a view to substantial justice between the parties, C. S., 535, and the demurrer will not be sustained unless the complaint is wholly insufficient. *Kirby v. Reynolds*, 271; *Cox v. Jenkins*, 667.

§ 16. For Misjoinder of Parties and Causes.

Demurrer for misjoinder of parties and causes *held* properly overruled in this case. *Daniels v. Duck Island*, 90.

Demurrer for misjoinder of parties and causes *held* properly sustained in this case. *Wilkesboro v. Jordan*, 197; *Vollers Co. v. Todd*, 677.

§ 19. Time of Filing Demurrer and Waiver of Right.

All grounds for demurrer are waived by failure to file demurrer in apt time, except demurrers for want of jurisdiction and for that complaint fails to state cause of action. *Gurganus v. McLawhorn*, 397.

§ 20. Office and Effect of Demurrer.

Upon demurrer, the allegations of the pleading will be taken in the light most favorable to the pleader, and the demurrer will not be sustained unless the pleading is wholly insufficient. *Midgett v. Nelson*, 41; *Kirby v. Reynolds*, 271.

A demurrer admits facts properly alleged, but not conclusions of law. *Kirby v. Reynolds*, 271.

PLEADINGS—*Continued.*

§ 22. Allowance of Amendment by Court.

The trial court has broad power to allow amendments to pleadings and process, C. S., 547, but such power does not extend to amendments which substantially change the cause of action. *Clevenger v. Grover*, 13.

Amendment of process and pleading by inserting correct name of defendant *held* properly allowed under facts of this case. *Ibid.*

Upon appeal from the clerk's order denying a motion to vacate plaintiff's attachment, the Superior Court, in denying defendants' motion, has ample power to allow plaintiff to amend the complaint and affidavits. *Meekins v. Game Preserves*, 96.

In summary ejectment brought by rental agent, court may allow amendment making owner party plaintiff. *Rental Co. v. Justice*, 523.

§ 23. Amendment After Decision on Appeal.

Party may apply for permission to amend after certification of judgment of Supreme Court. *Ragan v. Ragan*, 753.

§ 27. Motions for Bill of Particulars or That Allegations Be Made Definite and Certain.

Defendant desiring more certain and definite statement should make motion therefor under C. S., 537. *Cox v. Jenkins*, 667.

Court must consider application for bill of particulars in its discretion, and may not rule thereon as a matter of law. *Tickle v. Hobgood*, 762.

§ 29. Motions to Strike Out. (Review of, see Appeal and Error § 40b.)

In a legislative disbarment proceeding, a motion to strike from the complaint allegations relating to matters occurring prior to the effective date of ch. 210, Public Laws of 1933, is too late when not made until after the jury has been impaneled. C. S., 537. *In re West*, 189.

PRINCIPAL AND AGENT.

§ 6. Compensation of Agent.

Evidence *held* sufficient to support finding that plaintiff was to receive commissions on all sales of real estate made in his district, although defendant introduced written statement signed by plaintiff that he was to receive commissions only on sales actually made by him, the conflicting evidence being for the trier of facts. *Smith v. Land Bank*, 79.

§ 7. Evidence and Proof of Agency.

Declarations of an alleged agent are incompetent to prove the fact of agency. *Hildebrand v. Furniture Co.*, 100.

§ 10. Wrongful Acts of Agent.

A principal is liable for the torts of his agent when expressly authorized, or when committed within the scope of his employment and in furtherance of his master's business, and therefore within his implied authority, or when ratified by the principal. *Snow v. DeButts*, 120.

The test to determine whether a wrongful act of an agent comes within his implied authority is whether the agent is acting within the scope of his employment and is about his master's business, attempting to do what he was employed to do, and the intent or motive of the agent to secure a benefit for his employer or to protect his property is not controlling. *Ibid.*

Acts done by the agent outside the scope of his employment, irrespective of intent, or which are done for the agent's own purpose and in consummation of his personal desire, are not within his implied authority, and the principal may not be held liable therefor in the absence of ratification. *Ibid.*

In determining whether an act is within the implied authority of an agent, there is a marked distinction between an act done for the purpose of protect-

PRINCIPAL AND AGENT—*Continued.*

ing the principal's property, or recovering it back, and an act done for the purpose of punishing an offender for an offense already committed. *Ibid.*

Evidence *held* insufficient to show that general manager had implied authority to assault plaintiff. *Ibid.*

§ 12. Ratification and Estoppel.

Acceptance and use of goods and signing replevy bond *held* to ratify agent's execution of conditional sales contract. *Payne-Farris Co. v. Kuester*, 545.

PRINCIPAL AND SURETY.

(Liability on Administration bonds see Executors and Administrators.)

§ 5a. Liability on Bonds of Public Officers.

Officer and surety are liable for sums received by officer in excess of salary. *Carolina Beach v. Mintz*, 578.

PROCESS.

§ 3. Defective Process and Amendment.

The trial court has broad power to allow amendments to pleadings and process, C. S., 547, but such power does not extend to amendments which substantially change the cause of action. *Clevenger v. Grover*, 13.

Amendment of process and pleading by inserting correct name of defendant *held* properly allowed under facts of this case. *Ibid.*

§ 5. Service by Publication.

While a substantial compliance with C. S., 484, will suffice for service by publication, the statutory affidavit must aver that defendant cannot be found, after due diligence, in the State, and this must be made to appear to the satisfaction of the court, and an averment that defendants are nonresidents, or that summons was duly issued and returned by the sheriff with endorsement, "Defendant, after due diligence and search, cannot be found in the" county, is insufficient, and service of process by publication based upon such affidavit is void, and the court obtains no jurisdiction over the person of defendant by such service. *Denton v. Vassiliades*, 513.

§ 7d. Service on Local Agent of Foreign Corporation.

Person regularly employed in making collections in this State is agent for foreign corporation for purpose of service of process under C. S., 483 (1). *Mauney v. Luzier's, Inc.*, 634.

§ 14. Grounds and Essentials of Right of Action for Abuse of Process.

Use of criminal process to collect civil debt constitutes abuse of process. *Ledford v. Smith*, 447.

Complaint *held* sufficient to state cause of action for abuse of process under authority of *Ledford v. Smith, ante*, 447. *Cox v. Jenkins*, 667.

PUBLIC OFFICERS.

§ 4b. Rule Against Holding Two Public Offices.

Municipal officer is not entitled to receive any compensation for performance of statutory duties in excess of that stipulated in the statute, nor may he be elected to hold additional office and receive compensation for such additional services. *Carolina Beach v. Mintz*, 578.

§ 4c. Effect of Accepting Two Public Offices.

Effect of accepting another public office in contravention of Constitution is to vacate first office. *In re Barnes*, 735.

PUBLIC OFFICERS—*Continued.*

§ 5. Duties and Authority.

Public officers leasing public property may not waive a provision of the lease under which the lease may be terminated when the property may be leased to others for a higher rental. *Oil Co. v. Mecklenburg County*, 642.

§ 7a. Liability for Malfeasance, Misfeasance or Nonfeasance.

In action for misfeasance, officer may not challenge constitutionality of statute under which he was elected. *Carolina Beach v. Mintz*, 578.

RAILROADS.

§ 9. Accidents at Crossings.

Evidence *held* to show contributory negligence as matter of law in driver's colliding with flat car standing at crossing. *Lee v. R. R.*, 340.

Evidence that defendant railroad company failed to give timely warning of the approach of its train to a grade crossing on its main line by signals or lowering the gates maintained at the crossing, or otherwise, is sufficient to be submitted to the jury on the issue of negligence. *Bullock v. R. R.*, 760.

