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NORTH CAROLINA REPORTS

VOL. 213

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1937
SPRING TERM, 1938

REPORTED BY
ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1938

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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 opinions of the Court, consisting of five members, from 1889 to 1 July, 1937, are published in volumes 102 to 211, both inclusive. Since 1 July, 1937, and beginning with volume 212, the Court has consisted of seven members.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1938.

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:

HARRY McMULLAN,‡
T. W. BRUTON,
ROBERT H. WETTACH,§
L. O. GREGORY.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

EDWARD MURRAY.

LIBRARIAN:

DILLARD S. GARDNER.

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*Died 23 April, 1938.
†Appointed Associate Justice of the Supreme Court to succeed Hon. George W. Connor, deceased.
‡Appointed Attorney-General to succeed Hon. A. A. F. Seawell upon his appointment as Associate Justice.
§Succeeded Emmett C. Willis.

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

F. A. Daniels	Goldsboro.
T. B. Finley	North Wilkesboro.
P. A. McElroy	Marshall.
Walter L. Small	Elizabeth City.

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.

SUPERIOR COURTS, SPRING TERM, 1938

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

Spring Term, 1938—Judge Bone.

Beaufort—Jan. 17* (2); Feb. 21† (2); Mar. 21* (A); April 11†; May 9† (2); June 27.

Camden—Mar. 14.

Chowan—April 4.

Currituck—Mar. 7; May 2†.

Dare—May 30.

Gates—Mar. 28.

Hyde—May 23.

Pasquotank—Jan. 10†; Feb. 14†; Feb. 21* (A); Mar. 21†; May 9† (A) (2); June 6*; June 13† (2).

Perquimans—Jan. 17† (A); April 18.

Tyrrell—Feb. 7†; April 25.

SECOND JUDICIAL DISTRICT

Spring Term, 1938—Judge Parker.

Edgecombe—Jan. 24; Mar. 7; April 4† (2); June 6 (2).

Martin—Mar. 21 (2); April 18† (A) (2); June 20.

Nash—Jan. 31; Feb. 21† (2); Mar. 14; April 25† (2); May 30.

Washington—Jan. 10 (2); April 18†.

Wilson—Feb. 7*; Feb. 14†; May 16*; May 23†; June 27†.

THIRD JUDICIAL DISTRICT

Spring Term, 1938—Judge Williams.

Bertie—Feb. 14; May 9 (2).

Halifax—Jan. 31 (2); Mar. 21† (2); May 2*; June 6† (2).

Hertford—Feb. 28*; April 18‡ (2).

Northampton—April 4 (2).

Vance—Jan. 10*; Mar. 7*; Mar. 17†; June 20*; June 27†.

Warren—Jan. 17 (2); May 23 (2).

FOURTH JUDICIAL DISTRICT

Spring Term, 1938—Judge Frizzelle.

Chatham—Jan. 17; Mar. 7†; Mar. 21†; May 16.

Harnett—Jan. 10*; Feb. 7† (2); Mar. 21* (A); April 4† (A) (2); May 9†; May 23*; June 13† (2).

Johnston—Jan. 10† (A) (2); Feb. 14† (A); Feb. 21† (2); Mar. 7 (A); Mar. 14; April 18 (A); April 25† (2); June 27*.

Lee—Jan. 31† (A) (2); Mar. 28 (2).

Wayne—Jan. 24; Jan. 31† (A) (2); Mar. 7† (A) (2); April 11†; April 18†; April 25† (2); May 30; June 6†; June 13† (A).

FIFTH JUDICIAL DISTRICT

Spring Term, 1938—Judge Grady.

Carteret—Mar. 14; June 13 (2).

Craven—Jan. 10*; Jan. 31† (3); April 11‡; May 16†; June 6*.

Greene—Feb. 28 (2); June 27.

Jones—April 4.

Pamlico—May 2 (2).

Pitt—Jan. 17†; Jan. 24; Feb. 21†; Mar. 21 (2); April 18 (2); May 9† (A); May 23† (2).

SIXTH JUDICIAL DISTRICT

Spring Term, 1938—Judge Harris.

Duplin—Jan. 10† (2); Jan. 31*; Mar. 14† (2).

Lenoir—Jan. 24*; Feb. 21† (2); April 11; May 16† (2); June 13† (2); June 27*.

Onslow—Mar. 7; April 18† (2).

Sampson—Feb. 7 (2); Mar. 28† (2); May 2† (2).

SEVENTH JUDICIAL DISTRICT

Spring Term, 1938—Judge Cranmer.

Franklin—Feb. 7*; Mar. 21† (A) (2); April 18* (A) (2).

Wake—Jan. 10*; Jan. 17† (2); Jan. 24 (A) (2); Jan. 31†; Feb. 7† (A); Feb. 14†; Feb. 21† (2); Feb. 21 (A) (2); Mar. 7*; Mar. 7† (A); Mar. 14† (2); Mar. 21 (A) (2); Mar. 28† (2); April 11*; April 11† (A); April 18† (2); April 25 (A); May 2†; May 9*; May 9† (A); May 16† (3); May 23 (A); June 6*; June 6† (A); June 13† (2); June 27† (2); June 27 (A) (2).

EIGHTH JUDICIAL DISTRICT

Spring Term, 1938—Judge Sinclair.

Brunswick—Jan. 10†; April 11; June 20†.

Columbus—Jan. 31; Feb. 7 (A); Feb. 21† (2); May 2 (2); June 27*.

New Hanover—Jan. 17*; Feb. 7† (2); Mar. 7† (2); Mar. 21*; April 18† (2); May 16*; May 30† (2); June 13*.

Pender—Mar. 28 (2).

NINTH JUDICIAL DISTRICT

Spring Term, 1938—Judge Spears.

Bladen—Jan. 10; Mar. 21*; May 2†.

Cumberland—Jan. 17*; Feb. 14† (2); Mar. 7 (A); Mar. 14*; Mar. 28† (2); May 9† (2); June 6*.

Hoke—Jan. 24; April 25.

Robeson—Jan. 31* (2); Feb. 28† (2); Mar. 21* (A); April 11* (2); May 9* (A) (2); May 23† (2); June 13†; June 20*.

TENTH JUDICIAL DISTRICT

Spring Term, 1938—Judge Thompson.

Alamance—Jan. 31† (A); Feb. 28*; April 4†; May 16* (A); May 30† (2).

Durham—Jan. 10† (3); Feb. 21*; Feb. 28† (A); Mar. 7† (2); Mar. 21† (A); Mar. 28*; April 25† (A); May 2† (2); May 23*; May 30† (A); June 6† (2); June 27*.

Granville—Feb. 7 (2); April 11 (2).

Orange—Mar. 21; May 16†; June 13 (A); June 20†.

Person—Jan. 24 (A); Jan. 31†; April 25.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Spring Term, 1938—Judge Phillips.

Ashe—April 18*; May 30† (2).
Alleghany—May 2.
Forsyth—Jan. 10 (2); Jan. 17† (A) (3); Jan. 24† (2); Feb. 7 (2); Feb. 21† (2); Mar. 7 (2); Mar. 21† (2); April 4 (2); April 18† (A); April 25†; May 9 (2); May 30† (A) (2); June 6† (A) (2); June 13 (2); June 27† (2).

TWELFTH JUDICIAL DISTRICT

Spring Term, 1938—Judge Bivens.

Davidson—Jan. 31*; Feb. 21† (2); April 4† (2); May 9*; May 30†; June 6† (A); June 27*.
Guilford—Jan. 10† (2); Jan. 24*; Feb. 7† (2); Feb. 21† (A) (2); Mar. 7* (2); Mar. 21† (2); April 4† (A) (2); April 18† (2); May 2*; May 16† (2); June 6† (2); June 20*.

THIRTEENTH JUDICIAL DISTRICT

Spring Term, 1938—Judge Harding.

Anson—Jan. 17*; Mar. 7†; April 18 (2); June 13†.
Moore—Jan. 24*; Feb. 14†; Mar. 28† (A) (2); May 23*; May 30†.
Richmond—Jan. 10*; Feb. 7† (A); Mar. 21†; April 11*; May 30† (A); June 20†.
Scotland—Mar. 14; May 2†.
Stanly—Feb. 7†; Feb. 14† (A); April 4; May 16†.
Union—Jan. 31*; Feb. 21† (2); Mar. 28†; May 9†.

FOURTEENTH JUDICIAL DISTRICT

Spring Term, 1938—Judge Armstrong.

Gaston—Jan. 17*; Jan. 24† (2); Mar. 14* (A); Mar. 21† (2); April 25*; May 23† (2); June 6*.
Mecklenburg—Jan. 3† (2); Jan. 10*; Jan. 17† (A) (2); Jan. 31† (A) (2); Feb. 7† (3); Feb. 14† (A) (2); Feb. 28*; Feb. 28† (A) (2); Mar. 7† (2); Mar. 14† (A) (2); Mar. 21* (A) (2); Mar. 28† (A) (2); April 4† (2); April 11† (A) (2); April 25† (A) (2); May 2† (2); May 9† (A) (2); May 16*; May 23† (A) (2); June 6† (A) (2); June 13*; June 20†; June 20† (A) (2).

FIFTEENTH JUDICIAL DISTRICT

Spring Term, 1938—Judge Warlick.

Alexander—Feb. 7 (A) (2).
Cabarrus—Jan. 10 (2); Feb. 28†; Mar. 7† (A); April 25 (2); June 13† (2).
Iredell—Jan. 31 (2); Mar. 14†; May 23 (2).
Montgomery—Jan. 24*; April 11† (2).
Randolph—Mar. 21† (2); April 4*.
Rowan—Feb. 14 (2); Mar. 7†; Mar. 14† (A); May 9 (2).

SIXTEENTH JUDICIAL DISTRICT

Spring Term, 1938—Judge Rousseau.

Burke—Feb. 21; Mar. 14† (2); June 6.
Caldwell—Feb. 28 (2); May 23† (2).
Catawba—Jan. 17† (2); Feb. 7 (2); April 11† (2); May 9† (2).
Cleveland—Jan. 10; Mar. 28 (2); May 23† (A) (2).
Lincoln—Jan. 24† (A) (2).
Watauga—April 25 (2); June 13† (2).

SEVENTEENTH JUDICIAL DISTRICT

Spring Term, 1938—Judge Pless.

Avery—April 11*; April 18†.
Davie—Mar. 21; May 30†.
Mitchell—Mar. 28 (2).
Wilkes—Mar. 7 (2); May 2† (2); June 6† (2).
Yadkin—Feb. 28*; May 16† (2).

EIGHTEENTH JUDICIAL DISTRICT

Spring Term, 1938—Judge Johnston.

Henderson—Jan. 10† (2); Mar. 7 (2); May 2† (2); May 30† (2).
McDowell—Jan. 3*; Feb. 14† (2); June 13 (2).
Polk—Jan. 31 (2).
Rutherford—Feb. 28†; April 18† (2); May 16 (2); June 27† (2).
Transylvania—April 4 (2).
Yancey—Jan. 24†; Mar. 21 (2).

NINETEENTH JUDICIAL DISTRICT

Spring Term, 1938—Judge Alley.

Buncombe—Jan. 10† (2); Jan. 24; Jan. 31; Feb. 7† (2); Feb. 21; Mar. 7† (2); Mar. 21; April 4† (2); April 18; May 2† (2); May 16; May 30; June 6† (2); June 20 (2).
Madison—Feb. 28; Mar. 28; April 25; May 23.

TWENTIETH JUDICIAL DISTRICT

Spring Term, 1938—Judge Clement.

Cherokee—Jan. 24† (2); April 4 (2); June 20† (2).
Clay—
Graham—Mar. 21 (2); June 6† (2).
Haywood—Jan. 10† (2); Feb. 7 (2); May 9† (2).
Jackson—Feb. 21 (2); May 23 (2).
Macon—April 18 (2).
Swain—Jan. 17† (A) (2); Mar. 7 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Spring Term, 1938—Judge Sink.

Caswell—Mar. 21 (2).
Rockingham—Jan. 24 (2); Mar. 7 (2); April 18; May 9 (2); May 23 (2); June 13 (2).
Stokes—April 4*; April 11†; June 27*.
Surry—Jan. 10*; Jan. 17†; Feb. 14*; Feb. 21† (2); April 25*; May 2†; June 6†.

*For criminal cases only.
†For civil cases only.
‡For jail and civil cases.
(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. SADIE 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. MATILDA H. TURNER, 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.
JOHN H. MANNING, Assistant United States District Attorney, Raleigh.
CHAS. F. ROUSE, Assistant United States District Attorney, Kinston.
F. S. WORTHY, United States Marshal, Raleigh.
THOMAS DIXON, Clerk United States District Court, Raleigh.

MIDDLE DISTRICT

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

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

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

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

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

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

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

OFFICERS

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

WESTERN DISTRICT

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

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

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

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

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

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

OFFICERS

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

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1937

JOS. CALCUTT, TRADING AS THE VENDING MACHINE COMPANY, v. N. H. McGEACHY, SHERIFF OF CUMBERLAND COUNTY; BARNEY McBRYDE, CHIEF OF POLICE OF THE CITY OF FAYETTEVILLE, AND A. A. F. SEAWELL, ATTORNEY-GENERAL OF THE STATE OF NORTH CAROLINA.

(Filed 2 February, 1938.)

1. Declaratory Judgment Act § 2a—

Only civil rights, status and relations may be determined under the Declaratory Judgment Act, and when an action instituted thereunder involves both civil and criminal matters, the courts have jurisdiction to determine only the civil matters. C. S., 628 (a-o).

2. Constitutional Law § 7—Nature and extent of police power of the State.

The police power is a necessary attribute of the sovereignty of the State and embraces the power to make regulations relating to the public health, safety, morals, comfort, convenience and welfare and the peace and good order of the community, the exercise of the power being largely in the discretion of the Legislature, limited only by the requirements that the regulations should not unnecessarily interfere with the rights of the citizen, and that there must be a reasonable relation between the regulation and the purpose sought to be accomplished.

3. Constitutional Law § 6b—

The courts will not declare a law unconstitutional unless clearly so, since the presumption is in favor of constitutionality.

4. Constitutional Law § 10—Statute prohibiting slot machines which enable player to make varying scores upon which wagers may be made held valid.

Ch. 196, Public Laws of 1937, prohibiting coin slot machines in the operation of which a player may make varying scores or tallies upon

which wagers may be made, and differentiating between such machines and those returning a definite and unvarying service or thing of value each time they are played, is in accord with the policy of the State to suppress gambling and has a reasonable relation to this objective, and the statute is constitutional as a reasonable regulation relating to the public morals and welfare, well within the police power of the State.

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

APPEAL by plaintiff from *Sinclair, Resident Judge,* in Chambers, 26 July, 1937, of CUMBERLAND.

Action under Uniform Declaratory Judgment Act of North Carolina (ch. 102, Public Laws 1931; C. S., 628 [a]-628 [o]) to determine constitutionality of ch. 196, Public Laws 1937, prohibiting "manufacture, sale, possession, and use of slot machines, gambling apparatus and devices," for declaration of rights, status and other legal relations thereunder, and for injunction.

Plaintiff alleges that he is "engaged in the business of managing and selling to parties both in the State of North Carolina and in other states certain vending and amusement machines and devices, . . . and has made and . . . is making, storing, keeping, possessing, selling, transporting (both within the State and from this State into other states) said machines and devices, and . . . is under contractual obligation to make and is prepared . . . to make such machines and devices"; that he has in his possession a number of machines and devices of twelve types "operated by slot, the sole function of which is to collect (in lieu of personal collection) the uniform and unvarying use charge, namely, charge made for use of the machine"; that, as to the first eleven types, "in their playing the operator or player may make varying scores or tallies; that the twelfth type involves no element of either skill or chance, since the return in merchandise is invariably predictable and known in advance to the operator; and there is no chance to make varying scores or tallies"; that, claiming to act under the authority of ch. 196, Public Laws of 1937, declaring the maintenance or keeping of all or any machines therein described to be a public nuisance, defendant McGeachy, sheriff, and McBryde, chief of police, have threatened to seize all such machines which may on or after 1 July, 1937, be, remain or come into the possession of plaintiff, to institute proceedings against plaintiff under C. S., 3181 to 3187, for injunction, abatement and other penalties therein set out, and to prosecute against plaintiff "both such civil and such criminal actions for and on account of the possession, maintenance, sale, transportation and the making of contracts and agreements with reference to the same as may be authorized by said" Public Laws of 1937. Defendants, sheriff and chief of police, admit that, acting in accordance with their oaths of office and with said laws, they are preparing to enforce the same as to such machines.

The court below found the following facts: "The plaintiff at the time this action was instituted, and at the time of the hearing of the same, had in his possession a large number of slot machines, devices and apparatus, which under the provisions of ch. 196, Public Laws 1937, it was unlawful to manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend, or give away, transport or expose for sale or lease, or to offer to sell, rent, lease, let on shares, lend or give away or to permit operation of, and that for a long while the plaintiff has been engaged in the business in this State of making, storing, keeping, possessing, selling and transporting within and without the State such slot machines, apparatus and devices; that the plaintiff in the complaint filed herein admitted that he owned and had in his possession various types of slot machines, apparatus, and devices which are described in the complaint as consisting of twelve (12) types by reference to characteristics of said machines, devices and apparatus and the results achieved from the operation thereof; that no further description or designation of said slot machines was made in the complaint; and that at the hearing the plaintiff requested the court to visit the plaintiff's factory and make a personal inspection of the various types of machines referred to in the complaint, which the court declined to do, the court finding as a fact that the characteristics and nature of said machines, apparatus and devices were sufficiently described in the complaint. It found as a fact that all of the slot machines of the plaintiff as thus described in the complaint, except Type No. 12, are expressly declared to be public nuisances and unlawful under the provisions of ch. 196 of the Public Laws of 1937, if kept in violation of said act. It is further found as a fact that none of the defendants have threatened or intended to enforce the provisions of ch. 196, Public Laws of 1937, against the plaintiff except as to machines, apparatus and devices which are declared illegal and the maintaining or keeping of which is declared to be a public nuisance by the provisions of said law."

The court concluded as a matter of law as follows: "Upon consideration of the statute and the relation of the plaintiff thereto, and a further consideration of the evidence and admissions of plaintiff and defendants made upon the trial of this cause, the court is of the opinion, and so declares, that ch. 196, Public Laws 1937, is constitutional and valid in all its parts, both *per se* and in its application to the matters complained of by the plaintiff, and that with the exceptions of the types of devices included within Type No. 12 of the complaint, the devices catalogued and named by the complaint may not be manufactured, sold, possessed or operated under the said law in this State; that the defendants have the right to enforce the said statute with respect thereto and under the authority of the said statute and other pertinent laws, prosecute the

plaintiff and other persons manufacturing, selling, possessing or operating the said devices contrary to the said statute.

"As described by its characteristics and results of operation, type of slot machine No. 12, as set up in the complaint, involves no element of skill or chance, and invariably returns a definite piece of merchandise, the character of which is known in advance by the operator. As thus described in the complaint the defendants made no contention that said slot machine violated the provisions of ch. 196, Public Laws of 1937; the particulars and exact nature of said machine was not set up in the complaint, but as thus described, ownership and operation of the same is not found to be illegal, and it is further found by the court that no controversy whatever has existed between the parties hereto with respect to such type of machine, and that as to such machine no justiciable cause of action is presented to the court."

From adverse judgment thereon, plaintiff appealed to the Supreme Court, and assigned error.

Malcolm McQueen and Ehringhaus, Royall, Gosney & Smith for plaintiff, appellant.

Attorney-General Seawell and Assistant Attorneys-General McMullan and Bruton for defendants, appellees.

WINBORNE, J. While on this appeal the question of jurisdiction of the court under the Uniform Declaratory Judgment Act, C. S., 628 (a) *et seq.*, is not presented by the parties, it is proper to state that the action is maintainable only in so far as the legislative act, ch. 196, Public Laws 1937, affects the civil "rights, status and other relations" in the present actual controversy between parties. We consider it only in that aspect.

The court below has found as a fact, without objection, that the first eleven types of slot machines and devices described in the complaint are within the letter of the definition of "slot machines and devices" which are condemned by the act under consideration as public nuisances. In the playing of each of these types the operator may make varying scores and tallies upon the outcome of which wagers might be made. The defendants, sheriff and chief of police, admit their intention and preparation to seize such machines and devices. Therefore, the correctness of the ruling below, as to the rights, status and other relations thereto is unchallenged, provided, of course, the act be constitutional.

The record then presents the determinative question: Is ch. 196, Public Laws 1937, entitled "An act to prohibit the manufacture, possession, sale and use of slot machines, gambling apparatus and devices," constitutional? We agree with the affirmative holding below.

The title of the act manifests the intention and purpose of the Legislature to suppress and prohibit gambling. After prescribing the pro-

hibitive provisions, the definition of slot machines and devices covered by the act is clearly set forth as follows: "Sec. 3. That any machine, apparatus or device is a slot machine or device within the provisions of this act if it is one that is adapted, or may be readily converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated in such manner that the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, or which may be exchanged for any money, credit, allowance or any thing of value, or which may be given in trade, or the user may secure additional chances or rights to use such machine, apparatus or device; or in the playing of which the operator or user has a chance to make varying scores or tallies upon the outcome of which wagers might be made, irrespective of whether it may, apart from any element of chance or unpredictable outcome of such operation, also sell, deliver or present some merchandise, indication or weight, entertainment or other thing of value. This definition is intended to embrace all slot machines and similar devices except slot machines in which is kept any article to be purchased by depositing any coin or thing of value, and for which may be had any article of merchandise which makes the same return or returns of equal value each and every time it is operated, or any machine wherein may be seen any pictures or heard any music by depositing therein any coin or thing of value, or any slot weighing machine or any machine for making stencils by the use of contrivances operated by depositing in the machine any coin or thing of value, or any lock operated by slot wherein money or thing of value is to be deposited, where such slot machines make the same return or returns of equal value each and every time the same is operated and does not at any time it is operated offer the user or operator any additional money, credit, allowance, or thing of value, or check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for money, credit, allowance or thing of value or which may be given in trade or by which the user may secure additional chances or rights to use such machine, apparatus, or device, or in the playing of which the operator does not have a chance to make varying scores or tallies."

Sec. 5 declares an article or apparatus maintained or kept in violation of the act to be a public nuisance.

The above definition manifests the intention of the Legislature to distinguish the *bona fide* merchandise vending machines, picture machines, music machines and machines of like character from well recognized types of gambling slot machines. The line of distinction is illustrated in the judgment below, wherein type 12 is separated from those types

in which there is an element of chance in some form even though such element be only that of making varying scores or tallies on which wages may be made.

In order to properly understand the background, purpose and constitutional force of the act, it is appropriate to review briefly the attitude of the General Assembly with reference to gambling as a State policy. In the year 1848, in *S. v. Gupton,* 30 N. C., 272, *Ruffin, C. J.,* speaking to statutes on the subject theretofore enacted, said: "The Legislature has wisely set its face against the idle and vicious practice of gambling, and to that end passed various laws calculated more or less to suppress it." We find statutes have been enacted from time to time dealing with numerous forms of gambling and nuisances. Then, in 1923, the Legislature gave special attention to slot machines, at that time passing an act making "the operation or possession for purpose of operation of a slot machine, punch board or other gambling device a misdemeanor," when the machine did not produce or give to the person who played it the same return at market value each and every time. Ch. 138, Public Laws 1923. Further legislation was enacted in 1931, defining "an illegal punch board and an illegal slot machine, and to provide punishment for the operator of same." Ch. 14, Public Laws 1931. In 1935 two acts were passed: The first, ch. 37, prohibiting "the manufacture, sale, possession and use of slot machines, gambling apparatus and devices"; and the second, ch. 282, "to regulate the operation of certain coin operated games, devices and apparatus, and to fix the penalties for the violation of the provisions" therein. In each act the Legislature condemned as a public nuisance an article or apparatus maintained or kept in violation of it. Thus, it is seen that the General Assembly in the exercise of the police power vested in it has adopted as a State policy the suppression and prohibition of gambling by means of coin operated slot machines, gambling apparatus or devices.

These acts have met with judicial sanction. The act of 1923 came up for consideration in the case of *S. v. May,* 188 N. C., 470, 125 S. E., 9, in which a conviction for violation thereof was sustained. The 1935 acts were considered and conviction sustained by this Court in *S. v. Humphries,* 210 N. C., 406, 186 S. E., 473. In that case the acts, considered and construed *in pari materia,* declared as unlawful a slot machine "substantially defined as one adapted for use in such a way that as a result of the insertion of a coin such machine may be operated, and, by reason of any element of chance over which the operator cannot have any control over the outcome of the operation of such machine each and every time it is operated, the user may receive something of value." *Hinkle v. Scott,* 211 N. C., 680, 191 S. E., 512. The 1937 Legislature in the act in question has undertaken to clarify the

definition in and to meet the contentions made as to the previous acts. Ch. 196, Public Laws 1937, includes in effect all of the coin operated slot machines, gambling apparatus and devices condemned by and described in the acts of 1923, 1931, and 1935, and goes a step further to include coin operated slot machines "in the playing of which the operator or user has a chance to make varying scores or tallies upon the outcome of which wagers might be made." It is apparent that the Legislature under the police power vested in it has considered it necessary in suppressing and prohibiting gambling to enact laws from time to time to meet changing machines and devices tending to and fostering gambling.

In *Skinner v. Thomas,* 171 N. C., 98, 87 S. E., 976, the Court said: "The police power is an attribute of sovereignty, possessed by every sovereign state, and is a necessary attribute of every civilized government.—6 R. C. L., 183—'It is the power to protect the public health and the public safety, to preserve good order and the public morals, to protect the lives and property of the citizens, the power to govern men and things by any legislation appropriate to that end.' 9 Ency. of U. S. Rep., 473: 'Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property.' *Slaughterhouse cases,* 16 Wall., 36, 21 L. Ed., 394."

"The exercise of this power is left largely to the discretion of the lawmaking body, and the authority of the courts cannot be invoked unless there is an unnecessary interference with the rights of the citizen, or when there is no reasonable relation between the statute enacted and the end or purpose sought to be accomplished. 6 R. C. L., 236." *Durham v. Cotton Mills,* 141 N. C., 615, 54 S. E., 453; *Shelby v. Power Co.,* 155 N. C., 196, 71 S. E., 218; *Reed v. Engineering Co.,* 188 N. C., 39; 123 S. E., 479.

Enactments having for their object the suppression of gambling are within the legislative scope of police power. 12 C. J., 918.

"It has long been the practice in this country for the Legislature of a State . . . to pass laws prohibiting and punishing any practice or business, the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, or to encourage idleness instead of habits of industry, and to prohibit and punish gambling in various forms in which it is practiced. Such regulations, when not in conflict with general laws or with the Constitution, . . . under which they are enacted, are universally upheld by the courts." *Ex Parte O'Shea,* 105 Pac., 776.

In *Thomas v. Sanderlin,* 173 N. C., 329, 91 S. E., 1028, *Hoke, J.,* said: "It has been properly said that no adequate or satisfactory definition of police power can be given, for as our civilization and social con-

ditions become more advanced and complex the extent and inclusive character of this power is being more and more illustrated, and in the later decisions has been held to embrace not only governmental regulations appertaining to the good order, health, and morals of a community, but also such as are considered promotive of its economic welfare and public convenience and comfort. . . ." Quoting from 6 R. C. L., 193, he continues: "All the property is held subject to the general police power of the State so to regulate and control its use in a proper case as to secure the general safety, the public welfare, and the peace, good order, and morals of the community. Accordingly, it is a fundamental principle of the constitutional system of the United States that rights of property, like all other social and conventional rights, are subject to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in it by the Constitution may think necessary and expedient."

"The presumption is that the Legislature has done its duty and that an act passed by it is not in conflict with the Constitution. . . . Again, the courts will not adjudge legislative acts invalid unless their violation of the Constitution be clear, complete and unmistakable." *Stacy, C. J.*, in *Person v. Doughton*, 186 N. C., 723, 120 S. E., 481, citing *Bonitz v. School Trustees*, 154 N. C., 375, 184 S. E., 247; *Coble v. Comrs.*, 184 N. C., 348; also citing the case of *Adkins v. Children's Hospital*, 67 L. Ed., 440, in which the U. S. Supreme Court said: "The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy. The statute here in question has successfully borne the scrutiny of the legislative branch of the Government, which, by enacting it, has affirmed its validity; and that determination must be given great weight. This Court, by an unbroken line of decisions from *Chief Justice Marshall* to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt."

In *S. v. Brockwell*, 209 N. C., 209, 183 S. E., 378, *Connor, J.*, speaking to the power of the courts when validity of a statute is challenged, said: "In the exercise of this power and in the performance of this duty it is a recognized principle, uniformly applied, that the courts will not adjudge that a statute is void on the ground that its enactment was in violation of a constitutional limitation, unless it so appears beyond a reasonable doubt."

In *Glenn v. Express Co.*, 170 N. C., 286, 87 S. E., 136, speaking to the question of the constitutionality of a statute which made it unlawful for any person, firm or corporation to ship, transport, carry or deliver for hire, or otherwise, whiskey, *Allen, J.*, said: "If considered without regard to the policy of the State in favor of prohibition, we would hold

it an arbitrary and unwarranted interference on the right of the carrier to transport, and with the right of the consignee to receive, but when it is understood that the statute is but a means of enforcing a State policy of prohibition, there seems to be such a reasonable relation between the two as justifies upholding the statute as a reasonable regulation." *Skinner v. Thomas, supra.*

In the instant case, when considered in the light of a State policy of suppressing and prohibiting gambling, there is a reasonable relation between a coin operated slot machine in the playing of which the operator may make varying scores or tallies upon the outcome of which wagers may be made, and those so operated which may give a return of something of value which is unknown to or unpredictable by the operator. The element of chance is present. This justifies sustaining the statute as a reasonable regulation, and within the police power vested in the Legislature.

The judgment below is

Affirmed.

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

W. S. HALLYBURTON, AND SUCH OTHER PERSONS IN INTEREST AS MAY CHOOSE TO MAKE THEMSELVES PARTIES HERETO, v. BOARD OF EDUCATION OF BURKE COUNTY AND BOARD OF COMMISSIONERS FOR THE COUNTY OF BURKE.

(Filed 2 February, 1938.)

1. Taxation § 3—Art. V, sec. 4, imposes definite check on increase of debt by State, county or municipality, except with approval of voters.

The language of Art. V, sec. 4, of the State Constitution, as amended, is unambiguous, and by its plain terms the power of the State, or any county or municipality to contract debts in any biennium or fiscal year, respectively, without submitting the matter to a vote of the people, except for those purposes specifically enumerated in the amendment, is definitely prescribed to two-thirds of the amount by which its outstanding indebtedness was decreased during the prior biennium or fiscal year.

2. Same—Limitation prescribed by Art. V, sec. 4, is in addition to limitations prescribed by Art. VII, sec. 7, and Art. V, sec. 6.

The limitation of Art. V, sec. 4, on the contraction of debt by counties and municipalities is in addition to the limitations prescribed by Art. VII, sec. 7, and Art. V, sec. 6, and such local units may not create debts and issue bonds without a vote of the people, even for necessary expenses within the limitation prescribed by Art. V, sec. 6, without the approval

of the Legislature, or in excess of the limitation prescribed by Art. V, sec. 6, with the special approval of the Legislature, unless such bonds, together with such other bonds as may have been issued during the fiscal year, do not exceed two-thirds of the amount by which such unit decreased its outstanding indebtedness during the prior fiscal year.

3. Same—Method of determining amount of debt contracted in fiscal year within meaning of Art. V, sec. 4.

In determining the amount of debt contracted in any fiscal year within the provision of Art. V, sec. 4, limiting the power of a taxing unit to contract debts to two-thirds the amount by which the taxing unit's outstanding debt was decreased during the prior fiscal year, the total amount of bonds issued during the fiscal year, by the taxing unit, whether with or without the approval of its voters, should be included, except bonds issued by it to fund or refund a valid existing debt, to supply a casual deficit, to suppress riots or insurrections, or to repel invasions, and except tax anticipation notes issued in an amount not exceeding fifty per centum of the taxes for the fiscal year.

4. Same—County may not borrow money for necessary expenses without vote when its outstanding debt was not reduced during prior fiscal year.

The findings of fact disclosed that defendant county had not reduced its outstanding indebtedness during the prior fiscal year, and that it proposed to borrow money and issue its bonds to erect a schoolhouse necessary for the maintenance of the constitutional school term in the county, without submitting the question of borrowing the money to the qualified voters of the county. *Held:* The limitation prescribed by Art. V, sec. 4, as amended, is in addition to other constitutional limitations relating to taxation, and the county may not borrow money, even for a necessary expense, without submitting the question to a vote, Art. VII, sec. 7, when its outstanding indebtedness has not been reduced during the prior fiscal year, and plaintiff taxpayer is entitled to injunctive relief restraining the issuance of the proposed bonds.

APPEAL by defendants from *Warlick, J.*, at Chambers. From BURKE. Affirmed.

This is a civil action instituted by the plaintiff against the defendants to restrain the defendants from borrowing certain money from the State Literary Loan Fund, or from any other source, and from the issuance of bonds by said county for the purpose of constructing a high school building in Burke County, without a vote of the people. The hearing on the motion to show cause was had in Charlotte, N. C., by consent. At said hearing the court entered a judgment permanently restraining the commissioners of Burke County from contracting the proposed debt until the question of the increase of the public debt of the county had been submitted to the people of Burke County qualified to vote thereon, or until such time as the issuance thereof, in some subsequent fiscal year, became permissible under the terms of Article V, sec. 4, of the Constitution. The defendants excepted and appealed.

C. E. Cowan for plaintiff, appellee.
Ervin & Butler for defendants, appellants.

BARNHILL, J. The facts upon which the judgment of the court below was based were found by consent and are in substance as follows:

The plaintiff is a citizen and taxpayer of Burke County, and he instituted this action in good faith to test the validity of the proposed bonds. Burke County, through its board of county commissioners and at the request of the board of education, is negotiating a loan from the State Literary Fund in the sum of $37,000 for the purpose of erecting and equipping certain school buildings in Burke County. Burke County, during the fiscal year ending 30 June, 1937, failed to decrease its outstanding indebtedness, but, on the contrary, increased said indebtedness in the sum of more than $27,000. The board of commissioners of said county is in good faith undertaking to contract the loan from the State Literary Fund in the sum of $37,000, with the aim, desire and intent to comply with the mandatory provisions of the fundamental law of the State with respect to education. The improvements contemplated, and for which the fund is to be borrowed, are to take care of the necessary school buildings of the county. The question of borrowing money and increasing the public debt has not been submitted to a vote of the people and by them refused or ratified. The proposed issuance of bonds in the sum of $37,000 to the State Literary Fund would be and constitute a debt as against Burke County.

The question presented to us on this appeal involves the interpretation of Article V, sec. 4, of the Constitution of North Carolina, as amended at the general election in 1936, the question of such amendment being submitted to the people by authority of Public Laws 1935, ch. 248, sec. 3. If the proposed bonds under the admitted facts in this case are prohibited by said section the judgment below must be affirmed, otherwise the bonds are for a necessary expense and are authorized by the Legislature.

Article V, sec. 4, as contained in the Constitution as originally adopted, provided a restriction upon the increase of the public debt of the State, except that no limitation was placed upon the power of the Legislature to contract any new debt to supply (1) a casual deficit, or (2) for suppressing invasion or insurrection. For any other purpose no new debt could be contracted until the bonds of the State should be at par.

The financial condition of the State at the time of the adoption of the Constitution was such that the provisions of this section as then written provided an ample safeguard against any undue increase of the public debt. However, the financial condition of the State in its gradual

growth became so improved that the cited provisions of this section became for all practical purposes obsolete and no longer provided the safeguard the people of the State seemingly have at all times desired to place upon the governing authorities of the State. So, at the general election of 1924, under authority of Public Laws 1923, ch. 145, sec. 4 of Article V as originally adopted was stricken out and a new section substituted as follows:

"Sec. 4. *Restrictions upon the increase of the public debt in certain contingencies.* Except for refunding of valid bonded debt, and except to supply a casual deficit, or for suppressing invasions or insurrections, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State to an amount exceeding in the aggregate, including the then existing debt recognized by the State, and deducting sinking funds then on hand, and the par value of the stock in the Carolina Railroad Company and the Atlantic and North Carolina Railroad Company owned by the State, seven and one-half per cent of the assessed valuation of taxable property within the State as last fixed for taxation. 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."

It will be noted that this section is in substantially the same language as the original section, except that the basis of the limitation was changed. Under the original section, with certain exceptions, *no* bonds could be issued and *no* debt contracted "until the bonds of the State shall be at par." Under the original section so long as, or whenever, the bonds of the State could be sold at par, the sky was the limit. Under the 1924 amendment the General Assembly had no power to contract any new debt or pecuniary obligation in behalf of the State (with certain exceptions) to an amount exceeding in the aggregate . . . 7½ per cent of the assessed valuation of taxable property within the State as last fixed for taxation. Under this section the power of the State to issue bonds fluctuated as the assessed valuation of taxable property within the State increased or decreased, and the power of the Legislature to issue bonds could be increased by an arbitrary increase in the valuation of taxable property.

It is well now to note that neither the section as originally incorporated in the Constitution nor the section as substituted in 1924 undertook in any manner to limit the right of the governing authorities of local governmental units in their right to increase local debts, nor did

they seek to impose any limitation on the right of the Legislature to grant authority to local units to increase their debts.

Just prior to and during the period immediately succeeding the amendment of 1924 both the State and all of its subdivisions engaged in an extensive expansion, which necessitated a large increase in the debt of the State and of the municipalities of the State. In 1920 the State debt was less than $11,000,000. In 1935 it had grown to more than $150,000,000. There does not seem to be any reliable record of the bonded indebtedness of the municipalities in 1920, but we may safely say that such debts increased 100 per cent from 1920 to 1935.

Realizing that the then existing provisions of Article V, sec. 4, did not provide any adequate check against the increasing bonded indebtedness of the State and its subdivisions, and desiring to put some adequate curb upon the growing tendency to incur debt for permanent improvements, the people of the State at the general election in 1936, under authority of Public Laws 1935, ch. 248, sec. 3, again amended Article V, sec. 4, by striking out all of said sections as it then existed down to and including the word "taxation" in line 12, and substituting in lieu thereof the following:

"Sec. 4. *Limitations upon the increase of public debts.* 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 approved by a majority of those who shall vote thereon."

Do the provisions of this section as so amended prohibit the issuance of the proposed bonds by Burke County? We are of the opinion that a proper interpretation of the language of this constitutional provision leads to the conclusion that it does prohibit the proposed bonds and that Burke County is without authority to increase its public debt during the present fiscal year in any amount without a vote of the people except for one or more of the four purposes first enumerated in the amendment.

Under this section the right of the State, or of any county or municipality, to contract debts and pledge its faith and credit is definitely prescribed. There is no limitation upon the right of the State to contract debts and to pledge its faith and credit, or upon the right of the State Legislature to authorize counties and municipalities to contract debts and pledge their faith and credit: (1) To fund or refund a valid existing debt; (2) to borrow in anticipation of the collection of taxes due and payable within the fiscal year to an amount not exceeding 50 per centum of such taxes; (3) to supply a casual deficit; or (4) to suppress riots or insurrections, or to repel invasions.

For *any purpose* other than these enumerated the General Assembly has 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 preceding biennium unless the subject be submitted to a vote of the people of the State.

Except for the purposes enumerated the General Assembly has no power to authorize counties or municipalities to contract debts, and counties and municipalities are forbidden to 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.

The language of Article V, sec. 4, as it presently exists is unambiguous, plain and direct. Its terms are definite and certain. The limitations this section places upon the debt increasing power of the State and of the counties and other municipalities of the State are in such terms that "he who runs may read" and understand. A compliance therewith gives assurance to the people of the State that the counties, cities and towns of the State must of necessity put their financial houses in order and forever hereafter, so long as the amendment exists, avoid the harassing conditions the recent economic depression created in most of the counties, cities and towns, resulting in default by many of them in the payment of their honest and just obligations.

As stated, until the adoption of this amendment in 1936, this section imposed no limitations upon the right of the State to grant counties, cities and towns special approval to levy taxes for a special purpose under the provisions of Article V, sec. 6, nor did it limit the right of counties, cities and towns to issue bonds for necessary expenses under Article VII, sec. 7, or to levy taxes for the payment thereof within the provisions of Article V, sec. 6. This section now further limits the right of governing authorities of local governmental units in respect to the creation of debts and the levy of taxes for the payment thereof. The argument that the provisions of this section do not embrace the creation of a debt for necessary expenses and do not prohibit such debt when created within the limitations of Article VII, sec. 7, is not sound. Heretofore local units could issue bonds for necessary expenses without the approval of the people within the taxing limitation provided by Article V, sec. 6, and when special approval was granted by the General Assembly even the limitations contained in the latter section might be disregarded. The amendment is so worded as to limit the creation of debts by local authorities for necessary expenses without a vote of the people, whether such debt is created with or without the special approval of the General Assembly and regardless of the limitations contained in Article V, sec. 6.

So that now, local units may create debts and issue their bonds for necessary expenses without a vote of the people and without special approval of the Legislature, provided that by so doing, taxes in excess of the limitations provided in Article V, sec. 6, are not required, and provided further that the total amount of such bonds and such other bonds as may have been issued during that particular fiscal year do not exceed two-thirds of the total amount by which the public debt of the unit was decreased during the preceding fiscal year. Such local unit may exceed the constitutional limitation on the taxing power by legislative authority without the approval of the voters, provided the total amount of bonds issued by such unit during any fiscal year does not exceed two-thirds of the amount by which the debt of the unit was decreased during the preceding fiscal year. In determining the total amount of bonds issued during any fiscal year all bonds so issued whether approved by a vote of the people or not, must be included: except bonds issued to fund or refund a valid existing debt; tax anticipation notes issued in an amount not exceeding fifty per centum of the taxes for the fiscal year; bonds to supply a casual deficit; and bonds issued to suppress riots or insurrections, or to repel invasions; which need not be taken in consideration in arriving at such total.

It follows that the provisions of Article V, sec. 4, now constitute the dominant or controlling limitation upon the power of local units to contract debts or to issue its bonds, and its provisions are superimposed

upon the limitations contained in Article VII, sec. 7, and in Article V, sec. 6, of the Constitution. To the provisions of the section under consideration the former decisions of this Court must likewise yield and are no longer authoritative except within the limitations of this section.

The wisdom of this section is apparent. Oftentimes minorities demanding the expenditure of public moneys for different purposes, combine their forces and bring such pressure to bear upon public officials (who are usually willing to meet the demands of a substantial group of their constituents) as to cause the creation of two or more debts when neither minority group desired more than one.

It does not leave those communities whose financial affairs are in good condition helpless. If the citizenship of any given local unit is willing to continue its present bonded indebtedness without curtailment, or to increase it, this section puts no additional limitation upon them so long as the expenditures are authorized by public election. It limits only the governing authority of such unit.

The primary duty to provide for a six months public school during each year and to furnish the necessary buildings and equipment therefor rests primarily upon the State. The State in turn is empowered to, and has, delegated to the several counties the duty to furnish the necessary buildings for the constitutional school term. The board of commissioners of a county, however, are without authority to comply with this delegation of power in violation of the provisions of the section of the Constitution under consideration without first submitting the question to a vote of the people. If the people of the county or other municipal corporation will not by their vote authorize an increase of the bonded debt beyond the prescribed limitations the State will have to devise other means to meet the requirements of the Constitution in respect to education.

The judgment below is

Affirmed.

STATE v. MILFORD EXUM.

(Filed 2 February, 1938.)

1. Criminal Law § 33—Mere presence of officers does not render confession involuntary.

The evidence disclosed that defendant was imprisoned in jail in another county, that the sheriff and his deputies visited him, told him their investigations indicated he had information as to the circumstances under which the crime was committed, and urged defendant to tell what, if anything, he knew about the crime, that thereafter defendant stated that if the officers would take him to his home where he could see and confer

with relatives, he would tell all he knew about the crime, that the sheriff agreed, and that while on the trip in a car with the officers, defendant made the confession. *Held:* The evidence supports the finding of the court that the confession was voluntary, without evidence to the contrary, the mere presence of officers not being sufficient to render a confession involuntary.

2. Arrest and Bail § 4—In absence of request by defendant, detention of defendant without permitting counsel to see him is not unlawful.

Where defendant is informed immediately after his arrest that he is charged with the murder of a named person, and defendant makes no request to be allowed to communicate with friends or counsel, the arrest and detention of defendant without permitting friends or counsel to communicate with him does not constitute a violation of ch. 257, Public Laws of 1937.

3. Arrest and Bail § 5—

When defendant is arrested pending investigation on a capital charge, the officer making the arrest is not required to have bail fixed. Ch. 257, Public Laws of 1937.

4. Criminal Law § 33—

The violation of ch. 257, Public Laws of 1937, in regard to bail and the manner of detention of defendant under arrest, would not render defendant's voluntary confession incompetent.

5. Criminal Law § 34d—

Evidence tending to show that defendant, after his arrest and while in the custody of officers, attempted suicide by drinking poison, is competent.

6. Criminal Law § 79—

Contentions of counsel that defendant did not have a fair trial in the court below need not be considered when they are not supported by the record, and no authorities are cited in the brief and no reasons given in the argument in support of the contentions.

7. Homicide § 25—

Evidence in this case *held* sufficient to support the contentions of the State that defendant shot and killed deceased in the perpetration of a robbery, and therefore was guilty of murder in the first degree. C. S., 4200.

APPEAL by defendant from *Grady, J.*, at August Term, 1937, of WAYNE. No error.

At May Term, 1937, of the Superior Court of Wayne County, the defendant Milford Exum and Earl Sasser were indicted, each by a separate indictment, for the murder, in Wayne County, North Carolina, on 2 April, 1937, of James Williams.

At August Term, 1937, of said court the defendant Milford Exum and the said Earl Sasser were each duly arraigned on said separate indictments. Each entered a plea of not guilty. Without objection, and in its discretion, the court ordered that said separate indictments be consolidated for trial. The defendant Milford Exum and the said

Earl Sasser were thereupon tried on said consolidated indictments for the murder, in Wayne County, North Carolina, on 2 April, 1937, of James Williams.

There was a verdict that both the defendant Milford Exum and the said Earl Sasser are guilty of murder in the first degree.

On motion of Earl Sasser, the verdict as to him was set aside by the court. Thereafter, the said Earl Sasser tendered to the court a plea of guilty as an accessory before the fact to murder in the first degree. C. S., 4175. With the approval of the solicitor for the State, this plea was accepted by the court. The said Earl Sasser did not appeal from the judgment on his plea that he be confined in the State's Prison for his life, as required by statute. C. S., 4176.

The motion of the defendant Milford Exum that the verdict as to him be set aside and that he be granted a new trial was denied by the court.

From judgment on the verdict, as required by statute, C. S., 4200, that he suffer death by means of asphyxiation, as provided by statute, C. S., 4658, as amended (see N. C. Code of 1935, section 4658), the defendant Milford Exum appealed to the Supreme Court, assigning errors in the trial and judgment.

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

Paul D. Grady, Paul B. Edmundson, and Hugh Dortch for defendant.

CONNOR, J. On or about 2 April, 1937, Paul Garrison, sheriff of Wayne County, was informed at his office in the city of Goldsboro, N. C., that James Williams, an elderly colored man, who lived alone at his home in Wayne County, some distance from the city of Goldsboro, had not been seen at his home or in the neighborhood for several days, and that apprehension was felt by his neighbors as to his whereabouts. In consequence of this information, the sheriff went at once to the home of James Williams. He found that the door of the house in which James Williams lived was locked, and that there was no one in the house. He entered the house and found that the bedclothes had been dragged from the bed in the room which James Williams occupied as his bedroom. They were on the floor of the room. The furniture in the room was broken, and scattered about the room. Papers were scattered on the floor. On the floor and under the bedclothes there was a considerable amount of dried blood. Two empty pistol cartridges were found on the floor in the room. Both cartridges were .25 calibre cartridges, such as are used in an automatic pistol. The condition of the room showed that someone, after a fierce struggle, had been shot and wounded in the room. The sheriff closed the house, and with his deputies

searched the premises and the surrounding woods for James Williams. He was not found. After the search, the sheriff returned to the city of Goldsboro, but continued his investigation to ascertain the whereabouts of James Williams.

About two weeks after James Williams had disappeared from his home in Wayne County, his dead body was found in Little River, in Johnston County, about eight miles from his home. When the body was taken from the river, it was wrapped in a sheet. A heavy iron bar was tied to the body with a rope. The body was taken to an undertaker's place of business in Goldsboro where an examination disclosed wounds on the head and near the spinal column. Two bullets were taken from the head, and one from the body. These bullets were from .25 calibre cartridges which had been fired from an automatic pistol. The wounds caused by these bullets caused the death of James Williams.

After the body of James Williams was found in Little River, in consequence of information disclosed by his investigations, the sheriff of Wayne County went to the home of the defendant Milford Exum, which is a short distance from the home of James Williams, and there arrested the defendant Milford Exum, Earl Sasser, and Tinker Holland, three young white men, and charged them with the murder of James Williams. He did not procure a warrant for these men, but took them to Goldsboro, where they were held in custody pending further investigation by the sheriff. The next day after his arrest, the defendant Milford Exum was taken by the sheriff to Snow Hill, in Greene County, where he was placed in jail.

While the defendant was confined in jail at Snow Hill, his relatives and friends employed counsel for him, and inquired of the sheriff where the defendant was confined. The sheriff declined to give them any information as to where the defendant was confined, but told them that the defendant was in his custody. He refused to permit counsel employed by relatives and friends of the defendant in his behalf to confer with the defendant or to see him, until after a writ of *habeas corpus* had been served on him by the coroner of Wayne County. The writ of *habeas corpus* was issued on the application of counsel employed by relatives and friends of the defendant.

After the defendant had been placed in jail at Snow Hill, and while he was confined in said jail, the sheriff and his deputies visited him on several occasions. They told him the results of their investigation of the death of James Williams and that said investigations had disclosed facts which indicated that the defendant had information as to circumstances under which the homicide was committed. They urged the defendant to tell them what, if anything, he knew about the homicide. After he had been confined in the jail at Snow Hill for several days, the defendant

told the sheriff that if he would take him from the jail to his home in Wayne County, where he could see and confer with relatives and friends, he would tell all he knew about the homicide. This the sheriff agreed to do.

Accordingly, the sheriff took the defendant from the jail in Snow Hill and carried him in his automobile to his home in Wayne County. The sheriff and his deputies who were in the automobile with the defendant each testified that while on the trip the defendant made statements to them, and in their presence, with respect to the homicide.

Counsel for defendant, in apt time, objected to any testimony by the sheriff or by his deputies as to any statement made to them, or to either of them, or in their presence, by the defendant with respect to the homicide, on the ground, first, that no statement in the nature of a confession made by the defendant while he was in the custody of the sheriff was admissible as evidence against him, because such statement was involuntary on the part of the defendant, and, second, that no statement in the nature of a confession, made by the defendant, while he was in the custody of the sheriff, was admissible as evidence against him, because such statement was made by the defendant while he was held in custody by the sheriff in violation of chapter 257, Public Laws of North Carolina, 1937.

The objections of the defendant to testimony of the sheriff and his deputies tending to show that the defendant made statements to them in the nature of confessions, were overruled by the court, and the defendant duly excepted.

The sheriff and certain of his deputies thereupon testified that while he was on the trip with them, in the sheriff's automobile, from Snow Hill to his home in Wayne County, the defendant told them that on the night of 2 April, 1937, he and Earl Sasser went to the home of James Williams in defendant's Ford automobile; that when they arrived at James Williams' house they called to him and that he opened the door for them; that they went into his house and told James Williams that they wished to borrow some money from him; that James Williams refused to lend them the money; that they ordered him to open his safe, which was in the room; that he opened the safe and at once started to his bed where the defendant knew he kept his pistol; that before he got to his bed the defendant shot him with his .25 calibre automatic pistol; that the first shot did not kill him; that he staggered and fell to the floor, and that defendant shot him again; that after he was dead Earl Sasser left and went to his home and soon returned to James Williams' home, bringing with him a sheet, an iron bar, and a rope; that they wrapped the sheet about the body of James Williams and tied the iron bar to his body with the rope; that they placed the

body in the rear of defendant's automobile, and drove with it some distance to a river; and that when they came to the river they took the body from the automobile and threw it into the river.

The defendant further stated to the sheriff and to his deputies that both he and Earl Sasser were drunk on the night they went to the home of James Williams, and were drunk when defendant shot and killed the deceased; and that after he shot and killed James Williams, he and Earl Sasser took $4.00 from his safe, which they divided between them.

After the sheriff and his deputies, with the defendant, arrived at the home of the defendant in Wayne County, they all went to a filling station, which was owned and operated by the defendant. While they were in the filling station the defendant drank a bottle of Coca-Cola, in which he had put a large quantity of paris green. The defendant was taken to a hospital at Goldsboro, where the paris green was pumped from his stomach by a physician. There was evidence tending to show that the defendant drank the paris green with suicidal intent. The defendant objected to the admission of this evidence. His objection was overruled, and defendant duly excepted.

Neither the defendant Milford Exum nor Earl Sasser testified at the trial. They offered evidence tending to show that both had been drinking intoxicating liquor to excess for several months prior to the homicide, and for that reason that neither of them was capable of such premeditation and deliberation as constitutes one element of the crime of murder in the first degree, as defined by statute. C. S., 4200.

There is no evidence in the record in this appeal which supports the contention of the defendant that there was error in the admission of testimony by Sheriff Garrison and his deputies tending to show statements made by the defendant to them or in their presence in the nature of a confession.

All the evidence shows, and the court so found, that the statements made by the defendant to the sheriff and his deputies, or in their presence, although made by him while he was in the custody of the sheriff, were voluntary on the part of the defendant. There was no evidence to the contrary.

In *S. v. Stefanoff*, 206 N. C., 443, 174 S. E., 411, it is said: "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 incomptent. *S. v. Newsome*, 195 N. C., 552, 143 S. E., 187; *S. v. Drakeford*, 162 N. C., 667, 78 S. E., 308. 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, 135 S. E., 555."

In *S. v. Rodman,* 188 N. C., 720, 125 S. E., 486, it is said:

"This Court has held consistently and uniformly that statements made by a defendant, although in custody or in jail, are competent, if made voluntarily, and without any inducement of hope or fear."

The detention of the defendant by the sheriff pending his investigation of the death of James Williams was not in violation of chapter 257, Public Laws of North Carolina, 1937.

The statute reads as follows:

"Section 1. That upon the arrest, detention, or deprivation of the liberties of any person by an officer in this State, with or without a warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him, and it shall further be the duty of the officer making said arrest, except in capital cases, to have bail fixed in a reasonable sum, and the person so arrested shall be permitted to give bail bond; and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately and the rights of such persons to communicate with counsel and friends shall not be denied.

"Sec. 2. That any officer who shall violate the provisions of this act shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court.

"Sec. 3. This act shall be in full force and effect from and after its ratification."

The act was ratified on 20 March, 1937.

The evidence at the trial shows that immediately after his arrest, the defendant was informed by the sheriff that he was charged with the murder of James Williams. This is a capital case. For this reason the provisions of the statute with respect to bail are not applicable to this case.

There is no evidence in the record tending to show that after his arrest and while he was in the custody of the sheriff the defendant demanded of the sheriff that he be permitted to communicate with friends or with counsel. For this reason the provisions of the statute with respect to the right of a defendant in the custody of an officer and charged with the commission of a crime, to communicate with friends and counsel are not applicable to this case.

Conceding, however, that the sheriff had violated the provisions of the statute, in the instant case, it would not follow that a voluntary confession made by the defendant to the sheriff would be inadmissible as evidence because of such violation. It is not so provided in the statute.

There was no error in the admission of evidence tending to show that after his arrest and while he was in the custody of the sheriff, the defendant attempted to commit suicide by drinking paris green. See *S. v. Lawrence,* 196 N. C., 562, 146 S. E., 395.

No exceptions to the charge of the court to the jury appear in the statement of the case on appeal. A careful reading of the charge set out in the record fails to disclose any error.

The contentions of counsel for the defendant discussed in their brief filed in this Court that the defendant has not had a fair and impartial trial in the Superior Court of Wayne County are not supported by the record in this appeal and require no comment in this opinion. No authorities are cited in the brief in support of these contentions, nor were any reasons given or arguments made by counsel to sustain these contentions. Rule 28, 200 N. C., 831.

There was ample evidence at the trial of this action to support the contention of the State that the defendant shot and killed James Williams, as alleged in the indictment, in the perpetration of a felony, to wit, a robbery, and that he is for this reason guilty of murder in the first degree as defined by the statute. C. S., 4200. The jury so found at a trial free from error. The judgment is supported by the verdict and is affirmed.

No error.

EMELYN A. ABERNETHY v. THE MECKLENBURG FARMERS' MUTUAL FIRE INSURANCE COMPANY.

(Filed 2 February, 1938.)

1. Insurance § 25c—

Where plaintiff introduces the fire policy sued on, and evidence of the destruction of the premises insured by fire, the burden is on defendant insurer to establish affirmative defenses relied on to defeat recovery.

2. Insurance § 22b—Mutual company must show levy of additional assessment in conformity with statutory provisions.

Where a mutual fire insurance company relies on the failure of insured to pay an assessment levied against policyholders in order to defeat recovery on the policy, it must show that the assessment was legally made in conformity with the provisions of C. S., 6353, and where it fails to so show and plaintiff insurer testifies that she did not get notice of the assessment or of the cancellation of the policy, peremptory instructions against insurer on the affirmative defense are without error.

3. Insurance § 13: Contracts § 8—

Laws in force at the time of the execution of a contract become a part thereof.

4. Insurance § 13—

Policies of insurance, having been prepared by insurer, will be liberally interpreted in favor of insured.

APPEAL by defendant from *Rousseau, J.*, at 29 March, 1937, Regular Term, of MECKLENBURG. Affirmed.

This is an action brought by plaintiff to recover of defendant the sum of $900.00 and interest, from 13 December, 1934, on a policy of insurance issued by defendant to plaintiff. The plaintiff alleges:

"3. That on or about 16 March, 1929, plaintiff became a member of defendant corporation, and thereupon defendant issued to plaintiff its fire insurance contract upon a barn and residence located in Mallard Creek Township, Mecklenburg County, about one and one-half miles southeast of Derita, the amount of the insurance upon said residence being $800.00, and the amount of insurance upon said barn being $100.00, said amounts being three-fourths of the value of said property, all of which will more fully appear by reference to application to defendant, No. 2107.

"4. That plaintiff continued to be a member of defendant, and is now a member of defendant, under the terms of said application and policy, and, on or about 12 December, 1934, the residence and barn insured by said fire insurance contract, from causes unknown to plaintiff, ignited and caught fire and said residence and said barn were totally destroyed by fire.

"5. That thereupon plaintiff duly notified defendant of said loss under the terms of said policy caused directly by said fire on 13 December, 1934, and duly made claim upon said defendant for the sum of $900.00 due plaintiff by defendant under the terms of said policy.

"6. That, although plaintiff has observed and kept the terms of said policy, defendant has failed and refused and still fails and refuses to abide the terms of said policy and pay the amount of loss sustained by plaintiff as herein narrated in the sum of $900.00, which defendant promised and agreed to pay under the terms of said policy to plaintiff."

The plaintiff prayed judgment for $900.00 and interest from 13 December, 1934.

The defendant, in answer, says:

"3. That on or about 27 July, 1932, the plaintiff herein was issued Policy No. 389 in the defendant company, which policy stipulated that it was to take the place of and cancel plaintiff's Policy No. 2107. Except as herein admitted, the allegations of paragraph 3 are untrue and are denied.

"4. That the allegations contained in paragraph 4 of the complaint are untrue and are denied.

"5. That the allegations contained in paragraph 5 of the complaint are untrue and are denied.

"6. That it is true that the defendant has refused, and still refuses, to pay any claim of the plaintiff for the reason that the said defendant is not indebted to the plaintiff under the terms of its policy, or for any other reason; otherwise, the allegations contained in paragraph 6 of the complaint are untrue and are denied, etc."

And for further answer and defense, the defendant alleges:

"1. That under the terms and provisions of its policy issued to the plaintiff as hereinbefore set out, an assessment was levied against the said plaintiff, being Assessment No. 38, and notice thereof was duly mailed to the said plaintiff on 1 October, 1934, which notice stated that the said assessment was due within thirty days from that date.

"2. That on 20 November, 1934, a duplicate notice was mailed to the plaintiff, stating that her protection would cease after 30 November, 1934.

"3. That the said assessment was not paid until 12 December, 1934, which was more than 13 days overdue, and after the plaintiff's property had been destroyed by fire, as alleged in the complaint, and without knowledge by the defendant that loss had occurred."

The issues submitted to the jury and their answers thereto were as follows:

"1. Did the defendant execute and deliver to the plaintiff a policy of insurance, as alleged in the complaint? Ans.: 'Yes.'

"2. What amount, if any, is the plaintiff entitled to recover of the defendant? Ans.: '$900.00.'"

The court below charged the jury as follows: "Gentlemen of the jury, in this case there will be two issues submitted: '(1) Did the defendant execute and deliver to the plaintiff a policy of insurance, as alleged in the complaint?' The court charges you, gentlemen, that if you find the evidence to be true, as testified to by the witnesses—the witnesses for the plaintiff and the witnesses for the defendant—and the record evidence offered in this case—if you find those facts to be true, it would be your duty to answer this issue 'Yes.' '(2) What amount, if any, is the plaintiff entitled to recover of the defendant?' The court instructs you, on that issue, that if you find the evidence to be true, as testified to by the witnesses in this case, it would be your duty to answer that issue in the sum of $900.00. You may take the issues, gentlemen, and say how you find." To the above charge counsel for the defendant objected on the ground that the court had deprived the defendant of its defense, that the plaintiff had failed to pay the assessment of 1 October, 1934, and that consequently the policy was void. The defendant's objection was overruled. Exception by defendant.

Judgment was rendered by the court below on the verdict. The defendant excepted and assigned errors to the charge of the court and the judgment assigned, and appealed to the Supreme Court. The necessary facts will be set forth in the opinion.

H. L. Taylor for plaintiff.

Pharr & Bell for defendant.

CLARKSON, J. We do not think the exceptions and assignments of error made by defendant can be sustained. The plaintiff introduced the policy on which she sues, and testified as to the burning of the buildings on the premises covered by the policy, and that the value of the property destroyed by fire on 12 December, 1934, was $900.00.

Plaintiff testified, in part: "The buildings on the premises burned on 12 December, 1934. Well, on the night of 11 December, or near about 12 December. They were completely destroyed by the fire. In my opinion the buildings were worth $1,200. I got no notice of any assessment, nor any notice that the insurance company intended to cancel my policy. I have not changed my address since I took out this policy. If the notice came to my house in the ordinary course of events, I should have gotten it. I filed a written claim for the loss with the insurance company. They refused to pay it. . . . I never at any time failed to promptly pay any assessment that I got notice of. So far as I know, I paid all the assessments that were due on these policies. I never got any notice of any effort or attempt on the part of the company to cancel these policies until this letter of 11 February." This was after the property was burned. The plaintiff rested.

In *Hedgecock v. Insurance Co.*, 212 N. C., 638 (640), *Barnhill, J.*, says for the Court: "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."

The secretary and treasurer of defendant company testified: "I made out this Policy No. 2107 on 16 March, 1929. These policies were all taken up and new policies issued in 1932. This policy was superseded by Policy No. 389. That was done with all the policies outstanding in the company. Policy No. 389 was mailed to Miss Abernethy at her address, Charlotte, Route 8. Miss Abernethy has had a policy with the company since 16 March, 1929. All of our correspondence with her was sent to that address. I sent out all the notices of assessments to the policyholders. I did it personally. . . . (Cross-examination.) We issued Policy No. 389 to take up Policy No. 2107. We never got possession of Policy No. 2107. We mailed the new policy to Miss Abernethy. There is a record here in the book."

One of the directors of defendant company testified: "Without any explanation, Mr. Abernethy came over to my house one afternoon and we were talking about this policy, and I told him that I thought it ought to be paid, before I knew the circumstances about it. At the time I told Mr. Abernethy that he ought to be paid, I did not know the full facts about the matter."

There was evidence to the effect that plaintiff received no new policy and had no notice of the cancellation of Policy No. 2107, dated 16

March, 1929, and it was never taken up or delivered to defendant company. The plaintiff contends that the alleged cancellation was contrary to law.

The court held, as a matter of law, under Public Laws 1899, ch. 54, secs. 36 and 37, being sec. 6353 of the Consolidated Statutes, that it was the duty of the defendant to show that the assessment referred to was legally made, and that consequently the failure to pay would void the policy.

N. C. Code, 1935 (Michie), sec. 6353, is as follows: "When a mutual fire insurance company is not possessed of cash funds above its reinsurance reserve sufficient for the payment of insured losses and expenses, it must make an assessment for the amount needed to pay such losses and expenses upon its members liable to assessment therefor in proportion to their several liabilities. The company shall cause to be recorded in a book kept for that purpose the order for the assessment, together with a statement which must set forth the condition of the company at the date of the order, the amount of its cash assets and deposits, notes, or other contingent funds liable to the assessment, the amount the assessment calls for, and the particular losses or liabilities it is made to provide for. This record must be made and signed by the directors who voted for the order before any part of the assessment is collected, and any person liable to the assessment may inspect and take a copy of the same," etc.

The defendant contends: "It will undoubtedly be conceded that, but for the provisions of section 6353 of the Consolidated Statutes (Rev., sec. 4742; 1899, ch. 54, secs. 36 and 37), the assessment of 1 October, 1934, which the plaintiff failed to pay, was properly levied and binding upon her. . . . A policy of insurance is a contract, and is to be governed by the same principles as govern other contracts."

The above statute was passed in 1899, ch. 54, secs. 36 and 37. This law was in existence before the contract of insurance in this case was made, on 16 March, 1929. In this jurisdiction the laws existing at the time and place of a contract form a part of it. *Bateman v. Sterrett,* 201 N. C., 59; *Alexander v. Boyd,* 204 N. C., 103; *Hood, Comr. of Banks, v. Simpson,* 206 N. C., 748.

In the *Hood case, supra,* p. 757, citing a wealth of authorities, it is said: "It is well settled that general laws of a State in force at time of execution and performance of a contract become a part thereof and enter into and form a part of it, as if they were referred to or incorporated in its terms."

We think the evidence clearly shows that the statute was not complied with. This statute was no doubt passed to protect the policyholders. It may be that the attempted cancellation under defendant's by-laws was not in accordance with its provisions. But, from the view we take of this case, this question is not necessary to be decided.

The defendant in its brief says: "The defendant company has saved the farmers of Mecklenburg County thousands of dollars upon their insurance premiums, because of the honesty and ability of its directors and the loyalty of its members. It is respectfully submitted that this plaintiff should not be allowed to object now to a mere technicality which she could not show has injured her or any of her fellow members in any way. It is further respectfully submitted that the lower court erred in holding that this defendant had failed to prove the validity of its assessment." This is well said, and we approve of most of the statement, but policyholders are entitled to have their contracts construed, be they ever so technical, as written. The courts are liberal in the interpretation of such contracts in favor of the policyholders, as they are prepared and written by the insurer.

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

Affirmed.

JESSE A. PICKARD, EMPLOYEE, v. E. M. HOLT PLAID MILLS, INC., EMPLOYER, SELF-INSURER.

(Filed 2 February, 1938.)

Master and Servant § 40f—Evidence held sufficient to sustain finding that injury arose in the course of claimant's employment.

The evidence disclosed that defendant employer furnished a confectionery wagon which an employee rolled around the plant for sale of candy, sandwiches and drinks to employees for their convenience and not for profit, that claimant, while working on the night shift, bought a bottle of milk from the wagon, and placed it on a window ledge about twenty feet from his place of employment, in order to keep the milk cool until he should want it, that shortly thereafter, while attempting to open the window to get the milk, his hand slipped and his arm hit and broke the pane, and that the broken pane cut his elbow, resulting in serious injury. *Held:* The evidence supports the finding of the Industrial Commission that the injury resulted from an accident arising out of and in the course of the employment, claimant being on duty at the time and being at a place where a man so employed might reasonably be, and doing what an employee might reasonably do during such time.

APPEAL by defendant from *Williams, J.*, at September Term, 1937, of ALAMANCE. Affirmed.

Jesse A. Pickard was employed as a weaver at the Belmont plant of E. M. Holt Plaid Mills, Inc., and was employed on the night shift. The E. M. Holt Plaid Mills, Inc., maintain a confectionery wagon, run without profit, for the convenience of the employees, and such confec-

tionery wagon is rolled from one department of the mill to another, where employees purchased all kinds of confectioneries—milk, sandwiches, etc. If a profit is made it is distributed to the employees at Christmas time.

At approximately one o'clock a.m., on 21 January, 1936, the plaintiff purchased from the confectionery wagon a bottle of milk, left his place of work and went to a window about twenty or twenty-five feet away, opened the window and put the bottle of milk on the outside ledge in order to keep it cool until plaintiff desired to drink it. At approximately 25 minutes after 3 o'clock in the morning plaintiff again left his place of work and went to the window to get the bottle of milk, upon attempting to open the window plaintiff found that it had frozen tight. Plaintiff, being unable to raise the window alone, called a fellow employee from his place of work to assist him and while attempting to open the window plaintiff's hand slipped and his right arm struck and broke the window pane. When plaintiff's arm struck and broke the window pane, it was cut on the tip of the elbow, the cut being about an inch long.

Plaintiff was given first-aid treatment at the mill, later his arm became infected, requiring medical treatment, which treatment was first received on 3 February, 1936. As a result of the injury to the plaintiff's right arm and its subsequent infection, plaintiff now suffers a 20 per cent loss of use of that member.

The defendant E. M. Holt Plaid Mills, Inc., self-insurer, denied liability for the injury and the plaintiff filed with the North Carolina Industrial Commission a formal request for hearing, dated 26 March, 1936, and formal notices of such hearing were duly issued on 30 June, 1936, fixing 14 July, 1936, as the time, and the courthouse at Graham, North Carolina, as the place for the hearing, and at said time and place T. A. Wilson, Commissioner, attended and the plaintiff Jesse A. Pickard appeared in person and was represented by Clarence Ross, attorney at law, Graham, N. C., and Messrs. T. D. Cooper and Emerson T. Sanders, attorneys at law, Burlington, N. C., attended, representing the defendant.

From the evidence on the hearing T. A. Wilson, Commissioner found certain facts and rendered an award for the employee. Defendant appealed to the Full Commission, and the Full Commission made the following decision: "The claimant, at the time of the injury, was employed in defendant's mill and purchased a bottle of milk from one of the company's employees, the company having one of its employees to pass through the mill with a cart selling various articles of food and confections for sale to the company employees. The employee passed through the mill at about one o'clock a.m., selling such articles, and the claimant purchased a bottle of milk and not caring at that particular time to drink the milk, placed the same on the outer ledge of a window

where it would keep cool until such time as he cared to drink it. Some two hours or more later, when attempting to raise the window so as to reach out and get the bottle of milk, claimant's elbow was pushed through the window, thus injuring the tip of his elbow. Infection set in and at the present time claimant has 20 per cent permanent loss of use of the arm on account of the injury. The Full Commission reviewed the evidence supporting the above facts and is of the opinion that there is no justifiable reason for disturbing the award of the hearing Commissioner. There is practically no controversy as to the facts, it being a matter of legal interpretation of the facts. The findings of fact, conclusions of law, and award of Commissioner Wilson are approved and adopted as the findings of fact, conclusions of law, and award of the Full Commission, and are in all respects affirmed. Cost of appeal will be taxed against defendants. Buren Jurney, Commissioner. Examined and approved, J. Dewey Dorsett, Chairman, T. A. Wilson, Commissioner."

The employer appealed to the Superior Court. The court below rendered the following judgment: "This cause coming on to be heard and being heard before the undersigned upon appeal from the award of the North Carolina Industrial Commission and upon the facts found and set out in the opinion and findings filed by the Commission, the court being of the opinion that the conduct of the plaintiff was not such deviation from the course of his employment as would deprive him of the beneficial effects of the Employees' Liability Act doth adjudge that the said award be and the same is hereby in all respects affirmed. Clawson L. Williams, Judge holding the courts of the Tenth Judicial District."

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

J. Elmer Long and Clarence Ross for plaintiff.
Cooper, Curlee & Sanders for defendant.

CLARKSON, J. The sole question involved in this appeal is: Whether appellee, Jesse A. Pickard, employee, having purchased a bottle of milk from a wagon operated by appellant, E. M. Holt Plaid Mills, Inc., employer, and rolled by appellee's place of employment, and having placed the same on the outer ledge of a window about 20 or 25 feet from his employment, sustained an injury arising out of and in the course of his employment, when he received a 20 per cent disability to his arm in later attempting to raise the window to secure the milk? We think so. When the injury occurred it was during plaintiff's working hours and while he was on the job.

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.'" *Hildebrand v. Furniture Co.*, 212 N. C., 100 (109).

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."

In *Bellamy v. Mfg. Co.*, 200 N. C., 676 (678), it is said: "In L. R. A., 1916-A, at p. 237, we find: 'An employee in a mill is not outside the scope of her employment in going from an upstairs room, where her work had run out, to a room downstairs, where she had been told by the overseer that there was work for her to do. And an employee by the week in a shop does not go outside of the employment merely because she leaves the shop for the purpose of getting a lunch.' (Note 99.) In *Surdine's case* (1914), 218 Mass., 1, *post*, 318, 105 N. E., 433, it was held that a girl employed in a shop who was employed by the week, does not go outside of the employment merely because she leaves the shop for lunch."

In *Gordon v. Chair Co.*, 205 N. C., 739 (741-2): "The plaintiff was an employee of the defendant, but was not certain the plant would run on the Monday morning he went to work. He lived some distance from the plant and rode to work with a fellow employee. There had been a big snow and he had his son to come with his automobile so that he

could ride back home, if the plant would not run that day. He went to his place of work and found that the plant would run that day and put his lunch up. This was about the time the five-minutes-to-seven whistle blew. He then went to the outside platform at the front of the plant to tell his son that the plant would run and his feet slipped on ice and he fell and was injured. We think the facts of this case come within the decision of *Bellamy v. Mfg. Co.*, 200 N. C., 676."

The plaintiff, while on his job, about his master's business, during the time he was working—at night—purchased a bottle of milk from the defendant's confectionery wagon, from which defendant sold milk, sandwiches, etc., to the employees (a laudable enterprise). He raised the window some 25 feet away to put the bottle of milk on the outside ledge to keep it cool. When ready to drink the milk he attempted to again raise the window, with the help of a fellow employee, and it was frozen tight. His hand slipped and his right arm struck the window and broke the pane and his elbow was cut. It would be too technical to say that the injury did not arise "out of and in the course of the employment." In the judgment of the court below is the following: "The conduct of the plaintiff was not such deviation from the course of his employment as would deprive him of the beneficial effects of the Employer's Liability Act." What the plaintiff did was the natural sequence, after purchasing the milk, to put it where it would keep cool until he was ready to drink it.

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

Affirmed.

W. B. SINGLETON v. DURHAM LAUNDRY COMPANY AND THE TRAVELERS INSURANCE COMPANY.

(Filed 2 February, 1938.)

1. Master and Servant § 53a—Industrial Commission should find facts and conclusions of law.

The Industrial Commission is required by C. S., 8081 (nnn), to file with the award, which is its judgment, a statement of the findings of fact and conclusions of law upon which the award is based, and although specific and definite findings of fact may not be necessary in all cases, the Commission should make such specific and definite findings upon the evidence reported as will enable the courts on appeal to determine whether general findings or conclusions should stand.

2. Master and Servant § 40a—

Whether an injury results from an accident arising out of and in the course of the employment is a mixed question of law and fact.

3. Master and Servant § 47—Employee must give notice of injury or show to satisfaction of Commission reasonable excuse for failure to do so.

An employee is not entitled to compensation for injury by accident arising out of and in the course of the employment unless he gives notice to the employer as required by the statute, or unless he shows to the satisfaction of the Commission reasonable excuse for not giving the notice, and the Commission finds that such failure did not prejudice the employer.

4. Master and Servant § 55g—Proceedings remanded to Superior Court for order recommitting cause to Industrial Commission for findings.

On appeal to the Full Commission, the findings of fact and conclusions of law of the hearing Commissioner were vacated and set aside, and the Commission, without making definite findings of fact, held that the claimant sustained an injury by accident arising out of and in the course of his employment, and awarded compensation. Defendant employer resisted recovery on the ground of the failure of the employee to give notice of the injury as required by the statute, and also contended that the employee's condition was not the result of the accident occurring in the course of his employment, but resulted from a previous malady. *Held:* The record is insufficient to enable the Supreme Court to determine the rights of the parties upon the matters in controversy, and the proceedings are remanded to the Superior Court to the end that the cause may be recommitted to the Industrial Commission for findings of fact and adjudication of the rights of the parties thereon.

APPEAL from *Williams, J.*, at September Civil Term, 1937, of DURHAM. Error and remanded.

This is a claim for compensation under the Workmen's Compensation Act, filed by the plaintiff employee against Durham Laundry Company, employer, and the Travelers Insurance Company, carrier. The claim was allowed by the Industrial Commission and the defendants appealed. The court below entered judgment affirming the award and the defendants excepted and appealed.

J. L. Morehead for plaintiff, appellee.
Sapp & Sapp for defendants, appellants.

BARNHILL, J. The plaintiff filed claim on 25 February, 1936, with the North Carolina Industrial Commission, seeking an award for injuries alleged to have been received by him while engaged in the course of his employment by the defendant Durham Laundry Company on 15 March, 1935.

At the hearing before Commissioner Dorsett the defendants admitted that plaintiff was employed at the time of the alleged accident at a wage of less than $11.00 per week; that the Travelers Insurance Company was the carrier, and that the employer had more than five employees at the time of the alleged accident. The record further shows that at the

same time the defendants denied liability, for that the matter was never reported, the employer had no knowledge that the accident existed until the notice was received from the Industrial Commission, and that all other matters at issue, except as then admitted, were denied.

Commissioner Dorsett, after hearing the evidence, concluded that he was unable to find that the plaintiff suffered an injury by accident causing the trouble complained of and denied the claim for compensation. The plaintiff appealed to the Full Commission and upon hearing before the Full Commission an award was entered as follows: "The Full Commission directs that the findings of fact, conclusions of law, and the award of J. Dewey Dorsett be vacated and set aside, and in lieu thereof finds that the plaintiff, during the month of March, 1935, sustained an injury by accident arising out of and in the course of his employment, in consequence of which he was totally disabled for a period of six weeks, and that plaintiff's average weekly wage was $11.00; wherefore, the Full Commission directs that the defendant pay plaintiff compensation for six weeks at the rate of $7.00 a week." (Immaterial recitals omitted.)

This leaves the record in such condition as to make it impossible for us to determine the rights of the parties. The Full Commission set aside such findings of fact as were made by Commissioner Dorsett and at the same time failed to find the material facts at issue.

C. S., sec. 8081 (nnn), requires the Commission not only to make an award, but to likewise file with the award a statement of the findings of fact, rulings of law and other matters pertinent to the question at issue. This requirement has not been complied with. The finding "that plaintiff, during the month of March, 1935, sustained an injury by accident arising out of and in the course of his employment" is a conclusion and involves a mixed question of law and fact. Apparently the Workmen's Compensation Act treats it as a conclusion of law. The Commission is required to find the facts and conclusions of law. Ordinarily, the only question of law arising in a compensation case is as to whether the alleged injury, if any, was sustained by accident arising out of and in the course of employment. The award is the judgment of the Commission.

In respect to the facts involved in the claim for compensation, it is clearly apparent from the statute that the Legislature intended that the Industrial Commission should proceed more as a referee than as a jury, the difference being that the findings of fact by the Commission are conclusive if there is any evidence to support them, whereas the findings of fact by a referee are subject to review. It is the duty of the Commission to make such specific and definite findings upon the evidence reported as will enable this Court to determine whether the general find-

ing or conclusion should stand, particularly when there are material facts at issue. We do not mean to hold that specific and definite findings of fact are required in every case, as cases may arise where the evidence is short and uncomplicated or uncontradicted, or in which the facts are admitted. It would be the better practice, however, for the Commission to comply with the statute. To do so would certainly materially aid this Court in reviewing appeals. Speaking to the subject of a similar award, *Crosby, J.*, in *Mathewson's case*, 116 N. E. (Mass.), 831, says in part: "Manifestly a finding by the committee that an injury arose out of and in the course of the employment in a given case, without any other finding and without report of the evidence presented to the committee, would not be a compliance with Part 3, sec. 7, as it would be impossible for this Court to determine upon appeal whether there was evidence to support such finding. So, in this case, where findings of fact are made based upon the testimony of witnesses whose credibility is to be determined by the committee, and where different inferences of fact may be drawn from the evidence, it is not sufficient merely to embody the testimony in the report with a finding that the injury arose from and in the course of the employment. . . . It was the duty of the committee to make such specific and definite findings upon the evidence reported as would enable this Court to determine whether the general finding should stand. . . .

"The act should be construed liberally, to the end that rights of parties may be fully protected. On the other hand, it should not be so interpreted, or the procedure thereunder be of such a nature as to jeopardize the substantial rights of either party." *Doherty's case*, 222 Mass., 98, 109 N. E., 887; *Madden's case*, 222 Mass., 487, 111 N. E., 379; L. R. A., 1916-D, 1000; *Rozek's case*, 200 N. E., (Mass.), 903.

In *Madden's case, supra*, referring to a report containing only the conclusion of the committee, it is said: "It simply is a categorical repetition of the words in the statute by which the result is reached entitling the employee to compensation, without a statement of what the personal injury was, out of which grows the right to money payments."

In this proceeding the defendant interposes the defense of want of notice. The statute provides that the employee, or his representative, shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physicians' fees, nor to any compensation which may have accrued under the terms of this article prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or fraud

or deceit of some third person, but no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice, and the Commission is satisfied that the employer has not been prejudiced thereby.

Non constat the plaintiff sustained an injury by accident arising out of and in the course of his employment he is not entitled to recover unless he can show that he has complied with the provisions of the statute in respect to the giving of a notice, or has shown reasonable excuse to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby. No finding whatever is made in respect to this controverted issue.

There is evidence that the plaintiff suffered an injury growing out of an accident in the course of his employment. There is also evidence that he was at the time suffering from a former malady or injury. If he suffered an injury by accident in the course of his employment, was said injury independent of the old malady or did it merely aggravate the same? As to this there is no finding, which, however, is perhaps not near so important as a finding on the question of notice.

We can well understand how the Commission inadvertently overlooked the fact that they were reversing and not affirming the report of the individual Commissioner and were thereby led into a failure to find the facts. This, however, does not relieve the situation. The rights of the parties herein cannot be determined until there has been an adequate finding of facts. It therefore becomes necessary to vacate the judgment below and remand this proceeding to the Superior Court, to the end that an order may there be made, recommitting the cause to the Industrial Commission with directions to find the facts and adjudge the rights of the parties thereon.

Error and remanded.

I. E. CARPENTER AND WIFE, FANNIE CARPENTER, v. J. W. CARPENTER AND R. E. O'BRIANT AND WIFE, INEZ VIRGINIA O'BRIANT.

(Filed 2 February, 1938.)

1. Judgments § 1—

A judgment by consent is in effect the contract of the parties entered upon the records with the sanction and permission of the court, and it must be construed in the same manner as a written contract between the parties.

2. Mortgages § 2—Consent judgment in this case held not to constitute equitable mortgage, but to give plaintiffs only option to purchase.

Plaintiffs mortgagors instituted an action against the mortgagee and the purchasers at the foreclosure sale, attacking the validity of the mortgage. A consent judgment was entered in the action declaring that the mortgage was valid, and that the purchaser at the sale acquired a fee simple title "fully freed, released and discharged from any or all right, title or interest" of plaintiffs, but providing that should plaintiffs pay a stipulated sum to the purchasers within a specified time, the purchasers should execute deed to plaintiffs. *Held:* The terms of the consent judgment did not establish the relation of mortgagors and mortgagees between plaintiffs and the purchasers at the foreclosure sale, but gave plaintiffs merely an option to purchase the property within a given time, and upon their failure to tender the amount agreed within the time stipulated, plaintiffs lose any rights thereunder. *Bunn v. Braswell*, 139 N. C., 135, cited and distinguished upon the difference of the intent of the parties as gathered from the language of the consent judgment.

3. Vendor and Purchaser § 7—Usually purchaser must pay or tender payment within the time specified in order to enforce contract.

Options to sell land, being unilateral in their inception, are to be strictly construed in favor of the vendor, and it will be generally held that time is of the essence, and that payment or tender of the amount agreed within the time specified is necessary to convert the right to buy into a contract for sale.

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

APPEAL by plaintiffs from *Ervin, J.*, at October Civil Term, 1937, of DURHAM.

Action to have consent judgment declared a mortgage on, and for sale of land, and for accounting for rents therefrom.

At the trial below the parties, plaintiffs and defendants, waived trial by jury and consented that the court hear the evidence, find the facts, and render judgment thereon. The court made findings of fact substantially as follows: (1) In 1919 the plaintiffs bought from defendant J. W. Carpenter a tract of land and agreed to pay $2,300 therefor; that in 1923, when plaintiffs had paid $1,200 on the purchase price, J. W. Carpenter made a deed to them and they executed to him a mortgage deed to secure the balance of the purchase price. Upon default in the payment thereof, J. W. Carpenter foreclosed the mortgage, and on 16 September, 1932, sold the land, after due publication of notice of sale, at public auction, when the defendants R. E. O'Briant and wife became the purchasers, and pursuant thereto J. W. Carpenter as mortgagee executed deed to them. (2) The plaintiffs instituted an action in the Superior Court of Durham County against J. W. Carpenter and R. E. O'Briant to have the said mortgage deed declared to be a forgery. The case was tried on the single issue of forgery. The jury found

against the plaintiffs, and judgment was signed at the October-November Term, 1932, declaring the mortgage to be valid. (3) Thereafter, in 1932, the plaintiffs instituted another action in said court against J. W. Carpenter and R. E. O'Briant involving the same land and embracing the same allegations as were made in the first action, and upon issues joined, the case came on for trial at the March Term, 1934, before Judge Clayton Moore. During the progress of the trial a settlement was agreed upon between plaintiffs and defendants therein and a judgment dated 23 March, 1934, was entered with the consent of, and signed by, plaintiffs and defendants in person and their respective counsel, in which judgment the following pertinent recitals appear:

"And it further appearing to the court that all parties to this action have agreed upon a settlement of all the matters and things in controversy between them and have likewise agreed that this judgment shall be final adjudication of all issues or questions of fact pertaining to the validity of the mortgage from I. E. Carpenter and wife, Fannie Carpenter, to Jno. W. Carpenter, dated 13 April, 1923, recorded in Mortgage Book 56, p. 414, registry of Durham County, and shall likewise be a final adjudication of the indebtedness due thereon and the power of the said Jno. W. Carpenter to sell the land described therein; and it further being agreed by all parties hereto that the sale of said property under said mortgage on 16 September, 1932, by Jno. W. Carpenter, mortgagee, to R. E. O'Briant and wife, Inez Virginia O'Briant, was and is a valid and legal sale and the deed was made by the said Jno. W. Carpenter, mortgagee, to R. E. O'Briant and wife, Inez Virginia O'Briant, dated 5 October, 1932, duly registered in Deed Book 105, p. 602, registry of Durham County, was sufficient to, and did, convey to said R. E. O'Briant and wife, Inez Virginia O'Briant, the land described therein in fee simple fully freed and discharged of and from any and all right, title or interest therein of I. E. Carpenter, and/or his wife, Fannie Carpenter, and/or their heirs and assigns: It is now, therefore, expressly found as facts that all of the recitals contained in this judgment are true and are, by consent, finding of fact by the court." Thereupon Judge Moore, by consent of the parties aforesaid, adjudged that: (1) The sale under the mortgage deed is valid in all respects; (2) the deed from Jno. W. Carpenter, mortgagee, to R. E. O'Briant and wife, Inez Virginia O'Briant, conveyed in fee simple the land so sold to them and they are the owners thereof in fee simple "fully freed, released, and discharged from any and all right, title or interest of I. E. Carpenter and/or his wife, Fannie Carpenter, and/or their heirs"; and (3) "If the said I. E. Carpenter and wife, Fannie Carpenter, shall pay to R. E. O'Briant and wife, Inez Virginia O'Briant, within five (5) months from the date of this judgment, the sum of five hundred and fifty and no/100 ($550.00)

dollars, in cash and shall assume all taxes outstanding and unpaid against said property, including taxes for the year 1934, then and in that event the said R. E. O'Briant and wife, Inez Virginia O'Briant, are ordered to execute and deliver a deed to said I. E. Carpenter and wife, Fannie Carpenter, conveying said property to them in fee simple, said deed to be made without warranty as to title, or against encumbrances, but to convey all the right, title and interest in the property which is owned by said O'Briant and wife as herein above declared; however, in the event the said I. E. Carpenter and wife, Fannie Carpenter, shall fail to pay to said R. E. O'Briant and wife, Inez Virginia O'Briant, the said sum of $550.00 in cash, and assume the payment of all taxes unpaid against said property as above set out and declared, on or before five (5) months from date of this judgment, the said O'Briant and wife shall be not required or obligated to convey said property to said Carpenter and wife, Fannie Carpenter, and in that event either the said I. E. Carpenter and wife, Fannie Carpenter, and their heirs shall be forever precluded and barred from the right to have any conveyance made to them by said O'Briant and his wife, and said O'Briant and wife will be under no further obligation to convey said property to said Carpenter and/or his wife or to any of their heirs or assigns."

The court below in the instant action further finds as a fact that the plaintiffs did not tender to the defendants R. E. O'Briant and wife the $550.00 within the said period of 5 months from the date of said judgment, or at any other time, but did attempt, thereafter, on 26 September, 1935, by motion in the cause to compel the said defendants to execute deed to plaintiffs, which motion was heard before Judge Frizzelle, who made findings of fact and conclusions of law and rendered judgment adverse to plaintiffs, from which no appeal was taken; and that attorneys for plaintiffs stated in open court that plaintiffs relied upon judgment of 23 March, 1934, signed by Judge Moore.

Upon the foregoing findings of fact the court below concluded that the said judgment was intended to have, and has, the effect of a contract to convey, upon the conditions expressed therein, and was not intended to, and does not, constitute a mortgage, and is a valid and binding judgment.

From judgment in accordance with the findings of fact and conclusions of law the plaintiffs appealed to the Supreme Court, and assigned error.

Bennett & McDonald for plaintiffs, appellants.
Victor S. Bryant and C. V. Jones for defendants, appellees.

WINBORNE, J. Do the terms of the consent judgment of 23 March, 1934, establish the relation of mortgagors and mortgagees between the

plaintiffs and defendants, R. E. O'Briant and wife, purchasers at the mortgage foreclosure sale? This question is determinative of the case on appeal. The court below answered "No." With this we agree.

"A judgment or decree entered by consent is not the judgment or decree of the court so much as the judgment or decree of the parties, entered upon its record with the sanction and permission of the court, and being the judgment of the parties it cannot be set aside or entered without their consent." *Ellis v. Ellis,* 193 N. C., 216, 136 S. E., 350, and cases cited.

The judgment is, therefore, to be construed in the same way as if the parties had entered into the contract by writing duly signed and delivered. *Bunn v. Braswell,* 139 N. C., 135, 51 S. E., 927.

The parties have agreed and declared that the sale under the mortgage deed executed by plaintiffs to J. W. Carpenter is valid in all respects, and that R. E. O'Briant and wife, who purchased at that sale, acquired a fee simple title "fully freed, released and discharged from any or all right, title or interest" of plaintiffs. Their language is specific, plain and unambiguous. In their ordinary meaning the words used clearly express the intention of the parties. Nothing else appearing, R. E. O'Briant and wife are the owners in fee simple of the property in question.

The right given to plaintiffs to have a deed made to them by O'Briant and wife for the property is no more than an option to purchase within a given time. The judgment contains nothing which obligates the plaintiffs to buy. It is an unilateral agreement, "merely a right acquired by contract to accept or reject a present offer within a limited or reasonable time." *Mizell v. Lumber Co.,* 174 N. C., 68, 93 S. E., 436. "Contracts of this character, being unilateral in their inception, are construed strictly in favor of the maker, because the other party is not bound to performance, and is under no obligation to buy, and it is generally held that time is of the essence of such contract, and that the conditions imposed must be performed in order to convert the right to buy into a contract for sale." *Winders v. Kenan,* 161 N. C., 628, 77 S. E., 687.