Where the gates maintained by a railroad company at a grade crossing are raised, the traveling public may assume that the crossing is clear and that they may enter the crossing in safety, but person entering crossing must use due care for own safety notwithstanding fact that gates are raised. *Ibid.*

Pedestrian struck at crossing *held* barred by contributory negligence in failing to look in direction from which train approached. *Bullock v. R. R.*, 760.

Whether intestate was guilty of contributory negligence in failing to stop before entering crossing *held* for jury. *Preddy v. Britt*, 719.

RAPE.

§ 8. Sufficiency of Evidence and Nonsuit.

Evidence in this prosecution to the effect that defendant obtained carnal knowledge of prosecutrix against her will by threatening to kill her with a knife *is held* sufficient to be submitted to the jury on an indictment charging rape. *S. v. Caldwell*, 484.

RECEIVERS.

§ 8. Proceedings and Appointment of Receiver.

An order appointing a receiver after due notice to the insolvent, in a cause pending in a court having jurisdiction of the parties and subject matter, and directing the receiver to take possession of insolvent's property, which order is filed in compliance with statute in the county in which the insolvent resides and the property is situate, C. S., 724, 722, is not void, and if erroneous, may be attacked by the insolvent only by perfecting an appeal therefrom. *Nobles v. Robeson*, 334.

RECEIVING STOLEN GOODS.

§ 2. Knowledge and Felonious Intent.

Charge that defendant would have guilty knowledge if he reasonably believed or knew goods to be stolen *held* error. *S. v. Miller*, 361.

§ 6. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence in this case *held* sufficient to be submitted to the jury on the charge of receiving stolen goods. *S. v. Conner*, 668.

REFERENCE.

§ 9. Duties and Powers of Court in General Upon Review in Consent Reference.

Upon appeal to the Superior Court in a consent reference, the trial judge has the power to make his own findings of fact upon matters presented by exceptions. *Dent v. Mica Co.*, 241.

§ 13. Right to Jury Trial Upon Review of Compulsory Reference.

Appellant in compulsory reference waives right to jury trial by failing to demand it separately under each of his exceptions to finding of fact, and by failing to tender issue thereon. *Gurganus v. McLawhorn*, 397.

§ 14. Duties and Powers of Court Upon Review in Compulsory Reference.

In compulsory reference, where jury trial is not preserved by appellant, court must pass separately upon each exception, and may affirm, modify, or set aside report. *Gurganus v. McLawhorn*, 397.

REFORMATION OF INSTRUMENTS.

(Action to have deed and contract to reconvey declared a mortgage see Mortgages § 2.)

§ 3. Mutual Mistake.

Where incorrect description is incorporated in deed by mutual mistake of parties, deed may be reformed. *Yopp v. Aman*, 479.

§ 11. Issues and Verdict.

In a suit for reformation, an issue whether the clause sought to be inserted by plaintiff was omitted from the deed "by mutual mistake or by the fraud of grantee" is defective as being in the alternative, and on appeal from judgment entered on an affirmative answer thereto a new trial will be awarded, since the verdict is uncertain and establishes neither proposition with definiteness. *Edge v. Feldspar Corp.*, 246.

§ 7. Pleadings.

Where defendants contend that the contract as written failed to express the agreement between the parties, defendants must clearly allege the facts constituting fraud or mutual mistake relied upon. *Home Owners Loan Corp. v. Ford*, 324.

REMOVAL OF CAUSES.

§ 4a. Determination of Whether Controversy Is Separable.

Whether an action is separable is to be determined by the allegations of the complaint, and where the complaint states a joint cause, the action is not removable even though it may be later determined upon the trial that plaintiff is not entitled to recover from the parties jointly. *Edwards v. R. R.*, 61.

Complaint in this case *held* to state joint cause, and nonresident defendant's motion to remove was properly denied. *Edwards v. R. R.*, 61; *Hall v. Stone Co.*, 254; *Allen v. Stone Co.*, 255.

ROBBERY.

§ 3. Sufficiency of Evidence.

Evidence identifying defendant as perpetrator of crime *held* sufficient to be submitted to the jury. *S. v. Murph*, 494.

SCHOOLS.

§ 3. Establishment, Enlargement and Alteration of School Districts.

Legislature had power by general act to provide for redistricting territory of several counties for school purposes. *Moore v. Board of Education*, 499.

SCHOOLS—*Continued.*

§ 6. State Supervision and Control.

Legislature retains control over agencies for maintenance of constitutional school term. *Moore v. Board of Education*, 499.

§ 8. District Boards and Officers.

County board of education has no jurisdiction over or duty in respect to maintenance of schools in special charter district. *East Spencer v. Rowan County*, 425.

§ 14. Selection of School Sites.

County board of education has discretionary power to select school sites in each legally constituted district. *Moore v. Board of Education*, 499.

§ 32. Assumption of Bonds or Indebtedness by County.

County has discretionary power to assume special charter district debt incurred for constitutional school term, but *mandamus* will not lie to compel such discretion when county has no assumed debt of other districts. *East Spencer v. Rowan County*, 425.

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. Brewington*, 244.

§ 8. Requisites and Sufficiency of Supporting Testimony.

By provision of the statute, C. S., 4339, there must be evidence of each of the essential elements of seduction, independent of the testimony of prosecutrix, in order to sustain a conviction. *S. v. Brewington*, 244.

Held: Nonsuit should have been granted for failure of supporting evidence as to innocence and virtue of prosecutrix. *Ibid.*

SHERIFFS.

§ 1. Appointment and Qualification.

A sheriff occupies a constitutional (Art. IV, sec. 24) public office, and a sheriff takes office, not by contract, but by commission subject to the power of the Legislature to fix fees and compensation for which the Constitution does not provide. *Borders v. Cline*, 472.

§ 2. Deputies sheriff.

A sheriff may appoint deputies to perform the ministerial duties of his office, a general deputy having authority to execute all the ordinary duties of the office of sheriff, and a special deputy being authorized to perform a specific act, and functions of deputies sheriff are of a public character, and their fees fixed and paid as prescribed by statute and not by the sheriff. *Borders v. Cline*, 472.

Deputy sheriff is appointee of sheriff, who acts in his stead in ministerial matters, and is not agent or employee of sheriff. *Styers v. Forsyth County*, 558. County has no control over deputies sheriff under general laws; as to whether salary deputies, under ch. 451, Public-Local Laws of 1929, are employees of the county, *quære*. *Ibid.*

STATUTES.

(Table of statutes construed see page 936.)

§ 2. Constitutional Inhibition Against Passage of Special Acts.

Ch. 562, Public Laws of 1933, is public act relating to school districts and does not come within inhibition of Constitution against passage of special act changing boundary of school district. *Moore v. Board of Education*, 499.

STATUTES—*Continued.*

§ 5a. General Rules of Construction.

The title of an act may be called in aid of its construction. *Styers v. Forsyth County*, 558; *Dyer v. Dyer*, 620.

The heart of a statute is the legislative intent. *Dyer v. Dyer*, 620; *Supply Co. v. Maxwell, Comr. of Revenue*, 624.

Where a statute uses words having a well known sense in the law, the words will be given that sense in construing the statute. *C. H. T. Corp. v. Maxwell, Comr.*, 803.

§ 7. Effective Date of Statutes.

As a general rule, statutes framed in the present tense will be construed to apply not only to conditions existing at the time of their enactment, but also to conditions arising thereafter. *In re Barnes*, 735.

§ 8. Criminal Statutes.

The rule that a criminal statute must be strictly construed does not mean that a criminal statute should be construed stintingly or narrowly, but that it may not be extended by implication or equitable construction beyond the scope of the language employed. *S. v. Whitehurst*, 300.

§ 10. Repeal by Implication and Construction.

A public-local law applicable to a particular county or municipality is not repealed by a subsequently enacted public law, State-wide in its application, on the same subject matter, unless repeal is expressly provided for or arises by necessary implication. *Rogers v. Davis*, 35.

Where two statutes are in irreconcilable conflict, the statute which was first enacted must give way to the later enacted statute to the extent of the conflict, the last expression of the legislative will in the matter being the law. *Guilford County v. Estates Administration, Inc.*, 653.

TAXATION.

I. Requirements, Restrictions, and Validity
2. License and Privilege Taxes
3. Limitation on Tax Rate and Increase of Debt
4. Necessary Expenses
5. Public Purpose
IV. Property Exempt from Taxation
19. Property of State or Political Subdivisions
V. Levy and Assessment
23. Regulations and Construction of Tax levying Statutes in General
27. Levy and Assessment of Corporate Franchise Taxes
28. Levy and Assessment of Inheritance Taxes
29. Levy and Assessment of Income Taxes
30. Levy and Assessment of Sales Taxes
VII. Actions to Determine Validity of Levy of Taxes or Issuance of Bonds
38a. Actions to Enjoin Issuance of Bonds
IX. Sale of Property for Taxes
40b. Foreclosure of Tax Sale Certificates

§ 2c. License and Privilege Taxes.

Ch. 116, secs. 1 and 2, Public Laws of 1919, imposing a privilege tax on the ownership of dogs is valid and constitutional, and is made applicable to Yancey County by ch. 318, Public Laws of 1929, which repealed ch. 84, Public Laws 1923. N. C. Code, 1673, 1684 (b). *McAlister v. Yancey County*, 208.

§ 3. Limitation on Tax Rate and Increase of Debt.

Vote is not necessary for issuance of county bonds to refund township bonds constituting valid existing debt of county. *Thompson v. Harnett County*, 214.

§ 4. Necessary Expenses.

What are necessary expenses of a county or municipality within the meaning of the Constitution is a question of law for the courts. *Palmer v. Haywood County*, 284.

Defendant county proposed to issue bonds to construct an annex to its county hospital, to be used principally for the care of the indigent sick of the county, without submitting the question to a vote. *Held:* The building of an

TAXATION—*Continued.*

annex to the county hospital is not a necessary expense of the county within the meaning of Art. VII, sec. 7, of the Constitution of North Carolina, and plaintiff taxpayer is entitled to an order restraining the issuance of the bonds. *Ibid.*

§ 5. Public Purpose.

Taxes may be levied only for a public purpose. Art. V, sec. 3, of the Constitution of North Carolina. *Palmer v. Haywood County*, 284.

§ 19. Property of State or Political Subdivisions.

Property acquired by State and held for benefit of Veterans' Loan Fund is exempt from taxation. *Wearerville v. Hobbs, Comr.*, 684.

§ 23. Regulations and Construction of Tax Levying Statutes in General.

That regulation issued by Commissioner of Revenue is repugnant to former regulation under prior statute does not affect validity of ruling. *Supply Co. v. Maxwell, Comr. of Revenue*, 624.

Fact that certain construction would yield more revenue is not germane to Constitution. *Ibid.*

§ 27. Levy and Assessment of Corporate Franchise Taxes.

The words "doing business" in this State, as used in statutes imposing a corporate franchise tax, are to be broadly construed, and while an isolated business transaction is not sufficient to bring a corporation within the meaning of such statutes, a corporation comes within the statute if it transacts within the State a substantial part of the business it was organized to perform. *C. H. T. Corporation v. Maxwell, Comr.*, 803.

Plaintiff corporation *held* "doing business" in this State within meaning of statutes levying franchise tax. *Ibid.*

The ownership of property for the purpose of computing the amount of corporate franchise taxes means the ownership of any valuable right in property, and not necessarily the ownership of the fee simple. *Ibid.*

Plaintiff corporation *held* the owner of lands in this State for purpose of computing corporate franchise tax. *Ibid.*

§ 28. Levy and Assessment of Inheritance Taxes.

The right to receive rents from property devised in trust creates an equitable interest in the beneficiaries in the *corpus* of the property, and inheritance taxes are properly apportioned among them in accordance with their respective interests therein. *Maxwell, Comr. of Revenue, v. Waddell*, 572.

§ 29. Levy and Assessment of Income Taxes.

Rents received by beneficiary under terms of will from property devised in trust is not bequest deductible from net income. *Maxwell, Comr. of Revenue, v. Waddell*, 572.

The successive Revenue Acts show the clear intent of the Legislature, in the general plan of taxing all income, to tax incomes from trust estates to the trustee if such income is not distributable during the tax year, and to the beneficiary, if distributed or distributable during the tax year. *Ibid.*

§ 30. Levy and Assessment of Sales Taxes.

Sale of plumbing and heating equipment to plumbing and heating contractor is retail sale taxable at 3 per cent. *Supply Co. v. Maxwell, Comr. of Revenue*, 624.

§ 38a. Actions to Enjoin Issuance of Bonds.

Action to restrain issuance of bonds is properly dismissed when not instituted in time allowed by statute. *Jones v. Alamance County*, 603.

TAXATION—*Continued.*

§ 40b. Foreclosure of Tax Sale Certificates.

The foreclosure of a tax sale certificate is a remedy in the nature of an action to foreclose a mortgage, C. S., 8037, and must be instituted in the county where the land, or some part thereof, is situated, C. S., 463. *Guilford County v. Estates Administration, Inc.*, 653.

TORTS.

(Particular torts see particular titles of torts; torts by persons in particular relationships see Master and Servant, Municipal Corporations, Corporations.)

§ 8a. Fraud in Procuring Release.

Evidence *held* properly submitted to the jury on the issue of whether release was obtained by fraud. *Preddy v. Britt*, 719.

§ 8d. Rights of Parties Upon Setting Aside of Release.

Where release is set aside for fraud, consideration should be deducted from damages assessed by jury. *Preddy v. Britt*, 719.

TRESPASS.

§ 4. Encroachment of Buildings and Structures.

Construction of wharf so as to interfere with plaintiff's riparian rights *held* trespass. *O'Neal v. Rollison*, 83.

§ 7. Evidence and Nonsuit.

Evidence *held* insufficient to show that loss by theft resulted from wrongful trespass by defendant's employee. *Catoe v. Baker*, 520.

§ 8. Damages.

The measure of damages for wrongful trespass upon realty in cutting and removing timber is the difference in the value of the land immediately before and after the trespass. *Owens v. Lumber Co.*, 133.

TRIAL.

(Trial of criminal prosecutions see Criminal Law, Title VIII.)

II. Order, Conduct, and Course of Trial
7. Argument and Conduct of Counsel
V. Nonsuit
22. Office and Effect of Motions to Nonsuit
b. Consideration of Evidence on Motions to Nonsuit
c. Nonsuit in Favor of Party Having Burden of Proof
23. Contradictions and Discrepancies in Plaintiff's Evidence
24. Sufficiency of Evidence to Overrule Nonsuit
VI. Directed Verdict
27. Directed Verdict in Favor of Party Having Burden of Proof
VII. Instructions
29. Form Requisites and Sufficiency
a. In General
c. Instructions on Burden of Proof
30. Conformity to Pleadings and Evidence
32. Requests for Instructions
33. Statement of Contentions and Objections Thereto
36. Construction of Instructions and General Rules of Review
VIII. Issues and Verdict
37. Form and Sufficiency in General
X. Motions after Verdict
47. Motions for New Trial for Newly Discovered Evidence (In Supreme Court see Appeal and Error s 47a)
49. Motions to Set Aside as against Weight of Evidence

§ 7. Argument and Conduct of Counsel.