The case of *Bunn v. Braswell, supra,* upon which the plaintiffs rely, is distinguishable from the case at bar. The consent judgment there declared "that the defendant has an equity to redeem the land" upon payment of a sum certain within a given time, otherwise to "stand absolutely debarred and foreclosed of and for any and all equity or other estate or interest in the premises." Speaking to the question, *Connor, J.,* said: "The term, 'right to redeem,' is appropriate to express the right, interest or estate of a mortgagor, and not a vendee. When we speak of the interest of one in or right to real estate as an 'equity of

redemption,' which is synonymous with 'right to redeem,' we understand that reference is made to the status of a mortgagor, not a vendee." There it was manifest that the defendant had an equity in the premises. But in the case at bar we do not have the relationship of debtor and creditor. The expressions "equity to redeem," "equity of redemption," "right to redeem," or words of like meaning, are not used here.

The judgment below is

Affirmed.

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

OTIS V. POWERS, ADMINISTRATOR, v. S. STERNBERG & COMPANY ET AL.

(Filed 2 February, 1938.)

Automobiles §§ 21, 18d: Negligence § 7—Intervening negligence of driver held to preclude recovery for death of guest on contention that defendants were negligent in parking truck on highway.

This action was instituted to recover for the death of plaintiff's intestate, who was killed while riding as a guest in an automobile. The evidence tended to show that as the driver of the car in which intestate was riding approached a curve he saw on the straightaway from the curve a car standing on one side of the highway and another car in the ditch on the other side of the highway, and a truck parked on the right side of the highway, partly on the hard surface, about 100 feet further on, that he passed the first two cars in safety, that he then saw another car approaching him from the opposite direction, put on his brakes and put his car into second gear in order to avoid hitting the approaching car, causing his car to skid on the ice-covered highway for some distance and hit the parked truck with such force as to knock it five or ten feet up the highway, and killing plaintiff's intestate. The evidence disclosed that the driver of the car had knowledge of the icy condition of the highway. Plaintiff instituted this action against the owner and the driver of the truck, contending that the negligence in parking the truck on the highway was the proximate cause of intestate's death. *Held:* Conceding that there was negligence in parking the truck, the evidence discloses that the active negligence of the driver of the car was the real, efficient cause of the accident, insulating defendants' negligence, and defendants' motions to nonsuit should have been granted.

APPEAL by defendants from *Clement, J.*, at April-May Term, 1937, of HENDERSON.

Civil action to recover damages for plaintiff's intestate's death, alleged to have been caused by the negligence of the defendants.

The record discloses that on the afternoon of 27 November, 1936, about 3:30 or 4:00 p.m., plaintiff's intestate met her death while riding as a guest in a Ford coupe with J. H. Bedenbaugh, his wife and plaintiff's intestate's sister. The car was owned and operated by J. H. Bedenbaugh, and all four were sitting on the one seat. They had driven from Greenville, S. C., to Asheville, N. C., on the morning of the same day and were on their return trip, when the fatal accident occurred just around a curve south of "Mountain Home" on the Asheville-Hendersonville highway.

The road was slick, with ice and snow on the pavement at nearly all the places where it was shaded by trees, and there was ice on the curve and straightaway leading from the curve to the scene of the fatal injury. 'Twas a clear, cold day, wind blowing, sun shining.

As Bedenbaugh approached the curve he saw a Chevrolet automobile standing on the left shoulder of the road, (2) a Packard car partly turned over in the ditch, on the opposite side, and a little further down, (3) a one-and-one-half-ton Chevrolet truck standing off, slightly on, or considerably on, the right-hand side of the concrete road about 100 feet of where the Packard was in the ditch, and about fifty feet north of an intersecting road. There was also present a number of people, perhaps a dozen, who had gathered about the scene of an accident in which these three motor vehicles were involved.

Bedenbaugh passed between the first two cars in safety, but as he approached the truck he saw a car, driven by Mrs. Henry Fisher, coming in the opposite direction; and in order to avoid a collision with her car, he applied his brakes, threw his car into second gear, which caused it to skid around on the ice sidewise and hit the rear of the truck with such force as to knock it quite a distance, from five to twenty-five feet, demolished his own car, and instantly killed plaintiff's intestate, who was sitting on his right, next to the door.

The evidence is in sharp conflict as to the speed of Bedenbaugh's car. Several witnesses say thirty or thirty-five miles an hour; others put it at fifty or sixty miles. Mr. Renfrow, witness for plaintiff, testified: "I saw the Ford coming; I knew it was slick there, and was afraid he was going to have a wreck." Bedenbaugh testified: "I hit the truck with my car so hard it was knocked from my car 5 or 10 feet up the road. . . . I could have stopped if there had been no ice there. . . . My car skidded 25 or 30 feet after I applied the brakes." Defendants' evidence is that it skidded much farther.

The truck belonged to S. Sternberg & Company and was being driven by Taft W. Wallis. The Chevrolet and Packard had "sideswiped" each other, and as a result the Chevrolet struck the left front fender and bumper of defendant's truck, mashed them down upon the tire and

incapacitated the vehicle, making it necessary for Wallis to lift them from the wheel, which he did, and then drove his truck 100 feet south to get it off the road. He stopped there, set the hand brake, placed the shift in low gear, and went back to adjust the accident with the drivers of the Chevrolet and Packard cars. They had been in conversation from five to fifteen minutes when the Ford came around the curve. Wallis testifies that he flagged Bedenbaugh, but his signal was ignored. This is denied by Bedenbaugh. There was a liquor bottle in Bedenbaugh's car. He admits having taken a drink early that morning, but says it had no influence upon him. He had liquor on his breath after the accident.

Both defendants demurred to the evidence and moved for judgment of nonsuit. Overruled; exception.

The case was submitted to the jury on the usual issues of negligence, contributory negligence and damages, which resulted in verdict and judgment for plaintiff.

Defendants appeal, assigning errors.

M. M. Redden and J. E. Shipman for plaintiff, appellee.
Smathers & Meekins for defendants, appellants.

STACY, C. J., after stating the facts: The case is controlled by the decision in *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108, which was rendered after the trial of the present cause in the Superior Court.

Even if it be conceded that defendant's truck was negligently parked on the side of the road, *Smithwick v. Pine Co.,* 200 N. C., 519, 157 S. E., 612; *Pender v. Trucking Co.,* 206 N. C., 266, 173 S. E., 336, which may be doubted on the facts revealed by the record, *Stallings v. Transport Co.,* 210 N. C., 201, 185 S. E., 643, still it would seem that the active negligence of the driver of the Bedenbaugh car was the real, efficient cause of plaintiff's intestate's death. *McNair v. Kilmer Co.,* 210 N. C., 65, 185 S. E., 481; *Beach v. Patton,* 208 N. C., 134, 179 S. E., 446; *Haney v. Lincolnton,* 207 N. C., 282, 176 S. E., 573; *Burke v. Coach Co.,* 198 N. C., 8, 150 S. E., 636; *Hughes v. Luther,* 189 N. C., 841, 128 S. E., 145.

There are a few physical facts which speak louder than some of the witnesses. The force with which the Bedenbaugh car ran into the truck, with its attendant destruction and death, establishes the negligence of the driver of the car as the proximate cause of the injury. *Baker v. R. R.,* 205 N. C., 329, 171 S. E., 342; *Hinnant v. R. R.,* 202 N. C., 489, 163 S. E., 555; *Herman v. R. R.,* 197 N. C., 718, 150 S. E., 361.

Nor is it material whether Wallis flagged Bedenbaugh. Every appearance indicated that he was running into a zone of danger which he

must have seen. *Burke v. Coach Co., supra.* Others saw it, if he did not. Moreover, he was familiar with the icy condition of the road, having passed over it only a few hours before. *Baker v. R. R., supra; Haney v. Lincolnton, supra.* He says himself that he could have stopped but for the ice.

The parking of the truck, if a remote cause, was not the proximate cause of the injury. *Craver v. Cotton Mills,* 196 N. C., 330, 145 S. E., 570. The conduct of Wallis would have produced no damage but for the active intervening negligence of Bedenbaugh. This exculpates the defendants. *George v. R. R.,* 207 N. C., 457, 177 S. E., 324; *Holt v. R. R.,* 201 N. C., 638, 161 S. E., 76.

Speaking to the applicable principle in *Kline v. Moyer,* 325 Pa., 357, 191 A., 43, 111 A. L. R., 406, the Pennsylvania Supreme Court formulated the following as a practicable and workable statement of the rule: "Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause. Where, however, the second actor does not become apprised of such danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties."

Tested by this criterion, it would seem that plaintiff's intestate's death, which was a most unfortunate occurrence, by correct interpretation of the record, is properly attributable to the heedless conduct of the driver of the car in which she was riding. *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761; 22 R. C. L., 132. His was not the "normal response" of a reasonably prudent man to the circumstances as they appeared, but rather the "extraordinarily negligent" act of a careless driver—in the language of the Restatement of Torts, sec. 447.

It is conceded that the instant record, like that of *Quinn v. R. R., post,* 48, presents a border-line case in which the rule is difficult of application. *R. R. v. Kellogg,* 94 U. S., 469.

The motion of defendants for judgment of nonsuit should have been allowed.

Reversed.

STATE v. A. E. SPIVEY.

(Filed 2 February, 1938.)

1. Criminal Law § 11—Common law misdemeanors punishable by imprisonment in penitentiary under C. S., 4173, are made felonies by C. S., 4171.

While an attempt to commit a felony is a misdemeanor, when such misdemeanor is infamous, or done in secrecy and malice, or with deceit and intent to defraud, it is punishable by imprisonment in the State's Prison, C. S., 4173, and is made a felony by C. S., 4171, and an attempt to commit the crime against nature, C. S., 4336, is infamous and is punishable by imprisonment in the State's Prison as a felony within the definition of C. S., 4171.

2. Attorney and Client § 12—Courts have inherent power to disbar attorneys found to be unfit and unworthy to practice law.

C. S., 204, 205, restricting the power of courts to disbar attorneys, were repealed by sec. 20, ch. 210, Public Laws of 1933, and the statutory method of disbarment, provided by the Act of 1933, is not exclusive, but to the contrary recognizes the inherent power of the courts, and the courts have jurisdiction to order the disbarment of an attorney upon his conviction of an infamous misdemeanor, converted to a felony by C. S., 4171 and 4173.

3. Attorney and Client § 15—Court has inherent power to order copy of disbarment order to be certified to State granting license by comity.

When a license to practice law issued by this State is revoked, it is proper for the court to direct that a copy of the judgment and order be certified to a state which had granted the attorney the right to practice therein by comity, the order not purporting to revoke the license granted by such other state.

4. Same—

An order disbarring an attorney upon his conviction of a felony is not additional punishment, but is entered as a protection to the public.

APPEAL by the defendant from *Parker, J.*, at May Term, 1937, of DURHAM. No error.

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

R. O. Everett and J. Grover Lee for defendant, appellant.

SCHENCK, J. The defendant was tried upon a bill of indictment charging him with a violation of C. S., 4336, in that he did unlawfully, willfully, and feloniously commit the abominable and detestable crime against nature with mankind, to wit, a thirteen-year-old male person. The jury returned a verdict of "Guilty of an attempt to commit a crime

against nature." The judge sentenced the defendant to confinement in the Central Prison for a period of not less than five nor more than eight years, and entered an order striking the name of the defendant from the roll of attorneys practicing before the courts of the State of North Carolina, and directing that his license to practice law be returned to the Supreme Court which issued it, and directing the clerk to certify a copy of the order of disbarment to the Court of Appeals of the State of Virginia, which had issued, by comity, a license to the defendant to practice law in the courts of the State of Virginia. To the judgment and order of the court the defendant reserved exceptions.

The defendant contends that since he was found guilty of only an attempt to commit the felony against which the statute enveighs, that he was convicted of only a misdemeanor and could not be sentenced to imprisonment in the Central Prison. With this contention we cannot concur.

While a criminal intent to commit a felony accompanied by some act done amounting to an attempt to accomplish the purpose, without doing so, is a misdemeanor, *S. v. Jordan,* 75 N. C., 27, C. S., 4173, reads: "All misdemeanors, where a specific punishment is not prescribed, shall be punished as misdemeanors at common law; but if the offense be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall be punished by imprisonment in the county jail or State's Prison for not less than four months nor more than ten years, or shall be fined."

The offense of which the defendant was convicted, namely, an attempt to commit a crime against nature, is infamous, and therefore could be punished by imprisonment in the State's Prison for a period of ten years or less.

C. S., 4171, reads: "A felony is a crime which is or may be punishable by either death or imprisonment in the State's Prison. Any other crime is a misdemeanor." Since the offense of which the defendant was convicted could be punished by imprisonment in the State's Prison, the offense is made a felony by C. S., 4173. "The Code, sec. 1097 (C. S., 4173), provided that misdemeanors created by statute, where no specific punishment was prescribed, should be punished as at common law; and further enacted that as to misdemeanors that were infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender might be punished by imprisonment in the county jail or penitentiary. This, by virtue of the subsequent Act of 1891, ch. 205 (C. S., 4171), made the classes of misdemeanors thus subjected to punishment in the penitentiary, felonies." *S. v. Mallett,* 125 N. C., 718.

The defendant contends that the court exceeded its authority when it ordered that the name of the defendant be "stricken from the rolls of

attorneys practicing before the courts of the State of North Carolina, and that his license to practice law in the State of North Carolina be returned to the Honorable, the Supreme Court of North Carolina, which issued it." With this contention we cannot concur.

As was said in *In the Matter of Ebbs,* 150 N. C., 44, "We do not entertain any doubt that, in the absence of restrictive legislation, the courts have an inherent power to strike from their rolls names of attorneys who are found by reason of their conduct unfit and unworthy members. The decisions to this effect are numerous and uniform." As was also said in *Haywood, Ex parte,* 66 N. C., 1, "The Act of 1871 takes from the court the common-law power to purge the bar of unfit members, except in specified cases, and it fails to provide any other power to be used in its place." The Act of 1871, which became C. S., 204 and 205, was repealed *eo nomine* by section 20, chapter 210, Public Acts 1933, and thereby the restriction upon the inherent power of the courts to strike from the rolls the names of unworthy attorneys was removed.

While the Act of 1933, being an act to organize The North Carolina State Bar, provides a method and procedure for disbarment of attorneys, such method is not exclusive, and does not fetter the courts in the exercise of their inherent power to disbar unworthy attorneys. To remove any doubt as to the method of disbarment of attorneys provided therein being a restriction upon the courts, the Act of 1933 was amended by section 4, chapter 51, Public Laws 1937, by adding thereto section 18a, which reads: "Nothing contained in this act shall be construed as disabling or bridging the inherent powers of the court to deal with its attorneys."

As was said by the present *Chief Justice* in discussing a proceeding brought under the Act of 1933, "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 re West,* 212 N. C., 189.

In the *Gorson case, supra,* the license to practice law was revoked of one who had fraudulently concealed from the court the fact that he had been disbarred by the courts of another state, and had fraudulently represented that he had studied law two years in this State to qualify himself to take the examination for license. In the *Winburn case, supra,* the license to practice law granted to Winburn was ordered revoked when it was made to appear that he had made false statements in his application for admission to practice in the Supreme Court of the District of Columbia and in the Supreme Court of the United States.

These proceedings were taken by virtue of the inherent power of the court to revoke a license to practice law of one who has shown himself unworthy of such license.

In the instant case it having appeared to the court that the defendant was guilty of an infamous misdemeanor, converted to a felony by C. S., 4171, and C. S., 4173, the court by virtue of its inherent power was authorized to order his name stricken from the rolls of attorneys and his license to practice law in the State of North Carolina returned to the Supreme Court which issued it.

The order of disbarment is not entered as additional punishment to the defendant, but as a protection to the public against an unworthy practitioner. *In the Matter of Ebbs, supra.*

The order of the court does not purport to revoke the license of the defendant to practice law in the State of Virginia, but simply directs that a copy of its judgment and order be certified to the Supreme Court of Virginia. This the court was authorized to do by virtue of its inherent power, since it was made to appear that the defendant had been granted license in the State of Virginia by comity to the State of North Carolina.

In the judgment and order of the Superior Court we find

No error.

ESTHER ANN QUINN, BY HER NEXT FRIEND, HELEN DOVER QUINN, v. ATLANTIC & YADKIN RAILWAY COMPANY ET AL.

(Filed 2 February, 1938.)

1. Automobiles § 21: Railroads § 9—

Defendant railroad company's motion to nonsuit on the ground that the evidence showed that the negligence of the driver of the car in which plaintiff was riding as a guest was the sole proximate cause of the accident, *held* properly overruled on authority of *Brown v. R. R.*, 208 N. C., 57.

2. Same: Negligence § 7—Negligence of third person which is sole proximate cause of injury insulates negligence of defendant.

Plaintiff was riding as a guest in an automobile and was injured in a collision between the car and a train at a grade crossing. The negligence of the driver of the car was admitted. The court instructed the jury that the negligence of the driver would constitute the sole proximate cause of the injury, exculpating the railroad company, if it were palpable and gross. *Held:* The instruction constitutes error entitling the railroad company to a new trial, since the negligence of the driver need not be palpable and gross in order to insulate the negligence of the railroad company, but would be sufficient for this purpose if it were the sole proximate cause of the injury.

3. Railroads § 7—

A traveler has the right to expect a train to give timely warning of its approach to a grade crossing, but absence of such warning does not warrant him in assuming that no train approaches, nor relieve him of the duty to keep a proper lookout.

4. Same—Fact that view of crossing is partially obstructed does not relieve driver of duty to keep proper lookout.

A railroad crossing is of itself a notice of danger, and a traveler is not relieved of his duty to keep a proper lookout by the fact that the view of approaching trains is partially obstructed, and an instruction that if the railroad company failed to keep its right of way adjacent to the crossing reasonably free from obstructions, or if the driver of the car in which plaintiff was riding as a guest was lulled into security by such failure, to answer the issue of the negligence of the railroad company in the affirmative, constitutes reversible error.

APPEAL by Atlantic & Yadkin Railway Company from *Armstrong, J.*, at May Term, 1937, of GUILFORD.

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

The record discloses that on the afternoon of 7 November, 1935, plaintiff and a student friend were riding as invited guests with C. W. Simmons in his Terraplane automobile when it was hit by a train operated by the defendant railway company at what is known as the Cornwallis Road crossing in the city of Greensboro, resulting in serious injury to plaintiff. The purpose of the trip was to give the young ladies a ride around the city. C. W. Simmons was at the time employed by defendant partnership, Oettinger Lumber Company.

It appears from the plaintiff's evidence that the train approached the crossing at a speed of 25 or 30 miles an hour without signals or warning of any kind; and that plaintiff's view was obstructed by reason of a fence, shrubbery, rosebushes and bus station on defendant's right of way.

It is also in evidence that C. W. Simmons stopped his automobile 40 or 50 feet from the crossing; neither saw nor heard the train; proceeded from this point, in second gear, at a speed of 12 to 15 miles an hour, and he says: "The first knowledge that I had of the presence of this engine and train was when I was on the track and it hit me. . . . That was the first time that I knew there was a train anywhere about."

The automobile was equipped with a radio, but was not turned on according to plaintiff's testimony. Defendant's evidence is, that immediately after the collision it was playing loud enough to interfere with conversations between persons standing near the car.

Defendant's evidence is also to the effect that the fence, shrubbery and rosebushes on defendant's right of way were not more than five feet high;

that the view from the highway was not obstructed, and that ample and timely warning was given of the train's approach.

Upon the call of the case for trial, the plaintiff suffered a voluntary nonsuit as to the defendant partnership, Oettinger Lumber Company, as C. W. Simmons was not about the business of his employers at the time of the injury. *Liverman v. Cline,* 212 N. C., 43, 192 S. E., 849; *Dickerson v. Refining Co.,* 201 N. C., 90, 159 S. E., 446.

After the evidence was in, the plaintiff announced that she would take a voluntary nonsuit as to C. W. Simmons. Defendant railway company objected; objection overruled; exception.

The defendant demurred to the evidence and moved for judgment of nonsuit. Overruled; exception.

The case was then submitted to the jury on the usual issues of negligence, contributory negligence and damages, which resulted in verdict and judgment for plaintiff.

Defendant railway company appeals, assigning errors.

B. L. Fentress, R. R. King, Jr., and Harry Rockwell for plaintiff, appellee.

Hobgood & Ward and Francis I. Anderson for defendant, appellant.

Stern & Stern for defendant Simmons.

STACY, C. J. The defendant's demurrer to the evidence or motion for judgment of nonsuit was properly overruled on authority of *Brown v. R. R.,* 208 N. C., 57, 179 S. E., 25, and *Bagwell v. R. R.,* 167 N. C., 611, 83 S. E., 814.

The court instructed the jury that if the negligence of Simmons was the sole proximate cause of plaintiff's injury, she could not recover of the railway company. In this, there was no error. *Powers v. Sternberg, ante,* 41. He further gave four tests to be applied in determining whether Simmons' negligence was the sole proximate cause of plaintiff's injury. One was: "The negligence of the driver must be palpable and gross." In this, there was error. *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108. It is true, the court was here quoting from *Hinnant v. R. R.,* 202 N. C., 489, 163 S. E., 555, but what was said in that case was addressed to the question of nonsuit, and not to matters for the jury. Moreover, the language may be inexact, or too strong, even on demurrer to the evidence. It is enough if the negligence of the driver be the sole proximate cause of the injury. *Powers v. Sternberg, supra; Herman v. R. R.,* 197 N. C., 718, 150 S. E., 361.

The court also instructed the jury that Simmons "had a right to assume that reasonable and timely notice of the approach of defendant's train would be given." And further: "It was the duty of the defendant

railway company to keep its right of way adjacent to the crossing reasonably free from shrubs, vines, trees, houses, fences and other obstructions so that the driver of the car in which the plaintiff was riding . . . would or could have had an unobstructed view of its railroad train approaching from the north, and if the defendant railway company negligently failed to keep said right of way reasonably free from obstructions, . . . or if the plaintiff was prevented from seeing it (the train) and was thereby lulled into security, . . . it would be your duty to answer the first issue 'Yes.' "

These instructions would seem to be more favorable to the plaintiff than any heretofore sanctioned by the decisions or as warranted by the circumstances of the case. We have said that a traveler has the right to expect timely warning, *Norton v. R. R.*, 122 N. C., 910, 29 S. E., 886, but the failure to give such warning would not justify the traveler in relying upon such failure or in assuming that no train was approaching. It is still his duty to keep a proper lookout. *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598; *Holton v. R. R.*, 188 N. C., 277, 124 S. E., 307. "A traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty." Fourth headnote, *Cooper v. R. R.*, 140 N. C., 209, 52 S. E., 932.

Nor has it been held that a traveler is entitled to "an unobstructed view" of a train as it approaches a crossing, or that he may be "lulled into security" by an obstructed view. *Moore v. R. R.*, 201 N. C., 26, 158 S. E., 556; *Perry v. R. R.*, 180 N. C., 290, 104 S. E., 673. "A railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence, and when the conditions are such that a diligent use of the senses would have avoided the injury, a failure to use them constitutes contributory negligence and will be so declared by the Court"—*Brown, J.*, in *Coleman v. R. R.*, 153 N. C., 322, 69 S. E., 251.

The pertinent rules applicable to crossing cases are set out in *Johnson v. R. R.*, 163 N. C., 431, 79 S. E., 690. They have been repeated in a number of later decisions. It would only be a matter of repetition to enumerate them here again. Suffice it to say the last of the foregoing instructions, which defendant assigns as error, is not supported by the rules there stated. This was not a blind crossing.

The evidence on behalf of the defendant is in sharp conflict with that of the plaintiff. It tends to show an unobstructed view and timely warning of the approaching train. This makes it a case for the jury.

The negligence of Simmons, the driver of the car, is not seriously disputed. *Eller v. R. R.*, 200 N. C., 527, 157 S. E., 800. Whether his

negligence was the sole proximate cause of plaintiff's injury is the battle-ground of debate. This case, we think, falls on one side of the line, while *Powers v. Sternberg, supra,* falls on the other. The two are border-line cases.

The remaining exceptions may not arise on another hearing, hence present rulings thereon are pretermitted.

The defendant is entitled to a new trial. It is so ordered.

New trial.

ELM & GREENE STREETS REALTY COMPANY v. JAMES DEMETRELIS, SUCCESSOR TO JAMES DEMETRELIS AND THEMIS DEMETRELIS, TRADING AS THE GREENSBORO HOTEL.

(Filed 2 February, 1938.)

1. Landlord and Tenant § 15c—Notice of intention to renew must be given as required by lease, as time is of the essence.

When a lease provides that lessee may renew the lease at its expiration for a stipulated period at the same rental upon giving notice of intention to so renew six months before the termination of the lease, the lessee looses all right under the extension agreement by failing to give notice within the time stipulated, time being of the essence of the option to renew.

2. Landlord and Tenant § 19—When lease terminates by its own terms on specified date, landlord is not required to give notice.

The lease in question terminated upon a specified date according to its own terms, but contained an extension agreement permitting lessee to renew for a specified term upon giving notice six months before termination and providing that upon failure of notice lessor should have the "right and privilege of declaring this contract terminated." *Held:* Upon failure of lessee to avail himself of the extension agreement, the lease terminated upon the date provided therein, and lessor was not obligated to take action or give notice of such termination.

3. Landlord and Tenant § 15c—Acceptance of sums after expiration of lease held not to waive notice required under renewal agreement.

The lease in question terminated by its own terms upon a specified date, but gave lessee option to renew upon giving notice six months prior to such date. Lessee failed to give the required notice of intention to renew, but lessor accepted sums monthly, in the same amount received as rent under a modification of the lease, for several months after the date specified in the lease for its termination. *Held:* The acceptance of such sums does not constitute a waiver by lessor of the notice of intention to renew, required of lessee under the extension agreement, since lessor was entitled to recover damages for the occupation of the premises after the termination of the lease and might accept in payment thereof the sums voluntarily paid by lessee.

4. Ejectment § 6—

When lessee claims right of possession solely upon a certain lease, and denies all other leases and tenancies, a directed verdict in lessor's favor in his action in summary ejectment is proper when the lease relied on by lessee had terminated according to its terms prior to the institution of the action.

5. Appeal and Error § 39d—

The court's rulings upon the evidence cannot be held prejudicial upon appellant's exceptions when rulings in accord with appellant's contentions could not change the result of the trial.

APPEAL by defendant from *Armstrong, J.*, at May Term, 1937, of GUILFORD. No error.

Brooks, McLendon & Holderness for plaintiff, appellee.
Younce & Younce for defendant, appellant.

SCHENCK, J. This is an action in summary ejectment heard in the municipal court of the city of Greensboro and upon appeal therefrom tried *de novo* in the Superior Court of Guilford County.

The defendant claims the right of possession of certain hotel property in the city of Greensboro by virtue of a written lease entered into on 27 February, 1925, by the Huntley-Stockton-Hill Company, as lessor, and the partnership of Demetrelis Brothers, composed of James Demetrelis and Themis Demetrelis, as lessees. The plaintiff Elm & Greene Streets Realty Company is the successor in title to the original lessor, and is the present owner of the premises. The defendant James Demetrelis is the surviving partner of the original lessees, the other partner, Themis Demetrelis, being dead.

The lease contains the following:

"It is mutually agreed:

"First. That this lease shall be for a period of ten (10) years, with the privilege of renewing for an additional five (5) years on such terms as are hereinafter set out.

. . . . . .

"Eleventh. If the lessees wish to avail themselves of an extension for another five (5) years at the rent hereinafter provided for, then and in that event it is specifically agreed that the lessees must, and they are hereby required to give the lessor a written notice of their intention and purpose to avail themselves of renewal or extension rights, said notice must be sent by registered mail and addressed to the owner of said building, at Greensboro, N. C., at least six (6) months before the expiration of the ten (10) year period covered by this lease; and the failure on the part of the lessees to give this written registered mail notice to the owner of said building shall, and does hereby give the lessor the right

and privilege of declaring this contract terminated at the end of the ten (10) years. If, however, said written, registered mail notice is given to the owner of said building six (6) months prior to the expiration of the ten (10) year period, and if in said notice the said lessees ask for a renewal covering a period of five (5) years as herein contemplated, then and in that event the lessees may have an extension of five (5) years, making fifteen (15) years in all, at the same rate, or $700.00 per month, as per terms heretofore set out."

It is admitted that neither the defendant nor his deceased partner has ever given to the plaintiff any written notice of their intention or purpose to avail themselves of renewal or extension rights. It is also admitted that the plaintiff gave no notice to the defendant, or his deceased partner, on 27 February, 1935, of the termination of the lease.

There is evidence tending to show that prior to 27 February, 1935, by mutual agreement, the monthly rental was lowered and raised from time to time as business was good or bad, and that the defendant has remained in possession of the premises since 27 February, 1935, and has paid during a portion of this time $400.00 per month and the remaining time $500.00 per month, which has been accepted by the plaintiff.

On 16 January, 1937, the plaintiff gave the defendant notice to quit possession on 1 March, 1937, and upon failure of the defendant so to do, plaintiff instituted this action on 2 March, 1937.

The trial judge instructed the jury, in effect, that if they found the facts to be as shown by all of the evidence, they should answer the first issue in the affirmative, thereby finding that the plaintiff was the owner and entitled to the immediate possession of the premises. This instruction is the subject of defendant's principal exceptive assignment of error.

It is the contention of the appellant, first, that it was necessary under the renewal or extension clause of the lease for the plaintiff to have given the defendant notice of the termination of the lease on 27 February, 1935, and the failure to give such notice was a waiver of the right to terminate the lease at that time. With this contention we cannot agree. A reading of the lease clearly indicates that it was for a period of ten years from 27 February, 1925, with an option in the lessees for a renewal or extension for five years, the exercise of said option to be signified by notice from the lessees to the lessor in a certain manner "six months before the expiration of the ten-year period covered by this lease." Time was of the essence of this option and the lessees not having availed themselves thereof within the time fixed lost the opportunity to do so. *Oil Co. v. Mecklenburg County,* 212 N. C., 642, and cases there cited.

While the extension clause of the lease gives to the lessor, upon failure of notice from the lessee, "the right and privilege of declaring this contract terminated at the end of the ten years," we do not concur in the

contention of the defendant that any action on the part of the lessor was thereby rendered necessary to terminate the lease, since the lease by the force of its own terms terminated at the expiration of ten years in the absence of any notice from the lessees of their desire to avail themselves of the extension privilege.

It is further contended by the defendant that the payment by him after 27 February, 1935, of $400.00 per month until June, 1936, and $500.00 per month from then until the time of the trial, and the acceptance of these payments by the plaintiff constituted a waiver of the notice required by the renewal or extension clause of the lease. With this contention we cannot concur. Upon the expiration of the lease on 27 February, 1935, the plaintiff was entitled to recover damages for the occupation of the premises thereafter, and therefore it could receive payment for such occupation voluntarily without the effect of continuing the lease. *Vanderford v. Foreman,* 129 N. C., 217; *Mauney v. Norvell,* 179 N. C., 628.

The defendant claims the right of possession solely upon the lease of 27 February, 1925, and denies the contention of the plaintiff that he is occupying the premises under a subsequent lease of from month to month or at sufferance. Since the lease under which he claims expired by its own terms on 27 February, 1935, the instruction of his Honor, upon which defendant bases his exception, was correct.

We have examined the exceptions reserved to the rulings of the court upon certain evidence and find no prejudicial errors therein. Rulings in accord with defendant's contentions could not have changed the result of the trial.

The judgment of the Superior Court that the plaintiff is the owner and entitled to the immediate possession of the premises and that it recover of the defendant the amount agreed upon by the parties and costs of the action is affirmed, since on the record we find

No error.

A. LESLIE HARWOOD, JR., ADMINISTRATOR, v. A. J. MAXWELL, COMMISSIONER OF REVENUE.

(Filed 2 February, 1938.)

Taxation § 28—Federal taxes not deductible under provisions of State statute may be computed according to later Federal amendment changing rates.

It is proper for a State statute levying inheritance and transfer taxes to refer to a Federal statute in allowing deductions for amounts paid the Federal Government in estate taxes and in excepting from deductible

amounts additional taxes levied by the Federal Government under a Federal Act effective on a certain date, and a taxpayer relying on the State statute for the right to make deductions may not complain that additional Federal taxes not deductible, ch. 445, sec. 7, Revenue Act of 1933, were computed according to an amendment of the Federal Act changing the schedule of rates but depending upon the original act for the tax-levying provisions, although the amendment was enacted subsequent to the enactment of the State Revenue Act, since in such case the additional Federal estate taxes are levied by the original Federal Act, although the amount thereof is computed under the amendment changing the schedule of rates.

APPEAL by plaintiff from *Johnston, J.*, at May-June Term, 1937, of BURKE.

Civil action to recover back alleged overpayment of inheritance tax.

The facts are not in dispute. On 21 October, 1934, J. Frederick Kistler, a resident of North Carolina, died domiciled in Burke County, and a few days thereafter, the plaintiff duly qualified as administrator of his estate.

The plaintiff filed with the defendant Commissioner of Revenue an inheritance and estate tax inventory, showing a deduction of $3,244.12 tentative estate taxes levied by the Federal Government under the 1926 Federal estate tax law, which is not in dispute.

Thereafter, the plaintiff paid to the Federal Government "additional estate taxes," amounting to $57,017.65, under "Acts of Congress applicable thereto," and proceeded to claim as a deduction from decedent's gross estate the amount thus paid to the Federal Government as additional estate taxes.

This deduction was disallowed, whereupon on 1 June, 1936, the plaintiff paid under protest $7,927, the amount of taxes represented by the difference between allowing and disallowing the deduction in question, and proceeded agreeably to the terms of the statute, to preserve his rights, and this action is to recover back the alleged overpayment with interest and costs.

From judgment dismissing plaintiff's action, he appeals, assigning error.

Harwood & Spalding and Mull & Patton for plaintiff, appellant.

Attorney-General Seawell and Assistant Attorneys-General McMullan and Bruton for defendant, appellee.

STACY, C. J. The case presents a question of statutory construction.

It is provided by the Revenue Act of 1933, ch. 445, sec. 7, Public Laws 1933, that in determining the clear market value of property taxed under the inheritance tax article, "the following deductions, and no

others, shall be allowed: . . . Federal estate taxes, except additional estate taxes levied by Act of Congress, effective 6 June, 1932."

It is agreed that the Federal taxes here in question, which plaintiff claims the right to deduct from decedent's gross estate, were "additional estate taxes" levied by "Acts of Congress applicable thereto."

The schedule of additional estate taxes levied by Act of Congress, effective 6 June, 1932, was changed by amendment effective 11 May, 1934, and a new schedule substituted therefor. The tax-levying provision of the 1932 act, however, was not reënacted, but remained unchanged, and the effectiveness of the 1934 schedule is dependent upon the tax-levying provision of the 1932 act. The taxes in question were computed under the 1934 schedule, as plaintiff's intestate died after its adoption.

The controversy arises over whether these additional estate taxes were levied by Act of Congress effective 6 June, 1932, within the meaning of the Revenue Act of 1933.

It is the contention of the plaintiff that the additional estate taxes here in question were levied by Act of Congress effective 11 May, 1934. The defendant contends that they were levied by Act of Congress effective 6 June, 1932, the rate being determined by the 1934 amendment. The question, then, becomes quite a practical one in computing the amount of inheritance tax due under the State law. If plaintiff's contention be correct, decedent's gross estate is to be reduced by the amount thus paid to the Federal Government as additional estate taxes. If defendant's contention be correct, such reduction is not to be made. This much is conceded.

It will be observed that the 1934 amendment is not complete within itself. It simply changes the schedule of rates in the 1932 act, and is entirely dependent upon the original act for its revenue-producing force and effect. Hence, it seems proper to say that the additional estate taxes here in question were levied by Act of Congress effective 6 June, 1932. *U. S. v. La France,* 282 U. S., 571. It was by this act that the taxes were levied, the rate alone being affected by the amendment. *Robinson v. Goldsboro,* 122 N. C., 211, 30 S. E., 324. In other words, where the schedule of rates in a revenue act is changed by amendment, with the force and effect of the law left dependent upon the tax-levying clauses in the original act, it is proper to say that the taxes levied thereunder, while computed according to the revised schedule, are levied by the original act. 25 R. C. L., 907; 59 C. J., 1096.

The appropriateness of this kind of legislation, within constitutional bounds, was considered in the case of *Hagood v. Doughton,* 195 N. C., 811, 143 S. E., 841, and what is there said may be regarded as answer

to plaintiff's challenge here. Indeed, plaintiff's right to any deduction depends upon the validity of the legislation in question. His objection is not to the principle of cross reference used in the statute, but to what he calls an extension of the exception contained therein. Note, 63 A. L. R., 1096. We think the action must fail.

Affirmed.

ELIZABETH ROOKS v. DR. W. H. BRUCE AND D. C. MOREHEAD.

(Filed 2 February, 1938.)

1. Assault and Battery § 5—

Nonsuit *held* correctly allowed as to one defendant upon plaintiff's testimony that the defendant did not curse, abuse, or frighten plaintiff, but merely took hold of his codefendant.

2. Trespass § 1—

Nonsuit on cause of action for trespass *held* proper upon failure of allegation and evidence of trespass other than for an assault, the motion to nonsuit on the cause of action for assault being denied.

3. Appeal and Error § 39b—

Exceptions to rulings upon the evidence relating to damages become immaterial when the answer to the first issue establishes that plaintiff was not injured by wrongful act of defendant.

4. Trials § 7—

The court has discretionary power to allow counsel for defendant to speak privately to defendant while he is a witness on the stand.

5. Trial § 34—

Objections to the statement of the contentions of a party must be made in apt time in order for assignments of error based thereon to be availing on appeal.

6. Appeal and Error § 28—

An assignment of error for that the charge failed to state in a plain and correct manner the evidence and to explain the law arising thereon as required by C. S., 654, without pointing out its deficiencies, is too general.

7. Appeal and Error § 37d—

The verdict of the jury on conflicting evidence is conclusive in the absence of prejudicial error upon the trial.

APPEAL by plaintiff from *Bivens, J.*, at September Term, 1937, of FORSYTH. No error.

F. W. Williams for plaintiff, appellant.
Efird & Liipfert for defendant Bruce, appellee.
Price & Jones for defendant Morehead, appellee.

SCHENCK, J. This is an action to recover damages for injuries alleged to have been inflicted by an unlawful and willful assault upon the plaintiff by the defendants.

The appellant assigns as error the granting of a motion for judgment as in case of nonsuit as to the defendant Morehead, lodged when the plaintiff introduced her evidence and rested her case. C. S., 567. This assignment of error cannot be sustained. The plaintiff in her own testimony says: "Morehead did not curse or abuse me at all. The only thing Morehead did was to take hold of Dr. Bruce. . . . Morehead didn't scare me."

The appellant assigns as error the granting of a motion for judgment as in case of nonsuit as to the defendant Bruce "on the action charging trespass" lodged when the plaintiff had introduced her evidence and rested her case. C. S., 567. This assignment cannot be sustained. There is neither allegation nor evidence of a cause of action for trespass other than that for an assault. The motion for judgment as of nonsuit as to the defendant Bruce of the action for an unlawful and willful assault was denied.

There was evidence for the plaintiff tending to show that the defendant Bruce entered the place of business of the plaintiff, a hair-dressing establishment, and threatened plaintiff by cursing her and by placing his hand on his hip-pocket, and attempted to strike the plaintiff, and thereby caused her to stop her work and leave the place at which she was working.

There was evidence for the defendant tending to show that he did not enter the place of business of the plaintiff, did not threaten her, and did not attempt to strike her.

The court submitted the following issues:

"1. Did the defendant unlawfully and wrongfully assault the plaintiff, as alleged in the complaint?

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

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

The jury answered the first issue in the negative and left the remaining issues unanswered.

From judgment accordant with the verdict the plaintiff appealed, assigning errors.

The first group of assignments of error are to the rulings upon the evidence which relate to the measure of damages. If such rulings were erroneous they were rendered harmless by the answer to the first issue. *Brewer v. Ring and Valk,* 177 N. C., 476.

The appellant assigns as error the fact that the court permitted counsel for defendant to speak privately to the defendant while he was a

witness on the stand. It appears that the court granted this request of counsel in its discretion. In this there was no error, especially since it does not appear what counsel said to the witness, his client. "The court below is given large discretionary power as to the conduct of a trial. *Bowman v. Howard,* 182 N. C., 662; *Banking Co. v. Walker,* 121 N. C., 115; *Shober v. Wheeler,* 113 N. C., 370; *S. v. Anderson,* 101 N. C., 758; *Cheek v. Watson,* 90 N. C., 302; and *Brooks v. Brooks, ibid.,* 142. This discretion frequently has the effect of shortening trials and arriving at the main gist of the case." *May v. Menzies,* 186 N. C., 144.

The only assignments of error as to the charge are to the statement of certain contentions of the defendant. The objections upon which these assignments are based were made for the first time upon appeal. They came too late. They should have been made at the time the charge was delivered to avail the appellant. *S. v. Steele,* 190 N. C., 506, and cases there cited.

The assignment of error that the court failed to state in a plain and correct manner the evidence and to explain the law arising thereon as required by C. S., 564, without stating in what manner the charge falls short of the requirements is too general and cannot be sustained. *Jackson v. Lumber Co.,* 158 N. C., 318; *Davis v. Keen,* 142 N. C., 496; *Simmons v. Davenport,* 140 N. C., 407.

The jury heard the evidence, observed the witnesses on the stand, and, under a charge free from prejudicial error, answered the first issue in favor of the defendant. It may have been that in the conflict of evidence the rule as to the burden of proof was determinative of the jury's finding. However this may be, the jury having spoken, we are not at liberty to reverse their finding in the absence of prejudicial error.

No error.

R. L. SING, ON BEHALF OF HIMSELF AND OTHER TAXPAYERS OF THE CITY OF CHARLOTTE WHO MAY DESIRE TO JOIN WITH HIM, v. CITY OF CHARLOTTE, THE CITY COUNCIL OF THE CITY OF CHARLOTTE, AND CLAUDE L. ALBEA, HERBERT H. BAXTER, JOHN F. DURHAM, T. V. GRISWOLD, W. N. HOVIS, W. ROY HUDSON, H. H. HUNTLEY, A. PARKS LITTLE, J. S. NANCE, L. R. SIDES, AND JOHN L. WILKINSON, AS MEMBERS OF SAID COUNCIL, AND BEN E. DOUGLAS, MAYOR.

(Filed 2 February, 1938.)

1. Taxation § 4—

What are necessary municipal expenses for which a tax may be levied without a vote is a question for the courts.

2. Same—

The courts determine what class of expenses are necessary expenses of a municipality, and the governing body of the municipality determines when such expenses are necessary for that particular locality.

3. Same—

Whether a given expense is a necessary expense of a municipality is to be determined by the courts by ascertaining whether the purpose of the expense partakes of a governmental nature or purports to be an exercise by the municipality of a portion of the State's delegated sovereignty.

4. Same—

An airport is not a necessary expense of a municipality.

5. Same—

A municipality may levy taxes for necessary expenses up to the constitutional limitation without a vote of the people and without legislative authority.

6. Same: Taxation § 3—

A municipality may levy taxes for necessary expenses in excess of the constitutional limitation by special legislative authority without a vote of the people. Constitution of North Carolina, Art. V, sec. 6.

7. Same—

A municipality may not levy a tax for other than necessary expenses, either within or in excess of the constitutional limitation, without a vote of the people under special legislative authority.

8. Taxation § 4—

Since an airport is not a necessary municipal expense, a city may not levy a tax for the purpose of operating, maintaining, and improving a municipal airport without submitting the question to a vote.

9. Same—Municipality may not levy tax directly or indirectly for purpose of improving municipal airport without a vote.

Since a municipality may not levy a tax directly for the purpose of operating, maintaining, and improving an airport without a vote of the people, Art. VII, sec. 7, it may not levy a tax for a contingent fund and thereafter in the same year appropriate money from the contingent fund thus created for the purpose of operating, maintaining, and improving the airport, since it may not do indirectly what it is without power to do directly. *Adams v. Durham*, 189 N. C., 232, cited and distinguished.

10. Municipal Corporations § 43—Municipal Fiscal Control Act prohibits city making appropriation and levying tax for common contingent fund.

Under provision of the County Fiscal Control Act as applied to cities and towns (secs. 65, 67, 71, of ch. 60, Public Laws of 1931; C. S., 2969 [n]), the governing body of a municipality is required to appropriate and make tax levy for each fund or function separately, and it is without authority to make an appropriation and levy a tax for a common contingent fund, and while it may appropriate an additional five per cent for emergency purposes for each fund for which it has authority to levy a tax, which becomes a part of the fund requirement to be covered by a subse-

quent tax levy, it may not make a transfer from one fund to another except from the general municipal expense fund. Ch. 146, Public Laws of 1927 (C. S., 1334 [53] to [76]).

11. Same—Municipality may not appropriate money from contingent fund for purpose of operating, maintaining, and improving airport.

By provision of the County Fiscal Control Act as applied to municipalities, a city may not levy a tax for a contingent fund and thereafter appropriate from the fund so created a sum for the purpose of operating, maintaining, and improving the municipal airport, especially where there is no authority for an "airport fund" in the appropriation resolution.

DEVIN, J., concurring.

BARNHILL, J., concurring.

SCHENCK, J., concurs in the concurring opinion of *Barnhill, J.*

CLARKSON, J., dissenting in part and concurring in part.

APPEAL by defendant from *Warlick, J.*, at November Term, 1937, of MECKLENBURG.

Action for injunction against appropriating funds and levying taxes for operation, maintenance, and improvement of municipal airport without a vote of the majority of the qualified voters.

The plaintiff is a resident and taxpayer of the defendant city of Charlotte, a municipal corporation, of which the codefendants are and constitute the governing body.

By consent of parties, a jury trial being waived, the court below finds pertinent facts substantially as follows: At an election held in the city of Charlotte on 3 November, 1936, the issuance of $50,000 in bonds of said city for the purpose of purchasing a tract of land for a municipal airport, and the levying of a sufficient tax on taxable property therein to pay the principal of and interest on said bonds were approved by a vote of the majority of the qualified voters in said city. Thereafter the governing body of the city purchased approximately 450 acres of land outside of, but near, the limits of the city. The airport constructed thereon with Federal Government funds was completed and turned over to the city about 1 June, 1937, for maintenance and operation.

An airport commission of three was appointed under authority of an act of the General Assembly of 1937, with power to appoint a manager for said airport and to fix his compensation to be paid from the proceeds derived from the operation of the airport, and to establish and collect fees, tolls, and charges from those using said airport and its facilities, and to deposit all proceeds from the said airport from any source in separate account, to be known as the "Airport Fund," of which the treasurer of the city is the treasurer. Disbursements from said fund are authorized to be made on warrant signed by the treasurer, mayor, city manager, and chairman of the airport commission. The airport com-

mission is given authority to employ an assistant manager and such other employees as they may deem necessary for the proper maintenance and operation of the airport.

In the budget for the fiscal year beginning 1 July, 1937, the governing body of and for the city set up and appropriated, and levied taxes to raise, respectively, both (1) the sum of $25.00 to be expended toward the maintenance of the municipal airport, and (2) a sum, the amount of which is not shown in the record on appeal, but in excess of $5,000, and stated by counsel to be $20,000, as a contingent fund.

Thereafter, on 3 November, 1937, the governing body of the city passed an ordinance in which there appears in part the following:

"Whereas, the said commission has been unable to derive sufficient revenue for the operation, maintenance, and upkeep of the said airport in a proper and adequate manner; and whereas, additional hangar facilities are needed at said airport. Now, therefore, be it ordained by the city council in regular session that $5,000 be and the same hereby is appropriated from the contingent fund of the city and transferred to the airport fund to be used in the operating cost, maintenance, and further improvement of the facilities of said airport, said fund to be disbursed in accordance with the provisions of the legislative act authorizing said airport commission, and known as chapter 559 of the Private Laws of 1937."

The court below further finds as a fact: "That the $5,000 referred to in the pleadings transferred from the contingent fund to the airport fund was money derived from taxation and was not an unappropriated surplus fund derived from other sources."

Upon these findings of fact the court below concluded as a matter of law that the city of Charlotte is without authority to appropriate and expend (1) The sum of $25.00 set out in the budget for the purpose of operating and maintaining a municipal airport, and (2) the sum of $5,000 for that purpose under the provisions of an ordinance by the governing body, "without the question being submitted to and approved by a majority of the qualified voters. Art. VII, sec. 7, of the North Carolina Constitution."

Thereupon judgment was entered enjoining and restraining the defendants, and each of them, from expending any sum for the construction, operation, and maintenance of the municipal airport until the question of levying of such taxes has been submitted to and approved by a majority of the qualified voters of said city of Charlotte. The defendant appealed therefrom to the Supreme Court, and assigned error.

J. L. DeLaney for plaintiff, appellee.
Basil M. Boyd for defendants, appellants.

WINBORNE, J. Two questions arise on this appeal: (1) Are the operation, maintenance, and improvement of a municipally owned airport necessary expenses within the meaning of Art. VII, sec. 7, of the Constitution of North Carolina? (2) Can the governing body of a municipality make an appropriation and levy a tax for a contingent fund, and when the tax money is collected transfer it to, and use it for, a purpose for which such body is without authority to levy a tax?

Both questions are answered in the negative. The action of the city council as the governing body of the city of Charlotte in making the appropriations and tax levies is violative of the provisions of both Art. VII, sec. 7, of the State Constitution and the County Fiscal Control Act applicable to cities and towns.

First: "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 necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." Art. VII, sec. 7, of the Constitution of North Carolina; C. S., 2691.

In the recent case of *Palmer v. Haywood County,* 212 N. C., 284, 193 S. E., 668, it is said: "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. Mount 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.'"

When thus tested, an airport is not a necessary governmental expense.

The subject of the authority to levy taxes has been discussed in numerous cases. The law is well settled and may be summed up:

(1) "For necessary expenses. The municipal authorities may levy up to the constitutional limitation without a vote of the people and without legislative permission;

(2) "For necessary expenses, they may exceed the constitutional limitation by special legislative authority without a vote of the people. Constitution, Art. V, sec. 6.

(3) "For other than necessary expenses a tax cannot be levied either within or in excess of the constitutional limitations except by a vote of the people under special legislative authority." *Palmer v. Haywood County, supra; Walker v. Faison,* 202 N. C., 694, 163 S. E., 875; *Glenn v. Comrs.,* 201 N. C., 233, 159 S. E., 439; *Burleson v. Board of Aldermen,* 200 N. C., 30, 156 S. E., 241; *Greene County v. R. R.,* 197 N. C., 419, 149 S. E., 397; *Comrs. v. Assell,* 194 N. C., 412, 140 S. E., 34; *Henderson v. Wilmington, supra; Herring v. Dixon,* 122 N. C., 420, 29 S. E., 368.

Not being a necessary expense, the levy of a tax directly or indirectly to be expended for the purpose of the operation, maintenance and improvement of a municipal airport without a vote of a majority of the qualified voters, is violative of Art. VII, sec. 7, of the Constitution of North Carolina. While the good faith of the governing body of the city of Charlotte is not here impugned, the effect is no different in an indirect appropriation and tax levy than in a direct appropriation and tax levy for an unauthorized purpose. The money collected pursuant to a tax levy for an undesignated purpose under the name of "contingent fund" is, nevertheless, money derived from an *ad valorem* tax. Giving it the name of "contingent fund" does not strip it of its qualities of tax money, nor can it thereby be transformed magically into the character of money "in the treasury" or "money on hand" unappropriated and subject to be used for a purpose for which a direct tax cannot be levied. This patently would authorize to be done indirectly that which the Constitution forbids to be done directly.

It will be noted that the ordinance appropriating the $5,000 in question is not predicated upon any finding or determination of the governing body that it is for a necessary governmental expense. The resolution is based upon the following premises:

"Whereas, the said commission has been unable to derive sufficient revenue from the operation, maintenance, and upkeep of the said airport in a proper and adequate manner; and

"Whereas, additional hangar facilities are needed at said airport."

The case of *Adams v. Durham,* 189 N. C., 232, 126 S. E., 611, is distinguishable from the instant case. There the city had on hand a fund derived from the sale of a municipal building, and no question of taxation or credit was involved. It is there specifically pointed out that "in no event shall further liability be imposed on the city" in the construction of the new building. Here, we are dealing with a question of taxation and the use of a contingent fund derived from a tax levy. The Constitution is not to be circumvented by the simple device of raising a contingent fund by taxation and then using it in the promotion of objects for which a direct tax could not be levied.

Second: The County Fiscal Control Act (chapter 146, Public Laws 1927; C. S., 1334 [53], 1334 [76]), which provides the machinery, charts the course, and prescribes the limitations for the administration of the fiscal affairs of counties, including the budgeting for appropriations and levying of taxes to cover same, is made applicable to cities and towns by sections 65 and 67 to 71 of chapter 60 of the Public Laws of 1931.

Sec. 65 thereof, C. S., 2969 (n), reads: "All cities and towns shall be subject to and be governed by all of the provisions of the County Fiscal Control Act and acts amendatory thereof and supplemental thereto, including acts ratified at the present session of the General Assembly, except as herein otherwise provided or except as the context shows that it is not intended that such acts should be applicable to cities and towns."

Section 74 reads: "The provisions of this act shall apply to all counties, cities, and towns in this State, regardless of any provision to the contrary in any special or local act heretofore enacted."

The record fails to disclose any allegation, admission, or finding of fact that the city of Charlotte comes, or is operating within the provisions of the exceptions of the said section 65.

In section 68 there are defined the funds required for cities and towns for each of the functions of municipal government. It is there prescribed, when read in connection with the County Fiscal Control Act, that each fund for each function shall be stated separately in preparing the budget estimate for appropriation, and shall be so set up in the appropriation resolution and tax levy.

Analyzing pertinent sections of County Fiscal Control Act, as applied to cities and towns, we find that: (1) The municipal accountant shall prepare and submit to the governing body not later than the first Monday in July a "budget estimate" of: (a) The amounts necessary to be

appropriated for the next ensuing fiscal year for the different objects of the municipality, listing each object of disbursement under the appropriate class of function as defined in section 68 of chapter 60, Laws of 1931, "which estimate shall include the amount of any deficit in any fund, and *may include an emergency estimate for each fund not greater than FIVE per cent in excess of other estimates for such fund"*; (b) an itemized estimate of the revenue to be available during the ensuing fiscal year, separating revenue from taxation from revenue from other sources, classifying the same under proper funds as defined in said section 68 of chapter 60, Public Laws 1931; and (c) an estimate of the amount of unencumbered and surplus revenues of the current fiscal year in each fund. C. S., 1334 (57); C. S., 2969 (o); C. S., 2969 (p).

(3) Then the governing body, not later than the fourth Monday in July, shall adopt and record on its minutes an appropriate resolution, which shall make appropriation for the several purposes of the municipality, upon the basis of the estimates and statements submitted by the municipal accountant such sums as the governing body may deem sufficient and proper, whether greater or less than the recommendation of the budget estimates; "Provided, however, that '(d) no appropriation shall be made in excess of the amount which may be raised under any constitutional or statutory limits of taxation.'" C. S., 1334 (59). This resolution becomes the chart for the municipal accountant and municipal treasurer in disbursing the city funds. C. S., 1334 (60).

(4) Before any levy of taxes is made the municipal accountant shall submit to the governing body a supplemental budget showing: "(a) The amount of any increase or decrease in each item of (1) deficits and (2) unencumbered balances and (3) surplus revenues as reported by him in the budget estimate, and (b) the amount of miscellaneous revenues collected in the preceding year from sources other than taxation, this amount to be separately classified as to funds and functions, and (c) an estimate of the amount of taxes for the current fiscal year which will not be collected in the same year. Upon the submission of the figures showing increase or decrease in deficits, the appropriation resolution shall be deemed automatically amended by adding such increase to or subtracting such decrease from the amount appropriated for the fund or function to which such deficit pertains. . . ."

(5) Thereafter, and not later than Wednesday after the third Monday in August, the governing body, by resolution to be recorded in its minutes, shall levy upon all the taxable property of the city such rate of tax as may be necessary to produce: "(a) The sum appropriated and (b) the amount of the supplemental budget estimate of taxes which will not be collected in the current fiscal year, after taking into consideration the figures contained in the budget estimates and supplemental

budget showing surplus revenues and unencumbered balances carried over from the preceding fiscal year and the estimated miscellaneous revenues from other sources than taxation." C. S., 1334 (63).

(6) No appropriation made by the appropriation resolution, except an appropriation for general municipal expenses, shall be transferred from one fund to another fund, and no appropriation for general municipal expenses shall be transferred to any fund of any subdivision of the municipality, or *vice versa.* C. S., 1334 (64).

(7) Then follows provisions prescribing restrictions and limitations for contracting with reference to and disbursing the funds—with penalties for violations of the act. C. S., 1334 (65) to 1334 (72), under the County Fiscal Control Act as applied to cities and towns.

Thus, it is seen that the governing body of the city of Charlotte is required to appropriate and make tax levy for each fund or function separately. It is without authority to make an appropriation and levy a tax for a common contingent fund. For emergency purposes as to each fund for which it has the authority to levy a tax, it may appropriate an additional five per cent of the fund requirement which becomes a part of that fund requirement to be covered by subsequent tax levy. Only from the general municipal expense fund may transfer be made to any other fund—and there is no authority for an "airport fund" in the appropriation resolution.

It is worthy in passing to pause and appraise that part of the preamble to the ordinance transferring the $5,000 fund which reads: "Whereas, additional hangar facilities are needed at said airport," followed by the appropriation "to be used in further improvement of the facilities of said airport." "Hangar," in connection with an airport, is defined to be "a shed for housing aeroplanes." "Facility" is "that which facilitates any action; aid;" used in plural as "facilities for trade, study, travel, etc." "Improvement" is "a valuable addition or betterment, as a building, clearing, drain, fence, etc., on land."

If the approval by the qualified voters of the purchase of an airport site be implied authority to the governing body of the city to spend tax money to build hangars, why not for concrete runways and other additions and improvements without limit, without further approval of such voters?

The judgment of the court below is

Affirmed.

DEVIN, J., concurring: I concur in the result reached in the well considered opinion delivered by *Winborne, J.*, for the majority of the Court.

I do not understand that on this record the decision goes to the extent of holding that the city is without power, by appropriate resolution, to

provide for the expenditure of money in its treasury applicable to general municipal expenses when this is done for the purpose of protecting and making essential repairs to property owned by the city and used for a public purpose.

The County Fiscal Control Act is by later statute made applicable to cities and towns, except where the context shows that it was not so intended. The act contains this provision: "No appropriation made by the appropriation resolution, except an appropriation for general county expenses, shall be transferred from one fund to another, and no appropriation for general county expenses shall be transferred to any fund of any subdivision, or *vice versa*. C. S., 1334 (64). The last clause obviously is inapplicable to cities and towns.

Thus it appears that the transfer by the city of funds appropriated for general municipal expenses to another fund for an authorized municipal purpose, such as the necessary maintenance and repairs to city property, would not seem to be prohibited by the Municipal Fiscal Control Act. Otherwise, the city might be seriously hampered in the performance of its corporate functions, in case of a sudden casualty or emergency, or be caused to incur substantial liability.

This would not involve a violation of Art. VII, sec. 7, of the State Constitution.

Nor is there anything in the holding in *Adams v. Durham,* 189 N. C., 232, 126 S. E., 611, as interpreted by later decisions, that would invalidate an appropriation from funds already in the treasury for this essential purpose. In *Holmes v. Fayetteville,* 197 N. C., 740, 150 S. E., 624, upholding the right of the city "to use only such available funds as it has" for the purpose of extending its electric light facilities beyond the city limits, it was said (*Adams, J.,* speaking for the Court): "This course was pursued in the erection of a building in the city of Durham and was approved by this Court, but the auditorium was in the city and was intended for a public purpose. *Adams v. Durham,* 189 N. C., 232."

In *Nash v. Monroe,* 198 N. C., 306, 151 S. E., 634, it was said (*Brogden, J.,* speaking for the Court): "Undoubtedly, if the city of Monroe had the money in its treasury, it could purchase equipment for its hospital. *Adams v. Durham,* 189 N. C., 232." It was there held that a municipal hospital is not a necessary governmental expense.

In *Mewborn v. Kinston,* 199 N. C., 72, 154 S. E., 76, we find this language: "The right of the city to use funds on hand for a public purpose is fully sustained by the decisions of this Court. *Adams v. Durham,* 189 N. C., 232."

In *Burleson v. Board of Aldermen,* 200 N. C., 30, 156 S. E., 241, where the application of funds of a town for the maintenance of a hospital, a public purpose but not a necessary expense, was consid-

ered, *Connor, J.*, speaking for the Court, uses this language: "Under the authority of *Adams v. Durham,* 189 N. C., 232, it may apply for that purpose funds already on hand in the treasury of the city or town."

In *Goswick v. Durham,* 211 N. C., 687, it was said: "The acquisition of the land (for public purpose) from surplus funds was not beyond the power of the city, and it in no way offended the provisions of Art. VII, sec. 7, of the Constitution," citing *Adams v. Durham, supra,* and *Nash v. Monroe, supra.*

I concur in the view that the maintenance of an airport may not now be classed as a necessary municipal expense, and that, upon the facts presented by the record in this case and under the resolution of the city, the appropriation of $5,000 from the contingent fund of the city to the airport fund for additional hangar facilities cannot be upheld. To do so would be to open the door to appropriations for new and additional construction, and would permit expenditures which would necessarily require the levy of taxes indirectly in violation of Art. VII, sec. 7, of the Constitution.

The inclusion in the budget of a sum to be raised by the levy of taxes for the maintenance of the municipal airport was properly enjoined as in conflict with the prohibition contained in the above quoted section of the State Constitution.

BARNHILL, J., concurring: The resolution adopted by the city council of the city of Charlotte, transferring $5,000 from the contingency fund to the maintenance fund for the municipal airport, contemplates that this fund shall be used for the enlargement and improvement, as well as for the maintenance, of the airport. The operation of an airport is not a necessary expense of a municipality any more so than would be the operation of a railway terminal or a railway or bus line depot. Consequently, the city council is without authority to make the proposed expenditure for the purposes contemplated by the resolution. The inclusion of $25.00 in the budget for the operation and maintenance of the airport was likewise without authority in law. A municipality is not authorized to operate, as a necessary expense of the municipality, airports, railway terminals, railroad or bus line depots, or similar undertakings. It follows that the city council was without authority to levy a tax without a vote of the people to operate the airport.

I am of the opinion, however, that the city council has the authority to use tax money to keep the airport property in a reasonably safe condition. In so far as the majority opinion intimates, if it does so intimate, that the city council is without this authority, I disagree.

The city acquired the airport property under mandate of the people as expressed in an election. When the city acquired the property it did

so in its proprietary capacity. *Non constat,* the city having acquired the property, it immediately became the duty of the city council to maintain the same in a reasonably safe condition, not only for the purpose of preserving the property of the city, but likewise for the purpose of protecting the city against contingent liability for injury sustained by persons legally using the property. This property should be maintained by the city council as all other property owned by the city, and the cost of its maintenance constitutes a necessary expense. The money needed therefor should come from the same fund as does the money which is used to maintain the other property owned by the city, or from the general expense fund.

SCHENCK, J., concurs in this concurring opinion.

CLARKSON, J., dissenting in part and concurring in part: In one aspect I cannot agree with the main opinion:

(1) I think the levy of $25.00 included in the budget for the fiscal year ending 30 June, 1938, for the Charlotte "airport" was a necessary expense and it was not such an expense that should be submitted to a vote of the people, under Const. of N. C., Art. VII, sec. 7.

(2) I think the governing body of the city of Charlotte has a right to pass an ordinance transferring $5,000, on hand unappropriated and collected as a "contingent fund," for the "airport." In the concurring opinion of *Devin, J.,* is the following: "I do not understand that on this record the decision goes to the extent of holding that the city is without power, by appropriate resolution, to provide for the expenditure of money in its treasury applicable to general municipal expenses when this is done for the purpose of protecting and making essential repairs to property owned by the city and used for a public purpose." If this is the correct interpretation, on this aspect I concur.

The judgment of the court below is as follows: "This cause coming on to be heard before the undersigned judge at the November, 1937, Term of the Superior Court, and a stipulation having been entered into waiving a jury trial and agreeing that the court finds the facts in said cause, and the court having found the following facts: '(1) That the plaintiff is a citizen, resident, and property owner and taxpayer of the city of Charlotte, North Carolina. (2) That the defendants constitute the governing body of the city of Charlotte, a municipal corporation. (3) That the city of Charlotte is a city of substantial and fastly expanding government, with a population of approximately 95,000, and total taxable values of approximately $110,000,000, and is strategically located for further immediate growth and development, and has been recognized by the Federal Government as a strategic airport center between New

York and Miami, Florida, being three and three-fourths hours from New York and six and one-half hours from Miami by way of airline. (4) That in the budget for the fiscal year beginning 1 July, 1937, and ending 30 June, 1938, which budget was duly adopted by the governing authorities of the city of Charlotte, as by law provided, an appropriation of $25.00 was made to be expended towards the maintenance, operation, and upkeep of the said airport. That the $5,000 referred to in the pleadings transferred from the contingent fund to the airport fund was money derived from taxation and was not an unappropriated surplus fund derived from other sources. (5) That on 3 November, 1936, the voters of the city of Charlotte voted upon and approved an ordinance authorizing the issuing of bonds by the city of Charlotte in the sum of $50,000 for the purpose of purchasing a tract of land for a municipal airport, which ordinance further provided that a tax sufficient to pay the principal and interest on the said bonds should be annually levied on all taxable property in the city of Charlotte; that of the entire voting population of approximately ..... thousand qualified voters, only 119 votes were cast against said bonds. (6) That pursuant to the approval of said bonds by the voters of the city, the governing body of said city issued said bonds and purchased with the proceeds thereof approximately 450 acres of land outside the limits of, but near the city of Charlotte. (7) That thereafter the Federal Government spent approximately $325,000 for leveling and grading the said land, building three runways, and equipping said field with an office or administration building, one hangar, and a field lighting system, completing the same about 1 June, 1937, and turned the same over to the city of Charlotte for maintenance and operation. (8) That the Highway Commission of the State of North Carolina constructed a highway approximately ..... miles long from State Highway ..... to said airfield, and built a concrete bridge over the main line of the Southern Railway over which said highway crossed, all for the total cost of approximately $35,000. (9) That pursuant to the authorities vested in the said city of Charlotte by the 1937 session of the North Carolina General Assembly, the governing body of the said city of Charlotte appointed an "airport commission," composed of three citizens who serve without pay, to operate said airport for the city, in which said legislative act the treasurer of the city of Charlotte is designated as treasurer of the airport funds, and all moneys collected from the operation of said airport are disbursed by said treasurer upon warrants signed by him, the mayor of the city of Charlotte, the city manager of the city of Charlotte, and the chairman of said airport commission, and that said airport commission is authorized to employ a manager, assistant manager, and such other employees as they deem necessary for the proper maintenance and operation of said airport.

(10) Since its appointment in July, 1937, the said airport commission has been operating said airport in this manner for the benefit of the city of Charlotte, in which said city the title to the property and improvements thereon is vested. (11) That the present and prospective income from the operation of said airport is grossly inadequate to meet the cost of operating and properly maintaining said airport, and that the only funds available for the operation and maintenance of said airport are such funds as the commission is able to derive from its operation, which funds are not sufficient to employ the necessary personnel for the proper operation of said airport, to say nothing of its maintenance and upkeep. (12) That the Department of Air Commerce of the Federal Government in conjunction with the United States Post Office Department has designated the said airport as an air mail distributing center, and the Eastern Air Lines, Inc., are now operating six planes daily through said airport, giving air mail, passenger and express service; that in order to keep this service in North Carolina and the city of Charlotte, it is necessary, under the requirements of the Federal Government, to keep the said airport and its facilities up to a certain standard of equipment and condition at all times, which requirements necessitate the expenditure of more money than is derived from the operation of said airport. (13) That unless the said city of Charlotte is permitted to expend the sums appropriated for the maintenance, operation, and upkeep of said airport, it will result in great damage and depreciation, while, on the other hand, such sums so spent will result in saving and economy to the taxpayers of the city of Charlotte; that unless the said city is permitted to spend said sums thus appropriated, it will be unable to maintain said airport to the standard of conditions prescribed by the Federal Government for the air mail center and said service will be withdrawn, thus resulting in loss of revenue and other attending losses.' Upon the above findings of fact, the court is of the opinion that the city of Charlotte is without authority to appropriate and expend the sum of $25.00 set out in the budget for the purpose of operating and maintaining the municipal airport, and is also without authority to appropriate and expend the sum of $5,000 for that purpose under the provisions of an ordinance passed by the council of the city of Charlotte, a copy of which ordinance being attached to the complaint, marked 'Exhibit A,' without the question being submitted to and approved by a vote of a majority of the qualified voters as provided in Article VII, section 7, of the Constitution of North Carolina: It is therefore ordered, adjudged, and decreed that the defendants, and each of them, be enjoined and restrained from expending any sum for the construction, operation, and maintenance of a municipal airport until and when the question of levying such tax has been submitted to and

approved by a majority of the qualified voters of the city of Charlotte. This 8 November, 1937. Wilson Warlick, Judge presiding."

It is to be noted that (1) "the appropriation of $25.00 was made to be expended towards the maintenance, operation, and upkeep of the said airport," and that (2) "the $5,000 . . . transferred from the contingent fund to the airport fund was money derived from taxation and was not an unappropriated surplus fund derived from other sources." It is apparent that the revenues from the airport are insufficient to maintain it in such a way that it would retain its status as an airmail distributing center and a regular passenger and express depot. Unless its revenues are supplemented by tax funds, the large investment of the city will rapidly depreciate, its usefulness will be increasingly lessened until it is ultimately destroyed, and that which was rightly conceived as a far-sighted, advantageous, and progressive enterprise will die for want of sufficient public support during the early years of the project.

The citizens of Charlotte voted a $50,000 bond issue to construct this municipal airport. Only 119 votes were cast against the bond issue. The Federal Government spent $325,000, and the State Highway and Public Works Commission another $35,000, to complete this airport. When the citizens of Charlotte voted the bonds, when the Federal Government made the grant, and when the State project was approved, it was generally and necessarily assumed by the citizens and the Federal, State, and local officials alike that the maintenance of the airport would be upon the municipality, certainly until the project should become self-supporting. It is significant that the judgment states that upon the completion of the airport by the Federal Government about 1 June, 1937, it was "turned . . . over to the city of Charlotte for maintenance and operation." When the citizens of Charlotte voted upon the establishment of a municipal airport, the very nature of the proposition submitted involved two elements: (1) The initial outlay of $50,000 by the city, and (2) the assumption of the general support and maintenance of the airport until such time as the airport should become self-supporting. The movement to establish the airport was initiated by the city and for the city. No other agency assumed the support of the airport. The citizens of Charlotte, by their vote, approved the airport and assumed its maintenance. By the mandate of the people, the city of Charlotte has the implied obligation to maintain this airport and to make expenditures essential to its general maintenance.

The essence of Art. VII, sec. 7, of the Constitution is the provision that no "tax be levied . . . except for necessary expenses, . . . unless by a vote of the majority of the qualified voters therein." Only under two conditions may taxes be levied by a municipal corporation: (1) For necessary expenses of government, or (2) where voted by the

people. *Glenn v. Commissioners of Durham,* 201 N. C., 233. It might well be argued that a municipal airport is essential to and a necessary expense of a city of the size and importance of Charlotte. As was said in *Storm v. Wrightsville Beach,* 189 N. C., 679 (681), "The question, what is a necessary expense, which is a judicial one for the courts to determine, is one that cannot be defined generally so as to fit all cases which may arise in the future. As we progress, we look for better moral and material conditions and the governmental machinery to provide them. 'Better access to the good things of life for all people,' safety, health, comfort, convenience in the given locality. . . . The term in the Constitution 'necessary expenses' is not confined to expenses incurred for purposes absolutely necessary to the very life and existence of a municipality, but it has a more comprehensive meaning. It has been held in this jurisdiction that streets, waterworks, sewerage, electric lights, fire department and system, municipal building, market house, jail or guard house, are necessary expenses."

In *Goswick v. Durham,* 211 N. C., at pp. 689-690, *Justice Devin* wrote, "While there is no contention that the construction, equipment, and maintenance of an airport and landing field is a necessary municipal expense within the meaning of Article VII, section 7, of the Constitution (*Henderson v. Wilmington,* 191 N. C., 269), yet it may not be improper to say that man's constantly advancing progress in the conquest of the air as a medium for the transportation of commerce and for public and private use indicates the practical advantage and possible future necessity of adequate landing facilities for the use of the 'argosies of magic sails . . . dropping down with costly bales' to the same extent that paved streets and roads are now regarded for the purposes of communication and transportation on land. *Hargrave v. Comrs.,* 168 N. C., 626; *Dysart v. City of St. Louis,* 321 Mo., 514. As was said by *Brogden, J.,* speaking for the Court in *Walker v. Faison,* 202 N. C., 694: "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."

In *Starmount Co. v. Hamilton Lakes,* 205 N. C., at p. 520, *Justice Brogden* quoted the general rule: "The courts determine what class of expenditures made or to be made by a municipal corporation come under the definition of 'necessary expense.'" Then he added, "That is to say, the courts determine whether a given project is a necessary expense of a municipality." By judicial approval of particular expenditures, the list of "necessary expenses" is constantly growing as befits the law of a progressive commonwealth. Until a particular type of expenditure is brought within the magic circle of "necessary expenses," such expenditures cannot be made by a municipality without a vote of the citizens.

Even though the particular type of expenditure has been approved by the court in one case, such as expenditure for a different municipality under different conditions still remains a question for the court. In *Storm v. Wrightsville Beach, supra,* it was declared that incinerators for the destruction of garbage, and jetties to protect the town from the ocean, are "necessary expenses." Yet, it is quite obvious that an expensive incinerator would not be a "necessary expense" for a small, rural village, nor would jetties against the ocean be a "necessary expense" for any inland or mountain town. An expense may be a "necessary expense" for one municipality, but not a "necessary expense" for another municipality. As stated in the majority opinion, "the courts determine whether a *given project* is a necessary expense of a municipality." This power of the Court to examine the necessity for a particular expenditure is not eliminated by the mere fact that an expenditure for a similar purpose, an expenditure within the same general class, has been previously approved for another municipality under quite different circumstances. The test for a "necessary expense" suggested by the majority—whether the purpose "partakes of a governmental nature or purports to be an exercise by the city of a portion of the State's delegated sovereignty"—is scarcely a precise one. What is, or is not, "of a governmental nature" remains a matter of judicial determination; the limitations of the phrase "of a governmental nature" are even more vague than those of the words "necessary expenses." Bearing in mind that an expenditure for a particular purpose in one community does not set a binding precedent with respect to a similar expenditure in some other community, I think that the overwhelming logic of the instant case compels the recognition that a municipal airport at Charlotte, under the conditions set out in the judgment, is a "necessary expense." Treating the maintenance of the airport as a "necessary expense," it follows that the governing body of the city could levy taxes for this purpose. *Tucker v. Raleigh,* 75 N. C., 267; *Jones v. New Bern,* 152 N. C., 64.

The citizens of Charlotte approved the bond issue for the purpose of building the airport—I think that the "vote of the majority of the qualified voters" thereby complied with the requirement of Art. VII, sec. 7, of the Constitution. When the citizenship of a community expressly approves the establishment of a public project at public expense, there is necessarily the approval by the citizens of the continued operation of that project. It is inconceivable that the citizens would approve the establishment of a project which they did not wish operated thereafter. If this were not true, the entire expenditure assumed by the citizens would be wasted. In my opinion, when the citizens of Charlotte voted to establish an airport at municipal expense, their vote became a

mandate to the governing body to continue to maintain and to operate the airport at municipal expense.

Under this latter view it becomes pertinent to examine to what extent this mandate was applicable. Certainly it extended to include the usual and ordinary maintenance, repair, and current operating expenses. If this mandate extended at all to the "maintenance" of the airport (and that it did seems abundantly demonstrated), it extended, as a minimum, to the ordinary, commonplace, and routine operation and maintenance expenditures. It seems to me that this mandate might also be extended to include expenditures for capital outlay items, such as additional hangars, under the theory that the vote of the people gave to the governing body of the city authority to expand, as well as maintain, the airport in keeping with the rapidly changing needs of a beginning enterprise.

The reasoning of *Justice H. G. Connor,* in *Brockenbrough v. Comrs.,* 134 N. C., 1, is applicable here; there, at p. 16, he wrote: "The people of Charlotte have by their votes declared that a system of waterworks is essential to their corporate welfare and safety. They have empowered their municipal servants and agents to expend a large sum for securing such a system. It is not clear that this involves the duty of protecting this property and making it efficient for the very important, may we not say necessary, purpose for which it was acquired? If so, the power to contract such obligations as are necessary to discharge the duty must be found. 'Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, and designated as a chart upon which every man, learned or unlearned, may be able to trace the leading principle of government.' Cooley, Constitutional Limitations, 59."

Whether the judgment of the citizens of Charlotte in establishing this airport was sound is not before this Court. The citizens have made the investment and now ask this Court the privilege of protecting it without the additional expense of a special election each year to approve the allotment of funds for an enterprise which has the almost unanimous approval of the entire taxpaying citizenship. Art. VII, sec. 7, was intended to protect the people in their rights, not to prevent them from exercising their rights after they had given their solemn judgment by ballot. When the people have spoken, the courts should be slow to thwart the popular will. The abiding and protective spirit which broods over the entire Constitution is that the will of the people, as far as it may be or has been determined, shall prevail; that which tends to defeat the expressed wishes of the sovereign citizenship is inimical to this spirit of the Constitution.

This view of the law of this case has received legislative sanction in the following clear and unequivocal terms: "The *governing body* or

bodies *of a city,* town, and/or county which has or have established an airport or landing field, and acquired, leased, or set apart real property for such purpose, *may* construct, *improve,* equip, *maintain and operate* the same. The *expense of such* construction, *improvement, maintenance and operation shall be a city, town, and/or county charge as the case may be.* . . ." (Italics mine.) Public Laws 1929, ch. 87, sec. 7 (Michie's N. C. Code, 1935, sec. 191g). *"The governing body* or bodies *of a city,* town, and/or county to which this act is applicable (Public Laws 1929, ch. 87, sec. 2, made the act applicable to "any city or town in the State"), having power to appropriate, individually or jointly, money therein, are *hereby authorized to annually appropriate and caused to be raised by taxation in such city,* . . . *a sum sufficient to carry out the provisions of this act.* . . ." (Italics mine.) Public Laws 1929, ch. 87, sec. 8. (Michie's N. C. Code, 1935, sec. 191h.)

Under a liberal application of the view that the approval of the people carried a mandate to the governing body to maintain and improve the airport, both the $25.00 appropriation and the $5,000 appropriation would be fully approved, even to the extent of use of the funds for the building of an additional hangar. Even under a restricted interpretation of this mandate, the $25,000 appropriation would be valid; and the $5,000 appropriation, if limited strictly to the purpose of current maintenance and general operating expenses (a limitation which is not required by the general statute), would likewise be valid. Further, under the theory that a municipal airport for Charlotte, under present conditions, is a "necessary expense," both the $25.00 and the $5,000 appropriations for the airport would be valid. I think the facts in the present case similar to those in the case of *Adams v. Durham,* 189 N. C., 232.

In *Nash v. Monroe,* 198 N. C., 306 (307), it is said: "Undoubtedly, if the city of Monroe has the money in its treasury, it could purchase equipment for its hospital. *Adams v. Durham, supra; Henderson v. Wilmington, supra.*"

Streets and highways are "necessary expenses," under Art. VII, sec. 7, of our Constitution. Airports, to facilitate the landing, flight, and accommodation of aeroplanes, traveling over air routes and carrying passengers, freight, mail, and the varied commerce of the air, may, in the widening realm of human progress, be a necessary expense in certain localities, as the present. The expenditure of money by the city of Charlotte, a city of its size, for the maintenance of a municipal airport, is, I think, a necessary expense within the meaning of Art. VII, sec. 7, of the Constitution.

Hence, it follows that the inclusion in the budget for the fiscal year ending 20 June, 1938, of the sum of $25.00 to be expended for this purpose and for which taxes are to be levied and collected, without a vote

of the people, comes within the provisions of the Constitution. The main opinion in the holding declares void the act of the General Assembly above set forth, which says: "The expenses of such construction, improvement, maintenance, and operation *shall be* a city, town, or county charge as the case may be."

In my opinion, the use of this fund, $5,000, on hand, unappropriated, for the current maintenance and operation of the airport is permissible.

STATE v. E. L. SMOAK.

(Filed 2 February, 1938.)

1. **Homicide § 25—Evidence that defendant killed his daughter by means of poison held sufficient for jury on charge of first degree murder.**

The State's evidence tended to show that defendant insured the life of his daughter, that thereafter he purchased strychnine, that his daughter, against whom defendant at that time had ill will, was brought to a hospital suffering from strychnine poisoning, and was later dismissed, that about four days later she was again taken violently ill and died, with expert opinion evidence that her death resulted from strychnine in lethal dose, together with evidence that immediately after his daughter's death defendant attempted to collect the insurance on her life, and that defendant's first and second wives, who had been insured in policies in which he was named beneficiary, had died of poisoning, *is held* sufficient, with other circumstantial evidence, to be submitted to the jury on a charge of murder in the first degree.

2. **Criminal Law § 52b—**

On a motion to nonsuit all the evidence on the whole record tending to support the State's contentions is to be considered in the light most favorable to the State, and it is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 4643.

3. **Criminal Law § 52a—**

The competency, admissibility, and sufficiency of the evidence is for the court, its weight, effect, and credibility is for the jury.

4. **Criminal Law § 77c—**

Where the charge of the court is not in the record, it will be presumed on appeal that the court correctly charged the law on every material aspect arising upon the evidence in the case.

5. **Criminal Law § 29b: Homicide § 20—Evidence of guilt of other crimes is competent when tending to show scienter, motive, and intent.**

The State's evidence tended to show that defendant insured the life of his daughter and thereafter poisoned her with strychnine, and immediately after her death attempted to collect the insurance. *Held:* Evidence tending to show that defendant had insured the lives of his first and second wives successively and collected the insurance, that his second

wife died of strychnine poisoning under similar circumstances, that his first wife stated in his presence during her last illness that she had been poisoned, and that another person upon whose life he had taken out a policy of life insurance had had a serious, but not fatal, attack of strychnine poisoning, is competent, the prior crimes being closely related to the crime charged, and evidence tending to establish defendant's guilt of the prior crimes being competent to show intent and motive.

6. Criminal Law § 31g—Witness with special training in toxicology need not be licensed physician in order to be qualified as expert.

Evidence that the witness had had special training in toxicology, and had studied chemistry for more than twenty years, is sufficient to support the court's finding that the witness was an expert and competent to testify from his analysis of organs from the body of deceased that he found strychnine sufficient to cause death, and it is not necessary that the witness be a licensed physician.

7. Same: Criminal Law § 81a—

The competency of a witness as an expert is primarily addressed to the discretion of the trial court, whose decision is ordinarily not reviewable.

8. Criminal Law § 31h—Hypothetical question based upon jury's finding facts as contended for by State, supported by its evidence, held proper.

A hypothetical question based upon the symptoms during deceased's fatal illness, the time of her death, the exhumation of her body, and the delivery of her vital organs to the witness, all based upon contentions of the State supported by ample evidence, and inquiring of the witness, from such facts, assuming the jury should so find from the evidence, and from the witness' chemical examination of the vital organs, whether the witness had an opinion satisfactory to himself as to the cause of death, *is held* a proper hypothetical question, and upon an affirmative answer, supports the witness' testimony that death was caused by strychnine poisoning, and it is not necessary that the question should include all the evidence bearing upon the alleged facts.

9. Criminal Law § 40—

In proving defendant's good character it is competent to ask witnesses as to defendant's general reputation in the community, but it is incompetent to ask witnesses as to defendant's reputation in any restricted group in the community.

10. Criminal Law § 81c—

Where an expert testifies that the amount of strychnine actually recovered by him from the vital organs of deceased was more than enough to cause death, his testimony estimating, from the amount recovered, the total amount of strychnine in the body, is not prejudicial.

11. Same—

Defendant's exceptions to the admission of evidence become immaterial when similar evidence is later introduced without objection.

12. Homicide § 20—Evidence of animosity between defendant and deceased held competent as tending to show motive.

In this prosecution of defendant charged with the murder of his daughter, testimony tending to show that a few days after the death of the

daughter's mother, defendant brought another woman into his home and that there was animosity between the defendant and his daughter as a result thereof, is competent to show motive.

13. Homicide § 17: Criminal Law § 32a—Where State relies on circumstantial evidence, evidence of all circumstances forming integral part of composite picture is competent.

The State contended that defendant took out insurance on the life of his daughter and thereafter poisoned her with strychnine, that defendant had previously poisoned his first and second wives, successively, and collected the insurance on their lives, and had attempted to poison another woman upon whose life he had taken out insurance. *Held:* Testimony tending to show that defendant's victims, as contended by the State, had died of strychnine poisoning, that defendant's daughter died of the same poison, that the premiums on the policies on her life were paid further in advance than other policies held by defendant, is competent as tending to show links in the chain of circumstantial evidence.

14. Criminal Law § 33—

Testimony of an officer as to statements made by defendant after the officer had told defendant he wanted to ask him some questions, to which defendant assented, *held* competent.

15. Criminal Law § 31a—Medical experts are competent to testify upon proper hypothetical questions as to the cause of death.

Doctors qualified as experts are competent to testify upon proper hypothetical questions based upon the symptoms during the fatal illness of deceased persons, the condition of their bodies after death, and the amount of strychnine recovered from their vital organs upon autopsies, that the deceased persons died as the result of being poisoned with strychnine.

APPEAL by defendant from *Clement, J.*, and a jury, at February, 1937, Special Term of NEW HANOVER. No error.

The defendant was indicted on the following bill of indictment:

"North Carolina—New Hanover County.

"Superior Court, January Term, 1937.

"The jurors for the State upon their oath do present, that E. L. Smoak, late of New Hanover County, on the 1st day of December, A.D. 1936, with force and arms, at and in the said county, feloniously, willfully, and of his malice aforethought, did kill and murder Annie Thelma Smoak, contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State.

(Signed) BURNEY, *Solicitor.*"

A true bill was found by the grand jury, and the defendant was put on trial. "On motion of counsel for the defendant, the jury was polled, and each juror, for himself, doth say that the defendant is guilty of murder in the first degree." Upon the verdict, the court below imposed upon the defendant the sentence of death.

The State relied on evidence to the effect that the defendant killed his daughter, Annie Thelma Smoak, about 16 years of age, by administering strychnine. She died on 1 December, 1936. Shortly prior to this, on Thanksgiving Day, 26 November, 1936, she was taken to a hospital and the physicians treated her there for strychnine poisoning.

Jack Penny testified that he was employed by the Brooklyn Pharmacy on 19 November, 1936, and about 5 o'clock in the afternoon the defendant purchased from him a small bottle of strychnine—an eighth of an ounce. The defendant stated that he wanted the strychnine for hogs. Jack Penny recorded the sale, name, address, and purpose. At that time defendant had no hogs. Later he said it was to kill cats and dogs or whatever was eating his chickens and biddies. The evidence tended to show that at different periods defendant bought strychnine.

(1) Defendant had taken out insurance on the life of his daughter, Annie Thelma Smoak: (a) $445.00 on 1 April, 1935, in the Metropolitan Life Insurance Company, payable to her closest relative; (b) $445.00 on 16 March, 1936, in the American National Insurance Company, with defendant as beneficiary. A premium was paid on 25 November, 1936, through the week of 14 December—two weeks further in advance than he paid any other policy which he held with that company; (c) $100.00 in the Andrews Mutual Burial Association, which was taken out on 28 October, 1936.

W. G. Stewart testified: "Her head was drawn backward, the hands seemed to be clinched in a very tight position, and it was necessary to break up the *rigor mortis* to straighten them—the feet were extended, the toes being forward." It was also in evidence that Annie Thelma Smoak and Alice Mason Smoak both died with violent convulsions.

(2) Policy in the Metropolitan Life Insurance Company on the life of Alice Mason Smoak, his second wife, for $565.00. The policy was dated 25 December, 1932. Also policy in the Life Insurance Company of Virginia for $250.00. Defendant filed proof of death and was paid—her death occurred 8 July, 1935. She married defendant 7 October, 1932.

(3) Policy carried in Life Insurance Company of Virginia and Metropolitan Life Insurance Company on the life of Georgia Jones Smoak, his first wife, for about $500.00. This was paid defendant. She died in 1922 in a manner similar to that of Annie Thelma Smoak.

(4) He took out a policy of insurance in the American National Life Insurance Company on the life of Mrs. Bertha Stewart, mother of Mrs. Jeannette Harker, about 11 November, 1935, in which he was named as beneficiary, and represented in the policy that his relationship to her was that of cousin. Her physician said that she came near dying from strychnine poisoning, which defendant had given her and which he said

was "indigestion powders." It was also in evidence that defendant had taken out insurance on the life of Mrs. Jeannette Harker and his two sons.

The first wife of defendant was Georgia Jones Smoak, mother of Annie Thelma Smoak. After her death (9 months thereafter) he married Alice Mason Smoak, who died on 8 July, 1935. Before and after her death, he paid attention to Mrs. Jeannette Harker, a widow about 26 years of age, and took her, about a week after his wife's death, into his home to live. Before his wife died he bought her a house-dress and she wrote him while in a hospital and stayed at his house off and on after she first went there. He gave her $5.00 every two weeks and paid her insurance—90c a week. In consequence, Annie Thelma Smoak left and went to the home of Evylin Horne. Evylin Horne testified, in part: "Mr. Smoak came to the house about four o'clock, or a little after, one afternoon in October, 1936. . . . He said, 'Thelma, why did you leave home?' and she said, 'I could not get along with Mrs. Harker, and I thought it would be best to leave home.' . . . Thelma said, 'Daddy, I can't have any friends, and nobody can come to see me,' and he said, 'Why?' She said, 'Mrs. Horne won't let her children come there because Mrs. Harker is there,' and he said, 'She is a perfect lady.' I said, 'All I know is what Thelma has told me.' Thelma said, 'Please don't let daddy take me,' and she kept holding my hand, and said, 'I am scared to go home, I don't know what he will do to me.' . . . Mr. Smoak said, 'Are you coming home?' and she said 'No,' and he kept asking her why, and she kept telling him she could not get along with Mrs. Harker. He said, 'I have a housekeeper there,' and she said, 'I know, but you make me do all the work.' . . . All the time Thelma was crying." Thereafter the matter was taken up with the welfare officers of New Hanover County and she went to her father's home.

Wash Morgan testified, in part: "I know E. L. Smoak. He came to my place some time in the fall of 1936. Q. State what conversation you had with him, please, in reference to Thelma Smoak, his daughter? (Exception.) A. He came there about half-past three o'clock on a Wednesday evening. He came to my store about the middle of October, and asked if I knew where his daughter, Thelma, was, and I said I did not. I said she stayed down here Monday night. I asked him what was the trouble between him and Thelma. He said she was running around and doing a whole lot of lying. I asked him about what, and he said concerning him and Mrs. Harker, and if she didn't quit it, he was going to beat her half to death. I asked him about Mrs. Harker and he said Mrs. Harker had not stayed a night in his home, and had not been in his home in over a month, and he said if she did not stop lying on him he was going to kill her. (Exception.) At the solicitation of

the sheriff, I went up in the jail and made that statement in the presence of Mr. Smoak, and he told me I was lying." Mrs. Wash Morgan and Annie Morgan testified to the same effect as to defendant's threat to kill his daughter.

On Thanksgiving evening, 26 November, 1936, Annie Thelma Smoak was taken sick while in an automobile with defendant and Mrs. Jeannette Harker. She was taken to a hospital and defendant said he had given her one "B. C." powder. She recovered from the attack. Before her death Annie Thelma Smoak was perfectly normal and slightly nervous. Defendant had brought home some capsules which he said was quinine prescribed by Dr. W. J. Lancaster. Dr. Lancaster testified that he had not prescribed anything for defendant's daughter, nor had he been consulted about her condition. It was in evidence that immediately after the death of Annie Thelma Smoak the defendant took steps to collect the insurance on her life.