Whether counsel should be permitted to comment on failure of party to take stand to refute personal charges *held* in discretion of court. *York v. York*, 695.

§ 22b. Consideration of Evidence on Motion to Nonsuit.

Upon motion to nonsuit, all the evidence tending to support plaintiff's cause of action is to be considered in the light most favorable to him, and he is

TRIAL—*Continued.*

entitled to every reasonable intendment thereon and every reasonable inference therefrom. *Leonard v. Ins. Co.*, 151; *Pearson v. Luther*, 412; *Preddy v. Britt*, 719; *York v. York*, 695.

On defendant's motion to nonsuit, only the evidence favorable to plaintiff will be considered. *Gower v. Davidian*, 172.

§ 22c. Nonsuit in Favor of Party Having Burden of Proof.

While the burden of proof is upon the owner to show that at the time of notice to him by a materialman there was nothing due by him to the contractor, where the evidence affirmatively shows that there was nothing due, the owner's motion to nonsuit is properly granted. *Dixon v. Ipock*, 363.

Where plaintiff makes out a *prima facie* case, a nonsuit may not be granted upon defendant's evidence in support of an affirmative defense, a nonsuit upon an affirmative defense being permissible only if plaintiff's own evidence establishes such defense as a matter of law. *Hedgecock v. Ins. Co.*, 638.

§ 23. Contradictions and Discrepancies in Plaintiff's Evidence.

Contradictory statements by plaintiff in his examination in chief and in his cross-examination does not warrant the granting of defendant's motion to nonsuit, it being for the jury to determine which version of the facts they will believe. *Gunn v. Taxi Co.*, 540.

Discrepancies in plaintiff's own evidence do not warrant granting of nonsuit. *Lumber Co. v. Perry*, 713.

§ 24. Sufficiency of Evidence to Overrule Nonsuit.

If diverse inferences may reasonably be drawn from the evidence, some favorable to plaintiffs and others favorable to defendant, the cause should be submitted to the jury for final determination. *In re West*, 189.

Ordinarily, the evidence should be submitted to the jury when, viewed in the light most favorable to plaintiff, it is sufficient in any aspect to support plaintiff's cause of action. *Lumber Co. v. Perry*, 713.

§ 27. Directed Verdict in Favor of Party Having Burden of Proof.

Where defendant's evidence or admissions do not establish plaintiff's cause, directed verdict for plaintiff is error. *Taylorsville v. Moose*, 379.

§ 29a. Form, Requisites and Sufficiency of Charge in General.

A charge will be sustained when, considered as a whole, it embodies the law applicable to the essential features of the case. *Bullock v. Williams*, 113.

§ 29c. Instructions on Burden of Proof.

Charge, construed as whole, *held* not objectionable as putting burden on issue of negligence on defendant. *Bullock v. Williams*, 113.

Charge *held* for error in placing burden of proof on defendant. *Williams v. Ins. Co.*, 516.

§ 30. Conformity to Pleadings and Evidence.

Where there is no allegation or evidence that defendant driver failed to give a warning signal required of him by the statute under the circumstances, it is error for the court to charge the law requiring the giving of such signal, since the court is required to charge the law arising upon the evidence, C. S., 564. *Farrow v. White*, 376.

Instruction *held* for error in submitting elements of damage not supported by allegation and evidence. *Young v. Levin*, 755.

§ 32. Requests for Instructions.

A party desiring more specific instructions on subordinate features of the charge must aptly tender request therefor. *Owens v. Lumber Co.*, 133.

TRIAL—*Continued.*

Party desiring more specific instructions should aptly tender request therefor, and request made over two hours after commencement of argument is not made in apt time. *Lewis v. Hunter*, 504.

§ 33. Statement of Contentions and Objections Thereto.

Statement of contentions not based upon evidence introduced at trial constitutes reversible error. *Smith v. Hosiery Mill*, 661.

Inadvertence in the statement of the contentions of the parties and the evidence supporting them must be brought to the court's attention in apt time to afford opportunity for correction. *Sorrells v. Decker*, 251.

§ 36. Construction of Instructions and General Rules of Review.

A charge will be construed as a whole and an exception to the charge will not be sustained when, so construed, it is without prejudicial error. *Bullock v. Williams*, 113; *Batton v. R. R.*, 256.

§ 37. Form and Sufficiency of Issues in General.

Where issues submitted afford opportunity to present all phases of case to jury, exception thereto will not be sustained. *Lewis v. Hunter*, 504; *Price v. Askins*, 583.

Two distinct propositions, to which different answers might be returned, should not be submitted to the jury in one issue, and where such propositions are submitted in the alternative in one issue, an affirmative answer thereto is fatally defective for uncertainty and ambiguity. *Edge v. Feldspar Corp.*, 246.

While a verdict will be interpreted with reference to the pleadings, evidence, admissions of the parties, and charge of the court, an affirmative answer to an issue embodying two separate propositions in the alternative cannot be made definite by such interpretation. *Ibid.*

Verdict will be interpreted in light of allegations and evidence. *Jackson v. Casualty Co.*, 546; *Ledford v. Smith*, 447.

§ 47. Motions for New Trial for Newly Discovered Evidence.

Motion for new trial for newly discovered evidence must be made at trial term, unless continued by consent, and consent to continuance for hearing of motion to set aside for errors does not constitute consent for continuance for motion to set aside for newly discovered evidence. *Riddle v. Honbarrier*, 528.

§ 49. Motions to Set Aside as Against Weight of Evidence.

Trial court may set aside verdict, but has no power to change or modify the verdict as returned by the jury. *Edwards v. Upchurch*, 249.

TRUSTS.

§ 15. Acts and Transactions Creating Resulting or Constructive Trusts.

Widow assuming to pay mortgage indebtedness in her report as administratrix is in position of trust for heirs. *Creech v. Wilder*, 162.

USURY.

§ 2. Contracts and Transactions Usurious.

A sum paid an independent broker by the borrower to cover costs, commission, and expenses in securing the loan, does not perforce render the loan usurious. *Ins. Co. v. Smathers*, 40.

VENDOR AND PURCHASER.

§ 18. Payment of Purchase Price.

Evidence *held* to disclose that option was not exercised according to its terms, and purchaser could not recover for ejectment by vendor's grantee. *Grant v. Brown*, 39.

VENDOR AND PURCHASER—*Continued.*

§ 24. Recovery of Purchase Money Paid.

Where a vendor denies any extension of the option sued on, and pleads the statute of frauds, he will not be permitted to retain moneys paid on the purchase price after the expiration of the option. *Grant v. Brown*, 39.

VENUE.

§ 1a. Residence of Parties.

Evidence *held* sufficient to support finding that plaintiff's residence was in county in which action was instituted. *Howard v. Coach Co.*, 201.

§ 1b. Executors and Administrators.

Denial of motion to remove action brought by administratrix in county of her residence affirmed on authority of *Lawson v. Langley*, 211 N. C., 526. *McLean v. Gas Co.*, 543.

Action against administrator to foreclose tax sale certificate must be instituted in county where land is situated and motion to remove to county of administrator's qualification. *Guilford County v. Estates Administration, Inc.*, 653.

§ 3. Actions Involving Realty.

Action against administrator to foreclose tax sale certificate must be instituted in county in which land is situated. *Guilford County v. Estates Administration, Inc.*, 653.

§ 8b. For Convenience of Parties or Witnesses.

A motion for change of venue for convenience of witnesses and to promote the ends of justice is addressed to the sound discretion of the trial judge, and his action thereon is not reviewable upon appeal except upon abuse of discretion. *Howard v. Coach Co.*, 201.

WATERS AND WATERCOURSES.

§ 1a. Nature, Determination and Extent of Riparian Rights.

Where the shore line is substantially straight, the riparian rights of adjoining landowners along a navigable stream are to be determined, not by extending the side property lines in a straight line to the channel, but by drawing lines from the end of the side property lines perpendicular to the shore line to the channel. *O'Neal v. Rollinson*, 83.

The grantee of land bounded by a nonnavigable river or creek has riparian rights in such waters to the center thereof. *Dunlap v. Light Co.*, 814.

Riparian rights of landowners along a nonnavigable stream is a right inseparably attached to the soil itself, and each has an equal and common right to the reasonable use of the water for any purpose which does not materially affect the rights of others, the right of each to such use being the same as the right of other riparian owners in like circumstances, but what is a reasonable use for farming cannot be compared with what is a reasonable use for manufacturing or power purposes. *Ibid.*

§ 1b. Obstructing and Interference With Enjoyment of Riparian Rights.

Where a riparian owner of land along a navigable stream erects a wharf which extends several feet beyond his riparian ownership, and to that extent interferes with the adjoining owner's right of access to navigable waters, the wharf constitutes a continuing trespass and the adjoining landowner is entitled to a mandatory injunction for the removal of the part which interferes with his riparian rights. *O'Neal v. Rollinson*, 83.

WATERS AND WATERCOURSES—*Continued.*

§ 2. Diminishing and Accelerating Flow.

Right of riparian owner to natural, undiminished flow of stream is qualified by rights of other proprietors to reasonable use of waters. *Dunlap v. Light Co.*, 814.

Riparian owner using stream for power purposes has the right to diminish flow to extent reasonably necessary for this purpose. *Ibid.*

The burden rests upon a lower proprietor to prove alleged unlawful, wrongful or unreasonable use of the waters of a stream by an upper proprietor. *Ibid.*

What constitutes reasonable use of the waters of a nonnavigable stream by an upper proprietor is a question of fact for the jury to determine in accordance with the nature and size of the stream, the object, importance, nature and necessity of the use, and the manner and occasion of its exercise, and it is only when there is no evidence tending to show an unreasonable use that the question is one for the court. *Ibid.*

Evidence *held* insufficient to show unreasonable use of waters of stream by power company. *Ibid.*

§ 3. Diversion and Pollution.

A lower riparian owner has a cause of action against an upper proprietor for any pollution or substantial diversion of the waters of the stream. *Dunlap v. Light Co.*, 814.

WILLS.

I. Nature and Requisites in General
1. Definition
II. Contracts to Convey
5. Actions on Contracts to Convey
IX. Construction and Operation
31. General Rules of Construction
32. Determination of Whether Land is Taken by Descent or Purchase
33. Estates and Interests Created
a. In General
b. Rule in Shelley's Case
c. Vested and Contingent Interests and Defeasible Fees
f. Devises with Power of Disposition
34. Designation of Devisees and Legatees
35. Conditions and Restrictions
36. General and Specific Legacies
38. Residuary Clauses
46. Nature of Title and Rights of Devisees and Legatees

§ 1. Definition.

A will is the duly expressed mind of a competent person as to what he would have done after his death with those matters and things over which he has the right of control and disposition. *Richardson v. Cheek*, 510.

§ 5. Actions on Contracts to Convey.

Where contract to devise is void under statute of frauds, party performing services in reliance thereon may recover upon *quantum meruit*. *Price v. Askins*, 583.

§ 31. General Rules of Construction.

A will should be construed from its four corners to effectuate the intent of the testator as expressed in the instrument. *Barco v. Owens*, 30; *Hampton v. West*, 315.

Cardinal rule for construction of wills is to effectuate intent of testator as gathered from instrument as a whole. *Richardson v. Cheek*, 510.

Each clause should be harmonized and given effect, if possible, without violation of general intent as gathered from entire will. *Ibid.*

Since the intent and purpose of no two testators can be exactly alike, each will must be separately construed to effectuate the particular intent and purpose therein expressed. *Ibid.*

§ 32. Determination of Whether Land Is Taken by Descent or Purchase.

Where devise is to M., and should he leave no children the land to go to named remaindermen, creates defeasible fee in M., which becomes absolute

upon his death leaving children him surviving, and M.'s children take as his heirs and not as purchasers under the will. *Merritt v. Inscoe*, 526.

§ 33a. Estates and Interests Created in General.

A devise will be construed to be in fee simple unless a contrary intention plainly appears from the language of the instrument. *Barco v. Owens*, 30.

The rule that a general devise will be construed to be in fee, C. S., 4162, applies only when the language employed by testator fails to show a clear intent to convey an estate of less dignity. *Hampton v. West*, 315.

While ordinarily a general devise with power of disposition vests the fee in the first taker, the rule does not apply where the power of disposition, as to part of the estate at least, is limited to disposition by will, with provision for the vesting of the estate undisposed of by will in named beneficiaries. *Ibid.*

The terms "loan" and "lend," when used in a will, are to be interpreted as "give" or "devise," unless it is manifested that the testator intended otherwise. *Allen v. Hewitt*, 367.

§ 33b. Rule in Shelley's Case.

A devise to one for life with limitation over to his heirs in fee conveys a fee simple under the rule in *Shelley's case*, which is a rule of law and not of construction, and the rule applies when the intent is apparent to convey the fee in remainder to the heirs, and is unaffected by a further limitation over. *Allen v. Hewitt*, 367.

A devise to F. "for his use and benefit during his natural life and at his death to go to his heirs in fee simple forever; and I further will and direct that the said land . . . shall return into and make a part of the surplus of my estate to be disposed of by my executor as directed in my will" *is held* to convey the fee simple to F. by operation of the rule in *Shelley's case*, and the subsequent provision that the lands should return into the estate, to be disposed of by the executor as directed, is void as being repugnant to the fee. *Ibid.*

§ 33c. Vested and Contingent Interests and Defeasible Fees.

Absolute devise will not be divested by subsequent clause expressing desire for disposition after death of devisee. *Barco v. Owens*, 30.

A devise to certain beneficiaries with provision that upon their death without issue the lands should go to M., the testator's son, and should M. leave no child, the land to be divided among named remaindermen, "and in case of their death, their children to this heir same," *is held*, upon the death of the first named beneficiaries without issue, to create a defeasible fee in M., which is made absolute upon his death with children him surviving. *Merritt v. Inscoe*, 526.

The devise in this case was to testator's daughter-in-law for life, remainder over to the children of testator's son, the life tenant's husband. The daughter-in-law died leaving one child of the marriage her surviving, and her husband subsequently remarried. *Held:* The takers of the remainder are to be determined as of the date of the death of the life tenant and the termination of the life estate, and only those *in esse* as of that time are entitled to take, and the child of the life tenant takes a fee simple in the property upon her death to the exclusion of any children her husband may have by his second wife. *Mosley v. Knott*, 651.

The law favors the early vesting of estates, and as a general rule a remainder over to a class after a life estate vests immediately upon the death of

WILLS—*Continued.*

the testator, unless a contrary intent appears from the will. *Weill v. Weill*, 764; *Satterfield v. Stewart*, 743.

The will in question provided that testator's wife should have the income from his property, real and personal, for life, and at her death all her indebtedness should be paid, and the property divided equally among testator's sister and brothers, or their heirs. *Held:* The remainder over to the class vests upon the death of testator and not upon the death of the life tenant. *Weill v. Weill*, 764.

Devise *held* to vest in testator's daughters at time of death of testator and not as of time of death of life tenant. *Satterfield v. Stewart*, 743.

§ 33f. Devises With Power of Disposition.

A devise with power of disposition ordinarily vests the fee in the devisee, but this rule does not apply when the power is limited to disposition by will, with provision for the vesting of the estate undisposed of in named beneficiaries. *Hampton v. West*, 315.