Dr. Heywood M. Taylor testified, in part: "I am assistant professor of biological chemistry and toxicology at Duke Medical School. (Court) Let him explain what a toxicologist is. Ans.: A toxicologist is one who detects the presence of poisons. I got my B.S. in chemistry at the University of North Carolina; my Master of Chemistry and my S. and Ph.D. at the same institution. I further had special training in toxicology with Dr. Gadler in the Chief Medical Examiner's office in New York City. I was there for three months. I was also an instructor at the University of North Carolina in general chemistry, analytical chemistry, and organic chemistry. I have been connected with the Duke University since 1 July, 1930." Dr. Taylor was found by the court below to be an expert in toxicology and chemistry, and was asked the following question: "Q. Assuming the jury should find from the evidence, and beyond a reasonable doubt, that Annie Thelma Smoak died on 1 December, 1936; with violent convulsions; her head drawn back, and her hands clinched; that she was practically rigid; that the undertaker had to straighten her fingers out; that she was taken to Orangeburg, S. C., buried, and on 10 December, the body was exhumed; that the liver, kidneys, and brains were taken therefrom, carried to you, and from the chemical analysis you made, and the strychnine you found there, have you an opinion satisfactory to yourself as to the cause of her death? Ans.: Yes, sir. Q. What is it? (Exception.) Ans.: My opinion is she died from strychnine poisoning. . . . A therapeutic dose of strychnine is two milligrams. In ordinary every-day language, that would be a regular medicinal dose. I found approximately seventeen times that amount in the viscera of Annie Thelma Smoak. Two milligrams, roughly speaking, is the thirtieth of a grain, and I said I found 34.04 milligrams. That is about half a grain, or a little over half a

grain. I recovered that from the liver and the brain alone. You will find strychnine in the kidneys and sometimes it is found in the urine, and it has been reported found in the bones. Q. Is it possible to recover the maximum amount of strychnine from the body? Ans.: The maximum amount that could be recovered would depend on how much was present. It is a hard matter to say how much we can get out. We cannot get more than is there. Q. State what the percentage of recovery is? (Court) You qualified as an expert; if you have an opinion satisfactory to yourself, from your experience, and from your training, as to the maximum amount that could be obtained, or discovered, you could say so. Ans.: I think that would vary from ten to twenty-five per cent. (Mr. Grant) Of What? Ans.: Of the total amount present." (Exception.)

Dr. Charles B. Graham, a practicing physician, held to be an expert, treated her at the hospital. He testified, in part: "I saw Annie Thelma Smoak at the hospital the morning after her admission. (Admitted Thanksgiving Day, 26 November, 1936.) I discussed her case, and the history of it, with Dr. Warshauer. I am familiar with the medicine given her the night she was admitted. Q. Was that the proper treatment to counteract strychnine poisoning? Ans.: Yes, sir. I did not assist in the puncture of her spine. I saw the patient the following morning, after she had been admitted to the hospital. She was perfectly conscious at the time I saw her, and she seemed to be a little depressed, and drowsy from the excitement and the sedative she had during the night, and complained of headache and muscular soreness. Her general condition seemed to be good. She left the hospital Saturday afternoon, at 6:15, I think. She was admitted on Thanksgiving Day, Thursday, and left the following Saturday. Q. Assuming the jury should find from the evidence, and beyond a reasonable doubt, that on Thanksgiving night, 26 November, 1936, Annie Thelma Smoak was in violent convulsions; was carried to the hospital, and given the treatment that you spoke of, and that she was carried home Saturday night, and on Tuesday morning, 1 December, she was taken with violent convulsions, and died before the doctor arrived; that her body was rigid; her hands clinched so much so that the undertaker had to straighten the fingers out; that she was buried in Orangeburg, S. C., on 3 December; her body exhumed on 10 December; the kidneys, liver, and brains taken to Dr. Heywood Taylor, toxicologist at Duke University; that a chemical analysis was made, and 34.04 milligrams of strychnine found in her body, have you an opinion satisfactory to yourself as to the cause of her death? Ans.: I do. Q. What is it? (Exception.) Ans.: Strychnine poisoning."

Dr. S. E. Warshauer, found by the court below to be a medical expert, upon like hypothetical question being propounded to him, testified: "In my opinion she died of strychnine poisoning." (Exception.)

Dr. J. E. Evans, a practicing physician, found by the court below to be an expert, testified, in part: "On Thanksgiving night . . . Mr. Smoak appeared at my door and asked me to come out and see his girl, who was sick in the car. . . . We carried her into my house. . . . She was in a state of violent convulsions. I asked what medicine she had taken, and he replied that she had had one 'B. C.' powder. I began to try to investigate to find out, as best I could, what was the trouble with her. She was conscious. There in the presence of the defendant, in the midst of her convulsions she would scream and ask me to do something for her; that she was going to die. I am familiar with strychnine. The symptoms of strychnine poisoning are marked convulsions, periodic convulsions, and contraction of the hands and arms. Q. State if the symptoms she had at that time were those of strychnine poisoning? (Exception.) Ans.: It was strongly suggestive."

Leon P. Andrews, owner of the Andrews Mortuary, testified that on 8 July, 1935, he saw Alice Mason Smoak, who had just passed away. "Her body was very tense, and her hands clinched, and her feet turned downward, and the toes inclined inward. The body was warm. I took the body to the mortuary, and it was buried at Oakdale Cemetery in a single grave plot. I have seen the body since, but I do not recall the date. It was this year. I prepared the body for burial, and buried the body. I exhumed the body, and removed it to my undertaking parlors, where an autopsy was performed on it by Dr. Graham Barefoot and Dr. A. H. Elliott. That was three or four weeks ago. When the body was exhumed the condition of the fingers was the same as when the body was buried; so was the condition of the feet; drawn."

Dr. Victor Sullivan, found by the court below to be a medical expert, testified, in part: "Q. Assuming that the jury should find that Alice Mason Smoak, on 8 July, 1935, was seized with violent convulsions; that her head was drawn back; her body rigid; that she cried out 'hold me,' and when the undertaker arrived her body was still warm, and rigid; her hands were clenched; that she was prepared for burial and buried on 10 July, 1935; that about 7 February, 1937, the body was exhumed; an autopsy performed and the kidneys, liver, lungs, and brains taken therefrom, and delivered to Dr. Heywood Taylor, toxicologist at Duke University; that he reports the finding of strychnine in the body in sufficient amount to cause death, have you an opinion satisfactory to yourself as to the cause of the death of Alice Mason Smoak? Ans.: Yes, sir. Q. State what that opinion is. (Exception.) Ans.: That she died from strychnine poisoning."

Dr. A. H. Elliott, a physician held by the court to be a medical expert, testified, in part: "Dr. Barefoot and I performed an autopsy on the body of Alice Mason Smoak about three weeks ago, at Andrews

Mortuary, at Third and Red Cross. Q. What organs were taken from the body. Ans.: We took what there was of the brain, and the liver; both kidneys, the stomach and part of the lung. Q. State whether or not Alice Mason Smoak was pregnant. (Exception.) Ans.: She was. We tried to estimate how long she had been pregnant from the length of the fetus, which is the way of calculating the period of gestation, but whether or not there was any considerable shrinkage or not I don't know, but according to the length of the fetus we recovered, we estimated it was between three and four months. With the exception of the fetus, we took all of the organs we removed from the body to Dr. Taylor, at Durham. I, myself, delivered them to Dr. Taylor."

Dr. Heywood M. Taylor, recalled, testified, in part: "About three weeks ago Dr. A. H. Elliott brought me certain specimens purporting to be from the body of Alice Mason Smoak. They were brought to me on 5 February, 1937. He brought me the liver, the brain, and portions of the lungs, the stomach and the kidneys. Q. Did you make a chemical analysis of a part of the parts, or specimens he brought you? Ans.: I did. I analyzed the liver and kidneys. The condition of the kidney and liver was very good; the body had been embalmed; the brain appeared to be very much decayed. The kidney and liver were combined; ground up, and extracted with acid alcohol; the extract was cleared up; taken up in water solution; made alkaline, and extracted with ether; the ether was evaporated off, and the extract dissolved in water, and tested for alkaloids, and the residue is dissolved in acid; and is treated with potassium dichromate and sulphuric acid. The material was then subjected to another test with amonium vanadate, and it was tested with bromide. All of the tests showed the characteristics of strychnine poison. A portion of the material was put in solution and injected into a live frog, and violent strychnine convulsions were obtained. On the basis of the total weight, I recovered 22 milligrams of strychnine from the liver and the kidney. That is sufficient amount to cause death. Q. Assuming that the jury should find that on 8 July, 1935, Alice Mason Smoak suffered with severe convulsions; that her head was drawn; her hands clinched, and shortly thereafter she died; was buried on 10 July; that her body was embalmed; that it was exhumed, and those parts of the organs taken to you and from the amount of strychnine found by you, have you an opinion satisfactory to yourself as to the cause of her death? (Exception.) Ans.: I have. Q. What is that opinion? Ans.: Strychnine poisoning."

Dr. J. E. Evans, a practicing physician, found by the court below to be an expert, recalled, testified, in part: "Q. Assuming that the jury should find from the evidence and beyond a reasonable doubt that on the afternoon of 8 July, 1935, Alice Mason Smoak was seized with violent con-

vulsions; that her head was drawn back; her hands clinched; and she cried out, 'Hold me,' and died in a short time, and when the undertaker arrived her hands were clinched, and her body rigid, and still warm; that she was buried on 10 July, and about 7 February, this year, the body was exhumed, and an autopsy performed; the kidneys, lungs and liver taken to Dr. Heywood Taylor, toxicologist at Duke University, and from a chemical analysis there he found 22 milligrams of strychnine, have you an opinion satisfactory to yourself as to the cause of the death of Alice Mason Smoak? Ans.: I have. Q. What is that opinion? (Exception.) Strychnine poisoning." Prior to her death she was in a normal condition.

Dr. H. A. Codington, Alice Mason Smoak's physician, held by the court below to be an expert, testified, in part: "This improvement continued straight along until 5 June, when she was so much better I let her go home with instructions to advise me if she did not continue to improve, or to feel well. She returned to my office on 13 June, complaining of a little flow of blood. For this she was given an injection we have that frequently checks these flows, and she returned on the 15th for another injection, which she received, and that stopped the flow, and she seemed to progress satisfactorily, and I didn't see her any more until 8 July, 1935, at which time I was called to come at once to her home, that she was desperately ill. I got to the home about thirty minutes after the call, and she had just died. . . . Q. If the jury should find from the evidence and beyond a reasonable doubt that Alice Mason Smoak, on 8 July, 1935, was seized in the afternoon, or early night, with violent convulsions; that her head was drawn; her arms stretched and hands clinched and she cried out for someone to hold her, and in a short time she died, and when the undertaker arrived the body was warm but it was stiff; that he removed her to his undertaking establishment; that the body was embalmed; that she was buried in Oakdale Cemetery on 10 July; that on 7 February, 1937, the body was exhumed, an autopsy performed; the liver, kidneys, and brain taken therefrom and delivered to Dr. Heywood Taylor, toxicologist at Duke University, who upon a chemical analysis found strychnine of sufficient amount to cause death, have you an opinion satisfactory to yourself as to the cause of the death of Alice Mason Smoak? Ans.: I do. Q. What is that opinion. (Exception.) Ans.: My opinion is that death was caused by some convulsive drug, or a drug capable of producing convulsions, probably of the strychnine family."

The defendant, in 1919, married Georgia Jones. Of this marriage was born Annie Thelma Smoak. Georgia Jones Smoak died on 10 February, 1922. In regard to her death, Mrs. S. D. Collins testified, in part: "I was sitting at the foot of the bed, and Mr. Smoak was sitting

on the bed to his wife's left, and we were discussing her illness in the hospital. She said she thought she had been poisoned, because she acted like she had been poisoned, and Mr. Smoak said he thought she had been poisoned, too. Q. What did she ask you to do, if anything? (Court) Was that in the presence of the defendant? Ans.: Yes, sir, in the defendant's presence." (Exception.)

There was plenary evidence in the record on which to base the hypothetical questions asked the experts. The defendant denied his guilt. He stated that the cause of Annie Thelma Smoak's death was overexertion on Thanksgiving Day, fits, convulsions, epilepsy.

Roy Vann, a witness for defendant, testified on direct examination: "I have known the defendant for twelve to thirteen years. I am leading machinist now in the Atlantic Coast Line shops in Wilmington. I have been connected with the Atlantic Coast Line for twenty-five to twenty-eight years. I was at one time foreman of the roundhouse, and held that position for fifteen years. Q. How many men do you work in the Wilmington terminal of the Coast line. (State objects; sustained; exception.) (If allowed to answer, the witness would have said: 'In the roundhouse, about sixty men; there were more during the time I was foreman.') I did not know the general esteem in which Mr. Smoak was held prior to his indictment for the murder of his daughter. Q. Did you know the esteem he was held, and his general character among the employees of the Atlantic Coast Line? (State objects; sustained; exception.) (If allowed to testify, the witness would have said: 'It is good.')"

Several witnesses were asked similar questions. The State objected, which was sustained, and defendant excepted. Many witnesses testified that defendant's general reputation was good.

There was much evidence on the part of the State corroborating the above evidence set forth. The defendant assigned error to the exceptions above set forth and made numerous other exceptions and assignments of error, and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

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

L. Clayton Grant and W. L. Farmer for defendant.

CLARKSON, J. The defendant, at the close of the State's evidence and at the close of all the evidence, moved in the court below to dismiss the action or for judgment of nonsuit. C. S., 4643. The court below denied the motions, and in this we can see no error.

From the statement of facts above set forth on the part of the State, there was plenary evidence to be submitted to the jury as to the guilt of defendant.

"On motion to dismiss or judgment of nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. 'An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any evidence on the whole record of the defendant's guilt.' *S. v. Earp, ante,* at p. 166. See *S. v. Carlson,* 171 N. C., 818; *S. v. Sigmon,* 190 N. C., 684. The evidence favorable alone to the State is considered—defendant's evidence is discarded. *S. v. Utley,* 126 N. C., 997. The competency, admissibility, and sufficiency of evidence is for the court to determine, the weight, effect, and credibility is for the jury. *S. v. Utley, supra; S. v. Blackwelder,* 182 N. C., 899. The evidence in the case was circumstantial." *S. v. Lawrence,* 196 N. C., 562, at p. 564.

The charge of the court below is not in the record and the presumption of law is that the court charged the jury as to the law applicable to the facts, the law of circumstantial evidence, and every other material aspect of the law that arose from the facts in this case.

The defendant contends that he was tried for other offenses of which he was not charged in the bill of indictment. Under well settled law in this jurisdiction, this contention is untenable. The other like offenses were to show the *scienter,* intent, and motive of defendant. On this record they are so connected or associated that this evidence would throw light upon the question of his guilt.

In Wharton's Criminal Evidence, Vol. 1 (11th Ed.), section 352, pp. 527-8, we find: "Evidence of other crimes may be admitted when it tends to establish a common scheme or plan embracing the commission of a series of crimes so related to each other that proof of one tends to prove the other, and to show the defendant's guilt of the crime charged. . . . The question is one of induction, and the larger the number of consistent facts the more complete the induction. . . . (p. 532). Like crimes committed against the same class of persons, at about the same time, tend to show the same general design, and evidence of the same is relevant and may lead to proof of identity."

In Underhill's Criminal Evidence (4th Ed.), section 187, pp. 344-5, it is written: "Another exception to the general rule is that evidence of other crimes of the same general character is admissible when it tends to prove, plan, system, habit, or scheme of related offenses, or a design to commit a series of like crimes. This exception has been applied to many and varied kinds of offenses, such as murder, etc. *Commonwealth v. Chalfa,* 313 Pa., 175, 169 Atl., 164."

In *S. v. Miller,* 189 N. C., 695 (696), speaking to the subject, it is said: "It is undoubtedly the general rule of law, with some exceptions, that evidence of a distinct substantive offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other. *S. v. McCall,* 131 N. C., 798; *S. v. Graham,* 121 N. C., 623; *S. v. Frazier,* 118 N. C., 1257; *S. v. Jeffries,* 117 N. C., 727; *S. v. Shuford,* 69 N. C., 486. But to this there is the exception, as well established as the rule itself, that proof of the commission of other like offenses is competent to show the *quo animo,* intent, design, guilty knowledge, or *scienter,* when such crimes are so connected with the offense charged as to throw light upon this question. *S. v. Simons,* 178 N. C., 679, and cases there cited. Proof of other like offenses is also competent to show the identity of the person charged with the crime. *S. v. Weaver,* 104 N. C., 758. The exceptions to the rule are so fully discussed by *Walker, J.,* in *S. v. Stancill,* 178 N. C., 683, and in a valuable note to the case of *People v. Molineaux,* 168 N. Y., 264, reported in 62 L. R. A., 193-357, that we deem it unnecessary to repeat what had there been so well said on the subject." This decision was cited with approval and applied in the recent case of *S. v. Flowers,* 211 N. C., 721.

North Carolina follows the general rule and its exceptions. An interesting discussion of the subject can be found in Vol. 16, N. C. Law Review, No. 1, December, 1937, p. 24, where the North Carolina cases are fully cited as to where collateral offenses have been held admissible to show intent.

The admissibility of evidence of previous poisonings to show motive and *scienter* is most clearly brought out by the case of *People v. Gosden,* 56 Pac. (2d Ed.), 211 (Calif., 1936). The defendant had taken out insurance on a first and second wife. Both had died from strychnine poisoning. He was tried for the death of his second wife, and at the trial objected to introduction of evidence showing the similarity of the circumstances surrounding the death of his first wife. In upholding the admissibility of the evidence, the California Court said: "This evidence tended to show that each died of strychnine poisoning, each was insured with the appellant as the beneficiary, and in each case the appellant attempted immediately upon the death of the wife to collect the insurance upon her life. The evidence as to the death of the first wife and the fact that her life was insured with the appellant as beneficiary was properly admitted to show motive of the appellant in the murder of his second wife. *People v. Northcott,* 209 Calif., 639, 652, 289 Pac., 634, 70 A. L. R., 806. It was also admissible to show knowledge on the part of the appellant as to the effect of administering strychnine to a human being." See, also *Goersen v. Commonwealth,* 99 Pa. St. Reports, 388 (1882), and *Zoldoske v. State,* 52 N. W., 778 (Wis., 1892).

To the effect that such evidence is admissible to show criminal intent are: *People v. MacGregor,* 114 N. W., 869 (Mich., 1914); *People v. Seaman,* 65 N. E., 203 (Mich.); *People v. Tokly,* 144 N. E., 808 (Ill.); *Goersen v. Commonwealth, supra; People v. Gosden, supra; Zoldoske v. State, supra;* and *State v. Hyde,* 136 S. W., 316 (Mo.).

The defendant cites *People v. Molineaux,* 168 N. Y. Rep., p. 264. That case is distinguishable from the present case. On the facts in that case, the Court held: "Therefore, the events connected with the alleged former crime are not so related to the crime charged as to form an exception to the general rule excluding such proof, and thus bring it within one of the above mentioned exceptions, and the reception of such evidence constitutes reversible error." There are, of course, a few cases in which evidence of similar poisonings was excluded. In these cases the exclusion did not result from failure of the courts to recognize exceptions to the general rule. They are based on the grounds that the facts involved did not fall within the exception. In his brief defendant relies on *People v. Molineaux, supra,* but there the defendant was on trial for a murder which was induced by hatred arising out of certain quarrels. The State attempted to introduce evidence that the defendant had killed another person by use of the same peculiar poison, but the motive for this second killing was jealousy caused by intervention in a love affair. The ruling excluding this evidence was upheld on the narrow ground of the difference in motive. In *People v. MacGregor, supra,* the Michigan Court considered the *Molineaux case, supra* (p. 882), and carefully distinguished it upon this ground.

The *Molineaux case, supra,* was tried in 1901. It may be of interest to the profession to know that two North Carolinians appeared in that famous case: James Walker Osborne (a kinsman of the late *Justice Platt D. Walker,* former member of this Court), who was Assistant District Attorney of New York and prosecuted and brought about the conviction of Molineaux, and George Gordon Battle, who represented him and obtained a reversal of the conviction—a new trial being ordered by the Court of Appeals of New York.

Was Dr. Heywood M. Taylor such an expert that he was competent to answer the hypothetical question propounded by the State? We think so. We may say that from a careful review of the State's evidence, it was plenary and sufficient to base the hypothetical questions propounded to the different experts on, whose testimony is above set forth.

Black's Law Dictionary (3rd Ed.), p. 912, defines "hypothetical question": "A combination of assumed or proved facts and circumstances, stated in such form as to constitute a coherent and specific situation or state of facts, upon which the opinion of an expert is asked, by way of evidence on a trial," citing authorities.

Dr. Taylor was assistant professor of biological chemistry and toxicology at Duke Medical School, and stated that he held the degree of Doctor of Philosophy in these subjects and had had special training in toxicology in the Chief Medical Examiner's office in New York City. Although not an M.D., he had taught chemistry at the University of North Carolina and had been connected with Duke since 1930. He had studied chemistry for more than twenty years. The court found that he was an expert in toxicology and chemistry. In this there was no error. The competency of a witness as an expert is primarily addressed to the discretion of the trial judge, whose decision is ordinarily not reviewable. *Flynt v. Bodenhamer,* 80 N. C., 205; *Hardy v. Dahl,* 210 N. C., 530. It is not necessary that an expert witness be a licensed physician. *Hardy v. Dahl, supra,* at p. 535.

Dr. Taylor described in detail the symptoms of strychnine poisoning generally, his examination of the vital organs of Annie Thelma Smoak, and his discovery in her body many times as much strychnine as constitutes a regular medicinal dose. He stated that experts could recover from the body from ten to twenty-five per cent of the strychnine present, and that he found in the body of Annie Thelma Smoak sufficient strychnine to cause death. In reply to a hypothetical question including the symptoms and conditions of Annie Thelma Smoak's death, the time of death, of exhumation of the body, and of the delivery to him of the vital organs examined, he gave as his opinion that "she died from strychnine poisoning." The question, in the usual form, was based upon the assumption that the jury would find as facts that these events, conditions, and times were as contended for by the State, and there was ample evidence supporting each of these contentions. The hypothetical question was a proper one. *Martin v. Knitting Co.,* 189 N. C., 644; *McManus v. R. R.,* 174 N. C., 735; *Pigford v. R. R.,* 160 N. C., 93; *Ray v. Ray,* 98 N. C., 566; *S. v. Bowman,* 78 N. C., 509. It was not essential that the hypothetical question include all the evidence bearing upon the alleged facts. *Godfrey v. Power Co.,* 190 N. C., 24.

The evidence in regard to the defendant's first wife, Georgia Jones Smoak, was remote, but, linked in with the other evidence, we think it was a circumstance to be considered by the jury. At least it was not prejudicial, as defendant denied any effort on his part to poison her.

Was the evidence of those with whom he worked competent on which to base a question as to the general reputation of defendant? We think not. " 'The rule as to this matter has been fully settled by many decisions of this Court. It is this: The party himself, when he goes upon the witness stand, can be asked questions as to particular acts, impeaching his character, but as to other witnesses it is only competent to ask the witness if he "knows the general character of the party." If he

answers "No," he must be stood aside. If he answers "Yes," then the witness can of his own accord qualify his testimony as to what extent the character of the party attacked is good or bad.' *Clark, C. J.*, in *Edwards v. Price,* 162 N. C., 244. See, also, *S. v. Gee,* 92 N. C., 760; *S. v. Ussery,* 118 N. C., 1177; *S. v. Holly,* 155 N. C., 485; *S. v. Robertson,* 166 N. C., 356; *S. v. Killian,* 173 N. C., 796; *Tillotson v. Currin,* 176 N. C., 484; *S. v. Haywood,* 182 N. C., 815." *S. v. Steen,* 185 N. C., 768 (778).

Defendant sought to show by several witnesses his "general character among the employees of the Atlantic Coast Line." There was no error in refusing to allow such questions on direct examination. "In North Carolina the testimony of a character witness is confined by the general reputation of a person whose character is attacked, or supported, *in the community in which he lives. S. v. Parks,* 25 N. C., 296; *S. v. Perkins,* 66 N. C., 126; *S. v. Gee,* 92 N. C., 756; *S. v. Wheeler,* 104 N. C., 893; *S. v. Coley,* 114 N. C., 879, and numerous other cases since. Reputation is the general opinion, good or bad, held of a person by those of *a community in which he resides.* This is eminently a matter of hearsay, based upon what the witness has heard or learned, not as to any particular acts, but as to the *general opinion or standing in the community.*" (Italics ours.) *S. v. Steen,* 185 N. C., 768, 770. The emphasis upon the word "community" is significant. It is not the reputation of a man among a particular group—such as his associates in church, lodge, or business—which is competent in evidence, it is his reputation generally in the community which is admissible. As stated by *Chief Justice Tilghman* in *Wike v. Lightner,* 11 Ser. & Rawle, at p. 199: "The question is, What is said by people in general? This is the true point of inquiry, and everything which stops short of it is incorrect."

The testimony of Dr. Taylor as to taking so many milligrams of strychnine from the brain, liver, and estimating the balance is not prejudicial, as the amount he found was sufficient to produce death. Most of the defendant's exceptions and assignments of error became immaterial when defendant went on the stand and similar evidence during the course of the trial was introduced without objection. The evidence of Mrs. Harker was competent to show motive, and also that of Mrs. Mason—at least circumstances to be considered by the jury. Dr. J. E. Evans' testimony was a link in the chain of circumstances and competent for what it was worth. He said of the symptoms, "It was strongly suggestive." *Yates v. Chair Co.,* 211 N. C., 200. He had treated Annie Thelma Smoak and had personal knowledge of her symptoms, and was a physician qualified to know. So was the testimony of Dr. Victor Sullivan, Dr. S. E. Warshauser, and Dr. Chas. B. Graham competent. *Shaw v. Handle Co.,* 188 N. C., 222 (232).

The evidence in regard to Alice Mason Smoak's condition was competent—a link in the chain.

The evidence of C. David Jones, sheriff of New Hanover County, was competent: "I told Mr. Smoak I wanted to ask him a few questions and he said 'All right.'" *S. v. Caldwell,* 212 N. C., 484; *S. v. Perry,* 212 N. C., 533. The testimony of Leon P. Andrews in regard to what was the condition of Alice Mason Smoak after her death was a link in the chain, and competent. The fact that a witness for an insurance company stated that the insurance on the life of Annie Thelma Smoak was paid two weeks further in advance than any other policy which defendant held with his company was a link in the chain and competent. The evidence relative to insurance on the life of Mrs. Bertha Stewart, mother of Jeannette Harker, and on Jeannette Harker, was also a link in the chain. The testimony of the physicians found to be experts was competent.

We have read the record and able briefs of defendant with care, and none of his exceptions and assignments of error can be sustained.

The evidence in this case tends to show that the defendant attempted to poison his young daughter, Annie Thelma Smoak, with strychnine on Thanksgiving Day, 26 November, 1936, and that on 1 December, 1936, he again gave her strychnine, from the effects of which she died. He had purchased strychnine poison prior to that time, on 19 November, 1936. He had ill will against his daughter, who resented the fact that in a week or two after the death of his wife, Alice Mason Smoak, he had taken a widow, Jeannette Harker, into his home. Further, he had insurance on the life of Annie Thelma Smoak, which he attempted to collect immediately after her death. He also had insurance on the life of Alice Mason Smoak, his second wife (who died of strychnine poisoning), which he collected. He had insurance on the life of Mrs. Bertha Stewart, mother of Jeannette Harker, payable to him, and she came near dying from strychnine poisoning after taking medicine which he gave her for "indigestion." He had insurance on the life of his first wife, Georgia Jones Smoak, who in the presence of defendant said she had been poisoned. The crime of which defendant was convicted is horrible and unthinkable; but, on the record there is sufficient evidence of his guilt, and the jury so found.

We find on the record no prejudicial or reversible error.

No error.

J. P. WILLIAMSON, AND DUKE POWER COMPANY, INTERVENING, PLAINTIFF, v. CITY OF HIGH POINT, C. S. GRAYSON, AS MAYOR, AND E. L. BRIGGS, EDWARD GURLEY, C. A. LEWIS, E. N. PHILLIPS, J. S. PICKETT, F. LOGAN PORTER, R. H. SECHREST, AND J. E. WARD, AS MEMBERS OF THE COUNCIL OF SAID CITY.

(Filed 2 February, 1938.)

1. Taxation § 38a—

Taxpayers of a municipality may maintain an action to enjoin the municipality from issuing its bonds.

2. Appeal and Error § 41—Where plaintiff is entitled to enjoin defendant, right of intervener to same relief need not be considered.

Where it is determined on appeal that plaintiff taxpayer is entitled to an injunction restraining the issuance of bonds for the construction of an electric power plant by defendant city, the right of an intervening power company to the same relief on its contention that its valuable franchise rights would be destroyed, need not be considered.

3. Taxation § 4—Bonds for municipal power plant are for public purpose and necessary expense.

Bonds for the construction of a municipal electric power plant are for a public purpose and a necessary municipal expense, and may be issued up to the constitutional limitation without a vote of its electors and without legislative authority, and in excess of the constitutional limitation by legislative authority without a vote of the people. Art. VII, sec. 7.

4. Taxation § 3—Art. VII, sec. 7, will be construed in pari materia with the amended Art. V, sec. 4.

Art. VII, sec. 7, and the amended Art. V, sec. 4, will be considered *in pari materia*, and the word "debt" in Art. V, sec. 4, will be given the same construction as has been given the word in construing Art. VII, sec. 7, since the Legislature in framing the amendment must have had in mind the construction which has been given the word as used in Art. VII, sec. 7.

5. Same—Contract of city to pay for property bought for public purposes solely from revenue from the property does not create "debt."

A contract of a municipality to construct a municipal electric power plant and to issue its bonds to pay for same, with provision that principal and interest of the bonds should be paid exclusively from the profits from the plant without resort to funds raised by taxation, does not create a "debt" of the municipality within the meaning of amended Art. V, sec. 4, which prohibits the contraction of a debt by a municipality in any fiscal year in excess of two-thirds of the amount by which its debt was decreased during the prior fiscal year.

6. Municipal Corporations § 5—

A municipal corporation is an agency of the State for the administration of local government, and has only the express and implied powers conferred by the Legislature or which are essential to the declared objects and purposes of the corporation.

7. Municipal Corporations § 8—

Public utilities are operated by a municipality in its *quasi*-private and not in its political or governmental capacity, but a municipality is without power to extend its electric lines beyond the corporate limits for the purpose of selling electricity to nonresidents in the absence of legislative authority.

8. Same—Ordinarily, power to construct electric lines outside city limits is limited by proprietary power to operate utility for its citizens.

Ordinarily, the power given a city by the Legislature to construct municipal electric lines and power plants outside its corporate limits and to sell electricity to nonresidents is related to and limited by its proprietary capacity to carry on such activities primarily for the benefit of its citizens. C. S., 2791, 2792, 2807, 2808; ch. 171, Private Laws of 1931, as amended by ch. 149, Private Laws of 1935.

9. Same—Revenue Bond Act of 1935 authorizes municipalities to construct and operate utilities for the use and benefit of the citizens thereof.

The power conferred upon a municipality to construct power lines and plants outside its corporate limits (C. S., 2791, 2792, 2807, 2808, ch. 171, Private Laws of 1931, as amended) is limited by the provisions of the Revenue Bond Act of 1935, since the act expressly repeals inconsistent provisions of any prior general or special law, C. S., 2969 (13), and under the provisions of the Revenue Bond Act a municipality may construct such lines and plants only in consonance with the policy of the act and the authority therein given municipalities to provide such conveniences for the health, safety, and benefit of the citizens of the municipality. C. S., 2969 (3).

10. Same—City held without authority to construct or acquire proposed municipal electric power plant.

Defendant city owned and operated its own electric distributing system, and purchased the electric power which it distributed from a power company. The city proposed to construct a municipal power plant and to issue its bonds therefor to be paid solely out of the revenue derived from the operation of the plant. The trial court found, under agreement of the parties, that the proposed plant would be located twenty-five miles outside the corporate limits, with transmission lines running through three counties, that it would generate more than three times the amount of electricity then used by the entire city, and that the purpose of project was to engage in the power business generally and to sell electricity to municipalities, industries, and individuals generally. *Held:* The undertaking is *ultra vires* the city, since the excess power is not incidental to a plant operated for its own use or for the use and benefit of its inhabitants, and therefore goes far beyond the powers conferred by the Revenue Bond Act of 1935.

11. Appeal and Error § 37c—Under circumstances of this case, findings of lower court in injunctive proceedings held conclusive.

Although the Supreme Court can review the evidence on appeal in injunctive proceedings, where there are no exceptions to the findings of fact by the lower court, and the record shows that the statement of case on appeal as served by appellees stated that it did "not contain all the evidence relating to the findings of fact to which there are no exceptions" the findings of fact will be held conclusive. Art. IV, sec. 13.

WILLIAMSON *v.* HIGH POINT.

APPEAL by plaintiffs from *Sink, J.*, at August Special Term, 1937, of GUILFORD.

Action originally submitted as controversy without action, in which Duke Power Company intervened and filed complaint, for injunction against the issuance of revenue bonds for construction of electric light, heat, and power plant for the city of High Point, without the approval of a majority of the qualified voters of the city, and against the construction of such plant.

The parties waived jury trial and agreed that the court should hear the case upon agreed statement of facts and upon evidence offered by either party, and find the facts. The court finds facts substantially as follows: The plaintiffs are property owners and taxpayers in defendant city of High Point, a municipal corporation, of which the codefendants are and constitute the governing body.

The governing body of the city of High Point, acting under the authority of the Revenue Bond Act of 1935, ch. 473, Public Laws 1935, and the charter of the city of High Point, as amended (chs. 107 and 171, Private Laws 1931; ch. 149, Private Laws 1935; and chs. 65 and 561, Private Laws 1937), by resolution of 30 November, 1936, as amended 30 June and 4 August, 1937, authorized the acquisition, construction, and operation of an electric system "primarily for the use and benefit of the city of High Point and the consumers therein," but with the further provision that "any services, facilities, or commodities furnished by the electric system which shall not, in the judgment of the council, be immediately required for the use and benefit of the city and consumers therein may be sold to consumers outside of the city." Contemporaneously, and for the purpose of financing same, the said governing body authorized the issuance of $3,171,500 of bonds, "payable solely from the revenue of said electric system," to the payment of both principal and interest of which as same mature, and to create and maintain reserves therefrom as therein provided, a sufficient amount of said revenues are pledged.

The governing body in said resolution prescribed at length regulations for the fixing and maintaining of rates, fees, and charges for the facilities and services afforded by said system; the collecting, handling, and distributing of revenues to cover expenses of operation, and to create a bond fund and a reserve for and the payment of said bonds and of other obligations, not incurred under the Revenue Bond Act of 1935 to the payment of which the revenue shall have been pledged also; against free service by said electric system; and as to numerous other phases in connection therewith to the faithful and punctual performance of which the city, by the issuance of the bonds, is obligated and all of which shall constitute covenants between the city and the holders of the bonds.

(The full context of the regulations is not necessary to consideration of this appeal.)

On 2 December, 1936, the said governing body accepted an offer of the United States of America to make a grant to the city of High Point in the amount of forty-five per cent of the cost of said electric system upon completion as determined by the Federal Emergency Administrator of Public Works, but not to exceed in any event the sum of $2,595,000. This grant is subject to terms and conditions of PWA Form 210, July, 1936.

The court further finds as fact that: Duke Power Company now holds and owns a municipal franchise originally granted by the city of High Point on 8 February, 1909, to John Leddy and his assigns for the term of sixty years from and after said date.

"5. Duke Power Company is now supplying, and for a number of years has supplied, the entire power requirements of the city of High Point and of the citizens, residents, and industrial enterprises within said city and in its vicinity, including the sale of electric power and current to the city of High Point for street lighting, city pumping, and for resale by said city to the citizens and residents within said city. During the calendar year 1935 the total power requirements of the city of High Point amounted to 11,083,000 kilowatt hours. During said year the total power requirements of all consumers of power within said city, including the city itself, amounted to 30,233,000 kilowatt hours, all of which was supplied by Duke Power Company. During said year the total power requirements within said city and in the vicinity thereof and adjacent thereto, also including the requirements of the city itself, were 32,249,000 kilowatt hours, all of which was supplied by Duke Power Company, and since said date it is agreed that there has been no substantial change up to the date of the hearing.

"6. The city of High Point now owns and operates, and for a number of years has owned and operated, within said city an electrical distribution system for the sale and distribution of electric current to the citizens and residents of said city, which system is adequate and sufficient for said purpose. The city of High Point purchases, and for a number of years has purchased, from Duke Power Company at wholesale the electric current which the city resells within said city.

"6½. The city of High Point is preparing and proposes to construct on the Yadkin River, at a point known as 'Styers' dam site' in Forsyth and Davie counties, a hydroelectric plant, with transmission and distribution lines extending from said plant into and through the counties of Guilford, Forsyth, and Davidson, together with substations, switching stations, and other electric appliances and equipment for use in connection with the operation of said plant, for the purpose of engaging in the

power business generally and of furnishing electric power and current to cities and towns, to industrial and commercial enterprises, to private individuals, and to the public generally for domestic, commercial, and industrial use. The annual output of said system will be 104,000,000 kilowatt hours of electric power, consisting of approximately 60,000,000 kilowatt hours of primary power and approximately 44,000,000 kilowatt hours of secondary power. The details of the construction of said system will be as set out in the application of the city of High Point to the PWA. That the dam site is something more than twenty-five miles from the city of High Point and the reservoir created by said dam will cover something like 15,000 acres of land located in the counties of Forsyth, Davie, and Yadkin. That the entire plant and system will require several additional thousands of acres of land, all of which will be located outside of the corporate limits of the city of High Point. . . .

"7. The question of issuing said bonds has not been submitted to the voters of the city of High Point at an election.

"8. The amount of said bonds is far in excess of the amount by which the indebtedness of the city of High Point was reduced during the last fiscal year of said city, namely, the fiscal year which ended 30 June, 1937, and this same condition is true of the fiscal year ending 30 June, 1936.

"9. The city of High Point owns and operates and for more than forty years has owned and operated a system for the distribution of electricity for light, heat, and power purposes; that said distribution system is owned and operated by the city of High Point in its proprietary or private capacity for public purposes, and that the proposed electric generating system would be owned and operated by the city of High Point in its proprietary or private capacity for public purposes; that the said system for the distribution of electricity for light, heat, and power purposes is one of the most fruitful sources of revenue of the city; said city has for a number of years derived a net profit after paying all expenses of operation, maintenance, administration, interest, and principal on the debt of said electric distribution system; and that for the fiscal year 1936-1937 the net profit derived from said system was approximately $200,000; that at the present time such electricity is purchased by said city from a private corporation and is not generated by said city. The city of High Point has outstanding bonds issued partly for the purpose of constructing said distribution system and partly for the purpose of funding a debt incurred for the purchase of electricity. The net revenues of said distribution system are pledged for the payment of all or some of said bonds, but the said net profit, after annual interest and principal payment, inures to the benefit of all the citizens and taxpayers of the city of High Point.

"10. That the resolutions of the city of High Point and the commitment from the Federal Emergency Administration of Public Works, all referred to hereinabove, do not commit the said city of High Point to the 'Styers' dam site' project nor to any other specific project. That, however, the city of High Point and the Federal Emergency Administration of Public Works have each made considerable investigation in regard to the possibilities of such a plan and the cost thereof. That it is the purpose and intent of said city, in the event that its right is established, to issue the revenue bonds as set forth in said resolution, to procure an advanced grant from the Federal Emergency Administration of Public Works to conduct further investigations and surveys of the possibilities and cost of erecting a generating plant at said 'Styers' dam site' and other available hydroelectric sites. That provision is made under the terms of said grant for an advanced grant for said purpose, which advanced grant, in the event that said project is not found to be practicable or feasible, is not to be repaid by said city unless same is expended in bad faith."

Upon the foregoing facts, the court below concluded as matters of law:

"1. That the issuance of said proposed bonds by the city of High Point will not violate the provisions of Art. V, sec. 4, of the Constitution of North Carolina, for the reason that said bonds are payable exclusively from the revenue of the proposed electric generating system and will not constitute 'debts' within the meaning of said section of the Constitution.

"2. That the issuance of said proposed bonds without the vote of the majority of the qualified voters of the city of High Point will not violate Art. VII, sec. 7, of the Constitution of North Carolina for the reason that said bonds will not constitute a debt, pledge of faith, or loan of credit within the meaning of said section of the Constitution.

"3. The issuance of said proposed bonds will not be in violation of the rights of the holders of the outstanding bonds to which the revenues of the present electric distribution system of the city of High Point are pledged.

"4. That ch. 149 of the Private Laws of 1935, and ch. 171 of Private Laws of 1931, and ch. 473 of the Public Laws of 1935, known as the 'Revenue Bond Act of 1935,' and ch. 107 of the Private Laws of 1931, and chs. 65 and 561 of the Public-Local and Private Laws of 1937, are not unconstitutional.

"5. That the plaintiff, Duke Power Company, has no right to an injunction against the city of High Point prohibiting said city from erecting said electric system, thus preventing competition in the electric and power business from the said city. That competition by the city of High Point in said city violates no right of the Duke Power Company.

"6. That the plaintiffs J. P. Williamson and Duke Power Company have no right as taxpayers of the city of High Point to an injunction against the issuance of said proposed bonds for the reason that said bonds will not be a general obligation of the city of High Point, and for the reason that said city will not, by the issuance of the proposed revenue bonds, incur a debt, pledge its faith, or lend its credit."

From judgment in accordance therewith, and denying injunctive relief, plaintiffs appealed to the Supreme Court, and assigned error.

L. J. Fisher, Jr., and Gaston A. Johnson for plaintiff J. P. Williamson, appellant.

W. M. Hendren, Roberson, Haworth & Reese, W. B. McGuire, Jr., and W. S. O'B. Robinson, Jr., for Duke Power Company, intervening plaintiff, appellant.

R. L. Deal, R. T. Pickens, T. J. Gold, and G. H. Jones for defendants, appellees.

WINBORNE, J. The right of plaintiffs, as taxpayers in the city of High Point, to maintain this action to test the authority of the city to issue the proposed bonds and to acquire and construct the proposed electric system, is too well recognized in this State to admit of debate. Therefore, if the plaintiffs be correct in their contentions, they are entitled to injunction. Hence, we deem it unnecessary to consider the further claim of the intervening plaintiff, as a public electric utility entity, owning a lawful business, valuable franchises, and property rights, to the additional right to maintain the action against threatened competition from a municipally owned electric system to be constructed allegedly without legal authority.

Three questions arise on this appeal for consideration: (1) Do bonds, issued to enable a municipality to acquire and construct a revenue producing undertaking, an electric system, payable exclusively from the revenue therefrom, pledged in security therefor, constitute a debt of the municipality within the meaning of Art. VII, sec. 7, and of Art. V, sec. 4, of the Constitution of North Carolina?

(2) If not, on the facts presented on this record, has the city of High Point, under the Revenue Bond Act of 1935 and its charter as amended, the authority to issue the proposed revenue bonds?

(3) On the facts presented on this record, does the city of High Point have the authority to acquire and construct the proposed electric system?

The first question is answered "No," on the authority of *Brockenbrough v. Comrs.*, 134 N. C., 1, 46 S. E., 28. An electric plant for municipal use and for the comfort and convenience of the inhabitants of a municipality is a public purpose and a necessary expense within

the meaning of Art. VII, sec. 7. *Fawcett v. Mount Airy,* 134 N. C., 125, 45 S. E., 1029; *Swindell v. Belhaven,* 173 N. C., 1, 91 S. E., 369. Nothing else appearing, the city of High Point has the authority to contract a debt for such expense and levy a tax (1) up to the constitutional limitation, without a vote of the majority of the qualified voters without legislative authority, and (2) in excess of the constitutional limitation by legislative authority without a vote of the people. *Palmer v. Haywood County,* 212 N. C., 284, 193 S. E., 668, and cases cited therein. However, Art. V, sec. 4, as adopted in amended form in 1936, except in certain cases not pertinent here, provides: ". . . 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 the instant case it is admitted of record that the amount of the proposed bonds is far in excess of the amount by which the indebtedness of the city of High Point was reduced during the last fiscal year. Therefore, if the proposed bonds be a debt within the meaning of Art. V, sec. 4, even though the purpose be a necessary expense, the Legislature has no power to authorize the city to issue them unless the question be submitted to a vote of the people.

The word "debt" is used in both Article VII, sec. 7, and Article V, sec. 4. The sections are to be considered *in pari materia. Parvin v. Comrs.,* 177 N. C., 508, 99 S. E., 432.

When so considered, the *Brockenbrough case, supra,* is decisive of the question. In that case this Court first considered the question and approved the issuance of special revenue bonds. There the board of water commissioners, acting for the city of Charlotte, under ch. 271, Private Laws 1899, as amended by ch. 196 of Private Laws of 1903, was authorized to issue $200,000 in bonds "to acquire additional property and make such additional improvements thereto as may be necessary to at all times furnish the city of Charlotte with a sufficient supply of good, wholesome water," and to be secured equally and ratably by a first mortgage or deed of trust upon all the property that constitutes the waterworks system, including such additional property.

The act there provides for the payment of the principal and interest on said bonds out of revenues collected from the said water system, and further provides: "That none of the funds of the city of Charlotte, raised by taxation, shall ever be applied to the payment of either the principal or interest of the bonds issued by virtue of sec. 6 hereof." It is recited that: "The city has found it necessary to and has laid many

miles of sewer and water pipes, and purchased the necessary implements, tools, etc., for the operation thereof, all of which are necessary for the protection of the property and health of said city and its inhabitants; that the present water supply is inadequate to meet the demands of public and private consumers and an efficient operation of said plant." The resolution of the commission provided: "That neither the bonds authorized to be issued hereunder, the coupons attached thereto, nor the deed of trust securing the same, shall be deemed or held as creating any debt of the city of Charlotte, or as pledging the faith or lending the credit of said city for the payment of the indebtedness hereby authorized, and no action shall be maintained in any court against said city or any of its officers to enforce the payment of said indebtedness evidenced by said bonds, coupons, or deed of trust except as to the funds and property herein expressly charged with the payment thereof." This Court, speaking to the question, said: "If, as contended by the defendants, the bonds proposed to be issued are not debts or liabilities of the city, or if the making and issuance of them be not pledging the faith or lending the credit of the city within the meaning of Art. VII, sec. 7, of the Constitution, several important and interesting questions discussed in the briefs will be eliminated. This question has not before been presented to or decided by this Court. The language of the Constitution declares that no county, city, town, or other municipal corporation 'shall contract any debt, pledge its faith, or loan its credit,' etc. The plaintiffs insist that the issuing of the bonds in controversy comes within this inhibition. 'Debt' is defined to be 'that which is due from one person to another; that which one person is bound to pay or perform to another.' Black's Law Dict., 337. *Perrigo v. Milwaukee,* 92 Wis., 236. 'An indebtedness within restrictions upon municipal indebtedness is an agreement of some kind by the municipality to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement.' *Sackett v. New Albany,* 88 Ind., 473, 45 Am. Rep., 467. 'A debt is a specified sum of money which is due from one person to another, and denotes not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment.' *S. v. Hawes,* 112 Ind., 323. It would not be contended that upon the facts in this case the city lends its credit or pledges its faith in regard to the proposed bonds. It does not endorse or guarantee their payment or assume any obligation in respect to them. Nor can its revenues be applied to the payment of them." Then, after reviewing authorities elsewhere, the Court continued: "We can see no reason why the Legislature may not, under its general power to provide for the government of cities and towns and legislate in regard to them, authorize the board of water commissioners to apply the rents and tolls, as they accrue, to the purposes set out in the act and to pledge such application. The contract

thus made will be enforcible by appropriate remedies. We therefore hold that the bonds authorized by the Act of 1903 to be issued do not constitute a debt against the city of Charlotte; . . . that the Legislature has the power to authorize the issuing of bonds and the execution of the mortgage proposed to be issued and executed pursuant to the Act of 1903. . . ."

"It is an established rule of construction that, where a constitutional provision has received a settled judicial construction, and is afterward incorporated into a new or revised Constitution, it will be presumed to have been retained with a knowledge of the previous construction, and the courts will feel bound to adhere to it." 12 C. J., 717.

In this State, in *Ferrall v. Ferrall,* 153 N. C., 174, 69 S. E., 60, *Hoke, J.,* speaking to the same subject of construction, said: "The action of our constitutional convention in thus adopting a public statute of accepted construction and on a subject of momentous interest and making the same, in its entirety and very words, a part of our organic law, while not necessarily conclusive, affords well-nigh convincing evidence that the words were intended to bear their established meaning, and in this subject should so prevail as the law of the land," citing *Rhyne v. Lipscombe,* 122 N. C., 650, 29 S. E., 57.

In *Hall v. Redd,* 196 N. C., 622, 146 S. E., 583, *Stacy, C. J.,* said: "It is not proposed that the municipality shall contract any debt or loan its credit so as to involve the imposition of a tax. Hence, this renders Art. VII, sec. 7, of the Constitution, requiring a vote of the people, except for a necessary expense, inapplicable," citing *Brockenbrough v. Comrs., supra; Gardner v. New Bern,* 98 N. C., 228, 3 S. E., 500.

Since the word "debt" as used in Art. VII, sec. 7, of the Constitution has been so interpreted by the Court, proper interpretation will give to it the same meaning in a later amendment to the Constitution as in Art. V, sec. 4.

The prevailing opinion in other jurisdictions is that the special fund doctrine, as enunciated in the *Brockenbrough case, supra,* to the effect that a contract by a municipality to purchase and pay for property for public purposes solely out of the net earnings of the property, without resort directly or indirectly to revenue derived from taxation, does not create a debt within the meaning of such constitutional provisions. *Fairbanks v. City of Wagoner,* 81 Fed. (2d), 209, note, page 216; *George v. City of Asheville,* 80 Fed. (2d), 55; 72 A. L. R., 688 n.

In view of the disposition hereinafter to be made of the present case, we deem it needless to determine whether any of the covenants between the city and the bondholders go beyond the holding in the *Brockenbrough case, supra.*

The second question is so closely interwoven with the third that the two may be considered together. Each is answered in the negative.

This invites inquiry as to the authority and extent of authority of a municipal corporation in connection with a municipally owned and operated public utility.

The Constitution imposes upon the Legislature the duty to provide by general laws for the organization of cities, towns, and incorporated villages. Art. VIII, sec. 4. "It is said that the power of the Legislature to control them in the exercise of their municipal powers is somewhat more restricted than in the case of counties, yet both are but instrumentalities of the State for the administration of local government, and their authority as such may be enlarged, abridged, or withdrawn entirely at the will or pleasure of the Legislature." *Murphy v. Webb*, 156 N. C., 402, 72 S. E., 460.

In *Holmes v. Fayetteville*, 197 N. C., 740, 150 S. E., 624, *Adams, J.*, said: "The powers of a municipal corporation are those granted in express words, those necessary or fairly implied in, or incident to, the powers expressly granted, and those essential to the declared objects and purposes of the corporation. . . . The dual capacity or twofold character possessed by municipal corporations is governmental, public, or political, and proprietary, private, or *quasi*-private. In its governmental capacity a city or town acts as an agency of the State for the better government of those who reside within the corporate limits, and in its private or *quasi*-private capacity it exercises powers and privileges for its own benefit. . . . The general rule is that a municipal corporation has no extra-territorial powers; but the rule is not without exceptions. The Legislature has undoubted authority to confer upon cities and towns jurisdiction for sanitary and police purposes in territory contiguous to the corporation. . . . If a municipality owns and operates a water or lighting plant and has an excess of water or electricity beyond the requirements of the public, which is available for disposal, it may make a sale of such excess to outside consumers as an incident to the proper exercise of its legitimate powers. . . . It is equally clear that without legislative authority the defendant would not be permitted to extend its lines beyond the corporate limits for the purpose of selling electricity to nonresidents of the city."

In *Asbury v. Albemarle*, 162 N. C., 247, 78 S. E., 146, *Brown, J.*, said: "It is well settled that local conveniences and public utilities, like water and lights, are not provided by municipal corporations in their political or governmental capacity, but in that *quasi*-private capacity in which they act for the benefit of their citizens exclusively."

Reviewing pertinent statutory authority with which the city of High Point is clothed, we find that the charter, Private Laws 1931, ch. 107, Art. II, sec. 4, provides that the city shall have the rights *inter alia* contained in: (1) C. S., 2791-2792, to purchase lands within and outside of the city, for electric lights, power systems, and other public utilities,

with right of eminent domain; (2) C. S., 2807-2808, to own and maintain its own light and water systems, to furnish light to the city and its citizens and to any person, firm, or corporation desiring same outside the corporate limits, where the service is available," and to fix rates for those outside different from those inside. The charter was amended by ch. 171, Private Laws 1931, by which the city was given the right to operate its water, sewerage, and electric light lines and system "for a distance not exceeding three miles" outside the city limits. The words "for a distance not exceeding three miles" were stricken therefrom by ch. 149, Private Laws 1935, so that the provisions of ch. 171 now read: "The said city of High Point be and it is hereby authorized and empowered, in its discretion, to extend, construct or purchase, maintain and operate its water, sewerage and electric lines and system . . . in all directions beyond the corporate limits of said city as the same now exist or may hereafter be established; to sell and furnish electric current and lights in such area, and to charge for the use of such utility such rates as the city council may determine." This act became effective upon ratification on 10 April, 1935.

Then in 1937 by two private acts, chs. 65 and 561, the powers of the Revenue Bond Act of 1935 were continued for four years for High Point to issue revenue bonds thereunder for any purpose now authorized by the Municipal Finance Act or any other law. C. S., 2787 (3) (5), authorizes all cities to purchase, conduct, own, lease, and acquire public utilities and to create, provide for, construct, regulate, and maintain all things in the nature of public works.

Conceding, therefore, that the city of High Point has express authority of the Legislature to purchase lands within and outside of the city for an electric power system, and to extend, construct, maintain, and operate such system in all directions beyond the corporate limits, and to sell and furnish electric current and lights to the users in such area, ordinarily such powers relate to and are limited by the proprietary capacity in which the city acts for the benefit of its citizens in a compact community.

But, be that as it may, the city of High Point is here undertaking to acquire and construct an electric system and to issue revenue bonds to finance same under the authority of the Revenue Bond Act of 1935. This act became effective 11 May, 1935. It contains provision that: "The powers conferred in this act shall be in addition and supplemental to the powers conferred by any other general, special, or local law." But it further provides that: "In so far as the provisions of this act are inconsistent with any other general, special, or local law, the provisions of this act shall be controlling." C. S., 2969 (13).

In the act the Legislature expressly declares the policy of the State with reference to its purpose in this manner: ". . . No municipal-

ity shall operate such undertaking primarily for profit, but shall operate such undertaking for the use and benefit of the consumers served by such undertaking and for the promotion of the welfare and for the improvement of the health and safety of the inhabitants of the municipality." C. S., 2969 (3).

Policy is a settled or definite course or method adopted and followed by a government. Webster's International Dict. Ordinarily, where the law making power distinctly states its design, no place is left for construction. 59 C. J., 960.

Further analyzing the Act of 1935, it is seen that, in addition to the powers which it may now have, any municipality as therein defined, including cities, shall have the power under this act: "(a) To construct, acquire by gift, purchase, or the exercise of the right of eminent domain, . . . any undertaking, within the municipality, and to acquire . . . lands or rights in land or water rights in connection therewith, (b) *to operate and maintain any undertaking for its own use or for the use and benefit of its inhabitants, and also to operate and maintain such undertaking for the use and benefit of persons, firms, and corporations (including municipal corporations and inhabitants thereof) whose residences or places of business are (or which are) located in such municipality* (italics ours); (c) to issue its bonds to finance in whole or in part the cost of the acquisition, purchase, construction, . . . of any undertaking; (d) to prescribe and collect rates, fees, charges for services, facilities and commodities furnished by such undertaking; and (e) to pledge to the punctual payment of said bonds and interest thereon an amount of the revenues of such undertaking . . . sufficient to pay said bonds and interest as the same shall become due and to create and maintain reasonable reserves therefor." Thus, the right of acquisition, purpose of operation, and manner of financing of an undertaking are linked together, and limit the extent of the undertaking.

The narrative revealed by the findings of fact of the court below discloses that in the proposed undertaking and proposed bond issue the city of High Point is in conflict with the purpose and intent of the provisions of the act. These findings show that: The city owns and operates, in its proprietary capacity, a system for distribution of electricity for light, heat and power purposes, through which it sells and distributes electric current, purchased therefor. The system and supply of current are adequate and sufficient for the needs and requirements of the city and its citizens. For the fiscal year 1936-37 the net profit derived from the distribution system was approximately $200,000. The total power requirements during the calendar year 1935 within the city and in the vicinity thereof and adjacent thereto, including the requirements of the city itself, were 32,249,000 kilowatt hours. The current annually generated by the proposed system will be 104,000,000 kilowatt hours of

electric power, consisting of approximately 60,000,000 kilowatt hours of primary and approximately 44,000,000 kilowatt hours of secondary power. The city is preparing and proposing to construct a system, to cost more than $5,500,000, "with transmission and distribution lines extending from said plant into and through the counties of Guilford, Forsyth, and Davidson, . . . for the purpose of engaging in the power business generally and of furnishing electric power and current to cities and towns, to industrial and commercial enterprises, to private individuals and the public generally for domestic, commercial, and industrial use."

Such an undertaking goes far beyond the powers conferred by the Revenue Bond Act of 1935, and is *ultra vires*. The excess power is not incidental to a plant operated "for its own use or for the use and benefit of its inhabitants."

The defendant contends, however, that there is no evidence to support such findings, and that the only evidence in the record bearing upon the purpose of the city council is that expressed in the amendment of 30 June, 1937, to the original resolution authorizing the construction of the system, in which it is stated: "The electric system shall be constructed and operated primarily for the use and benefit of the city of High Point and the consumers therein, but any services, facilities or commodities furnished by the electric system which shall not, in the judgment of council, be immediately required for the use and benefit of the city and consumers therein may be sold to consumers outside the city." Defendants request that facts be reviewed by this Court, and cite *Mewborn v. Kinston*, 199 N. C., 72, 154 S. E., 76, as authority. *Brogden, J.*, there said: "The Court has the power to review facts in injunction proceedings. *Peters v. Highway Commission*, 184 N. C., 30, 113 S. E., 567. Nevertheless, there is a presumption that the judgment and findings of fact are correct, and the burden is upon the appellant to assign and show error. *Plott v. Comrs.*, 187 N. C., 125, 126 S. E., 190."

In the instant case there is no exception to the findings of fact by either plaintiffs or defendants. The record further shows that the statement of case on appeal as served by plaintiffs, service of which was accepted by defendants, contains the statement: "The following statement . . . does not contain all of the evidence relating to the court's findings of fact to which there are no exceptions." Under these circumstances, the findings of fact have the force and effect of a verdict by a jury and are conclusive. Art. IV, sec. 13, N. C. Constitution. *Barringer v. Savings & Trust Co.*, 207 N. C., 505, 177 S. E., 795.

On these facts the court below erred in refusing to grant the injunction as prayed.

The judgment below is

Reversed.

MRS. LUCY GRIMSLEY v. MISS NELL SCOTT.

(Filed 2 February, 1938.)

Automobiles § 14—Evidence held to show contributory negligence of plaintiff hitting parked car while sledding.

The evidence favorable to plaintiff tended to show that defendant's car was parked too far from the curb and too near an intersection in violation of a city ordinance, that plaintiff was coasting down a steep grade on a sled after dark, did not see the parked car until 50 or 100 feet away because blinded by a large street light, and was unable to avoid hitting the car although there was a clear passage of 20 feet between defendant's car and the cars parked on the other side of the street. *Held:* Even conceding the evidence shows negligence on the part of defendant in parking the car, plaintiff's evidence discloses contributory negligence barring recovery as a matter of law.

APPEAL by plaintiff from *Hill, Special Judge,* at March Term, 1937, of FORSYTH. Affirmed.

This is an action for actionable negligence brought by plaintiff against defendant, alleging damage. The defendant denied negligence and set up the defense of "last clear chance" and contributory negligence.

In the city of Winston-Salem there are certain streets that have very steep grades. Jersey Avenue leads into Summit Street and continuing down Summit Street there is a triangle. One can continue down Summit Street or turn into Carolina Avenue at the triangle and go down Carolina Avenue. In going down Summit Street and Carolina Avenue the grade is steep.

The defendant, an hour or two before the injury complained of, had parked her car opposite the home in which she lived on the triangle, it is alleged by plaintiff contrary to law—too near the intersection of Summit Street and Carolina Avenue and not close enough to the curb. Ice and snow were on the streets and the plaintiff, while sitting on a sled with her daughter (about 11 years of age) in front of her, ran into the parked car of defendant and was seriously injured. The accident occurred on 31 December, 1935, about 8 o'clock at night. A street light was burning on Summit Street and near its intersection with Carolina Avenue, and some 28 feet from the east end of the triangle near which defendant's car was parked. Carolina Avenue was 34 feet wide. Cars were parked near the curb on the street opposite to the triangle. There was 20 feet clear space on Carolina Avenue for one to travel.

Guy T. Hinshaw, witness for plaintiff, testified, in part: "The steepest part of the grade is about where Jersey Avenue enters Summit. Summit curves to the left from Jersey, going down the hill. The grade where Jersey enters Summit is 12.9%. There is a long swinging curve

from Jersey Avenue into Summit Street. From where Jersey Avenue hits the curb line on Summit Street it is 150 feet to the east end of the triangle. . . . There is a street light shown on the map just before reaching the triangle, in Summit Street. It is approximately twenty-eight feet from the east end of the triangle. *It is a large suspended light over the street; I think it is a standard light.*"

The plaintiff testified, in part: "About a week prior to 31 December, 1935, quite a deep snow fell in Winston-Salem, and this snow remained on the ground for several days, and the ground was covered with snow on the evening of 31 December. . . . I did not go coasting until in the evening, after six o'clock. . . . I started from my home about 6:25 or 6:30 on the evening of 31 December, and the signs were up then. I did not go coasting before the signs were up. First, I went to Mrs. McNair's home and waited for her, as she was going with me. She lives at the intersection of Manly and Summit streets. I have coasted all my life. I was raised in Virginia and coasted there. My little daughter was with me when I left home on this occasion. She was eleven years old at that time. We left our home on Carolina Avenue, and in going to Mrs. McNair's we came out Carolina Avenue to this triangle, went by the triangle and crossed the street by the triangle, going up Summit Street, on the left. At that time, which was 6:25 or 6:30, there was no car parked at that triangle. There were cars parked on the right-hand side of the street in front of the apartments, across the street from the triangle. When I arrived at Mrs. McNair's home she was not ready to go coasting with us, and we waited for her something like an hour, and then we went up to a point near Sixth Street as it enters Summit Street, and started coasting from there down Summit Street, on the right-hand side. I was on my sled with my little girl in front of me on the sled. . . . I was on the sled coasting down, and after I came around the curve beyond Jersey Avenue to about this point (indicating on map), just before *I got to that big street light, I saw the car.* I could not see it sooner because of the light. I looked to the right and planned to turn to the right, going down Summit Street, but that street was blocked with this sign; I could see it plainly then, and I turned to the left as far as I possibly could, but I could not miss the car which was parked on Carolina Avenue at the triangle, and near the east end of the triangle. . . . I was injured about eight-twenty that night. I only coasted down that hill two times that night, the first time as far as Jersey Avenue, and the second time all the way down to Carolina Avenue, when I was injured. . . . There was a wide space in the street we could coast. . . . The whole street was covered with snow and came up just about even with the curb. Vehicles had not made a track up and down the hill. The street was smooth.

There were no ruts in that street. . . . My sled was running on top of the ice, the runners of the sled being on top of the ice. The ice had refrozen where it had melted and there was ice on top of the snow and the runners of the sled did not cut through. *It was slick.* . . . I was coasting on a Flexible Flyer sled, with steel runners, I would say an inch wide at least. . . . *I could not have been more than a hundred feet up the hill from that street light shown on the map when I first saw the automobile parked, and probably not that much.* I was just in front of the light because the light blinded me. It was less than a hundred feet, I would say between fifty and one hundred feet, when I first saw the car. It was not more than fifty feet ahead of the light. I saw the car, say, fifty feet east of the light for the first time. I do not know how fast my sled was going at that time. It was sliding, going smoothly; *it was going fast enough then.* . . . I cannot tell how fast my sled was going when I got to Carolina Avenue. *I must have been going very fast.* . . . I don't have any idea how fast my sled was going at that point. *I had been coasting down a very steep hill.* My daughter and I had traveled on the sled at least two hundred yards down Summit Street *and had all the speed we could make running on top of ice. We were going fast.* . . . Notwithstanding the fact that *I knew it was so slick and that I could not stop, I was going down without any brakes,* sitting up with my feet out in front and my little daughter in front of me. There are no brakes on a sled. You can guide the sled with your feet or hands, and have perfect control of it by that guiding. . . . There was no obstruction between the cars parked on the east side of Carolina Avenue and Miss Scott's car parked on the triangle, or west side; there was no signs or barricades of any kind there, and *that thirty-four foot street was open between Miss Scott's car and cars parked on the other side, or east side of the street.* . . . I did not plan to stop the sled at the triangle; I planned to go on home on Carolina Avenue. *My sled was going much faster when we reached the triangle than at Jersey Avenue, because we had gained momentum, I imagine.*"

The plaintiff made numerous exceptions and assignments of error. The material ones and necessary facts will be considered in the opinion.

Polikoff & McLennon and Ratcliff, Hudson & Ferrell for plaintiff.
Peyton B. Abbott and Hastings & Booe for defendant.

PER CURIAM. At the close of plaintiff's evidence the defendant in the court below made a motion for judgment as in case of nonsuit, which was refused. This motion was renewed at the close of all the evidence (C. S., 567), and was granted. In this we see no error.

Defendant introduced city ordinances of Winston-Salem, in regard to skating on the street, being section 126, as follows: "Section 126.—*Skat-*

ing or Coasting on Street Forbidden. All persons are hereby forbidden to coast on sledge, coaster express wagon, toy wagon or other similar vehicle or move or skate on any roller skates or other similar device on or along that part of any of the streets of the city that lies between the curbing."

The plaintiff offered the following testimony in rebuttal: Section 141 of the city ordinances of the city of Winston-Salem, and also section 170 of the ordinances, as follows: "Section 141—*Vehicles Shall Stop Within Twelve Inches of Curb.*—When it is necessary for a vehicle to be stopped at the curb, it shall be stopped with the right-hand side next to the same and both front and rear wheels on said side shall be not more than twelve inches from the curb." "Section 170.—*Police to Manage Traffic.*—The police department shall have full power and authority in relation to the management of traffic, including street cars, and all street cars and other vehicles shall instantly stop when ordered to do so by any policeman."

We find no sufficient evidence in the record that the above ordinance, section 126, has been repealed by the city of Winston-Salem. We think section 170 has no bearing on the facts in this case. From the view we take of the controversy the exceptions and assignments of error made by plaintiff to the admission and exclusion of evidence are immaterial and cannot be sustained.

In *Lee v. R. R.,* 212 N. C., 340 (341), it is held: "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."

Conceding that defendant was negligent in parking her car, yet we think plaintiff was guilty of contributory negligence. She was sitting on the sled wth her young daughter in front of her, going down a steep incline very fast, on slick ice. The car of defendant, which was parked on the triangle, could be seen by the plaintiff 50 to 100 feet away. There was a large light over the street—a standard light. Plaintiff testified it was a "big street light." She said that she had a clear passageway on Carolina Avenue of 20 feet. Plaintiff, going down grade at a rapid speed on slick ice, keeping near the curb on Carolina Avenue, hit the rear end of defendant's car and was injured. We think the contributory negligence of plaintiff was the proximate cause of her injury.

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

Affirmed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1938

DORIS PARKER v. J. B. EASON, EXECUTOR OF ESTATE OF JOS. D. EASON, DECEASED; J. B. EASON, TRUSTEE UNDER THE WILL OF JOS. D. EASON, DECEASED, FOR DORIS PARKER; AND J. B. EASON, INDIVIDUALLY.

(Filed 2 March, 1938.)

1. Descent and Distribution § 12—

An advancement is a gift *in præsenti* made by a parent on behalf of a child to advance the child in life, and thus enable him to anticipate his inheritance to the extent of the advancement. C. S., 1654 (2).

2. Same—

Advancements are restricted by statute, N. C. Code, 138, to gifts from a parent to a child, and ordinarily grandchildren may not be held accountable for gifts to themselves, but must account for gifts from their grandparent to their parent before they can inherit from their grandparent.

3. Same: Wills § 34—Will held to require accounting for advancements in same manner as though testator died intestate.

The will in suit directed that loans and advancements by testator to his children should be accounted for and taken into consideration in dividing the property and the amount finally received by those to whom advancements were made to be reduced proportionately, and by subsequent item divided the estate into twelve parts, one of which was to be held in trust for the children of a deceased daughter. Plaintiff is one of the children of the deceased daughter. *Held:* The intent of the testator as gathered from the will requires advancements to be accounted for before dividing the property, in the same manner as though he had died intestate, and plaintiff must account for the advancements made to her mother, in proportion with her sisters, before receiving her share of the *corpus* of the trust fund.

PARKER *v.* EASON.

APPEAL by plaintiff from *Williams, J.,* at October Term, 1937, of WILSON. Affirmed.

"The above entitled matter came on to be heard before his Honor, Clawson L. Williams, Judge presiding, and a jury. After the reading of the pleadings, the plaintiff admitted in open court that she had received from the defendant on account of whatsoever sum was due her under the will of her grandfather, Jos. D. Eason, the sum of $345.39, as set out in the fourth paragraph of her complaint, and that she was properly chargeable with the sum of $209.38 in addition thereto, which sum had, by the defendant, been advanced to her sister, Grace Parker, at the special request and instance of the plaintiff, with the direction and understanding that she, the plaintiff, should be charged therewith, the defendant having heretofore in his account filed with the clerk of the Superior Court, charged the plaintiff with the two respective sums.

"The following facts were admitted in open court, to wit: Jos. D. Eason, deceased, was the father of Sallie Eason Parker; the plaintiff Doris Parker, Grace Parker and Edith Parker are the children of Sallie Eason Parker. Sallie Eason Parker died prior to the death of her father, Jos. D. Eason. The plaintiff Doris Parker, Grace Parker, and Edith Parker are the persons mentioned in subsection . . . of the fifth item of the last will and testament of Jos. D. Eason, deceased. In making settlement of the estate of Jos. D. Eason, deceased, the defendant, as executor, charged the plaintiff herein with one-third of certain indebtedness of Sallie Eason Parker to Jos. D. Eason, subject to certain credits, all of which is set out in the answer and in the report filed by the defendant herein as trustee of the plaintiff and her other sisters.

"The plaintiff contended that under a proper construction of the will of her grandfather, Jos. D. Eason, the defendant, as executor of Jos. D. Eason, should not have charged her with one-third of the indebtedness of her mother to the testator. The defendant, on the other hand, contended that under a proper construction of the will of Jos. D. Eason, he was required to charge the plaintiff with one-third of the indebtedness of her mother, his daughter, to Jos. D. Eason.

"The defendant introduced evidence tending to show that Sallie Eason Parker owed her father, his testator, the sums of money which he had charged against the plaintiff, and her sisters in his accounts. The plaintiff stated, in open court, that she had no evidence to offer to contradict the evidence offered by the defendant tending to show that Sallie Eason Parker did owe her father, the defendant's testator, the sums of money which he had charged against the plaintiff and her sisters.

"The court being of the opinion that under a proper construction of the will of Jos. D. Eason it was the duty of the defendant to charge

against the share of the plaintiff one-third of the net indebtedness of her mother, Sallie Eason Parker, to her father, Jos. D. Eason, the testator of defendant, as the defendant did in the settlement of the said estate, whereupon the plaintiff stated in open court that if the defendant had the right to charge the items, the correctness of the amount of the items was admitted and she waived her right to the submission of an issue to the jury, admitting that the items as charged were the correct amounts of the indebtedness of her mother, Sallie Eason Parker, to the estate of Jos. D. Eason.

"It is therefore, upon motion, ordered, decreed and adjudged that the plaintiff take nothing by this action; that the defendant go hence without day and recover his costs in this behalf expended.

CLAWSON L. WILLIAMS,
Judge Presiding."

To the foregoing judgment the plaintiff excepted, assigned error, and appealed to the Supreme Court.

"Agreed Case on Appeal. This is a civil action commenced by plaintiff to recover of defendant, in his various capacities, certain moneys alleged to have been wrongfully withheld in a settlement made by the defendant as executor of the estate of Joseph D. Eason and as trustee for plaintiff under the will of Joseph D. Eason.

"Defendant answered the complaint and set up that he was due the plaintiff only the sum of $641.52, and that he had paid the sum into the hands of the clerk of the Superior Court of Wilson County for her use.

"The sole controversy between plaintiff and defendant resolved itself into a construction of the last will and testament of Joseph D. Eason. For the purposes of this record it is agreed that if plaintiff was correct in her contention that she was not chargeable with one-third of the indebtedness of her deceased parent to the estate of Joseph D. Eason, then the amount owing by defendant to her would be $1,381.61, and that if she be chargeable with one-third of said indebtedness, then the amount of $641.52 paid into the hands of the clerk of the Superior Court by defendant was the correct amount."

The last will and testament of Joseph D. Eason was introduced in the evidence, and the material parts for a decision of this controversy will be set forth in the opinion.

L. Bruce Gunter, Finch, Rand & Finch, and Troy T. Barnes for plaintiff.

D. M. Hill and Connor & Connor for defendants.

CLARKSON, J. The question for decision: Is plaintiff chargeable with one-third of the indebtedness of her deceased parent, Sallie Eason Par-

ker, to the estate of her mother's father, Joseph D. Eason? We think so. It is agreed between the litigants if plaintiff was chargeable with one-third of the indebtedness due by her mother to the estate of her father, Joseph D. Eason, the amount due her was $641.52, otherwise $1,381.61. In *Paschal v. Paschal,* 197 N. C., 40, citing authorities, it is said: "An advancement may be defined as a gift *in præsenti* or provision made by a parent on behalf of a child for the purpose of advancing said child in life, and thus to enable him to anticipate his inheritance to the extent of such advancement. C. S., 1654, rule 2."

Grandchildren are bound to bring in the advancements to their parents, but ordinarily not gifts to themselves. This rule is restricted by the statute to gifts from a parent to a child, N. C. Code (Michie), sec. 138. *Headen v. Headen,* 42 N. C., 159 (161).

If Joseph D. Eason had died intestate without a will, the plaintiff in this action, his granddaughter, before she could inherit from her grandfather had to bring into hotchpot the advancements made to her mother. In the present case plaintiff takes under the will of her grandfather, and the will must be construed.

At the date of the execution of the will by Joseph D. Eason his wife and nine children were living and two were dead. The two dead each left children. The mother of plaintiff left three children. Under the will he gave to his wife the house and lot on which they resided and a small farm. He gave to two of his sons, J. L. Eason and J. D. Eason, Jr., certain life insurance policies.

"Fourth: During my life I have loaned and advanced certain sums of money to certain of my sons and daughters which I wish taken in consideration in a division of my property, and for that purpose I direct that all advances or loans so made by me to any of my sons and daughters be accounted for, with interest, the amount to be finally received by those to whom such advances or loans have been made to be reduced proportionately.

"Fifth: All the balance, remainder and residue of the property that I may own at the time of my death, and which I have not hereinbefore specifically disposed of, I hereby bequeath and devise unto my wife, sons and daughters, and grandsons and granddaughters in the manner following and in the proportion set opposite their respective names, to wit":

Then he devises the balance into twelve parts:

"(A) K. T. Eason a one-twelfth interest thereof, etc. . . .

"(L) A one-twelfth interest thereof I give, bequeath, and devise unto J. B. Eason in and upon the following trust, to wit: In trust to have, hold, retain and safely keep to the use and benefit of Grace Parker, Doris Parker, and Edith Parker (the daughters of my deceased daughter,

Sallie Eason); and in this connection I direct said J. B. Eason, as such trustee, in his discretion and under the direction of the proper court, to expend and pay out said one-twelfth interest (one-third thereof to each) for the maintenance and education of said Grace Parker, Doris Parker, and Edith Parker during their minority, the balance, if any, remaining of their respective one-third of said one-twelfth interest to be paid by said trustee to said Grace Parker, Doris Parker, and Edith Parker, respectively, when they shall reach twenty-one years of age, but not before."

It would appear from Item 4 of the will, *supra,* "I direct that all advances or loans so made by me to any of my sons and daughters be accounted for," etc., when construed with Item 5 as to the residue of the property, there should be an equal distribution after deducting advancements—like in case of intestacy—equality is equity. It seems that the intent of the testator was to divide the residue of the estate after advancements were deducted. It also seems that none of the others interested under the will make the contention that plaintiff does, but are satisfied. It is estimated that if plaintiff's contention prevailed the children of Sallie Eason Parker would receive nearly 75 per cent more than any of the other children. For the reasons given, the judgment of the court below is

Affirmed.

STATE EX REL. WAYNE BRIGMAN v. J. M. BALEY, SR.

(Filed 2 March, 1938.)

1. Public Officers § 4b—

A statute which creates no new office and appoints no additional officer, but merely attaches new duties to offices already existing, to be performed by the incumbents therein, does not violate Art. XIV, sec. 7.

2. Same—Act is question held to require one person to hold two public offices, and statute is unconstitutional as violating Art. XIV, sec. 7.

Ch. 177, Public-Local Laws 1931, providing that the chairman of the board of education, the chairman of the board of health, and the superintendent of public schools of Madison County should serve without pay as the jury commission of the county, with specified duties, with provision that their terms of office should begin on a specified date and that they should qualify and take oath of office, and that the jury commission thus constituted should serve as the tax commission for the county with power to name tax supervisors, listers and assessors, and should also be members of the Equalization Board, *is held* to create new offices to be filled by persons already holding public office, as distinguished from the mere addition of other duties to offices already existing, and is unconstitutional as requiring the same person to fill two public offices in violation of Art. XIV, sec. 7; C. S., ch. 62.

3. Public Offices § 4c—

A statute providing that the incumbent of one public office should also fill another public office is unconstitutional as violating Art. XIV, sec. 7, and cannot be upheld as merely affording the choice between the offices so that the acceptance of the second office would *ipso facto* vacate the first, since incumbency in the first is essential to incumbency in the second.

4. Public Offices § 11—

Where it is determined that the special statute under which relator was appointed to an office is unconstitutional and void, his suit to recover the emoluments of office from the person appointed under a valid general statute which he contends was repealed by the special statute, necessarily fails.

APPEAL by defendant from *Johnston, J.*, at September Term, 1937, of MADISON.

Proceeding in the nature of *quo warranto* to try title to office of tax lister and to recover emoluments of the office alleged to have been wrongfully collected by respondent.

The relator, Wayne Brigman, alleges that he was duly appointed tax lister in No. 1 Township, Madison County, for the year 1935 by the Tax Commission of said county under authority of ch. 177, Public-Local Laws 1931; that the respondent, J. M. Baley, Sr., claims a like appointment by the county commissioners of the county under the general law, and that said respondent has received the emoluments of the office, which justly belong to the relator.

Respondent demurred to the evidence and moved for judgment of nonsuit. Overruled; exception.

From verdict and judgment in favor of relator the respondent appeals, assigning errors.

Carl Stewart and Jones, Ward & Jones for relator, appellee.
Roberts & Baley for respondent, appellant.

STACY, C. J. It is conceded by all the parties that the case turns on the validity of ch. 177, Public-Local Laws 1931, being "An Act to Create a Jury Commission and a Tax Commission for the County of Madison."

The record discloses that relator was appointed tax lister in one of the townships of Madison County for the year 1935 by the Tax Commission created by the Public-Local act in question, while the respondent was appointed to the same office by the commissioners of the county under the general law. If relator's appointment be valid, the remaining questions are not difficult of solution. On the other hand, he concedes that if the members of the Tax Commission were not authorized to act, his purported appointment is a nullity. The office was held by respond-

ent under his appointment by the county commissioners, and he has received the emoluments thereof.

The pertinent provisions of the act in question follow:

"Sec. 1. That the chairman of the board of education, the chairman of the board of health, and the superintendent of public schools of Madison County, and their successors in office, be and they are hereby named as a jury commission for the said county of Madison, to serve without pay, and whose term of office shall begin on the first Monday in April, one thousand nine hundred and thirty-one, or as soon thereafter as they may qualify, as hereinafter provided. . . .

"Sec. 3. That on the first Monday in April, one thousand nine hundred and thirty-one, or as soon thereafter as practicable, the aforesaid named commission shall present themselves before the clerk of the Superior Court for Madison County, or some other person qualified to administer oaths, where they shall all take the oath of office to the effect that they will honestly and conscientiously perform their said duties towards carrying out the provisions of this act without fear or favor, to the very best of their ability.

"Sec. 4. That immediately after taking their said offices it shall be their duty to revise the jury box for Madison County. . . .

"Sec. 10. That the jury commission of Madison County, composed of the chairman of the board of education, chairman of the board of health, and the county superintendent of schools and their successors, shall serve as a tax commission for Madison County, and shall, from and after the ratification of this act, as is or hereafter may be provided by law, name all county supervisors, tax listers and assessors for Madison County, including county, township, and all other county supervisors or supervisors, listers and assessors that are or may hereafter be provided by law. The said commission shall, while acting in the capacity of a tax commission, name the salaries to be drawn as is or hereafter provided by law, and make such other rules and regulations as the law governing listers and assessors provides. The said commission shall serve as members of the equalization board and shall sit with the county commissioners as members of said equalization board, and the two boards shall constitute the equalization board of Madison County."

The validity of this Public-Local Act, which respondent here assails, was upheld in the court below on authority of *McCullers v. Comrs.*, 158 N. C., 75, 73 S. E., 816. There it was said that certain duties of the county boards of health might be performed *ex officio* by the chairman of the board of commissioners, the mayor, and the superintendent of schools, as a part of the duties of their several offices, without violating the provisions of the Constitution, Art. XIV, sec. 7, against dual office-holding. It was specifically pointed out that the statute created no new office so far as the *ex officio* members were concerned, but only imposed

upon them additional duties as "a part of the duties of the one office already held by each."

The decision in the *McCullers case, supra,* is supported by authority, as well as by time-honored custom and practice. It is not unusual for the General Assembly to confer or impose additional powers and duties upon offices already in existence, or to require officers already elected or appointed for general service to act as *ex officio* members of boards or commissions. *Grimes v. Holmes,* 207 N. C., 293, 176 S. E., 746. Many instances might be cited, but in serving in such *ex officio* capacity it is not customary for any new qualification or oath of office to be required of the officers whose duties are thus increased or enlarged. *Bridges v. Smallcross,* 6 W. Va., 562.

A statute which creates no new office and appoints no additional officer, but merely attaches new duties to offices already existing, to be performed by the incumbents therein, does no violence to Art. XIV, sec. 7, of the Constitution, which provides that "no person who shall hold any office or place of trust or profit . . . under this State, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State." *McCullers v. Comrs., supra,* and cases there cited.

The Public-Local Act here assailed is presumed to be within the constitutional power of the General Assembly. *S. v. Williams,* 209 N. C., 57, 182 S. E., 711. However, from a careful perusal of its provisions, the conclusion seems inescapable that new offices are thereby created and not merely additional duties added to offices already existing. *Groves v. Barden,* 169 N. C., 8, 84 S. E., 1042; *S. v. Knight, ib.,* 333, 85 S. E., 418; *Eliason v. Coleman,* 86 N. C., 236; *Clark v. Stanley,* 66 N. C., 60; *Worthy v. Barrett,* 63 N. C., 199; *U. S. v. Hartwell,* 73 U. S., 385. Certain officers and their successors in office are named as a jury commission, whose "term of office" is to begin on the first Monday in April, 1931, or as soon thereafter as "they may qualify as hereinafter provided." The qualification thereinafter provided consists of taking "the oath of office" as jury commissioners; and "immediately after taking their said offices" the commissioners are required to revise the jury list, etc. "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." *Mr. Justice Swayne* in *U. S. v. Hartwell,* 73 U. S., 385. See McIntosh, N. C. Prac. and Proc., 1089.

The jury commission is to serve as tax commission for Madison County and also as members of the equalization board. As tax commission they are to name all county supervisors, tax listers and assessors, fix their salaries, and promulgate rules and regulations governing listers and assessors. The effect of the act, therefore, is to create new offices, with certain defined duties, and attach these offices to other offices al-

ready existing. This is not permissible under the Constitution. See C. S., ch. 62, Offices and Public Officers.

It is not provided by the Public-Local Act in question that the persons or individuals who hold the offices of chairman of the board of education, chairman of the board of health and superintendent of public schools of Madison County, respectively, shall constitute the jury commission, with duties of tax commission attached, so as to put them to an election between their present offices and the new ones. *Barnhill v. Thompson,* 122 N. C., 493, 29 S. E., 720. The statute affords no opportunity of choice or election. Its effect is to combine the several offices and require them to be filled by the same persons at the same time. Herein lies its deficiency. *McNeill v. Somers,* 96 N. C., 467, 2 S. E., 161; *Hannon v. Grizzard, ib.,* 293, 2 S. E., 600.

We do not have the case where the acceptance of a second office by one holding a public office operates *ipso facto* to vacate the first. *Harris v. Watson,* 201 N. C., 661, 161 S. E., 215. Here incumbency in the first is essential to incumbency in the second, and to vacate the former would be to vacate the latter. The two are inseparably connected or linked together. This is the fault or imperfection of the statute. It is not permissible under the Constitution for one person to hold two offices at the same time except in certain instances which are not presently germane.

Nor do we have a case of *de facto* officers acting *colore officii* or under color of authority. *Hughes v. Long,* 119 N. C., 52, 25 S. E., 743; *Norfleet v. Staton,* 73 N. C., 551.

The conclusion results that as the designated officers are not competent to serve as jury commission, with duties of tax commission attached, under the terms of the statute, the attempted appointment of relator as tax lister was unavailing, and his action fails. *Whitehead v. Pittman,* 165 N. C., 89, 80 S. E., 976. The motion for judgment as in case of nonsuit should have been allowed.

Reversed.

C. V. MERRELL AND WIFE, ESTELLE MERRELL, v. G. F. BRIDGES AND WIFE, MARGREE BRIDGES.

(Filed 2 March, 1938.)

1. Highways § 10—Evidence held sufficient for jury on issue of establishment of road under ch. 80, Public Laws 1909.

Uncontradicted evidence that the county commissioners ordered a survey for a road, that the road was laid out as ordered and, following the inspection and survey, report was made to the commissioners and that the report was duly adopted by proper resolution, *is held* sufficient

to be submitted to the jury on the issue of the establishment of the road under ch. 80, Public Laws 1909, even though the surveyor's report does not appear of record.

2. Appeal and Error §§ 38, 39c—Appellant held to have failed to show prejudicial error in instructions.

Since the burden is on appellant to show error, an instruction that the record evidence established the claim of plaintiff is not held for error as an expression of opinion by the court on the weight of the evidence, since the context of the instructions is fairly susceptible to the interpretation that the court was stating what the record evidence showed in reviewing the evidence as required by C. S., 564.

3. Trial § 36—

The inadvertent use of the word "no" instead of "yes" will not be held for reversible error when the error does not mislead the jury or prejudice the rights of the parties.

APPEAL by defendants from *Johnston, J.*, at December Term, 1937, of the Superior Court of BUNCOMBE. Affirmed.

This was an action instituted in the general county court of Buncombe County for a mandatory injunction to require defendants to remove obstructions placed by them in a road leading to plaintiffs' land.

The plaintiffs alleged in their complaint that, according to the method prescribed by ch. 80, Public Laws 1909, the board of county commissioners, in 1914, had laid out and established a public road in Leicester Township over land formerly belonging to J. E. Roberson and now owned by defendants, and that this road had been used by plaintiffs and defendants and others, continuously, since that time until 1935 when defendants placed obstructions therein.

The defendants denied that they had obstructed any road which had been legally established over their land or as to which plaintiffs had any right to pass, as a public road or cartway, and denied that any road had been legally placed upon their land.

The issues submitted to the jury were answered as follows:

"1. Did the board of county commissioners of Buncombe County establish a public road according to law over the land of the defendants, as alleged in the complaint?"

Answer: "Yes."

"2. What damages, if any, are plaintiffs entitled to recover of defendants for closing said road?"

Answer: "None."

From judgment on the verdict defendants appealed to the Superior Court, assigning errors.

Upon the hearing in the Superior Court all of defendants' objections and assignments of error were overruled, and the judgment of the general county court affirmed. From the judgment of the Superior Court the defendants appealed to the Supreme Court.

Don C. Young for plaintiffs, appellees.
R. M. Wells for defendants, appellants.

DEVIN, J. The defendants noted exception to the denial of their motion for judgment of nonsuit in the trial court, and now assign as error the affirmance of this ruling by the Superior Court.

The statutory method in force in 1914 for laying out and establishing public roads in Buncombe County, as set forth in ch. 80, Public Laws 1909, gave to the board of county commissioners the power and authority to lay out all new roads, with power of condemnation, and prescribed the method as follows: "Whenever said board shall be of the opinion that it is necessary and for the public good that any new road or cartway shall be made, said board shall so declare, and shall appoint one or more of its members who, together with the road engineer or a competent surveyor to be designated for that purpose, shall view the premises and lay out the same, and they shall make report of their action to the board. The board shall either approve or disapprove said report at its next regular meeting. . . ."

Plaintiffs offered in evidence the minute book of the board of county commissioners, showing the official action relative to the road in question, as therein recorded, as follows:

"Ordered that engineer and county commissioner be sent to Leicester Township to lay out a public road over the lands of J. F. Radcliff, J. E. Roberson, and N. H. Waldrop to the lands of J. F. Radcliff.

"July 14, 1914, ordered that the report of J. C. Cowan and Charles Neal, engineer, in regard to public road over lands of N. H. Waldrop and J. E. Roberson be adopted." Also "Ordered that the report of the commissioner and engineer in regard to the public road over the lands of N. H. Waldrop and J. E. Roberson be adopted."

It was in evidence that plaintiffs' predecessor in title had appeared before the board of county commissioners in May, 1914, and that shortly thereafter, pursuant to the order of the board, one of the commissioners, J. C. Cowan, and a surveyor went out to the locality and "surveyed off the road through there on the J. E. Roberson land," and that the road was laid out and built where the survey was made, and that it was used by those living in that vicinity continuously since that time up to 1935, when it was obstructed by defendants. It was also in evidence that J. E. Roberson, who then owned the land now belonging to defendant, had agreed to give a road through his land about where the road was laid off a few days later.

The engineer testified that he and Mr. Cowan made report to the board of county commissioners of their action in laying out this road. While this report does not appear of record, that fact alone would not render the action of the board nugatory nor impair the legal effect of the laying

out of the road as ordered, since it was in evidence, uncontradicted, that, following the inspection and survey of the location, report thereof was made to the board of county commissioners, and it does appear of record that by proper resolution of the board the report was adopted.

The motion for judgment of nonsuit was properly denied. *Luther v. Comrs.*, 164 N. C., 241, 80 S. E., 386; *Parks v. Comrs.*, 186 N. C., 490, 120 S. E., 46; *Russell v. Garner*, 205 N. C., 791, 172 S. E., 405.

The only other assignment of error brought forward in appellants' brief relates to the judge's charge. Complaint is made of the use of the following language in the trial judge's instruction to the jury:

"Now, in this case the burden of proof is upon the plaintiffs to satisfy you, by the greater weight of the evidence, that that road was established, and the court charges you that so far as the record goes it was established. And if you find, from the evidence offered by the plaintiffs, that Commissioner Cowan did go and locate the road, as directed to do, and that he reported it to the board of county commissioners, if you find that to be a fact, the court charges you that the proceeding taken by the commissioners was according to the statute, and would warrant the jury in finding that a public road was established. If the plaintiffs have satisfied you by the greater weight of the evidence that Commissioner Cowan and the assistant engineer did do what they were directed to do, and reported to the commissioners, and that the road was used, since that time, by the public, if you are so satisfied, you should answer this issue 'No' ('Yes')."

It is urged by defendants that the words "And the court charges you that so far as the record goes it was established" constituted an expression of opinion as to the proof. But, observing the rule that the burden is upon the appellant to show error, it is apparent that the quoted words of the trial judge are fairly susceptible of the interpretation that he was referring to the evidence which had been offered, as required by C. S., 564, and that he was stating what the record evidence showed, rather than expressing an opinion. This view is strengthened by the context in which the words occur and the manner in which the question at issue was presented to the jury for their decision. Considered in this light we think this exception to the charge was properly overruled.

The inadvertent use of the word "No" instead of "Yes" at the conclusion of the instruction on this point was not misleading to the jury nor prejudicial to the defendants, and no exception was noted thereto.

The case was fairly presented to the jury in the trial court and the verdict and judgment therein were properly upheld by the judge of the Superior Court, and his ruling thereon must be

Affirmed.

CARL MORROW AND ITASCA MORROW, BY THEIR NEXT FRIEND, J. W. MORROW, v. SOUTHERN RAILWAY COMPANY AND FRANK CLINE.

(Filed 2 March, 1938.)

1. Dead Bodies § 3—

A right of action for the mutilation of a dead body of a person divorced at the time of death rests in his children as his next of kin.

2. Dead Bodies § 5—

Mutilation which accompanies a killing does not give rise to a cause of action for wrongful mutilation of a dead body, such cause of action existing only for mutilation after death.

3. Same—To recover for mutilation of body by train, plaintiff must show that body was struck by train intentionally or negligently.

In order to recover for the mutilation of a dead body by a railroad train, plaintiffs must show by the greater weight of the evidence that the body was struck by a train, and also that the engineer saw, or could have seen in the exercise of due care, the body, recognizable as that of a human being, on the track in time to have stopped and avoided hitting it. Evidence tending to show merely that the body, mutilated to such an extent as not to have the appearance of that of a human being, was found scattered up and down the track, is insufficient to be submitted to the jury.

4. Same: Railroads § 10—

It is not the duty of an engineer to stop his train whenever he sees any object on the tracks.

5. Master and Servant § 23—

Since the doctrine of *respondeat superior* is based upon responsibility for the negligent act of the servant, when judgment as of nonsuit is granted on the issue of the servant's negligence, without appeal, the judgment is conclusive against plaintiffs as to the employer also.

APPEAL by defendant, Southern Railway Company, from *Sink, J.*, at October-November Term, 1937, of SWAIN. Reversed.

This is a civil action instituted to recover damages for the wrongful and tortious mutilation of the dead body of the father of the infant plaintiffs. The corporate defendant operates a train in the evenings from Asheville to Bryson City, which train passes Governors Island Flag Station about 7 o'clock p. m. The train makes a return trip in the mornings, leaving Bryson City about 8 o'clock a. m. The defendant, Frank Cline, is the engineer operating said train as the agent and employee of the corporate defendant. In the mornings the train passes Governors Island Station at about 8:20 a. m. On the morning of 11 November, 1934, this train passed the point at which the body of the deceased was found, stopped and backed back near the point, and the

employees of the defendant company and others got off and discovered parts of the remains of the deceased. The train then proceeded to the next station, stopped and then proceeded on its run. Shortly thereafter the coroner was called from the station and he and others went to the scene. The body was badly mutilated. The head, one arm and shoulder were found in the weeds near the track. This part of the body had frost on it. The heart, lungs, small particles of flesh and the torso were found scattered along the track over a distance of 150 to 200 feet in between the rails. The torso also had frost on it. There was very little blood. The witnesses testified that the torso looked like it had been wadded up or chewed up; that it looked like a "tow sack." The body was found about midway of a 600-yard straightaway. At the conclusion of the plaintiffs' evidence the defendants moved for judgment as of nonsuit. The motion was allowed as to the defendant Frank Cline and denied as to the Southern Railway Company and the said defendant excepted. The defendant having offered no evidence, issues were submitted to and answered by the jury in favor of the plaintiffs. From judgment thereon the defendant Southern Railway Company appealed.

T. D. Bryson, T. D. Bryson, Jr., and Edwards & Leatherwood for plaintiffs, appellees.

W. T. Joyner and Jones, Ward & Jones for defendant, appellant.

BARNHILL, J. At the time of the death of Robert Morrow, father of the infant plaintiffs, he was divorced. The cause of action, if any, relied upon by the plaintiffs, therefore, rests in the plaintiffs, his only next of kin. It does not appear from the record, and the plaintiffs do not contend, that there is any sufficient evidence tending to show that the train of the defendant company killed the deceased, and this is not an action for wrongful death. All the evidence tended to show that at the time the body was discovered on the morning of 11 November, 1934, the deceased had been dead twelve to sixteen hours. If the deceased was killed by a train of the defendant it is apparent that he was killed by the train passing the point on the evening of 10 November.

It is a well established principle of law that mutilation which accompanies a killing does not give rise to a cause of action. Such mutilation as occurred at the time the deceased was killed must be eliminated from consideration.

This leaves for determination the one question as to whether there is sufficient evidence in the record to show the tortious mutilation of the body of the deceased by the defendant to be submitted to the jury. The first case in our courts dealing with the right to recover for wrongful mutilation is *Kyles v. R. R.*, 147 N. C., 394, in which it is said: "This

is not an action for the negligent killing of the deceased, but an action by the widow (here the next of kin) for the willful, unlawful, wanton and negligent mutilation of his dead body. She was entitled to his remains in the condition found when life became extinct; and for any mutilation incident to the killing the defendant would not be liable, but it is liable in law for any further mutilation thereof after death, if done either willfully, recklessly, wantonly, unlawfully or negligently." *Lawson v. Chase,* 47 Minn., 307; *Foley v. Phelps,* 37 N. Y., Supp., 471; *Stephenson v. Duke University,* 202 N. C., 624.

To maintain their action the plaintiffs must show by competent evidence not only that the body of the deceased was mutilated by a train of the defendant company, but likewise that such mutilation was either intentionally or negligently committed. Plaintiffs were unable to offer any evidence tending to show the condition of the body or how it was lying on the track, or any other circumstances in connection therewith, prior to the time defendant's train passed over the track on the morning of 11 November, except that it is apparent that the head, one arm and a part of his shoulder was then some distance from the track in the weeds. After the body was discovered it had been mutilated to such an extent that it was scattered up and down the track. From the testimony of witnesses it is clear that the body did not at that time have the appearance of a human being. It was not the duty of the engineer to stop his train whenever he saw any object upon the track. The plaintiffs must show by the greater weight of the evidence that the engineer saw, or by the exercise of ordinary care could have seen, an object having the appearance of a human being lying on the track, and that he saw it, or by the exercise of ordinary care could have seen it, in time to stop his train before striking the body. As there is a total absence of evidence in this respect we are of the opinion that the plaintiffs failed to offer sufficient evidence to be submitted to the jury on the first issue.

But there is a further compelling reason why the plaintiffs cannot now maintain their action against the appealing defendant, even though it be conceded that there was some evidence tending to show wrongful mutilation. It is alleged in the complaint, and the evidence tends to show, that the defendant Cline was the engineer in charge of defendant's train, both on the evening of 10 November and the morning of 11 November. If the defendant is liable at all, it is liable under the doctrine of *respondeat superior.* The wrongful mutilation, if such occurred, was attributable to the defendant's agent, Cline. At the conclusion of the plaintiffs' testimony the defendants moved for judgment as of nonsuit. This motion was allowed as to the defendant Cline and the plaintiffs did not appeal. It was thereby judicially determined that the agent did not wrongfully mutilate the body of the deceased. This defendant cannot

be called upon to respond in damages for an act of its agent which was not wrongfully or negligently committed. The judgment of the court below as to Cline is conclusive against the plaintiffs in this action as to both defendants. *Whitehurst v. Elks,* 212 N. C., 97.

Judgment should be entered dismissing the action as to defendant Southern Railway Company.

Reversed.

MRS. C. M. ANDERSON v. REIDSVILLE AMUSEMENT COMPANY, INC.

(Filed 2 March, 1938.)

1. Trial § 22b—

Upon motion to nonsuit, the evidence must be viewed in the most favorable light for plaintiff.

2. Trial § 24—

If there is any competent evidence tending to prove the fact in issue, the evidence must be submitted to the jury.

3. Negligence § 4d—Evidence held sufficient for jury in this action to recover for injuries resulting from fall in theatre.

Evidence to the effect that a patron in a theatre slipped and fell in the foyer, that at the place of her fall there was some dark substance resembling grease which showed the imprint of plaintiff's shoe where it slipped, causing her to fall, *is held* sufficient to be submitted to the jury on the questions of negligence and proximate cause in plaintiff's action to recover for the resulting injury, although plaintiff's evidence on material aspects of the case is sharply contradicted by defendant's evidence.

4. Same—

A patron purchasing a ticket and entering a theatre is an invitee.

5. Same—

While the owner of the premises is not an insurer of the safety of invitees, he owes them the duty to use due care to avoid injury to them while on the premises.

6. Same: Appeal and Error § 39d—Exclusion of evidence held not prejudicial in view of other like evidence introduced upon the trial.

In this action by a theatre patron to recover for injuries resulting from a fall in the foyer of the building, the exclusion of testimony of a witness that a large number of patrons were in the theatre on the same day and that none had fallen, tendered as negative evidence that excessive oil or wax had not been left at a spot on the floor where plaintiff fell, *is held* not prejudicial error in view of the admission of other evidence by defendant of the number of persons in the theatre that day, some of whom passed over the place where plaintiff fell, and the other evidence properly admitted on the trial.

ANDERSON *v.* AMUSEMENT CO.

APPEAL by defendant from *Phillips, J.*, at September Term, 1937, of the Superior Court of ROCKINGHAM. No error.

This was an action to recover damages for a personal injury due to a fall in defendant's theatre. It was alleged that defendant had negligently placed a quantity of oil or greasy substance on the floor, by reason of which plaintiff, a patron, was caused to slip and fall, sustaining serious injury.

The testimony of the plaintiff tended to show that she, in company with Mrs. Peeples, purchased a ticket at the front box office of defendant's building and entered the theatre; that between the box office and the main auditorium was the foyer or lobby, about eight feet wide, with a stairway leading upward to the balcony; that plaintiff and her companion walked down the right aisle of the main auditorium, and, finding all seats filled, turned and walked back up the aisle to the foyer, and turned to the left to go up the stairs to the balcony—about three steps from the aisle—when she slipped and fell on her left side. Plaintiff testified: "I looked down in front of me where my foot had slipped and my footprint was there and some grease or oily substance right in that spot and a whole lot more there than any other place in the foyer. I could see more at that particular place than anywhere else in the foyer. Mrs. Peeples and an attendant of the theatre helped me up the stairs and I was in considerable pain. The substance on the floor there was an accumulation of some kind of grease. It was dark, smudgy all along the side of my hose and shoes as if it might have been some kind of dark grease. That was not on my clothes when I went into the theatre. Right in front of where I had fallen I looked down in front of me and there was kind of a print of my slipper where I had slipped, and it seemed to be a little more right there in that particular spot than in the rest of the foyer. I could plainly see where my foot had slipped. The light was very dim in the foyer; there was a little lamp over in the corner. It didn't reflect the light down on that floor. I think the place where I fell was covered with a rubberized linoleum. I was watching where I was walking. I had on low-heel sandals. I had seen other folks, other patrons, going in the theatre walking over this rubberized linoleum just as I went in before, several of them. I did not see anybody else except myself step where that accumulation of that stuff was on the floor. It wasn't in the middle of the place; it was closer to the wall than the middle of the space. In (I was) coming out of the aisle to go up the steps when I stepped in it. The light they had up there had a small globe in this lamp, had a shade on it, a shade that came down over the light. It throwed the light on this little landing, but not down on the foyer. There was no light that I could see the floor plainly in the foyer. I walked as I usually did when I came out of that aisle and started upstairs. I looked where I was going."

Mrs. Peeples testified (by deposition) in substantial support of plaintiff's evidence as to the circumstances of plaintiff's fall. She further testified, without objection: "The floor to the foyer was covered with rubber. The rubber on the floor of the foyer had been waxed; it was very slick and shined like glass. The floor was slick and difficult to stand upon. The attendant and I helped Nannie Worth (the plaintiff) up and I had a hard time keeping my footage. Mrs. Anderson slipped and fell on her left side. She fell to the floor. She fell on her left side and could not get up. A young black-haired boy named Charles Phipps, an attendant there, and myself helped her up from the floor. Charles Phipps told us that the floor had just been waxed and that he thought it was very foolish for the theatre to wax a rubber floor because it made it entirely too slick. It was slippery and was hard to stand on, especially if you turned a corner."

It was also in evidence from defendant's witness that the defendant used liquid floor wax on this rubberized linoleum, and that it had been about two weeks since it was waxed.

Defendant offered evidence tending to show that the rubber composition with which the floor was covered was inspected daily; that it was mopped once or twice a week; that no oil was put upon it; that there was no accumulation of wax or oil or sticky substance at any place. Defendant also offered evidence tending to contradict plaintiff's evidence as to the circumstances and effect of her fall, and in contradiction of the alleged statement of one of defendant's attendants.

Defendant moved for judgment of nonsuit at the close of plaintiff's evidence and renewed its motion at the close of all the evidence, and duly excepted to the denial of these motions.

Issues of negligence, contributory negligence and damage were submitted to the jury and answered in favor of the plaintiff. From judgment for the plaintiff on the verdict defendant appealed, assigning errors.

Glidewell & Glidewell and Claud S. Scurry for plaintiff, appellee.
Sapp & Sapp for defendant, appellant.

DEVIN, J. Was there error in the denial of defendant's motion for judgment of nonsuit?

Upon a motion for nonsuit the uniform rule is that the evidence must be viewed in the most favorable light for the plaintiff, and if there is any competent evidence tending to prove the facts in issue, the case must be submitted to the jury. Considering the testimony offered in the instant case in accord with this rule, we are led to the conclusion that there was sufficient evidence of negligence on the part of the defendant,

proximately causing injury to the plaintiff, to warrant the submission of the case to the jury, and that defendant's motion for judgment of nonsuit was properly denied.

The plaintiff, a patron of defendant's theatre, purchased a ticket and entered the building at the implied invitation of the defendant. While the defendant was not an insurer of plaintiff's safety while on its premises, it did owe her the duty to exercise due care to avoid injury to her. As was said by this Court in *Bowden v. Kress,* 198 N. C., 559, 152 S. E., 625: "The general rule deduced from the authorities is that an owner or occupant of buildings who directly or by implication invites or induces others to enter therein owes a duty to such persons to exercise ordinary care to keep such premises in a reasonably safe condition and to give warning of hidden peril. The owner is not an insurer of the safety of the invitee while on the premises. *Leavister v. Piano Co.,* 185 N. C., 152, 116 S. E., 405; *Bohannon v. Stores Co.,* 197 N. C., 755." *Miller v. Sensenbrenner Mercantile Co.,* 33 A. L. R., 176, and note; *J. C. Penny v. Robinson,* 128 Ohio St., 626; 100 A. L. R., 705, and notes.

In *Bowden v. Kress, supra,* a customer in a store slipped on some oil on the floor and was injured. *Brogden, J.,* speaking for the Court in that case, in holding the evidence sufficient to be submitted to the jury, uses this language: "It is apparent that there was an accumulation of oil upon the floor where the plaintiff sustained her injury. This accumulation was unusual for the reason that the testimony tended to show that there was much more oil at this point than at any other point in the store. The print of plaintiff's shoe was observed in this patch of oil. These pertinent facts point unerringly to the conclusion that the oil was not properly applied or that it was applied in a negligent and unusual manner and had been in such condition for more than a week. Hence the trial judge properly submitted to the jury the question as to whether the condition had existed for such length of time as to have been discovered by the exercise of ordinary care."

In *Parker v. Tea Co.,* 201 N. C., 691, 161 S. E., 209, where a customer in a store slipped on oil on the floor, the evidence was strikingly similar to that of plaintiff in this action. In that case, in sustaining a recovery by the plaintiff, this Court said: "Considering the evidence in the case at bar with that liberality which the law requires, it would appear as a reasonable inference that the floor was not properly oiled, in that oil had been permitted to accumulate on the floor at a place where customers were invited to inspect the merchandise displayed."

In *Cooke v. Tea Co.,* 204 N. C., 495, 166 S. E., 336, where a customer slipped on a banana peeling just outside the door of the store, on the floor of the entrance to the store, nonsuit was sustained "in the absence of any evidence tending to show that the defendant was negligent."

And in *Fox v. Tea Co.*, 209 N. C., 115, 182 S. E., 662, where a customer slipped on a beet on the floor of the store and fell, nonsuit was sustained, the Court using this language: "Since there is no evidence how the beet got upon the floor of the aisle, or how long the beet had been upon the floor before the plaintiff stepped on it, there is no evidence of negligence on the part of the defendant." In *King v. Thackers*, 207 N. C., 869, 178 S. E., 95, where an employee slipped on some meal on the floor of the kitchen, recovery was denied on the ground of contributory negligence.

Defendant noted exception to the exclusion of the testimony of a witness that of a large number of patrons who were in the theatre that day none had fallen while walking over the same place where plaintiff fell. Though the evidence sought to be elicited in response to the question excluded was in some respects negative in character, it was not for that reason incompetent, but is usually regarded as of less probative value (*S. v. Murray*, 139 N. C., 540, 51 S. E., 775), and its admission would open the door to a variety of collateral questions. This is the ground upon which the admissibility of such evidence was denied in *Branch v. Libbey*, 78 Me., 321 (defect in street); *Newcomb v. R. R.*, 182 Mo., 687 (oil on platform); *Marvin v. New Bedford*, 158 Mass., 464 (hole in sidewalk); *Bauer v. Indianapolis*, 99 Ind., 56 (obstruction in sidewalk); *Temple Hall Assn. v. N. J. L.*, 260 (defect in street), and *Anderson v. Taft*, 20 R. I., 362 (defective street). In 2 Jones Com. on Ev., sec. 683, the author says: "The authorities are divided as to the relevancy of showing that other persons passed over the same walk or street without injury, the weight being against the admissibility of such evidence."

In *Parker v. Tea Co., supra*, similar testimony was excluded by the trial judge, and this Court, referring to the question, used this language: "The defendant undertook to show that three hundred customers entered the store on the day plaintiff fell, and that no one else sustained injury. Doubtless this evidence was offered for the purpose of refuting the theory that the floor was improperly oiled. The trial judge excluded the evidence, but it appears from a notation in the record that counsel on each side, without objection, argued to the jury that there were three hundred people present in the store on the day plaintiff was injured. So that if it be conceded that the excluded evidence was competent, nevertheless the defendant had the full benefit of every inference which could be drawn from such testimony."

In the case at bar the defendant was permitted to offer evidence tending to show that four hundred and seventy-five persons were in the theatre that day, some of whom had passed over the same place where plaintiff fell, and plaintiff testified she had seen others going in the theatre walking over this rubberized linoleum, but she said, "I did not see anybody else except myself step where that accumulation of that stuff was on the floor."

In view of all the evidence, properly admitted and before the jury, we are unable to say that the exclusion of the testimony offered by the defendant under the circumstances was prejudicial, or that it affected the result.

Defendant noted numerous exceptions to the judge's charge to the jury, but upon examination of the charge as a whole we find it free from error.

The case seems to have been fairly presented to the jury, and we find no sufficient ground to warrant the overthrow of the verdict of the triers of the facts on the issues submitted or to vacate the judgment of the court thereon.

No error.

CATHERINE DeLANCEY WEBSTER v. S. J. WEBSTER.

(Filed 2 March, 1938.)

1. Judgments § 1—

A consent judgment is the contract of the parties entered upon the records with the sanction of the court, and the judgment must be construed in the same manner as a contract to ascertain the intent of the parties.

2. Divorce § 17—Consent judgment for support of child held to require payments only for such time as child was in custody of mother.

Under the provisions of a consent judgment defendant paid his wife a certain sum in complete settlement of alimony, and agreed to pay a stipulated sum monthly for the support of their minor child, the judgment providing that the wife should have the custody of the child except for one week each month. The wife voluntarily permitted the husband to have the custody of the child for longer periods than those provided in the consent judgment. *Held:* The wife is entitled to receive sums for the support of the child only for the number of days he was actually cared for by her at the rate per day allowed in the consent judgment, and the wife's contention that she was entitled to the full amount stipulated in the consent judgment is untenable, since this would require him to pay sums in excess of the amount agreed upon for the daily support of the child, which would inure to the benefit of the wife with whom full settlement had been made.

APPEAL by defendant from *Bivens, J.*, at Chambers, 1 December, 1937, of ROCKINGHAM. Reversed.

Glidewell & Glidewell and Allen H. Gwyn for plaintiff.
Sharp & Sharp and J. Hampton Price for defendant.

DEVIN, J. The question presented by this appeal arose upon a motion by the plaintiff to require the defendant to comply with the terms of a consent judgment previously rendered in the cause by Judge Harding and to require the payment by the plaintiff of the full sum of $20.00 per month as therein agreed for the use and benefit of the minor child of the parties.

The material portions of the consent judgment entered by Harding, J., are as follows:

"This cause coming on to be heard and it appearing to the court that all issues, matters, and differences between the plaintiff and defendant with relation to alimony and with relation to the maintenance, care and custody of their minor child, Jack Webster, Jr., have been agreed upon, settled and compromised with the approval of the court. It appearing that the defendant, S. J. Webster, has agreed to pay the plaintiff, Catherine DeLancey Webster, the sum of twenty dollars per month for the use and benefit of Jack Webster, Jr., and in addition thereto the said defendant, S. J. Webster, is to purchase and furnish such clothing as may be reasonably necessary for said minor child; it appearing that the parties hereto have agreed that the plaintiff, Catherine DeLancey Webster, shall have the care, custody and tuition of said minor child with the exception of one week out of each month, and that the defendant, S. J. Webster, is to have the care and custody and tuition of said child for at least one week during each month, said child to be carried to and from his mother's home by the said defendant, and it appearing to the court that the agreement herein recited is to the best interest of said minor child:

"It is therefore considered, ordered, and adjudged that the defendant, S. J. Webster, be and is hereby ordered and directed to pay to the plaintiff, Catherine DeLancey Webster, the sum of twenty dollars, payable each month for the use and benefit of Jack Webster, Jr.; that said defendant is ordered and directed to purchase and otherwise provide for Jack Webster, Jr., reasonable and necessary clothing; that said minor shall be and remain in the care and custody of his mother, Catherine DeLancey Webster, with the exception of one week out of each month, and during said one week the defendant, S. J. Webster, shall have the right and privilege to take said minor child to his home and there to maintain and care for him during said time; it is ordered and adjudged that both plaintiff and defendant shall have reasonable access to said minor at all times for the purpose of visiting and otherwise seeing said child during either sickness or health."

It was further provided in the Harding judgment that defendant pay the plaintiff $500 in complete settlement of all claims of alimony. This it is admitted has been complied with.

After consideration of the affidavits of the parties, in connection with the recited consent judgment, Judge Bivens found the facts and rendered judgment as follows:

"This cause coming on to be heard before his Honor, E. C. Bivens, judge holding the courts of the 21st Judicial District, upon an order served on defendant to show cause why he should not be attached for contempt for failure to comply with the terms of a judgment heretofore entered in this cause, and being heard, the court finds the following facts:

"1. That the judgment, a copy of which is hereto attached, was signed by Harding, J., and consented to by the parties and their counsel.

"2. That plaintiff has not kept the child for the length of time allotted to her, but has requested and voluntarily permitted defendant to keep said child longer than his allotted time; that since the signing of the judgment plaintiff has kept the child 13 weeks and the defendant has kept said child 20 weeks.

"3. That defendant has paid plaintiff the sum of $70.00, which covers the number of days during which plaintiff has had the child at the rate of $20.00 per month.

"4. That defendant contends that under the terms of the judgment he is only liable for the actual number of days the child stayed with plaintiff and was actually cared for by her, whereas plaintiff contends that defendant is obligated to pay her $20.00 per month, irrespective of the number of days she has kept the child.

"5. That at the time of the signing of the judgment defendant and his counsel believed that the stipulation for the payment of $20.00 per month to the plaintiff would apply only in the event that she kept the child her allotted time, or proportionately, if a part of the time.

"Upon the foregoing facts the court holds as a matter of law, upon an interpretation of the judgment, that defendant is bound to pay plaintiff the sum of $20.00 per month, irrespective of whether or not she keeps said child all her allotted time or any part of it or at all. The court, however, does not adjudge plaintiff (defendant) in contempt, but orders that he pay plaintiff at the rate of $20.00 per month from the date of the judgment hereto attached."

The consent judgment entered by Judge Harding was nothing more than a contract between the plaintiff and defendant, with respect to the "maintenance, care, and custody" of their minor child, which had the sanction of the court and was spread upon its records. *Cason v. Shute,* 211 N. C., 195; *LaLonde v. Hubbard,* 202 N. C., 771, 164 S. E., 359. Considering it in that light, it is apparent that the defendant contracted to pay $20.00 per month for the support of the child conformably to the stipulation for the "care, custody and tuition" of the child by the

plaintiff for the entire time, with the exception of one week out of each month when the custody and support of the child devolved upon the defendant.

It was found by the trial judge, without objection by the plaintiff, that the plaintiff requested and voluntarily permitted defendant to keep the child longer than the time specified, and that "since the signing of the judgment plaintiff has kept the child 13 weeks and the defendant has kept the child 20 weeks," and that defendant has paid the amount for the time plaintiff had the child at the stipulated rate.

While the agreement provided for the payment of a specified amount each month, the plaintiff may not be held entitled to require the full payment of this sum by defendant when she voluntarily relinquished the custody and support of the child to the defendant for the greater portion of the time since the consent judgment was signed. To hold, as ruled by the court below, that the defendant is bound to pay the full amount of $20.00 per month for the care of the child, whether the plaintiff keeps the child any part of the time or not, would seem to impose upon the defendant an obligation which he did not assume, and result in the requirement of additional payments for the sole benefit of the plaintiff, with whom a complete settlement has been had. This cannot be held to have been in contemplation of the parties or in accord with their intent.

The judgment of the Superior Court must be reversed with directions that defendant be required to pay to the plaintiff only such sums as may be found to be due her for the support of the child when kept by her in substantial compliance with the agreement, as evidenced by the consent judgment, and not for periods during which the plaintiff may have voluntarily relinquished the custody and support of the child to the defendant in excess of the time specified.

Reversed.

STATE OF NORTH CAROLINA EX REL. GARLAND A. THOMASSON, GUARDIAN OF HENRY ROSE, A MINOR, v. M. K. PATTERSON, EXECUTRIX OF THE ESTATE OF A. S. PATTERSON, DECEASED, ET AL.

(Filed 2 March, 1938.)

1. Statutes § 5a—

Conflicting provisions of a statute, like conflicting provisions of two acts dealing with the same subject matter, will be reconciled if this can be done by a fair and reasonable intendment.

2. Venue § 1—Action on guardianship bond is properly brought in county where bond was given and sureties reside, although brought against executrix of principal who qualified in another county.

An action against an executrix to recover on a guardianship bond executed by testator is properly brought in the county in which the bond was given and the sureties thereon resided and in which the administrators of the sureties qualified, and the motion of defendant executrix to remove as a matter of right to the county in which she qualified is properly denied, the primary and controlling intent of C. S., 465, being that actions on official bonds should be instituted in the county in which the bonds were given if the principal or any surety on the bond is in the county.

3. Same—

An action against an executor or administrator in his official capacity must be instituted in the county in which he qualified unless the action is on an official bond executed by the deceased.

4. Venue § 8a—Where statute makes place where bond was given and sureties or principal reside controlling, insolvency of parties is immaterial.

In an action on a guardianship bond instituted in the county in which the bond was given and the sureties resided, the contention that the sureties were insolvent and that their administrators were joined to prevent removal to the county in which the executrix of the principal on the bond qualified, is untenable, since the controlling factors are the place where the bond was given and the residence of the sureties and not the solvency or insolvency of the sureties. C. S., 465.

APPEAL by defendant M. K. Patterson, executrix of the estate of A. S. Patterson, deceased, from *Johnston, J.*, at November Term, 1937, of BUNCOMBE. Affirmed.

This is a civil action instituted by the State of North Carolina *ex rel.* Garland A. Thomasson, guardian of Henry Rose, a minor, upon the official guardianship bond of A. S. Patterson, now deceased. A. S. Patterson, original guardian of Henry Rose, qualified as such in Buncombe County and filed his guardianship bond with the clerk of the Superior Court of said county, with B. B. Jones and J. C. Penland as sureties thereon. Said guardian having died domiciled in Swain County, the defendant M. K. Patterson qualified as executrix of his last will and testament in Swain County. B. B. Jones, a resident of Buncombe County and surety on said bond, having died, the defendant Lela J. Sisk qualified as administratrix of his estate in Buncombe County. J. C. Penland, resident of Buncombe County and surety on said bond, having died, the defendant Eugene Garland qualified as administratrix of his estate in Buncombe County. The defendant M. K. Patterson, executrix of the last will and testament of A. S. Patterson, deceased, filed motion for a change of venue to Swain County, alleging that inasmuch as she qualified as administratrix of A. S. Patterson, deceased, in

Swain County, the cause should be removed to said county for trial as a matter of right. The motion was denied and said defendant excepted and appealed.

Parker, Bernard & Parker for plaintiff, appellee.

Edwards & Leatherwood and Jones, Ward & Jones for defendant M. K. Patterson, executrix, appellant.

BARNHILL, J. The defendant, in demanding a removal of this cause to Swain County as a matter of right, relies upon C. S., 465, in which it is provided that: "All actions upon official bonds or against executors and administrators in their official capacity must be instituted in the county where the bonds were given, if the principal or any surety on the bond is in the county; if not, then in the plaintiff's county."

This section seems to be incomplete in its terms. It provides that all actions upon official bonds, *or against executors and administrators in their official capacity*, must be instituted in the county where *the bonds* were given if the principal or any surety on the bond is in the county. Where the action is against executors and administrators, but not upon any official bond, it makes no provision for the venue of the suit. However, this Court has construed the statute to mean that suits against executors and administrators in their official capacity must be instituted in the county in which the executor or administrator qualified. Giving force to these decisions an apparent conflict arises in the instant case. This action is upon an official bond given in Buncombe County, and two of the sureties on said bond resided in Buncombe County and their administrators qualified in that county. On the other hand, the principal on said bond resided in Swain County, and the executrix of his last will and testament qualified in the latter county.

Under the terms of this statute, should defendant's motion be granted as a matter of right? We must answer this question in the negative.

When there are two acts of the Legislature applicable to the same subject, the terms of which are in conflict, their provisions are to be reconciled if this can be done by fair and reasonable intendment. It is apparent from a reading of this statute that its primary intent was to provide that suits upon official bonds should be instituted in the county where the bonds were given if the principal or any surety on the bond is in the county. Here the bond was given in Buncombe County. The administrator of J. C. Penland, a surety, and the administrator of B. B. Jones, a surety, each lives in Buncombe County. Buncombe County, therefore, is the proper venue, not only by virtue of the fact that the bond, which is the subject matter of the action, was given in Buncombe County, but by virtue of the further fact that the administrators of each of the sureties live in said county. To hold otherwise

would merely serve to create confusion and irreconcilable conflicts. Should the cause be removed to Swain County for the reason now assigned by the appealing defendant, then immediately each of the other defendants could move for a change of venue to Buncombe for the reason that they were administrators of the estates of sureties and the bond was given in Buncombe County, or else the plaintiff would be forced to institute two separate suits, one in Swain County against the appealing defendant and another in Buncombe County against the other defendants to have his rights determined.

We therefore hold that the provision of C. S., 465, that an action upon an official bond shall be instituted in the county where the bond is filed, if the principal or any one of the sureties on said bond resides in said county, is controlling. Actions against executors and administrators in their official capacity, when not upon an official bond filed in some other county, must be instituted in the county where the executor or administrator qualified. The provision that the action must be instituted in the county where the bond, which is the subject matter of the action, was filed is dominant. Except where the action is on an official bond the former decisions of this Court will be adhered to.

The defendant contends that, it being shown that the plaintiff admits the insolvency of the estates of the sureties, the joinder of the administrators of the estates of the sureties is for the purpose of depriving the Superior Court of Swain County of jurisdiction. This contention cannot prevail. It is the fact that the bond was given in Buncombe County and the residence of the sureties in that county that fixes the venue, not the solvency or insolvency of the estates of the surety. The condition of the estates of the sureties cannot be held to affect the plain wording of the statute.

The judgment of the court below is

Affirmed.

ROCKY MOUNT SAVINGS & TRUST COMPANY AND T. R. MCDEARMAN, ADMINISTRATORS OF T. S. MCDEARMAN, v. MARY B. MCDEARMAN, WIDOW; S. B. MCDEARMAN; BESSIE MCDEARMAN, T. R. MCDEARMAN; SILPHA MCDEARMAN WINSTEAD AND HUSBAND, GEORGE C. WINSTEAD; ELLA B. MCDEARMAN; MARY LOUISE MCDEARMAN, AND NANCY LEE MCDEARMAN, MINORS.

(Filed 2 March, 1938.)

1. Executors and Administrators § 13a—Reversion after dower is not subject to sale to make assets when homestead is allotted in same property.

While the setting aside of dower in intestate's lands does not prevent the sale of the reversionary interest to make assets to pay debts, when

dower is allotted in a house and the minors' homestead is allotted in rooms in the same house, the reversion after the homestead not being subject to sale, it could not be sold to advantage of creditors, and delay in the sale would work no injury to the heirs.

2. Executors and Administrators § 26—

An estate is not fully settled until all debts are paid or all assets exhausted.

3. Executors and Administrators § 13a—

As long as an estate remains unsettled, the real property undisposed of is subject to sale to make assets by petition properly filed by the administrator. C. S., 74.

4. Executors and Administrators §§ 13a, 26—Under facts of this case, administrator was not guilty of laches in moving for sale of assets.

All the lands of intestate were sold to make assets upon petition properly filed within one year from the date of the administrator's qualification, except certain land in which was allotted both the widow's dower and the minor heirs' homestead, which was excepted from the petition to sell by an amendment thereto. Upon the termination of the homestead rights some thirteen years thereafter, the successor administrator moved, after notice, to sell the reversion after the dower estate to make assets to pay the remaining debts of the estate. *Held:* Motion upon notice in the original proceeding was proper, since the original proceeding was still pending under its provisions implying that other real estate would later become available for sale, and under the facts of the case the successor administrator was not guilty of laches, as a representative of creditors, in moving for the sale of the balance of the real estate, nor guilty of unreasonable delay in settling the estate.

5. Limitation of Actions § 10—No statute of limitations bars administrator's right and duty to sell lands to make assets to pay debts.

When all lands of the estate are sold upon proper petition to make assets to pay debts of the estate except lands in which both the widow's dower and the minor heirs' homestead were allotted, upon the falling in of the homestead rights, the heirs' plea of the statute of limitations as a bar to the administrator's motion to sell the reversionary interest after dower to make assets to pay debts still outstanding against the estate, is bad although the motion is not made until some thirteen years after the filing of the original petition to sell lands to make assets, since no statute of limitations bars the administrator's right and duty to sell the remaining lands. The application of statutes of limitation against claims against the estate, distinguished.

6. Executors and Administrators §§ 3, 13a—

The appointment of successor administrators does not interrupt the course of administration or constitute two administrations, or affect the rights of the parties upon a petition to sell lands to make assets.

APPEAL by defendants from *Hamilton, Special Judge,* at September Term, 1937, of NASH. Affirmed.

This was a petition by motion in the above entitled special proceeding to sell real property of the intestate to pay the debts of the estate.

These are the material facts as they appear from the record:

T. S. McDearman died intestate in 1922, leaving him surviving his widow and three minor children. The Rocky Mount Savings & Trust Company and T. R. McDearman were appointed administrators. The administrators reported that the debts of the estate amounted to $125,000, with $42,000 personalty available, and in 1923 instituted proceedings as above entitled to sell real estate to make assets to pay debts, and asked that the widow's dower be set apart, and that homestead be allotted the minor children. Thereupon the dwelling house was set apart to the widow as her dower, and, subject to the dower right, the homestead was allotted to the minor children in two rooms in the house, described as follows: "The two upstairs front rooms in the McDearman residence on Sunset Avenue, with full right of ingress and egress to said rooms by way of the front yard, walk, porch, downstairs hall, steps and upstairs hallway, so that they may go to and from said rooms unmolested."

Thereafter, pursuant to the petition and amended petition of the administrators, all the real property of the intestate then subject to sale, except the reversionary interest in the dwelling house, was sold and the proceeds applied to the payment of debts, leaving some $50,000 of approved debts unpaid.

Subsequently, in 1936, upon the liquidation of the Rocky Mount Savings & Trust Co. and the removal from the State of T. R. McDearman, the Peoples Bank & Trust Co. was duly appointed administrator *de bonis non* of the estate of T. S. McDearman. As soon as the youngest child of the decedent became of age, in 1936, the administrator *de bonis non* filed petition by motion, upon notice to the heirs, in the original proceeding, for leave to sell the dwelling house subject to the dower interest of the widow, in order to make assets for the payment of the outstanding debts of the estate.

It also appeared that certain personalty amounting to $500, derived from some fund in a closed bank, remained unapplied.

The defendants, the heirs at law, filed answer setting up the seven and ten years statutes of limitation as a bar to petitioner's proceeding. The clerk ruled the proceeding was not barred by the statutes of limitation, and, upon appeal to the judge of the Superior Court, the order of the clerk was affirmed, and commissioners were appointed to sell the property subject to the life interest of the widow, for the purpose of creating assets for the payment of the debts of the estate. The defendants appealed to the Supreme Court.

F. S. Spruill for plaintiff, appellee.

Battle & Winslow for defendants, appellants.

DEVIN, J. The estate of T. S. McDearman not having been fully settled, and a substantial amount of the debts of the estate remaining unpaid, the falling in of the homestead which had been allotted to the minor children in a portion of the dwelling house rendered that property subject to sale, and the administrator *de bonis non* filed petition by motion in the original proceeding asking that this property be sold and the proceeds applied in payment on the debts of the estate. The original proceeding was begun in 1923, within the year following the death of the decedent, and all the real property was then sold except the interest in the dwelling house. This property had been set apart as the widow's dower. This fact would not have prevented a sale of the reversionary interest therein after the widow's life estate, but in a portion of the same house the homestead of the minor children have been allotted. The reversion after the homestead was not the subject of sale (*Hinsdale v. Williams*, 75 N. C., 430). Deeming that property consisting of a dwelling house subject to a life estate, with an unsalable homestead right covering a portion of the house (including right to hall, stairway, porch and front yard) superimposed thereon, could not be sold to advantage, if at all, the representatives of the estate awaited the falling in of the homestead before asking for the sale of the house. It does not appear that there was objection on the part of creditors or any one else. The delay inured to the advantage of the creditors of the estate and worked no injury to the rights of the heirs.

Under these circumstances it cannot be held that there was unreasonable delay in settling the estate, nor that the administrators, as representatives of the creditors, were guilty of laches (24 C. J., sec. 1491), nor that the application for leave to sell the remaining real property to make assets was barred by the statute of limitations. As long as the estate remained unsettled, and real property of the decedent remained subject to sale, the administrator could unquestionably proceed by proper petition in the original proceeding to have the real property sold for the payment of outstanding debts and for the final settlement of the estate. No statute of limitations barred that right or the performance of that duty. C. S., 74; *Adams v. Howard*, 110 N. C., 15, 14 S. E., 648; *Sledge v. Elliott*, 116 N. C., 712, 21 S. E., 797; *Lee v. McKoy*, 118 N. C., 518, 24 S. E., 210; *Warden v. McKinnon*, 94 N. C., 378; *Frier v. Lowe*, 232 Ill., 622; *Bursen v. Goodspeed*, 60 Ill., 277; *Killough v. Hinton*, 54 Ark., 65. As was said in *Creech v. Wilder*, 212 N. C., 162: "Until the debts have been paid, or the assets of the estate exhausted, the estate is not settled, and the duties and obligations of the administrator continue."

While the order of sale entered by the clerk in 1923 does not contain express reservation of the proceeding for further orders, the amended

petition excepted from the enumeration of property asked to be sold the property in which was allotted dower and homestead. It would seem, therefore, to be fairly implied that other real property would later become available for sale to make additional assets for the payment of remaining debts of the estate, and hence a motion upon notice in the original proceeding was proper.

The change in administrators did not affect the rights of the parties. It was said in *Smith v. Brown,* 99 N. C., 377, 6 S. E., 667: "The administrator *de bonis non* but takes up the broken thread and carries out an interrupted and incomplete administration. The two constitute a single administration of the estate."

The holding in *Fisher v. Ballard,* 164 N. C., 326, 80 S. E., 239, is inapplicable to the facts of this case, since here the original proceeding had been instituted by the duly qualified administrators within a year of decedent's death to sell real property for the payment of debts, and subsequently there was a petition by motion in the same proceeding to subject other remaining real property to sale for the payment of the outstanding debts of an unsettled estate.

The decision in *Smith v. Brown,* 99 N. C., 377, 6 S. E., 667, cited by defendants in their able brief, referred rather to the applicability of statutes of limitations affecting the validity of claims against the estate rather than to the right to sell available real property of the decedent to pay the approved debts of an uncompleted estate.

The judgment of the court below is

Affirmed.

L. C. REED v. MADISON COUNTY ET AL.

(Filed 2 March, 1938.)

1. Jury §§ 3, 8—

Challenge to the array for that jury commission drawing the panel was created by ch. 177, Public-Local Laws 1931, and was not legal agency for drawing the panel, should have been sustained.

2. Jury § 1: Appeal and Error § 39a—

The fact that the panel was not drawn by a legal agency does not entitle appellants to a new trial in the absence of a showing of prejudice.

3. Public Offices § 11—

In an action to recover emoluments of public office to which plaintiff contends he was legally elected, a directed verdict in plaintiff's favor is error when defendants plead the statute of limitations and controvert the evidence relative to the amount of time and mileage claimed by plaintiff.

4. Trial § 27—

Ordinarily, a verdict may not be directed in favor of the party upon whom rests the burden of proof.

5. Public Offices § 11—

In an action to recover the emoluments of a public office, no recovery may be had upon *quantum meruit*, since a public officer is entitled only to compensation specified by statute, ordinance, or contract.

6. Appeal and Error § 40g—

When an appeal may be decided on either one of two grounds, one involving a constitutional question and the other a question of less moment, the constitutional question will be pretermitted.

APPEAL by defendants from *Johnston, J.*, at November Term, 1937, of MADISON.

Civil action to recover certain emoluments or perquisites belonging to the office of auditor of Madison County.

In apt time the defendants entered a challenge to the array of the jury on the ground that the jury commission which drew the panel for the November Term, 1937, Madison Superior Court, was not a proper legal agency for drawing such panel, the said commission having been created by ch. 177, Public-Local Laws 1931. Overruled; exception.

The defendants denied the validity of plaintiff's election to the office of auditor; pleaded the two-year statute of limitations, C. S., 442, and controverted the amount of time and mileage set out in plaintiff's claim.

There was a directed verdict and judgment for plaintiff from which the defendants appeal, assigning errors.

Carl R. Stuart and Smathers & Meekins for plaintiff, appellee.
Roberts & Baley for defendants, appellants.

STACY, C. J. It follows from what is said in the case of *Brigman v. Baley, ante,* 119, that the challenge to the array should have been sustained. McIntosh, N. C. Prac. and Proc., 596. But this alone would not entitle the defendants to a *venire de novo*. *S. v. Levy,* 187 N. C., 581, 122 S. E., 386. *Non constat* that they may not have had a jury to their liking or that they were prejudiced thereby. Indeed, it appears from the record that no member of the original panel served on the jury in this case. It seems to have been composed of talesmen. Judgments are not to be disturbed for jury defect except upon proper showing of prejudice. *S. v. Gosnell,* 208 N. C., 401, 181 S. E., 323.

Upon another ground, however, defendants are entitled to a new trial. His Honor inadvertently directed a verdict for the plaintiff in the face of the plea of the statute of limitations and the controverted evidence

relative to the correctness of the amount of time and mileage set out in plaintiff's claim. It is true, the principal matter debated on the hearing was the legality of plaintiff's election as auditor, but this was not the whole case. There were issues of fact for the jury, as well as questions of law for the court, with the burden on the plaintiff throughout.

It is seldom that a verdict can properly be directed in favor of the party upon whom rests the burden of proof. *Yarn Mills v. Armstrong,* 191 N. C., 125, 131 S. E., 416. Indeed, it is said in some of the cases that "a verdict can never be directed in favor of the party upon whom rests the burden of proof." *Cox v. R. R.,* 123 N. C., 604, 31 S. E., 848; *House v. R. R.,* 131 N. C., 103, 42 S. E., 553.

As plaintiff is suing for the emoluments or perquisites of a public office, he is not to recover on a *quantum meruit. Borden v. Goldsboro,* 173 N. C., 661, 92 S. E., 694.

Speaking to the question in the *Borden case, supra, Brown, J.,* delivering the opinion of the Court, said: "A public officer is not entitled to payment for duties imposed upon him by statute, in the absence of an express provision for such payment. 25 Cyc., 449. In 1 Dillon on Mun. Corp., 731, it is said: 'There is no such implied obligation on the part of municipal corporations and no such relation between them and officers which they are required by law to elect as will oblige them to make compensation to such officers unless the right to it is expressly given by law, ordinance, or by contract. Officers of a municipal corporation are deemed to have accepted their office with knowledge of and with reference to the provisions of the charter or incorporating statute relating to the services which they may be called upon to render and the compensation provided therefor. Aside from these, or some proper by-law, there is no implied *assumpsit* on the part of the corporation with respect to the services of its officers. In the absence of express contract, these determine and regulate the right of recovery and the amount.' Many cases are cited in the notes in support of the text."

With this disposition of the appeal, rulings upon the constitutional questions presented, or sought to be presented, are pretermitted. *S. v. Ellis,* 210 N. C., 166, 185 S. E., 663. It is not after the manner of appellate courts to pass upon constitutional questions, even when properly presented, if there be also present some other ground upon which the case may be made to turn. *Newman v. Comrs.,* 208 N. C., 675, 182 S. E., 453; *Wood v. Braswell,* 192 N. C., 588, 135 S. E., 529. "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Mr. Justice Peckham* in *Burton v. U. S.,* 196 U. S., 283. The rule is that if a case can be decided on either of two grounds, one involving a constitutional

question, the other a question of lesser moment, the latter alone will be decided. *Siler v. L. & N. R. R.*, 213 U. S., 175; *Light v. U. S.*, 220 U. S., 523; *In re Parker*, 209 N. C., 693, 184 S. E., 532.

For the error as indicated in directing the verdict the defendants are entitled to a new trial. It is so ordered.

New trial.

MRS. ELSIE PLEMMONS, WIDOW, PHOY MARCUS PLEMMONS, DECEASED, v. WHITE'S SERVICE, INC., EMPLOYER, AND NEW AMSTERDAM CASUALTY COMPANY, CARRIER.

(Filed 2 March, 1938.)

1. Master and Servant § 40a—

The Compensation Act provides, unless the context otherwise requires, that a death of an employee in order to be compensable must result from an injury by accident arising out of and in the course of the employment. C. S., 8081 (i), subsecs. j and f.

2. Master and Servant § 40e—

The words "out of" refer to the origin or cause of the accident.

3. Master and Servant § 40f—

The words "in the course of" refer to the time, place, and circumstances under which an accident occurs.

4. Master and Servant § 40e—

Whether an accident arises "out of the employment" is a mixed question of law and fact to be determined in the light of the facts and circumstances of each case, but the term requires that there be some causal connection between injury and the employment or that the risk be incidental to the employment.

5. Same—Accident resulting in death held not to have arisen out of the employment under facts of this case.

Intestate died of hydrophobia resulting from a dog bite received by him while engaged in his duties as attendant in a filling station. *Held:* Claimant is not entitled to compensation for the employee's death, since there was no causal connection between the employment and the bite of a dog running at large, and the accident was not from a risk incidental to the employment.

APPEAL by defendant from *Alley, J.*, at January Term, 1938, of BUNCOMBE.

Proceeding under the N. C. Workmen's Compensation Act for compensation on account of death of the Phoy Marcus Plemmons.

The claim was heard first before Commissioner Dorsett of the N. C. Industrial Commission, from whose decision claimant appealed to the

Full Commission. On such appeal the findings of fact and conclusions of law of the single Commissioner were set aside and reversed. Pertinent to the question on this appeal, the Full Commission finds in substance the following facts: While deceased, Phoy Marcus Plemmons, was regularly employed by respondent, White's Service, Inc., on night duty at its filling station on the night of 26 May, 1936, and while he was waiting on a customer at the station, a small dog ran through the station premises at the place where deceased was at work and bit him on the finger. The finger was dressed the next morning and within a week was entirely healed. Deceased continued to work until 4 July, 1936, when he was taken seriously ill and died four days later of hydrophobia, "which was proximately caused by the dog-bite on 26 May, which was an accident arising out of and in the course of the deceased's employment; . . . that the filling station was exposed to the public, both humans and animals, and the deceased employee working there on night duty was exposed to a greater hazard than the public generally was and was more likely to be bitten by a dog under these conditions than the public in general."

Thereupon compensation was awarded, and, on appeal to the Superior Court the award was affirmed.

Respondents appeal therefrom to the Supreme Court, and assign error.

J. Frazier Glenn, Jr., and J. G. Merrimon for plaintiff, appellee.
J. M. Horner, Jr., for defendants, appellants.

WINBORNE, J. A single question is determinative of this appeal: Did the death of Phoy M. Plemmons result from injury by accident arising out of and in the course of his employment? We think not, and so hold.

The N. C. Workmen's Compensation Act provides that when used therein, unless the context otherwise requires, "the term 'death' as a basis for a right of compensation means only death resulting from an injury," and "'injury' means an injury by accident arising out of and in the course of the employment. . . ." C. S., 8081 (i) (j and f). *Harden v. Furniture Co.*, 199 N. C., 733, 155 S. E., 728.

"The condition antecedent to compensation is the occurrence of an injury (1) by accident (2) arising out of and (3) in the course of employment." *Conrad v. Foundry Co.*, 198 N. C., 723, 153 S. E., 266; *Whitley v. Highway Com.*, 201 N. C., 539, 160 S. E., 827; *Beavers v. Power Co.*, 205 N. C., 34, 169 S. E., 825.

Conceding, without deciding, that there is sufficient evidence to support the finding of fact that while in the course of his employment Phoy M. Plemmons was bitten by a dog running at large from which hydro-

phobia developed, resulting in his death, did the dog-bite arise "out of the employment?"

The words "out of" refer to the origin or cause of the accident, and the words "in the course of" to the time, place and circumstances under which it occurred. *Conrad v. Foundry Co., supra; Harden v. Furniture Co., supra; Hunt v. State,* 201 N. C., 707, 161 S. E., 203; *Ridout v. Rose's Stores, Inc.,* 205 N. C., 423, 171 S. E., 642.

Whether an accident arose out of the employment is not exclusively a question of fact. It is a mixed question of fact and law. *Harden v. Furniture Co., supra; Ridout v. Rose's Stores, Inc., supra.*

It has been said that the term "arising out of employment" is broad and comprehensive and perhaps not capable of precise definition. It must be interpreted in the light of the facts and circumstances of each case, and there must be some causal connection between injury and the employment. *Chambers v. Oil Co.,* 199 N. C., 28, 153 S. E., 594; *Harden v. Furniture Co., supra; Canter v. Board of Ed.,* 201 N. C., 836, 160 S. E., 924; *Walker v. Wilkins,* 212 N. C., 627, 194 S. E., 89.

In *Hunt v. State, supra, Adams, J.,* said: " 'Arising out of' means arising out of the work the employee is to do or out of the services he is to perform. The risk must be incidental to the employment." *Harden v. Furniture Co., supra; Chambers v. Oil Co., supra; Beavers v. Power Co., supra; Bain v. Mfg. Co.,* 203 N. C., 466, 166 S. E., 301.

In the present case there is no causal relation between the employment of the deceased and the bite of a dog running at large. The risk of such injury by accident is not incidental to the employment. We therefore hold that the accident did not arise out of and in the course of the employment.

The judgment below is

Reversed.

STATE v. JOHN CARVER.

(Filed 2 March, 1938.)

1. Assault § 9: Homicide § 16—Presumption from use of deadly weapon does not apply to assault cases, but only to prosecutions for homicide.

In a prosecution for assault with a deadly weapon with intent to kill, resulting in serious injury, C. S., 4214, defendant's admission that he shot the prosecuting witness with a pistol does not raise the presumption that defendant is guilty as charged, and does not place the burden on defendant to prove to the satisfaction of the jury matters in mitigation, excuse, or justification upon his plea of self-defense and not guilty, the presumption arising from the use of a deadly weapon being applicable only to homicide

cases, and the burden is on the State throughout the trial to rebut the presumption of innocence and prove defendant guilty beyond a reasonable doubt.

2. Criminal Law § 81c—Instruction placing burden on defendant to prove innocence is not cured by verdict of guilty of less degree of crime charged.

An instruction that defendant's admission of assault with a deadly weapon, which resulted in serious injury, raised the presumption of defendant's guilt of assault with a deadly weapon with intent to kill, resulting in serious injury, as charged, C. S., 4214, and placed the burden on defendant to satisfy the jury of matters in mitigation or excuse, is not cured by a verdict of guilty of the misdemeanor of an assault with a deadly weapon, since the instruction required defendant to show to the satisfaction of the jury matters in mitigation or excuse before he could successfully ask for a verdict of not guilty.

APPEAL by defendant from *Sink, J.*, at September Term, 1937, of GRAHAM. New trial.

R. L. Phillips and Moody & Moody for defendant, appellant.

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

SCHENCK, J. The defendant was convicted of an assault with a deadly weapon upon a bill of indictment charging a violation of C. S., 4214, which reads: "Any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punished by imprisonment in the State Prison or be worked on the county roads for a period not less than four months nor more than ten years."

The defendant entered a plea of not guilty, and in the course of his testimony admitted that he shot the prosecuting witness, Harrison Wilson, with a pistol, but contended that what he did he did in self-defense.

From judgment of imprisonment the defendant appealed to the Supreme Court assigning as error, *inter alia,* the following excerpt from the charge of the court:

"The court charges you as a matter of law where one admits in a case of this kind that he used upon another as named in the bill of indictment a deadly weapon, and the court charges you that a pistol is a deadly weapon, then the law says the duty devolves upon him to show, not beyond a reasonable doubt, not by the greater weight of the evidence, but to the satisfaction of the jury, circumstances in mitigation of his conduct that will reduce the offense from that charged in the bill of indictment, to wit, assault with a deadly weapon with intent to kill, to that of guilty of an assault with a deadly weapon, or relieve him from the liability of any offense whatever and render a verdict of not guilty.

The defendant admits he shot the prosecuting witness, therefore it is his duty to satisfy you, not by the greater weight of the evidence nor beyond a reasonable doubt, but to satisfy you he was justified in so doing."

This assignment of error is well taken. In *S. v. Redditt*, 189 N. C., 176, it is said: "The admission or proof of an assault with a deadly weapon, resulting in serious injury but not in death, cannot be said, as a matter of law, on the present record, to establish a presumption of felonious intent, or intent to kill, sufficient to overcome the presumption of innocence raised by a plea of traverse, and cast upon the defendant the burden of disproving his guilt. *S. v. Wilbourne*, 87 N. C., 529; *S. v. Falkner*, 182 N. C., 793."

The Attorney-General in his brief admits that the charge complained of is in contravention of the principle laid down in *Redditt's case, supra*, but contends that the error was harmless since the defendant was not convicted of an assault with intent to kill, a felony, but was convicted only of an assault with a deadly weapon, a misdemeanor. With this contention we cannot concur.

That portion of the charge reading "The defendant admits he shot the prosecuting witness, therefore it is his duty to satisfy you, not by the greater weight of the evidence nor beyond a reasonable doubt, but to satisfy you he was justified in so doing," cast upon the defendant the burden of proving to the satisfaction of the jury matters in justification or excuse before he could successfully ask for a verdict of not guilty. Such is not the law. The defendant's plea of not guilty raised a presumption of his innocence, and this presumption continued throughout all stages of the trial until removed by a verdict of guilty. *S. v. Murphrey*, 186 N. C., 113. If the defendant's evidence raised a reasonable doubt as to his guilt, or if such evidence caused to linger in the minds of the jury from the original presumption of innocence a reasonable doubt as to his guilt, or if upon all the evidence the jury entertained a reasonable doubt as to his guilt the defendant was entitled to a verdict of not guilty, although the defendant's evidence may not have satisfied the jury of matters in justification or excuse.

The rule in certain homicide cases that where the defendant admits, or it is proven, that he slew the deceased with a deadly weapon, there is a presumption of guilt of murder in the second degree and the burden is cast upon the defendant to show to the satisfaction of the jury matters in mitigation, excuse, or justification, *S. v. Willis*, 63 N. C., 26; *S. v. Brittain*, 89 N. C., 481; *S. v. Robinson*, 188 N. C., 784, doubtless had its origin in the necessity arising out of the fact that the deceased's mouth is closed, but such necessity does not exist and such rule does not apply in assault cases.

New trial.

STATE v. GENE BURNETTE.

(Filed 2 March, 1938.)

1. **Assault § 12: Criminal Law § 54c—Failure to charge jury it might find defendant guilty of less degrees of crime charged held error.**

The evidence disclosed a vicious assault by three persons on prosecuting witness in which a knife was used, resulting in serious injury, and that at the time defendant declared he was going to kill all the Negroes in Leaksville. Defendant relied on an alibi. The court instructed the jury they might find defendant guilty of assault with a deadly weapon with intent to kill, resulting in serious injury, or not guilty. *Held:* The intent to kill was a question for the jury upon the evidence of defendant's declaration and the nature and viciousness of the assault, as was also the question whether defendant used a deadly weapon, and the court should have instructed the jury that they might find defendant guilty as charged in the bill of indictment if they so found beyond a reasonable doubt, or guilty of assault with a deadly weapon if they had a reasonable doubt of defendant's intent to kill, or of assault wherein serious injury was inflicted if they should fail to find that defendant used a deadly weapon and should further fail to find that the assault was committed with a deadly weapon, or not guilty. C. S., 4640.

2. **Criminal Law § 81c—Verdict of guilty of crime charged does not cure error in failing to submit question of guilt of less degrees.**

A verdict of guilty of the crime charged in the bill of indictment does not cure error in failing to submit to the jury the question of defendant's guilt of less degrees of the crime charged, since it may not be determined on appeal whether the jury might have found defendant guilty of less degrees if the questions had been submitted.

APPEAL by defendant from *Phillips, J.*, at August Term, 1937, of ROCKINGHAM. New trial.

This is a criminal action tried on a bill of indictment charging that the defendant did unlawfully and feloniously assault one Bud Minute, alias Bud Miller, with a deadly weapon with intent to kill, inflicting serious injury not resulting in death.

The evidence tends to show that Bud Minute between 11 and 11:30 o'clock p. m., on or about 20 November, 1935, was walking along a public road near Dan River bridge in Rockingham County when the defendant drove up in an automobile and got out and asked Minute for a cigarette. Minute told him he did not have a cigarette, but that he had paper and tobacco with which to make one. The defendant declined to use these, became angry, said that he was going to kill every Negro in Leaksville, cursed Minute and said that he was going to fix him and began to fight him. Two other men stepped out of the car to help the defendant. One of them had a knife. Minute was cut three times about

the throat. One of the men suggested throwing Minute over the bridge. They took him and attempted to do so and struck his head against the banister of the bridge. They then threw him over the bridge and he fell about forty-three feet down upon rocks and sticks. The prosecuting witness was found about 3 a. m. under the bridge. At that time his arms, legs and ribs were broken and his teeth were knocked out and he remained in bed twelve months. There was evidence tending to corroborate the State's witness. The defendant denied the assault and relied upon evidence tending to establish an alibi. There was a verdict of guilty "as charged in the bill of indictment." From judgment pronounced thereon the defendant appealed.

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

D. Floyd Osborne and J. Hampton Price for defendant, appellant.

BARNHILL, J. One of the defendant's exceptions is directed to the failure of the court below to charge the jury as to its right to return a verdict of guilty of a less degree of the crime charged in the bill of indictment. In this connection the court charged the jury: "If you are satisfied from the evidence and beyond a reasonable doubt as to the guilt of the defendant, your verdict will be 'guilty.' If you have a reasonable doubt as to his guilt, from all the evidence, you will return a verdict of 'not guilty.'" . . . And again, "If you are satisfied, and beyond a reasonable doubt, of his guilt, whether the State proves a motive or not, you will, if you are satisfied beyond a reasonable doubt that he is guilty, your verdict will be 'guilty,' even though no motive has been proven."

It was permissible for the jury under the bill of indictment to return either one of four verdicts according as they should find the facts to be, to wit: (1) Guilty as charged in the bill of indictment. (2) Guilty of an assault with a deadly weapon. (3) Guilty of an assault wherein serious injury was inflicted, or (4) Not guilty. Nowhere in the charge does the court undertake to define the lesser degrees of the felony charged, or instruct the jury that if it was satisfied beyond a reasonable doubt that the defendant assaulted the prosecuting witness with a deadly weapon, but had a reasonable doubt as to the intent to kill, then that it should return a verdict of guilty of an assault with a deadly weapon, nor does the court instruct the jury as to its duty to return a verdict of an assault wherein serious injury was inflicted if they should fail to find that the defendant used a deadly weapon and should further fail to find that the assault was committed with an intent to kill.

C. S., 4640, expressly provides that a defendant may be convicted of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime,

and procedure under this statute in criminal actions constitutes a well-recognized rule of practice in this jurisdiction. When there is evidence tending to support a milder verdict than the one charged in the bill of indictment the defendant is entitled to have the different views presented to the jury under a proper charge, and an error in this respect is not cured by a verdict convicting him of the crime as charged in the bill of indictment, for in such case it cannot be known whether the jury would have convicted of a less degree if the different views, arising on the evidence, had been correctly presented by the trial court. *S. v. Robinson*, 188 N. C., 784; *S. v. Lutterloh*, 188 N. C., 412; *S. v. Merrick*, 171 N. C., 788; *S. v. Allen*, 186 N. C., 307; *S. v. Williams*, 185 N. C., 685, and cases there cited.

The only evidence of an intent to kill was the evidence of the declaration of the defendant that he was going to kill all the Negroes in Leaksville and the facts and circumstances tending to show the nature and viciousness of the assault. The probative force and effect of these circumstances was for the determination of the jury. If the jury was not fully satisfied that the assault was committed with an intent to kill it was yet possible for them to return a verdict of guilty of a lesser degree of the crime charged. If the jury rejected the testimony tending to show an alibi and found that the defendant in fact committed an assault upon the prosecuting witness, as its verdict indicates, it may be well understood from the evidence in this case—as to the nature and effect of the assault committed—that it would hesitate long before returning a verdict of not guilty. Inadvertently the court below gave it only this one choice.

The failure of the court to charge the jury as to its right to return a verdict of a less degree of the crime charged, and to explain the law in respect thereto, deprived the defendant of a substantial right, entitling him to a

New trial.

FRANK PEYTON, ADMINISTRATOR CUM TESTAMENTO ANNEXO OF THE WILL OF JOHN R. PEYTON, AND FRANK PEYTON, BETTY MOBLEY AND JASPER PEYTON AND OTHERS, CHILDREN OF NOE PEYTON, DECEASED, v. JESSE SMITH AND MAGGIE L. CLARK, ADMINISTRATORS OF EMILY S. PEYTON AND JESSE SMITH, AND MAGGIE CLARK, HEIRS AT LAW OF EMILY S. PEYTON.

(Filed 2 March, 1938.)

Wills § 33a—When absolute estate is conveyed to first taker, provision for disposition after her death is void.

A devise of land to testator's wife in fee simple with full power of disposition, and a bequest of personalty "to use or sell as she may choose"

with provision in each item that any surplus left at her death should go to testator's heirs, *is held* to vest the absolute fee simple in the realty and the absolute estate in the personalty in the wife, the provision directing or expressing a desire for the disposition of the property after the first taker's death being void as repugnant to the absolute estate previously conveyed.

APPEAL by plaintiff from *Parker, J.*, at December Term, 1937, of BEAUFORT. Affirmed.

The judgment of the court below, which indicates the controversy, is as follows:

"This cause came on for hearing at the above term of court before his Honor, R. Hunt Parker, judge presiding, the plaintiffs being represented by Albion Dunn, of Greenville, N. C., H. S. Ward and Samuel M. Blount, of Washington, N. C. The defendants being represented by Harding & Lee, of Greenville, N. C., and Grimes & Grimes, of Washington, N. C. The counsel of record on both sides waived a jury trial and entered into a stipulation as follows:

" 'It is stipulated and agreed by and between the plaintiff and defendants to this action that the only real estate in controversy is the Major Jordan tract, and that is the only land that passed under the will.

" 'It being specifically admitted that the house and premises occupied by Emily Peyton at her death passed to her as tenant by entirety upon the death of John R. Peyton.

" 'It is further stipulated and agreed that John Peyton at the time of his death owned, in fee, personal property and at the death of Emily Peyton there was a surplus of personal property that passed to her under the second item of the will of John Peyton, and if the plaintiffs are correct in their contentions they are entitled to this surplus.

" 'It is further stipulated and agreed between all the parties that Emily Peyton died intestate in April, 1937, and that she did not assign nor bequeath the Major Jordan tract of land, nor dispose of in any way the surplus of personalty.'

"And the will was then presented to the court for construction under the provisions of the Declaratory Act, C. S., 628 (a) to 628 (o), inclusive. After hearing argument of counsel and citations of authorities by them, it is the opinion of the court, and the court decrees as follows:

"1. That the item in said will reading as follows: '*First:* I give and devise unto my wife, Emily Peyton, all of my lands and real estate of every description, and wherever situated, to have and to hold unto her in fee simple right forever, with full power to assign away or bequeath as she may choose, and if there is any surplus at her death, it to be given to my heirs,' devises an absolute fee simple estate in Emily Peyton, and any other language therein is surplusage and a restriction upon a fee, and is therefore void.

"2. That the item in said will reading as follows: *'Second:* I give and bequeath unto my wife, Emily Peyton, all of my personal estate of every kind or description, to use or sell as she may choose, and if there is any surplus at her death I want it to be given to my heirs,' vests an absolute estate in favor of Emily Peyton in all of the personal estate of every kind or description which was owned by the said John R. Peyton at the time of his death, and any other language therein, which language does not create an executory limitation nor a remainder, is a restriction upon an absolute estate, and is therefore void.

"It is further adjudged that the plaintiffs pay the costs of this action, to be taxed by the clerk.

R. HUNT PARKER,
Judge Presiding."

To the foregoing judgment plaintiffs excepted, assigned error, and appealed to the Supreme Court.

H. S. Ward, S. M. Blount, and Albion Dunn for plaintiffs.
Harding & Lee and Grimes & Grimes for defendants.

CLARKSON, J. Item One of the will to be construed, which applies to real estate, is as follows: "I give and devise unto my wife, Emily Peyton, all of my lands and real estate of every description and wherever situated, to have and to hold unto her in fee simple right forever, with full power to assign away or bequeath as she may choose, and if there is any surplus at her death it is to be given to my heirs."

Item Two of the will to be construed, which applies to personal property, is as follows: "I give and bequeath unto my wife, Emily Peyton, all of my personal estate of every kind or description, to use or sell as she may choose, and if there is any surplus at her death I want it to be given to my heirs."

We think the court below construed both items of the will correctly.

The present case is similar to that of *Barco v. Owens,* 212 N. C., 30. It is there said at pp. 31-32: "We agree with the trial court that 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 dispondendi* or the *jus dividendi,* and therefore void. . . . 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. . . . Conditions subsequent, in the absence of compelling language to the contrary, are usually con-

strued against divestment. . . . The absolute devise is permitted to stand, while the subsequent clause is generally regarded as precatory only." Abundant authorities are cited to sustain the above rules of construction. *Hampton v. West*, 212 N. C., 315.

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

Affirmed.

CATHERINE LATHAM, ADMINISTRATRIX OF DAVID LATHAM, v. ELIZABETH CITY ORANGE CRUSH BOTTLING COMPANY.

(Filed 2 March, 1938.)

Automobiles § 12a—Operation of truck on highway at speed in excess of 35 miles per hour is only prima facie evidence of negligence.

An instruction that the operation of a vehicle designed for the transportation of property at a rate of speed in excess of 35 miles per hour on a State Highway constituted negligence *per se* (N. C. Code of 1935, sec. 2621 [46a]) is reversible error, since under the provisions of ch. 311, sec. 2, Public Laws of 1935, such speed is made *prima facie* evidence of negligence and not negligence *per se*.

APPEAL by defendant from *Parker, J.*, at October Term, 1937, of DARE. New trial.

R. Clarence Dozier and M. B. Simpson for plaintiff, appellee.

Savage & Lawrence, T. L. Sawyer, and John H. Hall for defendant, appellant.

SCHENCK, J. This is a civil action to recover damages for the alleged wrongful death of the plaintiff's intestate.

The plaintiff offered evidence tending to show that her intestate was driving his automobile in a southerly direction on the public highway leading from Currituck courthouse to Manteo, and that the defendant's agent and servant was driving the defendant's truck on said highway in a northerly direction; that the said truck was towing another truck of the defendant; that as said two trucks were about to pass the automobile of the plaintiff's intestate the rear truck ran to its left of the center of the highway and collided with the automobile of the plaintiff's intestate, knocking off one of the wheels of said automobile and causing it to run off of the highway and inflicting injury to said intestate from which he subsequently died. The plaintiff offered further evidence tending to show that the defendant's trucks at the time of the collision were being operated at a rate of speed "around 40 or 45 miles per hour."

The defendant offered evidence tending to show that its trucks were being operated on their right of the center of the highway and at a rate of speed not in excess of 25 miles per hour, and that the automobile of the plaintiff's intestate collided with the rear truck while being so operated.

All of the evidence tended to show that the defendant's two trucks were motor vehicles designed, equipped for, and engaged in transporting property, namely, bottled drinks.

The jury found that the plaintiff's intestate was killed by the negligence of the defendant.

His Honor in his charge read to the jury several excerpts from the motor vehicle law, including a portion of sec. 2621 (46a) of N. C. Code of 1935 (Michie), as follows: "No motor vehicle designed, equipped for, or engaged in transporting property shall be operated over the highways of the State at a greater rate of speed than thirty-five (35) miles per hour, . . ." and then followed the reading with this instruction: "The court instructs you that it is negligence *per se* for any person to operate an automobile in North Carolina upon the public highway in violation of any of the statute law that the court has just read to you." This instruction is made the subject of an exceptive assignment of error, and we are constrained to sustain such assignment.

Public Laws 1935, ch. 311, sec. 2, reads:

"Sec. 2. Amend article two of said act by striking out section four. and substitute in lieu thereof new section four as follows:

"Sec. 4. *Speed Restrictions.*

"(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.

"(b) Where no special hazard exists the following speeds shall be lawful, but any speed in excess of said limits shall be *prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful:

"1. Twenty miles per hour in any business district;

"2. Twenty-five miles per hour in any residence district;

"3. Thirty-five miles per hour for motor vehicle designed, equipped for, or engaged in transporting property; and thirty miles per hour for such motor vehicle to which a trailer is attached;

"4. Forty-five miles per hour under other conditions."

Chapter 311, Public Laws 1935, was enacted to amend the traffic law of the State "so as to make this law conform more nearly with the uniform traffic code," and since its enactment the operation of a motor vehicle designed, equipped for, or engaged in transporting property at a speed in excess of thirty-five miles per hour is only *prima facie* evidence of unlawfulness, and not unlawful *per se*, and therefore not negligence *per se* as was the case prior to the enactment.

". . . the change in the law resulting from the enactment of sec. 2, ch. 311, Public Laws of North Carolina, 1935, which provides that driving an automobile on a highway or public road in this State at a speed in excess of 45 miles per hour, under conditions as shown by all the evidence in the instant case, 'shall be *prima facie* evidence that the speed is not reasonable or prudent, and is unlawful.' By reason of this statute, driving an automobile on a highway or public road in this State, since its enactment, at a speed in excess of forty-five miles per hour is not negligence *per se* or as a matter of law, as was the case prior to its enactment." *S. v. Webber,* 210 N. C., 137.

"While prior to the enactment of sec. 2, ch. 311, Public Laws 1935 (N. C. Code of 1935 [Michie], sec. 2621 [46]), the operation of a motor-driven vehicle upon the highways of the State at a greater rate of speed than forty-five miles per hour was unlawful, and therefore negligence *per se,* since said enactment such operation is only *prima facie* evidence of negligence. . . ." *Exum v. Baumrind,* 210 N. C., 650.

For the error assigned there must be a

New trial.

N. H. GILL, ON BEHALF OF HIMSELF AND OTHER TAXPAYERS OF THE CITY OF CHARLOTTE WHO MAY DESIRE TO JOIN WITH HIM, v. CITY OF CHARLOTTE ET AL.

(Filed 2 March, 1938.)

Taxation § 3—All bonds issued by city, whether with or without vote, must be included in determining amount of bonds issued during year.

A municipality may not issue bonds for street and sewerage construction or extension without a vote when, during the fiscal year, such city has issued bonds with the approval of the voters in excess of the amount by which it had reduced its outstanding indebtedness during the prior fiscal year, N. C. Constitution, Art. V, sec. 4, the purpose of the amendment being to limit the existing power of the governing authorities to issue bonds for necessary expenses so that the net indebtedness of the taxing unit should not be increased beyond the limits prescribed in the amendment, except with the approval of its voters.

APPEAL by plaintiff from *Warlick, J.,* at November Term, 1937, of MECKLENBURG. Reversed.

This is a civil action instituted by the plaintiff on behalf of himself and other taxpayers of the city of Charlotte, in which he seeks to enjoin the issuance of $210,000 of bonds of the city of Charlotte for constructing and reconstructing the surface of roads, streets and highways, sidewalks, curbs, gutters and drains, and $20,000 for the purpose of extending the existing sanitary sewerage system of said city, which the gov-

erning authorities of the city of Charlotte, under ordinances adopted by them, propose to issue without a vote of the electors of said city.

The total bonded indebtedness of the city of Charlotte amounts to $9,712,000. During the fiscal year ending 30 June, 1937, said city reduced its bonded indebtedness by the sum of $441,631.34. During the present fiscal year it has issued bonds in the sum of $1,300,000 for the improvement and enlargement of the waterworks system of Charlotte. This bond issue was approved by a vote of the electors of the city. The court below concluded that the waterworks bonds, having been submitted to and approved by a vote of the people, are not to be considered in computing the debt contracting power of the city of Charlotte, as provided by amended Art. V, sec. 4, of the Constitution of North Carolina, and entered judgment denying the plaintiff injunctive relief. The plaintiff excepted and appealed.

J. L. DeLaney for plaintiff, appellant.
Basil M. Boyd for defendants, appellees.

BARNHILL, J. There is a controversy between the parties to this action as to the amount by which the bonded indebtedness of the city of Charlotte was reduced during the preceding fiscal year ending 30 June, 1937. The court below, upon a consideration of the cause, concluded that the amount of the reduction was $441,631.34, which was the amount contended for by the defendant. The plaintiff contends that the net reduction was $241,646.41. It is unnecessary for us to review the findings of the court below in this respect or to determine the exact amount of the reduction of the bonded indebtedness of the defendant city during the preceding fiscal year. For the purpose of determining the legal question presented to us we may accept the amount claimed by the defendant. In the event bonds approved by the people at an election called and held for that purpose and issued by the city of Charlotte are to be included in determining the debt contracting power of the governing authorities of the defendant, under the restrictions imposed by Art. V, sec. 4, of the Constitution, then the proposed bonds exceed the permitted limitation and cannot be issued without a vote of the people. This question has heretofore been determined by this Court in *Hallyburton v. Board of Education, ante,* 9, in which it is said: "So that now, local units may create debts and issue their bonds for necessary expenses without a vote of the people and without special approval of the Legislature: *Provided,* that by so doing, taxes in excess of the limitations provided in Art. V, sec. 6, are not required; and *provided further,* that the total amount of such bonds and such other bonds as may have been issued during that particular fiscal year do not exceed two-thirds of the total amount by which the public debt of the unit was

decreased during the preceding fiscal year. Such local unit may exceed the constitutional limitation on the taxing power by legislative authority without the approval of the voters, provided the total amount of bonds issued by such unit during any fiscal year does not exceed two-thirds of the amount by which the debt of the unit was decreased during the preceding fiscal year. In determining the total amount of bonds issued during any fiscal year all bonds so issued, whether approved by a vote of the people or not, must be included: except bonds issued to fund or refund a valid existing debt; tax anticipation notes issued in an amount not exceeding fifty per centum of the taxes for the fiscal year; bonds to supply a casual deficit, and bonds issued to suppress riots or insurrections, or to repel invasions, which need not be taken in consideration in arriving at such total." This decision is controlling. The city of Charlotte having, during the present fiscal year, issued bonds in excess of two-thirds of the amount by which its bonded indebtedness was reduced during the preceding fiscal year, the governing authorities of said city are without authority to issue any bonds during the present fiscal year, except for one or more of the four purposes enumerated in the amendment, without a vote of the people.

The governing authorities of local units have never had authority to issue bonds without a vote of the people except for necessary expenses. The purpose of Art. V, sec. 4, of the Constitution, as it presently exists, therefore, is to limit the authority of the governing boards of local units in the exercise of the power they have heretofore possessed to issue bonds for necessary expenses without first submitting the question to a vote of the people of the unit, and to give assurance to the people of such units that the bonded indebtedness of the unit shall not be increased beyond the limits prescribed in the amendment until and unless they approve such bonds.

There was error in the judgment below. The plaintiff is entitled to a permanent injunction.

Reversed.

THE FIRST & CITIZENS NATIONAL BANK OF ELIZABETH CITY v. R. L. HINTON.

(Filed 2 March, 1938.)

Execution § 24—Affidavit held sufficient to support order for examination of judgment debtor concerning choses in action subject to execution.

An affidavit stating that affiant had obtained judgment against defendant, which judgment was duly docketed and execution issued thereon, and that the judgment and execution remained unsatisfied, that defendant had no known interest in realty sufficient to satisfy execution, and that defend-

ant listed for taxation certain notes and evidences of debt due him, and had other choses in action of value, not exempt from execution, which he unjustly refused to apply to the satisfaction of the judgment, *is held* in substantial compliance with C. S., 712, and sufficient to support an order for the examination of defendant and others concerning such notes and choses in action.

APPEAL by defendant from *Frizzelle, J.*, at October Term, 1937, of PASQUOTANK. Affirmed.

This was a proceeding supplemental to execution, instituted by a judgment creditor, based upon affidavit, to require the examination of the judgment debtor and other persons concerning certain debts and choses in action alleged to be subject to execution.

Upon appeal from an order of the clerk the judge of the Superior Court ruled that the affidavit was sufficient to entitle the plaintiff to examine the parties, and remanded the cause of the clerk to conduct such examination. From the order of the judge the defendant appealed to the Supreme Court.

J. Kenyon Wilson for plaintiff, appellee.

Q. C. Davis, Jr., and George J. Spence for defendant, appellant.

DEVIN, J. The only question presented by this appeal is whether the affidavit was sufficient to warrant the order for the examination of the judgment debtor and the persons alleged to be indebted to him.

It was set forth in the affidavit that the plaintiff had recovered a judgment against the defendant and had same duly docketed in the Superior Court of Pasquotank County; that execution thereon had been issued; that the judgment and execution remained unpaid and unsatisfied, and that there was no known property or equitable interest in real property sufficient to satisfy the execution; that the defendant listed for taxation notes due by certain persons and other evidences of debt, of which the defendant was still the owner, and that the defendant had other choses in action and things of value, not exempt from execution, which he unjustly refused to apply toward the satisfaction of said judgment.

The affidavit was in substantial compliance with the provisions of sec. 712 of the Consolidated Statutes, and constituted sufficient basis for the order of examination as entered by the judge of the Superior Court. *Bank v. Burns*, 109 N. C., 105, 13 S. E., 871; *Boseman v. McGill*, 184 N. C., 215, 114 S. E., 10; McIntosh Prac. and Proc., sec. 748.

The order of the court below is in all respects

Affirmed.

PASQUOTANK HOSIERY COMPANY v. HEMPHILL COMPANY.

(Filed 2 March, 1938.)

1. Sales § 18—

Testimony by the president of the purchasing company that the company had paid the purchase price after discovery of every defect complained of, precludes recovery for breach of warranty and for failure to furnish necessary parts when needed.

2. Sales § 20—When purchaser's own evidence does not admit liability for purchase price, directed verdict for seller is error.

A directed verdict for the seller on its counterclaim for the purchase price of needles in the purchaser's action for breach of warranty, is error when the purchaser's testimony contains no admission of liability for the purchase price of the needles, the burden of proof on the issue being on the seller.

3. Trial § 27—

Ordinarily, a verdict may not be directed in favor of the party having the burden of proof.

APPEAL by plaintiff from *Parker, J.*, at November Term, 1937, of PASQUOTANK.

Civil action to recover (1) for alleged breach of contract in the sale or reconditioning of hosiery knitting machines, and (2) for failure to furnish necessary parts when needed.

The defendant interposed a counterclaim (1) for balance due on said machines, and (2) for quantity of needles shipped at the same time.

The president of plaintiff company testified on cross-examination: "We paid them every penny of the purchase price for all sixty machines except $528.00. The reason we held that out was not on account of any defects in the machines, but because we claim that they had wrongfully charged us for needles. . . . We paid for the machines after we discovered every defect about them I have testified to on this stand—that is to say, we paid all except $528.00 which we held back for needles."

There was a directed verdict against the plaintiff on both of its causes of action and in favor of defendant on its counterclaim. Exception.

From judgment on the verdict, peremptorily instructed, plaintiff appeals, assigning errors.

John H. Hall and M. B. Simpson for plaintiff, appellant.
McMullan & McMullan for defendant, appellee.

STACY, C. J. The case was tried upon plaintiff's evidence, which fails to make out either cause of action as alleged in the complaint.

Parker v. Fenwick, 138 N. C., 209, 50 S. E., 627, but it would seem that the issues raised by the counterclaim should have been submitted to the jury. There is no admission in plaintiff's testimony of liability for the needles.

Moreover, it is seldom that a verdict can properly be directed in favor of the party upon whom rests the burden of proof. *Reed v. Madison County, ante,* 145.

The plaintiff is entitled to a new trial on the issues relating to the counterclaim.

Partial new trial.

BRYSON CITY BANK v. TOWN OF BRYSON CITY ET AL.

(Filed 2 March, 1938.)

1. Constitutional Law § 4: Municipal Corporations § 5—

The power of municipalities to levy taxes, within constitutional bounds, may be expanded or contracted by the Legislature at will, provided that in limiting or reducing the power to levy taxes the obligations of existing contracts of the municipalities are not impaired.

2. Taxations § 3—Legislature may not limit municipal tax rate so as to prevent prompt discharge of municipality's obligations.

Where it is admitted or found as a fact that under an act limiting the tax rate of a municipality the municipality could not raise sufficient funds to pay according to their tenor its bonds outstanding at the time of the enactment of the statute, the limitation of the statute so far as it affects such bonds is void as impairing the obligations of a contract. Ch. 81, Public-Local Laws 1935, as amended by ch. 338, Public-Local Laws 1937.

3. Constitutional Law § 22—Obligations of contract include all means and assurances available for enforcement at time of its execution.

The obligations of a contract within the meaning of the constitutional prohibition against impairment, include all the means and assurances available for its enforcement both under its terms and under statutory provisions in force at the time of its execution, and remedies for its enforcement may be altered only so long as such alteration does not impair substantial rights thereunder.

4. Contracts § 8—

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.

5. Constitutional Law § 22—Provision that refunding bonds should carry same remedies as bonds refunded may not be impaired by later act.

Provision in a municipal ordinance that holders of proposed refunding bonds should be subrogated to all rights and powers of the holders of the bonds refunded is sanctioned by law (ch. 60, Public Laws 1931, as amended by ch. 258, Public Laws 1933, and ch. 356, Public Laws 1935,

N. C. Code, 2492 [50] b), and such provision will enter into and become an integral part of the bonds when issued, with contractual force and effect, and may not be impaired by subsequent legislation.

6. Same: Taxation § 3—Legislative limitation on tax rate held inoperative as to refunding bonds proposed to be issued in this case.

Defendant municipality proposed to issue refunding bonds to be exchanged for like amounts of the original bonds in the hands of the holders of the original indebtedness, the refunding bonds to be secured by all rights and powers of taxation which protected and formed a part of the obligation of the original bonds. *Held:* The parties and the debt are the same and the transaction amounts in reality to an extension and renewal of the original bonds under legislative sanction, N. C. Code, 2492 (50) b, and an act of the Legislature, passed after the issuance of the original bonds, limiting the tax rate of the municipality (ch. 81, Public-Local Laws of 1935, as amended by ch. 338, Public-Local Laws of 1937) is inoperative as to the refunding bonds when the limitation therein imposed would prevent the payment of the refunding bonds according to their tenor, and the contention that even though the refunding bonds would not create a new debt, such debt would be evidenced by a new contract, and that therefore the refunding bonds would be subject to the limitation of the statute enacted prior to the issuance of the refunding bonds, is untenable.

APPEAL by plaintiff from *Sink, J.*, at December Term, 1937, of SWAIN.

Civil action to restrain issuance and delivery of refunding bonds pursuant to ordinance of defendant city.

The pertinent facts, duly found and set out in the judgment, follow:

1. The town of Bryson City has outstanding bonded indebtedness in the principal sum of $365,000, represented by bonds issued and held by purchasers prior to 1 July, 1933, the accrued interest thereon and a portion of the principal now being in default.

2. The town proposes to refinance its existing bonded indebtedness by issuing refunding bonds "in lieu of, and to be exchanged for a like amount of its said outstanding bonds," which said refunding bonds are "to be delivered to the present holders of the original bonds in lieu of and in exchange for said original bonds and the defaulted interest now due and unpaid thereon."

By ordinance duly adopted 8 October, 1937, pursuant to the Local Government Act, ch. 60, Public Laws 1931, as amended by ch. 258, Public Laws 1933, and ch. 357, Public Laws 1935, it is provided, among other things, "that in each year while any of said refunding bonds shall be outstanding there shall be levied upon all the property within the corporate limits of the town of Bryson City, except only such property as would be exempt from taxation under the laws in force at the time of the creation of the indebtedness refunded, a tax sufficient to pay the principal and interest of said refunding bonds as the same shall become due and payable . . . and that the holder or holders of said re-

funding bonds shall be subrogated to all the rights and powers of the holders of such indebtedness so refunded."

3. At the time of the creation of this original indebtedness, and the bonds representing same were sold and delivered, there was no limitation, other than that contained in the Constitution and general laws, upon the total tax that the town might levy for the payment of said bonds and accrued interest.

4. Under the provisions of ch. 81, Public-Local Laws 1935, as amended by ch. 338, Public-Local Laws 1937, the town of Bryson City is prohibited from levying any annual taxes in excess of $1.60 on the $100 valuation on the taxable property situate within the corporate limits of said town for all purposes for the years 1935-1939, and perhaps for succeeding years.

5. A levy of $1.60 on the $100 valuation of taxable property within the corporate limits of Bryson City has not produced sufficient revenue to pay the principal and interest on the outstanding bonded indebtedness of said city, and will not produce sufficient revenue to pay the principal and interest on the proposed refunding bonds as they became due and payable.

6. It is to the best interest of all concerned that the present bonded indebtedness be refunded and that the proposed refunding bonds be exchanged for the original bonds.

Upon the foregoing findings his Honor concluded that said refunding bonds would not be subject to the tax limitation prescribed by ch. 81, Public-Local Laws 1935, as amended by ch. 338, Public-Local Laws 1937, and entered judgment accordingly.

Plaintiff appeals, assigning errors.

S. W. Black for plaintiff, appellant.
McKinley Edwards for defendants, appellees.

STACY, C. J. The power of municipal taxation, within constitutional bounds, may be expanded or contracted according to the legislative will, provided that in limiting or reducing the power previously granted the obligation of existing contracts is not thereby impaired. *Smith v. Comrs.*, 182 N. C., 149, 108 S. E., 443; *Green v. Asheville*, 199 N. C., 516, 154 S. E., 852; 6 R. C. L., 327. Here it is admitted, or found as a fact, that the prohibition contained in ch. 81, Public-Local Laws 1935, as amended by ch. 338, Public-Local Laws 1937, against levying any annual taxes in excess of $1.60 on the $100 valuation of property within the corporate limits of Bryson City, if permitted to stand, will impair the obligation of the city's outstanding bonds. As to these engagements, therefore, the limitation contained in said act must be held to be inoperative. *Spitzer v. Comrs.*, 188 N. C., 30, 123 S. E., 636.

Generally speaking, it may be said that the obligation of a contract is coeval with the undertaking to perform, and includes all the means which the law afforded for its enforcement at the time of the making of the contract. *Green v. Asheville, supra.* In other words, the obligation of a contract, within the meaning of the constitutional prohibition against impairment, includes all the means and assurances available for its enforcement at the time of its execution. *Bateman v. Sterrett,* 201 N. C., 59, 159 S. E., 14; *Barnes v. Barnes,* 53 N. C., 366; *Jones v. Crittenden,* 4 N. C., 55; 6 R. C. L., 324 *et seq.*

"The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.'" *Mr. Justice Swayne* in *Edwards v. Kearzey,* 96 U. S., 595; also reported in 79 N. C., 664.

As pertinent and illustrative of the principle may be instanced *Clark v. Reyburn,* 8 Wall., 322, where it was said that the remedy provided by statute for the foreclosure of a mortgage, in existence at the time of its execution, enters into and becomes a part of the contract of the parties, and any change by legislative action, which substantially and materially affects this remedy to the injury of the mortgagee, is a law "impairing the obligation of contracts," within the meaning of the constitutional provision on the subject; and *Brine v. Ins. Co.,* 96 U. S., 627, where it was held that a statutory right of redemption, existent at the time of the making of a mortgage, enters into and becomes a part of its terms. See 6 R. C. L., 365, and cases there cited.

Speaking to a question parallel to the one here presented, in *Hubert v. New Orleans,* 215 U. S., 170, *Mr. Justice Day,* delivering the opinion of the Court, said: "The power of taxation conferred by law entered into the obligation of the contracts, and any subsequent legislation withdrawing or lessening such power, leaving the creditors without adequate means of satisfaction, impaired the obligation of their contracts within the meaning of the Constitution."

And in support of the position the following was quoted from the opinion of *Mr. Justice Field* in *Louisiana v. New Orleans,* 102 U. S., 203: "'The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is

to that extent weakened. The Latin proverb, *Qui cito dat bis dat*—he who gives quickly gives twice—has its counterpart in a maxim equally sound—*Qui serius solvit, minus solvit*—he who pays too late pays less. Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition.' "

Again, in *Port of Mobile v. Watson,* 116 U. S., 289, it was said: "Therefore the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the Legislature, or, if they are changed, a substantial equivalent must be provided. Where the resources for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void."

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. *Eckard v. Ins. Co.,* 210 N. C., 130, 185 S. E., 671; *Headen v. Ins. Co.,* 206 N. C., 270, 172 S. E., 349; *Bateman v. Sterrett,* 201 N. C., 59, 159 S. E., 14; *Trust Co. v. Hudson,* 200 N. C., 688, 158 S. E., 244; *House v. Parker,* 181 N. C., 40, 106 S. E., 136; *Mfg. Co. v. Holladay,* 178 N. C., 417, 100 S. E., 567; *Hill v. Kessler,* 63 N. C., 437.

The law on the subject is very clearly stated by *Mr. Justice Swayne* in the leading case of *Von Hoffman v. City of Quincy,* 4 Wall., 535: "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This principle embraces those which affect its validity, construction, discharge, and enforcement. . . . Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract 'is the law which binds the parties to perform their agreement.' The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden. . . . It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No at-

tempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void.

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." And see *Louisiana v. New Orleans,* 102 U. S., 203; *Seibert v. Lewis,* 122 U. S., 284; *Hendrickson v. Apperson,* 245 U. S., 106; *Williams v. Suydam,* 6 Wall., 723, 18 L. Ed., 967.

It is provided by the Local Government Act, ch. 60, Public Laws 1931, as amended by ch. 258, Public Laws 1933, and ch. 356, Public Laws 1935, that in refunding, funding, or renewing indebtedness incurred prior to 1 July, 1933, the ordinance or resolution adopted by any local unit, authorizing the issuance of bonds for such purpose, may contain provision whereby the holders or purchasers of said bonds "shall be subrogated to all the rights and powers of the holders of such indebtedness," which said provision "shall have the force of contract between the unit and the holders of said bonds." Michie's N. C. Code of 1935, sec. 2492 (50) b. Such a provision was incorporated in the ordinance authorizing issuance of the bonds here sought to be enjoined; hence the provision, having the sanction of law, will enter into and become an integral part of the bonds when issued, with contractual force and effect, which may not be impaired by subsequent legislation, as was held by the court below. *Hammond v. McRae,* 182 N. C., 747, 110 S. E., 102; *Eckard v. Ins. Co., supra; Headen v. Ins. Co., supra; Long v. St. John,* 170 So. (Fla.), 317.

A similar question was before the Court in *Blanton v. Comrs.,* 101 N. C., 532, 8 S. E., 162, where it was held (as stated in 2nd head-note, which accurately digests the opinion): "Where a county, prior to the adoption of the present Constitution, contracted a debt for which it issued bonds, and since that Constitution went into effect the board of commissioners issued other bonds in exchange for the first, under an act of the General Assembly which provided that such 'bonds shall be deemed and held to be a continuation of the liability created by the county' for the original bonds: *Held,* that all the securities and remedies which attached to the bonds first issued entered into and became a part of the new obligation, and that the limitations upon the rate of taxation contained in the Constitution of 1868 did not apply to them."