§ 34. Designation of Devisees and Legatees.

Devise to "heirs" will be construed as to "children" in absence of contrary intent expressed in instrument. *Moseley v. Knott*, 651.

§ 35. Conditions and Restrictions.

The right of a devisee in common to have the land remain undivided so long as she should remain single, is a personal right which she may waive or surrender. *Satterfield v. Stewart*, 743.

§ 36. General and Specific Legacies.

Bequest *held* specific bequest of articles of personalty and money for life, and legatee was entitled to possession of *corpus*. *Collett v. Farnan*, 346.

§ 38. Residuary Clauses.

After directing the payment of debts and providing for certain specific legacies, the will in question directed that the remainder of the money be divided between testatrix' sisters and brothers, or their children, and by later item provided that one of the sisters should have for her lifetime only certain enumerated articles of personalty "and money if any are to come back to my estate." *Held:* The later item does not constitute a residuary bequest to be enjoyed by persons in succession. *Collett v. Farnan*, 346.

The will in this case provided for the payment of funeral expenses and just debts out of the first moneys coming into the hands of the executors, then made several devises covering all the real estate and required the devisees to pay designated amounts to the estate, and from the sum thus accumulated, directed a number of legacies to be paid in cash, and then contained a residuary clause directing that the "remainders of my estate, if there be any, is to be equally divided between" named sons, and that "all of my personalty is to go to" another son. *Held:* The "remainders of my estate" referred to the remainder of the sums paid to the estate by the devisees, and the legacy "of all my personalty" referred only to personal chattels owned by the testator. *Richardson v. Cheek*, 510.

§ 46. Nature of Title and Rights of Devisees and Legatees.

Where devisees take a vested remainder in common, subject only to the right of one devisee to have the land remain undivided so long as she remained single, the remaindermen may exchange quitclaim deeds among themselves so that they may hold their respective interests in severalty, and the personal right of the devisee to have the land remain undivided is surrendered by executing the quitclaim deeds. *Satterfield v. Stewart*, 743.

CONSOLIDATED STATUTES AND MICHIE'S CODE CONSTRUED.

(For convenience in annotating.)

SECS. 59, 60. Heirs have no personal liability for debts of estate, but take realty subject thereto. *Price v. Askins*, 583.

SEC. 74. Devisees under a will *held* entitled to file cross action to surcharge and falsify account of executor to prevent sale of lands. *Gurganus v. McLawhorn*, 397.

SECS. 74, 77. Execution may not issue after death of judgment debtor. *Flynn v. Rumley*, 25.

SECS. 74, 105. Estate is not settled until all debts are paid or all assets exhausted. *Creech v. Wilder*, 162.

SECS. 93, 102, 62. Attachment and appearance of heirs cannot give judgment against estate priority. *Price v. Askins*, 583.

SECS. 135, 136. Superior Court is given concurrent, original jurisdiction of cross action alleging that sale of realty would not be necessary if personalty were properly administered. *Gurganus v. McLawhorn*, 397.

SEC. 160. Parent's right of action to recover for loss of services of child abates upon death of child, the sole remedy being action for wrongful death by administrator. *White v. Charlotte*, 539.

SEC. 218 (18). After filing final report, Commissioner of Banks may not be held liable on claims against the bank. *Windley v. Lupton*, 167.

SEC. 218 (22). Funds apportioned to unproven claims are subject solely to rights of those who failed to prove the claims. *Windley v. Lupton*, 167.

SEC. 426. Where State is not a party, title is conclusively presumed to be out of the State. *Berry v. Coppersmith*, 50.

SEC. 428. Where grantee in unregistered deed conveys by registered deed, registered deed is color of title. *Glass Co. v. Shoe Co.*, 70.

SEC. 429. Where plaintiff establishes title by adverse possession under color, he is not required to show actual possession within twenty years before institution of action. *Berry v. Coppersmith*, 50.

SEC. 430. Pleadings *held* sufficient to raise issue of adverse possession of tenant in common under parol partition. *Martin v. Bundy*, 437.

SEC. 437 (2). Instrument having printed word "seal" in brackets after signature *held* sufficient evidence that instrument was sealed instrument to support directed verdict, in absence of evidence to the contrary. *Allsbrook v. Walston*, 225.

SEC. 441 (10). Relates to individuals and not to sovereign, and does not bar street assessments. *Asheboro v. Morris*, 331.

SECS. 460, 547. In summary ejectment brought by rental agent, court may allow amendment making owner party plaintiff. *Rental Co. v. Justice*, 523.

SECS. 463, 465. Action against administrator to foreclose tax sale certificate must be instituted in county where land is situate. *Guilford County v. Estates Administration, Inc.*, 653.

SECS. 469, 470. Evidence *held* sufficient to support finding that plaintiff's residence was in county in which action was instituted. *Howard v. Coach Co.*, 201.

SEC. 483 (1). Person regularly employed in making collections in this State is agent of foreign corporation for purpose of service of process, and fact that corporation may not have complied with C. S., 1137, 1181, is immaterial. *Mauney v. Luzier's, Inc.*, 634.

CONSOLIDATED STATUTES—*Continued.*

SEC. 484. Affidavit for service by publication must aver that defendant cannot be found, after due diligence, in the State, and averment merely that he could not be found in county is insufficient. *Denton v. Vassiliades*, 513.

SEC. 507. Separate and distinct causes of action by different plaintiffs against different defendant may not be joined. *Wilkesboro v. Jordan*, 197; *Vollers Co. v. Todd*, 677.

SEC. 511 (5). Demurrer for misjoinder of parties and causes *held* properly overruled in this case. *Daniels v. Duck Island*, 90.

SEC. 511 (6). Upon demurrer for failure of complaint to state cause of action, pleadings will be liberally construed in favor of pleader. *Kirby v. Reynolds*, 271.

SEC. 518. All grounds for demurrer are waived by failure to file demurrer in apt time, excess for want of jurisdiction and failure of complaint to state cause of action. *Gurganus v. McLawhorn*, 397.

SECS. 534, 537. Application for bill of particulars and motion to require pleadings to be made definite are addressed to discretion of court and it is error to rule thereon as matter of law. *Tickle v. Hobgood*, 762.

SEC. 535. Upon demurrer, pleadings will be liberally construed with a view to substantial justice between the parties. *Kirby v. Reynolds*, 271; *Cox v. Jenkins*, 667.

SEC. 537. Motion to strike out is too late when not made until after jury is impaneled. *In re West*, 189. If defendant desires more certain and definite statement, proper remedy is motion under this section. *Cox v. Jenkins*, 667.

SECS. 540, 1823. Complaint alleging substance of contract declared on is good as against demurrer without setting out agreement in full, the action not being based on instrument for payment of money, and there being no question of profert or oyer. *Sossamon v. Cemetery, Inc.*, 535.

SEC. 547. Court has power to allow amendment unless it substantially changes cause of action. *Clevenger v. Grover*, 13.

SEC. 564. In this proceeding to appoint guardian for alleged incompetent, instruction *held* deficient for failure to define standard of mentality constituting "want of understanding." *In re Worsley*, 320. Where there is no evidence that defendant driver failed to give warning signal required by law, it is error for the court to charge the law requiring the giving of such signal. *Farrow v. White*, 376.

SEC. 567. On motion to nonsuit, all the evidence must be considered in the light most favorable to plaintiff. *Pearson v. Luther*, 412; *York v. York*, 695; *Preddy v. Britt*, 719.

SEC. 591. Trial court may set aside verdict, but has no power to change or modify verdict as returned by jury. *Edwards v. Upchurch*, 249.