It is the contention of the plaintiff, however, that while the refunding of a subsisting indebtedness may not create any new or additional debt, or extinguish the original obligation, still the refunding bonds would represent a different contract evidencing the indebtedness. *Fleming v. Turner,* 122 Fla., 200, 165 So., 353; *S. v. Milam,* 113 Fla., 491, 153 So., 100. In other words, plaintiff says that while the retirement of the bonds, presently outstanding, with refunding bonds, extending the dates of payment and lowering the rate of interest, would not extinguish the original indebtedness, nevertheless the indebtedness would then be evidenced by new and different contracts or obligations, entered into after the enactment of ch. 81, Public-Local Laws 1935, as amended by ch. 338, Public-Local Laws 1937, and that the taxing power in support of such new contracts is to be determined by the laws in effect at the time of the issuing of the refunding bonds, nothing else appearing. *Nash v. Comrs. of St. Pauls,* 211 N. C., 301, 190 S. E., 475; *Hicks v. Greene County,* 200 N. C., 73, 156 S. E., 164; *Klein v. Kinkead,* 16 Nev., 194.

The case then comes to a single question: Are the refunding bonds here proposed entitled to the benefit of the same security—that is, the same taxing power, the pledge of which protected and formed a part of the obligation of the original bonds? Upon the record as presented we think the question should be answered in the affirmative.

This conclusion is induced by the following considerations: In the first place, no new debt is to be created. Secondly, the funding bonds are to be issued "in lieu of, and to be exchanged for a like amount of its said outstanding bonds." Thirdly, the funding bonds are in reality but renewals and extensions of the original bonds. Fourthly, the parties are the same; the debt is the same, and the transaction is sanctioned by legislative enactment. The conclusion is supported, either directly or in tendency, by the following authorities: *Broadfoot v. Fayetteville,* 124 N. C., 478, 32 S. E., 804; *Blanton v. Comrs., supra; Mann v. Allen,* 171 N. C., 219, 88 S. E., 235; *McCless v. Meekins,* 117 N. C., 34, 23 S. E., 99; *Edwards v. Kearzey, supra; Keeney v. Kanawha County Court,* 115 W. Va., 243, 175 S. E., 61; *Folks v. County of Marion,* 121 Fla., 17, 163 S. E., 298; *W. B. Worthen Co. v. Kavanaugh,* 295 U. S., 56; *Los Angeles County v. Rockhold,* 3 Cal. (2d), 192, 44 P. (2d), 340, 100 A. L. R., 149.

It follows, therefore, that the tax limitation prescribed in ch. 81, Public-Local Laws 1935, as amended by ch. 338, Public-Local Laws 1937, should be disregarded or considered as inoperative so far as the refunding bonds here proposed are concerned. This is the result of the judgment below, and we are disposed to think that the right conclusion has been reached.

Affirmed.

ANNIE DUNN, ADMINISTRATRIX OF THE ESTATE OF ARTHUR DUNN, DECEASED, v. H. E. BOMBERGER.

(Filed 2 March, 1938.)

1. Highways § 1: Negligence § 4b—Employee entering upon lands in performance of work on highway project is a licensee.

An employee of a contractor for the State Highway Commission who enters upon land in the performance of work upon a highway project is a licensee, since he occupies the same relation to the owner of the land as his employer, who is given the right to enter upon the land for this purpose by virtue of the State Highway statute.

2. Negligence § 4b—Duty of owner of land to licensee.

The owner of land owes the duty to a licensee to refrain from willful or wanton negligence and from doing any act which increases the hazard to the licensee while he is on the premises, but he is not required to warn the licensee of defects, obstacles or pitfalls, and is not liable for injuries resulting therefrom in the absence of active, affirmative negligence resulting in increasing the hazard therefrom while the licensee is on the premises.

3. Negligence § 4a—

The owner of land has the right to construct an underground drain-pipe thereon for the discharge of waste water, and where the saturated condition of the soil resulting therefrom is not dangerous except upon subsequent excavation, no liability attaches to the owner merely by reason of the existence of the condition.

4. Negligence § 4b—Facts alleged held insufficient to show liability on part of owner for injury to licensee.

Plaintiff's intestate was employed by a contractor for the Highway Commission in excavating to widen a highway, and was fatally injured when the sides of the excavation on defendant's land caved in. Plaintiff alleged that the land was so saturated and softened with water from an underground drain maintained by defendant on his land for the discharge of waste water, that the ground would not support itself in the event of excavation, that defendant knew of the condition, and that the excavation was being done or was to be done, and failed to warn intestate or his employer of the danger, and failed to instruct his agents not to continue to discharge water into the drain. *Held:* Defendant's demurrer to the complaint should have been sustained, since the alleged acts of defendant did not increase the hazard while intestate was upon the land as a licensee, it not being alleged that the condition of the land constituted a hidden defect or pitfall, but only that it was dangerous in the event of excavation, and it appearing that the dangerous condition was created by the excavation and not by act of defendant.

5. Negligence §§ 1, 9—

In order to establish liability on the part of the owner of land for injuries resulting from alleged defects or dangerous conditions, plaintiff must establish that the owner foresaw, or should have foreseen in the exercise of due care, that injury might result from the alleged defect.

6. Same—Held, under evidence in this case, owner could not be charged with duty of foreseeing that injury might result from condition of land.

Plaintiff's intestate was fatally injured when an excavation on a State Highway project, on which he was working, caved in. Plaintiff alleged that defendant discharged waste water into an underground drain-pipe, causing the soil to become saturated and soft so that it could not support itself in the event of excavation, and that defendant was negligent in failing to warn intestate or his employer of the condition of the soil although he knew the excavation was being done or was to be done. *Held:* Intestate and those doing the excavation were in a better position to determine the condition of the soil than defendant, and defendant can not be held to the duty of foreseeing that the agents of the State Highway Commission would excavate at a point where the soil was so saturated as to make excavation dangerous or would excavate in a manner which would result in injury.

APPEAL by defendant from *Johnston, J.*, at October Term, 1937, of BUNCOMBE. Reversed.

This is a civil action instituted in the general county court of Buncombe County to recover damages for the alleged wrongful death of plaintiff's intestate.

The plaintiff alleges in her complaint that the defendant is the owner of a tract of land near Oteen, N. C., abutting on Highway No. 10; that the said defendant, before the date of plaintiff's intestate's death, constructed and at the time aforesaid was maintaining a drain pipe from the defendant's residence under and near the top of the ground along the defendant's lot for the purpose of draining waste water discharged from a private laundry and otherwise, and that the waste water from said drain pipe was discharged upon the defendant's land under the surface of the ground, which, in the event of excavation, constituted a hidden danger and a defect to the defendant's land; that said discharge of water from the said drain saturated and softened the defendant's land, causing same to become soft and porous and not capable of self-support. She further alleges:

"4. That the State Highway Commission of North Carolina was improving State Highway No. 10 by widening said highway along the front of the defendant's land, and in the process of so doing were removing or causing to be removed a part of the lands of the defendant by excavation, and while so excavating said lands, as aforesaid, and while plaintiff's intestate was engaged in the discharge of his duty, assisting in said excavation, without warning or fault or notice on the part of the plaintiff's intestate, the bank adjoining said excavation suddenly gave way, caved in and fell upon and killed plaintiff's intestate, or caused his death in a short time after his injury, all the result of the defendant's negligence, as hereinafter and hereinbefore alleged.

"5. That the negligence of the defendant proximately resulting in the death of the plaintiff's intestate's death was:

"(a) That defendant had negligently buried under the surface of the said lot of land a drain pipe, through which he discharged waste water from his residence and laundry therein, thereby causing his said lot of land to become saturated and softened to the extent that said land would not support itself in the event of excavation by said State Highway Commission in widening Highway No. 10, which fact of widening said highway the defendant knew the said Highway Commission was engaged in doing at the time of the plaintiff's intestate's death.

"(b) That the defendant negligently failed and neglected to warn said State Highway Commission and the plaintiff's intestate of the burial and use of said hidden, secret drain pipe, when the defendant knew that said excavation was being done, or was to be done, and further negligent in that he, the defendant, negligently failed to warn said State Highway Commission and the plaintiff's intestate that the ground in proximity to the discharge and of said drain pipe was saturated and softened and in such condition as to cave in while the excavation was being made; all such facts were known to the defendant, or by the exercise of reasonable care could have been known by the defendant.

"(c) That the defendant negligently failed to instruct his agents or tenants to discontinue the use of said secret and hidden drain pipe for the discharge of waste water after the defendant knew, or by the exercise of reasonable care could have known, that the excavation of his said land was in progress, and when he knew, or should have known, that the ground in close proximity to the discharge end of said drain pipe was softened by saturation of said waste water and would cave in and injure or kill plaintiff's intestate or other laborers working on said excavation.

"6. That the negligence of the defendant, as herein alleged, was the proximate cause of the plaintiff's intestate's death and consequent injury and damage to the plaintiff.

"7. That the plaintiff's intestate was 38 years of age, was in robust and good health at the time of his death and was earning $..... per day, and was physically in condition to pursue his vocation as a laborer for many years; also, plaintiff's intestate was a constant worker, was economical and frugal in his habits and worked consistently, and the plaintiff avers that by reason of the premises and the tortious, wrongful, and negligent acts of the defendant, as here alleged, the plaintiff has been damaged in the sum of $10,000."

The defendant demurred *ore tenus* to the complaint, for that the same does not state a cause of action. The demurrer was sustained by the

judge of the county court and the plaintiff appealed. When the cause came on to be heard in the Superior Court the judgment of the county court sustaining the demurrer was held for error and the cause was remanded for a trial on the merits. To this judgment the defendant excepted and appealed.

Smathers and Meekins for plaintiff, appellee.
George W. Craig and Edward N. Wright for defendant, appellant.

BARNHILL, J. Where the State Highway Commission, its contractors or employees, enter upon the premises of an individual under and by virtue of the power vested in the State by the provisions of the State highway statute, those so entering upon the lands of another are licensees. There is no allegation in the complaint that any part of the lands of the defendant had been condemned. It is merely alleged that the State Highway Commission, in the process of widening State Highway No. 10, adjacent to the lands of the defendant, entered upon the lands of the defendant and were removing, or causing to be removed, a part of the soil thereof, and that the plaintiff's intestate was an employee of the contractor or agent of the State Highway Commission in charge of the work. Under these circumstances the plaintiff's intestate was a mere licensee, for an employee of a licensee occupies the same relationship towards the owner of the land as his employer.

As plaintiff's intestate was a licensee, defendant did not owe him the duty to keep his premises in a reasonably safe condition. The only duty resting upon the defendant was to refrain from willful or wanton negligence and from the commission of any act which would increase the hazard. The owner of land is not required to keep his premises in a suitable or safe condition for those who come there solely as licensees and who are not either expressly invited to enter or induced to come upon them for the purpose for which the premises are appropriated and occupied. In authoritative decisions of this and other jurisdictions the degree of care to be exercised by the owner of premises toward a person coming upon the premises as a bare or permissive licensee for his own convenience is to refrain from willful or wanton negligence and from doing any act which increases the hazard to the licensee while he is upon the premises. The owner is not liable for injuries resulting to a licensee from defects, obstacles or pitfalls upon the premises unless the owner is affirmatively and actively negligent in respect to such defect, obstacle or pitfall while the licensee is upon his premises, resulting in increased hazard and danger to the licensee. *Brigman v. Construction Co.*, 192 N. C., 791, and cases there cited. The *Brigman case* is reported and annotated in 49 A. L. R., 773.

Speaking to the subject in *Peterson v. R. R.*, 143 N. C., 260, it is said: "A licensee who enters upon premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes at his own risk and enjoys the license subject to its concomitant perils."

Does the complaint allege any failure on the part of the defendant to perform any legal duty which he owed the plaintiff's intestate, a licensee upon defendant's premises? Stripped of all unnecessary verbiage and boiled down to their bare essentials the allegations are that the defendant had and maintained upon his premises an underground drain pipe which had caused the soil at the outlet of the drain pipe to become saturated and softened to the extent that said land would not support itself in the event of excavation by the State Highway Commission, and that the defendant, knowing that the deceased was on his premises as a licensee, negligently failed to warn the deceased, or his employer, of the drain pipe and the saturated and softened condition of the soil when he knew that excavation was being done or was to be done; and that the defendant failed to instruct his agents or tenants to discontinue the use of said secret and hidden drain pipe for the discharge of waste water after he knew that excavation of his land was in progress, and that the saturated condition of the soil would cause it to cave in during the progress of excavation.

The defendant had a legal right to construct an underground drain pipe upon his land and use it for the discharge of waste water. In so doing he breached no duty he owed to plaintiff's intestate. This is recognized by plaintiff, for it is said in her brief filed in this case: "It has never been our understanding of the case that plaintiff seeks to condemn the defendant for installing a drain pipe in his own soil. . . . He should be answerable for his failure to give timely notice and warning to the plaintiff's intestate of the hidden peril, which the defendant knew existed and which the plaintiff's intestate did not know existed, under circumstances where the defendant knew plaintiff's intestate was in the presence of the hidden peril.

"It is not, therefore, a mere question of the defendant's failure to keep the premises safe for plaintiff's intestate, assuming he was a mere invitee, but rather the duty owed when the defendant, with knowledge of the conditions, and of the plaintiff's intestate's presence, failed to warn the plaintiff's intestate of the hidden peril about him." No liability, therefore, attaches to the defendant merely by reason of the existence of the conditions complained of. It follows that the one essential allegation of negligence contained in the complaint is that the defendant failed to warn the plaintiff's intestate and his employer of the conditions

existing upon his land, which would become dangerous in the event excavation was attempted. The failure to warn is negative rather than active in its nature. By failing to warn the defendant created no new danger, nor did he increase the hazard and danger attendant upon the condition of the land. The plaintiff having assumed the risk incident to his entry upon the premises of the defendant, no duty rested upon the defendant to warn him of the probable results of such conduct.

It is to be noted that the plaintiff does not allege that the condition created by the underground drain pipe was in itself dangerous or that such condition created a hidden defect or pitfall. She alleges only that the soil had become so saturated and softened that said land would not support itself *in the event of excavation by said State Highway Commission.* The alleged dangerous condition was created by the active conduct of the Highway Commission, or its agents, in undertaking to excavate at a point where the soil was saturated and softened by the water. This condition was created not by the defendant, but by the licensee. The defendant cannot be held liable for the resultant injury.

Furthermore, in order to establish actionable negligence the plaintiff must show that the defendant, in the exercise of ordinary care, could foresee that some injury would result from his alleged negligent act. The law does not require omniscience of the defendant. It is admitted that the conditions which existed upon the defendant's premises in themselves, unaccompanied by any acts of excavation on the part of others, created no danger to plaintiff's intestate and was not a negligent breach of duty. It could not be said that a man of ordinary prudence could foresee, or should be charged with the duty of foreseeing, that the agents of the Highway Commission would excavate lands at a point where it was so saturated as to make it dangerous to those doing the work and would continue such excavation after the condition of the land was discovered. The plaintiff's intestate and his employer were on the scene, actually engaged in the work of excavation. They were the ones who first had the opportunity of discovering the condition of the soil. They either negligently failed to discover such condition or, having discovered it, continued to work in the face of a recognized danger. The conduct of the employer of the deceased was active, that of the defendant was negative. The employer of deceased actually created the danger by excavating at a point where the banks would cave in, or by excavating in such a manner as to cause them to cave in. They were on the defendant's premises without invitation, by virtue of the terms of the law which prohibited the defendant from ejecting them from his land. We cannot conceive under these circumstances that the law would be so oppressive as to require the defendant to give the Highway Commission, or its contractor, or employee, notice of the conditions upon his land, or

require him to exercise a higher degree of omniscience in foreseeing the probable results of such conduct on the part of the Highway Commission than it and its agents and employees were required to exercise.

It is unnecessary for us to discuss whether the act of the Highway Commission, in continuing to excavate the soil at a point where the soil was in the condition described by the plaintiff, constituted an act of intervening insulating negligence, such as would in any event free the defendant of liability. Certainly it may be said that those who were actually engaged in the work had a better opportunity to discover the danger which would arise from the excavation of the soil, which was in the condition described by the plaintiff, than did the defendant.

The judgment entered by the judge of the county court was correct, and the exception of the plaintiff thereto should have been overruled. The judgment below is

Reversed.

MRS. J. S. WELLS, INDIVIDUALLY, AND MRS. J. S. WELLS, EXECUTRIX OF J. S. WELLS, v. THE GUARDIAN LIFE INSURANCE COMPANY OF NEW YORK.

(Filed 2 March, 1938.)

1. Insurance § 36c—Insurer held not liable for disability benefits upon death of insured prior to anniversary date upon which payment was due.

The policy in suit provided for disability benefits payable annually during disability on the anniversary date of the policy. Insured received several annual disability payments, and died less than two months before another disability payment was due. *Held:* Under the terms of the policy insured's death terminated the disability and matured the policy prior to the date of the next annual payment, and insured's personal representative is not entitled to recover payment on the disability clause for the proportionate part of the year prior to insured's death.

2. Same: Annuities—Under common law annuities are not apportionable except those to minor children and to wives living apart from husbands.

Where disability benefits are payable annually and insured dies less than two months before an annual payment becomes due, insured's personal representative is not entitled to recover disability benefits for the proportionate part of the year during which insured lived, since the annuity does not come within the exceptions to the common law rule that annuities are not apportionable, or within statutory modifications of the common law.

3. Common Law—

The common law which has not been provided for in whole or in part, or abrogated or repealed by statute and which is not obsolete, is in force in this State. C. S., 970.

4. Constitutional Law §§ 4, 6a—

The courts may not change or alter the common law by judicial decision, the power to make or alter the law, within constitutional limits, being the province of the Legislature alone.

5. Insurance § 36c: Annuities—

C. S., 2346, providing that annuities shall be apportionable in certain instances, has no application to disability benefits payable annually under the terms of an insurance policy, since there is no provision for successive owners, but the right to payment terminates upon the death of insured.

APPEAL by defendant from *Phillips, J.*, at September Term, 1937, of ROCKINGHAM. Modified and affirmed.

Claud S. Scurry and Glidewell & Glidewell for plaintiff, appellee.

Smith, Wharton & Hudgins and E. P. Dameron for defendant, appellant.

SCHENCK, J. This is an action to recover an alleged balance due on the face amount of a life insurance policy and an alleged balance due under the disability provisions of said policy, heard upon an agreed statement of facts.

On or about 20 August, 1918, The Germania Life Insurance Company of the City of New York issued and delivered to J. S. Wells a policy of life insurance in the sum of $2,500 which provided for the payment of an annual premium of $125.13 of which $4.62 was allocated to the disability benefit coverage and protection contained in said policy, in which policy the daughter of the insured, Mary Ann Wells, was named as beneficiary. On 2 October, 1935, the beneficiary named in said policy was changed to Myrtle Warren Wells, wife of the insured (being the identical person as Mrs. J. S. Wells, plaintiff herein). Subsequent to the issuance of said policy all liability thereunder was duly and properly assumed by the defendant, The Guardian Life Insurance Company of New York.

Among other provisions the said policy of insurance contained the following: "24. Total and Permanent Disability Benefits. Whenever the company shall receive due proof during the continuance of this policy and before default in payment of premium that the insured has become wholly and incurably disabled by bodily injury or disease, not due to any cause or condition existing at the time of delivery hereof or to military or naval service in time of war, so that he is and will be presumably thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, and that such disability has existed continuously for not less than sixty days prior to furnishing such proof—the permanent loss of the sight of both eyes, the loss of both feet above the ankles, the loss of both hands above the

wrists, or a similar loss of one hand and one foot, to be regarded as constituting total and permanent disability without prejudice to other causes of disability—then the company will grant disability benefits as follows:

"(A) If the disability occurred before the insured attained age 60: 1. Waiver of Premiums. Commencing with the policy year next following the receipt of such proof the company will at the beginning of each policy year waive payment of premium for such year during such disability, and the provisions and benefits of the policy shall be continued in force, except as hereinafter provided, as if such premiums were being paid in cash. 2. Disability Annuity. Six months after the receipt of such proof, if the disability then exists, the company will begin to pay to the insured (with the written consent of the assignee, if any) a disability annuity of one-tenth of the face amount of this policy and will make such annuity payments annually on the anniversary of the first payment during such disability prior to maturity of the policy. Premiums waived and annuity payments made hereunder will not be an indebtedness on the policy and will not be deducted from any payment or payments to be made when the policy becomes a claim by death or matures as an endowment or in any settlement under the policy. . . ."

On 1 April, 1929, the insured became totally and permanently disabled as contemplated by the policy provisions and filed with the defendant due and proper proofs of such disability, and the defendant duly acknowledged the said disability of the insured, admitted the disability claim, waived the annual premium due on 29 August, 1929, waived all subsequent premiums due between the said date and the date of the death of the insured on 30 October, 1936, and made the annual disability payments of $250.00 each provided in said policy of insurance on 1 December, 1929, and on the first day of each and every December thereafter down to and including 1 December, 1935.

The insured, Julius S. Wells, died on 30 October, 1936, and at the time of his said death there was outstanding against said policy a policy loan in the sum of $1,091.10, which was subject to an unearned loan interest credit at the rate of 5 per cent for nine months and twenty-four days, said credit amounting to $44.55 and leaving $1,453.45 as the net balance due upon the face amount of said policy at the time of the death of said insured. The said policy of insurance was in full force and effect at the date of the death of the said insured.

Subsequent to the death of the insured due demand was made upon the defendant by the beneficiary, Mrs. J. S. Wells (named as Myrtle Warren Wells in the change of beneficiary endorsement on said policy of insurance) for payment of the net death proceeds under said policy, and demand was likewise made upon the defendant by the said Mrs.

J. S. Wells, executrix of the estate of J. S. Wells, for proportionate disability payment alleged to have accrued and to have become due to the estate of the said J. S. Wells on account of the existing disability of J. S. Wells during the period from 1 December, 1935, until 30 October, 1936. The defendant insurance company admitted liability unto the said Mrs. J. S. Wells, beneficiary, for the net amount of $1,453.45 due as net death benefits under the said policy, but denied the claim for alleged proportionate disability benefits, and asserted that under the terms of said policy and by general provisions of law said alleged proportionate disability benefits were not owing, valid, payable, or collectible. The defendant insurance company offered to pay in full settlement of all liability under said policy the said net death benefits, which offer was declined by the plaintiff. Thereupon this suit was instituted for the recovery of the balance due on the face amount of the policy, less loan secured thereon, and for the proportionate part of the annuity from 1 December, 1935, to 30 October, 1936. At the time of the filing of its answer the defendant tendered into the registry of the court the amount ($1,453.45) alleged to be due by the defendant unto the plaintiff in her individual capacity under the terms of said policy.

The plaintiff contends "That plaintiff, in her capacity as executrix of the estate of J. S. Wells, is likewise entitled to recover the proportionate part of the annual disability payment alleged to be allocable to the period from 1 December, 1935, to 30 October, 1936, the amount of said payment claimed by the plaintiff in her said capacity being that fractional part of $250.00 which is equal to that fractional part of the year from 1 December, 1935, to 1 December, 1936, which is represented by the period from 1 December, 1935, to 30 October, 1936."

The defendant contends: "That the disability payments provided by said policy of insurance are not apportionable, and that since the insured, Julius S. Wells, died prior to 1 December, 1936, the next annual payment date of disability benefits, no further disability benefit payments are due or payable to any one whomsoever in connection with the said policy of insurance."

His Honor was of the opinion that the plaintiff, individually, was entitled to recover the alleged balance due on the face of the policy, and that the plaintiff, as executrix, was entitled to recover the alleged balance due under the disability provisions of the policy, and awarded judgment accordingly.

With the first provision of the judgment that the plaintiff, individually, recover the alleged balance due on the face of the policy (about which there was no controversy) we concur, but with the second provision of the judgment that the plaintiff, as executrix, recover the alleged balance due under the disability provisions of the policy we cannot concur.

The terms of the policy under the facts of this case created "a disability annuity of one-tenth of the face amount of the policy," payable to the insured by the insurer, and provided for the making of "such annuity payments annually on the anniversary of the first payment during such disability prior to the maturity of the policy." The first annuity payment was made on 1 December, 1929, and the last annuity payment was made on 1 December 1935. The next annuity payment would have been due on 1 December, 1936, had the insured lived to that date, but on 30 October, 1936, the insured died, thereby terminating his disability and maturing the policy, hence there was no "anniversary of the first payment during such disability prior to the maturity of the policy" after 1 December, 1935.

But plaintiff's contention is that she, as executrix of the estate of J. S. Wells, is entitled to the proportionate part of the annuity from 1 December, 1935, to 30 October, 1936. This contention is contrary to the rule of the common law, which rule is stated as follows: "The general rule both of law and equity is that where an annuity, whether created *inter vivos* or by will, is payable on fixed days during the life of the annuitant, who dies before the day, the personal representative is not entitled to a proportional part of the annuity. This principle of the non-apportionability of an annuity, properly and technically so called, rests upon the doctrine of the entirety of contracts, and proceeds upon the interpretation of the contract by which the grantor binds himself to pay a certain sum on fixed days during the life of the annuitant, and when the latter dies, such day not having arrived, the former is discharged from his obligation. It results in the general rule that if the annuitant dies before or even on the day of payment, his representatives can claim no portion of the annuity for the current year." 2 American Jurisprudence, Annuities, par. 27, p. 830. To the same effect is 3 C. J. S., Annuities, par. 6, p. 1383. At common law there were two, and only two, well recognized exceptions engrafted on the general rule that annuities were not apportionable, namely, where the annuity was given by a parent to an infant child and by a husband to a wife living separate and apart from him. However, the harshness of the rule has been modified in many jurisdictions by statute, and in some by judicial decisions.

The common law, "which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete," is "declared to be in full force within this State." C. S., 970. It is not for us by judicial decisions to change or alter the common law. If this is to be done it must be by legislative enactment. It is the function of the courts to interpret the law and that of the Legislature, within constitutional limits, to make or alter the law.

The plaintiff contends that the common law has been altered by the enactment of C. S., 2346, which reads: "In all cases where rents, rent charges, annuities, pensions, dividends, or any other payments of any description, are made payable at fixed periods to successive owners under any instrument, or by any will, and where the right of any owner to receive payment is terminable by a death or other uncertain event, and where such right so terminates during a period in which a payment is growing due, the payment becoming due next after such terminating event shall be apportioned among the successive owners according to the parts of such periods elapsing before and after the terminating event." This statute has no application to the facts of this case, since in the instrument creating the annuity there is no provision that the annuity shall be payable at fixed periods to successive owners. The contract is to make such annuity payments to the insured annually prior to the maturity of the policy. There is no provision for successive owners. The death of the insured matured the policy and no further annuity payments became due.

Since the common law is in force in this State, and since under the common law annuities are not apportionable, with certain exceptions not affecting this case, and since the common law has not been changed or altered by legislative enactment, we are constrained to hold that his Honor erred in awarding judgment to the effect that the plaintiff, as executrix, recover of the defendant $229.15, with interest thereon, as the proportionate part of the annuity accruing from 1 December, 1935, to 30 October, 1936.

The portion of the judgment adjudging that the plaintiff, individually, recover of the defendant $1,453.45, with interest, due on the face amount of the policy is affirmed, except that the provision for the recovery of interest is eliminated.

The case is remanded for judgment in accord with this opinion.

Modified and affirmed.

W. R. MESSER, MRS. D. C. CLARK, MRS. MARGARET ORR JARRETT, R. L. GARDEN, M. W. NOBLITT, AND H. G. CLIFF, ET AL., v. W. M. SMATHERS, W. A. GOODSON, W. RANDALL HARRISS, MRS. FRED HAMPTON, AND MRS. ROBERT RUSSELL, CONSTITUTING THE ASHEVILLE SCHOOL BOARD.

(Filed 2 March, 1938.)

Schools § 14—Courts may not control selection of school site by school board in absence of abuse of discretion by the board.

Defendant school board was vested with the power and discretion to control the school buildings in the city, and in the exercise of such power

and discretion, ordered a vacant school building to be repaired for use as a school for colored children of the city. Plaintiffs obtained a temporary restraining order, and upon the hearing the trial court found detailed facts in regard to the need for additional facilities for the colored school children of the city, and in regard to the residence of colored people around the proposed site except property immediately north, which was used mainly for business purposes, and dissolved the temporary order. *Held:* The findings support the court's order, since the courts cannot undertake to control the exercise of the discretionary powers of the school board in the selection of sites and the use of property for school purposes except in cases of manifest abuse of discretion, and in this case there was no evidence of such abuse.

APPEAL by plaintiffs from *Johnston, J.*, at September Term, 1937 of BUNCOMBE. Affirmed.

This was an action to restrain the Asheville school board from opening and establishing the Asheland Avenue school building in the city of Asheville, North Carolina, as a school for colored children.

At the hearing before the court, from the pleadings, affidavits, and record evidence, the court found the following facts:

"1. That the plaintiffs are property holders on Asheland Avenue, in the city of Asheville, all residing north of the Asheland Avenue school building herein referred to.

"2. That the defendants, W. M. Smathers, W. A. Goodson, W. Randall Harriss, Mrs. Fred Hampton, and Mrs. Robert Russell, constitute the Asheville school board, having been appointed on said board by an Act of the General Assembly of North Carolina, ch. 114 of the Private Laws, Session 1937.

"3. That on 1 July, 1937, the Asheville school board unanimously adopted the following resolution:

" 'In view of the overcrowded conditions existing in the Negro schools of the Asheville City School Administrative Unit, be it resolved by the Asheville school board, at a meeting held on 1 July, 1937, that the Buncombe County board of education is unanimously requested to take early steps to provide school facilities to relieve the overcrowded conditions now existing in the Negro schools of the Asheville city school administrative unit.'

"4. That immediately after adoption of said resolution the chairman of said school board was directed to deliver a copy thereof to the chairman of the Buncombe County board of education, which was done in the form of a letter signed by R. H. Latham, secretary of said board, to which letter was attached a statement of certain facts as a basis for the request of said board to the board of education of Buncombe County, which said letter and memorandum attached thereto and designated at the top thereof, 'Some 1936-1937 Facts and Figures—The Negro

Schools,' which letter and attached statement marked defendants' Exhibit 'A,' are hereto attached and made a part hereof.

"5. That on 28 July, 1937, the board of education of Buncombe unanimously adopted and transmitted to the Asheville school board the following resolution:

" 'Be it resolved, by the board of education of Buncombe County, that the school board of the city of Asheville administrative unit be, and it is hereby, granted by this board permission to use any and all school buildings located within the limits of the territory embraced within said administrative unit for school purposes only.'

"6. That on said 28 July, 1937, the Asheville school board, upon the receipt of said resolution from the Buncombe County school board, unanimously adopted the following resolution:

" 'Be it resolved, that in view of the resolution of the Buncombe County board of education granting permission to the city administrative unit to use any and all school buildings located within said administrative unit, that the Asheville school board accept at this meeting on 28 July, 1937, the Asheland Avenue school building on Asheland Avenue, Asheville, North Carolina, to be used exclusively for school purposes.

" 'Be it further resolved that the excess colored elementary students residing in the territory surrounding the Asheland Avenue school building be transferred from schools they are now attending to the Asheland Avenue building, and that proper school teachers be assigned to the Asheland Avenue building.'

"7. That the Asheville school board, pursuant to instructions given to its business manager on 29 July, 1937, for putting the Asheland Avenue school building in proper repair, was thus engaged, when a temporary restraining order was served upon the defendants upon application of the plaintiffs herein, and that further work on said building was discontinued.

"8. That the Asheland Avenue school building herein referred to is a 12-room, 2-story brick building, which building up to .... May, 1929, was used as an elementary school for white children, at which time the city school authorities discontinued the use of said building on account of excessive cost for operating and maintaining said school.

"9. That the city of Asheville was made a local tax district, known and designated as the 'Asheville Local Tax School District,' by virtue of ch. 149, Private Laws of North Carolina, Session 1931, which act is in words and figures as follows: 'An act providing for the appointment of a school board for the Asheville Local Tax School District, and defining its powers and duties.' . . .

" 'Section 4. That said Asheville school board shall have the control and custody of all the school buildings located in the Asheville local school district, with power and authority to repair the buildings, make additions to and alterations thereof, replace or erect new buildings if the funds are available, and otherwise care for the property and employ and fix the compensation of all the employees that are necessary for the proper maintenance, repair and care of said school buildings and school property.' . . .

"10. That said Asheland Avenue school building can be repaired and reconditioned and made suitable for operating it as a school building for colored children in the elementary grades at a cost of about one thousand ($1,000) dollars, and that practically all of the children who would attend said school can reach said building without going over that portion of Asheland Avenue above said building.

"11. That all the area in and around the Asheland Avenue school building, with the exception of that portion of said avenue just north of said building to Patton Avenue, is inhabited by Negroes, and has been for a number of years, that is to say, the lower end of said avenue from its intersection by Silver Street on the west at a point about opposite the upper end of the playground of said school to the lower end thereof, at its intersection with Phifer Street, is occupied exclusively by Negroes; that South Grove Street, running parallel to Asheland Avenue where it intersects Silver Street, is occupied exclusively by Negroes; that Blanton Street, intersecting the south side of Silver Street, near its intersection with South Grove Street, is occupied by Negroes, said street extending parallel to South French Broad Avenue to its intersection with Southside Avenue on the west or northwest; that Phifer Street, running from the northwest side of Southside Avenue to the east side of French Broad Avenue, is occupied by Negroes; that Bartlett Street, east of its intersection by South French Broad Avenue, is occupied on both sides by Negroes; that Adams Street, running south from Bartlett Street to Southside Avenue is occupied on both sides by Negroes; that the last two or three houses on the east side of French Broad Avenue, north of its intersection with Southside Avenue, are occupied by Negroes; that all of Southside Avenue, from its intersection with Biltmore Avenue on the west to the Asheville depot, is occupied on both sides by Negroes; that Short Bailey Street, intersecting on the east the lower end of Asheland Avenue, below the building, runs parallel to and back of Asheland Avenue school building to a point above said building a short distance below Hilliard Avenue, where it again intersects the east side of Asheland Avenue, and is occupied, and has been for a long number of years, on both sides, occupied exclusively by Negroes, said street running for a long distance immediately in the rear of the property of the plaintiffs herein.

"12. That Hill Street School is located about two blocks from the intersection of the south margin of Patton Avenue with Clingman Avenue, and that Clingman Avenue runs in a southwesterly direction toward the Asheland concrete bridge, and that both sides of Clingman Avenue are occupied by Negroes, as well as both sides of Rector Street, which intersects the west margin of Clingman Avenue, and runs thence to the south margin of Patton Avenue below its intersection with Clingman Avenue; that the distance from Hill Street School to the last house on Clingman Avenue is six-tenths of a mile, and the distance from the last house on the lower end of Clingman Avenue to Asheland Avenue school building is nine-tenths of a mile *via* Hilliard Avenue.

"13. That north of the said school building and between said building and Hilliard Avenue is a large business establishment known and designated as the M. & M. Body Works, which establishment is operated for the purpose of repairing automobiles, and that at the intersection of the east side of Asheland Avenue with the south margin of Hilliard Avenue is a business establishment, and that the south side of Hilliard Avenue running east to Coxe Avenue is exclusively business property; that on the northwest corner of Hilliard Avenue and Asheland Avenue is located a large new filling station which is just about to begin business, and that on the southwest corner of Asheland and Hilliard Avenue is located a small combination residence and antique shop, and that immediately west thereof is a large garage at the southeast corner of Hilliard Avenue and South Grove Street, and that a considerable portion of the east side of Asheland Avenue between Aston Street and Patton Avenue is vacant or unimproved property, and that there is a large business establishment at the intersection of the south margin of Patton Avenue with the west margin of Asheland Avenue, and that there is a large dwelling house on the east side of Asheland Avenue a short distance north of the school building, which is now and has been vacant for a long period of time, and that Short Bailey Street runs from a point several hundred feet below the school building and back thereof parallel to Asheland Avenue and up to a point a short distance south of Hilliard Avenue where it intersects the east margin of Asheland Avenue near the said M. & M. Body Works' place of business, and that said Short Bailey Street is occupied exclusively by Negroes.

"14. That the map or plat made by R. L. Maynard, city engineer, and offered in evidence by the defendants, correctly shows the streets from the intersection of Clingman Avenue with Patton Avenue; thence with Patton Avenue to College Street *via* Pack Square and with College Street to Hildebrand, Mountain and Clemmons Streets, and the other streets lying east of Biltmore Avenue and the territory between the intersection of Southside Avenue with Biltmore Avenue, and thence

with Southside Avenue to Depot Street; thence along Depot Street and Clingman Avenue to its intersection with Patton Avenue, which map or plat is hereby made a part of this findings of fact.

"15. That the distance from the Stephens-Lee School to Asheland Avenue school building is one mile *via* Southside Avenue and Asheland Avenue, and that the distance from the Mountain Street school building to the Asheland Avenue school building *via* nearest route is one and one-half miles.

"16. That the Asheland Avenue school building will accommodate about 500 or 600 children; that said building has reasonable playgrounds for such children as may attend said school, and that said building is located in an area populated entirely by colored people, except that portion of Asheland Avenue immediately north of said building, and that the portion of said avenue north of said building is not exclusively residential property.

"17. That the Stephens-Lee (elementary and high school) building has twenty-one classrooms and twenty-nine teachers, and that the children of the sixth grade and 7A grade have only half-time instruction; that the Mountain Street school building has twelve rooms and fourteen teachers, and that the pupils of the first grade have only half-time instruction.

"18. That the opening and use of said school building as a school for colored children will not depreciate the property of the plaintiffs.

"From the foregoing facts it is considered, ordered and decreed by the court that the Asheville school board has fairly and properly exercised the discretion vested in said board by law in respect to the selection of the Asheland Avenue school building for the operation of a school for the colored children of the Asheville city school administrative unit, and that the restraining order heretofore issued by this court be and the same is hereby vacated, dissolved, and set aside."

From judgment dissolving the restraining order the plaintiffs appealed.

J. Y. Jordan, Jr., for plaintiffs, appellants.
Zeb F. Curtis for defendants, appellees.

DEVIN, J. The detailed and definite findings of fact made by the judge of the Superior Court, based upon the pleadings, affidavits and record before him, fully sustain his conclusion that the temporary restraining order should be vacated and dissolved, and in this we concur. The action of the Asheville school board, in whom is vested the power and discretion to control the school buildings in Asheville and to regulate their use for public education of all the children of the city, was

not unreasonable, nor influenced by improper motive, nor in violation of law. The courts cannot undertake to control the exercise of the powers conferred upon the local school authorities who are charged with the duty of providing for the education of the children in the community, unless their action be so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion, of which there is no evidence in this case. *Moore v. Board of Education,* 212 N. C., 499; *Crabtree v. Board of Education,* 199 N. C., 645, 155 S. E., 550; *Clark v. McQueen,* 195 N. C., 714, 143 S. E., 528; *Board of Education v. Forrest,* 190 N. C., 753, 130 S. E., 621; *McInnish v. Board of Education,* 187 N. C., 494, 122 S. E., 182; *School Com. v. Board of Education,* 186 N. C., 643, 120 S. E., 202; *Davenport v. Board of Education,* 183 N. C., 570, 112 S. E., 246; *Dula v. School Trustees,* 177 N. C., 426, 99 S. E., 193; *Newton v. School Com.,* 158 N. C., 186, 73 S. E., 886; *Brodnax v. Groom,* 64 N. C., 244.

The judgment of the Superior Court is

Affirmed.

ROSS L. VAUGHAN v. MRS. ELIZABETH S. VAUGHAN.

(Filed 2 March, 1938.)

1. Contempt of Court § 5: Divorce § 14—Court should find husband's financial condition on contempt hearing for failure to comply with order for support.

Upon the hearing of an order directing respondent to show cause why he should not be held in contempt for failure to comply with a prior order of the court requiring him to pay counsel fees and a certain sum monthly for the support of his wife, respondent having paid only the sums ordered for the support of his minor child, the court should find, upon respondent's allegations that he was financially unable to comply with the order, respondent's assets and liabilities and ability to work and pay, and take an inventory of respondent's financial condition, and adjudge him in contempt only if such findings disclose that his failure to comply with the order of court was willful. N. C. Code, 978 (4).

2. Appeal and Error § 48—Cause remanded for findings necessary for determination of whether disobedience of court order was willful.

When, upon the hearing of an order directing respondent to show cause why he should not be held in contempt for failure to comply with an order of the court requiring him to pay stipulated amounts monthly for the support of his wife, the court fails to find facts sufficient to enable the Supreme Court to determine whether respondent's failure to comply with the order was willful, the cause will be remanded for additional facts.

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

VAUGHAN *v.* VAUGHAN.

APPEAL by plaintiff from *Williams, J.*, 11 October, 1937. From NASH. Error and remanded.

This is a petition in the cause made by defendant setting forth the allegations she relies on to support her contention. The prayer is as follows:

"1. That a citation issue requiring the plaintiff, Ross L. Vaughan, to show cause before your Honor, if any he has, why he has not complied with the order made by M. V. Barnhill, Judge, on 10 October, 1936; and, further, why he should not be adjudged in contempt of court for failing to comply with said order.

"2. That the plaintiff, Ross L. Vaughan, be required to forthwith pay the counsel fees heretofore allowed, and that the court order him to forthwith pay in addition thereto reasonable counsel fees for the services rendered by said attorneys in connection with this cause in the Supreme Court of North Carolina, and that he be required to forthwith make reasonable payment to the defendant's attorneys for service to be rendered by them in the Superior Court of Nash County in connection with this trial upon its merits.

MRS. ELIZABETH S. VAUGHAN,
Petitioner."

The plaintiff was cited to appear before his Honor, Williams, J., at Wilson, N. C., at 10 o'clock a. m. on "Thursday, 7 October, 1937, and show cause, if any you may have, why you have not complied with the order that was made on 10 October, 1936, by his Honor, M. V. Barnhill, Judge; and further show cause why you should not be adjudged in contempt of court for your failure to comply therewith.

"You will further show cause, if any you may have, why an order should not be made by this court requiring you to forthwith comply with the order heretofore made, and in addition thereto pay to counsel for the defendant, Elizabeth S. Vaughan, a reasonable sum for the services rendered in the Supreme Court of North Carolina in connection with your appeal from the order made by Barnhill, Judge, and a further reasonable sum for services to be rendered by said counsel upon the trial of this cause upon its merits, which is now calendared for trial on 12 October, 1937."

The plaintiff answered and denied the material allegations of the complaint, and in further answer says:

"That he is not now, nor has been at any time, in contempt of any order or direction made by the court in respect to the matters set out in the petition. That so far as he was able to do, this respondent has faithfully carried out and performed the direction contained in the order and orders made in this cause. If the respondent, as before stated,

has not complied with said orders to pay to the defendant, his child, and attorneys for the defendant the amounts directed to be paid, it is because the respondent was absolutely unable to do so, and he is advised that, having done the best he could in the circumstances in which he found himself and without any evil purpose or intent, he could not or ought not to be held in contempt, since to do so would be holding the respondent liable or responsible for something or to do something which was not in his power or by any means that he had or was able to control."

The plaintiff also sets forth in detail his "financial transactions, ability, and resources," etc., and alleges:

"That the respondent has no income from any source other than that mentioned in this answer. Necessarily he has maintained himself in as economical manner as was possible, and in a large measure he has done this on money advanced by those who had liens on his crops and personal property. He has paid for the maintenance and support of his child since the order of Judge Barnhill $220.00, or an average of $20.00 per month.

"That the amount fixed by Judge Barnhill's order, $60.00 per month, is absolutely and entirely beyond the reach or the means of this respondent to pay. That the order directing the payment of said $60.00 per month should be stricken out and some amount fixed commensurate with the ability of the respondent to pay. That the attorney's fees have not been paid for the reason that the respondent did not have the money nor has it now nor could he borrow it. If the respondent had possessed the means to do so he would have paid the amount of said fees as well as that ordered to be paid to the defendant and child.

"That respondent says that in addition to furnishing the statements hereinbefore made concerning his financial transactions, ability, and resources, he stands ready to furnish any further details concerning the same that may be desired by the court.

"This respondent, as first above stated, has not purposed or intended at any time to violate willfully or to disobey any term or direction contained in the order of Judge Barnhill, as is set out in the petition. He has not complied with the direction of said order because he has been and is now financially unable to do so. He has not at any time intended to be disrespectful to the court, and he has not been guilty of any willful disregard of the order of the court, and he has had no intent to disregard said order nor to do anything not respectful to the court.

"Wherefore, this respondent, having fairly, fully, and honestly answered the allegations of the petition, respectfully prays your Honor that the rule requiring him to show cause be discharged, and that the allowance of alimony and attorney's fees in the order of Judge Barnhill

be stricken out, or that it be reduced to an amount commensurate with respondent's financial condition and ability to pay.

ROSS L. VAUGHAN,
Plaintiff."

The plaintiff testified in detail as to his financial condition and also filed affidavits of many corroborating him. The following judgment was rendered by the court below:

"This cause duly came on to be heard and was heard before his Honor, Clawson L. Williams, Judge, at Nashville, N. C., on 11 October, 1937, upon a citation heretofore issued in this cause requiring the plaintiff, Ross L. Vaughan, to show cause why he should not be adjudged in contempt of court for his failure to comply with the order entered in this cause on 10 October, 1936, by his Honor, M. V. Barnhill, Judge. The plaintiff and the defendant were present in court and were represented by counsel; and after hearing the affidavits and other evidence offered by the parties, the court finds the facts to be as set forth in the affidavit and petition made by the defendant, Elizabeth S. Vaughan, on .... October, 1937, and on which said citation was based; and the court further finds as a fact that the plaintiff, Ross L. Vaughan, has been, and is now, financially able to comply with the order made by his Honor, Judge Barnhill; and the court further finds as a fact that the plaintiff, Ross L. Vaughan, has willfully and contemptuously neglected and failed to comply with the said order of the court, and that he is now indebted to the defendant, Elizabeth S. Vaughan, in the sum of $710.00 for alimony and counsel fees which have accrued under said order to this date; and the court further finds as a fact that the said Ross L. Vaughan is in contempt of court.

"It is hereupon ordered and adjudged:

"1. That the defendant, Mrs. Elizabeth S. Vaughan, have and recover of the plaintiff, Ross L. Vaughan, the sum of $710.00, which is now due and payable under the order entered herein on 10 October, 1936. It is further ordered and adjudged that the plaintiff, Ross L. Vaughan, pay said amount into the office of the clerk of the Superior Court of Nash County for the use and benefit of the defendant. It is further ordered and adjudged that this judgment shall constitute, and it is hereby declared to be, a lien on all of the real and personal property of the plaintiff, Ross L. Vaughan." The judgment further was left in contempt and sentence pronounced.

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

Simms & Simms and T. T. Thorne for plaintiff.
Douglass & Douglass and O. B. Moss for defendant.

CLARKSON, J. This action has heretofore been before this Court. *Vaughan v. Vaughan,* 211 N. C., 354.

The judgment of Barnhill, J., as to the payment by plaintiff to defendant of $60.00 per month alimony *pendente lite* for the support of herself and infant child and reasonable attorney's fees was sustained. The plaintiff did not comply with the order of the court and the petition now considered is to compel plaintiff to pay the judgment and attorney's fees or be punished for contempt. In the judgment is the following:

"That the plaintiff, Ross L. Vaughan, is in contempt of court because of his willful failure and neglect to comply with the said order of Judge Barnhill. It is, therefore, considered, ordered, and adjudged by the court that the respondent, Ross L. Vaughan, is sentenced to be committed to and confined in the common jail of Nash County, N. C., until he complies with said order of Barnhill, Judge, of 10 October, 1936."

N. C. Code, 1935 (Michie), sec. 978: "Any person guilty of any of the following acts may be punished for contempt: . . . Sec. 4. Willful disobedience of any process or order lawfully issued by any court." *In re Odum,* 133 N. C., 250 (251-2); *West v. West,* 199 N. C., 12; *Nobles v. Roberson,* 212 N. C., 334 (337). In *In re Hege,* 205 N. C., 625 (630), we find:

"We think that evidence should be taken by the clerk on all the disputed matters and a complete statement of the account made up by him and his conclusion of law found thereon. From the present state of the record we cannot hold that there was a willful disobedience of any process or order lawfully issued by the clerk."

We think the court below should take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work—an inventory of his financial condition. From the facts found, determine if plaintiff is financially able to pay the $60.00 per month for his wife and child and attorney's fees according to the judgment of Judge Barnhill. If his failure to do so was a willful disobedience to the order of Judge Barnhill, then punish him for contempt.

From the record it seems that plaintiff has paid $20.00 each month for the support of his child, but has refused to pay anything for the support of his wife. If he can, and did not, this is evidence of his willful disobedience to the order of Judge Barnhill. From the present state of the record we cannot hold that there was a "willful disobedience of any process or order lawfully issued by any court."

For the reasons given, the cause is

Error and remanded.

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

MINNIE L. FELTON, MATTIE E. DANIELS, NELLIE B. FELTON, AND PATTIE W. NORFLEET v. EALEY A. FELTON, ADMINISTRATOR OF W. J. FELTON, DECEASED, U. S. FIDELITY & GUARANTY COMPANY, J. R. STOKES, AND ALPHONSO REED.

(Filed 2 March, 1938.)

1. Executors and Administrators § 32—

While the executrix is alive and the administration is not completed by payment of all debts or the exhaustion of all assets, and the distribution of the estate, the distributees may maintain an action for alleged waste or *devastavit* committed by the administratrix.

2. Executors and Administrators §§ 9, 30d—Personal representative may sell choses in action at private sale in good faith.

An administratrix may sell notes and choses in action of the estate at private sale without authorization from the court, and the purchaser obtains good title if the sale is made in good faith and for value, and C. S., 69, does not abrogate this common law rule, since the statute merely makes the obtaining of a court order permissive but not mandatory.

3. Statutes § 5a—

Ordinarily, when a statute employs the word "may" its provisions will be construed as permissive and not mandatory.

4. Executors and Administrators §§ 9, 30d: Pleadings § 28—Pleadings held to raise issue of fact for jury and granting of judgment on the pleadings was error.

When the purchasers of choses in action at private sale from an administratrix allege that the sale was made in good faith for value, the pleadings raise an issue of fact for the jury, and the granting of plaintiff distributees' motion for judgment on the pleadings in their action against the administratrix for *devastavit* and to set aside the sale, is error.

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

APPEAL by defendants from *Frizzelle, J.*, at November Term, 1937, of PERQUIMANS.

Action to recover value of note for *devastavit*.

The uncontroverted facts are: The plaintiffs are the children, and the defendant, Ealey A. Felton, is the widow of W. J. Felton, who died in October, 1931. The widow qualified as administratrix of the estate of the decedent on 10 November, 1931, and executed bond with the U. S. Fidelity & Guaranty Company as surety. In the course of the administration a promissory note in the sum of $2,500, executed by Henry B. Williams, payable to W. J. Felton or order, secured by a mortgage deed on a lot of land in the town of Hertford, North Carolina, and on which there was due a balance of $1,500, came into the possession of the administratrix who sold at private sale and assigned and delivered the note

and mortgage to defendant J. R. Stokes. On petition of J. R. Stokes the clerk of the Superior Court appointed H. Clay Stokes, son of J. R. Stokes, as "trustee in the mortgage" in lieu of the original mortgagee. At foreclosure sale by H. Clay Stokes, trustee, J. R. Stokes bid in the property described in the mortgage for the price of $500.00, and pursuant thereto deed was made to him. He in turn sold and conveyed the lot to defendant, Alphonso Reed, who entered into possession, but has not paid the purchase price.

Plaintiff alleges in substance: That the administratrix sold the note to J. R. Stokes for the sum of $155, of which $85 represented her personal indebtedness to Stokes; that at that time the value of the lot which secured the note was not less than the total principal and interest due thereon; that the condition of the estate did not justify a sale of the note; that the sale constituted a waste or *devastavit;* that the administratrix has filed a final account and there are no debts against the estate, and therefore the distributees are the real parties in interest; that the administratrix is insolvent; that the appointment of H. Clay Stokes as substitute trustee, the sale and deed by him to J. R. Stokes, and the deed from J. R. Stokes to Alphonso Reed are void.

The defendants J. R. Stokes and Alphonso Reed filed answer in which they deny material allegations of the complaint and assert in substance: That the administratrix "in the course of her administration of said estate found it necessary to convert said note into cash, in her opinion"; that at that time the maker of the note was insolvent, the property securing the note was in a bad state of repair, and taxes aggregating $600.00 to $700.00 due to the town of Hertford and the county of Perquimans were a first lien thereon; that she offered the note for sale to a number of people in the vicinity who were able to buy it; that the offer of J. R. Stokes to pay $155 was the best she was able to obtain; that that offer was reasonable and was the full and fair value of the note under the existing circumstances; that the administratrix represented to Stokes that she had the right to sell the note and that "she had consulted the other interested parties and that they all told her to go ahead and sell the note"; and that in buying, Stokes acted in good faith.

At the trial below, after the pleadings had been read, and after introducing in evidence the admission in the pleadings and records referred to in such admissions, plaintiffs moved for judgment thereon. The court allowed the motion and, among other things not here necessary to enumerate, adjudged that the assignment of the note by the administratrix to J. R. Stokes was void and passed no title; that the appointment of the substitute trustee and his sale were void and passed no title, and that the action be dismissed as to U. S. Fidelity & Guaranty Company.

Defendants J. R. Stokes and Alphonso Reed appealed therefrom to the Supreme Court and assigned error.

P. H. Bell and H. S. Ward for plaintiffs, appellees.
C. R. Holmes for defendants, appellants.

WINBORNE, J. Four questions are presented on this appeal:

1. Can distributees of the estate of the intestate, whose debts are paid, maintain action for waste or *devastavit?*

2. Has an administratrix the right and authority to sell a note, an asset of the estate, at private sale made in good faith and for fair value?

3. Does purchaser of a note, an asset of the estate, at private sale from the administratrix, for fair value and without notice of bad faith, if any, of the administratrix in making sale, obtain a good title?

4. Did the court below err in rendering judgment on the pleadings?

Careful consideration of the record leads to the conclusion that each question must be answered in the affirmative.

1. Until the debts have been paid or the assets of the estate exhausted the estate is not settled, and the duties and obligations of the administratrix continue. C. S., 105. *Creech v. Wilder,* 212 N. C., 162, 193 S. E., 281; *Trust Co. v. McDearman, ante,* 141. Until the settlement and distribution of an estate, the administration is incomplete. *Taylor v. Brooks,* 20 N. C., 273. The appointment of an administrator *de bonis non* is proper only where a vacancy occurs before full administration and distribution of the estate. 24 C. J., 1143. While the administratrix lives and the administration is incomplete, the distributees can maintain an action for alleged waste or *devastarit* committed by her. *University v. Hughes,* 90 N. C., 537, at 541; *Merrill v. Merrill,* 92 N. C., 657, at 662.

2-3. In accordance with a long line of decisions of the Court, administrators, having the legal title to the personal assets of their intestate's estate, may sell or pledge them, or may discount notes of the estate, if the exigencies of the estate make it advisable for them to do so. The parties dealing with them will get a good title and will be protected, provided the transaction be fair and honest. *Tyrrell v. Morris,* 21 N. C., 559; *Gray v. Armistead,* 41 N. C., 74; *Bradshaw v. Simpson,* 41 N. C., 243; *Wilson v. Doster,* 42 N. C., 231; *Polk v. Robinson,* 42 N. C., 235; *Latham v. Moore,* 59 N. C., 167; *Hendrick v. Gidney,* 114 N. C., 543, 19 S. E., 598; *Cox v. Bank,* 119 N. C., 302, 26 S. E., 22.

In *Cox v. Bank,* 119 N. C., 302, the Court said: "Executors have the right to sell or pledge notes of hand as well as chattels, and the sale is no breach of duty, for the purposes of the estate may require such sales, and the purchaser is not held liable for any misapplication of the pro-

ceeds unless collusion between the two appears, as if the sale was to pay an individual debt of the purchaser."

Private sale of choses in action by executor or administrator, if made in good faith, is valid. *Wynns v. Alexander,* 22 N. C., 58; *Cannon v. Jenkins,* 16 N. C., 427; *Gray v. Armistead, supra; Dixon v. Crawley,* 112 N. C., 629, 17 S. E., 158; *Odell v. House,* 144 N. C., 647, 57 S. E., 395.

This Court has spoken in several cases to the question of authority of an administrator to sell property at private sale when there is legislative authority to sell upon order of the court.

In *Tyrrell v. Morris, supra,* it is said: "It cannot be pretended that a sale by an executor is invalid, either in law or equity, because not made at public auction nor under an order of the court specially granted for that purpose. The most that can be required from the purchaser under such circumstances is to repel the presumption that he may have bought at an undervalue."

In *Wynns v. Alexander, supra, Daniel, J.,* stated: "The executor might, before the passage of the act, have sold *bona fide* the goods and chattels of the testator or intestate. The legal title was in him, and an honest purchaser from him would always have acquired a good title. The common law on this subject is not repealed by this act. The statute is only directory, which, however, it would always be well to follow, for, if the executor or administrator fails to obtain as much at private sale as would have been got at public vendue, he or they would have been bound to make good the deficiency out of their own pockets."

In *Odell v. House, supra, Connor, J.,* said: "We assume that his Honor based his opinion upon the provisions of section 67 of The Code (now C. S., 73), permitting executors and administrators to apply to the clerk for an order to sell insolvent evidences of debt and prescribing the manner of making the sale. This provision is first found in our statutes in Laws 1868-69. Prior thereto there was no statute empowering a personal representative to dispose of insolvent choses in action; he was compelled, upon his final account, to return them into court. This statute was enacted to provide a way for the administrator to relieve himself of liability and at the same time realize something from choses in action which, by reason of homestead and exemption laws, were not collectible, but which might have some prospective value. For many years the statute made it the duty of the administrator to sell all personal property at public sale, after advertisement, but the courts always held that the administrator could sell and pass the title to the personal property of his intestate." Then *Connor, J.,* continues with the above quotation from opinion of *Daniel, J.,* in *Wynns v. Alexander, supra.*

Plaintiffs rely upon C. S., 69, and contend that an administrator is without power to make private sale of any personal property, of whatever character, unless an order of the court be obtained as therein provided. Reference to that statute reveals the expression ". . . may . . . obtain an order to sell . . ." The word "may" as used in statutes in its ordinary sense is permissive and not mandatory. *Rector v. Rector,* 186 N. C., 618, 120 S. E., 195. Therefore, the statute is permissive, and not mandatory. It is manifest that it was enacted for the protection of administrators in making private sales, a course which an administrator may, but is not required to pursue.

4. In the light of what has been said hereinabove, the answer of the defendants J. R. Stokes and Alphonso Reed raises issues of fact which must be submitted to the jury.

The judgment below is reversed and the cause is remanded for further proceedings in accordance with this opinion.

Reversed.

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

ERVIN WALDROUP v. HARDY FERGUSON.

(Filed 2 March, 1938.)

1. Highways § 13—

Cartways are *quasi*-public roads, laid out and designed principally for the benefit of individuals, and paid for by them, although also intended to some extent for public use, and cartways may be established solely to give petitioning individuals access to a public highway.

2. Highway § 14: Constitutional Law § 16—

The establishment of a cartway involves the taking of private property by eminent domain, and land therefor may not be taken without giving the owner notice and an opportunity to be heard, with right of appeal according to the due course of law. N. C. Constitution, Art. I, sec. 35.

3. Highways § 14: Statutes § 10—Where private act does not provide constitutional procedure for certain remedy, later general statute providing such remedy is in force in the locality.

Ch. 40, Public-Local Laws of 1913, relating to highways in Madison County, does not provide a constitutional method for the establishment of cartways in the county in that it fails to give the owner of land sought to be taken for this purpose notice and an opportunity to be heard, and therefore ch. 448, Public Laws of 1931 (C. S., 3835-3838), prescribing general laws and constitutional procedure for the establishment of cartways, is in force and effect in Madison County, and the rights of litigants in the establishment of cartways in the county should be controlled and

determined by the later general act. *Rogers v. Davis*, 212 N. C., 35, cited and distinguished in that the private act applicable to Haywood County provided a constitutional method for the establishment of cartways in that county.

APPEAL by petitioner from *Johnston, J.*, at November Term, 1937, of MADISON. Reversed.

This was a proceeding for the establishment of a cartway over land of the respondent.

The petitioner, in accordance with chapter 448, Public Laws 1931 (C. S., 3835-3838), filed petition before the clerk of the Superior Court asking that a cartway be laid out over the land of the respondent. Respondent filed answer in effect admitting the material facts upon which the petition was based, and asking that the jury of view lay out only sufficient land for the petitioner's purpose and assess adequate damages. The clerk, from the pleadings, held that a cartway for petitioner over respondent's land was necessary, reasonable and just, and appointed jury of view to go upon the land, lay off the cartway and assess damages. Upon the coming in of the report of the jury, the respondent filed exceptions, on the ground of inadequacy of damages and improper method of laying out the cartway. The clerk confirmed the report of the jury and respondent excepted and appealed to the Superior Court, contending that chapter 40, Public-Local Laws 1913, applied, and that the clerk was without jurisdiction and the proceeding void.

Upon the hearing in the Superior Court, it was held by the judge presiding that chapter 40, Public-Local Laws 1913, and laws amendatory thereof were not repealed by chapter 448, Public Laws 1931 (C. S., 3835), and that the clerk was without jurisdiction, and dismissed the proceeding. The petitioner appealed to this Court.

Calvin R. Edney for petitioner, appellant.
John H. McElroy for respondent, appellee.

DEVIN, J. The only question presented by this appeal is whether the pertinent provisions of chapter 40, Public-Local Laws 1913, with reference to cartways, are still in force and constitute the sole method for laying out and establishing cartways in Madison County.

It was held by this Court in *Rogers v. Davis*, 212 N. C., 35, that chapter 448, Public Laws 1931, the general statute, did not have the effect of repealing chapter 119, Public-Local Laws 1923, with reference to cartways in Haywood County, since the general statute contained no repealing clause, and the local statute was regarded as an exception to the public law. *Schenck, J.*, speaking for the Court in that case, said: "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."

The conclusion reached in that well considered case was based upon sound reason and is supported by abundant authority. But the decision in that case was predicated upon the finding that the local statute applicable to Haywood County contained ample and properly enforceable machinery and methods for establishing cartways in that county. An examination of chapter 119, Public-Local Laws 1923, applicable to Haywood County, shows that this local act required that the proceeding be commenced by filing petition in writing with the board of county commissioners, that due notice be given those over whose lands the cartway is sought to be established, that timely hearing be had before the board, with provision in the statute for appeal to the Superior Court where the matter may be heard by the court and jury *de novo*.

An examination of chapter 40, Public-Local Laws 1913, however, reveals that the Madison County act contains none of these safeguards to the rights of the parties and does not provide for the landowner a "remedy by due course of law," as required by Art. I, sec. 35, of the Constitution of North Carolina.

The local statute applicable to Madison County enacted a general road law for the county, created a board of road commissioners to administer it, and designated in detail their duties and powers. In section 18 of chapter 40 the board of road commissioners were directed to classify the roads of the county into four classes or divisions, the first three to be designated according to width and grade, and the fourth class to constitute and embrace "cartways or roads not maintained by the public." Section 22 contains the machinery for establishing new roads by the board of road commissioners, "when it shall appear to them by petition or otherwise that it is to the best interest of the traveling public to lay out and establish a new road," with provision for appointment of jury of view to assess benefits and damages, and for "appeal from the finding of the jury to the Superior Court." These portions of the section manifestly apply only to public roads and not to cartways. The only provision as to method of laying out cartways is set forth in the following portion of section 22: "But when the road to be laid out, or amended and relocated, is of third or fourth class, the board may in its discretion order a jury of three freeholders," who, after being notified of their appointment, "shall meet at the time and place named in the notice, and after being duly sworn, proceed to lay out and locate said road, or amend and relocate, as the case may be, and report in writing to the

board issuing the order, and shall at the same time assess any and all damages accruing to any person over whose land the said road passes, taking into consideration any special benefits to the owner. Either party may appeal to the Superior Court, as in this section provided, on the question of damages."

By an amendatory act the name of the road board was changed to Madison County Highway Commission, and by chapter 529, Public-Local Laws 1921, this Commission was abolished and their duties and powers vested in the board of county commissioners. By chapter 343, Public-Local Laws 1931, the Highway Commission for Madison County was created and directed to act in place of the board of county commissions in relation to the highways of the county. By chapter 145, Public Laws 1931, exclusive control of all public roads in the State was vested in the State Highway Commission, and all local road commissions by whatever name called or however created were abolished. But none of these local or general statutes relate to cartways in Madison County.

In *Cook v. Vickers*, 141 N. C., 101, 53 S. E., 740, it was said that cartways were regarded as *quasi*-public roads, and that condemnation of private property for such use had been sustained only upon that ground as a valid exercise of the power of eminent domain. They are laid out on the application of particular individuals and paid for by them, and are designed primarily and principally for their special accommodation, but are intended also to some extent for the use of the public. As distinguished from a public highway—that is, one established and maintained by public authority for the traveling public—a cartway is a way established "for a person who has not the benefit of a public highway, and for that reason alone." *S. v. Purify*, 86 N. C., 681; *Warlick v. Lowman*, 103 N. C., 122, 9 S. E., 458; *Barber v. Griffin*, 158 N. C., 348, 74 S. E., 110; *S. v. Haynie*, 169 N. C., 277, 84 S. E., 385.

The contest for a cartway is between individuals and is conducted with a view of primarily benefiting one to the detriment of the other, and the landowner whose land is being taken is entitled to notice, opportunity to be heard, and ordinarily to an appeal according to the due course of law.

An act which permits a person to be summarily deprived of his rights other than by the ordinary course of judicial procedure, cannot be upheld. The property of a person may not be taken against his will for the benefit of another without giving him a day in court. Notice and opportunity to be heard are fundamental. *Lumber Co. v. Smith*, 146 N. C., 199, 59 S. E., 653; *Markham v. Carver*, 188 N. C., 615, 125 S. E., 409; *Brewer v. Valk*, 204 N. C., 186, 167 S. E., 638; *Beaufort County v. Mayo*, 207 N. C., 211, 176 S. E., 753; *Lexington v. Lopp*, 210 N. C., 196, 185 S. E., 766; *Simon v. Craft*, 182 U. S., 427; *Truax v. Corrigan*, 257 U. S., 312.

In *Cook v. Vickers*, 144 N. C., 312, 57 S. E., 1, cited with approval in *Brown v. Mobley*, 192 N. C., 470, 135 S. E., 304, *Walker, J.*, said: "Whether there is sufficient reason, under all the facts and circumstances of the case, for establishing the cartway is clearly a question for the jury to determine, under proper instructions from the court."

It is apparent that rights regarded as fundamental are not accorded in the procedure for laying out and establishing cartways prescribed by chapter 40, Public-Local Laws 1913, even if the meager provisions as to "third and fourth class roads" refer to cartways at all, and hence the learned judge was in error in ruling that petitioner was relegated to that act as providing the sole method of procedure. It follows that chapter 448, Public Laws 1931, prescribing general laws and procedure for the establishment of cartways, was and is in force and effect in Madison County and should control the determination of the rights of the litigants in the instant case.

The judgment of the Superior Court is reversed and the cause remanded for further proceedings under the statutes herein held to be applicable to this case.

Reversed.

NATHAN OWENS v. G. B. HILL AND W. M. SMATHERS.

(Filed 2 March, 1938.)

1. Automobiles § 18a—Evidence held not to show that condition of truck or fact that it was overloaded proximately caused injury.

Plaintiff employee's allegation and evidence tended to show that he was injured when he fell from a stationary truck as he was attempting to replace a sack of corn which had fallen off. There was no evidence that the condition of the truck or the fact that it was overloaded contributed to or proximately caused him to fall. *Held:* Plaintiff's allegation and evidence that the truck was overloaded and in disrepair are immaterial.

2. Appeal and Error § 37d—

The verdict of the jury on conflicting evidence is conclusive in the absence of error of law in the trial.

3. Appeal and Error § 47a—

A new trial for newly discovered evidence will not be allowed in the Supreme Court when the evidence relied on is immaterial in determining the ultimate rights of the parties.

APPEAL by plaintiff from *Johnston, J.*, at November Civil Term, 1937, of BUNCOMBE. No error.

This is a civil action instituted by the plaintiff, an employee of the defendant G. B. Hill, to recover for personal injuries sustained on 25 May, 1936. The plaintiff, accompanied by his employer, was driving a truck loaded with corn from the farm of the defendant Hill in Henderson County to Asheville, N. C. One of the sacks of corn fell off the truck. The plaintiff stopped and the defendant Hill directed him to go back and get the sack of corn and replace it on the truck. After putting the sack of corn on the truck the plaintiff climbed up on the left running board and fender of the truck for the purpose of so adjusting the sack of corn that it would not again fall off. He slipped and fell just as the defendant W. M. Smathers was driving his car by the truck. He was hit and injured by the car of the defendant Smathers. From the fall and his contact with the car of the defendant Smathers he suffered serious injury.

Plaintiff alleges that the defendant Hill was negligent in that he had said truck overloaded; that he had the sacks of corn piled on the truck higher than the side boards of the same and refused to permit the plaintiff to tie said sacks down so that they would not fall off, although the plaintiff requested to be permitted to do so; that said defendant failed to furnish the plaintiff with sufficient help to handle said sack of corn, which was too heavy for one man; that the said truck was not properly equipped and was not in proper condition to haul heavy loads; and that the defendant Hill ordered him to climb up on the running board and fender of the car to adjust the sack of corn which had fallen off.

He alleges that after he had fallen and was lying in the middle of the road the defendant Smathers carelessly and negligently failed to properly observe and see the plaintiff in his place of danger and peril, failed to keep his automobile under proper control, failed to give proper warning, and failed to stop his car before it struck the plaintiff.

The plaintiff alleges that the negligent acts of the two defendants were concurrent and proximately caused plaintiff's injuries.

The defendant Hill alleged and offered evidence tending to show that he did not order the plaintiff to climb up on the fender of the automobile, and the plaintiff did so without his knowledge or direction, and that act of the plaintiff was voluntary and unnecessary, as the sack of corn had already been replaced on the truck. The defendant Smathers alleged and offered evidence tending to show that the plaintiff fell off the truck just as he, Smathers, was driving by, and that the plaintiff fell against the Smathers car at a time and under circumstances which made it impossible for the defendant Smathers to avoid the collision.

The issues of negligence as to each of the defendants submitted to the jury were answered in the negative. From judgment thereon in favor of the defendants the plaintiff appealed.

Cecil C. Jackson for plaintiff, appellant.

J. E. Shipman for defendant G. B. Hill, appellee.

Harkins, Van Winkle & Walton for defendant W. M. Smathers, appellee.

PER CURIAM. This cause is one essentially of fact, and the facts have been found by the jury adverse to the plaintiff, under a charge which fully presented the evidence and the law arising thereon to the jury.

The negligence, if any, of the defendant Hill prior to the time the truck stopped on the highway is immaterial. The evidence fails to disclose that either the condition of the truck, or the fact that it was overloaded, in any manner contributed to or proximately caused the fall of the plaintiff. The only material allegation of negligence on the evidence in this case against the defendant Hill is the allegation that said defendant directed the plaintiff to climb up on the fender to adjust the corn. The jury has found the facts on this allegation adversely to the plaintiff. The jury has likewise found that the plaintiff failed to sustain his allegations of negligence as to the defendant Smathers.

We have examined all of the assignments of error of the plaintiff and find in none of them sufficient cause for disturbing the verdict and judgment.

Motion for new trial for newly discovered evidence has been filed. The newly discovered evidence relied upon by the plaintiff would tend to impeach and falsify the testimony of witnesses as to circumstances under which the truck was loaded, and to show that the defendant Hill was in fact present at the time the truck was loaded. This evidence, under the facts in this case, would in any event be immaterial. In the judgment below there is

No error.

THE COUNTY OF MADISON AND THE TOWN OF HOT SPRINGS *v.* CATHOLIC SOCIETY OF RELIGIOUS AND LITERARY EDUCATION,

and

JAMES E. RECTOR, INTERVENER, *v.* THE TOWN OF HOT SPRINGS, RESPONDENT.

(Filed 2 March, 1938.)

1. Trial § 32—

A party desiring more specific instructions on subordinate features of the charge must aptly tender request therefor.

2. Attorney and Client § 9: Appeal and Error § 37d—

The amount allowed by the jury's verdict in an action by an attorney to recover upon *quantum meruit* for services rendered is conclusive in the absence of a showing of prejudicial error on the trial.

3. Appeal and Error § 38—

The burden is on appellant to show prejudicial error, as the presumption is against him.

APPEAL by intervener James E. Rector from *Johnston, J.*, and a jury, at September Civil Term, 1937, of MADISON. No error.

In an order and decree at February Term, 1937, by *Sink, J.*, in the above entitled cause is the following: "The petitioner James E. Rector is ordered and directed to file with the town of Hot Springs, or their attorney, within ten days, a complaint setting forth his account, and the town of Hot Springs shall file with the said James E. Rector, or his attorney, within ten days thereafter, an answer setting forth any alleged defenses that it may have to the same. This order and decree is concurred in, approved, and consented to by each and every party to said litigation."

James E. Rector, the intervener, in accordance with the order and decree, filed a complaint against the town of Hot Springs alleging it was indebted to him for services performed as an attorney in certain tax suits involving the taxing of the Catholic Society of Religious and Literary Education, owning some 165 acres of land and more than 22 per cent in value of all taxable real estate in Hot Springs. The said Rector alleges in part that he "is justly entitled to be compensated for his services on the basis of customary charges for similar services, and by virtue of his contract for a contingent fee and by operation of law, he is the equitable owner of an undivided one-fourth interest in said recovery of $4,295.66, or of the sum of $1,073.91, out of the funds paid into this court by the defendant Catholic Society of Religious and Literary Education, pursuant to the judgment herein rendered.

"Wherefore, petitioner humbly prays that by an appropriate order, judgment and decree of the court, he be adjudged to be the owner of one-fourth interest in said judgment of the funds paid into court by the judgment debtor, and that he have and recover of the plaintiff town of Hot Springs all such other, further and different relief as to the court may seem just and equitable."

The defendant town of Hot Springs answers in part: "That since the filing of the complaint in this action respondent the town of Hot Springs has paid the said James E. Rector considerably more than his services actually amounted to. That since the intervening of the said James E. Rector in this action a voucher was issued to him for the balance claimed by him for his services, in the sum of $95.82, marked 'Payment in full for services in connection with Catholic Tax Suit.' That the said James E. Rector endorsed said voucher and obtained cash for same; that as hereinbefore alleged the respondent the town of Hot Springs has

paid the said James E. Rector $1,600 for his services in connection with the collection of taxes from the Catholic Society. That this respondent is not indebted to said James E. Rector in any amount whatsoever."

The intervener Rector made motions in apt time to strike out certain parts of the answer as impinging Consolidated Statutes, 519 and 537. Part was stricken out. Those left we do not think prejudicial.

The following issue was submitted to the jury and the answer thereto:

"1. Is the defendant the town of Hot Springs indebted to the plaintiff James E. Rector, and if so, in what amount? A. '$50.00.'"

Judgment was rendered on the verdict. The intervener Rector made numerous exceptions and assignments of error and appealed to the Supreme Court.

J. Scroop Styles and James E. Rector, in propria persona, for intervener Rector.

Roberts & Baley and John H. McElroy for town of Hot Springs.

PER CURIAM. In the case of *Catholic Society v. Gentry*, 210 N. C., 579 (580), this Court held: "It is alleged in the complaint that the plaintiff is a corporation organized under the laws of the State of Louisiana. It is therefore a foreign corporation, and for that reason its property, real and personal, situate in this State, although held and used exclusively for religious, educational, or charitable purposes, is not exempt from taxation under the provisions of C. S., 7971 (17), and C. S., 7971 (19). See C. S., 7971 (87). Each of these statutory provisions was in force and effect during the years 1928, 1929, 1930, and 1931."

The intervener Rector in the above case appeared for the defendant and sustained the town's right to tax the Society. In the present action Rector claims the town owes him the sum of $1,073.91 for services rendered in tax suits. This the town denied, and answered that it "is not indebted to said James E. Rector in any amount whatsoever." We do not think any of the exceptions and assignments of error made by Rector can be sustained. The theory of the trial in the court below was on *quantum meruit*. The defendant town of Hot Springs contended that the former case on appeal in this Court settled the issue that the Catholic Society was liable for the town tax and there could be no controversy about the tax thereafter. The court below, we think, fairly charged the law applicable to the facts and on the whole record can see no prejudicial error in the charge or on the trial. The court below told the jury: "The plaintiff contends that he had no contract whatever with the town of Hot Springs about the handling of this case in which he is suing. That being so, the court charges you that he is

entitled to recover, if entitled to recover at all, upon the theory of what is known in law as *quantum meruit*. That is asserted in the Old Bible that: 'the laborer is entitled to his hire.' It means as much as he has earned, that is the thought of the law. And the court charges you that where a party is to work, if an individual or a corporation approaches an attorney and asks him to handle certain business matters for him or it and nothing is said about the amount or the method of his payment, then the law raises the presumption that there is a contract between them and that the person or the corporation employing the attorney will pay him a reasonable amount for the services which are accepted and rendered. And that is not only the law in the case of an attorney, but it is the law in all matters of contractual relations. If you employ a doctor, and there is no agreement as to compensation, the law implies that you are going to pay him a reasonable amount for his services rendered during your required employment of him to do your work; the law steps in and says it is implied, it is understood you are going to pay a reasonable amount for his services."

The intervener made no objection or exception to the above contention or charge of the court below. If the intervener wanted more specific instructions on subordinate features he should in apt time have tendered a request for same. The town of Hot Springs in its brief says: "It is true that these checks referred to by the appellant (Rector) did not show payment to the appellant for services in the instant case, but they do sustain the appellee's theory of the trial, to wit: That the appellant in five previous suits had established the appellee's right to impose taxes against the Catholic Society and had been paid for these services. That having established this right to impose this tax, that the foreclosure of these tax sale certificates involved no more work or labor than the other certificates for which the appellant was being paid $4.00 each. Also, as stated previously in this brief, the entire theory of trial in the lower court was that the appellant having no contract of employment, if entitled to recover at all, was so entitled upon *quantum meruit* for services rendered."

The jury rendered a verdict of $50.00 for the intervener. The burden is on the appellant to show prejudicial or reversible error and the presumption is against him. We see in the judgment

No error.

BELLE BRIGHT v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 2 March, 1938.)

Master and Servant § 21b—Plaintiff must show that relation of master and servant existed in respect to the very transaction causing injury.

Nonsuit *held* properly granted upon evidence tending to show that plaintiff was negligently injured by defendant's employee while he was on his way home from work after the defendant employer's place of business had closed, since plaintiff is under duty to show that the relation of master and servant existed at the time of, and in respect to, the very transaction out of which the injury arose in order for the doctrine of *respondeat superior* to apply.

APPEAL by plaintiff from *Ervin, Special Judge,* at September Term, 1937, of HAYWOOD. Affirmed.

At about 9:30 o'clock on the night of 27 July, 1935, the plaintiff, a young woman, while crossing Haywood Street in Waynesville, was run into and injured by a bicycle ridden by Hugh Gaddy, a messenger boy employed by the defendant. The bicycle had no lights or bell or other warning device, and gave none. The plaintiff before starting across the street had stopped at the curb, looked both ways, and listened, and seeing nothing coming, walked almost to the center of the street before being struck. She did not hear or see the bicycle and did not know what had happened until she regained consciousness some time after the collision.

The defendant closed its office at 9:00 o'clock on that night, and Hugh Gaddy, the messenger boy, was on his way home.

Lonnie Yount, witness for plaintiff, testified: "The Western Union office in 1935 closed at 9:00 o'clock, and I was on duty until then. Hugh Gaddy took my place as messenger boy." The evidence was also to the effect that defendant sold the messenger boys the bicycles they rode and the equipment and the defendant's messenger boys, when on duty, were required to wear a uniform and cap.

At the close of plaintiff's evidence the defendant made a motion for judgment as in case of nonsuit. C. S., 567. The court below granted the motion. The plaintiff excepted, assigned error, and appealed to the Supreme Court.

Johnson & Medford for plaintiff.
Francis R. Stark and Alfred S. Barnard for defendant.

PER CURIAM. We see no error in the court below granting the nonsuit. There was no sufficient evidence to be submitted to the jury that Hugh Gaddy, an employee of defendant, was about his master's business

when he injured the plaintiff. He quit his work and was on his way home and there is no evidence that he was on duty or that the bicycle was being used by Gaddy in the defendant's business at the time of the collision with plaintiff. We think this case is similar to *Liverman v. Cline*, 212 N. C., 43 (45).

"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.

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

Affirmed.

HURD SMITH v. CHARLIE SOMERS, GORDON FRANKLIN, E. E. HODGES, AND O. L. SLAYTON.

(Filed 2 March, 1938.)

Process § 15: Principal and Agent § 10—

Evidence that defendant copartners authorized and ratified the act of their clerk in swearing out a warrant for plaintiff for the purpose of coercing him to pay a civil debt owed by plaintiff to the firm, *held* sufficient to be submitted to the jury.

APPEAL by plaintiff from *Bivens, J.*, at November Term, 1937, of ROCKINGHAM. Reversed.

This is an action brought by plaintiff against the defendants as joint tort-feasors for malicious prosecution and abuse of process.

The defendants Gordon Franklin, E. E. Hodges, and O. L. Slayton were partners on 23 November, 1936, doing business under the name of Franklin Grocery Company. Charlie Somers was a clerk in the store.

"That on 23 November, 1936, plaintiff was indebted to the Franklin Grocery Company in the sum of $6.76, which he had been unable to pay because of expenses which he had to meet incident to the illness and death of his baby.

"That on 23 November, 1936, Charlie Somers went before J. H. Stultz, justice of the peace and clerk of the recorder's court of Leaksville Township, and swore out a warrant against Hurd Smith charging that he did 'unlawfully, willfully and feloniously obtain goods from the

Franklin Grocery Company by false pretense by stating to them that he had a job and would pay for same when he received pay on the week-end.' That under said warrant plaintiff was arrested on 24 November, 1936, by Monroe Stultz, deputy sheriff, and was held in custody until he secured bond in the amount of $300.00.

"That on 27 November, 1936, when the case of 'State *v.* Hurd Smith,' charging false pretense, came on for trial in the recorder's court of Leaksville Township the solicitor of said court, Mr. Harvey Fitts, announced to the court that the State could not make out a case against Hurd Smith and that the State would take a *nol. pros.* Whereupon the court instructed the clerk to enter a *nol. pros.* and the case was dismissed.

"That in swearing out said warrant against Hurd Smith, Charlie Somers was acting as the agent and under the direction of defendants Gordon Franklin, E. E. Hodges, and O. L. Slayton.

"That the defendants caused said warrant to be issued and plaintiff to be arrested under said criminal process for the purpose of coercing him into paying a civil debt which he was due the Franklin Grocery Company and not because plaintiff had violated any criminal law. That the purpose of defendants was not to bring an offender to justice, because plaintiff had violated no criminal law and was not guilty of any false pretense in securing the credit for $6.76, but the sole purpose of defendants in securing the warrant for Hurd Smith was to force plaintiff to pay a civil debt to the Franklin Grocery Company, and that said warrant was sworn out without any probable cause whatever.

"That the action of defendants was a malicious prosecution and a malicious abuse of the criminal process of the State of North Carolina. That said abuse of process and malicious prosecution greatly humiliated the plaintiff, caused him great embarrassment and much mental anguish. That plaintiff had never been arrested before and said arrest greatly injured and damaged his character and standing in the community. That by said abuse of process plaintiff has been actually damaged $3,000.

"That defendants were angry with plaintiff because he had been unable to pay the sum of $6.76, and that their action in having a warrant issued for him was wanton, willful, and malicious and in utter disregard of the constitutional rights of this plaintiff as a citizen of North Carolina. That for said willful, malicious, and intentional violation of the rights of plaintiff he is entitled to recover punitive damages in the sum of $2,000.

"Wherefore, plaintiff prays judgment against the defendants, jointly and severally, for $3,000 compensatory damages, for $2,000 punitive damages, for the cost of this action, and for such other and further relief as to the court may seem just and proper."

The defendants denied the material allegations of the complaint.

At the close of plaintiff's evidence, the defendants in the court below made a motion for judgment as in case of nonsuit. The court below granted the motion as to all the defendants except Somers. The plaintiff excepted. Upon the ruling of the court the plaintiff took a voluntary nonsuit as to Somers and made exceptions and assignments of error and appealed to the Supreme Court.

Sharp & Sharp for plaintiff.
Glidewell & Glidewell and J. Hampton Price for defendants.

PER CURIAM. The law as to what is malicious prosecution and abuse of process is fully set forth in *Ledford v. Smith,* 212 N. C., 447.

The sole question on this appeal is: Was the evidence in the court below sufficient to be submitted to the jury as to all the defendants? We think so. It is taken in the light most favorable to plaintiff. We think that by analogy this case is somewhat similar to *Colvin v. Lumber Co.,* 198 N. C., 776. We will not set forth the evidence in detail as the case goes back to be tried in the court below. The probative force of the evidence, including the circumstantial evidence, was not strong, but sufficient as to authorization and ratification to be submitted to the jury as to all of the defendants.

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

Reversed.

STANDARD FERTILIZER COMPANY v. W. H. WHORTON, GERALD V. WHORTON, AND BETTIE E. WHORTON.

(Filed 2 March, 1938.)

Judgments § 23—

Defendants duly served with summons are not entitled to set aside a judgment by default final for surprise or excusable neglect because they had no notice that the case was calendared for trial and no notice of the trial.

APPEAL by defendants from *Johnston, J.,* at June Term, 1937, of MARTIN. Affirmed.

Motion to set aside verdict and judgment heretofore rendered in the cause, on the ground of inadvertence and excusable neglect. From an adverse ruling defendants appealed.

Coburn & Coburn for plaintiff, appellee.
Z. V. Rawls for defendants, appellants.

PER CURIAM. The court below found the material facts as follows: Summons was issued 16 February, 1935, and duly served on defendants. The complaint set out a cause of action for debt evidenced by a note secured by a mortgage on certain personal property, and plaintiff asked for the possession of the property for the purpose of enforcing its lien. No answer was filed, and at September Term, 1935, of the Superior Court of Martin County there was verdict and judgment for plaintiff for the balance of its debt ($385.03), and the plaintiff was adjudged entitled to the possession of the described property. Defendants are residents of Pamlico County and had no actual notice that the case was calendared for trial or of the trial, and the personal property was at the time of issuance of summons in Pamlico County.

On 15 March, 1935, defendants instituted an action in Pamlico County against plaintiff involving the same subject matter, and secured restraining order restraining the plaintiff herein from foreclosing its lien on the described personal property. When the case in Pamlico County came on for trial there at April Term, 1937, upon admissions by counsel for plaintiff and defendants, that the matters involved there were the same as those in the Martin County case, the presiding judge there (Frizzelle) dismissed the action, but by consent the restraining order was continued, pending the decision of this motion in Martin County.

Upon these facts the court found that defendants were not taken by surprise and have not shown excusable neglect, and their motion to set aside judgment was denied.

The facts found by the judge of the Superior Court are sufficient to sustain the judgment and his ruling must be

Affirmed.

CORA EDWARDS, ADMINISTRATRIX OF MARION EDWARDS, DECEASED, v. SOUTHERN RAILWAY COMPANY AND OTHERS.

(Filed 2 March, 1938.)

Carriers § 22—

Nonsuit *held* proper in action against railroad company upon evidence showing that intestate was a trespasser upon a train and fell therefrom to his death, without evidence that his fall was caused by any wrongful and willful act of the railroad company or its employees.

APPEAL by plaintiff from *Sink, J.*, at October-November Term, 1937, of SWAIN. Affirmed.

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

At the close of the evidence for the plaintiff, the defendants moved that the action be dismissed by judgment as of nonsuit. The motion was allowed by the court.

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

Edwards & Leatherwood for plaintiff.
Jones, Ward & Jones and W. T. Joyner for defendants.

PER CURIAM. This action was heard in this Court at Fall Term, 1937, on the appeal of the defendant Southern Railway Company from an order of the Superior Court of Swain County, denying its petition for the removal of the action from the Superior Court of Swain County to the United States District Court for the Western District of North Carolina for trial. The order was affirmed. See *Edwards v. R. R.*, 212 N. C., 61.

At the trial of the action in the Superior Court of Swain County, all the evidence showed that at the time plaintiff's intestate fell from the defendant's train, he was riding on said train as a trespasser. There was no evidence tending to show that his fall from defendant's train was caused by any wrongful and willful act of the defendant Southern Railway Company, or of any of its employees. The judgment dismissing the action is affirmed. See *Bailey v. R. R.*, 149 N. C., 169, 62 S. E., 883; *Hayes v. R. R.*, 141 N. C., 195, 53 S. E., 847; *Cook v. R. R.*, 128 N. C., 333, 38 S. E., 925.

Affirmed.

ROBERT COLEY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 2 March, 1938.)

Railroads § 9—Evidence held to show contributory negligence as matter of law on part of pedestrian struck at grade crossing.

Evidence that plaintiff looked in both directions before going upon defendant's northbound track, but stood there without further precaution while he watched a train pass on the southbound track, although in full possession of his faculties, and was struck and injured by a train approaching on the northbound track *is held* to disclose contributory negligence barring recovery as a matter of law, even conceding that the train that struck him was being negligently operated at an excessive speed without proper signal of its approach to the crossing.

CLARKSON, J., dissents.

COLEY *v.* R. R.

APPEAL by plaintiff from *Williams, J.*, at October Term, 1937, of WILSON.

Action to recover damages for alleged personal injury.

The plaintiff, a man about 41 years of age, a blacksmith by trade, was injured on the morning of 7 March, 1937, at the Main Street crossing in the town of Lucama, Wilson County, North Carolina, when struck by a northbound passenger train of defendant, known as a through train, which was not scheduled to stop there. Through the said town the defendant's railway, as a part of its main line from Richmond, in the Commonwealth of Virginia, to Jacksonville, in the State of Florida, consists of two tracks, upon one of which its trains going south are operated and upon the other of which its trains going north are operated.

A short distance north of the passenger station, Main Street, the principal one of the town, crosses the tracks of the defendant at right angles and connects the business section of said town with the State Highway No. 40, which runs parallel to the railroad. Over and along this street and over this crossing many persons pass, in both day and night. This was well known to the defendant, its agents, servants, and employees.

About three-quarters of a mile south of the crossing there is a depression or valley, and trains going from and coming into Lucama disappear from the sight of one standing at the crossing when such trains enter the valley. But a train going north is in plain view of a person standing at the crossing at all times after such train reaches a point one-half to three-quarters of a mile south thereof.

Plaintiff, who had lived in Lucama about a year, left his home about 7:30 on Sunday morning, 7 March, 1937, and upon returning, walked along Main Street and came to the crossing over the defendant's tracks. At that time a southbound freight train was passing. Plaintiff stepped up on the northbound track and stood on the east rail beside the freight train and watched it "go by." As he stepped upon the crossing he looked both north and south. The train was making a great deal of noise. He did not see or hear any train coming from the south going north. He did not look up or down the tracks (north or south) any more after he took his position to wait for the freight train to pass. He stood on the crossing about 30 seconds "when he heard two sharp, short, shrill blows or toots" from the passenger train when it was between fifty to one hundred feet from him, as some of the witnesses said "right on top of him." He then looked and turned to get out of the way, but was hit by the locomotive of the passenger train and was injured. Both his hearing and eyesight were good. He was sober. There was nothing about his appearance "to indicate that he was sick or

anything like that." There was evidence tending to show that: The train gave no signal by whistle or bell other than the distress signal; the train was being operated at a speed of 70 to 80 miles per hour, and, after hitting the plaintiff, it went three-quarters of a mile before it stopped; it carried about 10 to 14 cars, and the town of Lucama had an ordinance which in effect limited the speed of trains operating through the town to 20 miles per hour.

The plaintiff alleged as acts of negligence of the defendant the operation of the train at a rate of speed in violation of the town ordinance, at a highly dangerous rate of speed in and through the town, over and across the streets thereof, without giving warnings and proper signals of its approach; in failing to keep a proper lookout, and in failing to see the plaintiff when it could have seen him.

The defendant denied the allegations of negligence, and pleaded in bar of recovery the alleged contributory negligence of plaintiff.

From judgment sustaining defendant's motion for judgment as of nonsuit at close of plaintiff's evidence, the plaintiff appealed to the Supreme Court and assigned error.

Troy T. Barnes and Connor & Connor for plaintiff, appellant.
F. S. Spruill and Finch, Rand & Finch for defendant, appellee.

PER CURIAM. The judgment below, upon the facts revealed in the record on this appeal, is in accordance with well settled legal principles as enunciated in numerous decisions of this Court, which here require no further elaboration. *Pope v. R. R.*, 195 N. C., 67, 141 S. E., 350; *Rives v. R. R.*, 203 N. C., 227, 165 S. E., 709; *Young v. R. R.*, 205 N. C., 530, 172 S. E., 177; *Rimmer v. R. R.*, 208 N. C., 198, 179 S. E., 753; *Bullock v. R. R.*, 212 N. C., 760, and cases therein cited.

The factual situation in the *Rives case, supra,* is almost identical with the present case. In that case, despite that negligence of the defendant was conceded, the plaintiff's intestate was held to be guilty of contributory negligence as a matter of law which barred recovery. The decision there is applicable here.

The judgment of the court below is

Affirmed.

CLARKSON, J., dissents.

W. T. LAMM v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 2 March, 1938.)

Railroads § 9—Evidence held to disclose contributory negligence barring recovery for truck demolished in crossing accident.

Evidence that the driver of a truck saw defendant's train approaching, thought he could get across before the train got to the crossing, and that the train hit the rear wheels of the truck as it was crossing the second track, *is held* to disclose contributory negligence barring recovery for the destruction of the truck, as a matter of law, even though it be conceded that the train was being negligently operated at an excessive speed.

APPEAL by plaintiff from *Bone, J.*, at November Term, 1937, of WILSON. Affirmed.

W. A. Lucas for plaintiff, appellant.
F. S. Spruill and Finch, Rand & Finch for defendant, appellee.

PER CURIAM. This was an action to recover damages for the alleged negligent destruction of a truck.

The plaintiff's evidence was to the effect that the agent and servant of the plaintiff was driving plaintiff's truck on Green Street in the town of Wilson; that said Green Street crosses the double tracks of the defendant railroad company; that as the driver of the truck attempted to drive the truck across said tracks the truck was struck by the engine of a through passenger train of the defendant and demolished; that said train was being operated at a speed of from 60 to 70 miles per hour, in violation of an ordinance of the town of Wilson which provided that it should be unlawful to operate a railroad train through said town at a greater rate of speed than 25 miles per hour. The plaintiff's evidence was further to the effect that the driver of the truck stopped the truck as he approached the tracks of the defendant in five or six feet of the first track; that the driver's view of the track was unobstructed and that he looked and saw the train approaching at a distance of three-fourths of a mile north of the Green Street and track crossing, and remarked that "he thought he could make it and started the truck across the track, and while the truck was crossing the second track it was struck about the rear wheels by the train."

At the close of the plaintiff's evidence, the court allowed defendant's motion for judgment as in case of nonsuit, and the plaintiff reserved exception and appealed.

In allowing the motion for nonsuit we see no error. While it will be conceded that there is sufficient evidence of actionable negligence of

the defendant to carry the case to the jury, the plaintiff's own evidence proves him out of court on the issue of contributory negligence. *Harrison v. R. R.*, 194 N. C., 656.

"The universal rule (is) that a person who enters on a railway track in front of a train he knows to be approaching is guilty of such negligence that he cannot recover for injuries sustained." *Royster v. R. R.*, 147 N. C., 347, and cases there cited.

Since the driver's view of the track to the north, the direction from which the train was approaching, was unobstructed for at least three-fourths of a mile, he was guilty of contributory negligence in entering upon the track in front of an approaching train. *Kuykendall v. R. R.*, 208 N. C., 840.

The judgment of the Superior Court is

Affirmed.

STATE v. J. C. CRADLE.

(Filed 2 March, 1938.)

Constitutional Law § 14: Criminal Law § 43—Affidavit for search warrant signed by chief of police meets requirements of the statute.

An affidavit for a search warrant signed by the chief of police is sufficient compliance with ch. 339, sec. 1½, Public Laws of 1937, since if the chief of police is not the informant he is "some other person," and the statute does not require that the informant should make the affidavit, or that the person signing the affidavit should state therein who his informant is, and evidence obtained on a search warrant issued on such affidavit is competent.

APPEAL by defendant from *Bone, J.*, at January Term, 1938, of WASHINGTON. No error.

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

P. H. Bell for defendant, appellant.

PER CURIAM. The defendant was convicted of having in his possession liquor upon which the tax had not been paid, and from judgment of imprisonment appealed, assigning as error the denial by the court of his motion to suppress evidence of certain facts discovered by reason of the issuance of a search warrant.

The affidavit, upon which the search warrant was issued, was made by P. W. Brown, chief of police, who was the "complainant," or if not

the complainant he was at least some "other person" and met the requirement of the statute, Public Laws 1937, ch. 339, sec. 1½, upon which the appellant relies, and therefore the facts discovered by reason of the search warrant were not rendered incompetent. There is nothing in the statute that requires the complainant or other person who makes the affidavit to state therein who his informant is, or which requires the informant to make the affidavit, as seems to be the contention of the appellant.

In the trial we find

No error.

LOWELL MURPHY v. AMERICAN ENKA CORPORATION AND L. ZANDE.

(Filed 2 March, 1938.)

Master and Servant § 49—Employee bound by Compensation Act may not maintain action at common law for disease not compensable under the act.

The rights and remedies of an employee under the Compensation Act exclude all other rights and remedies, N. C. Code, 8081 (r), and an employee bound by the act, N. C. Code, 8081 (k), may not maintain an action at common law against the employer and his foreman to recover for injuries caused by an occupational disease not enumerated in the 1935 amendment (N. C. Code, 8081 [1] and [2]), even though the disease is the result of negligence.

APPEAL by plaintiff from *Johnston, J.*, at October Term, 1937, of BUNCOMBE.

Action to recover damages for alleged personal injury allegedly resulting proximately from actionable negligence.

It is admitted: That the relationship of employer and employee existed between plaintiff and defendant American Enka Corporation; that both have accepted and are governed by the provisions of the N. C. Workmen's Compensation Act; that plaintiff filed claim with the N. C. Industrial Commission for compensation for alleged injury while working for the defendant American Enka Corporation, in its paint room over which the defendant L. Zande was superintendent, contending that in using a spray gun for painting he was caused to inhale fumes of turpentine and other chemical elements in the paint, which resulted in the development of an abscessed kidney, permanently and totally disabling him as of 3 April, 1936; that although the single Commissioner awarded him compensation, on appeal therefrom by defendant the Full Commission rendered judgment in the following language:

"The Full Commission finds as a fact that the plaintiff did not sustain an injury by accident arising out of and in the course of his employment, which was the proximate cause of his present kidney trouble, and that the plaintiff is not suffering from an occupational disease, as defined by sec. 50½ of the N. C. Workmen's Compensation Act, and therefore reverses the award of the hearing Commissioner and orders that the findings of fact, conclusions of law, and the award of the hearing Commissioner be vacated and set aside."

That on appeal therefrom by plaintiff, the Superior Court of Buncombe County, by judgment entered at the regular civil term, August, 1937, affirmed the decision of the Full Commission, from which judgment no appeal was taken.

Thereafter plaintiff instituted this action at common law for damages and filed complaint in which he alleges in substance: That, although the above statement of admitted facts is true, the injury complained of "is a disease, or industrial disease, contracted through the negligence of the defendant, and is one of those diseases specifically excluded from the Workmen's Compensation Act of the State of North Carolina by sec. 8081 (1) of the Consolidated Statutes, said disease not being one of those enumerated and included in 8081 (2) of the Consolidated Statutes"; "that the injury was gradually incurred over a period of several weeks immediately prior to and culminating on 3 April, 1936"; and that the injury was directly and proximately caused by the joint and concurrent negligence of the defendants in the manner specifically set forth, which for the purpose of this appeal need not be detailed.

The defendant denies the material allegations of the complaint, and pleads in bar of plaintiff's right to recover: (1) That the provisions of the N. C. Workmen's Compensation Act, as amended, apply, and that the N. C. Industrial Commission has exclusive jurisdiction; (2) estoppel by the award of the N. C. Industrial Commission, and the judgment of the Superior Court of Buncombe County affirming same.

From judgment sustaining defendant's pleas in bar plaintiff appealed to the Supreme Court, and assigned error.

Don C. Young and Weaver & Miller for plaintiff, appellant.
Smathers & Meekins for defendant, appellee.

PER CURIAM. The record on appeal fails to disclose error.

The plaintiff and the defendant, having accepted the N. C. Workmen's Compensation Act, are bound by its provisions. C. S., 8081 (k).

The act as originally enacted defined "injury" and "personal injury" for which compensation is allowable to "mean only injury by accident arising out of and in the course of employment, and shall not include a

disease in any form except where it results naturally and unavoidably from the accident." C. S., 8081 (i), (f); Public Laws 1929, ch. 120, sec. 2.

Construing the act in the case of *McNeely v. Asbestos Co.*, 206 N. C., 568, 174 S. E., 509, a case similar to the present one, *Brogden, J.*, said: ". . . it would seem manifest that our act did not undertake to limit compensation to cases where the injury was begun and completed within narrow limits of time, but that it used the expression 'injury by accident' in its common sense everyday conception as referring to an injury produced without the design or expectation of the workman. Indeed, sec. 13 of the act declares: 'No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.' Manifestly, all other accidental injuries, not specifically withdrawn from the benefits of the act, should be logically deemed to fall within its purview."

Thereafter, the Legislature of 1935, by ch. 123, Public Laws 1935, C. S., 8081 (1) and (2), extended the provisions of the act to treat occupational diseases therein described as the happening of an injury by accident within the meaning of the act. The amendment provided in part that "the procedure, practice, and compensation and other benefits provided by said act shall apply in all such cases, except as hereinafter otherwise provided. The word 'accident' as used in the Workmen's Compensation Act shall not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously, or at frequent intervals in the course of such employment, over extended periods of time, whether such events may or may not be attributable to fault of the employer, and disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this act." It is manifest that the intent of the Legislature in the restriction here put upon the construction of the word "accident" is to limit the occupational diseases over which the provisions of the Compensation Act are extended, and to make clear the diseases intended to be compensable.

The plaintiff concedes that the injury of which he complains is not included among the occupational diseases enumerated in the 1935 amendment as being compensable. But he contends that the declared construction of the word "accident" eliminates his injury from the provisions of the Compensation Act, and that a common law action against his employer would lie for actionable negligence. This contention is not tenable. C. S., 8081 (r); Public Laws 1933, ch. 449, sec. 11.

The case of *Lee v. American Enka Corp.*, 212 N. C., 455, 193 S. E., 809, is decisive of the present appeal. There, *Connor, J.*, speaking to a

factual situation similar to the instant case, said: "When the plaintiff in this action failed to reject the N. C. 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."

The judgment below is

Affirmed.

STATE v. ANTON PROCTOR, FRITZ BRINKLEY, FRANK FAULK, AND WALTER "DOODLE" WELLS.

(Filed 23 March, 1938.)

1. Criminal Law § 79—

Exceptions not set out and discussed in appellant's brief will be deemed abandoned. Rule of Practice in Supreme Court, No. 28.

2. Criminal Law § 41f—

When defendant does not go upon the stand, N. C. Code, 1799, and does not offer evidence of good character, his character is not in issue and it may not be impeached by the State.

3. Same: Criminal Law § 53f—Instruction on State's contention that defendant associated with codefendants held not error in absence of objection by defendant.

The appealing defendant did not go upon the stand or put his character in issue in this prosecution for assault and robbery with firearms, N. C. Code, 4267 (a), and for conspiracy to commit the offense. The codefendants testified that the appealing defendant was with them and aided in the commission of the crime, and testified as to their convictions and sentences for former crimes. *Held:* An instruction that the State contended that the codefendants were men of bad character to appealing defendant's knowledge and that he associated with them *is held* not error in the absence of a request by defendant for a correction of the statement of the contention, the contention being permissible as relating to identity rather than character, and the court having fully and correctly instructed the jury that appealing defendant's failure to go upon the stand should not be considered against him, and the fact that appealing defendant knew his codefendants, and was with them immediately prior to the robbery being competent as some evidence that he was with them at the time of the robbery and as corroborative of their testimony.

4. Criminal Law § 53f—

A misstatement of the contentions of a party must be brought to the court's attention in apt time to afford opportunity for correction in order to be considered on appeal.

APPEAL by Walter "Doodle" Wells from *Burgwyn, Special Judge*, at October Term, 1937, of HALIFAX. No error.

The bills of indictment against the defendants charged them (1) assault and robbery with firearms [N. C. Code, 1935 (Michie), sec. 4267(a)], and (2) conspiring together to commit an assault and robbery with firearms. The defendants Anton Proctor and Fritz Brinkley pleaded guilty to the charges and were duly sentenced. Frank Faulk and Walter "Doodle" Wells pleaded not guilty. The court, at the conclusion of the State's evidence, ordered a verdict of not guilty as to Frank Faulk. The jury convicted Wells, who was duly sentenced. The defendant Wells excepted, assigned errors, and appealed to the Supreme Court. The necessary facts will be set forth in the opinion.

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

Allsbrook & Benton for defendant.

CLARKSON, J. Rules of Practice in the Supreme Court, 200 N. C., 831. Rule 28. *Appellant's Brief*, in part: "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him."

In defendant's brief there is only one exception and assignment of error, which is to the charge of the court below, which we think cannot be sustained, viz.: "The State contends that you ought to be convinced of the defendant's guilt beyond a reasonable doubt. The State contends that while the accomplices, Brinkley and Proctor, are men who have engaged in the bad things of life; that Brinkley is a bad man and has been to the penitentiary on more than one occasion, and that Proctor, while a young man, has also been engaged in things which he should not have done, and that he served sentences either on the roads or in jail, but the State contends Walter Wells is a man of similar character. The State contends that Wells associated with these men and well knew the men; that he lived in the same community with them, knows their reputation and knows they have been to the penitentiary and to the roads, if they have, and knows for what they were sent, and the State contends he would not associate and be riding around, if you find beyond a reasonable doubt he was associating and riding around with them, unless they were of similar character, and the State contends 'birds of a feather flock

together' applies in this case. That while up to this time Wells may have escaped punishment for anything he may have done or been connected with, the State contends on this occasion he was with these men."

Fritz Brinkley, who entered a plea of guilty, testified in part that he had known Wells some 18 years. They were both reared in and near Rocky Mount, N. C. "Anton Proctor and 'Doodle' Wells were with me the night I held up the Texaco Filling Station at Enfield and robbed Jack Hearne. 'Doodle' Wells drove the automobile. At the time Anton Proctor and I were in the filling station Wells was sitting under the wheel of the automobile. The automobile was a Ford, 1936 black coach. . . . We were drinking. When we left Rocky Mount we went out the Battleboro Highway toward Enfield. I think Enfield is 19 or 20 miles from Rocky Mount. When we saw this filling station open at that time of morning is when Wells, Proctor, and I made the agreement to hold up the filling station. We made the agreement as we were passing by the filling station. We rode on about a mile or a mile and a half and then turned and came back to the filling station. At the time Walter Wells and Anton Proctor each had guns in the car. Walter Wells drove the car right to the front door as you go into the filling station. I got out, went into the filling station and called for a coca-cola, and as soon as he reached for the coca-cola and before he handed it to me he was in the back of the filling station, and I drew the gun on him and said, 'Stick 'em up.' I had the gun with me that I got off of Walter Wells when I left the car. After I put the gun on the man in the filling station Anton Proctor is the one that carried out the cash register and shotgun. They are all I know that he carried out. He put them in the back of the black Ford. . . . When I got back in the car Walter Wells was under the steering wheel, Anton Proctor was in the back seat, the cash register and gun were in the back seat. After we got in the car we did not stay any longer than it took us to get away. On the way back to Rocky Mount from Enfield we stopped near the train station at Battleboro on the highway and split what was in the cash register. . . . Proctor got out of the car, and they put me out about 5½ miles from Rocky Mount, and 'Doodle' Wells left in the car. The last time I saw the car 'Doodle' Wells was driving it and going toward Rocky Mount. Proctor and I stayed there until daybreak and then went back to town. That is all I know about it."

Brinkley was corroborated by Anton Proctor. Corroborative evidence was given also by K. M. Sutton, E. M. Tilghman and others.

Fritz Brinkley testified as to his criminal record: "I got out of the penitentiary on 5 March, 1937, and came to Rocky Mount. I began working as an automobile mechanic in the same building where Walter Wells was, but was not employed by him. It is true that I borrowed

Walter Wells' automobile a few days after I came from the penitentiary to carry a girl to ride, and turned the car over and damaged it to the amount of $40.00 or $50.00, and paid for the damages to the car. I am the man who paid for the damages to the car, and my relations with Walter Wells have not been strained ever since. . . . I have been convicted of criminal offenses three times. . . . In the preliminary hearing I said I had been in trouble ever since I was 16 years old, but not in the juvenile court. I was sent to the roads at 16. I stated at that hearing I had not been off the roads or out of the penitentiary but very few days since I was 16 years old. I am now 31. I got 16 months one time, four months the second time, three to five years on one charge, and two to four years on the other. I pulled five to seven years in the penitentiary, and actually spent four years and some months, but don't remember the exact number; don't think it was more than 4½ years. As to what comprised the other nine years, I have not said anything about jail sentences or being locked up for investigation. I served 90 days in jail one time, 60 days another. I could not tell, just don't know how much of the time I have been confined on suspicion or for investigation. They have held me as much as 60 or 30 days then would be let out, and it would not be long before I would be back again."

Anton Proctor testified as to his criminal record: "I have previously been indicted for whiskey and larceny of an automobile; that was at Pinetops in Edgecombe County. I have served 12 months, six months, four months, and 60 days on the roads. I have never served a term in the penitentiary. I have served sentences for public drunkenness, making whiskey, drunk and disorderly, and stealing an automobile; that is all. I first met Fritz Brinkley in jail in Edgecombe County; I am positive of that; I guess that was about five years ago."

The court below gave a full, clear and accurate charge on all essential features of the action, applying the law applicable to the facts, to which no exception or assignment of error was made by the defendant Wells. The court further charged: "Now, gentlemen of the jury, the defendant in this case has not gone upon the witness stand. I charge you, gentlemen, this he did not have to do; he has the right under the laws of the State of North Carolina to sit mute, and rest his defense upon the alleged weakness, as he contends, of the State's case, and the fact that he did not go upon the stand, I charge you as explicitly as I may, should not be used in any way against the defendant in arriving at your verdict in this case."

N. C. Code, *supra*, sec. 1799, is as follows: "In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness,

and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as other witnesses. Except as above provided, nothing in this section shall render any person who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to criminate himself."

As the defendant did not go upon the stand nor offer evidence with respect to his character, his character was not at issue. *S. v. Nance,* 195 N. C., 47. Accordingly he was entitled to the benefit of the statute; this he received in most positive words, as the judge below charged, "I charge you as explicitly as I may" that his failure to go upon the stand "should not be used in any way against the defendant in arriving at your verdict in this case." The matter complained of here is a statement of a series of the State's contentions to the effect that Wells, knowing the bad character of defendants Brinkley and Proctor, had associated with them just prior to the time of the commission of the robbery, and that this tended to support the direct evidence to the effect that Wells was at the filling station at the time of the robbery. Both Brinkley and Proctor testified that Wells was, in fact, at the filling station, assisting them in the robbery. The question here is not one of character but of identity. Was Wells at the filling station? Evidence to the effect that Wells knew the other defendants and was with them immediately prior to the robbery is some evidence, however slight, that he was with them when the robbery was committed and, therefore, tends to corroborate Brinkley and Proctor on this point. The contention of the State was a permissible one under the evidence of this case. If the manner of the statement of the contention was objectionable to the defendant Wells, it was his duty, at the time, to call the court's attention to it and thus permit the court to correct any inadvertent misstatement of the contentions. The defendant is not permitted to wait until the case is made up on appeal to raise objections to the manner of statement of contentions. This has long been the rule in this State. *S. v. Baldwin,* 184 N. C., 791; *S. v. Barnhill,* 186 N. C., 446 (450); *S. v. Sinodis,* 189 N. C., 565 (571); *Braddy v. Pfaff,* 210 N. C., 248 (251); *Sorrells v. Decker,* 212 N. C., 251.

Taking the entire evidence on the record, the charge of the court below as a whole, and the contentions, we can see no prejudicial or reversible error.

No error.

ETHEL H. THREADGILL AND PERCY THREADGILL, AGENT, *v.* W. A. FAUST AND LEON L. NOBLE.

(Filed 23 March, 1938.)

1. Fraud § 7: Landlord and Tenant § 25—In an action for rent, tenant may set up counterclaim for fraud inducing execution of lease contract.

In this action to recover the balance of rent due under a contract leasing a mine with mining machinery, defendant set up a counterclaim alleging that plaintiff procured the execution of the lease by fraudulent misrepresentations. The referee found that the execution of the lease was induced by fraudulent misrepresentations as to the condition of the mine, output, and machinery on the premises, but found that after the discovery of the true condition, defendant began and continued operation of the mine and thereby elected to waive the fraud and affirm the contract. *Held:* The counterclaim set up a cause of action for damages for fraudulent misrepresentations inducing execution of the lease, and the action of the trial court in striking out the finding of the referee relating to waiver, and inserting in lieu thereof a finding, supported by evidence, that the true condition of the mine was not discovered until a much later date, when defendant ceased to operate the mine, and adjudging that defendant was not precluded by his conduct from setting up the counterclaim, is without error.

2. Reference § 9—

Upon review of exceptions to the report of a referee the Superior Court has the power to set aside findings of fact and make additional findings, C. S., 578, but such power is limited by the requirement that such additional findings must be supported by some competent evidence.

3. Appeal and Error § 40a—

Where the Superior Court strikes out a finding of a referee and makes an additional finding in lieu thereof, which additional finding is not supported by any competent evidence, there is no proper basis for the judgment, and the cause must be remanded for a proper determination of the pertinent exceptions to the referee's report.

4. Partnership § 9: Parties § 1—Partner may not sue for his sole benefit on cause of action accruing to the partnership.

In this action by a lessor to recover rents due under a lease of mining properties, defendant set up a counterclaim for damages for fraudulent misrepresentations inducing the execution of the lease. Defendant testified before the referee that he was setting up the counterclaim in his own name for his own benefit, but it appeared that the mine was operated by defendant's firm, that there had been no accounting between the partners or dissolution of the partnership. *Held:* Defendant was not entitled to maintain the counterclaim in his own name for his sole benefit, since the cause accrued to the partnership, and all the partners were real parties in interest, C. S., 446, and the finding of the court that defendant could maintain the counterclaim is not supported by the evidence and must be stricken out, and the cause remanded.

5. Partnership § 9: Parties § 10—Defect of parties held not waived by failure to object, since defect did not appear until taking of evidence.

This action to recover rents due under a lease of mining properties was instituted against the lessee alone, who filed answer setting up a counterclaim for fraudulent misrepresentations inducing the execution of the lease. Upon the hearing before the referee the evidence disclosed that the mine was operated by a partnership and that the losses alleged in the counterclaim was sustained by the partnership in the operation of the mine. *Held:* The defect of parties to the counterclaim was not waived by failure to object by proper plea, since the fact of partnership agreement was not disclosed until the taking of evidence before the referee.

6. Appeal and Error § 40a—Upon facts of this case, it is ordered that additional evidence be taken upon question of damages.

Upon this appeal the cause was remanded for want of evidence supporting the court's finding in regard to proper parties to defendant's counterclaim, and it is also ordered that additional evidence be taken on the question of damages upon the counterclaim in view of plaintiff's motion for a new trial for newly discovered evidence on this question, and the fact that the trial court was of the opinion that error was committed in calculating the damages, which he attempted to correct at a subsequent term over objection.

APPEAL by plaintiffs from *Alley, J.*, at June Special Term, 1937, of YANCEY. Error and remanded.

This was an action instituted to recover an amount alleged to be due as rental of certain machinery used in connection with a mine known as "Cat Tail Mine" or "Isen Mine," leased to defendants by Percy Threadgill as agent of the owner, Ethel H. Threadgill.

The defendant Noble was not served with summons and filed no answer. Defendant Faust filed separate answer admitting the lease, but setting up a counterclaim for damages for fraud and deceit on the part of plaintiffs, whereby he was induced to make expenditures and incur losses in the effort to operate said mine, and alleged that, after allowing plaintiffs credit for all such sums as were justly due them, he was entitled to recover of the plaintiffs $3,377.35.

The cause was referred to the Hon. Robt. W. Proctor as referee. In the evidence heard by the referee it appeared that the lease, though dated 1 April, 1935, was not actually executed until 3 and 4 June, 1935. The terms of the lease provided among other things for the payment by defendants of certain royalties on the minerals and subsoil products extracted, and for the payment of $50 per month for the use of plaintiffs' mining equipment then installed.

It further appeared that on 8 June, 1935, defendants Faust and Noble and one C. W. Larsen entered into a written partnership agreement for the operation of the "Cat Tail Mine" or "Isen Mine" in Yancey County, North Carolina, whereby the named partners agreed,

among other things, to share equally in the ownership and profits of the business.

After hearing the evidence the referee made due report to the court of his findings of fact and conclusions of law. The referee found that the execution of the lease was induced by the fraudulent representations of the plaintiffs as to the condition of the mine, output, and machinery on the premises, but found that after the discovery of the true condition of the mine and equipment defendant Faust began and continued operation for five months, and upon demand of plaintiffs made a small payment to plaintiffs in August, 1935, and the referee concluded as a matter of law that the conduct of defendant Faust constituted an election to waive the fraud and affirm the contract, and that he was not entitled to recover on his counterclaim.

The referee further found that defendants Faust and Noble and C. W. Larsen, who is not a party to this action, were partners in the lease, and that there had been no accounting between the partners nor dissolution of the partnership, and that defendant Faust, under his counterclaim, was undertaking to recover judgment for himself and not for the partnership. The referee thereupon concluded, as a matter of law, that all the partners of defendant Faust were necessary parties to his counterclaim, and that defendant Faust was not entitled to recover in his own behalf on a partnership claim, and was therefore not entitled to recover on the counterclaim set up in the answer.

The referee concluded that defendant Faust was indebted to plaintiffs on the cause of action alleged in the complaint in the sum of $345.00.

Defendants filed exceptions to the report of the referee, and upon the hearing in the Superior Court certain findings of the referee were set aside and the court found other facts instead, and overruled certain of the referee's conclusions of law, and entered judgment that defendant Faust "on behalf of himself and his copartners, Noble and Larsen, recover of the plaintiffs the sum of $3,377.35."

From the judgment of the Superior Court plaintiffs appealed.

A. S. Barnard and Charles Hutchins for plaintiffs, appellants.
Watson, Fouts & Watson for defendants, appellees.

DEVIN, J. The questions presented by this appeal concern only the counterclaim set up by defendant Faust. The referee concluded on the facts found by him that the plaintiffs were entitled to recover of the defendants $345.00 on the cause of action set out in the complaint, and his conclusion of law to this effect was adopted by the court below.

Upon the counterclaim of the answering defendant Faust for damages on account of the fraudulent representations of the plaintiffs, whereby

he was induced to enter into the contract of lease and caused to suffer loss in the purchase of machinery and in expenditures for labor, the referee found that fraudulent representations were made, and this finding was adopted and concurred in by the judge of the Superior Court.

But the referee held that defendant was not entitled to recover on his counterclaim upon two grounds: (1) For that he found that after discovery of the true facts of the matters misrepresented defendant began and continued operation on the premises for five months, and the referee concluded that defendants' conduct and actions constituted an election to waive the fraud and affirm the contract; and (2) for that defendants Faust and Noble and one C. W. Larsen, who was not a party to the action, were partners in the lease, and that there had been no accounting between the partners or dissolution of the partnership, and that defendant Faust by his counterclaim was undertaking to recover judgment for himself and not in behalf of the partnership, and the referee concluded that all the partners were necessary parties to the counterclaim, and that defendant Faust was not entitled to recover in his own behalf on a partnership claim.

The judge of the Superior Court struck out the referee's finding of fact and conclusions of law as to waiver of the fraud, and found as a fact that defendant did not discover the true facts as to the condition of the mine until November, 1935, and adjudged that defendant was not precluded by his conduct from setting up counterclaim for sums wrongfully paid out by reason of fraudulent representations. In this particular there was evidence to support the finding of the judge, and his ruling thereon was in accord with the decisions of this Court. *May v. Loomis,* 140 N. C., 350, 52 S. E., 728; *Wolf Co. v. Mercantile Co.,* 189 N. C., 322, 127 S. E., 208.

The referee's findings that defendants were partners with Larsen in the lease and operation of the mine, and that defendant Faust under his counterclaim was undertaking to recover judgment for himself and not in behalf of the partnership were stricken out by the court, and, instead, the court found as a fact "that the answer and counterclaim was filed by Faust for and on behalf of himself and his partnership, and the recovery sought in the further defense and counterclaim contained in said answer is for the benefit of said Faust and his firm," and the court struck out the referee's corresponding conclusion of law, and adjudged that defendant Faust had the right in this action to seek recovery for himself and his copartners, Noble and Larsen.

The finding of the judge in this particular does not seem to be supported by any evidence appearing in the record before us. The defendant Faust filed answer for himself alone, set up counterclaim seeking recovery for himself, and made no reference to the existence of a

partnership with others in relation to the transactions sued on. In the hearing before the referee defendant Faust testified: "I brought this suit in my name and am undertaking to make recovery as I made the investment individually. Mr. Larsen is not included because he has nothing to lose. Noble and Larsen have nothing in the investment. There are three partners to the contract—Noble, Larsen, and myself."

The power of the judge of the Superior Court, upon exceptions duly filed to the report of a referee, to set aside findings of the referee and to make other and additional findings of his own, as authorized by C. S., 578, and the uniform decisions of this Court, is limited by the established rule that there must be some competent evidence to support his findings. *Dent v. Mica Co.*, 212 N. C., 241; *Anderson v. McRae*, 211 N. C., 197; *Martin v. McBryde*, 182 N. C., 175, 108 S. E., 739. In the absence of any evidence adduced in the hearing before the referee to support the judge's finding on this material matter his ruling thereon cannot be upheld. Therefore it follows that, when the finding of the referee has been stricken out and the finding of the judge in lieu thereof is unsupported by evidence, there is no basis for the judgment, and it must be vacated and the cause remanded to the Superior Court for proper determination of the matters raised by the pertinent exceptions to the report of the referee. *Coleman v. Hood, Comr.*, 208 N. C., 430, 181 S. E., 280; *Wilson v. Allsbrook*, 203 N. C., 498, 166 S. E., 313.

The general rule in this jurisdiction is that one partner may not sue in his own name alone, and for his own benefit, upon a cause of action accruing to the partnership. The action must be prosecuted in the name of the real party in interest. C. S., 446; *Vaughan v. Moseley*, 157 N. C., 156, 72 S. E., 842. "It is the general rule that in all suits relating to a partnership all the partners are necessary parties, and the action must be brought in the name of the partnership." *Roller v. McKinney*, 159 N. C., 319, 74 S. E., 966; *Cain v. Wright*, 50 N. C., 282; *Heaton v. Wilson*, 123 N. C., 398, 31 S. E., 671; *Allen v. McMillan*, 191 N. C., 517, 132 S. E., 276; 47 C. J., 957.

While objection on this ground, ordinarily, must be raised in apt time by proper plea, in the instant case the fact of the partnership agreement did not appear in the pleadings and was not disclosed until the taking of testimony before the referee, who thereupon ruled that the one partner could not maintain action on a claim pertaining to the partnership. Hence it may not be held that the objection was waived. *Vaughan v. Moseley, supra.*

In view of the opinion of the trial judge that there was an error in the calculation of the amount of the recovery and his attempt at a subsequent term, over the objection of appellants, to correct the mistake, and upon consideration of the affidavits filed in support of plaintiffs'

motion in this Court for a new trial for newly discovered evidence on the question of the amount of defendant's damages, we deem it proper, and so order, that additional evidence be taken or a new hearing be had as to the amount of defendant's counterclaim, in the event he is found entitled to recover thereon.

It is ordered that the judgment appealed from be vacated, and that the cause be remanded to the Superior Court of Yancey County for further proceedings not inconsistent with this opinion.

Error and remanded.

CORBETT L. SILVER AND WIFE, IDA CARSON SILVER, v. T. H. SKIDMORE.

(Filed 23 March, 1938.)

1. Fraud § 11—Evidence held for jury on issue of fraudulent misrepresentation and damages in sale of land by vendor.

Plaintiffs alleged that defendant vendor represented that there was a sewer line along the highway in front of the property sold. The male plaintiff testified that defendant made such representation to him, told him that the house on the adjacent property was connected with the sewer and did not have a septic tank, and that he told defendant he intended building a house and that he would not buy property requiring the use of a septic tank under any circumstances, which testimony was corroborated by his brother. Plaintiffs also introduced evidence that plaintiffs relied and acted upon the representation in regard to the sewer line, that there was no sewer line along the highway, and that a septic tank was used for sewage disposal on the adjacent property, and that the value of the land was less without an available sewer. Defendant testified that he told the male plaintiff he thought there was an available sewer and that plaintiffs made their own investigation, and introduced evidence contradicting plaintiffs' evidence in other material aspects. *Held:* The defendant's motion to nonsuit was properly denied by the original trial court, and the conflicting evidence was properly submitted to the jury on the issues of fraudulent misrepresentation, injury and damage.

2. Appeal and Error § 21—

Where the charge of the court is not in the record, it will be presumed that the questions of fact were properly submitted to the jury.

APPEAL by plaintiffs from *Johnston, J.*, at November Term, 1937, of BUNCOMBE.

The plaintiffs recovered judgment in this action in the general county court of Buncombe County, but upon appeal of defendant to the Superior Court the judge sustained the exceptions of the defendant to the refusal by the trial judge to dismiss the action upon a demurrer to the

evidence, and remanded the case to the general county court for judgment as in case of nonsuit. To the ruling of the judge of the Superior Court the plaintiffs excepted, and appealed to the Supreme Court. Reversed.

Geo. M. Pritchard and M. A. James for plaintiffs, appellants.
Harkins, Van Winkle & Walton for defendant, appellee.

SCHENCK, J. The plaintiffs instituted this action to recover damages alleged to have been sustained by reason of false and fraudulent representations made by the defendant to the plaintiffs relative to the existence of a sewer line in the street in front of a 12½-acre tract of land conveyed by the former to the latter, and the absence of a cesspool or septic tank for sewage disposal for the house on said tract of land. The principal allegations in the complaint are in the following words:

"4. That, prior to purchasing said lands of the defendant, the plaintiff, Corbett L. Silver, expressly informed the defendant that it was the intention of said plaintiff to erect a nice residence on said tract of land on a ridge about 50 feet distant from said Padgett Town Road, and then and there expressly inquired of the defendant as to whether there was a regular sewer main along said road and opposite the place where plaintiff informed the defendant he intended to erect said residence, whereupon the defendant then and there assured the plaintiff that there was at that time a sewer main at said point on said road to which the plumbing and sewer system of said contemplated residence could be connected.

"5. That at the time the plaintiff made said inquiry as to the location of said sewer main along said road at said point the plaintiff also made inquiry as to whether the plumbing system of a residence already constructed on said lands, about 400 feet from said contemplated residence, was connected with said sewer main along said road in front of the residence already constructed and was then and there told by the defendant that such was the case.

"6. That relying upon and solely by reason of the defendant's said statement and assurance that a sewer line was laid along said highway in front of the residence already constructed and in front of the location of said contemplated residence, and solely by reason of said statements and assurances the plaintiff agreed to purchase said 12½ acres of land at said price and parted with $1,100 cash of the purchase price and together with his wife, the plaintiff, Ida Carson Silver, executed a promissory note to the defendant in the sum of $1,100, payable $100.00 each three months from 4 May, 1936, until paid, secured by a deed of trust on said lands and premises, and executed a note for $300.00 in payment

of the realtor's commission for negotiating said trade, the former of which notes, as plaintiffs are advised, informed, and believe are now held by the Wachovia Bank and Trust Company of Asheville for collection for the defendant.

"7. That the plaintiffs were caused and induced to purchase said 12½-acre tract of land of the defendant solely by reason of the defendant's said representation as to the location at said points on said road of a sewer main as aforesaid, and by reason thereof accepted said deed, paid said cash, and executed said promissory notes."

The defendant filed answer and denied the foregoing allegations, except he "admitted that the plaintiffs executed their promissory note to the defendant in the sum of $1,100.00, and that the same is secured by deed of trust on said land and premises."

After denying the defendant's motion for judgment as in case of nonsuit made when the plaintiffs had introduced their evidence and rested their case and renewed when the evidence on both sides was in (C. S., 567), the trial judge submitted the case to the jury upon the following issues:

"1. Did the defendant, T. H. Skidmore, falsely and fraudulently represent to the plaintiffs that the tract of land conveyed by him to the plaintiffs by deed bearing date 4 May, 1936, and recorded in the office of the register of deeds for Buncombe County, North Carolina, in Deed Book 478, on page 353, contained a regular sewer main as alleged in the complaint?

"2. Were the plaintiffs injured and damaged by said false and fraudulent representations?

"3. What damages, if any, are the plaintiffs entitled to recover?"

The first and second issues were answered "Yes" and the third issue "$400.00."

From judgment on the verdict the defendant appealed to the Superior Court, and from judgment in the Superior Court reversing the judgment of the county court the plaintiffs appealed to this Court, assigning as error the action of the Superior Court judge in sustaining the exception of the defendant to the refusal of the trial judge to grant his motion for judgment as in case of nonsuit.

The sole question presented on this appeal is: Was there sufficient evidence introduced to carry the case to the jury? After a close examination of the record we are constrained to hold that the question should be answered in the affirmative.

The plaintiff, Corbett L. Silver, testified: "I know the defendant, T. H. Skidmore. I first became acquainted with him April, 1936. . . . It (the 12½-acre tract) is 765 feet on the Rainbow Terrace Road. . . . The first talk I had with Mr. Skidmore about this

property he was called to Mr. Rowland's office to describe the property and the terms. . . . I asked Mr. Skidmore if this house (referring to the residence that was already on the tract when plaintiff purchased it) was connected with a sewer. He said it was. I told him I wanted to buy it. . . . I asked him if there was a sewer line there. He said there was. He said the house there was connected to it. . . . I asked him especially about a sewer, that I was going to build another house. He says, 'There is no cesspool, but that it connected with the city pool (sewer) of Black Mountain, runs with that street or road.' . . . I said I wouldn't have a septic tank under no consideration. I called it that and he called it a cesspool. He said there was no cesspool, but that it connected with the city sewer of Black Mountain, that it ran with that road. . . . I said I would not have the property under no consideration where I had to use a septic tank. I told him I had had previous experience and that it was not satisfactory, that I would not have a piece of property where I had to use a septic tank."

J. W. Silver, brother of the plaintiff, testified: "My brother asked Mr. Skidmore in Tom Rowland's office what the sewerage was. He said it was connected with the city sewerage, says, 'There is no cesspool there.' That is the Black Mountain City sewerage. He says, 'There is no cesspool there.' My brother told him he would not have a place where a cesspool was because he had been bothered with one where he lived." There was other evidence corroborative of the plaintiff's testimony.

The defendant testified: "As I recall it, Mr. Silver spoke about a sewer at that time. I told him I have no knowledge of a sewer, but I understood there was a sewer available. I have been told that. I told him I had not ever made any investigation. Nothing else was said at that time except the terms, as I recall. That conversation did not exceed five minutes. I never saw Mr. Corbett Silver, plaintiff in this action, after that time." There was other evidence corroborative of the defendant's testimony.

There was evidence tending to show that the plaintiffs relied and acted upon the representations made by the defendant as to the sewer and the absence of a cesspool or septic tank, and there is evidence that the plaintiffs did not so rely or act, but made their own investigations and relied and acted thereupon.

All of the evidence is to the effect that there is no sewer in the street in front of the tract of land sold by the defendant to the plaintiffs, and that the house on said tract of land used a cesspool or septic tank for sewage disposal, and that the value of the tract of land is less without an available sewer than it would be if a sewer was available in the street in front thereof.

The contradictory evidence of the plaintiffs and defendant raised questions of fact which could be clearly presented upon the issues upon which the case was tried, and, in the absence of the charge from the record, the questions of fact are presumed to have been properly submitted to the jury.

While the jury might have been entirely justified in answering the issues in favor of the defendant, we cannot concur with the holding of the judge of the Superior Court to the effect that there was no evidence of the plaintiffs' alleged cause of action.

This case is governed by the principle enunciated in *Haywood v. Morton,* 209 N. C., 235, wherein is quoted the following from *Ferebee v. Gordon,* 35 N. C., 350, to wit: "When, therefore, in a contract of sale the vendor affirms that which he either knows to be false or does not know to be true, whereby the other party sustains a loss, and he acquires a gain, he is guilty of a fraud for which he is answerable in damages. When, therefore, sued for a deceit in the sale of an article, he cannot protect himself from responsibility by showing that the vendee purchased with all faults, if it appear that he resorted to any contrivance or artifice to hide the defect of the article or made a false representation at the time of the sale."

We are of the opinion, and so hold, that the judge of the Superior Court was in error in sustaining the exception of the defendant to the refusal of the trial judge to grant the motion for judgment as in case of nonsuit, and the case is remanded to the Superior Court for judgment in accord with this opinion.

Reversed.

STATE v. ALVIN VICK.

(Filed 23 March, 1938.)

1. Burglary § 5—

The offense of possessing implements of housebreaking without lawful excuse, C. S., 4236, does not require the proof of any "intent" or "unlawful use."

2. Burglary § 5: Criminal Law § 28b—Courts will take judicial notice of whatever is, or ought to be, generally known in the jurisdiction.

The courts will take judicial notice that nitroglycerin, soap, eye-dropper, dynamite caps, dynamite fuse, pistol cartridges, a double-barrel shotgun, a single-barrel shotgun, a sawed-off shotgun, a pair of bolt clippers, a sledge hammer, and a cold chisel, are, in combination, implements of housebreaking, and come within the term "other implement of housebreaking" used in the statute, C. S., 4236.

3. Burglary § 10—Where implements are implements of housebreaking within judicial knowledge, court need not define the term.

In this prosecution for possession of implements of housebreaking, defendant relied solely upon an alibi. The implements found by the officers were such that the court properly took judicial notice that they were implements of housebreaking, and there was no evidence of lawful excuse in the possession of the implements. *Held:* An instruction that if the jury found beyond a reasonable doubt that defendant was in possession of such tools without lawful excuse, they should return a verdict of guilty, is sufficient, C. S., 564, and will not be held for error upon defendant's contention that it failed to properly define the offense charged and the elements thereof.

APPEAL by defendant from *Williams, J.*, at August Term, 1937, of NASH. No error.

This is a criminal action in which it is charged that the defendant did unlawfully, willfully and feloniously, without lawful excuse, have in his possession certain pick-locks, keys, bits, hammers, crowbars, nitroglycerin, dynamite caps, fuses, drills, soap, shotguns, rifles, axes, and other implements for housebreaking, contrary to the form of the statute.

About 4 o'clock a. m. on a morning in May, 1935, officers of Nash County were searching for one Alfred Denton, an escaped convict. They went to the home of one Bottoms at Gold Valley and waited. They saw an automobile approach Bottoms' home and drove out to meet it with their lights off. When the officers got within 150 or 200 yards of the approaching automobile they turned their lights on. Denton was driving the approaching car and attempted to turn around. In doing so he cut the wheels in a ditch and the car was unable to move. The officers recognized this defendant in the car with Denton. As the officers approached the car Denton opened fire with a pistol. The defendant picked up a rifle and shot at them from the rear seat. He then picked up a shotgun and shot at them twice. The officers returned the fire. Whereupon Denton and Vick got out of their car and escaped, using their car as a shield.

Upon searching the car abandoned by Denton and Vick the officers found an ink bottle full of nitroglycerin, soap, eye-dropper, nine dynamite caps, dynamite fuse, pistol cartridges, a double-barrel shotgun, a single-barrel shotgun and a sawed-off shotgun, a pair of bolt clippers, a sledge hammer, cold chisel, and pistol cartridges.

Denton was apprehended within a few days and returned to the State's Prison. The officers did not know this defendant and did not see him again until July, 1937, when they recognized him in the courthouse in Nashville. The defendant was thereupon arrested, indicted, and put upon trial. The defendant set up the defense of an alibi and testified that he left Nash County in January, 1935, and did not return

to the county until February, 1936; that at the time the officers related they saw Denton, he, the defendant, was registered at the Y. M. C. A. in Fayetteville under an assumed name.

There was a verdict of guilty, and from judgment pronounced thereon the defendant appealed.

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

A. O. Dickens and Connor & Connor for defendant, appellant.

BARNHILL, J. There are no exceptions to the evidence. The defendant relies primarily upon an alleged error in the charge of the court below and the failure of the trial judge to properly define the offense charged and the elements thereof.

While the statute under which the defendant stands indicted creates three separate offenses this defendant was indicted for the violation of only one, to wit: The possession of implements of housebreaking without lawful excuse. In the court below the defendant made no contention that the tools found in the possession of Denton and the other occupant of the car were not implements of housebreaking. His defense was bottomed entirely upon an alibi. He chose this theory upon which to test his guilt or innocence before the jury. It is doubtful whether he can now challenge the sufficiency of the evidence to establish the offense charged, or contest the sufficiency of the charge of the court in that respect. Speaking to the subject in *S. v. Church*, 192 N. C., 658, *Adams, J.*, says: "The defendant excepted to the charge on the ground that the judge failed to state in a plain and correct manner the evidence in the case, and to declare and explain the law arising thereon. C. S., 564. It is insisted that no definition of larceny or of burglarious breaking was given the jury, and that the essential elements of the crimes were not explained. We have had occasion to say that a statement of the contentions of the parties, together with a simple enunciation of a legal principle is not a legal compliance with the statute. *Watson v. Tanning Co.*, 190 N. C., 840. If the charge, otherwise clear, is subject to this criticism the inadvertence was no doubt due to the fact that the defense was an alibi and the alleged impossibility of the defendant's guilt.

"The principal question had reference to the defendant's participation in the crimes rather than to their essential elements; but as to the counts on which the defendant was convicted the constituent elements were at least inferentially given in the beginning of the charge." *S. v. White*, 171 N. C., 785.

The portion of the charge to which the defendant takes exception is as follows: "This is purely a question of fact for you under your oath according to the evidence, applying the law as laid down for you. If you find from the evidence, beyond a reasonable doubt, that the defendant was an occupant of the automobile, in possession of the tools there that night without any lawful excuse, it would be your duty to return a verdict of guilty. If you have a reasonable doubt you will acquit him." The particular section of the statute under which the defendant was being tried does not require the proof of any "intent" or "unlawful use." The gravamen of the offense is the possession of burglar's tools without lawful excuse. Without regard to other portions of the charge which would tend to explain what are burglar's tools, this charge is without error if the tools found in the possession of the defendant were in fact implements of housebreaking. No lawful excuse for their possession appears from the evidence, and the defendant undertook to show none. Even if it be conceded that the burden was on the State to show that the possession was without lawful excuse, the conduct of those in the car and the circumstances under which they were in possession of the tools leave only one reasonable conclusion to be drawn from the evidence and that is that their possession of the tools was without lawful excuse.

The particular tools enumerated in the pertinent statute are: "Any pick-lock, key, bit, or other implement of housebreaking." No pick-lock, key, or bit was found. If the tools found in the possession of the defendant are embraced within the general term, "other implement of housebreaking," their possession without lawful excuse is prohibited by the statute. The bill of indictment listed in detail the articles found, so the defendant was not taken unaware.

There are many facts of which the court may take judicial notice, and they should take notice of whatever is, or ought to be, generally known within the limits of their jurisdiction, for justice does not require that courts profess to be more ignorant than the rest of mankind. 15 R. C. L., 1057. It is not unusual for the court to take judicial notice that certain weapons not specifically described in the statute are deadly weapons. They likewise take notice of other like generally known facts. While each of the articles found in the possession of the defendant has its legitimate use, it cannot be said that taken in combination these articles are tools of any legitimate trade or calling. There is no legitimate purpose for which this defendant and his companion could have the combination of articles found in their possession. On the other hand, taken in combination, they are the instruments and tools usually possessed and used by housebreakers. Section 4237-A expressly recognizes nitroglycerin, dynamite, gunpowder, and other explosives as in-

struments of housebreaking. It is well known that soap and eye-droppers are instruments used by those who seek to make unlawful entry into safes and vaults through the instrumentality of nitroglycerin. Likewise, dynamite fuse and dynamite caps constitute a part and parcel of the equipment of those engaged in such enterprises, just as are bolt clippers, sledge hammers, and cold chisels a part of their equipment. Such persons also frequently go armed. What excuse in connection with a legitimate enterprise could the defendants offer for being armed with a rifle, a pistol, a double-barrel shotgun, a single-barrel shotgun, and a sawed-off shotgun loaded with buck shot? It would seem to us that we would have to appear to be willfully ignorant to fail to take notice of the fact that these articles and implements found in the possession of the defendant are tools of housebreaking. If they are, then there was no error in the charge. The court assumed, as it had a right to assume, and it took notice of the fact, that the articles found were implements of housebreaking. There was no evidence of any lawful excuse for the possession of such implements and the court was, therefore, fully justified in instructing the jury that if they found in fact the defendant was in possession of these implements without lawful excuse they should return a verdict of guilty.

The following implements in combination are held to be implements of housebreaking: Nitroglycerin fuse and a detonating cap. *S. v. Boliski,* 145 N. W. 368, 50 L. R. A., N. S. 825. One sectional jimmy, one small jimmy, two pairs of handcuffs, steel drills, one spatula, one push screw, drills, divers and sundry steel wedges, one extension bit, one bit lock, one bellows, tin spouts, one piece of rubber hose, pieces of fuse, powder, and two dark lanterns. *Com. v. Day,* 138 Mass., 186. A rubber bag of nitroglycerin, fuses, and revolvers. *Com. v. Conlin,* 188 Mass., 282. Drills, caps, jimmys, and dynamite. *People v. Reilly,* 63 N. Y. Supp., 18; affirmed in 164 N. Y., 600. In *S. v. Boliski, supra,* it is said: "It is considered that the bottle of nitroglycerin with the fuse and detonating cap clearly answer to the calls of the statute for a "tool, machine, or implement" adapted to the particular use mentioned therein, designed to that end, and intended to be used therefor."

We are of the opinion that the implements found in the possession of this defendant, when considered in combination, clearly come within the calls of C. S., 4236.

We can find no sufficient cause for disturbing the verdict and judgment below.

No error.

AUSTIN HOGSED v. H. PEARLMAN, TRADING AND DOING BUSINESS AS PEARLMAN'S RAILROAD SALVAGE COMPANY.

(Filed 23 March, 1938.)

1. Process § 3: Pleadings § 22—Motion to amend by substituting name of corporation for name of individual defendant held properly denied.

Plaintiff instituted this action by service of summons on an individual defendant. Prior to the accrual of the cause of action the business property of defendant, including the truck causing the damage complained of, was transferred to a corporation, defendant becoming secretary-treasurer of the corporation, and plaintiff had knowledge of the name and existence of the corporation, but caused process to be served and pleadings drawn against the individual defendant through inadvertence. *Held:* Plaintiff's motion to amend process and pleading by substituting the name of the corporation for the name of the individual defendant was properly denied, C. S., 547, since the corporation is a separate entity and may not be brought into the court without service of process. *Clevenger v. Grover*, 212 N. C., 13, cited and distinguished in that the amendment therein was a correction of the name of the corporation which had been duly served with summons.

2. Appeal and Error § 37b—

The denial of a motion to amend, being a matter within the sound discretion of the trial court, is not reviewable on appeal except in case of manifest abuse of discretion.

3. Same: Appeal and Error § 38—

It will be presumed on appeal that the court's ruling upon a matter resting in his discretion was properly based upon his discretionary power when the record does not affirmatively show that appellant's motion was denied as a matter of law or from want of power.

APPEAL by plaintiff from *Alley, J.*, at December Term, 1937, of TRANSYLVANIA. Affirmed.

Motion to amend the summons and complaint by striking out the words "H. Pearlman, Trading as Pearlman's Railroad Salvage Company," and substituting in place thereof the words "Pearlman's Railroad Salvage Company, Incorporated," in the summons and complaint. The motion was denied, but the court entered order that Pearlman's Railroad Salvage Company, Incorporated, be made party defendant and that plaintiff be allowed to file additional or amended pleadings. Plaintiff appealed.

Ralph H. Ramsey, Jr., for plaintiff, appellant.
J. M. Horner, Jr., for defendant, appellee.

DEVIN, J. This appeal presents for review the ruling of the court below denying plaintiff's motion to amend process and pleading by sub-

stituting for the name of the individual defendant sued (H. Pearlman, Trading as Pearlman's Railroad Salvage Company) the name of Pearlman's Railroad Salvage Company, Incorporated, as the party defendant, without the issuance of process for the named corporation. The court below, however, in denying the plaintiff's motion to amend, entered an order making Pearlman's Railroad Salvage Company, Incorporated, a party defendant, with leave to the plaintiff to file additional or amended complaint. But the plaintiff contends that he was entitled to have the court, by amendment to the summons and complaint and by substitution of the name of Pearlman's Railroad Salvage Company, Incorporated, as party defendant, bring the corporation into court without the issuance of summons therefor.

The facts as they appear from the pleadings and the findings of the trial judge were substantially these:

On 7 June, 1937, plaintiff caused summons to issue for H. Pearlman, Trading as Pearlman's Railroad Salvage Co., and on 7 August, 1937, filed complaint alleging a cause of action against the named defendant for negligent operation of a truck on 8 September, 1934, causing injury to the plaintiff. Summons and complaint were served on defendant H. Pearlman on 9 August, 1937, as found by the court, "by reading the within summons and delivering a true copy of the verified complaint on the within named defendant." Answer was filed by H. Pearlman, 13 September, 1937, containing general denial of the allegations of negligence. Motion to amend process and pleading was filed 10 December, 1937.

It was found by the court that prior to 1933 H. Pearlman had been carrying on business under the name of Pearlman's Railroad Salvage Company, but that in 1933, in order to obtain new capital, a corporation was duly organized by the name of Pearlman's Railroad Salvage Company, Incorporated, which took over the business, and issued one hundred and fifty-one shares of capital stock, of which H. Pearlman owned three shares, H. Pearlman becoming secretary and treasurer of the corporation; that the truck, the operation of which it is alleged caused injury to plaintiff, was, with other property, in 1933, transferred to said corporation. It was admitted by plaintiff and found by the court that plaintiff was aware of the transfer of the property to the corporation, but by inadvertence had summons issued and complaint filed against the individual defendant, H. Pearlman, and was not misled by this defendant or by the corporation.

The power of the court under C. S., 547, to amend process and pleading was recently considered by this Court in *Clevenger v. Grover,* 212 N. C., 13. There the summons was issued against the "Knott Hotel Company," whereas the corporation intended to be sued was "Knott

Management Corporation," and proper service of process was had upon the agent of the latter corporation. The ruling of the judge of the Superior Court in that case in allowing the amendment to substitute the correct name was affirmed by this Court, citing *Gordon v. Gas Co.*, 178 N. C., 435, 100 S. E., 878 (Pintsch Gas case), and other cases of similar import. But distinction was there drawn between the holding in that case and the principle set forth in *Jones v. Vanstory*, 200 N. C., 582, 157 S. E., 867, and *Plemmons v. Imp. Co.*, 108 N. C., 614, 13 S. E., 188. In the last named cases, in which individuals were sued and it was sought by amendment to bring in the corporation with which the individuals were connected without the issuance and service of summons on the corporation, it was held that the corporation could not be brought into court "in this shorthand manner by amendment" without the service of process. In *Bray v. Creekmore*, 109 N. C., 49, 13 S. E., 723, it was said: "If the amended summons adds a new defendant, it must be served on such defendant."

In *Plemmons v. Imp. Co., supra*, the summons, as issued and served, named "A. H. Bronson, President of the Southern Improvement Co.," as party defendant. This Court held that the superadded words, "President of the Southern Improvement Co.," were mere *descriptio personæ*, and that, while it was "competent for the court to make the Southern Improvement Co. an additional party, or substitute it as sole party defendant, . . . it could not bring the Southern Improvement Co. in as a party defendant to the action, without its consent, except by causing amended summons to be served on it."

The plaintiff is seeking by this motion not to correct a mistake in the name of a party, nor to show the true name of a party when there was a misnomer (*Barnhardt v. Drug Co.*, 180 N. C., 436, 104 S. E., 890; *Lane v. R. R.*, 50 N. C., 25), but to add by substitution as a party defendant one who has never been served with summons. While the individual defendant sued had been doing business for several years prior to the institution of this action and prior to the organization of the corporation, using a name similar to that of the corporation, the latter was a new and separate entity, and the plaintiff was aware of the fact that the corporation had previously taken over the business, including the offending truck, and knew its corporate name. As was said in *Camlin v. Barnes*, 50 N. C., 296, the effect of the order of substitution, if allowed, "would be to make, not amend, process." It would effect a material change in the parties and the statement of the cause of action. *Trust Co. v. Williams*, 209 N. C., 806, 185 S. E., 18.

Furthermore, it has been uniformly held that the denial of a motion to amend, being a matter within the sound discretion of the trial court, is not reviewable upon appeal except in case of manifest abuse of discre-

tion. *Temple v. Tel. Co.*, 205 N. C., 441, 171 S. E., 630; *Gordon v. Gas Co.*, 178 N. C., 435, 100 S. E., 878. The ruling of the court below in the instant case is couched in the following language: "Whereupon the court, being of opinion that the substitution of the name of Pearlman's Railroad Salvage Company, Incorporated, would result in a change of parties to the action and involve the statement of allegations for the new cause of action, the motion of plaintiff is denied."

While it does not affirmatively appear in the above quoted language that the ruling was based upon discretion alone, neither does it appear that the court denied the motion as a matter of law without the exercise of discretion (*Tickle v. Hobgood*, 212 N. C., 762), nor for want of power. The ruling of the court below in the consideration of an appeal therefrom is presumed to be correct. 3 Am. Jur., sec. 925; *Brown v. Sheets*, 197 N. C., 268, 148 S. E., 233.

We conclude that there was no error in the denial of plaintiff's motion, and that the judgment must be

Affirmed.

STATE v. A. M. ADAMS.

(Filed 23 March, 1938.)

1. Highways §§ 14, 16—Evidence held to sufficiently establish cartway for purpose of prosecution for destroying cartway bridge.

The State's evidence tended to show the institution of proceedings in the Superior Court to establish cartway over lands purporting to belong in severalty to Indians, judgment of confirmation in said proceeding, establishing the cartway, from which no appeal was taken. *Held:* The evidence sufficiently establishes the existence of the cartway for the purpose of this prosecution of defendant for destroying a bridge of said cartway, the Secretary of the Interior not being a necessary party to the proceeding to establish the cartway, and the presumption of jurisdiction arising from the fact that a court of general jurisdiction acted in the matter not having been rebutted, an opinion of the Circuit Court of Appeals, dealing with the same cartway, being insufficient to rebut the presumption in view of the fact that the present parties were not parties to that action, and the record in that case upon which the opinion was based not being before the Court on this appeal, and the invalidity of the proceeding establishing the cartway not being apparent on the face of the present record.

2. Judgments § 26—

A *prima facie* presumption or rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in the matter.

3. Highways § 14—

The Secretary of the Interior is not a necessary party in a proceeding to establish a cartway over lands belonging to Indians in severalty or to an Indian band.

4. Criminal Law § 81b—

The burden is upon defendant upon appeal from conviction to show not only that error was committed in the trial, but that the alleged error was prejudicial.

5. Cartways § 16—

The fact that the validity of a proceeding establishing a cartway over Indian lands might be questioned by the United States in a direct proceeding is no defense to a prosecution for destroying a bridge of the cartway, since the proceeding to establish the cartway may not be collaterally attacked.

6. Judgments § 22—

Only void judgments are subject to collateral attack.

7. Criminal Law § 6—Person asserting immunity from prosecution as a Federal officer must establish such immunity.

A person asserting immunity from prosecution as an officer of the United States must establish such immunity, and in this prosecution of a Farm Agent for Indian lands for destroying a cartway bridge on such lands, *held*, the evidence fails to establish that the act was done under authority of the United States or in pursuance of defendant's duties as Farm Agent.

8. Criminal Law § 52b—

On a motion to nonsuit, the evidence is to be considered in its most favorable light for the prosecution.

9. Same—Sufficiency of evidence to be submitted to the jury.

Evidence which tends to prove the fact of guilt or which reasonably conduces to that conclusion as a fairly logical and legitimate deduction, should be submitted to the jury, but the court should direct a nonsuit or an acquittal upon evidence which raises a mere suspicion or conjecture of guilt.

10. Indians § 4—

The criminal laws of the State are applicable to offenses committed within an Indian Reservation within the borders of the State.

APPEAL by defendant from *Sink, J.*, at September Term, 1937, of GRAHAM.

Criminal prosecution tried upon indictment charging the defendant (1) with destroying a cartway bridge, and (2) with hindering the construction of a cartway in Graham County.

The State offered evidence tending to show:

1. Proceeding in the Superior Court of Graham County, instituted 7 May, 1935, to establish cartway over certain lands of the respondents, John Teseteskey, Solomon Bird, and the Eastern Band of Cherokee

Indians of North Carolina, including Tracts 404 and 405 of the Indian Lands. Judgment of confirmation in said proceeding, establishing the cartway, was entered 24 June, 1935. There was no appeal from this judgment.

2. Destruction of cartway bridge by defendant and circumstances under which this was done.

3. It was agreed that the tracts of land on which the bridge was located and over which the cartway was laid out were tracts of Indian lands, and were conveyed to the United States of America, in trust for allotment to the Indians in severalty, by deed bearing date 21 July, 1925, executed by the Eastern Band of Cherokee Indians of North Carolina pursuant to resolution duly adopted in open council by the members of said band.

In 1934 Congress passed the Wheeler-Howard Act of 18 June, 1934, providing that "No land of any Indian reservation created or set apart by treaty or agreement with the Indians, Act of Congress, executive order, purchase or otherwise shall be allotted in severalty to an Indian." 25 U. S. C. A., sec. 461.

4. There was no denial of defendant's testimony that he was "Farm agent of the Cherokee Indian Agency," with duties of "farming and looking after the farm lands of the reservation."

The jury returned a general verdict of "Guilty"; whereupon judgment was rendered that the defendant pay a fine of $25.00 and the costs incurred.

Defendant appeals, assigning errors, relying principally upon his demurrer to the evidence or motion for judgment of nonsuit under C. S., 4643.

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

Charles E. Collett, Raymond T. Nagle, Julius Martin, II, Tyre Taylor, and Wm. H. Churchwell for defendant.

STACY, C. J. The first question for decision is whether the State has offered evidence sufficient to show the establishment of a cartway over the lands in question. We agree with the trial court that the proof adduced on the hearing supports the present prosecution. *S. v. Joyce,* 121 N. C., 610, 28 S. E., 366; *S. v. Witherspoon,* 75 N. C., 222.

In the first place, a *prima facie* presumption of rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in the matter. *Downing v. White,* 211 N. C., 40, 188 S. E., 815; *King v. R. R.,* 184 N. C., 442, 115 S. E., 172; *Starnes v. Thompson,* 173 N. C., 466, 92 S. E., 259; *Wood v. Sugg,* 91 N. C., 93; *Harvey v. Tyler,* 69 U. S., 328;

Dean v. Brown, 261 Ky., 593, 88 S. W. (2d), 298; *Horn v. Metzger,* 234 Ill., 240, 84 N. E., 893; 15 R. C. L., 884; 34 C. J., 537. There is nothing on the present record to overturn this presumption. It was not necessary that the Secretary of the Interior should appear as a party to the proceeding. 25 U. S. C. A., sec. 311.

Secondly, it is in evidence that John Teseteskey and Solomon Bird, respondents in the cartway proceeding, were in possession of the Indian lands over which the cartway was laid out, Tracts 404 and 405, claiming them as their own. Whether the claim of either was by allotment from the United States, under the trust deed of 21 July, 1925, with full power of alienation, does not appear. At any rate, the invalidity of the cartway proceeding is not apparent on the face of the record. *Fort Leavenworth R. R. Co. v. Lowe,* 114 U. S., 525; *U. S. v. Chicago,* 48 U. S., 185. See latest expression of the Supreme Court of the United States in *U. S. v. McGowan,* 82 L. Ed., 305.

It is true the defendant proffered as evidence the opinion of the Circuit Court of Appeals in the case of *U. S. v. Colvard,* 89 Fed. (2d), 312, dealing with this same cartway, but neither of the parties here was a party there, and the record in that case, upon which the court's opinion was based, is not before us. Hence, under our settled procedure, *Newbern v. Hinton,* 190 N. C., 108, 129 S. E., 181, the exception cannot be sustained. This was the only evidence offered to rebut the presumption of jurisdiction and its rightful exercise. *Townsend v. Townsend,* 4 Caldwell, 70, 94 Am. Dec., 184.

Moreover, conceding that the United States in a direct proceeding brought for the purpose might question the validity of this cartway, *U. S. v. Minnesota* (Circuit Court of Appeals, Eighth Circuit, 12 March, 1938), if Congress has not disavowed the trust, 25 U. S. C. A., sec. 461, still it is not perceived upon what footing this could avail the defendant in a collateral attack here. *S. v. Yoder,* 132 N. C., 1111, 44 S. E., 689. The United States is not a party to the prosecution, and the suggested voidableness of the cartway proceeding is no defense to the present action. *Non constat* that a proceeding, voidable as to some third person, is not to be taken as valid in a criminal prosecution against another. *S. v. Smith,* 100 N. C., 550, 6 S. E., 251.

Only void judgments are subject to collateral attack. *Downing v. White, supra; Harrell v. Welstead,* 206 N. C., 817, 175 S. E., 238; *King v. R. R., supra.*

The second question presented by the appeal is whether the defendant is immune from prosecution as an officer of the United States. The record fails to establish such immunity. *Vinson v. O'Berry,* 209 N. C., 287, 183 S. E., 423; *Philadelphia Co. v. Stimson,* 223 U. S., 605; *Isaac v. Googe,* 284 Fed., 269; *In re Waite,* 81 Fed., 359.

There is no evidence that the defendant in destroying the bridge in question was acting under authority of the United States or in pursuance of his duties as farm agent. *Isaac v. Googe, supra.* One who seeks to defend on the ground of sovereign immunity must show his authority. *Poindexter v. Greenhow,* 114 U. S., 270; *Kneedler v. Lane,* 45 Pa., 238.

The practice is now so firmly established as to admit of no questioning that, on a motion to nonsuit, the evidence is to be considered in its most favorable light for the prosecution. *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669. And further, 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; otherwise not, for, short of this, the judge should direct a nonsuit or an acquittal in 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. McLeod,* 198 N. C., 649; *S. v. Blackwelder,* 182 N. C., 899, 109 S. E., 644.

The remaining exceptions are too attenuate to require elaboration. They cannot be sustained under familiar principles and authorities.

It is freely conceded that the criminal laws of the State are applicable to offenses committed within the Indian Reservation. *Utah Power & Light Co. v. U. S.,* 243 U. S., 389; *U. S. v. McBratney,* 104 U. S., 621.

On the record, as presented, the verdict and judgment will be upheld.

No error.

M. BUCHANAN, JR., v. CAROLINA MORTGAGE COMPANY, CAROLINA DEBENTURE CORPORATION, AND KESWICK CORPORATION, TRUSTEE.

(Filed 23 March, 1938.)

1. Mortgages § 30d—

A mortgagor may not enjoin foreclosure on the ground of usury unless he tenders the amount of the debt with legal interest, the mortgagor not being entitled to invoke the forfeiture or penalty for usury in such action, since it is required that "he who seeks equity must do equity."

2. Same—

A temporary order restraining foreclosure should not be continued to the hearing upon a tender only of the amount of the debt after deducting the penalty for usury, since in such case the penalty for usury may not be invoked.

3. Same—Tender of amount of debt.

A tender of the amount of the debt after deducting the penalty for alleged usury plus a "tender" in the complaint of any amount which may be found due upon a proper accounting, is insufficient to support an order continuing the temporary restraining order, the "tender" in the complaint amounting to nothing more than an assertion of willingness and ability to pay, which is insufficient to constitute a legal tender.

APPEAL by defendants from *Sink, J.*, at Chambers, 8 December, 1937. From JACKSON. Reversed.

This was an action to restrain the sale of plaintiff's property under the power contained in a deed of trust thereon, executed by plaintiff to secure a loan from the defendants.

The plaintiff pleaded usury, and alleged that by reason of the resulting forfeiture of all interest the balance due on the debt had been reduced to $199.13, and plaintiff tendered that amount in satisfaction. Defendants, answering, denied the usury and alleged that the original loan to plaintiff was in the amount of $10,000, and that allowing plaintiff credit for all payments, and calculating interest at six per cent by the proper partial payments method, and charging plaintiff for advances to pay insurance and taxes, the balance due on the debt was $4,344.50.

His Honor continued the temporary restraining order to the hearing, finding that there was a controversy as to the amount due, and that plaintiff had paid to the clerk of the court the amount plaintiff contended was due ($199.13), and had in his complaint made tender of any amount found upon proper accounting to be due the defendants.

The defendants excepted to the judgment continuing the restraining order to the hearing and appealed.

Edwards & Leatherwood for plaintiff.

W. G. Mordecai, Dan K. Moore, and Heloise Denning for defendants.

DEVIN, J. The appellants rest their case under the shadow of the ancient maxim of the law that "he who seeks equity must do equity."

One who obtains a loan from another and executes a mortgage or deed of trust on his property to secure the payment of the debt may not be heard in a court of equity to enjoin the sale of his property for the nonpayment of his debt on the ground of usury until he has first paid or tendered the amount of his debt with interest at the legal rate. He must pay or tender payment of his just debt before a court of equity will come to his relief. *Waters v. Garris*, 188 N. C., 305, 124 S. E., 334; *Edwards v. Spence*, 197 N. C., 495, 149 S. E., 686; *Wilson v. Trust Co.*, 200 N. C., 788, 158 S. E., 479; *Mortgage Corp. v. Wilson*, 205 N. C., 493, 171 S. E., 783; *Jonas v. Mortgage Co.*, 205 N. C., 89, 170 S. E., 127;

Kenny Co. v. Hotel Co., 208 N. C., 295, 180 S. E., 697; *Dennis v. Redmond*, 210 N. C., 780, 188 S. E., 807.

In *Waters v. Garris, supra*, it was said: "It is the established law of this jurisdiction that when a debtor, who has given a mortgage to secure the payment of a loan, comes into equity, seeking to restrain a threatened foreclosure under the power of sale in his mortgage, as a deliverance from the exaction of usury, he will be granted relief and allowed to have the usurious charges eliminated from his debt only upon paying or tendering the principal sum with interest at the legal rate, the only forfeiture which he may thus enforce being the excess of the legal rate of interest. *Corey v. Hooker*, 171 N. C., 229; *Owens v. Wright*, 161 N. C., 127. This ruling which has been established by an unbroken line of precedents, beginning with *Taylor v. Smith*, 9 N. C., 465, and running through a multitude of cases down to our latest decision in *Adams v. Bank*, 187 N. C., 343, is based upon the principle that he who seeks equity must do equity."

In the case at bar there does not seem to be any material difference between the parties as to the amount the plaintiff received as a result of the loan secured by the deed of trust on his property. There is no dispute as to the number, amounts and dates of plaintiff's payments on his loan. The sums paid out by the defendants for taxes and insurance on plaintiff's property are not controverted. The balance on the debt, therefore, would seem to be largely a matter of computation. But the plaintiff invokes the penalty of forfeiture of all interest for the usury alleged to have been charged, and calculates he only owes $199.13, while the defendants, after deducting payments and adding advances and calculating interest at the legal rate, say the balance is $4,344.50.

The court below continued to the hearing the order restraining the sale of plaintiff's property under the deed of trust, and the appeal presents for review the correctness of his ruling.

In support of his ruling the judge of the Superior Court recited in his judgment that there was a controversy as to the balance due on the debt, and that plaintiff had paid into court the amount he claimed was due, to wit, $199.13, and that he had in his complaint tendered any amount found upon proper accounting to be due defendants. However, from an examination of the complaint as it appears in the record, it seems that the plaintiff has tendered no amount save the $199.13, which is the remainder after deducting the penalty for usury, though he avers that he is ready, able, and willing to pay any amount ascertained to be due on said loan. He merely asserts his ability and willingness to pay whatever may be determined by the court at the end of a lawsuit, still maintaining his right to enjoin the sale by tendering in satisfaction of his debt an amount less than the defendants have advanced for the payment

of the taxes on his property. He claims the remainder of his debt has been cancelled by the penalty for alleged usury. He has not brought himself within the rule laid down in *Waters v. Garris, supra*, and *Edwards v. Spence, supra*.

We are of opinion, and so decide, that the judge below was in error in continuing the restraining order. Under the present showing the defendants were entitled to have the restraining order dissolved.

Reversed.

JAMES P. TOMBERLIN v. O. O. BACHTEL.

(Filed 23 March, 1938.)

1. Gaming § 1—Slot machine is illegal under laws of 1935 if the result of its operation is affected by the element of chance.

Under the provisions of ch. 37 and ch. 282, Public Laws 1935, a slot machine which may or may not return to the operator a thing of value is illegal if the result of its operation is affected by the element of chance so that the operator cannot predict the result in advance, and an instruction that a slot machine is illegal if the result of its operation is not dependent wholly or in part upon practice or skill *is held* erroneous as charging in effect that a machine would not be illegal if the result of its operation is dependent in any degree upon the skill of the operator.

2. Appeal and Error § 41—

When a new trial is awarded on one exception, other exceptive assignments of error need not be considered.

APPEAL by defendant from *Johnston, J.*, at November Term, 1937, of BUNCOMBE. Reversed.

This was an action to recover damages for breach of contract relative to the ownership and operation of certain slot machines, instituted in the general county court of Buncombe County.

From judgment in the general county court on verdict for plaintiff the defendant appealed to the Superior Court, assigning errors in the trial. In the Superior Court all defendant's assignments of error were overruled and the judgment of the general county court affirmed.

From the judgment of the Superior Court the defendant appealed to the Supreme Court, preserving the exceptions noted in the trial court.

DuBose & Orr for plaintiff, appellee.
Jones, Ward & Jones for defendant, appellant.

DEVIN, J. This is the same case which was considered by this Court at Spring Term, 1937, and is reported in 211 N. C., 265. The action

related to the operation of slot machines, and the defendant pleaded that the machines, for the operation of which the contract sued on was alleged to have been made, were illegal gambling machines as defined by the statutes and the decisions of this Court.

One of the material issues submitted to the jury was the following:

"Was the contract sued on illegal in that it constituted a gambling transaction as condemned by law?" Upon this issue the trial judge charged the jury as follows:

"Gentlemen, if you find from the evidence, by the greater weight of the evidence, that the machines and tables which were placed out and operated by the defendant and the plaintiff or any of them were operated in such way that the operator depended entirely upon chance, that the result of the operation was not predictable or determinable by him in advance, was not dependent wholly or in part upon the skill and practice of the operator, and that the result of the operation would pay the operator something in the way of value, slug or token or merchandise, or the right to play the machine again, those two things concurring, if the defendant has satisfied you by the greater weight of the evidence in this case that, first, that the result of the play was unpredictable to the operator or that it was not dependent wholly or in part upon practice and skill of the operator, and second, that the result of the operation might or might not pay the operator something of value, such as I have described to you, then you would answer this issue 'Yes,' but if you are not so satisfied and find that the play of the machine was dependent wholly or in part upon the skill and practice of the operator, and that it did not pay a thing of value, even though it paid upon chance, then you would answer this issue 'No.'"

The statutes defining illegal slot machines, prohibiting their operation and rendering unlawful any agreement with reference to their use (ch. 37 and ch. 282, Public Laws 1935) were in force at the time of the transactions to which this action relates. These statutes were considered by this Court in *S. v. Humphries,* 210 N. C., 406, 186 S. E., 473. In that case it appeared that in the operation of the slot machine, by reason of the element of chance, the result was unpredictable, and that the operator could not predict in advance whether he would receive something or nothing. The defendant offered to show that the skill of the operator had something to do with the result. This evidence was excluded by the trial judge, and on appeal this ruling was affirmed by this Court, and in construing the pertinent statutes the Court used this language: "If the machine is rendered unlawful by reason of the fact that the element of chance is present, and that from its operation the result is unpredictable, its unlawfulness is not affected by the further fact that the machine may also sell merchandise or present entertainment, dis-

connected from such element of chance, or when the outcome is not dependent on skill." *Hinkle v. Scott*, 211 N. C., 680.

In his charge in the instant case the trial judge instructed the jury that, before they could find that the slot machines were illegal and thus answer the issue in favor of the defendant, they must find that the result of the operation of the machines was unpredictable to the operator, "or that it was not dependent wholly or in part upon the practice and skill of the operator." This portion of the charge is subject to the criticism that in effect the jury was instructed that, in order to establish the illegality of the slot machines, it must be found that the result of their operation was not dependent to any extent upon the skill or practice of the operator—that is, that the result was unaffected by the element of skill. The language in which the instruction on this point was couched was tantamount, therefore, to instructing the jury that the slot machines would not be illegal if the result of their operation was to any extent dependent on the skill of the operator, notwithstanding the fact that by reason of the element of chance the result was unpredictable and the operator might or might not receive something of value. In this there was error.

We conclude that the defendant's exception to the instruction given the jury on the quoted issue should have been sustained.

As this requires a new trial we deem it unnecessary to discuss the other exceptions noted at the trial and brought forward in defendant's assignments of error. The judgment of the Superior Court is reversed, with direction that the cause be remanded to the general county court for a new trial.

Reversed.

MABEL L. ROUNTREE v. ALBERT E. ROUNTREE, JR., ET AL.

(Filed 23 March, 1938.)

1. Wills § 1—

A paper writing in the handwriting of deceased, found among his valuable papers after his death, and bearing upon its face the *animus testandi*, will be declared his will as a matter of law.

2. Wills § 3—Paper writing in this case held to disclose the animus testandi which fixes the character of the instrument as a will.

A letter in the handwriting of deceased, found among his valuable papers, directed to his lawyer kinsman and asking him "to take charge" of his affairs and "arrange so Mable (the writer's wife) can carry on. Everything is left to her," *is held* to disclose the *animus testandi* and to constitute the will of the writer, the letter not having been mailed, but

placed among the writer's valuable papers, and the addressee being a person whom the writer would naturally designate to handle his estate.

3. 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.

APPEAL by respondents from *Frizzelle, J.*, at February Term, 1938, of LENOIR.

Proceeding under Declaratory Judgment Act, ch. 102, Public Laws 1931, to determine character of paper writing probated as a will.

Following the death of Albert E. Rountree on 3 March, 1934, there was found in his safe, among his valuable papers and effects, in a sealed envelope, written wholly in his own hand, a paper writing in the form of a letter addressed to his kinsman, Honorable George Rountree, Wilmington, N. C., attorney at law and former judge, in words and figures as follows:

"10 January, 1930.

HON. GEO. ROUNTREE,
Wilmington, N. C.

"DEAR COUSIN GEO.:—My affairs are in bad shape and I am in bad health. If managed properly there is enough to keep my family from want. Will you please take charge and arrange so Mable can carry on.

"Everything is left to her.

"Please do this for me.

Sincerely,
ALBERT E. ROUNTREE."

Upon the discovery of this letter the same was probated in common form as the last will and testament of the deceased.

The deceased left him surviving his widow, Mabel L. Rountree, petitioner herein, and four children parties hereto.

At the time of decedent's death he was tenant in common with Sallie R. Crisp and Rosabel R. Cowper of a tract of land in Lenoir County, each being seized of a one-third undivided interest therein.

Mabel L. Rountree, the person designated in the above paper writing as "Mable," and who claims as sole beneficiary and devisee thereunder, has suggested a voluntary division and partition of said tract of land, and the other tenants in common have consented to join with her in the execution of partition agreement or divisional deeds "in the event the petitioner shall be judicially declared to be the owner of a one-third undivided interest therein, . . . but defendants have questioned the validity of the paper writing quoted above as the last will and testament

of Albert E. Rountree, deceased," and for the purpose of obtaining the desired judicial declaration the respondents deny that the petitioner is the owner of a one-third undivided interest in the land in question.

The court being of opinion that said paper writing "appears to have been written *animo testandi*, and, on its face, is a valid will," entered judgment approving the voluntary partition, from which the respondents have appealed.

Charles F. Rouse for petitioner, appellee.
Albert W. Cowper for respondents, appellants.

STACY, C. J. On the hearing the matter was properly made to turn on whether the paper writing, which has been probated in common form as the last will and testament of Albert E. Rountree, deceased, is sufficient in character and substance to constitute his will. The trial court ruled in favor of its sufficiency on authority of *Wise v. Short*, 181 N. C., 320, 107 S. E., 134. With this we agree.

A paper writing which bears upon its face, as the present instrument does, the *animus testandi* of the maker will be declared his will as a matter of law. *In re Will of Rowland*, 206 N. C., 456, 174 S. E., 284; *In re Will of Ledford*, 176 N. C., 610, 97 S. E., 482; *Outlaw v. Hurdle*, 46 N. C., 150. Indeed, when the testamentary intent appears on the face of a paper writing its character is fixed. *In re Southerland*, 188 N. C., 325, 124 S. E., 632.

In the instant case the writer was in bad health. He wanted his kinsman, a lawyer and former judge, "to take charge" of his affairs "and arrange so Mable can carry on. Everything is left to her." This is dispositive language. *Spencer v. Spencer*, 163 N. C., 83, 79 S. E., 291. The communication was addressed to one to whom the writer would naturally turn for counsel and advice in the settlement of his estate, but would hardly have asked "to take charge" of his affairs during his lifetime. He knew that after his death proper management would be necessary to preserve his estate, so he requested his kinsman, who was eminently capable of fulfilling the trust, to "arrange so Mable can carry on," as everything is left to her. This means that at the writer's going or demise "everything is left to her." He undoubtedly intended the letter as his will. He did not mail it, but placed it in his safe among his valuable papers. "Please do this for me" was his final request. The writing is testamentary in character. *In re Rowland*, 202 N. C., 373, 162 S. E., 897.

One definition of a will is that it 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 disposi-

tion. *Richardson v. Cheek*, 212 N. C., 510. The paper writing in question seems to meet this test. *In re Will of Thompson*, 196 N. C., 271, 145 S. E., 393; *In re Johnson*, 181 N. C., 303, 106 S. E., 841. Nothing was said in *In re Bennett*, 180 N. C., 5, 103 S. E., 917, or in *In re Perry*, 193 N. C., 397, 137 S. E., 145, which militates against this position.

The judgment is approved.

Affirmed.

ANNE B. JOHNSTON v. ALEXANDRIA G. JOHNSTON.

(Filed 23 March, 1938.)

1. Husband and Wife § 34—

In this action by a married woman against her mother-in-law for alienation of the affections of plaintiff's husband, the evidence *is held* sufficient to be submitted to the jury.

2. Husband and Wife § 32—Parent must act in good faith in regard to marital relations of child.

The relation of parent and child justifies the parent in giving the child counsel and advice in regard to the child's marital relations so long as the parent acts in good faith, but the injured spouse may maintain an action for alienation when the parent acts with malice in breaking up the marital relation.

3. Husband and Wife § 36—Loss of support is proper element of damage in action for alienation.

Loss of support or assistance is a proper element of damage in an action for alienation, but plaintiff must introduce some evidence of the value of support of which she was deprived in order for it to be included in the award, and the instruction on this issue in this case *is held* not objectionable on the ground that it failed to limit recovery to the present cash value of future assistance, there being no reference in the charge to any future loss of assistance.

4. Damages § 14: Appeal and Error § 37b—

Objection on the ground that the verdict awarded excessive damages rests in the sound discretion of the trial court, and a verdict will not be disturbed on appeal in the absence of abuse of discretion or some error of law or legal inference in connection therewith.

APPEAL by defendant from *Johnston, J.*, at August Term, 1937, of BUNCOMBE.

Civil action for alienation of affections.

The complaint alleges a cause of action by a daughter-in-law against her mother-in-law for alienation of her husband's affections. Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Did the defendant, Mrs. Alexandria G. Johnston, maliciously alienate the affections of the plaintiff's husband and cause him to abandon his wife, the plaintiff, as alleged in the complaint? Answer: 'Yes.'

"2. If so, did the defendant, Alexandria G. Johnston, act from personal ill will towards the plaintiff or wantonly or oppressively or from reckless indifference to her rights? Answer: 'Yes.'

"3. What amount, if any, of compensatory damages is the plaintiff entitled to recover of the defendant, Mrs. Alexandria G. Johnston? Answer: '$10,000.'

"4. What amount, if any, of punitive damages is the plaintiff entitled to recover of the defendant, Mrs. Alexandria G. Johnston? Answer: 'None.'"

From judgment on the verdict the defendant appeals, assigning errors.

Alvin S. Kartus and Beddow, Ray & Jones for plaintiff, appellee.
Jones, Ward & Jones for defendant, appellant.

STACY, C. J. A married woman sues her mother-in-law for alienation of her husband's affections and recovers $10,000. That is this case. The record is replete with a story of domestic and family infelicity. It would serve no useful purpose to repeat it here. Suffice it to say the evidence adduced on the hearing was such as to require its submission to the jury. *Cottle v. Johnson,* 179 N. C., 426, 102 S. E., 769; *Powell v. Strickland,* 163 N. C., 393, 79 S. E., 872.

In passing, it may be observed that parents occupy a different position from a stranger in these matters. They, too, have a great interest at stake. Times of stress, with their attendant solicitude on the one hand and desire for aid on the other, naturally bring parent and child together for counsel and advice. This the law condones and does not condemn. Its one requirement is good faith. As said by *Kent, Ch. J.,* in *Hutcheson v. Peck,* 5 Johns., 196, "A father's house is always open to his children; and, whether they be married or unmarried, it is still to them a refuge from evil, and a consolation in distress. Natural affection establishes and consecrates this asylum." Nor does the law deny to a child the right to appeal to its parent, in the language of Wister, actually or figuratively: "In this moment of uncertainty and doubt my heart turns intensely to thee from whom it has so often sought, from whom it has never failed to receive, support." On the other hand, the law will not tolerate peccancy, or officious intermeddling and malicious interference with the marital rights of others, either on the part of parents or any one else. The line of demarcation between the permissible and the unlawful in this connection is to be determined by the *quo animo* of the parent. The rights of parents end at the border of

good faith. The case was submitted to the jury under a charge enunciating the above principles, with the result as noted.

While some of the exceptions are not altogether free from difficulty, nevertheless, viewing the record in its entirety, the conclusion is reached that it contains no exceptive assignment of error upon which a new trial should be awarded. The case was made to turn on whether the defendant, in what she did, was actuated by natural parental regard for her son or by malice towards the plaintiff. *Hankins v. Hankins,* 202 N. C., 358, 162 S. E., 766; *Townsend v. Holderby,* 197 N. C., 550, 149 S. E., 855; *Brown v. Brown,* 124 N. C., 19, 32 S. E., 320. For valuable case on the subject, see *Multer v. Knibbs,* 193 Mass., 556, 79 N. E., 762, as reported in 9 L. R. A. (N. S.), 322, with note.

It is urged for error that in enumerating the elements of damage "loss of his assistance" was included, without limiting such future loss, if any, to its present worth or present cash value. *Lamont v. Hospital,* 206 N. C., 111, 173 S. E., 46. Without making definite ruling upon this point it is sufficient to say that no reference is made in the court's charge to any future loss of assistance. *Murphy v. Lbr. Co.,* 186 N. C., 746, 120 S. E., 342. It is established by the authorities that loss of support, if shown to be of value, is a proper element of damages in a case of this kind. *Nichols v. Nichols,* 147 Mo., 387, 48 S. E., 947; *Jenness v. Simpson,* 84 Vt., 127; *Stanley v. Stanley,* 32 Wash., 489; *Waldron v. Waldron,* 45 Fed. Rep., 315; Note 8 Ann. Cas., 815; Annotation 10, British Ruling Cases, p. 394; Keezer, Marriage and Divorce (2nd Ed.), sec. 162; 30 C. J., 1148. "In fixing the amount of damages in such a case, the jury may consider the plaintiff's loss of her husband's affections and society, the loss of his support and protection, and the injury to her feelings caused by the defendant's conduct." Third headnote, *Noxon v. Remington,* 78 Conn., 296. There must be some evidence of the value of the loss of support before it can be made an element of the award. *Rice v. Rice,* 104 Mich., 371, 62 N. W., 833. "The services, conjugal affection and society of a husband is valuable property, and, in a suit by the wife for the alienation of her husband's affections, the measure of damages is the value of the husband of whom she has been deprived." First headnote, *Daywitt v. Daywitt,* 63 Ind. App., 444.

The verdict may be excessive. However, it is the rule in this jurisdiction that in the absence of some imputed error of law or legal inference arising in connection therewith the direct supervision of verdicts is a matter resting in the sound discretion of the trial court and is not reviewable on appeal. *Cole v. R. R.,* 211 N. C., 591, 191 S. E., 353; *Goodman v. Goodman,* 201 N. C., 808, 161 S. E., 686.

Nothing appears on the record which would seem to warrant a disturbance of the judgment.

No error.

A. B. CLEGG v. LAURA CANADY AND J. T. CANADY, HER HUSBAND.

(Filed 23 March, 1938.)

1. Ejectment § 12: Judgments § 11—In action in ejectment judgment may be rendered by default final for want of bond only on a Monday.

When defendant in an action for the possession of real property fails to file the required bond the clerk is authorized to enter judgment by default final, C. S., 595 (4), on any Monday, but he is without jurisdiction to enter such judgment except on Monday, C. S., 597 (b), and such judgment entered on a Wednesday is properly set aside upon appeal to the presiding judge at term.

2. Same: Motions § 4—Negotiations, as distinguished from agreement, cannot be held to extend time for hearing of motion.

Negotiations, as distinguished from agreement of counsel, cannot be held to extend the time to a day other than a Monday for hearing a motion and entering judgment by default final for want of the required bond in an action in ejectment, and the findings of the court in this case *are held* to disclose that no definite agreement of counsel had been made.

3. Ejectment § 12—

Defendants' bond in this action for the possession of real property *held* in substantial compliance with C. S., 495, and plaintiff's objection to the form of the bond is untenable.

APPEAL from *Williams, J.*, at January Term, 1938, of LEE. Affirmed.

K. R. Hoyle for plaintiff, appellant.
Gavin & Jackson for defendants, appellees.

SCHENCK, J. This is an action for the recovery of the possession of a certain tract of land in Deep River Township in the county of Lee, and for damages for the wrongful withholding thereof.

The summons was issued and complaint filed on 27 November, 1937, and service of summons made upon the defendants the same day; answer was filed 10 December, 1937; on 27 December, 1937, the plaintiff filed motion before the clerk to strike out the answer for the reason that no defense bond was filed, and on 21 January, 1938, served notice on the defendants that he would, on Monday, 24 January, 1938, move the court to grant his motion to strike out the answer and for a judgment by default; the hearing was not had upon Monday, 24 January, 1938, but was had by the clerk on the following Tuesday, 25 January, 1938, and the motion to strike out the answer and for judgment by default was allowed on Wednesday, 26 January, 1938; and on Thursday, 27 January, 1938, defendants tendered bond. On 31 January, 1938, de-

fendants gave notice of appeal to the judge at term from the clerk's order striking out the answer and granting judgment by default; the case came on for hearing before the judge presiding at the regular January Term, 1938, of Lee County, and the judge entered judgment vacating and setting aside the order striking out the answer and granting judgment by default entered by the clerk and permitted the defendants to file the defense bond, and from this judgment of the judge the plaintiff appealed to this Court, assigning errors.

The assignment of error relied upon by the appellant is the judge's holding that the clerk was without jurisdiction to enter the judgment on Wednesday, 26 January, 1938.

In his judgment the judge found "that on 21 January, 1938, notice, dated 20 January, 1938, signed by plaintiff and his counsel, was served on defendants, notifying defendants that plaintiff would move before the clerk on Monday, 24 January, 1938, at 10 o'clock a. m. to hear the motion to strike out answer and render judgment by default at such time; that verbal negotiations followed between counsel for plaintiff and defendants as to continuance and hearing said motion at a subsequent time and were initiated by defendants' counsel, and that a misunderstanding arose as to when it should be heard and no agreement of counsel was had in writing; that on Tuesday, 25 January, 1938, counsel for plaintiff moved to strike out answer and for judgment by default, and requested the clerk to hold the judgment then tendered until Wednesday, 26 January, 1938. That said judgment rendered was signed on Wednesday, 26 January, 1938, at the close of business; that the defense bond in the record, justified under date of 25 January, 1938, was left with the clerk at his office for filing on the morning of 27 January, 1938." There was evidence sufficient to sustain these findings.