SEC. 600. Movant must show meritorious defense in order to set aside judgment for surprise and excusable neglect. *Cayton v. Clark*, 374. Defendant in court at time of continuance cannot claim excusable neglect. *Baer v. McCall*, 389.

SECS. 613, 614. Grantee having knowledge of maiden name of grantor takes subject to lien of judgment against grantor indexed under her maiden name. *Henry v. Sanders*, 239.

SEC. 632. Only injured party is entitled to appeal. *Ragan v. Ragan*, 753.

CONSOLIDATED STATUTES—*Continued.*

SECS. 722, 724. Appointment of receiver in proceedings in conformity with statute is not void, and if erroneous, remedy is by appeal. *Nobles v. Roberson*, 334.

SECS. 767, 768. Execution against the person may be issued upon verdict in plaintiff's favor in action for abuse of process. *Ledford v. Smith*, 447.

SEC. 898 (a) (x). Uniform Arbitration Act does not exclude common law remedy of arbitration. *Copney v. Parks*, 217.

SEC. 978 (4). Husband may be attached for contempt for willful disobedience of court order for alimony. *Dyer v. Dyer*, 620. Willful disobedience of court order for possession of property by receiver constitutes contempt of court. *Nobles v. Roberson*, 334.

SEC. 987. Where party promising to pay debt receives new consideration from the debtor, statute does not apply. *Daniels v. Duck Island*, 90.

SEC. 988. Contract of owner to sell at stipulated price all logs which owner should cut from land does not come within statute. *Walston v. Lowry*, 23.

SECS. 997, 3305, 3308. Deeds having been of record for some thirty years *held* competent under ancient document rule, even if not properly registered. *Owens v. Lumber Co.*, 133.

SEC. 1005. Only creditor of grantor at time of institution of action may set up statutory presumption of fraud as to creditors. *Bryant v. Bryant*, 6. Action to set aside deed as being fraudulent as to creditors is improperly joined with action against grantor's administrator for maladministration of estate. *Vollers Co. v. Todd*, 677.

SEC. 1330. Allegation that claimant had made demand for payment of contractual obligation on city manager under Plan D *held* insufficient. *Nevins v. Lexington*, 616.

SEC. 1334. Action to restrain issuance of bonds is properly dismissed when instituted after thirty-day period prescribed by statute. *Jones v. Alamance County*, 603.

SEC. 1537. Whether mayor, when chosen recorder, occupies two public offices, *quære*. *In re Barnes*, 735.

SECS. 1608 (m), 1541. Municipal and general county courts in same municipality are given concurrent jurisdiction of offenses less than felonies. *In re Barnes*, 735.

SEC. 1661. When plaintiff's appeal is dismissed, defendant may thereafter apply for permission to amend answer setting up cross action for divorce *a mensa et thoro* to meet statutory requirements. *Ragan v. Ragan*, 753.

SECS. 1666, 1667. Upon hearing for alimony *pendente lite* it is error for court to award alimony without divorce. *Adams v. Adams*, 373.

SECS. 1667, 1659 (a), 1663. Absolute divorce upon two years separation does not affect decree for subsistence under C. S., 1667. *Dyer v. Dyer*, 620.

SECS. 1673, 1684 (b). Are applicable to Yancey County; county is not liable for damages inflicted by dogs in corporate capacity, and *mandamus* will not lie to compel payment. *McAlister v. Yancey County*, 208.

SEC. 1739. Devise to "heirs" will be construed to "children" in absence of contrary intention expressed in the will. *Moseley v. Knott*, 651.

SEC. 1763. Record evidence *held* sufficient to be submitted to jury on issue of sole issue of whether petitioner is tenant in common, petitioner not being required to prove title as in ejectment in absence of plea of *sole seizin*. *Talley v. Murchison*, 205.

CONSOLIDATED STATUTES—*Continued.*

SEC. 1779. Certificate authenticating public record may not be used to prove facts not appearing upon face of record. *Midgett v. Nelson*, 41.

SEC. 1795. Wife is not interested party within meaning of statute in husband's action for money recovered for services rendered decedent. *Price v. Askins*, 583. Fact that witness is father of one of parties to action does not constitute witness "party interested in event." *Walston v. Lowry*, 23.

SEC. 2150. Person claiming custody of minors under guardianship deed executed by their father may maintain action in juvenile court. *Winner v. Brice*, 294.

SEC. 2285. In proceedings for appointment of guardian for incompetent, court should define standard of mental capacity constituting "want of understanding." *In re Worsley*, 320.

SEC. 2287. Statute does not provide for appeal from order adjudging person who had been declared *non compos mentis* no longer insane. *In re Sylivant*, 343.

SEC. 2338. Trial judge has discretionary power to issue writ of *venire facias* instead of directing that jurors be drawn from jury box. *S. v. Casey*, 352.

SEC. 2354. Tenant at will is entitled only to reasonable notice to quit; tenant from month to month is entitled to 7 days. *Rental Co. v. Justice*, 523.

SECS. 2437, 2433. Materialman asserting lien under C. S., 2437, is estopped to thereafter assert lien under C. S., 2433. *Lumber Co. v. Perry*, 713.

SECS. 2437, 2438, 2440. Materialmen's liens are enforceable only if at time of giving notice owner owes money to contractor. *Dixon v. Ipock*, 363.

SEC. 2461. Proprietor of lodging house is not bailee of personal property left in rented room, and this result is not affected by statutory lien. *Wells v. West*, 656.

SECS. 2507, 2515. Power of married women to make contracts affecting property. *Martin v. Bundy*, 437.

SEC. 2519. Upon death of wife intestate, leaving husband surviving, husband has estate by curtesy in all her lands. *Stockton v. Maney*, 231.

SEC. 2563 (2), (6). Agreement that retailer should sell products upon condition that he not sell like products of competitors is unlawful. *Shoe Co. v. Department Store*, 75.

SEC. 2591. Last and highest bidder acquires no title until expiration of ten-day period, but is preferred bidder, and may assign bid. *Creech v. Wilder*, 162.

SEC. 2617 (a). Right of way at through street intersection. *Pearson v. Luther*, 412.

SECS. 2888, 2889, 2897. City manager under Plan D is solely an administrative officer. *Nevins v. Lexington*, 616.

SEC. 3003. Where name of maker is forged, instrument is wholly inoperative and is neither bill nor check. *Seymour v. Bank*, 707.

SECS. 3118, 3119. Endorser *held* liable on forged check protested by drawee bank within reasonable time. *Seymour v. Bank*, 707.

SEC. 3233. Findings, supported by competent evidence, *held* to sustain order for sale for partition. *Talley v. Murchison*, 205.

SEC. 3309. While unregistered deed is good as between the parties, it is ineffectual as against subsequent grantees under registered deeds and creditors of grantor. *Glass v. Shoe Co.*, 70.

CONSOLIDATED STATUTES—*Continued.*

SECS. 3309, 3311. Purchasers for value in registered instruments take free from claims arising from unregistered instruments, and purchase money deed of trust from husband on lands deeded to wife is ineffective as against purchaser from wife. *Smith v. Turnage-Winslow Co.*, 310.

SECS. 3311, 2418, 614, 446. Prior assignee of judgment takes title unaffected by second assignment, even though second assignment is first recorded. *In re Wallace*, 490.

SEC. 3835. In Haywood County, proceeding to establish cartway should be instituted before board of county commissioners. *Rogers v. Davis*, 35.

SEC. 3846 (bb). Highway Commission may condemn top soil for road construction, even from land not contiguous to highway. *Highway Com. v. Basket*, 221.

SEC. 4162. Absolute devise will not be divested by subsequent clause expressing desire for disposition after death of devisee. *Barco v. Owens*, 30. General devise *held* not to convey fee simple in view of subsequent items of will showing intent to convey estate of less dignity. *Hampton v. West*, 315.

SEC. 4215. Court is without power to impose imprisonment for more than thirty days upon verdict of simple assault permissible under evidence, C. S., 4640. *S. v. Palmer*, 10.

SEC. 4250. Charge that defendant would have guilty knowledge if he reasonably believed or knew goods to be stolen *held* error. *S. v. Miller*, 361.

SEC. 4267 (a). Evidence of defendant's guilt of robbery *held* sufficient to be submitted to the jury. *S. v. Murph*, 494.

SEC. 4268. Bank receiver does not come within purview of embezzlement statute. *S. v. Whitehurst*, 300.

SEC. 4339. Each element of seduction must be supported by evidence independent of testimony of prosecutrix. *S. v. Brewington*, 244.

SEC. 4447. Willful failure and refusal to support illegitimate child, ch. 228, Public Laws of 1933, is continuing offense, and decisions under C. S., 4447, are inapposite. *S. v. Johnson*, 566.

SEC. 4623. Informalities and refinements in indictment may be properly disregarded. *S. v. Linney*, 739.

SEC. 4640. In this prosecution for assault with deadly weapon with intent to kill, instruction that jury might convict defendant of less degrees of crime charged *held* without error. *S. v. Elmore*, 531.

SEC. 4643. Where it is determined on appeal that evidence is insufficient to be submitted to jury, action will be remanded for nonsuit. *S. v. Hanford*, 746.

SECS. 5039, 5062. Statute creating juvenile courts is valid, and juvenile court has jurisdiction of child in improper environment whose custody is in controversy. *Winner v. Brice*, 294.

SECS. 5047 (4), 5053. Juvenile court has jurisdiction to place minor in public or private institution in proper instances. *Winner v. Brice*, 294.

SEC. 5339 (4). Where one of three drainage commissioners dies, surviving commissioners have power to levy additional assessment necessary to discharge obligations of district. *Bank v. King*, 349.

SECS. 5387, 5430. County board of education has no jurisdiction over or duty in respect to maintenance of schools in special charter district. *East Spencer v. Rowan County*, 425.

SEC. 5599. County has discretionary power to assume special charter school district debt. *East Spencer v. Rowan County*, 425.

CONSOLIDATED STATUTES—*Continued.*

SEC. 5786. Funds apportioned to unproven claims in liquidation of bank escheat, subject solely to rights of those who failed to prove claims. *Windley v. Lupton*, 167.

SEC. 6289. Statements of fact in application are material as a matter of law. *Petty v. Ins. Co.*, 157.

SEC. 6437. Requirement of "unconditional and sole ownership" in fire policy is statutory as well as contractual, and will be construed rationally. *Roberts v. Ins. Co.*, 1. Tenant in common in possession under parol partition is sole owner within requirement. *Ibid.*

SEC. 6460. Where application denominates answers declarations in lieu of medical examination, such answers come within purview of statute. *Pugh v. Ins. Co.*, 372. Does not apply to reinstatement without medical examination of policy issued after medical examination. *Petty v. Ins. Co.*, 157.

SECS. 6508, 4447. "Legal dependent" of a person is one whom he is required by law to support and not merely one he may lawfully support. *Junior Order v. Tate*, 306.

SEC. 7977. Introduction of receipts in evidence *held* to require submission of issue of payment although municipality contended that receipts were given in exchange for notes and therefore tax collecting officer was without authority. *Taylorsville v. Moose*, 379.

SEC. 7990. Where municipality elects to enforce lien against land for street assessments under this section, no statute of limitations is applicable. *Asheboro v. Morris*, 331.

SEC. 8037. Action to foreclose certificate of sale of land for street assessments is not barred until 24 months from date of certificate. *Asheboro v. Morris*, 331. Foreclosure of tax sale certificate is remedy in nature of action to foreclose mortgage, and must be instituted in county where land lies. *Guilford County v. Estates Administration, Inc.*, 653.

SEC. 8081 (i), (a, b, c). Deputies sheriff are not employees of sheriff within meaning of Compensation Act. *Borders v. Cline*, 472. Deputies sheriff are not employees of county within meaning of Compensation Act. *Styers v. Forsyth County*, 558.

SEC. 8081 (i), (a), (l), (m), (k). Evidence *held* to raise presumption that action was governed by Compensation Act. *Miller v. Roberts*, 126.

SEC. 8081 (i), subsec. f. Injury by tornado does not arise out of employment. *Walker v. Wilkins, Inc.*, 627. Death of fireman from heart failure brought on by excitement and exhaustion is not result of accident. *Neely v. Statesville*, 365.

SEC. 8081 (i), subsecs. f, j. Evidence *held* to support finding that disease resulted naturally and unavoidably from accident. *Doggett v. Warehouse Co.*, 599.

SEC. 8081 (k). Employers and employees within scope of Compensation Act are bound by its terms in absence of notice to the contrary. *Lee v. American Enka Corp.*, 455.

SEC. 8081 (r). Nonsuit *held* proper upon finding, supported by evidence, that action was governed by Compensation Act. *Miller v. Roberts*, 126. Compensation Act excludes right of action at common law even for injuries not compensable under its terms. *Lee v. American Enka Corp.*, 455. Award of compensation precludes action for wrongful death against employer, even though death was caused by negligence. *Bright v. Motor Lines*, 384.

CONSOLIDATED STATUTES—*Continued.*

SEC. 8081 (u) (b). Refusal to dismiss on ground that Industrial Commission had exclusive jurisdiction *held* supported by jury's finding that defendant regularly employed less than five employees. *Young v. Mica Co.*, 243.

SEC. 8081 (ll), (bbb). Where partially disabled employee obtains other work, it constitutes "change of condition," and he is entitled to only 60 per cent of difference between wage before disability and new wage. *Smith v. Swift & Co.*, 608.

SEC. 8081 (ppp). Findings of fact of Commission, supported by evidence, are conclusive. *Walker v. Wilkins, Inc.*, 627.

CONSTITUTION, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART. I, SEC. 16. Provision does not apply to actions in tort. *Ledford v. Smith*, 447.

ART. II, SEC 29. Ch. 562, Public Laws of 1933, as amended, is general statute relating to all school districts, and is not special act within meaning of this section. *Moore v. Board of Education*, 499.

ART. IV, SEC. 24. Sheriff is constitutional officer and takes office not by contract but by commission. *Borders v. Cline*, 472.

ART. V, SEC. 3. Taxes may be levied only for public purpose. *Palmer v. Haywood County*, 284.

ART. V, SEC. 4. Vote is not necessary for issuance of county bonds to refund township bonds constituting valid debt of county. *Thomson v. Harnett County*, 214.

ART. V, SEC. 5. Property acquired by State and held for benefit of Veterans Loan Fund is exempt from taxation. *Weaverville v. Hobbs*, 684.

ART. VII, SEC. 7. County may not issue bonds to build annex to county hospital without submitting question to vote. *Palmer v. Haywood County*, 284.

ART. IX. Legislature has duty to provide for constitutional school term, and retains control over its agencies to effect this duty, and may provide for redistricting territory for school purposes. *Moore v. Board of Education*, 499.

ART. X, SEC. 2. Where homestead is allotted in encumbered lands and rest of land sold under execution, upon later foreclosure of entire tract, judgment debtor is not entitled to homestead in entire surplus. *Miller v. Little*, 612.

ART. X, SEC. 6. Power of married women to make contracts affecting property. *Martin v. Bundy*, 437.

ART. XIV, SEC. 7. Effect of accepting another public office in contravention of Constitution is to vacate first office. *In re Barnes*, 735.