The clerk was authorized to enter his judgment upon failure of the defendants to file the undertaking required by law, C. S., 595 (4), but he was without jurisdiction to enter such judgment except on Monday. C. S. 597 (b). His judgment was entered upon Wednesday, 26 January, 1938.

Plaintiff, appellant, contends that the time for hearing and entering judgment was extended by agreement of counsel. The defendants contend there was no such agreement. The judgment fails to find that there was such an agreement and finds only "that verbal negotiations followed between counsel for plaintiff and defendants as to the continuance and hearing said motion at a subsequent time, . . . and no agreement of counsel was had in writing." Negotiations, as distinguished from agreement of counsel, did not authorize the clerk to enter the judgment upon a day other than Monday, and for that reason there was no error in the judgment of the judge in vacating the clerk's order

striking out the answer and allowing a judgment by default, entered on a day other than a Monday.

The appellant's exception to the form of the bond filed by the defendants cannot be sustained since, under the allegations of the complaint and answer, it is in substantial compliance with the requirements of C. S., 495.

The judgment of the Superior Court is

Affirmed.

E. H. LAWHON ET AL. v. J. D. MCARTHUR.

(Filed 23 March, 1938.)

1. Injunctions § 11—

Ordinarily, when the facts are in dispute in an action for damages and to restrain future cutting of standing timber upon assertion of irreparable injury, the temporary order should be continued to the hearing, C. S., 845, or the defendant be required to give bond, C. S., 846.

2. Same—

When the facts are in dispute in an action to restrain the cutting of standing timber, it is error for the trial court upon the hearing of the order to show cause to dismiss the action and deprive plaintiff of a jury trial.

APPEAL by plaintiffs from *Burgwyn, Special Judge,* at January Term, 1938, of JOHNSTON.

Civil action to enjoin defendant from cutting timber on plaintiff's land.

On 20 November, 1935, the defendant took from W. J. Brown and wife timber deed for certain oak timber on 1,207 acres of land situate in Johnston County, with right to cut and remove same at any time within five years, which said timber deed has not been recorded, or is subsequent in registration to deed from W. J. Brown and wife to E. H. Lawhon for the land upon which the timber stands.

O. L. Duncan is the holder of a mortgage on said lands given by W. J. Brown and wife to secure the payment of $350.00 with interest from 28 November, 1936. The validity of this mortgage is not questioned. Defendant offers to assume payment of the debt secured by the mortgage.

In September, 1936, W. J. Brown and wife conveyed to E. H. Lawhon, by deed properly registered, the 1,207 acres in question.

It is the contention of the plaintiff that at the time he took deed for the land in question the defendant had already cut over the whole 1,207-acre tract, and had removed the oak timber which he had pur-

chased. Plaintiff also alleges irreparable damage, the insolvency of defendant, and asks that further cutting be enjoined and that he recover for the timber already wrongfully cut.

It appearing that E. H. Lawhon, as agent of W. J. Brown, negotiated the sale of the oak timber to J. D. McArthur, and the only consideration for plaintiff's deed was the services he rendered in making said sale, the court held that plaintiff was neither a creditor nor purchaser for value within the meaning of the statute as against the defendant, and directed that the temporary restraining order be dissolved and action dismissed. Plaintiff appeals, assigning error.

Stevens, Farmer & Hill for plaintiffs, appellants.
Wellons & Pool for defendant, appellee.

STACY, C. J. The facts are in dispute, and the case involves the cutting of timber trees. C. S., 845; *Stewart v. Munger,* 174 N. C., 402, 93 S. E., 927. The usual course in such circumstances is to continue the restraining order to the hearing, or else to require the defendant to give bond in the meantime. C. S., 846; *Lewis v. Lumber Co.,* 99 N. C., 11, 5 S. E., 19; *Lumber Co. v. Wallace,* 93 N. C., 22; *R. R. v. Transit Co.,* 195 N. C., 305, 141 S. E., 882. At any rate there was error in dismissing the action. *Grantham v. Nunn,* 188 N. C., 239, 124 S. E., 309; *Sutton v. Sutton,* 183 N. C., 128, 110 S. E., 77; *Bradshaw v. Comrs.,* 92 N. C., 278; McIntosh, N. C. Prac. & Proc., 994.

Error.

CLYDE SITTON v. V. E. TWIGGS AND JESS SHADRICK.

(Filed 23 March, 1938.)

1. Negligence §§ 11, 19b—Failure of plaintiff to leave scene held not contributory negligence barring recovery for negligent injury.

Plaintiff was injured by a stray bullet in an affray between defendants at a public place. Appealing defendant moved for judgment as of nonsuit on the theory that plaintiff's own evidence showed that he had an opportunity to leave the scene and failed to avail himself of the opportunity. *Held:* The evidence does not disclose contributory negligence as a matter of law.

2. Negligence §§ 1, 19a—

Evidence tending to show the use of firearms in a public place where a multitude of people were assembled, to the injury of plaintiff, a bystander, *held* sufficient evidence of actionable negligence to take the case to the jury.

SITTON *v.* TWIGGS.

APPEAL by plaintiff from *Alley, J.*, at December Term, 1937, of TRANSYLVANIA. Reversed.

Ralph H. Ramsey, Jr., for plaintiff, appellant.
J. Y. Jordan, Jr., for defendant Twiggs, appellee.

SCHENCK, J. This is an action to recover damages for injuries alleged to have been unlawfully and negligently inflicted by the defendants. The appellee, Twiggs, alone filed answer, and the trial below was of the alleged cause of action as it related to him.

The plaintiff alleged that as he was intending to enter the back door of the courtroom, where a political meeting was being held, and after he had ascended the rear staircase of the courthouse and was standing on the second floor upon which the courtroom was located, the defendants engaged in an affray on a landing half way up the rear staircase, and that Twiggs drew a pistol and in a scuffle the pistol was fired and the ball therefrom struck and injured the plaintiff's foot.

The plaintiff testified to facts tending to sustain these allegations, and was corroborated in part by the testimony of others. When plaintiff had introduced his evidence and rested his case the judge sustained motion for judgment as in case of nonsuit (C. S., 567) and plaintiff appealed, assigning error.

While it does not appear in the record, we gather from the argument had before us that the trial judge granted the motion for judgment as in case of nonsuit upon the theory that the plaintiff's own testimony established contributory negligence in that it showed that plaintiff had an opportunity to get away from the scene of the affray and failed to avail himself thereof. We cannot concur in this ruling. While there may have been evidence tending to show that the plaintiff might have gotten away from the scene we cannot hold, as a matter of law, that this evidence established contributory negligence.

The evidence tending to show the use of firearms, a pistol, in a public place, the courthouse, where a multitude of people were assembled, to the injury of the plaintiff, a bystander, was sufficient evidence of actionable negligence to carry the case to the jury.

We are of the opinion, and so hold, that the trial judge was in error in sustaining the motion for judgment as in case of nonsuit, and for that reason the judgment below is

Reversed.

C. McCOY FRANKLIN v. CROSSNORE SCHOOL ET AL.

(Filed 23 March, 1938.)

1. **Appeal and Error § 50: Reference § 10—When original order does not agree upon referee, trial court need not refer to same referee after Supreme Court grants a new trial for newly discovered evidence.**

When the order of reference merely waives the right to a jury trial and does not agree upon a referee, it is not error for the trial court upon certification of the opinion of the Supreme Court granting a new trial for newly discovered evidence, to refuse to sign defendant's order that the cause be referred to the same referee who first heard the matter.

2. **Appeal and Error § 49—**

When the Supreme Court grants a new trial for newly discovered evidence, the final judgment and the verdict or findings upon which it rests are *ex necessitate* set aside.

3. **Appeal and Error § 2—Appeal in this case dismissed as premature.**

When the Supreme Court has granted a motion for a new trial for newly discovered evidence in a cause originally heard by a referee, an appeal from judgment of the Superior Court annulling the former judgment and restoring the cause to the docket for trial, is premature and will be dismissed.

APPEAL by defendants from *Clement, J.*, at October Term, 1937, of AVERY.

Civil action for alleged breach of contract.

The action was instituted 26 July, 1935, pleadings filed, order of reference entered at April Term, 1936, matter heard before the referee, report duly made, and exceptions thereto filed, judgment on the report and appeal to the Supreme Court at the Fall Term, 1937, when and where, upon motion of defendants, a new trial was ordered on account of newly discovered evidence.

At the October Term, 1937, of Avery Superior Court the defendants tendered judgment on the certificate of the Supreme Court, cancelling the former judgment and directing the referee, previously appointed, to proceed to hear the matter anew and to report his findings, together with his conclusions of law. The court declined to sign this order and, in its stead, entered judgment annulling the former judgment and restoring the cause to the docket for trial. Defendants appeal, assigning errors.

Bowie & Bowie and J. V. Bowers for plaintiff, appellee.

Charles Hughes, Carrie L. McLean and C. W. Tillett for defendants, appellants.

STACY, C. J. It does not appear from the judgment entered at the October Term, 1937, Avery Superior Court, how the new trial is to be had, whether by reference, the judge, or the jury. There was no error in declining to sign the order tendered by defendants, for in the original order of reference the parties "merely waived the right to a jury trial" and did not agree upon the referee. Indeed it is stipulated in the order that in case of "an appeal by either party" from the report of the referee the judge shall "hear the facts in the same manner as the jury," and shall "have the right to find the facts in their entirety, . . . all of which shall be subject to the approval of the trial judge at the time." Whether this order, which contains several unusual provisions (*In re Snelgrove*, 208 N. C., 670, 182 S. E., 335), still subsists as a valid order in the cause was not determined in the court below. *Edwards v. Perry*, 206 N. C., 474, 174 S. E., 285; 20 R. C. L., 323.

The question debated on argument and in brief, *i.e.*, whether interlocutory orders, entered without objection or by consent, are vacated when a new trial is granted for newly discovered evidence is not before us for decision. It is conceded that the final judgment and the verdict or findings upon which it rests are *ex necessitate* set aside by the order. 20 R. C. L., 317.

The appeal is premature and must be dismissed.

Appeal dismissed.

J. W. ALLEN, JOHN A. HENDRICKS, ELIZABETH HENDRICKS SHEETS, AND EVELYN HENDRICKS WHITT, v. EULA ALLEN, T. R. ALLEN, R. E. ALLEN, MRS. DELLA E. DAVIS AND HUSBAND, J. N. DAVIS; MRS. ALICE HAUSER, ALDEEN DOUB, AND ALDEEN DOUB, GUARDIAN FOR WILLIAM ALLEN DOUB, AND GUARDIAN FOR EDITH DOUB, MINORS.

(Filed 23 March, 1938.)

1. Descent and Distribution § 12: Estoppel § 6g—Acceptance of deed with knowledge that land represented grantee's share in estates of his parents held to estop grantee from asserting interest in other lands of the parents' estates.

Where parents pool their real estate for the purpose of dividing it equitably among their children, and allot each child the share they desire it to have, and, pursuant to this design, execute a deed to two of the children, who accept same with full knowledge that the land conveyed represented their shares in the realty of their parents' estates, the children so accepting the deed with full knowledge are estopped from asserting any interest in other lands of the estates of their parents, and the estoppel is operative regardless of the fact that the deeds of gift executed to other children in the division of the real property are void because not registered within two years from their execution.

2. Same—Evidence that husband and wife pooled their real estate for equitable division among their children held sufficient for jury.

Testimony that husband and wife called in a draftsman, informed him of their plan to divide their real estate among their children, and gave him information for the preparation of the deeds, and that the deeds were drawn and signed pursuant to the plan, *is held* sufficient to be submitted to the jury on the question of whether the husband and wife entered into an agreement to pool the real estate for equitable division among their children, and the deeds executed in pursuance of the agreement are competent in evidence as a strong circumstance in support of the direct evidence of the agreement, even though some of the deeds were void because not registered within two years from their execution.

3. Same—Evidence that grantees accepted deeds with full knowledge that land conveyed represented their share in their parents' estates held sufficient to be submitted to the jury.

The evidence tended to show that a child of the grantors was given a deed to lands executed to himself and his sister, and informed that the land therein conveyed represented their shares of the real estate in a division of the grantors' lands among all the children, that both grantees were present at the time, that they later discussed the matter and that the sister suggested that they accept the deed, that they had the deed recorded, held the land for about two years, and then sold it, *is held* sufficient to be submitted to the jury on the question of whether the grantees accepted the deed with full knowledge that it represented their shares in their parents' estates, and the contention of the sister that she was not chargeable with knowledge of the information given her brother is untenable, since the evidence discloses that she had full knowledge at the time of her acceptance of the deed.

4. Estoppel § 6i—Children, as heirs at law, held entitled to plead estoppel relating to realty in favor of estate.

Where two children accept a deed with full knowledge that the land therein conveyed represented their full shares in the real estate of their parents' estates, upon the death of one of the parents the estoppel of the two children from claiming any interest in other real estate of the parent's estate operates in favor of the estate, but inures to the benefit of the other children who are representatives of and claim through the deceased parent, and such other children may plead said estoppel.

5. Estoppel § 6a—Contention that estoppel was ineffective for want of mutuality held untenable under facts of this case.

Parents pooled their real estate for equitable division among their children. Plaintiffs were deeded lands belonging to their mother in full of all claim they should have against the estates of both parents. Upon their father's death plaintiffs claimed an interest in the real estate of his estate, contending that the asserted estoppel deprived them of any interest in his lands. *Held:* The acts of the parents in pooling all their real estate for division among the children constituted but a single contract, the considerations having passed mutually between the parents for the benefit of all the children, and plaintiffs' contention of want of mutuality is untenable.

6. Trial § 39—

Where the issues submitted fully and adequately presented the cause to the jury, the refusal to submit issues tendered will not be held for error.

7. Appeal and Error § 50—Decision on former appeal held not to have adjudicated question of estoppel raised by the pleadings.

A decision of the Supreme Court adjudicating solely the invalidity of certain deeds of gift for want of registration within two years of their execution, and remanding the cause for a new trial, does not adjudicate the question of estoppel raised by the pleadings, and a motion for judgment on the pleadings and the certificate of the Supreme Court on the question of estoppel is properly denied.

8. Evidence § 29—Objection that entire testimony of witness at former trial was not read to jury held untenable under facts of this case.

When the full transcript of the testimony of a witness at a former hearing is properly identified and offered in evidence, the witness having died prior to the rehearing, the adverse party may not complain that all his testimony was not read to the jury when it appears that all of his direct examination and part of his cross-examination was read to the jury, without request that the entire cross-examination be read or objection to the failure to read it, and that appellants had the right to read the part omitted to the jury at any time.

9. Same—Rule governing admission of depositions is not applicable to transcript of testimony of a party to the action.

When the transcript of plaintiff's testimony at a former trial is properly identified, its admission in evidence is without error, the plaintiff having the right to contradict or explain any statement theretofore made by him, and the rule governing the admission of depositions not being applicable to testimony at a former hearing given by a party to the action.

10. Evidence § 32—

Testimony of conversations with a party to the action in which the witness related to the party statements made by a decedent is not in contravention of C. S., 1795.

11. Same—

A "person interested in the event" within the contemplation of C. S., 1795, is one having a direct legal or pecuniary interest in the subject matter of the litigation.

12. Same—

Since a husband has no vested interest in the real estate of his wife, it would seem that he is not a "person interested in the event" within the contemplation of C. S., 1795, in an action involving his wife's title to realty.

13. Appeal and Error § 39d—

The admission of testimony cannot be held prejudicial when it appears that the adverse party, in his testimony at a former trial introduced in evidence, admitted in substance the facts testified to by the witness.

APPEAL by plaintiffs from *Clement, J.*, at December Term, 1937, of YADKIN. No error.

This is a civil action instituted by the plaintiffs to have stricken from the record certain paper writings purporting to be deeds, executed by T. W. Allen and wife, E. J. Allen, both of whom are now deceased, for that said paper writings are null and void as deeds; and to have the plaintiffs and the defendants declared to be the owners as tenants in common of the lands described in the complaint, which are lands formerly owned by T. W. Allen, the father of the plaintiff J. W. Allen and the defendants, and the grandfather of the plaintiffs other than J. W. Allen.

In 1928 T. W. Allen and his wife, E. J. Allen, mother and father of the plaintiff J. W. Allen and the defendants, and grandparents of the plaintiffs other than J. W. Allen, agreed to pool their real estate and to divide it among their children before they should die. Pursuant to said agreement and in execution thereof on 20 April, 1928, the said T. W. Allen and E. J. Allen agreed upon a joint division of their holdings of real estate, and as a part thereof allotted and set apart to the plaintiff J. W. Allen and to their daughter, Hester V. Hendricks, now deceased, who was their daughter and the mother of the plaintiffs John A. Hendricks, Elizabeth Hendricks Sheets, and Evelyn Hendricks Whitt, 379 acres of land owned by E. J. Allen. A deed therefor was executed by them and delivered to J. W. Allen and Hester V. Hendricks. At the time of the delivery of said deed the grantees therein were fully informed as to the conditions upon which the deed was executed and delivered. The said T. W. Allen and E. J. Allen likewise allotted to each of their other children a share of the land, title to which was in T. W. Allen, and in evidence thereof they executed a deed to each of the defendants for his or her respective share under the division. The deeds executed to the defendants were tied in a bundle and placed in the safe of T. W. Allen, and instructions were given to one J. N. Davis, who had access to the safe of T. W. Allen, to deliver said deeds at the death of the grantors, it being a part of the agreement of division that the grantees in said deeds should not receive their respective shares in the division until after the death of the grantors.

On a former appeal in this cause, *Allen v. Allen,* 209 N. C., 744, it was held that the said deeds to the defendants were ineffectual to pass title to the land therein described for the reason that they were deeds of gift and were not within two years after the making thereof proved in due form and registered.

On the former appeal this Court did not undertake to adjudicate the rights of the parties in the lands formerly held by T. W. Allen. Issues of fact being raised by the pleadings a new trial was ordered. When the cause came on to be reheard in the court below issues were submitted to and answered by the jury as follows:

"1. Were the deeds to the defendants executed by T. W. Allen and wife, E. J. Allen, as deeds of gift during the lifetime of T. W. Allen and wife, E. J. Allen? Answer: 'Yes.'

"2. Were said deeds of gift delivered by T. W. Allen and wife, E. J. Allen, to J. N. Davis to be held in escrow until after the death of said T. W. Allen and wife, E. J. Allen, then to be delivered by the said J. N. Davis to the defendants in this cause? Answer: 'Yes.'

"3. Was said certificate of Oliver Long, notary public, adjudged to be in due form and according to law and the instruments, together with the certificate, ordered registered by J. L. Crater, clerk of the Superior Court, and were said instruments registered within two years after the making thereof? Answer: 'No.'

"4. Did T. W. Allen and wife, E. J. Allen, on 20 April, 1928, make a mutual division of their real estate among their children and grandchildren, to wit: J. W. Allen, Hester Hendricks, Eula Allen, T. R. Allen, R. E. Allen, Mrs. Della E. Davis, Mrs. Alice Hauser, Aldeen Doub, and William Allen Doub and Edith Doub, children of Lillian Doub, and execute and deliver instruments in writing as a memorandum of said division? Answer: 'Yes.'

"5. Are the plaintiffs, J. W. Allen, John A. Hendricks, Elizabeth Hendricks Sheets and Evelyn Hendricks Whitt, estopped from asserting any interest or title to the lands described in the complaint by reason of J. W. Allen and Hester Hendricks accepting the benefits of the mutual divisions of the property of T. W. Allen and wife, E. J. Allen, as alleged in the amended answer? Answer: 'Yes.'

"6. Are the plaintiffs and the defendants tenants in common of the lands described in the complaint? Answer: 'No.'"

Upon the coming in of the verdict the court below signed judgment declaring that the plaintiffs have no interest in the lands described in the complaint and that they take nothing by their action. The plaintiffs excepted and appealed.

C. F. Burns, Richmond Rucker, Hastings & Booe, and Peyton B. Abbott for plaintiffs, appellants.

Avalon E. Hall and Grant & Grant for defendants, appellees.

BARNHILL, J. There are 182 assignments of error the mere statement of which consumes 38 pages of the record. As these multitudinous assignments are not grouped it is with considerable difficulty that we are able to fish out of the record the pertinent questions of law the plaintiffs seek to present for determination on this appeal. It is clear, however, that whether there was a division of the lands belonging to T. W. and E. J. Allen among their children is not the decisive feature of the

case. Here the controlling factor is the fact that a deed was tendered to J. W. Allen and Hester Hendricks for a tract of land belonging to Mrs. Allen as representing the full share of the grantees in the lands of both of their parents, and the grantees accepted the deed with full knowledge of the conditions and have disposed of the land, so that they cannot now return it or account for it. They accepted the benefits of the gift or advancement and must abide by the conditions upon which it was made.

The situation presented is more comprehensive and far-reaching than a mere execution of deeds of gift by T. W. Allen and his wife to their children, and the validity of the deeds to the defendants does not materially affect the question presented.

These deeds merely evidenced and were in execution of an agreement entered into by and between T. W. Allen and his wife, E. J. Allen. The same question of estoppel would be presented by this record even if said deeds had not been executed. The real question presented is this: Where parents pool their real estate interests for the purpose of making an equitable partition thereof among their children, and actually partition and allot to each child the share they desire it to have in their real estate, and actually execute and deliver to two of the children a deed for the tract allotted to them jointly, which deed was accepted by the two children with full knowledge of the conditions upon which it was executed, and with the information at the time that it was tendered to them as representing their full interest in the joint real estate holdings of their parents, will the acceptance of such deed by said children estop them from claiming any further interest in the estate of their parents other than personal property which was not then divided? We answer this question in the affirmative.

If, therefore, there was sufficient competent evidence to sustain the verdict and there was no error in the trial the judgment below must stand.

There is ample evidence in the record to sustain the finding of the jury that T. W. Allen and his wife entered into an agreement to pool their real estate holdings and to make a joint division of same among their children, and that in the execution of said agreement and the partitioning of said land the plaintiffs received and accepted a deed for 379 acres of land, title to which was held in the name of E. J. Allen. The witness Long, who prepared the several deeds, was called in by the grantors in said deed and informed of the agreement and given information for the preparation of the deeds. In addition thereto there is supporting evidence of a number of other witnesses, who testified that the grantors told them of the agreement and division. To the same end is the testimony of J. N. Davis. The paper writings purporting to be

deeds, while not effectual to pass title to said lands for the reasons set forth in the opinion of this Court on the former appeal, constitute memoranda of the agreement and a strong circumstance in support of the direct evidence of the agreement to make a joint division. The plaintiff Allen at the former hearing (which statement was offered at this hearing) testified, in referring to a conversation with his mother, that: "Your Pa says this would be your part." Without undertaking to detail all of the testimony it is sufficient to say that there is ample evidence in the record to warrant a submission of the cause to the jury on the question as to whether T. W. Allen and E. J. Allen made a joint division of their real estate holdings among their children.

After the deeds in question had been executed J. N. Davis took the deed conveying 379 acres of land to J. W. Allen and Hester V. Hendricks to the grantees and delivered it to them. At the time he informed them that their mother and father had agreed to fix up their business, and in doing so had prepared a deed for each of the children, and that the deed then being delivered was for their part of the real estate. Mrs. E. J. Allen was present. At the time she told them: "Your Pa says this would be your part." When he received the deed J. W. Allen stated that he did not know what he would do with it and he did not know whether he would accept it or not. The evidence further discloses that he discussed it with his co-grantee, Hester Hendricks, and they decided to accept the deed and to get J. N. Davis to assist them in looking after the farm. They had the deed recorded, kept the land for about two years and then sold it.

The contention of the plaintiffs that Hester Hendricks in no event could be bound by the information J. W. Allen received from J. N. Davis cannot be sustained. The evidence of Davis shows that Hester Hendricks was present at the time. The evidence of statements made by J. W. Allen in the former trial shows that Hester Hendricks went to the home of J. W. Allen with J. N. Davis and Mrs. E. J. Allen at the time the deed was delivered. The plaintiff Allen stated that he could not at that time discuss the matter with Hester Hendricks because they did not give him the deed until just before they left, saying: "I told them I would talk it over with my sister. They never brought the question up until they were about ready to leave, and I did not have a chance to talk with her. They brought her and she was going back with them." He further testified that later: "I told her (referring to his joint grantee) that I knew that this land was not much account and if we accepted it it would be an expense for nothing. She suggested that we keep it, that she thought she could get J. N. Davis to look after it. So we went up there and she made a contract with him to look after this land. I had the deed recorded. I kept the land for two years and

my sister and I sold it. We knew that we got that part of the land and that is all that we did know. I would like for the land to be divided equally. The land we got wasn't any good. It is off a long ways from a good road and it is rough land. It is on the river with no bottom-land but lots of rough upland, which makes it mighty cheap land. The way I understand it, my other brothers and sisters got all the best land, valued at a much lower price." He further testified: "They told me that the others were not getting their land then, but that Hester and I were getting ours now. They said that the other children would get the other land."

Thus it appears that the plaintiff J. W. Allen and Hester V. Hendricks, through whom the other plaintiffs claim, were tendered a deed for a tract of land as representing their full share of the lands belonging to their mother and father, and that they accepted the deed with full knowledge that it was so tendered and after first debating whether to accept it or not. They have received the full benefits of the deed. It would be contrary to all the principles of equity to permit them now to disavow the conditions upon which the deed was given to them and to successfully assert a further interest in the real estate of their parents.

The estoppel is not in favor of the defendants; it is in favor of the estate of T. W. Allen. These plaintiffs received the land described in their deeds as an advancement from the joint estate of their parents in full satisfaction of all claims they might have against either estate in so far as the real estate is concerned. Having received and accepted the deed with full knowledge they are now estopped to assert any further claims against said estate in respect to the real estate. T. W. Allen being now dead, and the property involved being real estate, the defendants, who are the representatives of and claim through T. W. Allen, can plead said estoppel, which inures to their benefit.

If this transaction deprives the plaintiffs of any interest in the lands of their father, as they stressfully contend, it must be borne in mind that it likewise deprives the defendants of any part of the lands of their mother. The plaintiffs elected to accept the advancement to them of the lands belonging to their mother in full of all claim they should have against the estates of both of their parents. They had their election and have made it. The acts of the father and of the mother in agreeing upon a division and in executing a deed to the plaintiffs were part and parcel of a single contract. They, the parents, acted mutually with a single purpose to a common end. The considerations passed mutually between the parents for the benefit of all the children. Those taking the lands of the mother under the agreement cannot elect both to affirm and to disaffirm the acts of the parents. This is fundamental equity and justice.

There was no error in the refusal of the court to submit the issues tendered by the plaintiffs. The issues adopted and submitted by the court fully and adequately presented the cause to the jury. Answers to these issues determine the controverted issues of fact raised by the pleadings.

The admissions in the pleadings and the certificate of the Supreme Court in the former appeal settle only the question of the validity of the deeds executed to the respective defendants. The facts upon which the plea of estoppel is based still remained for jury trial. The motion for judgment on the pleadings and the certificate from this Court was properly denied.

Oliver Long, who prepared the deeds, testified at the former hearing of this cause. At the time this case was called for rehearing this witness was dead. The defendants offered in evidence a transcript of his testimony in the former hearing after first having the same properly identified by the court reporter. The plaintiffs insist that in this there was error for the reason that only a part of said testimony was offered. The record does not sustain this contention. It discloses that the full transcript was offered, that all of the direct examination and a part of the cross-examination was read to the jury. There was no exception to the failure of the defendants to read all of the cross-examination and no request that they be required to do so. The full transcript was in evidence and the plaintiffs had a right to read it to the jury at any time, even during the argument. They, therefore, have no cause to complain in this respect. The defendants likewise offered in evidence parts of the testimony of the plaintiff J. W. Allen given at the former hearing, after first having the transcript properly identified. The portions offered showed statements made by J. W. Allen tending to show his knowledge of the conditions upon which the deed was delivered to him and the value of the lands. Former statements made by the plaintiff on the witness stand or elsewhere were admissible. He was in court, and if he so desired he had the right to contradict or explain any statement he had theretofore made. The rule governing the admission of depositions would not apply to this particular testimony, and the admission by the court of pertinent statements made by the plaintiff at the former hearing was not erroneous. The plaintiffs likewise challenge the competency of the testimony of J. N. Davis, who is the husband of one of the defendants, a child of T. W. and E. J. Allen. They contend that inasmuch as he is the husband of one of the defendants he is incompetent under C. S., 1795. His testimony concerns almost entirely conversations between him and the plaintiff J. W. Allen. While in these conversations he related to J. W. Allen statements made by T. W. Allen and E. J. Allen, this in no wise was in contravention of the provisions

of C. S., 1795, even if it be admitted that he is an interested party within the meaning of that statute. He also testified as to statements made by T. W. and E. J. Allen and that they gave him the deeds, including the one to the plaintiffs. He likewise testified that he placed the deeds other than the one to the plaintiffs in the safe of T. W. Allen, and after the death of T. W. Allen delivered them to the respective grantees named therein. This Court has heretofore held that a "person interested in the event" within the contemplation of C. S., 1795, extends only to those having a "direct legal or pecuniary interest" in the subject matter of the litigation. *Hall v. Holloman,* 136 N. C., 34; *Helsabeck v. Doub,* 167 N. C., 205; *Vannoy v. Stafford,* 209 N. C., 748; *Burton v. Styers,* 210 N. C., 230.

A husband has no vested interest in the real estate of his wife. In this respect he occupies a status similar to that of a child. He has the expectation of inheritance of a fixed interest in the real estate of his wife, provided she does not dispose of the same by will, just as a child may anticipate the inheritance of his share of such real estate unless precluded from doing so by the will of his mother. Neither has a present legal or pecuniary interest in the property, so that a husband is not precluded from testifying in behalf of his wife in a lawsuit in which the provisions of said statute may be invoked. It may be noted, however, that this is not a suit between the estate of T. W. Allen and the wife of J. N. Davis. Likewise, even if his testimony in this respect be held for error, the evidence discloses that the plaintiff at the first trial admitted in substance the facts to be as testified to by Davis. Certainly, then, any error in that respect is harmless.

We have undertaken to carefully examine each of the numerous exceptions entered and in none of them do we find meritorious cause for a new trial.

No error.

STATE v. HARLEY ROBINSON AND WENDELL REED.

(Filed 23 March, 1938.)

1. Homicide § 16—

When the intentional killing of a human being with a deadly weapon is admitted or established, the law implies malice, constituting the offense murder in the second degree, with the burden on defendant to show to the satisfaction of the jury matters in mitigation or excuse.

2. Homicide § 11—Right to kill in self-defense rests upon necessity, real or apparent.

One may kill in self-defense if he is without fault in bringing on the affray, and it is necessary, or appears to him to be necessary, to kill his

adversary to save himself from death or great bodily harm, the reasonableness of his apprehension being for the determination of the jury from the circumstances as they appeared to him, and when he is without fault and a murderous assault is made upon him, he is not required to retreat but may stand his ground and kill his adversary if necessary in his self-defense.

3. Same—Language must be calculated and intended to bring on affray in order for defendant to be at fault in bringing on fight.

If one uses language calculated and intended to bring on a fight, considering the language in regard to the circumstances and the relation between the parties, he is at fault in bringing on the affray, and his plea of self-defense cannot absolve him of all criminal responsibility, but an instruction that defendant would be at fault if he used language calculated to bring on a controversy and it does so, without instructing the jury that defendant must have intended this result, is erroneous.

4. Homicide §§ 11, 27f—Person at fault may restore right of self-defense by quitting fight in good faith and giving adversary notice.

In this case the court instructed the jury that if defendants were at fault in bringing on the fight they could not plead perfect self-defense. *Held:* Under the evidence, it was error for the court to fail to charge the jury further that even if defendants were at fault, if they quit the fight in good faith and gave their adversary notice of such action, defendants' right to self-defense would be restored.

5. Homicide §§ 12, 27f—Stepson may kill in lawful defense of stepfather.

A stepson has the right to kill in the defense of his stepfather, such right being coextensive with the right of self-defense, and under the evidence in this case it was error for the court to fail to instruct the jury in regard to this right, whether the stepson aided his stepfather in his lawful defense or in an unlawful assault being for the determination of the jury.

6. Homicide §§ 10, 27f—Private citizen may interfere to prevent felonious assault.

When he has reasonable grounds to believe that a felonious assault is about to be committed, a private citizen has the right and duty to interfere to prevent the supposed crime, and under the evidence in this case it was error for the court not to have instructed the jury upon this matter under the contention and evidence of one of defendants.

7. Criminal Law § 53a—

It is error for the court to fail to charge the jury on substantive features of the case arising on the evidence, even in the absence of special requests for instructions.

8. Criminal Law § 81d—

When a new trial is awarded on certain exceptions, other exceptions need not be considered.

APPEAL by defendants from *Sink, J.*, at November Term, 1937, of HAYWOOD.

Criminal prosecution, tried upon indictment charging the defendants with the murder of one Ratcliff Robinson. The defendants pleaded not

guilty and relied upon a plea of self-defense. The defendant Wendell Reed further pleaded that he merely undertook to prevent a felonious assault.

The evidence for the State tends to show that: The deceased, Ratcliff Robinson, aged 31 years, died on 20 July, 1937, as the result of an injury to his head received on the night of 17 July, 1937, in an altercation with the defendants, Harley Robinson, aged 52 years, first cousin of the deceased, and Wendell Reed, aged 26 or 27, stepson of defendant, Harley Robinson.

Harley Robinson and his wife, the mother of Wendell Reed, and Wendell Reed lived on Robinson's farm on Beaver Dam Creek, about three miles from Canton. He worked for the Champion Fibre Company in Canton. The deceased, Ratcliff Robinson, worked for and on the farm of Harley Robinson, but resided at Pearson Clark's about a quarter of a mile away. Harley Robinson's house was located several hundred yards from the community public highway. A private road connected the house with the highway.

On the afternoon of 17 July Wendell Reed and Ratcliff Robinson were at the highway where the private road enters, drinking whiskey which Wendell Reed had hidden near there. The two were together in the neighborhood until the time to do the evening chores about the house of Harley Robinson. Between 7 and 7:30 o'clock Harley Robinson, Wendell Reed, and Ratcliff Robinson were engaged in an altercation at the junction of the said private road and highway. The brothers of Ratcliff Robinson testified that they saw Harley Robinson hit him on the head with a pistol; that on their approaching Harley Robinson and Wendell Reed, who had Ratcliff Robinson down on the ground, got up off of him. The brothers examined the head of Ratcliff Robinson and saw one bruise. He then left there, going in the direction of Pearson Clark's. The brothers went fishing and on returning about 11:30 that night were informed by Harley Robinson that some one was lying in the road near his rye stacks, and offered the suggestion that it might be Ratcliff. He was found near there in an unconscious condition, taken to the doctor that night, then to the hospital next morning, and died Tuesday night.

Through a deputy sheriff the State offered declaration of Harley Robinson as to the facts and circumstances under which the altercation took place, and, among other things, that he had not seen Ratcliff Robinson after the altercation until he saw him lying in the road, and that he did not disturb him and did not know then it was he.

The State contended below that after the altercation, which the brothers of Ratcliff Robinson witnessed in part, the defendants later met the deceased and beat him up and left him lying in the road.

On the other hand the defendants offered evidence tending to show that the only altercation took place after 8 o'clock. Defendant Harley Robinson testified: "I knew Ratcliff Robinson; I had known him all of his life. Prior to 17 July, Ratcliff Robinson was working with me and was taking his noon meals with me; he was doing farm work. He did the milking, and fed, and plowed corn, and such as that. He spent his nights over at Mr. Pearson Clark's. I live about 200 yards from the old home place of Ratcliff Robinson. His mother did live there; she is dead now; that is the old home place. . . . This was on Saturday; I came in from work about 5 o'clock. As I went home I left the highway going up home; as I passed over the hill Ratcliff Robinson, Wendell Reed, and Reed Robinson were sitting by the side of the road. . . . It was about 7 o'clock when I next saw Ratcliff, when he drove his cows to the milk gap. He milked that evening, then he fed the hogs. He came on through the yard and spoke a few words and he said, 'I got your rye all up,' and I said, 'That is fine,' and he said, 'I must go,' and I said, 'Don't hurry, go in and spend the night,' and he said, 'I have to go to town. I am going with Reed and Paul Sorrells and Canie to get a haircut,' and he went on. . . . The next time I saw him was about an hour later. . . . Wendell Reed was with him at that time. It was about 8 o'clock, probably five minutes after; I think it was about 8 o'clock when he left the house. It was getting dusk when I got to the road. I had started across to the far end of my field to look after a cow and calf. . . . I saw Ratcliff standing in the middle of the highway. . . . I saw the light of a car coming and I said to the boys, 'Boys, you had better look out and get out of the way, you might get run over.' When I said that to the boys Wendell moved out of the way and Ratcliff stood still where he was, and as the car passed it couldn't go down the right-hand side, its right-of-way, it cut to the left and it looked like it nearly hit him and I said, 'Boy, you are a fool.' He didn't say anything and he grabbed up a rock and here he come into my face and he said, 'I am going to burst your G— d— brains out,' and I said, 'Rat, what is the matter with you, I didn't mean to make you mad'; and he said 'By G—, I am going to get you,' and Wendell came up about that time and he said, 'Rat, that is nothing to get mad about, let's forget about it,' and he dropped his rock down, and I said, 'I am in a hurry, I am going to see about my cow, I must go,' and I started to make a step toward the road and he ran in front of me and grabbed me by the shirt collar and said, 'You are not going anywhere,' and he grabbed his knife and felt of the knife like he was feeling how sharp it was and he began to whet his knife, and I knew I was going to get cut, and the thought struck me maybe I could back off and go back home, and when I started backing off it made him that much madder, and he

gritted his teeth and here he come and I got into the wire fence that comes down my lane; this happened at the mouth of my lane, in eight or ten feet of the road, and when he got me into the fence he said, 'I am going to cut your G— d— g— out, you s.o.b.,' and he drawed back to strike me and I gave into the fence and he struck me, cut me across here and hit the seam of my pants and I gave the knife a shove and I felt that I was cut and I dropped on my right knee and got a rock and I think he thought he had cut me down; he stood there looking and I started to raise up and here he come at me with the knife, and when he got in reach of me I hit him somewhere above the ear in the side of the head with a rock and knocked him down and he caught on his left elbow and he reared up and come at me again, and the second time I struck at him I struck over him. I don't think I hit him that time, and he whirled around and I thought I could catch him and take the knife away from him, and directly we fell and he fell kind of on top of me, and I still held on to the hand he had the knife in *and I called Wendell:* . . . and Wendell come and broke the blade off of the knife trying to get the knife, and Wendell took hold of me by the shoulder and by the time I got about half straight he come at me with the butt of the blade and down I come, and he struck me two or three licks in the face, and I come up with him on my back and he slid off and he jumped back about to where he first cut me and he opened the little blade of the knife and said, 'G— d— you, I will get you,' and I got a rock and hit him again in the top or back of the head, I don't know which, and I knocked him to his knees that time, and when he come the next time he come at such an angle and I thought I will not hit you any more, I will catch you and maybe I can hold you, and we got to scuffling and Wendell took the knife away from him. . . . I hit him because I didn't want him to cut me all to pieces, to save my life, I didn't want to do it, I had to do it, and I told him I didn't want to; I had no ill will, malice or grudge against him; he and I have always been friends. . . . I knew the general reputation of Ratcliff Robinson as to whether he was a dangerous and violent man; when he was under the influence of whiskey he didn't have any friends; he didn't respect anybody. I wouldn't say that he was under the influence of whiskey on this occasion, I didn't smell any on him; I couldn't swear he was drinking; he was either crazy mad or drunk, I don't know which."

The testimony of Wendell Reed as to the altercation was substantially the same as that of Harley Robinson, differing only in matters of detail. He further testified: "I never had any trouble with this boy, never had a word with him; I had always been friendly with him. Me and him run together all the time. I didn't touch him only when I took the

knife away from him and pulled him up. I guess I have known the deceased for about 20 years; I had been friendly with him all this time. I did not have any ill will or malice or grudge against him. . . . *I was trying to part them. I didn't have anything to do with it.*"

Verdict: Guilty of manslaughter.

Judgment: As to Harley Robinson not less than three nor more than seven years, and as to Wendell Reed not less than eighteen months nor more than five years, each at hard labor in the State's Prison.

The defendants appealed to the Supreme Court and assigned error.

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

Grover C. Davis and Chester A. Cogburn for defendants, appellants.

WINBORNE, J. The record on this appeal reveals error affecting substantive rights of the defendants, and entitles each of them to a new trial.

The evidence introduced is sufficient to justify and require the submission to the jury under proper charge of the court, as to the defendant Harley Robinson, the plea of self-defense, and as to the defendant Wendell Reed, the pleas of self-defense, fighting in the necessary defense of his stepfather, and the right and duty of interfering as a private citizen to prevent a felonious assault. In the light of respective pleas the defendants insist that in the charge to the jury the court below erred in two respects: (1) In charging that "if he engaged in the controversy, whether a fist fight or what not, freely and voluntarily, or if he used language calculated to bring on a controversy and it does so, the law says he cannot plead the perfect self-defense, because to recognize his right to do so would make him the author of his own wrong," and (2) in failing "to state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon" as required by statute. C. S., 564. These assignments are well taken.

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 killing, the burden is on the defendant to show to the satisfaction of the jury facts and circumstances sufficient to reduce the homicide to manslaughter or to excuse it. *S. v. 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; *S. v. Terrell,* 212 N. C., 145, 193 S. E., 161.

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, or his family, when necessary to prevent death or great bodily harm. *S. v. Bryson,* 200 N. C., 50, 156 S. E., 143; *S. v. Bost,* 192 N. C., 1, 133 S. E., 176; *S. v. Johnson,* 166 N. C., 392, 81 S. E., 941; *S. v. Gray,* 162 N. C., 608, 77 S. E., 833.

"2. That one may kill in defense of himself, or his family, 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., 1005, 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., 672, 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."

For application of the principle, see *S. v. Barrett, supra; S. v. Cox,* 153 N. C., 638, 69 S. E., 419; *S. v. Blackwell, supra; S. v. Johnson, supra; S. v. Hand,* 170 N. C., 703, 86 S. E., 1005; *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617; *S. v. Waldroop,* 193 N. C., 12, 135 S. E., 165; *S. v. Bryson,* 200 N. C., 50, 156 S. E., 143; *S. v. Marshall, supra; S. v. Koutro,* 210 N. C., 144, 185 S. E., 682; *S. v. Reynolds,* 212 N. C., 37, 192 S. E., 870; *S. v. Terrell, supra; S. v. Holland,* 193 N. C., 713, 138 S. E., 8; *S. v. Glenn,* 198 N. C., 79, 150 S. E., 663; *S. v. Kirkman,* 208 N. C., 719, 182 S. E., 498.

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: "Where a man is without fault, and a murderous assault is made upon him, an assault with intent to kill, he is not required to retreat, but may stand his ground, and if he kill his assailant and it is necessary to do so in order to save his own life or protect his person from great bodily harm, it is excusable homicide, and will be so held." *S. v. Lucas,* 164 N. C., 471, 79 S. E., 674; *S. v. Ray,* 166 N. C., 420, 81 S. E., 1087; *S. v. Bost, supra; S. v. Hardee,* 192 N. C., 533, 135 S. E., 345; *S. v. Waldroop, supra; S. v. Dills,* 196 N. C., 457, 146 S. E., 1; *S. v. Thornton,* 211 N. C., 413, 190 S. E., 758; *S. v. Terrell, supra.*

In *S. v. Johnson,* 184 N. C., 637, 113 S. E., 617, *Walker, J.,* speaking to the question for the Court, said: "It all comes to this, that if the jury finds that the prisoner did not fight willingly, except in the sense that he was compelled to do so in order to defend himself, and was himself without fault, and he was feloniously or murderously attacked by the deceased, so that it reasonably appeared to him and he believed that his life was in danger, or that he was about to receive great bodily harm, his right of self-defense was in such case, if found by the jury, complete and justifiable, and if he slew his adversary under such circumstances the jury should acquit him."

To have the benefit of self-defense the assaulted party must show to the satisfaction of the jury that he is free from blame in the matter, that the assault upon him was with felonious purpose, and that he took life only when it reasonably appeared to him to be necessary to protect himself from death or great bodily harm. *S. v. Blevins, supra; S. v. Lucas, supra; S. v. Dove,* 156 N. C., 653, 72 S. E., 792.

1. The question arises, Were the defendants or either of them without fault in bringing on the difficulty? The court, in the portion of the charge to which exception is taken, told the jury that he would be at fault "if he used language calculated to bring on a controversy and it does so." This is error. The test, did he use language *calculated and intended* to bring on a fight and a fight ensues. Speaking of an affray, in the case of *S. v. Perry,* 50 N. C., 9, the court said: "If one person, by such abusive language toward another as is calculated and intended to bring on a fight, induces that other to strike him he is guilty, though he may be unable to return the blow." *S. v. Robbins,* 78 N. C., 431; *S. v. Davis,* 80 N. C., 351; *S. v. Fanning,* 94 N. C., 940; *S. v. Rowe,* 155 N. C., 436, 71 S. E., 332; *S. v. Lancaster,* 169 N. C., 284, 84 S. E., 529; *S. v. Crisp,* 170 N. C., 785, 87 S. E., 511.

In *S. v. Rowe, supra,* a homicide case, the Court said: "Whether language is provocative or not cannot always be determined by a mere consideration of the words by themselves. It is sometimes necessary, in

order to ascertain the meaning of intention of the speaker, or the probable effect of what is said upon the person to whom he has spoken, that we should view them in their proper setting—the circumstances and surroundings of the parties, their previous relations to each other, and the state of their feelings. What is said by a friend may pass unnoticed, while if the same words are uttered by an enemy they are like a spark, though small it be, falling into powder, and the explosion quickly follows. In such a case a single word, though apparently innocent and harmless, will arouse the human passions of anger and resentment." And, continuing, "The court properly instructed the jury to consider the evidence and decide whether or not the words were calculated and intended to bring on a fight."

In *S. v. Crisp, supra, Hoke, J.*, said: "In some of the decisions on the subject it has been stated as a very satisfactory test that this right of perfect self-defense will be denied in cases where, if a homicide had not occurred, a defendant would be guilty of a misdemeanor involving a breach of the peace by reason of the manner in which he had provoked or entered into a fight. Under our decisions such a position would exist: (a) Whenever one has wrongfully assaulted another or committed a battery upon him; (b) when one has provoked a present difficulty by language or conduct towards another *that is calculated and intended to bring it about.* . . . And, in this connection, it is properly held that language may have varying significance from difference of time and circumstances, and the question is very generally for the determination of the jury."

2. The charge failed to advert to and explain the law with reference to substantive rights of each of the defendants. As to both defendants the court below declared the law as to when they could not plead the perfect self-defense. Having done so, he should have gone further and told the jury that the right of self-defense may be restored to one who has started a fight, or entered into it willingly, by quitting in good faith and giving his adversary notice of such action on his part. *S. v. Pollard,* 168 N. C., 116, 83 S. E., 167; *S. v. Kennedy,* 169 N. C., 326, 85 S. E., 42; *S. v. Bost,* 189 N. C., 639, 127 S. E., 926.

As to the defendant Wendell Reed, the court failed to charge the law with respect to both (a) his right to fight in the necessary defense of his stepfather, and (b) his right and duty as a private citizen to interfere to prevent a felonious assault. Each right is recognized in the decisions of this Court.

(a) In *S. v. Johnson,* 75 N. C., 174, *Bynum, J.*, said: "The proposition is true that the wife has the right to fight in the necessary defense of the husband, the child in defense of his parent, the servant in defense of the master, and reciprocally; but the act of the assistant must have the same construction in such cases as the act of the assisted party

should have had if it had been done by himself, for they are in a mutual relation one to another." *S. v. Brittain,* 89 N. C., 482, at p. 504; *S. v. Bullock,* 91 N. C., 614; *S. v. Greer,* 162 N. C., 640, 78 S. E., 310; *Roberson v. Stokes,* 181 N. C., 59, 106 S. E., 151; *S. v. Maney,* 194 N. C., 34, 138 S. E., 441.

In *S. v. Dills,* 196 N. C., 457, 146 S. E., 1, it is stated: "Allen Dills contends that he shot the deceased in self-defense and his wife contended that she was engaged in defending her husband. Whether she aided him in an unlawful assault or only in his lawful defense is a matter which should have been explained and submitted to the jury." *S. v. Cox,* 153 N. C., 638, 69 S. E., 419; *S. v. Greer, supra; S. v. Gaddy,* 166 N. C., 341, 81 S. E., 608.

(b) If the defendant Wendell Reed had a well-grounded belief that a felonious assault was about to be committed on the defendant Harley Robinson, he had the right and it was his duty as a private citizen to interfere to prevent the supposed crime. The principle of law is well settled in this State. *S. v. Rutherford,* 8 N. C., 456; *S. v. Roane,* 13 N. C., 58; *S. v. Clark,* 134 N. C., 698, 47 S. E., 36.

The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial error. This is true even though there is no special prayer for instructions to that effect. *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501; *S. v. Bost, supra; S. v. Thornton, supra; School Dist. v. Alamance County,* 211 N. C., 213, 193 S. E., 31.

As the case goes back for a new trial for the errors treated, other exceptions upon which defendants rely need not be considered. *S. v. Stevenson,* 212 N. C., 648, 194 S. E., 81, and cases therein cited.

For the reason stated the defendants are entitled to a

New trial.

LILLIEBELLE E. BRINN, EXECUTRIX OF J. T. BRINN, AND LILLIEBELLE E. BRINN IN HER OWN RIGHT, v. T. P. BRINN AND WIFE, MARY G. BRINN, JACK BRINN, ROBERT BRINN, AND ONEIDA HOOKS AND HUSBAND, J. R. HOOKS.

(Filed 23 March, 1938.)

1. Wills §§ 33a, 33d—Words of request, desire, etc., addressed to devisee will not create trust unless it clearly appears testator so intended.

Where the testator, after bequeathing or devising property to a person, expresses a wish or desire as to its use or disposition, such expression will not be construed to create a trust in the legatee or devisee unless it clearly appears from the instrument as a whole that testator so intended, since the devise or bequest will be deemed absolute in the absence of a

clearly expressed intention to convey an estate of less dignity, C. S., 4162, but precatory words will create a trust when it appears from the instrument as a whole that the testator so intended, provided testator has pointed out with sufficient clearness and certainty both the subject matter and objects of the intended trust.

2. Same—Words of recommendation or request, when used in direct reference to estate, are prima facie testamentary and imperative.

Words of recommendation, request, or desire that a particular disposition be made of the property by the legatee in a limited gift or bequest are *prima facie* testamentary and imperative and not precatory when used in direct reference to the estate, and will be held to create a trust when used so as to exclude all option or discretion in the legatee as to whether he should act in accordance with them, and the subject matter and objects of the intended trust are expressed with sufficient definiteness, and this is particularly true when those in whose behalf the requests are made are the natural objects of testator's bounty, and no other disposition is made of the remainder of the estate after the limited estate.

3. Same—Request for disposition of estate, addressed to sole legatee and devisee, held to create trust under language of this will.

Testator bequeathed and devised all his property, both real and personal, to his wife so long as she remained testator's widow, with provision for distribution in the event of her remarriage, and provided that during widowhood she should "handle" the estate as she chose with "requests" that whenever she saw fit she should make equal distribution among their four children, taking into account advancements in specified amounts made to them, that a certain sum be invested and the proceeds therefrom paid for the benefit of a designated church for a period of ten years with provision that this "bequest" might be continued in the discretion of the heirs, and that testator's sister be cared for and given a fitting burial at her death, with further provision that should his wife die before fully executing the requests, testator's eldest son should qualify and execute his wishes. *Held:* Construing the will as a whole, it is apparent that testator intended to create a trust, and the subject matter and objects of the trust having been set forth with definiteness and clearness, the will creates a trust estate in the wife during her widowhood for the benefit of herself and children, with power of disposition in the widow solely among the children in accordance with the terms expressed at any time she elects.

APPEAL by the plaintiff and the defendants from *Williams, J.*, at April Term, 1937, of PERQUIMANS. Modified and affirmed.

This is a civil action in the nature of a petition to the court, instituted by the plaintiff, for the purpose of procuring an interpretation of the last will and testament of her testator and for a declaratory judgment adjudicating the rights of the respective parties named in the will. The will, submitted to the court for interpretation, is in the following language:

1. "I, J. T. Brinn, of Perquimans County, Hertford P. O., North Carolina, declare this to be my last will, and revoke any will previously made by me.

2. "After the payment of all my just debts and funeral expenses, I dispose of my estate as follows:

3. "I bequeath to my beloved wife, Lillabelle W. Brinn, my entire real and personal property—as long as she remains my widow—to be handled as she chooses.

4. "In the event of her marriage, it is my will that she retain only one-fifth interest in my estate and that the balance be divided equally among my four children.

5. "In leaving my entire estate to my wife, to be handled as she chooses as long as she remains my widow, I make the following request of her:

(a) "That she deal fairly and equally with our four children.

(b) "That she consider amounts that I have advanced to them (for various purposes) in the following sums—Preston $9,000, Onedia $2,500, Rob Winslow $800.00, Jack $850.00—as amounts due the estate (without interest), and that these amounts be added to what may be otherwise determined as the cash value of my estate, and that each child's part be determined as one-fifth the total—less amount advanced to him or her. That she make such distribution as, or when, she may see fit.

(c) "That, as soon as she can conveniently do so, if, and when the funds are available, invest safely with some insurance company, trust company, or otherwise the sum of twenty thousand dollars, ten thousand dollars for each of the boys, Rob Winslow and Jack, and purchase such amount of 20-year double indemnity, sick benefit, life insurance on the lives of Rob Winslow and Jack as may be determined can be carried from the income from the investment; that in handling this she solicit the services of Chas. Whedbee, if living, and two other persons whom she and my children may select. That this investment be made permanent and fixed—to be carried over the period of twenty years. That the invested capital and value of the insurance to be turned over in equal amounts to Rob Winslow and Jack (or their heirs) at the end of the twenty-year period.

(d) "That one thousand dollars be safely invested and the proceeds from same, for a period of ten years, be turned over as received to the chairman of the board of stewards of the Center Hill Methodist Episcopal Church, South. That this bequest may be continued at the discretion of my heirs.

(e) "That my sister, Mary E. Brinn, if she survives me, shall be cared for, with all the comforts of home, as a member of the family, and given burial at her death in a manner satisfactory to surviving members of the family.

6. "In the event of my wife's death before she may have fully executed my request, I desire that my estate be equally divided between my four children, as hereinbefore specified, and that all my request be carried out and that, in the event of my wife's not having made other arrangements, my son, Preston be made administrator, or executor, with authority to carry out my wishes. That no bond be required of him."

The paragraphs are numbered by the court for convenience of reference.

The court below, after finding certain facts, entered judgment as follows:

"Upon the foregoing findings of fact by the court and admissions contained in the pleadings the court is of the opinion and doth adjudge that, looking at the will as a whole in order to ascertain the intent of the testator, Lilliebelle E. Brinn, wife of said testator, is the holder of a life estate, or estate *durante viduatate,* in and to the real and personal property of the testator, which terminates as to a four-fifths interest therein upon her marriage, and is entitled to the income therefrom, subject to the other provisions of said will, and that upon her remarriage she *'retains'* a life estate in and to one-fifth interest in and to said property and the income from said one-fifth interest; that, while in its usual acceptation the word 'request' is merely precatory and is not, standing alone, sufficient to create a trust, the use of the word in this will at the beginning and in the concluding paragraph clearly indicates it to be the intention of the testator that the estate be impressed with a trust charged with the creation and maintenance of an insurance benefit for the sons, Robert Winslow Brinn and Jack Brinn, as set out therein, and charged with the expense necessary for the care, support, and maintenance of testator's sister, Mary E. Brinn, and her burial expense, and with an investment for ten years for the benefit of the Methodist Church referred to in said will; that in handling said estate 'as she chooses' the said Lilliebelle E. Brinn is a trustee for the purpose of carrying out the provisions of said will, invested with full discretion as to the way and manner in which she may see fit to handle the same, subject to the control of the court from time to time as necessity for effectuating transactions affecting said estate may arise, her compensation as such to be determined by the court; that she has no power or authority to sell and convey any of the property of said estate except subject to the control of the court; that in the event of the remarriage of the said Lilliebelle Brinn she *'retains'* for life a one-fifth interest in said estate and the other four-fifths interest is to be divided equally between the four children named in said will; and that, subject to the charges imposed upon said estate as herein set forth, the said Lilliebelle Brinn is entitled to the income from the whole thereof during widowhood, and to the income

from one-fifth interest thereof in the event of remarriage for the remainder of her life, such one-fifth interest to be equally divided between said children upon her death."

Both the plaintiff and the defendants excepted and appealed.

Whedbee & Whedbee for plaintiff.
Chas. E. Johnson for defendants.

BARNHILL, J. What is the estate of the widow in the property of the testator? Is such estate as she took impressed with a trust? These are the questions presented to us for determination.

Formerly the rule in England was that whenever property was given, coupled with expressions of "request, desire or recommendation," that the person to whom it is given will use or dispose of the same for the benefit of another, the donee will be considered a trustee for the purpose indicated by the donor. This was so held, even when the language of the gift, unaccompanied by the words of "request," etc., was absolute in its nature. This rule was followed by earlier American decisions. Thus, precatory words were given an arbitrary meaning and force imperative in nature. This doctrine has been modified, both by the English and American courts, so that now in this and other jurisdictions precatory words are interpreted in their usual, ordinary meanings, the force and effect of which are to be determined by consideration of the whole will in ascertaining the real intent of the testator. The old rule that the expression of a wish by a testator, like that of the sovereign, was construed as a command, has been abandoned. The later cases hold that in the absence of a clear indication to the contrary, expressions of wish, desire, etc., are to be taken as used in their commonly accepted sense and are not to be artificially construed by the courts as a trust unless it clearly appears from the consideration of the will as a whole that it was so intended by the testator.

As was said by *Allen, J.*, in *Hardy v. Hardy*, 174 N. C., 505: "Under the early English and American authorities language in a will expressive of the wish or desire of the testator as to the disposition of his property was generally held to raise a trust, or to limit the estate devised, unless a contrary intent was manifest from a consideration of the whole will; but the tendency of modern authority is to reverse this rule, and to hold that precatory words 'are not to be regarded as imperative unless it is plain from the context that the testator so intended them.'" This does not mean that precatory words will not impress a trust upon a devise, but that the force and effect to be given to precatory words is to be determined by a consideration of the will as a whole, and a trust will be imposed when it clearly appears that such was the intent of the testator.

A consideration of the decisions in this jurisdiction discloses that it is now a well-established rule in this State that where an estate is given to a person generally or indefinitely it is construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly indicated by the will, or some part thereof, that the testator intended to convey an estate of less dignity. It is so provided by our statute——C. S., 4162. *Springs v. Springs,* 182 N. C., 484; *Hayes v. Franklin,* 141 N. C., 599; *Carter v. Strickland,* 165 N. C., 69; *Hardy v. Hardy, supra; Barco v. Owens,* 212 N. C., 30; *Peyton v. Smith, ante,* 155. *Carter v. Strickland, supra,* is reported and annotated in Ann. Cases, 1915 D, at p. 416.

Where, however, a limited estate is devised to the first taker, words of recommendation, request, entreaty, wish or expectation addressed to the legatee or devisee will ordinarily make the first taker a trustee for the person or persons in whose favor such expressions are used, provided the testator has pointed out with sufficient clearness and certainty both the subject matter and the objects of the intended trust. Such words of recommendation or request, when used in direct reference to the estate, are held to be *prima facie* testamentary and imperative and not precatory. When accompanying a limited gift or bequest, words of request or desire or recommendation that a particular application be made of such bequest will be deemed to impose a trust upon these conditions: (a) That they are so used to exclude all option or discretion in the party who is to act, as to his acting according to them or not; (b) the subject is certain, and (c) the objects expressed are not too vague or indefinite to be enforced. This is particularly true when those in behalf of whom the requests are made are natural objects of the bounty of the testator and no other disposition of the remainder of the estate after the limited estate is made. *Little v. Bennett,* 58 N. C., 157; *Cook v. Ellington,* 59 N. C., 371; *Russ v. Jones,* 72 N. C., 52; *Young v. Young,* 68 N. C., 309; *Crudup v. Holding,* 118 N. C., 222; *Waldroop v. Waldroop,* 179 N. C., 674; *Jarrell v. Dyer,* 170 N. C., 177; *Laws v. Christmas,* 178 N. C., 359. The subject is fully discussed in *Colton v. Colton,* 127 U. S., 300, 32 U. S. Law Ed., 138.

And so it appears that the old rule has been modified—not abrogated. We still consider the will as a whole, giving "each key its proper tone" to ascertain the real intent of the testator.

Applying these principles of law in the interpretation of the will under consideration it appears: (1) That the gift to the plaintiff was a limited gift—"as long as she remains my widow." It is so limited in both the third and fifth paragraphs. (2) The limited gift is not accompanied by any words conferring the power of disposition. It is "to be handled" by her. "Handled" means to manage and control. It does

not import the power of disposition. (3) Those in behalf of whom "requests" are made are his children, his sister, and his church. (4) The manner in which he requests his estate to be distributed is definite and certain. And (5) provision is made for the execution of the request in the event his widow should die before fully executing the same.

It may also be noted that in subsection (d) of paragraph 5 his request is specifically referred to as a "bequest." It is likewise significant that the disposition of the remainder of his estate by the testator, unless the widow should remarry, is inseparably tied in with the requests contained in the will and that the remainder is to be distributed in accordance with such requests. That this was the intent of the testator would seem to be clear by force of the express language used in the last paragraph: "In the event of my wife's death before she may have fully *executed my request,* I desire that my estate be equally divided between my four children—*as hereinbefore specified, and that all my requests be carried out*—and . . . my son Preston be made administrator or executor with authority to *carry out my wishes.*"

It is apparent that this is the interpretation both the widow and the probate court first placed upon the language used in this will. She is not appointed executrix except by implication, yet she tendered the will to the probate court for the purpose of qualifying as executrix by virtue of the language used in the will and she was so qualified.

Should the widow die during the present state of administration what would become of the estate? Would it go to the children by inheritance or by virtue of the terms of the will as contained in the sixth paragraph? Unquestionably the courts would give force and effect to the language contained in this paragraph, which would require that his estate be equally divided between his four children, having due regard to his request that each be required to account for advancements, with the right in his son Preston to administer the estate and to distribute it among his children in accordance with his wishes. And yet such interpretation cannot be put upon this language without regarding the "requests" as express limitations upon the estate devised to the widow and as directions to her as to the manner in which she shall handle the estate.

We conclude that the gift to the wife is a gift in trust during widowhood, not for herself alone and not for the children alone, but for both, to be managed by her in her discretion—presently for her own benefit, but ultimately for the benefit of her children; and that the trust is coupled with the power to dispose of the property among the children in accordance with the terms expressed in the will in her discretion at any time she may choose. She has the power now if she so elects to close the trust by "executing" the "requests." She is not, however, vested with any general power of disposition.

Young v. Young, supra, is very similar to the instant case. There the testator's will devised, "To my beloved wife I give all my estate, real, personal and mixed, to be managed by her (and that she may be enabled the better to control and manage our children), to be disposed of by her to them in that manner she may think best for their good and her own happiness." Although the provisions in that will as to the manner of disposition among the children was not near so definite and was left entirely to the discretion of the devisee, it was held that the gift was one in trust for the use and benefit of the wife and the children, with power to dispose of the property among the children, discriminating at her own discretion as to the time, quantity and person. The Court said: "The trust is that it shall be managed and disposed of for the family."

The plaintiff has not remarried and it does not appear that she contemplates remarriage. It is not necessary, therefore, for us to anticipate a situation that may not arise and to undertake to determine the rights of the parties in the event of this contingency.

The judgment below should be modified to conform to this opinion.

Modified and affirmed.

ANDREW M. LAW v. JESSE CLEVELAND.

(Filed 23 March, 1938.)

1. Trial § 22a—

Judgment overruling defendant's demurrer for failure of the complaint to state a cause of action does not preclude defendant from raising the same question by a motion to dismiss or for judgment as of nonsuit.

2. Judgments § 34—Judgment of South Carolina court in action involving same parties and subject matter held to bar action in this State.

The holder of notes which were executed and delivered in South Carolina and which bore interest at 8 per cent as permitted by its laws, instituted action thereon in South Carolina, the parties being residents of that State, and defendant having been personally served with summons. It appeared that the notes were secured by a mortgage on lands in this State. The parties reconciled their differences and a consent judgment was entered in the action under which the maker conveyed the land to the holder of the notes in partial payment, and the holder was given judgment for the balance due thereon after such credit. *Held:* The South Carolina court had jurisdiction of the parties and subject matter, and its judgment bars the maker from maintaining an action in the courts of this State to enforce the forfeiture and penalty for usury and to cancel the mortgage and deed upon payment of the amount found to be due upon an accounting, since the questions at issue in the action instituted in South Carolina are the same as the questions at issue in the action instituted by the maker in this State.

3. Same—

Under the full faith and credit clause, U. S. Constitution, Art. IV, sec. 1, a consent judgment of another State will bar the parties from maintaining an action in our courts if such judgment would bar the action in the jurisdiction which rendered the judgment, unless the judgment is set aside for fraud or mutual mistake.

4. Judgments § 1—

A consent judgment is as valid and binding as a judgment rendered upon the trial of a cause.

5. Contracts § 8—

The courts must declare a contract as written.

APPEAL by plaintiff from *Johnston, J.*, at February Term, 1938, of POLK. Affirmed.

This is an action brought by plaintiff against the defendant. The judgment sets forth the controversy between the parties:

"This cause coming on to be heard before his Honor, A. Hall Johnston, judge holding the courts of the 18th Judicial District of North Carolina, and a jury, and being heard; and it appearing to the court that this is an action brought by plaintiff for the recovery of usurious interest and penalties therefor; for an accounting, and for the purpose of setting aside a certain deed from plaintiff to defendant, which deed is duly recorded in the office of the register of deeds for Polk County in Book 67 at page 276, and for the further purpose of redeeming certain lands covered by mortgage from plaintiff to defendant, which mortgage is recorded in Book 32 on page 21, in the office of the register of deeds for Polk County:

"And it further appearing to the court that the same land is described in both the mortgage and the deed:

"And it further appearing to the court that in the cross action set up by defendant Jesse Cleveland, said Jesse Cleveland pleads a judgment of the court of common pleas of Spartanburg County, South Carolina, in bar of plaintiff's right to recover, and further pleads that said judgment entitled defendant to recover on his cross action or counterclaim.

"And it further appearing to the court that in said South Carolina suit the parties were the same as in the present suit; and it further appearing to the court that the cause of action in the South Carolina suit was the same as in the present suit; and it further appearing to the court that in the South Carolina proceedings the plaintiff in the present suit, to wit, A. M. Law, was personally served with summons, filed an answer, appeared in person and through attorney, and consented to the judgment rendered therein; and it further appearing to the court that the South Carolina court had jurisdiction of both the parties and the subject of the action; and it further appearing to the

court that all matters which plaintiff seeks to adjudicate in the present action were adjudicated and finally determined in the South Carolina action; and it further appearing to the court that the following judgment was rendered in the said South Carolina action, by consent:

"'DECREE AND ORDER FOR JUDGMENT.

State of South Carolina—County of Spartanburg.
Court of Common Pleas.

Jesse Cleveland v. Andrew M. Law.

"'This is a suit upon seven separate promissory notes aggregating as a whole the sum of $15,000. The defendant, by his answer, sets up the fact that a real estate mortgage covering land situated in the State of North Carolina was given contemporaneously with and for the purpose of securing the notes in question.

"'The defendant, by his answer, requests the court to have the property appraised and that the defendant be given credit for the appraised value of the property on his judgment which may be rendered against him.

"'It appears now that plaintiff and defendant have reconciled their differences and have amicably settled their controversy by the defendant agreeing to convey the property in question to the plaintiff with dower renounced, free of all encumbrances except as to the plaintiff's mortgage, and the plaintiff has agreed to credit the obligation with the sum of $10,000 in consideration of this conveyance.

"'The parties have further agreed that the balance due after this credit by the defendant to the plaintiff is the sum of $8,114.28, which includes 10 per cent attorney's fees on the balance due after the credit above referred to, and that the plaintiff shall have judgment against the defendant for this sum, which shall bear interest from 15 July, 1935.

"'It is, therefore, ordered that Jesse Cleveland have judgment against Andrew M. Law for the sum of $8,114.28, with interest from 15 July, 1935, and for the costs of this action. 30 September, 1935. M. M. Mann, Circuit Judge. We consent: Luther K. Brice, attorney for plaintiff; Nichols, Wyche & Russell, attorneys for defendant.'

"And it further appearing to the court that at the close of plaintiff's evidence the defendant made a motion that plaintiff's cause of action be dismissed, and that defendant recover of plaintiff the sum of $8,114.28 plus interest from 15 July, 1935, and costs:

"And it further appearing to the court that defendant then introduced a certified copy of the suit and proceedings in the South Carolina court, including the judgment, and introduced in evidence the deed executed by plaintiff to defendant above referred to:

"And it further appearing to the court that at the close of all the evidence the defendant renewed said motion:

"And it appearing to the court that the said South Carolina judgment is entitled to full faith and credit under Art. IV, sec. 1, of the Constitution of the United States; and it further appearing to the court that said motion should be allowed:

"It is therefore ordered, adjudged, and decreed that the plaintiff take nothing by his action and that same be dismissed; that the defendant have and recover of the plaintiff the sum of $8,114.28 plus interest from 15 July, 1935, until paid, plus all costs taxed against Andrew Law in the South Carolina suit, plus the costs of this action to be taxed by the clerk.

"It is further ordered, adjudged, and decreed that the attachment heretofore issued in this cause be and the same is in all respects hereby vacated and dissolved. This 7 February, 1938.

A. HALL JOHNSTON,
Judge Presiding."

The plaintiff 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.

Donald Russell and Massenburg, McCown & Arledge for plaintiff.
Quinn, Hamrick & Hamrick for defendant.

CLARKSON, J. The litigants on both sides of the controversy have submitted long, carefully prepared and interesting briefs, but we see no new or novel proposition of law involved in the action. We think the court below made no error in dismissing plaintiff's action and in rendering judgment for defendant as therein set forth.

The two principal questions involved:

1. Did the judgment overruling defendant's demurrer, which was made on the fact that the complaint did not state a cause of action, preclude defendant from raising the same question on motion for judgment of nonsuit? We think not on the facts and circumstances of this case.

The judgment overruling defendant's demurrer was merely interlocutory in nature; the defendant still had the right to answer over. N. C. Code, 1935 (Michie), sec. 515. The precise point was passed upon in *Baker v. Garris,* 108 N. C., 218 (226-7), where it was said: "In view of the repeated decisions of this Court that a motion to dismiss upon the grounds mentioned *cannot be waived* and may be taken *at any time,*

we cannot give the effect contended for to such a merely interlocutory ruling as in this case." To the same effect is McIntosh, N. C. Prac. & Proc., part sec. 454, pp. 469-70, as follows: "Where the defendant demurred to the plaintiff's cause of action, and upon appeal from a judgment overruling the demurrer the judgment was sustained, the defendant is estopped to raise the same objection on a second appeal from a final judgment rendered in the action; but where the defendant demurs to the plaintiff's complaint upon the merits, as for want of jurisdiction or failure to state a cause of action, and the demurrer is overruled, he may appeal to the Supreme Court, or he may answer the complaint and on appeal from a final judgment against him raise the question by a motion to dismiss." These authorities are determinative of the point; even though the trial court, upon the demurrer, has held that the complaint states a cause of action, this question may again be raised, as in this case, by motion for judgment to dismiss.

2. Does the South Carolina judgment bar plaintiff's cause of action and entitle defendant to judgment? We think so.

The notes made by plaintiff to defendant, secured by mortgage on real estate in Tryon, Polk County, N. C., were executed and delivered in South Carolina. Both plaintiff and defendant are residents of South Carolina. Personal service was had in the South Carolina action. Plaintiff's land, securing these notes, is in Tryon (Polk County), N. C. These notes bore 8 per cent interest, which is the legal rate in South Carolina; the legal rate in North Carolina is 6 per cent. In the South Carolina action there was no suggestion made by plaintiff when he was sued by Cleveland as to any taint of usury in the transaction. The present action was commenced in this State by plaintiff against defendant to recover usury.

In this action the plaintiff prays judgment against the defendant: "For an accounting. That on account of the usurious interest demanded, charged and collected, all interest on the notes described in the complaint be forfeited, and for a recovery of double the amount of the usurious interest paid. For the right to redeem the property described in the deed recorded in Book 67, page 276, Polk County registry, upon payment of any indebtedness shown by said accounting to be due, and to have the mortgage recorded in Book 32, page 21, Polk County registry, duly cancelled of record upon the payment of said amount. For an attachment against sufficient of the property of the defendant in North Carolina to satisfy plaintiff's claim. For the costs of this action. For such other and further relief as is just and equitable."

Among other defenses the defendant says: "That said judgment is in all respects a valid and binding judgment, and that as such is entitled under Art. I, sec. 4, of the Constitution of the United States, to be

given full faith and credit by the courts of the State of North Carolina. That although defendant has demanded of plaintiff that he pay said judgment, the plaintiff has failed, neglected, and refuses to pay the same or any part thereof. Defendant prays: That plaintiff's action be dismissed and that plaintiff take nothing by his action. That defendant have and recover of plaintiff the sum of $8,114.28 plus interest thereon from 15 July, 1935, until paid. For the costs of this action, and for such other and further relief as to the court might seem just and proper in the premises."

Under the consent judgment Law conveyed to Cleveland the land in Tryon, N. C., on which he had given Cleveland a mortgage and made other adjustments. In the South Carolina "Decree and Order for Judgment" is the following: "It appears now that plaintiff and defendant have *reconciled* their differences and have *amicably* settled their controversy," etc. We think it too well settled to cite authorities that the South Carolina court had jurisdiction of the parties and the subject of the action. The questions at issue in the present case are the same questions which were at issue in the South Carolina case, and which were determined in and adjudicated by the South Carolina court. The South Carolina judgment settled these questions and they could not again be litigated in South Carolina unless the "Decree and Order for Judgment" be set aside for fraud or mutual mistake. Therefore we are of the opinion that, under the full faith and credit clause of the Constitution of the United States, these questions cannot be relitigated in North Carolina.

It is well settled that a consent judgment is just as valid and binding as a judgment rendered after the trial of a cause. *LaLonde v. Hubbard*, 202 N. C., 771.

The full faith and credit clause was recently stated by *Devin, J.*, in *Dansby v. Ins. Co.*, 209 N. C., 127 (129-130), as follows: "The only question presented by this appeal is whether the service of the original process in the manner set forth in the Mississippi judgment was a valid service under the laws of the state of Mississippi. The validity and affect of a judgment of another state must be determined by reference to the laws of the state where rendered. Art. IV, sec. 1, of the Constitution of the United States, commands that full faith and credit shall be given in each state to the judicial proceedings of every other state. And the acts of the Congress enacted in the exercise of the power thus granted specifically directs that judgments 'shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.' *Milwaukee County v. White Co.*, opinion by *Mr. Justice Stone*, U. S. Supreme Court Advance Opinions, Vol. 80, p. 155 (9 Dec., 1935);

34 C. J., 1128. When such judgment is made the basis of an action, it is conclusive on the merits in every other state if it appear that the court in which it was rendered had jurisdiction of the parties and the subject matter. *Morris v. Burgess,* 116 N. C., 40; 2 Black on Judgments, sec. 857. Recovery upon it can be resisted only on the grounds that the court which rendered it was without jurisdiction. *Milwaukee Co. v. White Co., supra.* Or for fraud in its procurement."

On account of the deflated conditions of the times the strict enforcement by defendant of his legal rights against plaintiff seems to be hard measure. We do not make, but construe contracts.

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

Affirmed.

META TOMS, INDIVIDUALLY AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF CHARLES FRENCH TOMS, SR., DECEASED, v. HORTENSE BROWN, M. F. TOMS, JR., NANCY TOMS, ROBERT TOMS, CHARLES FRENCH TOMS, III, PRESENT LIVING GRANDCHILDREN OF CHARLES FRENCH TOMS, SR., DECEASED, VESTRY OF THE ST. JAMES EPISCOPAL CHURCH, HENDERSONVILLE, NORTH CAROLINA, AND ALL UNKNOWN DEVISEES, WHETHER IN BEING OR NOT IN BEING, UNDER THE WILL OF CHARLES FRENCH TOMS, SR., DECEASED.

(Filed 23 March, 1938.)

1. **Executors and Administrators § 15i—Under terms of this will mortgage debt was proper charge against estate to be paid from other assets.**

The will in question directed that testator's wife, as his executrix, should be allowed to discharge out of any income of the estate or from funds derived from the sale of property, a mortgage indebtedness against certain property held by the entireties, so that she might have a home. *Held:* Under the terms of the will, in accordance with the expressed intent of the testator, the amount of the mortgage indebtedness is a proper charge against the estate, and the executrix is entitled to sell other lands of the estate to make assets to pay same.

2. **Executors and Administrators § 12b—Will held to confer power on executrix to sell realty without court order.**

Testator left his property, both real and personal, to his wife for life with remainder to his children, and directed the payment of certain debts, and by codicil affirmed the disposition of the property made by the will, and directed that enough property be sold to pay a certain sum to the vestry of a church. The will provided that his wife, as executrix, should have full power to sell the property and execute deeds therefor, and that her opinions and conclusions in the management of the estate should be final and conclusive. *Held:* Under the terms of the will and codicil the executrix was given plenary power to sell and convey the realty without court order.

3. Wills §§ 13, 31—

The revocation of a will by implication in a codicil is not favored, and when a codicil is attached to a will and does not import revocation, but explains, alters and adds to the will, the will and codicil will be construed together to ascertain the intent of the testator.

APPEAL by defendants from *Alley, J.*, at January Civil Term, 1938, of BUNCOMBE. Affirmed.

This is a special proceeding brought by plaintiff against defendants to sell land to make assets. N. C. Code, 1935 (Michie), sec. 74.

The judgment, which indicates the controversy, is as follows:

"This cause coming on to be heard at the January Term, 1938, of the Superior Court of Buncombe County, and being heard upon the agreed statement of facts appearing in the record, which are incorporated herein and made a part of this judgment, and upon the further facts as alleged in the petition and admitted in the answer, and all parties to this proceeding being represented by counsel except the vestry of the St. James Episcopal Church of Hendersonville, North Carolina, who was duly served by summons in this action but filed no answer, and all parties, through their counsel, having conceded, both in the agreed statement of facts and by admissions in open court, that the right of the plaintiff to sell the land described in the petition for the purpose of creating assets with which to pay debts and legacies under the will and codicil of Charles French Toms, Sr., deceased, is dependent upon the construction of the will and codicil of the testator and the ownership of certain bonds mentioned in the agreed statement of facts, and after hearing the argument of counsel on both sides, the court is of the opinion that the will of Chas. French Toms, Sr., dated 10 April, 1933, and the codicil thereto, dated 11 September, 1936, both of which were probated in solemn form in the Superior Court of Henderson County at the May-June, 1937, Term, must be construed together, and being so construed, the court is of the opinion as a matter of law, and so holds, that the $8,000 indebtedness against the estate as set out in the petition, and further set out in the third paragraph (h) of the will of Charles French Toms, Sr., is a valid charge against said estate and must be paid.

"The court further finds as a fact that there is not sufficient personal property assets with which to pay said debts of the estate, and that a sale of the real estate described in the petition is necessary, as a matter of law, for the purpose of creating additional assets with which to pay debts, legacies, and other proper charges against said estate.

"The court, having held that the said $8,000 item is a proper charge against said estate, does not deem it necessary to pass upon the question of the ownership of the bonds referred to in the petition, for the reason

that, even though said bonds be adjudged to be an asset of the said estate, and be added to the other personal assets as set out in the petition, it would still be necessary as a matter of law to sell the land described in the petition.

"And the plaintiff, who is the duly qualified executrix under the will and codicil of Charles French Toms, Sr., deceased, having requested the court to further construe said will upon the question of whether or not she has the power under the will to sell real estate belonging to the estate without resort to court action, and the court finding as a fact that all parties necessary to the adjudication of this question are properly before the court, and it having been made to appear to the court that if said executrix has such power under the will, the estate will be saved large sums hereafter in the elimination of fees and court expenses in court sales, and said will and codicil being construed upon this question, the court is of the opinion, and so holds, as a matter of law, that Meta Toms, the executrix named in said will, has full power and authority conferred upon her by said will to sell any part or all of the real estate belonging to Charles French Toms, Sr., at the time of his death.

"It is further ordered that this cause be remanded to the clerk of the Superior Court of Buncombe County, North Carolina, for an order directing the sale of the real estate described in the petition, and for such further action as by law required.

"It is further ordered that the cost of this proceeding shall be assessed by the clerk and paid from the proceeds of the sale. This 20 January, 1938.

FELIX E. ALLEY,
Judge Presiding and Holding the Courts of the Nineteenth Judicial District."

To the foregoing judgment defendants excepted, assigned error and appealed to the Supreme Court. The necessary facts will be set forth in the opinion.

R. L. Whitmire for plaintiff.
M. M. Redden for defendants.

CLARKSON, J. The questions necessary to be considered for the determination of this appeal:

1. Is the $8,000 item referred to in the petition a proper charge against the estate of Charles French Toms, Sr.? We think so under the language of the will.

Item 3rd (h) of the last will and testament of Charles French Toms, Sr., is as follows: "That upon my death my wife, as my executrix,

shall be allowed to fully discharge, out of the income of my estate, or out of any money or funds arising from the sale of property belonging to the estate, or any other income derived by the estate, a certain deed of trust for $8,000 against the K. G. Justus house and lot, owned by us jointly on the Flat Rock Road, and when she shall have discharged such mortgage, or any mortgage given in lieu thereof, and paid the same, the property shall belong to her and she shall not be required, either in law or in equity, to account for the same, it being understood that this is an outright gift to her for the purpose of allowing her to have a home."

It will be noted that the property was held by Charles French Toms, Sr., and his wife, Meta Toms, as tenants by the entirety. Both are seized by the entirety *per tout et non per my*. To make it sure that the $8,000 secured by a deed in trust made jointly by himself and wife on property held by the entirety should be paid out of his estate, he so specifically wills and bequests "for the purpose of allowing her to have a home."

2. Does the will and codicil attached to the petition confer power upon the executrix to sell real estate belonging to the estate? We think so.

In Charles French Toms, Sr.'s will, made 10 April, 1933, are the following provisions: (1) His entire estate was left to his wife for life with remainder to his children. (2) His wife as executrix was fully empowered to convey real estate. (3) He directed that the $8,000 should be paid from his estate. (4) He acknowledged certain indebtedness due his wife and directed that this be paid from his estate. In the codicil of 11 September, 1936, he expressly referred to his will of 10 April, 1933, and stated in the codicil that he has attached the two together. He says in his codicil that the indebtedness to his wife mentioned in his will has been paid without interest, and that he wishes her to have a building known as the Candy Kitchen to cover interest. The will is otherwise changed as follows: (1) He again leaves all his property to his wife with remainder to his grandchildren. He directs that she dispose of enough of said property to pay the vestry of St. James Episcopal Church of Hendersonville, North Carolina, the sum of one thousand ($1,000) dollars in cash, "which I desire them to use in the most useful manner that they may see fit in the advancement of the gospel."

A codicil does not import revocation but an addition, explanation, or alteration of a prior will. The courts are adverse to the revocation of a will by implication in a codicil. *Baker v. Edge,* 174 N. C., 100.

A will and codicil are to be construed together so that the intention of the testator can be ascertained from both. *Brown v. Brown,* 195 N. C., 315 (320).

In the will Item 3(b) is as follows: "She shall have the power to sell and convey any part of the property and make good and sufficient deeds to purchasers therefor, who shall receive a good title to the same."

Item 3(g): "That in the management of my estate her conclusions and opinions shall be conclusive and final and are not to be interfered with."

The power given in the will to the executrix to sell and convey is plenary. *Wells v. Williams*, 187 N. C., 134. The codicil does not revoke this, but the sale to pay the $1,000 to the church is a supplemental bequest and that the payment be in cash.

The judgment of the court below we think is correct in all respects and for the reasons given is

Affirmed.

STATE v. MANN SMITH, ALIAS HIAWATHA SMITH.

(Filed 23 March, 1938.)

1. Rape § 8—

Evidence that the crime of rape was committed upon the person of the prosecutrix and that defendant was the perpetrator of the crime *held* sufficient to be submitted to the jury.

2. Criminal Law § 33—Evidence held to support findings that confessions were voluntarily made.

In this prosecution of defendant for rape, the evidence disclosed that after his arrest when officers confronted defendant with a coat as described by prosecutrix as worn by her assailant, defendant stated he was the man and had assaulted prosecutrix twice, and that when he was taken to the home of prosecutrix and saw her he spontaneously declared: "That's the girl." There was no evidence that the officers having defendant in charge, or any other person, made any threats, offered any inducements, or held out any reward for a statement from him. *Held:* The evidence sustains the finding of the trial court that the confessions were voluntary and competent, the mere presence of officers being insufficient to affect their competency, and if defendant was suffering with fear at the time, there was no evidence that the fear was engendered by word or act of any person other than defendant.

3. Same—

In ruling upon the competency of testimony of alleged confessions, the trial court is required to find, and may properly find, only whether the alleged confession was voluntarily made, and it is not error for the court to refuse to find further facts.

4. Same—

Defendant is entitled to testify and offer witnesses in rebuttal upon the question of the voluntariness of his alleged confessions, but the court is not required to call upon him to offer testimony, and when he fails to do so he has no cause for complaint.

5. Clerks of Court § 7—

Juvenile courts have no jurisdiction to try boys fifteen years of age charged with a capital felony, the jurisdiction of the Superior Court over such prosecutions not having been taken away by the juvenile court act.

6. Criminal Law § 61c—Court is not required to sentence fifteen-year-old boy, convicted of capital crime, to reformatory.

It would seem that the Legislature did not intend that a fifteen-year-old boy, convicted of a capital crime, should be sentenced to a reformatory, C. S., 7322, 5912 D, but if the statutes be construed to permit such sentence, the power of the court to impose such sentence is made permissive and not compulsory, and sentence of death upon a conviction of a fifteen-year-old boy of the crime of rape is without error.

7. Criminal Law § 4—

The presumption is that a boy fifteen years of age is capable of committing the crime of rape.

8. Criminal Law § 81a—

The jurisdiction of the Supreme Court on appeal is limited to matters of law and legal inference, and whether the youth of a defendant constitutes a mitigating circumstance justifying a relaxation of the prescribed punishment is a matter addressed to the discretionary power of the Governor.

APPEAL by defendant from *Alley, J.*, at September Term, 1937, of MCDOWELL. No error.

This is a criminal prosecution under a bill of indictment charging the defendant with the commission of the capital felony of rape. The prosecutrix, a girl 13 years of age, was on her way home from school on 31 March, 1937. When she walked she took a shortcut by way of a path leading through woods. This path turned off at Black Bottom and led over the ridge. After she had gone some distance into the woods she saw the defendant standing by the path. There was evidence that he had seen her coming and had gone to this point to wait for her. When she got within a few steps of him the defendant told her to stop, and asked her if she wanted him to shoot her. He had his hands in his pocket; he then took her off the path in the woods and assaulted her, and later took her further in the woods and again assaulted her, detaining the prosecutrix altogether about two and one-half hours. There was a verdict of "guilty of rape as charged in the bill of indictment." From judgment of death by asphyxiation pronounced thereon the defendant appealed.

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

W. R. Chambers, Wm. C. Chambers, and Edward H. McMahan for defendant, appellant.

BARNHILL, J. The defendant offered no evidence, but rested his defense upon the contentions that: (1) He did not commit the crime; (2) the alleged confessions made by him were incompetent, and (3) that his age precluded his being sentenced to death.

To detail the evidence herein to any considerable extent would serve no good purpose. It is sufficient to say that there was ample evidence offered tending to show that the crime of rape was committed upon the person of the prosecutrix and to identify the defendant as the perpetrator of the crime. The prosecutrix testified to facts sufficient to constitute the offense, and she was corroborated by the doctor who examined her, and others. The testimony was sufficient to be submitted to the jury for it to determine whether the threats made by the defendant and the circumstances surrounding the assault were sufficient to, and did, put the prosecutrix in fear and overcome her power of resistance. The prosecutrix likewise identified the defendant on the night following the assault in the afternoon. When the defendant was carried into the presence of the prosecutrix, immediately upon seeing her, he said: "That's the girl." The evidence shows that this statement was spontaneous and was provoked only by the sight of the girl. The statements of the defendant offered as evidence of confessions likewise tend to prove both the commission of the offense and the identity of the perpetrator.

But the defendant stressfully challenges the competency of the evidence of statements made by the defendant by way of confession, and likewise challenges the admission of this evidence, for that the court did not find the facts. Counsel for the defendant insists that at the time the alleged statements were made by the defendant he was suffering from abject fear. Even so, there is no evidence that the officers having him in charge, or any other person, made any threats against him, offered him any inducement, or held out any hope of reward in exchange for a statement from him. The mere presence of a number of officers at the time the statements were made is not sufficient to affect the competency of the evidence.

The prosecutrix had described the defendant and the clothes that he was wearing at the time of the assault. When he was arrested he did not have on the coat described. When the officers found the coat at his mother's and showed it to him he said that he was the man and that he assaulted the prosecutrix twice. And then, as stated, when he was taken to the home of the prosecutrix he spontaneously said: "That's the girl."

When the State offered the evidence of statements made by the defendant the defendant objected and asked permission to cross-examine the witness regarding the voluntariness of the statement. After some considerable cross-examination the defendant requested the court to find the facts regarding the alleged confession and to hold that any evidence

regarding the same is incompetent. Thereupon the court asked the witness certain questions as to whether he made any promise, held out any hope or did anything to put the defendant in fear, or to induce him to make the statement. The court made the following entry: "I hold, under the present evidence, that what he said was voluntary." The defendant excepted to the refusal of the court to find the facts regarding the alleged confession, as requested. The only finding the court was permitted to make was made. In ruling upon the competency of this evidence the law required the court to make the preliminary finding, before admitting the evidence, that the statements were voluntary. A determination of the facts other than this is for the jury. It was not the duty of the court to find further facts. For the court to find facts other than that the statement was voluntarily made might be highly prejudicial to a defendant. The court below went as far in this respect as the law permits, and there was no error in the refusal to find further facts. Likewise, there was no error in the admission of the testimony to which exception was entered.

The defendant contends here that he had the right to testify and offer witnesses in the absence of the jury in rebuttal concerning the circumstances under which the alleged confession was procured from him. This is true if he asserts or requests the right at the time. However, when his counsel had completed his cross-examination of the witness in respect to the circumstances under which the confession was made he did not tender any witnesses in rebuttal, but elected to request the court at that time to find the facts. It was not the duty of the court to call upon the defendant to offer evidence. It ruled upon the competency of the testimony when called upon to do so by the defendant. This gives the defendant no cause for complaint.

But the defendant further contends that even if it be conceded that he was justly convicted in a trial free from error the court was without power to impose the sentence of death. He contends that it was the duty of the court to commit him to a reformatory.

The juvenile courts created by the Legislature are without jurisdiction to try boys fifteen years of age charged with a capital felony. *S. v. Burnett,* 179 N. C., 735. The jurisdiction of such offenses was not taken from the Superior Court by the passage of the juvenile court act. C. S., 7322, which is sec. 10, ch. 509, P. L. 1907, creating the Stonewall Jackson Manual Training and Industrial School, relied on by the defendant, by its terms did not impose upon the judge below the duty to sentence this defendant to a reformatory. We cannot conceive that the Legislature, by the terms of this act, intended to require or permit the commitment of persons convicted of capital felonies to a reformatory. Even if this be conceded it would not avail the defendant. The statute pro-

vides that: "The judges of the Superior Court . . . shall have authority, and it shall be their duty, to sentence to the school all persons under the age of sixteen years, convicted in any court of this State of any violation of the criminal laws: *Provided,* that such judge or other of said officers, shall be of the opinion that it would be best for such person and the community in which he may be convicted, that he should be so sentenced." It does not appear in this record that the court below was of the opinion that it would be best for the defendant and the community that he be sentenced to a reformatory. Nor does it appear that he was requested to make such finding. In the act creating the Morrison Training School for Negro Boys, the language providing for commitment of boys under the age of sixteen years is permissive and not compulsory. C. S., 5912-D.

The age at which, and the circumstances under which, a child or youth becomes liable to criminal prosecution and subject to punishment for crime has been discussed in a number of cases in this Court. *S. v. Pugh,* 52 N. C., 61; *S. v. Sam,* 60 N. C., 293; *S. v. Yeargan,* 117 N. C., 706; *S. v. Hicks,* 125 N. C., 636. *S. v. Yeargan, supra,* is treated as one of the leading American cases on the subject. It is reported in 36 L. R. A., 196, accompanied by an exhaustive and elaborate note on the English and American cases relating to the question. In this case *Faircloth, C. J.,* states the rule which prevails in this jurisdiction as follows: "An infant under seven years of age cannot be indicted and punished for any offense, because of the irrebuttable presumption that he is *doli incapax.* After 14 years of age he is equally liable to be punished for crime as one of full age. His innocence cannot be presumed. Between 7 and 14 years of age an infant is presumed to be innocent and incapable of committing crime, but that presumption in certain cases may be rebutted, if it appears to the court and jury that he is capable of discerning between good and evil, and in such cases he may be punished. The cases in which such presumption may be rebutted and the accused punished when under 14 years of age are such as an aggravated battery, as in maim, or the use of a deadly weapon, or in numbers amounting to a riot, or a brutal passion, such as unbridled lust, as in an attempt to commit rape, and the like. In such cases if the defendant be found *doli capax,* public justice demands that the majesty of the law be vindicated and the offender punished publicly, although he be under 14 years of age, for malice and wickedness supply the want of age." This defendant was slightly over fifteen years of age, and there is no presumption that he was incapable of committing the crime charged. The presumption is to the contrary.

We conclude that the acts creating the juvenile courts and the several reformatories of the State for boys did not require the court below to

impose any punishment other than that pronounced. If the youth of this defendant constitutes a mitigating circumstance and a just cause for relaxing the prescribed punishment as a matter of public policy in the relation of the State to its youth, it addresses itself to the discretionary power of commutation and parole possessed by the Governor of the State and not to this Court. The jurisdiction of this Court is limited to questions of law and legal inference.

In the trial below we find

No error.

STATE v. HENRY MOSLEY.

(Filed 23 March, 1938.)

1. Homicide § 16—

When an intentional killing of a human being with a deadly weapon is admitted or established, the law implies malice, constituting the offense murder in the second degree, with the burden on defendant to show to the satisfaction of the jury matters in mitigation or excuse.

2. Homicide § 11—

When a person is without fault in bringing on an affray, and a murderous assault is made upon him, he is not required to retreat, but may stand his ground and kill his adversary if necessary in his self-defense.

3. Same—Right to kill in self-defense rests upon necessity, real or apparent.

One may kill in self-defense if he is without fault in bringing on the affray, and it is necessary or appears to him to be necessary to kill his adversary to save himself from death or great bodily harm, the reasonableness of his apprehension being for the jury to determine from the circumstances as they appeared to him.

4. Homicide §§ 7, 11—

If excessive force or unnecessary violence is used in self-defense, defendant is guilty of manslaughter at least.

5. Homicide § 11—

Mere language is not sufficient to support the plea of self-defense, but it is required that defendant be put in fear of death or great bodily harm by an actual or threatened assault.

6. Homicide §§ 11, 27f—Fear either of death or great bodily harm will justify killing in self-defense.

In this prosecution for homicide, the court instructed the jury that defendant would be justified in killing his adversary if defendant believed, and had reasonable grounds to believe, that the act was necessary to save himself from death. *Held:* The instruction must be held for error as failing to include, as a basis of the plea of self-defense, reasonable apprehension of great bodily harm, even though the court elsewhere correctly charged the jury on the question, since it cannot be ascertained which instruction the jury followed in arriving at its verdict.

7. Criminal Law §§ 53g, 81c—

An erroneous instruction on a substantive feature of the case constitutes prejudicial error even though correct instructions on the point are elsewhere given in the charge, since it must be presumed on appeal that the jury were influenced by the erroneous portion in arriving at its verdict.

BARNHILL, J., dissents.

APPEAL by defendant from *Harding, J.*, at May Term, 1937, of FORSYTH.

Criminal prosecution tried upon indictment charging defendant with the murder of one Clarence Black.

The defendant pleaded not guilty, and relies upon self-defense.

The State offered evidence tending to show that: On the afternoon of Easter Monday, 1937, the defendant shot one Clarence Black with a pistol, inflicting a wound from which he died almost instantly. The scene of the shooting was on the north sidewalk of 8th Street, between Ridge Street on the west and Highland Avenue on the east, in front of a beer parlor in Winston-Salem. Defendant, on returning from Greenville, S. C., near midnight on Sunday found Clarence Black in defendant's home with his wife. Black came out the front door, passing defendant, and left. Between 8 and 9 o'clock the next morning defendant went to the home of Mary Perkins on E. 8th Street, where he was accustomed to visit. While there, in conversation with Robert Martin, he said that he was worried, that when he came home the night before Clarence Black came out and ran; that on being asked what he was going to do about it, defendant said, "I don't know what I might do"; that on being advised to "just give it up and not do anything about it," he said, "That is true. I am going to see him and have a talk to him. If he talks like a man I ain't going to do anything. If he talks to me like junk I am going to kill him." Then in the afternoon, between 3 and 4 o'clock, Clarence Black and four others were standing in front of the beer parlor, the scene of the shooting, two next to the building and Black and two others at edge of sidewalk. Defendant came from Highland Avenue on to and walked west down 8th Street in "a slow gait with his head kind of down," his hands in his front pocket, an overcoat thrown around his shoulders and his body coat buttoned up." Defendant walked between the two groups and asked to speak to Clarence Black. They took two or three steps to the west and engaged in a conversation in a low tone, about Black going to defendant's house. Shurley Brown, only eyewitness for the State, detailed that part of conversation he says he heard. His testimony differs from statement of defendant, hereinafter referred to, mainly in that he says that immediately before the shooting, defendant cursed Black, and said, "You boys get out of the way," and that at that time Black was standing with his right hand in his front pocket and a cigarette in his left.

R. N. Carroll, police officer, testified for the State that defendant came into police headquarters Easter Monday night and gave up. At that time he made a statement to the officer which was reduced to writing and signed. The officer testified that defendant said in substance: After describing the incident at his home on Sunday night, the defendant said that he saw Clarence Black the next afternoon about 3 o'clock at the beer parlor on E. 8th Street, near A. Ridge Alley; that he had his pistol in his pants pocket when he saw him; that he called to Black and told him he wanted to talk to him. They stepped off 10 or 12 feet from the beer parlor; that he asked Black why he didn't leave his wife alone; that Black told him he had not been bothering his wife; that then Black cursed him, using a vilely vulgar epithet; that Black put his hand in his bosom; that he shot him twice at a distance of 10 feet, and he fell. The written statement was introduced in corroboration. In it defendant stated: "I then asked him why he kept messing with my old lady. He then went to cursing me and called me a — — — and several other names, and said that he did not go with my old lady. Clarence then commenced to back off with his hand in his bosom. I had my pistol in my right pants pocket and my hand on it. I pulled my pistol when he was about 10 feet away. I shot him twice and he fell." Defendant offered no evidence.

Verdict: Guilty. Case remanded at Fall Term, 1937, for correction of record to speak the truth as to verdict. 212 N. C., 766, 194 S. E., 486. Correction made to read: "Guilty of murder in the first degree."

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 court below was of opinion that the evidence was sufficient to justify and to require submitting to the jury defendant's plea of self-defense. With this we agree. However, exceptions to the charge of the court with respect thereto reveals prejudicial error.

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 the implication is raised by an admission or proof of the fact of killing, the burden is on the defendant to show to the satisfaction of the jury facts and circumstances sufficient to reduce the homicide to manslaughter or to excuse it. *S. v. Robinson, ante,* 273, and cases cited.

"Where a man is without fault, and a murderous assault is made upon him, an assault with intent to kill, he is not required to retreat,

but may stand his ground, and if he kill his assailant and it is necessary to do so to save his own life or protect his person from great bodily harm, it is excusable homicide and will be so held." *Hoke, J.*, in *S. v. Blevins*, 138 N. C., 668, 50 S. E., 763; *S. v. Robinson, ante*, 273, and cases cited.

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 or his family when necessary to prevent death or great bodily harm. *S. v. Bryson*, 200 N. C., 50, 156 S. E., 143; *S. v. Bost*, 192 N. C., 1, 133 S. E., 176; *S. v. Johnson*, 166 N. C., 392, 81 S. E., 941; *S. v. Gray*, 162 N. C., 608, 77 S. E., 833.

"2. That one may kill in defense of himself or his family 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., 1005, 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., 672, 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. Cox*, 153 N. C., 638, 69 S. E., 419, it is 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; *S. v. Terrell*, 212 N. C., 145, 193 S. E., 161.

If excessive force or unnecessary violence be used the defendant would be guilty of manslaughter at least. *S. v. Glenn*, 198 N. C., 80, 150 S. E., 663.

"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. Barrett*, 132 N. C., 1007, 43 S. E., 832, *Walker, J.*, speaking to the question, said: "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." *S. v. Waldroop,* 193 N. C., 12, 135 S. E., 165; *S. v. Terrell, supra.*

Applying these principles, exception is well taken to that portion of the charge which reads: "I might meet a man out here on the street and he says, 'Throw up your hands; I am going to kill you.' I think he is and believe it. He points a pistol in my face and tells me he is going to kill me, and I shoot him first. It may be he was not going to kill me; that he was playing a joke on me; just trying to have a little fun, and there was no danger at all. If I had reasonable grounds to believe that I was in danger, about to be killed and in good faith believing I was, I have the right to use reasonable force to protect myself. On the other hand, a man meets me on the street and tells me to throw up my hands, he is going to kill me and he meant to do so. I was in actual danger of being killed instantly. If I did not believe it and thought he was joking or playing with me and did not believe it, but because he had thrown a pistol on me on the street in the presence of my acquaintances and made me mad and I flew into a temper and knocked him down and killed him, then I would be guilty at least of manslaughter, because I did not believe I was going to be killed. A *man must in good faith believe he is going to be killed* (italics ours); then he has the right to use such force as he believes to be necessary to protect himself."

A similar charge was considered in *S. v. Waldroop, supra.* What is said there is applicable here. There, as here, the right of self-defense was made to depend entirely upon a reasonable belief that defendant was about to be killed. Here it is specifically declared: "A man must in good faith believe he is going to be killed; then he has the right to use such force as he believes to be necessary to protect himself." The error in the instruction is the omission of any reference to *the apprehension of great bodily harm.* This is as much an element of defense

as the apprehension of death. The test is, *did the defendant have reasonable apprehension to believe,* and *did he believe, that his life was in danger* or *that he was about to receive great bodily harm?*

As in the *Waldroop case,* here there appears in other portions of the charge a correct statement of the principle of law. *Adams, J.,* speaking to the question, there said: "In substance the two are contradictory—one including both elements and the other only one. 'It is well settled that when there are conflicting instructions upon a material point a new trial must be granted, as the jury are not supposed to be able to determine when the judge states the law correctly or when incorrectly. We must assume in passing upon motion for new trial that the jury were influenced in coming to a verdict by that portion of the charge which is erroneous.' *Edwards v. R. R.,* 132 N. C., 99; *S. v. Barrett, supra.*"

For error in the charge as indicated there will be a

New trial.

BARNHILL, J., dissents.

IN RE WILL OF W. J. WATSON.

(Filed 23 March, 1938.)

1. Wills § 13—Methods by which wills may be revoked.

A will may be revoked by any of the acts enumerated in C. S., 4133, performed by testator or by some other person in his presence and by his direction and consent, indicating an intention to revoke same, or by proper execution of a subsequent will or other writing, or by the subsequent marriage of the testator, C. S., 4134, but a will may not be revoked by verbal declarations and it is expressly provided by statute that a will may not be revoked by any presumption of an intention to revoke on the ground of an alteration in circumstances, C. S., 4135.

2. Same—Tripartite will held not revoked by subsequent revocation by marriage of wills of other parties to the agreement.

Three single brothers, owning personalty and realty in common, each executed a will leaving all his interest in his property, real and personal, in fee and in common, to his brothers or the survivor of them. Caveators offered evidence that thereafter two of the brothers married, resulting in the revocation of their wills, that after the marriage of the brothers the personalty and the income from their business was equally divided among them, that the brothers agreed to partition the lands and mutually agreed to release each other from the obligations and conditions which entered into their agreement to make reciprocal wills, and contended that therefore the will of the unmarried brother, offered for probate, was revoked.

Held: The exclusion of the evidence offered by caveators was not error, since such evidence would at most establish testator's right to cancel his will at his option, without facts from which the exercise of this option can be inferred, a will not being revocable by verbal declarations and it being expressly provided by statute that a will may not be revoked by presumption arising from change of circumstances. C. S., 4135.

APPEAL by caveators from *Williams, J.*, at October Term, 1937, of WILSON. No error.

Wiley C. Glover and Finch, Rand & Finch for caveators, appellants.
W. A. Lucas and O. P. Dickinson for propounders, appellees.

SCHENCK, J. The caveators, B. A. Sasser, Mrs. Ava Sasser Moore, Howard Simpson, L. A. Simpson, W. M. Simpson, Mrs. Mattie Simpson Bunn, Mrs. Addie Simpson Boykin, Mrs. Bettie Simpson Hamilton, and Mrs. Bessie Simpson Bunn, are nieces and nephews of W. J. Watson, deceased, being children of his sisters, who predeceased him; the propounders, John D. Watson and James G. Watson, are brothers of the said W. J. Watson, deceased; and the caveators and propounders are all of the heirs at law and next of kin of said W. J. Watson, deceased.

W. J. Watson died on 10 December, 1936, and on 26 January, 1937, John D. Watson and James G. Watson filed with the clerk and procured the probate thereof in common form, and the issuance of letters testamentary to them thereon, a paper writing in words and figures as follows:

"North Carolina—Wilson County.

"Know all men by these presents that I, W. J. Watson, being of lawful age and sound mind and memory, do make, publish, and declare this instrument to be my will and testament, hereby revoking all former wills.

"Whereas the undersigned, together with his two brothers, John D. Watson and James G. Watson, are the owners as copartners and tenants in common of equal interest of all the property—real, personal and mixed—which we have already acquired and will be copartners and tenants in common of equal interest of all the property—real, personal, and mixed—which we may acquire in unchanged continuance of our operations and in like capacity; and

"Whereas the undersigned and his two said brothers, John D. Watson and James G. Watson, because of the conditions under which this property has been acquired, and is being acquired, have agreed together this day to execute tripartite wills (each executing a separate will of like intent to this), making each other sole devisees and legatees.

"Now, in the execution of this mutual agreement, and as his one of the tripartite wills made in pursuance thereof, I, W. J. Watson, on .... September, 1927, do make and declare this to be my will and testament, viz:

"Item 1. All of my just debts and funeral expenses shall be at all times fully paid by my executors hereinafter named.

"Item 2. I do hereby give, devise and bequeath to my two brothers, John D. Watson and James G. Watson, and to the survivor of either, as hereinafter set out, all and singular my interest, whether sole seized and possessed, or seized and possessed jointly and as tenants in common, in all the lands, tenements, properties, farm equipment, livestock, notes, bonds, moneys, mortgages, bills receivable, accounts, and real and personal property of every description, of which I may die seized and possessed, wheresoever situate and whether acquired at the date hereof or subsequent thereto; but it is expressly declared and provided, and I do declare the same to be my will, and this to be a part of the above bequest and devise, that, if either of my two said brothers shall predecease me, then all the property herein bequeathed and devised shall pass to the survivor absolutely and in fee; and, if both my said brothers shall predecease me, then the agreement, under which the tripartite wills are executed, shall cease and determine, and I shall be at liberty to make such disposition of all the property, howsoever and whensoever acquired, as I shall see fit.

"Item 3. I do hereby constitute and appoint my two said brothers, John D. Watson and James G. Watson, my lawful executors, to all intents and purposes, to execute this my last will and testament according to the true intent and meaning of the same, and every part and clause of the same.

"In witness whereof I, the said W. J. Watson, do hereunto set my hand and seal, 6 September, 1927.

W. J. WATSON. (Seal)

"Signed, sealed, published and declared by the said W. J. Watson to be his last will and testament, in the presence of us, who, at his request and in his presence, and in the presence of each other, do subscribe our names as witnesses thereto.

JOHN F. BRUTON
W. E. WARREN."

The propounders offered in evidence the testimony of the subscribing witnesses to the paper writing propounded to the effect that W. J. Watson executed the same as his last will and testament in their presence, and that they in his presence and in the presence of each other

signed the same, at his request, as witnesses, and that in their opinion the said W. J. Watson had sufficient mental capacity to know what he was doing at the time.

The caveators alleged and offered evidence tending to show the following facts:

That James G. Watson married in February, 1935, and thereby revoked his tripartite will; that John D. Watson married in October, 1935, and thereby revoked his tripartite will; that W. J. Watson, John D. Watson, and James G. Watson were, on 6 September, 1927, the date the tripartite wills were executed, the owners as copartners and as tenants in common of equal interest of real, personal, and mixed property, and contemplated a continuance of said relationship; that upon the marriage of James G. Watson, the three brothers mutually agreed to release each other from the obligations and conditions which entered into their agreement to make reciprocal wills, and that since the marriage of James G. Watson on 26 February, 1935, the proceeds from the operation of the farms have been divided among the brothers, one-third to each; that after the marriage in October, 1935, of John D. Watson, it was mutually agreed among the makers of the tripartite wills that the real estate of the brothers would be partitioned by 1 January, 1937; that after the marriage of the two brothers W. J. Watson was required to pay board to them, which he had not done before said marriages, and after said marriages of the two brothers their moneys and investments were divided among the three; that W. J. Watson, John D. Watson, and James G. Watson have stated that the agreement and the wills had been revoked and destroyed and each had released the other from all conditions and obligations in respect thereto.

The evidence tending to prove the allegations of facts contained in the caveat was, upon objection by the propounders, excluded by the court, and caveators reserved exception.

The issue was answered in favor of the propounders, and from judgment that the paper writing propounded is the last will and testament of W. J. Watson, deceased, the caveators appealed, assigning error.

The sole question presented for determination is whether the evidence tendered by the caveators to sustain their allegations of facts, excluded by the court, tended to prove a revocation or cancellation of the paper writing propounded as the last will and testament of W. J. Watson.

C. S., 4133, reads: "No will or testament in writing, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same, by the testator himself, or in his presence and by his direction and consent; but all wills or testaments shall

remain and continue in force until the same be burnt, canceled, torn, or obliterated by the testator, or in his presence and by his consent and direction; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, signed by him, or some other person in his presence at least; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, all of which shall be in the handwriting of the testator and his name subscribed thereto or inserted therein, and lodged by him with some person for safe-keeping, or left by him in some secure place, or among his valuable papers and effects, every part of which will or codicil, or other writing shall be proved to be in the handwriting of the testator by three witnesses at least." There is no allegation in the caveat, or evidence, offered tending to prove that the paper writing offered for probate was revoked by any of the means prescribed by the statute.

The method of revocation other than those mentioned in the statute just quoted is "by subsequent marriage of the maker," provided by C. S., 4134. Under this provision the other two of the tripartite wills may have been revoked by the marriage of the makers thereof, and while such revocations may have relieved W. J. Watson of any obligation to continue his will in effect, it only gave him the option of revoking it and did not *ipso facto* revoke it.

While the division of the personal property and the agreement to divide the real estate held by the makers of the tripartite wills as partners and tenants in common, as alleged in the caveat, may have brought about a change in the relationship existing among W. J. Watson and his brothers, C. S., 4135 provides that "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

The alleged fact that W. J. Watson and John D. Watson and James G. Watson all stated that the tripartite wills had been revoked and destroyed and that each had released the other from all obligations in respect thereto, if proven, would not have brought the will offered for probate within any of the methods of revocation or cancellation provided by the statute (C. S., 4133). A written will duly and truly prepared and executed cannot be revoked or canceled by verbal declarations.

There are no allegations of facts in the caveat, which, if proven by evidence, would have constituted a revocation or cancellation of the will of W. J. Watson, duly executed by him on 6 September, 1927. The most these alleged facts establish is a release from any obligation upon the part of W. J. Watson to have continued in effect such will, thereby giving to him the option to cancel or revoke the will duly made by him,

but there is no allegation of any facts from which an exercise of this option can be inferred.

In the exclusion of the evidence tending to prove the allegations of facts contained in the caveat, to which the only exceptive assignment of error is directed, we find

No error.

MRS. ERIE M. WOODS v. GEORGE FREEMAN.

(Filed 23 March, 1938.)

1. Trial § 22b—

On a motion to nonsuit the testimony must be considered in the light most favorable to plaintiff.

2. Automobiles §§ 8, 18g—Whether injury was result of unavoidable accident or of negligence of driver held for jury upon the evidence.

The evidence for both plaintiff and defendant tended to show that the car in which plaintiff was riding and the truck owned by defendant approached each other from opposite directions, that two men were fighting on the shoulder of the road to the truck's right, and that at approximately the same time one of the men suddenly quit the fight and ran out on the highway in front of the truck, that the truck driver turned to the left to avoid hitting him, since he could not turn to the right without hitting the man still standing on the shoulder of the road, and that the truck hit the car in which plaintiff was riding on the truck's left side of the highway, the driver of the car having also turned to his right. Plaintiff introduced further evidence that the truck was traveling at an excessive speed and that the driver of the truck failed to slow down or apply his brakes. *Held:* Whether the driver of the truck was confronted with a sudden emergency and the accident was unavoidable, or whether the driver of the truck was negligent in driving at an excessive speed and in failing to apply his brakes, and whether either or both of these acts or omissions, if established, was a proximate cause of the injury, is for the determination of the jury upon proper instructions.

3. Automobiles § 18h: Negligence § 20—Court should charge jury that negligence must be proximate cause in order for plaintiff to recover.

In an action to recover for injuries received in an automobile accident upon allegations of negligence, it is error for the court to instruct the jury that if defendant was negligent in the respects pointed out, they should return a verdict for plaintiff, since such instruction fails to take into consideration the element of proximate cause, but where the charge elsewhere instructs the jury that plaintiff could not recover unless defendant was responsible for negligence which proximately caused the injury, the charge may be held without error when construed contextually.

4. Automobiles §§ 12a, 18h—Speed in excess of statutory restriction is prima facie unlawful but does not constitute negligence per se.

A speed in excess of the statutory restrictions is *prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful, but it

does not establish that the speed is unlawful as a matter of law, and is not *prima facie* proof of proximate cause, and does not make out a *prima facie* case, and an instruction that such speed constituted *prima facie* evidence of negligence, and if the jury should so find they should answer the issue of negligence in the affirmative, is erroneous.

5. Evidence § 55—Effect of prima facie case.

A *prima facie* case does not require an affirmative finding for plaintiff, or change the burden of proof, its effect being merely to take the case to the jury for its determination of the issue, and subject defendant to the risk of an adverse verdict in the absence of evidence in rebuttal.

6. Automobiles § 18h—Charge held for error in inadvertently imposing wrong statutory speed restriction.

An instruction applying the statutory speed restriction of 25 miles per hour for trucks in an incorporated town (ch. 148, Public Laws of 1927) must be held for error when the evidence discloses that the accident occurred outside the corporate limits and not at an intersection, the statutory restriction of 35 miles per hour being applicable. (Ch. 311, Public Laws of 1935.)

APPEAL by defendant from *Alley, J.*, at November-December Term, 1937, of HENDERSON. New trial.

This is a civil action instituted by the plaintiff to recover compensation for personal injuries she alleges she sustained as the proximate result of the negligent operation of a truck being driven at the time by the agent and employee of the defendant. The defendant admits that M. J. Taylor on 29 August, 1936, at the time of the collision complained of, was operating defendant's truck as defendant's agent, servant and employee, within the scope of his authority.

The plaintiff was a passenger upon an automobile being operated by Mrs. E. M. Jarrett. The automobile was being driven in a northerly direction on the Hendersonville-Asheville highway and was approaching the village of Fletcher. The truck of the defendant was being operated in the opposite direction and had just passed through said village.

As the automobile approached the point of the collision the driver observed two men on the shoulder of the road on her left-hand side fighting, and one of the men suddenly quit the combat and ran out into the road. Mrs. Jarrett immediately turned her car to the right and stopped, with the car partly on the shoulder. The driver of the truck, who was coming from the opposite direction, turned his car to the left when the man ran into the road and drove the truck into the car, inflicting certain personal injuries upon the plaintiff.

The plaintiff's car had just passed a slight curve and the truck had just passed a curve about 75 yards back, and had also driven some distance beyond the restricted speed limit section of Fletcher. At the

point of collision the road was straight for some distance in each direction. The plaintiff alleges that defendant's agent was an incompetent driver and not capable of performing the duties assigned to him as a truck driver, to the knowledge of the defendant, and that said agent was negligent in that he was operating the truck in a reckless and negligent manner at an excessive speed and in utter disregard of the rights, lives, and safety of the plaintiff or other persons.

At the conclusion of plaintiff's evidence the defendant moved to dismiss as of nonsuit. The motion was overruled and the defendant excepted. The defendant having offered no evidence, the usual issues of negligence and damage were submitted to and answered by the jury in favor of the plaintiff. Upon the coming in of the verdict judgment was entered thereon, and the defendant excepted and appealed.

M. F. Toms and A. J. Redden for plaintiff, appellee.
R. L. Whitmire for defendant, appellant.

BARNHILL, J. The defendant, upon this appeal, presents but two questions: (1) Did the court err in overruling defendant's motion as of nonsuit? (2) Was there error in the charge on the first issue?

The defendant alleged and contended that one of the men fighting on the shoulder of the road suddenly ran out into the highway and immediately in front of the defendant's truck, just as his truck and the car occupied by the plaintiff were meeting on the highway, and that this created a sudden emergency; that the driver, being suddenly confronted with a perilous and dangerous situation, and with no time in which to think, suddenly turned the truck to the left of the highway in an effort to avoid hitting and killing a man in the road, resulting in a collision between the truck and the car. He alleges and contends that this was an unavoidable accident, not produced by any negligent or wrongful act of the driver of the truck. The plaintiff's testimony tends strongly to support the defendant's allegation and to exculpate the defendant's agent from any negligent or wrongful act. She testified: "When he swerved from his side into us his car was at least five feet in front of us. . . . When I first saw it coming the truck was on its right side of the road and remained on its right side of the road until this man suddenly ran out into the highway. . . . When the two cars were about to pass, one of these men dashed out into the highway and the other man stayed on the shoulder, which was to the right of the truck. The other man who stayed on the shoulder, which was to the right of the truck, was standing on the shoulder about two or three feet off the pavement. . . . It happened very suddenly. As a matter of fact, the man ran out into the highway and the truck swerved to the left and our car

swerved to the right almost at the same time; these things happened almost at the same time. . . . The truck swerved to the left and our car swerved to the right and that all three of these things happened about the same time." Accepting this testimony as a true picture of the occurrence it would seem that the driver of the truck was faced with the necessity of making a quick decision without time for consideration. If he drove his truck to the right on the shoulder he would strike the man standing there. If he continued on down the road he would strike the man running in front of him; if he turned to the left he would likely strike the car occupied by the plaintiff.

It is, however, a well-established rule that in considering a motion of nonsuit the testimony must be considered in the light most favorable to the plaintiff. There is testimony in the record that defendant was going thirty or forty miles per hour; that he began to cut his car to the left about 75 feet from the point where the cars actually collided; that he did not slow down or apply his brakes; that the man running in the road was dodging in an attempt to avoid colliding with the truck, and that the driver of the truck was likewise cutting it to prevent such a collision, but the driver was not applying the brakes or slowing down. It was for the jury to say upon all the testimony whether the defendant was going at an unreasonable rate of speed and whether, in the exercise of reasonable care, he could and should have stopped his truck. That is, whether the truck was a sufficient distance away when the party ran into the road for the driver of the truck, in the exercise of ordinary care, to apply his brakes and stop the truck before colliding either with the man or the car, whether his failure to apply brakes and stop the car and whether the speed at which he was going, either or both, proximately caused the collision. It would seem, therefore, that there was no error in denying the motion to nonsuit.

In its charge upon the first issue the court instructed the jury: (1) "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing, but where no special hazard exists the following speed limits 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: Twenty miles an hour in a business district; twenty-five miles an hour for motor vehicle designed, equipped for or engaged in transporting property, and twenty miles per hour for motor vehicles to which trailers are attached. Now, that was the law when this accident occurred." And (2) "So, bearing in mind the instructions I have given you with reference to the first issue, I charge you that if you find, by the greater weight of the evidence, that on the occasion in question plaintiff was in her car, driven by Mrs. Jarrett, on her way to Asheville, and that as

she approached the town of Fletcher, driving on her right side of the road, she saw the defendant's truck coming down the road, driven by M. J. Taylor, and that he was driving in excess of twenty-five miles per hour, why then that would constitute *prima facie* evidence of negligence, and if you so find, by the greater weight of the evidence, it would be your duty to answer the first issue 'Yes.' "

This charge is erroneous in three aspects: (1) It fails to take into consideration the element of proximate cause; (2) it gives *prima facie* evidence the force and effect of evidence establishing negligence *per se*, and (3) it incorrectly states the statutory restrictions upon the speed of an automobile, violation of which constitutes *prima facie* evidence that the speed is not reasonable or prudent and is unlawful.

The court had theretofore instructed the jury that before plaintiff could recover it must appear that the negligent act of the defendant, if any, was the proximate cause of the injury. Considered contextually it may be said that the charge was not erroneous in that it failed to properly state the law in respect to proximate cause.

Under the charge as given, if the jury found that the driver of the truck was operating the same at a rate of speed in excess of twenty-five miles per hour, an affirmative answer to the first issue was required. This is not the force and effect of *prima facie* evidence. *Prima facie* evidence unrebutted will support, but does not require, a verdict in favor of the party having the burden of proof. It does not change the burden of proof. The opposing party only takes the risk of an adverse verdict if he fails to offer evidence in rebuttal. *White v. Hines*, 182 N. C., 275. The case is carried to the jury on a *prima facie* showing, and it is for them to say whether or not the crucial and necessary facts have been established. *Cox v. R. R.*, 149 N. C., 117. Speaking to the subject in *Brock v. Ins. Co.*, 156 N. C., 112, *Walker, J.*, said: "The *prima facie* case is only evidence, stronger to be sure, than ordinary proof, and the party against whom it is raised by the law is not bound to overthrow it and prove the contrary by the greater weight of evidence, but if he fails to introduce proof to overcome it, he merely takes the chance of an adverse verdict, and this is practically the full force and effect given by the law to this *prima facie* case. He is entitled to go to the jury upon it and to combat it, as being insufficient proof of the ultimate fact under the circumstances of the case, but he takes the risk in so doing, instead of introducing evidence." *Speas v. Bank*, 188 N. C., 524. Here the *prima facie* evidence created by the statute does not rise to the dignity of a *prima facie* case. The prohibited speed is merely *prima facie* evidence that such speed is not reasonable or prudent and that it is unlawful. It is not *prima facie* proof of proximate cause.

The statute then in force so limits the evidence of speed and further provides, "the foregoing provisions of this section shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident." The plaintiff's own testimony furnishes strong evidence that the speed of the truck was not the proximate cause of the collision.

The provisions of ch. 311, P. L. 1935, are applicable to this case. The court below inadvertently quoted the provisions of ch. 148, P. L. 1927. The evidence discloses that the truck had passed out of the restricted speed area of Fletcher and was not at the time passing an intersection. Under these conditions a speed limit in excess of 35 miles per hour—not 25 miles per hour—for motor vehicles designed, equipped for, or engaged in transporting property creates *prima facie* evidence that such speed is not reasonable and prudent and is unlawful. As already noted, proof of the excessive speed alone does not establish actionable negligence as a matter of law. The plaintiff must show by the greater weight of the evidence that under all the facts and circumstances appearing from the evidence the speed was not in fact reasonable and prudent and proximately caused the collision and resulting injury. For the reasons assigned, the defendant is entitled to a new trial. It is so ordered.

New trial.

STATE v. MONROE LEE.

(Filed 23 March, 1938.)

Criminal Law § 85—

Where, on a former appeal, a new trial is awarded for error in the admission of evidence, but it is determined that the evidence was sufficient to be submitted to the jury, a motion to nonsuit upon the second trial upon substantially the same evidence is correctly denied.

APPEAL by defendant from *Burgwyn, Special Judge,* at September Term, 1937, of HARNETT. No error.

Defendant was indicted for willfully and wantonly burning a barn, the property of Wilson Lucas. From judgment pronounced on verdict of guilty defendant appealed.

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

J. R. Young and I. R. Williams for defendant.

PER CURIAM. The principal question presented by this appeal is the correctness of the ruling of the court below in denying defendant's motion for judgment as of nonsuit. When this same case was here on the defendant's appeal at Spring Term, 1937 (211 N. C., 326), a new trial was awarded for error in the admission of evidence. In that case it was said: "While the evidence was entirely circumstantial, and included testimony as to the action of bloodhounds, admitted for the purpose of corroboration, we are unable to say that this did not constitute more than a scintilla of evidence, and so sufficient to take the case to the jury. *S. v. Thompson,* 192 N. C., 704."

Substantially the same testimony was presented by the State in this last trial, and again the jury has found the defendant guilty. The motion for judgment of nonsuit was properly denied.

The other exceptions noted at the trial and assigned as error cannot be sustained. We find no sufficient reason to disturb the result of the trial.

No error.

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

(Filed 23 March, 1938.)

1. Trial § 47—

Affidavits supporting a motion for a new trial for newly discovered evidence are insufficient to invoke the discretionary power of the court to hear the motion when they disclose that the evidence relied upon is merely cumulative and contradictory.

2. Appeal and Error § 37b—

While a motion for a new trial for newly discovered evidence is addressed to the discretion of the trial court, when the affidavits supporting the motion are insufficient to invoke the discretionary power of the court, its ruling thereon is reviewable, and the granting of the motion will be held for error.

APPEAL by plaintiff from *Grady, J.,* at November Term, 1937, of HARNETT.

Motion for new trial for newly discovered evidence.

The action for recovery of damages for personal injury resulting allegedly from actionable negligence was tried at the February Term, 1937, of the Superior Court of Harnett County. From judgment on the verdict in favor of the plaintiff, defendant appealed to Supreme Court. Judgment was affirmed at the Fall Term, 1937. 212 N. C., 113, 193 S. E., 170. Opinion was duly certified to the clerk of the Superior

Court of Harnett County. At the next succeeding term of said Superior Court, the November Term, 1937, defendant filed motion for new trial upon ground of newly discovered evidence.

The judge below in his discretion allowed the motion, and in accordance therewith rendered judgment granting new trial, from which plaintiff appealed to Supreme Court, and assigned error.

Neill McK. Salmon for plaintiff, appellant.
J. R. Young and J. A. Jones for defendant, appellee.

PER CURIAM. The prerequisites to the granting of motion for new trial for newly discovered evidence are fully set forth in *Johnson v. R. R.*, 163 N. C., 431, 79 S. E., 690; also in *Brown v. Hillsboro,* 185 N. C., 368, 117 S. E., 41; *Brown v. Sheets,* 197 N. C., 268, 148 S. E., 233; *S. v. Casey,* 201 N. C., 620, 161 S. E., 81; *Love v. Queen City Lines,* 206 N. C., 575, 174 S. E., 514; *Furniture Co. v. Cole,* 207 N. C., 847, 178 S. E., 579.

An examination of the affidavits offered by defendant in support of the motion fails to show compliance with the tests required. When compared with the evidence introduced at the trial of the case in Superior Court, it is observed that the so-called newly discovered evidence is merely cumulative and tends only to contradict former witnesses.

"Although the discretionary ruling of the trial judge upon an application for new trial for newly discovered evidence is not reviewable on appeal, where the applicant fails to make out a showing of newly discovered evidence sufficient in law to invoke the discretionary ruling the granting of the application will be held for error," headnote in *Crane v. Carswell,* 204 N. C., 571, 169 S. E., 160, which is applicable here.

The granting of a new trial below is

Error.

D. W. McARTHUR v. JAMES C. BYRD AND SAMUEL M. BYRD, PARTNERS, TRADING AND DOING BUSINESS UNDER THE NAME OF J. C. BYRD AND BROTHER.

(Filed 23 March, 1938.)

1. Frauds, Statute of, § 9—Statute does not apply to executed contracts under which standing timber has been cut and converted into personalty.

When defendants alleged that they purchased timber which had been cut and removed from the land, the fact that the contract under which

their seller cut and removed the timber was not in writing is immaterial, since the statute applies to executory contracts and not to executed contracts under which timber has been converted to personalty.

2. Principal and Agent § 8—

Defendants' evidence that the person selling standing timber on plaintiff's land was plaintiff's general agent in the supervision of the farm with power to sell crossties, timber and crops therefrom *held* sufficient to be submitted to the jury.

3. Appeal and Error § 39b—

The failure of the jury to answer the issue of indebtedness does not entitle plaintiff to a new trial when the evidence is sufficient to justify an instruction that the issue be answered "Nothing," the verdict, though incomplete, not being prejudicial in such instance.

APPEAL by plaintiff from *Hamilton, Special Judge,* at October Term, 1937, of HARNETT. No error.

This is a civil action instituted by the plaintiff to recover damages for the alleged wrongful conversion by the defendant of certain timber cut and removed from premises owned by the plaintiff.

The plaintiff resides in Florida and his brother, Adam McArthur, has for years had plaintiff's farm in Cumberland County and his farm in Harnett County in his charge and under his general supervision. The plaintiff comes to North Carolina each year to see about these farms. Adam McArthur sold certain timber on the Harnett County farm to one Marvin Hobbs, who in turn, as he cut it, sold the timber to the defendants. These transactions extended over a period of about four years. The timber, when delivered to the defendants, had been cut into saw stock lengths. The defendant paid Adam McArthur the amount charged for the stumpage. Issues were submitted to and answered by the jury as follows:

"1. Is the plaintiff, D. W. McArthur, and was he at the time complained of in the complaint, the owner in fee of the lands described in the complaint? Answer: 'Yes' (by consent).

"2. Is the plaintiff by his conduct estopped to deny that Adam McArthur was his agent with respect to the property in question? Answer: 'Yes.'

"3. Did the defendants, J. C. Byrd and Brother, wrongfully receive, take possession of and wrongfully appropriate to their own use valuable pine timber in saw stock lengths, the property of the plaintiff, and dispose of the same and convert the proceeds therefrom to their own use, as alleged in the complaint? Answer: .....

"4. Is the plaintiff's action as a whole barred by the three-year statute of limitations? Answer: .....

"5. If the entire action is not barred, is any portion thereof barred; if so, what part? Answer: .....

"6. What amount, if any, is plaintiff entitled to recover of defendants? Answer: ....."

Upon the coming in of the verdict the court below signed judgment that the plaintiff have and recover nothing of the defendants, etc. The plaintiff excepted and appealed.

J. R. Young and Bullard & Bullard for plaintiff, appellant.
Ross & Ross and Neill McK. Salmon for defendants, appellees.

PER CURIAM. This cause does not involve an executory contract. The defendants do not claim the right to any timber standing and growing upon the premises of the plaintiff. It follows that the fact that the sale to the defendants was not in writing is immaterial. At the time the defendants received the timber in controversy it had been converted into personal property.

There is ample evidence in the record to sustain the answer of the jury to the second issue and which tends to show that Adam McArthur was in fact the general agent of the plaintiff in the supervision of said farm, the sale of crossties, timber and crops therefrom. So that, under the verdict of the jury the plaintiff is bound by the acts of his agent in collecting from the defendants the agreed market price of the timber received by them.

It would seem that the verdict of the jury is incomplete. There is no finding that the defendants are, or are not, indebted to the plaintiff for timber the defendants received from the plaintiff through his agent Adam McArthur or Marvin Hobbs, who was cutting the timber under contract with Adam McArthur. In view of the record herein, however, the failure of the court below to have the jury to answer the sixth issue is harmless error. The plaintiff offered evidence, which is uncontradicted, that the defendants paid Adam McArthur the prevailing market price for the timber received by them. This being true, the court below would have been fully warranted in charging the jury to answer the sixth issue "Nothing." His failure to do so cannot be held for reversible error.

We have examined the other exceptive assignments of error contained in the record and find in none of them sufficient cause to disturb the judgment below.

No error.

T. L. STELLING v. WACHOVIA BANK & TRUST COMPANY.

(Filed 13 April, 1938.)

1. Set-off and Counterclaim § 2—

The statutory right of counterclaim and set-off does not authorize a bank to apply a deposit to a debt due the bank by the depositor.

2. Set-off and Counterclaim § 1—Equitable set-off may not be asserted by party unless his conduct has been equitable.

The equitable right of set-off and counterclaim may not be invoked by a party unless his conduct has been equitable, fair and aboveboard, since "he who comes into equity must come with clean hand," and misconduct which will bar the assertion of the right need not necessarily be fraudulent.

3. Same—Conduct of defendant held to preclude it from asserting equitable right of set-off.

Plaintiff purchased a lot in a subdivision in reliance upon promissory representations as to improvements to be made therein within a year. The promoters failed to make the improvements as promised, and later transferred the capital stock of the corporation and the purchase money notes of the several purchasers to an individual. Suit by some of the purchasers of lots to set aside this transfer for fraud was settled by the appointment of defendant bank as trustee to collect the notes, pay off certain obligations, and to undertake to make the improvements. Before completing the improvements defendant terminated the trust, and retained certain purchase money notes in the sum of several hundred thousand dollars as collateral security for advancements made by it. It obtained judgment for the advancements, sold the collateral notes, including plaintiff's notes, and purchased same at the sale for $10,000. Plaintiff repeatedly repudiated and refused to pay the notes executed by him. Thereafter plaintiff started making deposits in a savings account in defendant bank, and the bank instructed its employees not to permit withdrawals therefrom, and when plaintiff attempted to withdraw funds informed plaintiff for the first time of its intention to apply same to the payment of plaintiff's notes. *Held:* Defendant bank made the advancements on the notes with full knowledge of the facts, and failed to inform plaintiff when the savings deposits were made that it intended to apply same to plaintiff's notes, and defendant may not assert the equitable right of set-off in plaintiff's action for the wrongful conversion of his savings account.

4. Bills and Notes § 24—Judgment for holder upon admissions in the pleadings held error when answer alleges affirmative defenses.

It is error for the court to render judgment in favor of the holder upon defendant's admission of the execution of the notes and nonpayment when the pleadings raise the defenses of breach of the contract for which the notes were given and partial failure of consideration, the availability of these defenses as against the holder being dependent upon the jury's finding as to whether he is a holder in due course.

5. Bills and Notes § 22—Pleadings held to raise defenses of breach of contract for which notes were given and failure of consideration.

Defendant in this action for a money recovery set up certain notes executed by plaintiff, and demanded judgment for the balance due on the notes after credits. Plaintiff admitted the execution of the notes and nonpayment, but alleged that the notes represented the balance due on the purchase price of a certain lot which he had bought in reliance upon promissory representations as to improvements to be made in the subdivision, that the improvements had not been made, and that defendant holder took the notes with knowledge of all the facts. *Held:* The pleadings raise the defenses of breach of contract for which the notes were given and failure of consideration, in whole or in part, and plaintiff is entitled to have both defenses submitted to the jury, the availability of the defenses as against the holder being dependent upon the jury's finding as to whether the defendant is a holder in due course.

6. Set-off and Counterclaim § 2—

The fact that a party is precluded from asserting the equitable remedy of set-off does not affect his statutory right of set-off.

7. Fraud § 11—

Evidence *held* insufficient to establish fraud in the procurement of the execution of notes for the balance of the purchase price of a lot in a real estate subdivision.

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

APPEAL by plaintiff from *Johnston, J.*, at December Civil Term, 1937, of BUNCOMBE. Reversed.

This is an action instituted by the plaintiff to recover damages for the wrongful confiscation and appropriation to its own use by the defendant of a deposit of the plaintiff in the defendant's banking institution at Asheville, N. C., in the total sum of $250.00. The defendant admits that it appropriated said deposit account and alleges that it had a right to do so for the purpose of applying same as a credit upon notes of the plaintiff then held by the defendant bank. The defendant also sets up a counterclaim to recover the balance due on said notes.

In 1925 William I. Phillips Company subdivided a tract of land in a suburban area of Asheville, near Skyland, N. C., designated as Royal Pines. In connection therewith many promissory representations as to the future development and improvement of said subdivision were made verbally and by press publication. Among other things it was represented that the development would be completed in one year along the most modern lines; that there would be fine administration buildings with stores and offices to be erected in Royal Pines business section; that there would be all modern conveniences without extra cost or future assessment; that there would be one mile of white-way in the park near the tea room; that there would be water, lights and telephone supplied to

every lot; that there would be long paved avenues seventy feet wide, and cement walks, electric lights, sewerage, and planted shrubbery; and that Royal Pines would be developed into the show place of America. The plaintiff, relying upon said promissory representations, purchased a lot for the price of $600.00, paying $150.00 cash and giving his three notes in the sum of $150.00 each, secured by trust deed upon the premises. The promoters of said development never made the improvements promised, but within a year thereafter substantially abandoned any effort to develop the property. Thereupon the plaintiff, having paid the first semiannual installment of interest, repudiated said notes and refused to make any further payment thereon.

The holders of the purchase money notes given for the purchase of lots in the development assigned the capital stock of the corporation and approximately $900,000 worth of said notes to L. B. Jackson for the sum of $250,000. Certain of the purchasers of the lots thereupon instituted an action against W. I. Phillips Company and L. B. Jackson to avoid said transfer as a fraud upon the purchasers of said lots. In settlement of said suit the defendant was appointed trustee to take charge of said purchase money notes, collect the same, pay certain fixed obligations, including approximately $200,000 due the Continental Mortgage Company, and to undertake to make the promised improvements.

The defendant made certain collections on said notes and disbursed the same in paying the stipulated amounts and making certain improvements upon the premises. Before completing the improvements as stipulated in the original contract the defendant terminated said trust, retaining the notes as collateral security for amounts advanced to L. B. Jackson.

Judgment was secured by the defendant against L. B. Jackson and the collateral security was sold and purchased by the defendant for $10,000. This collateral included the notes of the plaintiff.

The defendant made frequent demands upon the plaintiff for the payment of his notes and in each instance he positively and definitely refused to pay the same.

Thereafter, to wit, on 30 January, 1934, the plaintiff began to make deposits in the savings department of the defendant bank, receiving a passbook in evidence of said account, upon which, each time a deposit was made, the date and amount of said deposit was entered by the defendant. The plaintiff continued to make deposits through 12 May, 1934, at which time, including the deposit made on that date, his balance was $250.00.

Shortly after the plaintiff made his first deposit the defendant "put a latch on" his account, thereby prohibiting any withdrawals therefrom. This was done without any notice to the plaintiff and was for the pur-

pose and with the intent on the part of the defendant to eventually appropriate said account to the payment of plaintiff's notes. Subsequently, in the month of May, the plaintiff presented his passbook to the defendant bank and sought to withdraw his deposit. The defendant refused to honor his check or draft thereon and declined to pay the plaintiff the amount due him, then, for the first time, informing the plaintiff that he could not withdraw any part of his deposit. Later, on 5 June, 1934, an officer of the defendant bank issued a debit slip against the account of the plaintiff in the sum of $250.00 and charged the same to plaintiff's account, thereby withdrawing the money represented thereby. Said amount was credited on plaintiff's notes.

At the conclusion of all the evidence the defendant renewed its motion for judgment as of nonsuit, first made at the conclusion of plaintiff's evidence. The motion was allowed and the plaintiff excepted. Thereupon the court entered judgment dismissing the plaintiff's cause of action and rendered judgment for the defendant against the plaintiff for the balance due on his notes after crediting the $250.00 deposited by plaintiff in the defendant bank. The plaintiff excepted and appealed.

Frank Carter and H. Kenneth Lee for plaintiff, appellant.
Alfred S. Barnard for defendant, appellee.

BARNHILL, J. While there is a statutory right of counterclaim and set-off in certain instances, the statutory provisions are not such as would authorize a bank to appropriate a deposit to the payment of a debt due the bank by the depositor. This is permitted under the principles of equity, to do justly between the parties. When, however, a party seeks to invoke an equitable remedy or to assert an equitable right, or to rely upon an equitable defense, his conduct must have been equitable, fair and aboveboard. It is a familiar and oft-quoted maxim of equity that "he who comes into equity must come with clean hand," or, as it is frequently expressed, "he who has not done equity, cannot have equity." A right cannot arise to anyone out of his own wrong and the misconduct need not necessarily be fraudulent.

The defendant knew that the promissory representations made to the plaintiff when he gave the purchase money notes described in the pleadings had not been complied with. It knew that the promoters had abandoned all effort to make such improvements and had assigned the notes to another party. It knew that there was litigation attacking this transfer on the grounds of fraud. It had accepted a transfer of the purchase money notes and the capital stock of W. I. Phillips Company as trustee to collect and pay off the indebtedness of W. I. Phillips Company and to make the promised improvements. It terminated the trust

at a time when it knew that the property had not been developed to the extent and in the manner promised. It advanced money upon the notes with knowledge of the conditions and at a sale of the collateral purchased notes of the par value of several hundred thousand dollars for $10,000. It was fully advised that the plaintiff had repudiated said notes and had consistently refused to make any payment thereon. With this knowledge it accepted deposits from the plaintiff, issued a passbook therefor, showing that the plaintiff had on deposit in its institution subject to withdrawal by him, the amounts therein noted. In the meantime it had put a latch on this account. In other words, it had issued an order to its employees directing them not to honor any check against this account, of which procedure it did not advise the plaintiff. So that, the account was kept open for deposits but closed for withdrawals so long as the plaintiff would make deposits in said account. This was done by the defendant for the purpose of finally appropriating the account to the payment of the notes it held against the plaintiff. It well knew that so soon as, or in the event that, it should advise the plaintiff that the amounts deposited by him could not be withdrawn he would cease to make deposits. It concealed the true facts in respect to the account from the plaintiff for the purpose of benefiting therefrom. The conduct of the defendant is not such as would appeal favorably to the conscience of a court of equity. In our opinion, the defendant is in no position to successfully assert the right recognized in equity to appropriate the account of the plaintiff to the payment of notes it holds signed by the plaintiff in this cause.

This cause has heretofore been before this Court, *Stelling v. Trust Co.*, 208 N. C., 838. It was there held that the complaint sufficiently alleged a cause of action. As heretofore stated, the evidence offered is amply sufficient to establish an unauthorized application of plaintiff's account to the payment of his alleged indebtedness to the defendant as alleged in the complaint, and the defendant by its conduct is now estopped from setting up the equitable defense relied upon by it. It follows that there was error in the judgment of nonsuit.

The court below rendered judgment against the plaintiff on his notes upon the admissions contained in the pleadings. It is true the plaintiff admits that he signed the notes and that he has paid no part thereof except the first semiannual installment of interest. He alleges, however, a breach of the contract of which the notes were a part, and even if it be conceded that he does not sufficiently allege or prove fraud, he has sufficiently alleged and offered evidence tending to show that there has been a breach of the contract by Phillips & Company, and at least a partial failure of consideration, to the full knowledge of the defendant at the time it acquired title to said notes. As to this, he has a right to

be heard and to submit his cause to a jury. His rights under these pleaded defenses, even if established, are dependent upon the findings of the jury on defendant's plea that it is a holder of the notes in due course.

Upon the admitted facts the plaintiff is entitled to judgment for the amount of his deposit, with interest from 5 June, 1934. He is likewise entitled to have a jury determine the validity of his defense to the notes set up in the counterclaim, both as to whether he is relieved from the payment thereof by the breach of the contract by the payees in said notes, and as to whether there has been a failure of consideration either in whole or in part. In this connection it is well to say that defendant's loss of its right in equity to apply plaintiff's account to the payment of the notes held by it does not affect its right of offset under the statute.

We are of the opinion that the evidence is not sufficient to establish actionable fraud in the procurement of the execution of said notes.

Reversed.

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

J. W. COUNCIL, MARTHA A. COUNCIL, AND HELEN COUNCIL ANDREWS v. GREENSBORO JOINT STOCK LAND BANK, C. E. FLEMING, J. H. BLOUNT, J. K. BLOUNT, AND F. L. BLOUNT.

(Filed 13 April, 1938.)

1. Mortgages § 35a—

Where an officer of the corporate mortgagee purchases the property at foreclosure sale, the presumption is that he acts for the corporation and that it is the purchaser, but such sale is not void, but voidable, and ordinarily can be avoided only by the mortgagor or his heirs and assigns.

2. Mortgages § 39c—Mortgagors held to have waived their right to attack foreclosure by conduct ratifying the sale.

An officer of the corporate mortgagee bought in the property at the foreclosure sale and later transferred title to the mortgagee, which in turn sold the land to third persons. The evidence disclosed that the mortgagor, owning a 3/5 undivided interest, acting for himself and his cotenants, with knowledge that the corporate mortgagee had purchased the land, moved off the land and negotiated by several letters with the mortgagee for the repurchase of the land for himself or his cotenants, and sought to rent the land from the mortgagee but was unable to sell his crops for sufficient money either to buy the land back or to rent same. *Held:* The mortgagors are estopped to assert the invalidity of the sale, since by their conduct they have ratified and affirmed the sale.

3. Principal and Agent § 8—

Where tenants in common place one of their number in charge of the farm, and sign a mortgage thereon, and the tenant in charge impliedly represents in his dealings with the mortgagee after foreclosure that he was acting for himself and cotenants, his cotenants are bound by an estoppel arising from his negotiations.

4. Mortgages § 32a—

Where the instrument does not designate the place at which foreclosure sale should be held, the mortgagee is vested with sound discretion to select the place of sale, and where it selects the courthouse door in the county in which the land lies, there is no abuse of discretion.

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

APPEAL by plaintiffs from *Bone, J.*, at November Term, 1937, of EDGECOMBE.

Civil action to set aside foreclosure sale and deeds pursuant thereto made by and to mortgagee through its agent, and subsequent deed allegedly taken by grantees with notice, and for an accounting for fire insurance collected and for rents, and, in the event it should be decided by the court that the subsequent grantees are innocent purchasers for value, to recover of the mortgagee and its agent, the bidder at the sale, the value of the land, less the mortgage indebtedness.

Material allegations of the complaint as a first cause of action may be found in opinion on former appeal reported in 211 N. C., 262, 189 S. E., 777.

Defendants, Land Bank and C. E. Fleming, filed answer denying material allegations of the complaint, and pleaded that plaintiffs had full knowledge at all times of all the facts and circumstances in connection with the sale and consented thereto, and by their actions ratified same, and are estopped by their conduct to attack the validity of the foreclosure. Defendant Land Bank pleads three-year statute of limitations. The defendants, Blount, after decision of this Court on their appeal, *supra*, filed answer denying all material allegations of the complaint, and pleaded estoppel. All defendants aver that the defendants Blount are innocent purchasers for value.

In the trial below the plaintiffs introduced evidence tending to show that: The plaintiffs, owning a farm in Edgecombe County containing 244.5 acres, J. W. Council three-fifths undivided interest and each of his sisters, coplaintiffs, one-fifth undivided interest, executed to defendant Greensboro Joint Stock Land Bank a mortgage deed on the date and for the purpose alleged. The mortgage provides that in the event of default foreclosure sale may be had at "public auction to the highest bidder for cash, after advertising same for 30 days at least," but does not specify place of sale.

After the loan was made, plaintiff J. W. Council was in charge. He made all payments "until around 1929." In July, 1931, payments being nearly two years in default, defendant Land Bank foreclosed and sold the lands on 21 August, 1931, at the courthouse door in Tarboro, the county seat of Edgecombe, when C. E. Fleming became the highest bidder. Pursuant thereto and on 29 April, 1932, the Land Bank, as mortgagee, executed and delivered deed to C. E. Fleming, in which it is recited that the sale was had "after due and proper advertisement as required by law and the terms of the said mortgage, and that the amount bid is $4,000."

On 6 May, 1932, C. E. Fleming and wife, for recited consideration of $10.00, conveyed the lands by deed to the Land Bank. On 8 January, 1934, the Land Bank, for recited consideration of $10.00, by deed signed in its corporate name and under its seal by C. E. Fleming, president, and duly attested, conveyed the lands to defendants J. H. Blount, M. K. Blount, and F. L. Blount.

Defendants Land Bank and Fleming admit that Fleming was secretary and treasurer of the Land Bank at the time of the foreclosure. The defendants Blount denied any knowledge of that fact. The defendant Land Bank admits that one of the buildings on the property was destroyed by fire, and that it received $1,500 on account of insurance policy held by it. Entry showing foreclosure was made on the margin of the record of the mortgage on 12 January, 1934.

J. W. Council testified. His oral testimony, when read in connection with the letters exchanged between him and the Land Bank, introduced in evidence, presents this narrative in substance: Though he did not see notice of the advertisement in the paper he had a letter and knew the date and place of the sale and came to Tarboro that day. He knew the Land Bank bought the property. After the sale he moved tobacco flues off the place and quit the possession of the land. He wrote the Land Bank that he wanted to redeem the land. He said: "They told me I could redeem it. They told me no deed would be executed before 1 December, and if we would pay the past due installments they would reinstate it. . . . I had negotiations with the Land Bank with reference to renting land in 1932. . . . I tried to rent the farm from Greensboro Joint Stock Land Bank in 1932."

He wrote the Land Bank on 7 November, 1931: "When Mr. Fleming was down here to foreclose farm I thought possibly after selling crop I would be able to pay some on notes and *buy the farm back,* but everything we are selling is from one-third to one-fifth what produce was selling for when I borrowed the money, and it looks like now that the fertilizer company will get about what the crop brings for fertilizer this year. *If your company don't sell the farm* it may be that I could

rent same if you would let the fertilizer company come before your rent, and of course the rent would have to be reasonable. I will be in Greensboro one day next week and will see you or call you up to see if you would care to rent farm as above." Again, on 7 December, 1931: "The reason I had not answered your letter of 9 November was waiting to sell more of the tobacco crop; it sold so low I will not be in position to pay you cash in advance for rent of Farm 1932."

Then on 17 November, 1933, Council wrote Land Bank, in part: "*I am interested in buying farm back,* either me or my sister that company bought in when sold. . . . I understand the government will make a loan on same. . . ." Land Bank expressed willingness to permit repurchase, but negotiations to that end failed, and on 20 February, 1934, the Land Bank advised J. W. Council that property was sold on 11 January, 1934.

The plaintiff, Mrs. Helen Council Andrews, testified in part that: She knew nothing about the correspondence between her brother, J. W. Council, and the bank after the foreclosure; she did not authorize same; she did not get any of the proceeds of loan, and paid nothing on it; "My brother handled the whole transaction, but I did sign the papers. I turned it all over to my brother." The plaintiff, Martha Council, testified in part that: She did not authorize her brother, J. W. Council, to write the letters to the bank; she never saw one; she did not know the land was foreclosed, and after it was foreclosed she did not authorize her brother to negotiate with the bank; she had not lived on the land in 25 years. She said: "I did not pay any attention to the obtaining of the loan or payments thereon."

At the close of the evidence for plaintiff, defendants and each of them moved for judgment as of nonsuit. Motion was allowed, and from judgment in accordance therewith plaintiffs appealed to the Supreme Court and assigned error.

Geo. M. Fountain & Son and Bennett & McDonald for plaintiffs, appellants.

Arch T. Allen, Gilliam & Bond, and McLean & Stacy for defendants, Greensboro Joint Stock Land Bank and C. E. Fleming.

Blount, James & Taft and Fountain & Fountain for appellees, defendants Blount.

WINBORNE, J. Upon the facts presented in the record on this appeal the judgment of nonsuit was properly entered. It is apparent that plaintiffs have ratified the foreclosure sale.

Where, at a foreclosure sale of land under a mortgage deed by a corporation, mortgagee, an officer of the corporation buys the property, the presumption is that he acts for the corporation, and that it is the pur-

chaser. *Craft v. Assn.*, 127 N. C., 163, 37 S. E., 190; *Shuford v. Bank*, 207 N. C., 428, 177 S. E., 408.

The uniform decisions of this Court hold that: "Where a mortgagee of land purchases at his own sale, directly or by an agent, though he may convey to the agent and have the agent reconvey to him, the effect is to vest the legal estate in the mortgagee in the same plight and condition as he held it under the mortgage, subject to the right of the mortgagor to redeem (*Averitt v. Elliott*, 109 N. C., 560, 138 S. E., 785), unless in some way he releases or loses his equity. . . ." The sale by the mortgagee is not void, but only voidable, and ordinarily can be avoided only by the mortgagor or his heirs and assigns. *Smith v. Land Bank, post*, 343, and cases cited.

Conceding that at the foreclosure sale in the present case the Land Bank, mortgagee, through its agent, purchased the land, it was open to plaintiffs, mortgagors, (1) "To ratify the sale and accept the proceeds, or settled on that basis"; or (2) to pursue one of two remedies: (a) They "may treat the sale as a nullity and have it set aside," or (b), acting in repudiation of the sale, they may sue the mortgagee for the wrong done in making such a sale, and hold it liable for the true worth of the property; cases cited in *Smith v. Land Bank, post*, 343, *supra*.

Here, however, the plaintiffs, contending that they have not ratified the sale, seek to treat the sale as a nullity and have it set aside, and at the same time to hold the mortgagee liable for the true worth of the property. The question of misjoinder, both of parties and of causes of action, is not presented. The former appeal, 211 N. C., 262, discloses that only the defendants Blount, who claim to be innocent purchasers, demurred, and solely for that the complaint does not state facts sufficient to constitute a cause of action against them.

It is apparent, however, from the factual situation here that the plaintiffs, by their conduct, have ratified the foreclosure sale. In *Joyner v. Farmer*, 78 N. C., 196, the Court said: "The estate of the mortgagee acquired by the sale, being voidable only, may be confirmed by any of the means by which an owner of a right in equity may part with it:

"1. By a release under seal, as to which nothing need be said.

"2. Such conduct as would make assertion of his right fraudulent against the mortgagee or against third persons, and which would, therefore, operate as an estoppel against its assertion.

"3. Long acquiescence after full knowledge." *Shuford v. Bank, supra*.

Taking the evidence in the light most favorable to plaintiffs, J. W. Council was in charge of the farm and impliedly represented and acted for his coplaintiffs in the handling of the transaction with the defendant Land Bank. His testimony and letters clearly indicate that, while at the time of the sale he hoped to raise money from the sale of crops to

pay on the notes and to redeem the farm, he failed to realize on that hope, and abandoned the idea of redeeming it. In his letters of 7 November and 7 December, 1931, he gives expression to the hopelessness of the situation, and recognizes the right of the Land Bank to sell the farm. He then set about to rent, and inability to agree on terms of rental prevented him renting the farm for the year 1932—a recognition of title in the Land Bank. The language in the letter of 17 November, 1933, "I am interested in *buying farm back, either me or my sister,*" is pertinent.

All this manifests such conduct as now makes fraudulent their assertion of any right to have the sale as made declared void and set aside. By such conduct they are estopped to maintain this action. *Shuford v. Bank, supra.* They must settle on the basis of sale made.

Where in a mortgage deed power of sale is granted, without designating place of sale, the mortgagee is vested with sound discretion to select the place of sale so as to conserve and promote the interest of all the parties. *Clark v. Homes,* 189 N. C., 703, 128 S. E., 20. Here the mortgagee selected the courthouse door in the county seat of the county in which the land is situated—the usual place for holding public land sales. In doing so there is no abuse of discretion.

The judgment below is

Affirmed.

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

LUMBERMEN'S MUTUAL CASUALTY COMPANY, A CORPORATION, v. J. C. DELOZIER AND EVELYN THELMA TWEED.

(Filed 13 April, 1938.)

1. Insurance § 59—Insurer is bound to defend action when the allegations bring it within class of actions insurer agrees to defend.

The policy in suit bound insurer to defend any action for damages against insured founded upon alleged negligent driving by insured, whether groundless, false or fraudulent. Action was instituted by a third person against insured alleging damages resulting from insured's negligent driving. Insurer obtained a statement from insured that at the time of the accident insured's son, who was under fifteen years of age, was driving. The policy provided that insurer should not be liable if the car insured was being driven by a person under legal age. *Held:* The action as constituted alleged negligent driving on the part of insured, bringing the action squarely within the provisions of the policy requiring insurer to defend same.

2. Same: Injunctions § 1—Insurer may not enjoin third person from prosecuting suit while it litigates its contractual obligation to defend same.

Action was instituted against insured to recover for negligent injury resulting from an automobile accident. Insurer instituted proceedings under the Declaratory Judgment Act to determine whether it was bound by its policy to defend the suit, and insurer sought to enjoin the prosecution of the suit pending the determination of its liability. *Held:* The injured third person is not interested in the present controversy between insured and insurer as to insurer's obligation to defend the suit, and insurer may not interfere with her right to as expeditious a trial as the docket will permit, and insurer is not entitled to the restraining order prayed for.

APPEAL by plaintiff from *Johnston, J.*, at November Term, 1937, of BUNCOMBE. Affirmed.

This is a proceeding under the Declaratory Judgment Act, in which the plaintiff seeks to have the rights, status, and legal relations as between it and the defendant J. C. DeLozier under an automobile liability policy determined and declared.

The plaintiff issued and delivered to the defendant J. C. DeLozier a personal injury and property damage policy covering a Studebaker sedan automobile for the period from 30 May, 1937, to 30 May, 1938. The policy obligated the plaintiff to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, or because of injuries to or destruction of property sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile within the limits stipulated in the policy. The policy likewise obligated the plaintiff to defend in the name and behalf of the defendant any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent.

The policy contains certain noncoverage clauses, including one which provides that the policy does not apply while the automobile is operated by any person under the age of fourteen years, or by any person in violation of any state, Federal, or provincial law as to age applicable to such person or to his occupation, or by any person in any prearranged race or competitive speed test.

On or about 26 July, 1937, the automobile described in the policy was involved in a collision resulting in certain personal injuries to the defendant Evelyn Thelma Tweed and damage to her automobile. Thereafter the said Evelyn Thelma Tweed instituted an action in the general county court of Buncombe County against the defendant J. C. DeLozier to recover compensation for such injury and damage. The complaint

in said action alleges that at the time of said accident the Studebaker automobile described in the liability policy was being operated by the defendant J. C. DeLozier.

The plaintiff, in compliance with its duty under the policy, investigated said accident, and in the course of such investigation procured a statement from the defendant J. C. DeLozier, in which said defendant stated that the automobile at the time of the accident was being operated by his son, who was fifteen years of age 13 September, 1937, thus disclosing that his son was under fifteen years of age at the time of the accident.

On 24 August, 1937, counsel for the plaintiff wrote the defendant DeLozier advising that it was not obligated to assume any liability arising out of the accident by reason of the age of the driver of the car, and offering to defend upon the express condition that it did not thereby waive its right to deny coverage. On 25 August, 1937, the defendant DeLozier replied, stating that he contended that his liability arising out of the accident was covered by the policy and that the defendant was obligated to defend the suit instituted by the defendant Tweed, and making demand that the plaintiff defend said suit, but refusing to permit such defense with the reservations requested by the plaintiff. Other correspondence passed between these parties to like effect. On the last day of the time within which the defendant DeLozier was permitted to answer the complaint of the defendant Tweed, plaintiff applied to the judge of the general county court for an order extending time to file answer, which was granted. The defendant DeLozier thereupon notified the counsel for the plaintiff that, inasmuch as the plaintiff had appeared in the damage suit action and procured an order for an extension of time in which to file answer, he had released the attorneys he had theretofore employed and looked to the plaintiff to defend said action.

Thereupon the plaintiff instituted this proceeding in the general county court of Buncombe County, setting forth in his petition in some detail the foregoing facts and attaching thereto as exhibits copies of the letters which had passed between the plaintiff and the defendant DeLozier, a copy of the complaint filed by the defendant Tweed in her damage suit, and a copy of the statement made by the defendant DeLozier. Plaintiff prayed the court:

"1. That the court proceed under the law of the State of North Carolina, cited and known as the Uniform Declaratory Judgment Act, to pass upon, declare and determine, by declaratory judgment, the rights, status, and other legal relations of the parties, as well as upon the controversy as set forth in the foregoing complaint, and particularly to determine, under the circumstances and facts as they may be found to be, whether or not it is the duty and obligation of the said Lumbermen's

Mutual Casualty Company to proceed, for and on behalf of the said J. C. DeLozier, with the defense of the suit wherein the said Evelyn Thelma Tweed is plaintiff and the said J. C. DeLozier is defendant, and to interpret, in the light of the facts as they may be found to be, the terms and provisions of the said contract of insurance, and to declare and determine the rights, status, and other legal relations of the said Lumbermen's Mutual Casualty Company under the terms and provisions of said policy of insurance.

"2. That the court make an order suspending and staying the proceedings in the suit of the said Evelyn Thelma Tweed against the said J. C. DeLozier and pending in the general county court of Buncombe County, North Carolina, and ordering and directing that the said Evelyn Thelma Tweed, as plaintiff therein, and the said J. C. DeLozier, as defendant therein, and their respective attorneys, refrain and desist from proceeding, or attempting to proceed, any further in said action until the further orders of the court, and further requiring the said J. C. DeLozier and the said Evelyn Thelma Tweed, defendants herein, to appear and show cause, at a time to be fixed by said order, why said order staying said further proceedings in said suit shall not be continued in effect until the final termination of the rights, status, and legal relations of the respective parties as herein prayed for."

The petition herein was presented to the judge of the general county court and application was made for a temporary stay of the suit of "Tweed *v.* DeLozier," and an order staying said proceedings and notifying the defendants to appear and show cause was duly entered.

On the return day of said notice, after considering the evidence offered by the plaintiff, the court continued the order staying the proceedings in "Tweed *v.* DeLozier" until the further orders of the court, and ordered the defendants, their counsel and agents to refrain and desist from proceeding or attempting to proceed further in said action until the further orders of the court. The defendant Tweed excepted and appealed to the Superior Court.

When the cause came on to be heard in the court below the judge sustained defendant Tweed's Exception No. 8, which was an exception to the order, and the signing thereof, entered by the general county court, and signed an order vacating and reversing said order.

Harkins, Van Winkle & Walton for plaintiff, appellant.
Williams & Cocke for defendant Evelyn Thelma Tweed, appellee.

BARNHILL, J. Was there error in the judgment of the court below vacating the order entered by the judge of the general county court ordering the defendants, their attorneys and agents to refrain from prosecuting the action for damages instituted by the defendant Tweed

against the defendant DeLozier? This is the only question presented and it must be answered in the negative. Whether this proceeding is maintainable as between the plaintiff and the defendant DeLozier is not presented.

The plaintiff sets out fully the terms of its policy, the conditions under which liability attaches, the circumstances under which the plaintiff is required to defend in the name and behalf of the defendant DeLozier, and the noncoverage provisions of the policy. The defendant DeLozier files no answer. He thereby admits the allegations in the complaint or petition.

The defendant Tweed is not interested in the alleged controversy between the plaintiff and the defendant DeLozier as to whether the plaintiff is required to defend an action instituted against DeLozier for damages growing out of an accident while said defendant's child under sixteen years of age was operating the automobile. The defendant Tweed in her action specifically alleges that the defendant DeLozier was operating the automobile at the time she sustained her injuries. If she recovers it must be on evidence sustaining her allegations. In her present action she cannot recover on proof that the boy was driving.

The plaintiff concedes in its petition that it is its duty to defend an action instituted against DeLozier for damages growing out of his alleged negligence in the operation of said automobile, even if such suit is groundless, false or fraudulent. It is now called upon to defend an action in which it is alleged that the defendant DeLozier was so negligent. There can be no controversy as to its duty under the terms of its policy to respond to this call.

Litigants have the right to an expeditious trial of their causes, in so far as the condition of the docket will permit. No cause appears upon the record why this right should be denied to the defendant Tweed. If the plaintiff desires to have adjudicated the alleged controversy between it and the defendant as to the duty of the plaintiff to defend an action instituted against DeLozier, in which it is alleged that his infant son was operating the automobile in violation of law, it may do so. But it has no right to delay the defendant Tweed in the prosecution of her action pending the determination of that controversy.

This action presents a novel situation which is unique in the annals of legal procedure, at least in this State. The judge of the county court orders and directs a litigant and her attorneys to refrain and desist from proceeding in an action in his own court. In effect he restrains the trial of a cause pending before him.

Exception No. 8, entered by the defendant Tweed to the judgment signed by the judge of the county court, was well taken and the judge below properly sustained the same.

Affirmed.

GOLDSTON SMITH AND WIFE, DELLA SMITH, v. A. F. PHILLIPS.

(Filed 13 April, 1938.)

Party Walls § 2—Case held properly submitted to the jury on plaintiffs' contention that negligence of defendant caused collapse of party wall.

Plaintiffs instituted this action to recover damages to their building resulting from the collapse of a party wall between plaintiffs' and defendant's property. Plaintiff alleged and offered evidence tending to show that after the destruction of defendant's building by fire, defendant in reconstructing same, was guilty of negligence in digging the foundations two feet below the base of the party wall at a time when the soil was soggy from rain and long exposure, causing the collapse of the wall. Defendant denied the allegations of negligence and alleged contributory negligence and estoppel, and offered evidence in support of his contentions. *Held:* The conflicting evidence was properly submitted to the jury on the questions of negligence, contributory negligence and estoppel, and judgment in plaintiffs' favor on the verdict is without error.

APPEAL by defendant from *Clement, J.*, and a jury, at November Regular Term, 1937, of WILKES. No error.

This is a civil action for actionable negligence brought by plaintiffs against defendant, alleging damage.

The complaint of plaintiffs, in part, is as follows:

"2. That the plaintiffs are, and have been prior to and since 30 December, 1919, the owners and in possession of Lot No. 8 in Block No. 45, as shown on the map of the town of North Wilkesboro, and the defendant is the owner and in possession of, and has been prior to and since 30 December, 1919, the owner of Lot No. 7 in Block No. 45, as shown on the map of the town of North Wilkesboro.

"3. That on 30 December, 1919, the plaintiffs and the defendant entered into a party wall agreement, which was properly executed by all the parties and recorded in the office of the register of deeds of Wilkes County on 13 January, 1920, in Book 111, page 106, which contract as recorded is made a part of this complaint.

"4. That on 30 December, 1919, both the lot of the plaintiffs and the lot of the defendant were vacant and undeveloped.

"5. That immediately after the execution of the party wall agreement referred to in the preceding paragraph, the defendant A. F. Phillips proceeded to construct said party wall in connection with a building on his own Lot No. 7, Block No. 45, said wall being 70 feet long and two stories high. That said wall was built according to the contract by A. F. Phillips, he being the sole judge of the depth that said wall was placed in the ground, without any suggestion, supervision, or knowledge of the plaintiffs except such as they saw in passing backward and forward.

"6. That about three years after the defendant had completed said party wall the plaintiffs, pursuant to said party wall agreement, paid to the said defendant A. F. Phillips the sum of $500.00 and constructed their brick building on their said lot, covering the entire lot from the front on the west side of Tenth back the entire distance of 70 feet and two stories high, with 8-foot basement, said building being constructed of brick and so arranged that it constituted the residence of the plaintiffs and a store room on the ground floor fronting on Tenth Street.

"7. That the building of the plaintiffs was properly attached to said party wall, the plaintiffs having a basement eight feet deep and the defendant's basement being ten feet deep, thereby making the base of plaintiffs' basement two perpendicular feet above the base of said party wall. That two of the flues in the party wall were used by the plaintiffs, pursuant to the said party wall agreement, as a part of the construction of the plaintiffs' building.

"8. That some two or three years after the plaintiffs constructed their building to said party wall the defendant's building was completely destroyed by fire, leaving the defendant's basement open and unsheltered from the weather for several years, permitting the rain water and water from snows and ice to stand in said basement until it sank, making the earth under said party wall and open basement wetter and softer than it would have been had it been undeveloped naked earth, the said basement being clay and unprotected by natural top soil.

"9. That some time during April, 1935, the defendant began the reconstruction of his building by negligently sinking his said basement the distance of four perpendicular feet below his former basement and four feet below the basement of said party wall, the defendant knowing at the time the soggy condition of the clay and of the danger of leaving said party wall to which the plaintiffs' building was attached resting upon 17 inches of soft clay with only the additional support of a base eight inches wider than the party wall. That said excavation was negligently carried on by the defendant during the April and May rains, which had completely saturated the earth under said party wall, and negligently and recklessly permitted said party wall (the support and part of plaintiffs' building) to stand unprotected for several weeks until the rains had softened the clay supports of said wall to such an extent that on 21 May, 1935, without notice or warning, plaintiffs' building and party wall began cracking and giving way, and within about ten minutes said party wall had slid off into the defendant's basement and had wrecked plaintiffs' building to the extent that the plaintiffs were forced to abandon it as their residence, and the tenant of plaintiffs' store room was forced to abandon the room, thus leaving the plaintiffs' building gaping from the loss of its support and party wall, and sus-

pended on three sides with its joists supports pulled from the opposite wall, thereby leaving plaintiffs' building almost a complete wreck, and pulling the building of the plaintiffs, which they had attached to their building on their other lot opposite this building, until it was rent from top to bottom in its front wall fronting Tenth Street, this said building being also constructed of brick.

"10. That as a result of the negligence of the defendant A. F. Phillips, hereinbefore set out, plaintiffs were forced to abandon their building as a residence, and were forced to rent a residence in which to live, which at that time could not be had in North Wilkesboro or Wilkesboro, and the plaintiffs were unable to rent a residence in which to live, and were unable to rent the store room to their building for a period of four and one-half months as to their residence and a period of five and one-half months as to their store room.

"11. That the defendant A. F. Phillips admitted his negligence in doing the damage described to the buildings of the plaintiffs, and undertook to restore said damage done the plaintiffs by furnishing to them a three-room cabin just across the street from the courthouse in Wilkesboro, and attempted to restore the damage done the property of the plaintiffs in such a negligent manner that he did but little to restore plaintiffs' building except such as was necessary to do in the slow and faulty construction of his own building, and did without leave or license shove the steel beams of his new building through and beyond the center of the said party wall and into that portion of the party wall which belonged to the plaintiffs a distance of approximately four inches, thus giving him a ground floor space, thus further willfully and negligently weakening the building of the plaintiffs, and negligently continued to leave the plaintiffs out of the use and benefit of said building for a period of from four to five and one-half months.

"12. That as a follow-up of the willful and negligent injury to the property of the plaintiffs, the defendant negligently and willfully mistreated these plaintiffs in their persons and in their property by his negligence and negligent indifference to their rights and benefit of their property which they were entitled to; that he piddled around with the construction of his own property, leaving the plaintiffs in his cabin crowded for a period above set out, and by his negligence caused the plaintiffs' furniture and household goods to be left open to the air, winds, and moisture and weather during said time, and out of the use of their property; and when he had completed, as he contends, the reconstruction of the plaintiffs' property, had done his work in such a faulty, negligent manner that the plaintiffs' building is yet untrue, not level, is sagged and warped and the walls cracked, which will force the plaintiffs to tear down and reconstruct their building.

"13. That by reason of the negligence and willful acts and conduct of the defendant A. F. Phillips, as hereinbefore set out, the plaintiffs have been damaged in the sum of $8,695," and demand judgment for same.

The defendant admitted the 2nd, 3rd, and 4th paragraphs of the above complaint and denied negligence and the other material allegations of the complaint and set up estoppel, contributory negligence, and counterclaim.

The issues submitted to the jury and their answers thereto were as follows:

"1. Did the defendant, either through himself or his employees, wrongfully and negligently dig and excavate the earth so near the wall between the plaintiffs and defendant that it gave way and fell, as alleged in the complaint? Ans.: 'Yes.'

"2. If so, did the plaintiffs by their want of due care contribute to the injury? Ans.: 'No.'

"3. What damages, if any, are plaintiffs entitled to recover of the defendant? Ans.: '$2,000.'

"4. What amount, if any, is defendant entitled to recover of plaintiffs on defendant's counterclaim, as alleged in the answer? Ans.: 'None.'"

Judgment was rendered 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.

Chas. G. Gilreath and Trivette & Holshouser for plaintiffs.
Jones & Brown and Bowie & Bowie for defendant.

CLARKSON, J. At the close of plaintiffs' evidence and at the close of all the evidence the defendant made motions in the court below for judgment as in case of nonsuit. C. S., 567. These motions were overruled, and in this we can see no error. Plaintiffs' evidence fully sustained the allegations in the complaint and defendant's evidence was to the contrary. The jury found the issues, *tendered by defendant* and submitted to the jury by the court below, in favor of plaintiffs.

The court below gave, with a few exceptions in which we see no error, long and carefully prepared prayers for special instructions requested by defendant. We see no error in allowing and excluding certain evidence in the trial. We see no prejudicial error in the court's instruction on the measure of damages or otherwise. The questions of contributory negligence and estoppel were for the jury to determine and not the court.

The present action is in many respects similar to that of *Hammond v. Schiff*, 100 N. C., 161. The facts and issues are similar. *Davis v. Summerfield*, 131 N. C., 352; *S. c.*, 133 N. C., 325.

On the entire record we see no prejudicial or reversible error.

No error.

MYRTLE I. SMITH v. GREENSBORO JOINT STOCK LAND BANK, S. B. FOSTER, HOME INSURANCE & REALTY COMPANY, H. A. JOHNSON AND WIFE, J. HUBERT DICKINSON AND WIFE, WILLIE ALBRITTON DICKINSON, WALTON W. SMITH AND WIFE, MRS. WALTON W. SMITH.

(Filed 13 April, 1938.)

1. Mortgages § 35a—

When the mortgagee purchases at the foreclosure sale, either directly or by agent, the sale is not void but voidable, and ordinarily may be avoided only by the mortgagor or his heirs and assigns.

2. Mortgages § 39d—Mortgagor must elect between suit to set aside sale and action for damages for wrongful foreclosure.

When a mortgagee purchases the property at the foreclosure sale, either directly or by agent, the mortgagor, if he does not elect to ratify the sale and accept the proceeds, may treat the sale as a nullity and have it set aside, or sue the mortgagee for wrongful foreclosure and hold it liable for the true worth of the property, but the mortgagor must make his election between the two remedies, since they are inconsistent, one being a disaffirmance of the sale, and the other being for the recovery of damages while permitting the sale to stand.

3. Pleadings §§ 2, 16—Action to set aside foreclosure sale is improperly joined with action for damages for wrongful foreclosure.

An action against the mortgagee and his transferees to set aside a foreclosure sale on the ground that the sale was voidable for that the mortgagee bid in the property, is improperly joined with an action against the mortgagee, in the event the transferees should be found to be innocent purchasers for value, for damages for wrongful foreclosure, since all the parties are necessary only in the first cause of action and in the second action only the mortgagee is affected. C. S., 507.

4. Pleadings § 16—

When there is a misjoinder of both parties and causes of action, the action is properly dismissed upon demurrer interposed upon this ground.

APPEAL by defendants from *Spears, J.*, at September-October Term, 1937, of JOHNSTON.

Civil action to set aside deeds under foreclosure sale made to mortgagee through its agent, and subsequent deeds allegedly taken by grantees with notice, to recover the lands and for an accounting for rents and benefits; and, in the event it should be decided by the court that the

subsequent grantees are innocent purchasers for value, to recover of the mortgagee and its agent, the bidder at the sale, the value of the land less the mortgage indebtedness.

For a first cause of action the complaint alleges that: In 1926, to secure the payment of a loan obtained from the Greensboro Joint Stock Land Bank, plaintiff executed and delivered to the said bank a mortgage deed, which is duly registered, conveying 394.01 acres of land situated in Johnston County. This mortgage deed was foreclosed by the exercise of the power of sale therein contained, and the lands were sold at the courthouse door in said county on 19 February, 1934. The defendant S. B. Foster was declared to be the highest bidder at $12,000. On 2 March, 1934, pursuant to such sale, said Land Bank conveyed the lands to said Foster by deed, which was duly registered on 12 March, 1934. On the date last named Foster, for recited consideration of $10.00, conveyed the lands to said Land Bank by deed, which was duly registered on 14 March, 1934. On 18 December, 1934, said Land Bank, for recited consideration of $10.00 and other valuable considerations, alleged to be approximately $12,000, conveyed the lands to the defendant Home Insurance & Realty Co. by deed, which is duly registered. In January, 1935, said Home Insurance & Realty Co. conveyed all of the lands in three separate portions to defendants: (1) H. A. Johnson and wife for consideration of $6,000; (2) J. Hubert Dickinson and wife, Willie Albritton Dickinson, for $6,000, and (3) Walton W. Smith and wife for $5,000, by respective deeds which are duly registered.

The plaintiff in said first cause further alleges that the foreclosure sale is void in that the mortgage deed contained no power of sale sufficient to warrant the foreclosure for that it failed to designate the place of sale; and, further, that the purchaser, S. B. Foster, at the time of the sale, occupied a fiduciary relationship with the defendant Land Bank and was acting as its agent in purchasing the property; that in effect the Land Bank purchased the property at its own sale, indirectly through its agent; that the defendant Home Insurance & Realty Co. and its said grantees respectively took title to the said lands with notice of the alleged defects in the mortgage and in the foreclosure sale, of the circumstances under which the Land Bank "pretended to sell and convey the property to S. B. Foster, its agent, and the record title which rendered said sale illegal and void"; that all said grantees took title subject to plaintiff's equity of redemption; "that the said lands are now worth more than the sum of $27,500," and that the annual rental value is $1,500.

In the second cause of action the plaintiff alleges that in the event it should be decided by the court that the defendant Home Insurance &

Realty Co. and its grantees are innocent purchasers for value, then the plaintiff has been damaged and is entitled to recover of the defendants Greensboro Joint Stock Land Bank and S. B. Foster the sum of $12,500.

Defendants, Greensboro Joint Stock Land Bank and S. B. Foster, demur to the complaint for that there is misjoinder of causes of action. The defendants, H. A. Johnson and wife, J. Hubert Dickinson and wife, and Walton W. Smith and wife, demur to the complaint for that there is misjoinder both of causes of action and of parties.

The court below entered judgment overruling demurrer, from which defendants appealed to the Supreme Court and assigned error.

W. J. Hooks for plaintiff, appellee.

Arch T. Allen and McLean & Stacy for defendants, Greensboro Joint Stock Land Bank and S. B. Foster.

Wellons & Poole for defendants H. A. Johnson, Mrs. H. A. Johnson, J. Hubert Dickinson, Willie Albritton Dickinson, Walton W. Smith, and Mrs. Walton W. Smith.

WINBORNE, J. The demurrers presented on this record raise this question: Can a mortgagor unite in a complaint both a cause of action against the mortgagee and its subsequent grantees to set aside foreclosure sale under the mortgage at which the mortgagee becomes the purchaser, and deeds subsequently executed to purchasers with notice, and a cause of action against the mortgagee for damages resulting from such foreclosure sale? The decisions of this Court say "No."

The uniform decisions of this Court hold that "Where a mortgagee of lands purchases at his own sale, directly or by an agent, though he may convey to the agent and have the latter reconvey to him, the effect is to vest the legal estate in the mortgagee in the same plight and condition as he held it under the mortgage, subject to the right of the mortgagor to redeem," *Averitt v. Elliott,* 109 N. C., 560, 138 S. E., 785, unless in some way he releases or loses that equity. . . . The sale by the mortgagee is not void, but only voidable, and, ordinarily, can be avoided only by the mortgagor or his heirs and assigns. *Joyner v. Farmer,* 78 N. C., 196; *Whitehead v. Whitehurst,* 108 N. C., 459, 13 S. E., 166; *Averitt v. Elliott, supra; Shuford v. Bank,* 207 N. C., 428, 177 S. E., 408; *Davis v. Doggett,* 212 N. C., 589, 194 S. E., 288.

If the facts be true as alleged, it is open to plaintiff, mortgagor, (1) "to ratify the sale and accept the proceeds or settle on that basis," or (2) to pursue one of two remedies: (a) She "may treat the sale as a nullity and have it set aside." This she seeks to do in the first cause of action; or (b), acting in repudiation of the sale, she may sue the mortgagee for the wrong done in making such a sale, and hold it liable for the true worth of the property. This she seeks to do in her second cause

of action. *Froneberger v. Lewis,* 70 N. C., 456, and 79 N. C., 426; *Brothers v. Brothers,* 42 N. C., 150; *Patton v. Thompson,* 55 N. C., 285; *Bruner v. Threadgill,* 88 N. C., 361; *Burnett v. Supply Co.,* 180 N. C., 117, 104 S. E., 137.

In the first remedy plaintiff disaffirms the sale, and in the second, while acting in repudiation of it as unlawful, she permits it to stand. The two causes are, therefore, inconsistent. Plaintiff cannot at the same time enjoy both.

In *Machine Co. v. Owings,* 140 N. C., 503, 53 S. E., 345, quoting from 7 Enc. Pl. & Prac., 362, it is said in part: "No suitor is allowed to invoke the aid of the courts upon contradictory principles of redress upon one and the same line of facts."

In *Lanier v. Lbr. Co.,* 177 N. C., 200, 98 S. E., 593, Jefferson Lanier, after conveying the land in question to plaintiff, then a minor, and before the registration of deed to plaintiff sold and conveyed the timber to Blades Lumber Co., which thereafter sold and conveyed same to Roper Lumber Co. Speaking for the Court, *Allen, J.,* said: "The two causes of action alleged in the complaint, one against the Roper Lumber Co. to set aside the deeds under which it claims and to recover damages for cutting the timber on the land, and the other against the administrator and heirs of Jefferson Lanier to recover the purchase money of the land, are inconsistent and cannot be prosecuted at the same time, as one repudiates the deed executed to the Blades Lumber Co. and the other affirms it."

In the case of *Lykes v. Grove,* 201 N. C., 254, 159 S. E., 360, speaking for the Court, *Stacy, C. J.,* said: "Can a plaintiff unite in the same complaint an action for the rescission of a contract and one for its breach? The decisions are to the effect that he may not, as this would be to deny and affirm the contract at the same time—'to blow hot and cold in the same breath.' The rights are opposed and the remedies are inconsistent," citing numerous cases.

The causes of action that may be joined are classified in C. S., 507, which provides: "But the causes of action so united must all belong to one of these classes, and, except in actions for foreclosure of mortgage, must affect all the parties to the action." *Roberts v. Mfg. Co.,* 181 N. C., 204, 106 S. E., 664; *Bank v. Angelo,* 193 N. C., 576, 137 S. E., 705; *Sasser v. Bullard,* 199 N. C., 562, 155 S. E., 248; *Wilkesboro v. Jordan,* 212 N. C., 197, 193 S. E., 155.

In the case at hand the first cause of action affects all of the defendants. The second affects only the defendant Land Bank. Hence there is misjoinder of parties.

It is well settled that when there is a misjoinder, both of parties and of causes of action, and a demurrer is interposed on this ground, the

demurrer should be sustained and the action dismissed. *Cromartie v. Parker,* 121 N. C., 198, 28 S. E., 297; *Morton v. Tel. Co.,* 130 N. C., 299, 41 S. E., 484; *Thigpen v. Cotton Mills,* 151 N. C., 97, 65 S. E., 750; *Campbell v. Power Co.,* 166 N. C., 488, 82 S. E., 842; *Roberts v. Mfg. Co., supra; Shore v. Holt,* 185 N. C., 312, 117 S. E., 165; *Harrison v. Transit Co.,* 192 N. C., 545, 135 S. E., 460; *Bank v. Angelo, supra; Sasser v. Bullard, supra; Wilkesboro v. Jordan, supra.*

Counsel for plaintiffs rely upon *Council v. Land Bank,* 211 N. C., 262, 189 S. E., 777. Reference to that case, however, discloses that the Land Bank answered, and only defendants Blount, who claimed to be innocent purchasers, demurred on the ground that the complaint did not state facts sufficient to constitute cause of action against them. The question of misjoinder of parties and of causes of action was not presented.

We hold that there is misjoinder both of causes of action and of parties, and the demurrer should be sustained and the action dismissed. Therefore the judgment below is

Reversed.

CLAUDE L. BROWN v. ROSA HOOKER BROWN.

(Filed 13 April, 1938.)

1. Actions § 4—

A party may not maintain an action founded upon or growing out of his own wrongful or unlawful act.

2. Statutes § 5a—

While all questions of public policy are for the determination of the Legislature, a statute will not be construed to alter established principles of public policy founded on good morals, unless such intent is clearly and unequivocally expressed in the statute.

3. Divorce § 2a—Husband unlawfully abandoning wife is not entitled to divorce on ground of two years separation under ch. 100, Public Laws 1937.

Plaintiff instituted this action for divorce on the ground of two years separation under the provisions of ch. 100, Public Laws of 1937, which reënacted, with certain changes, C. S., 1659-A. The jury found from the evidence that the separation was caused by the unlawful act of plaintiff in abandoning his wife. *Held:* Plaintiff is not entitled to decree of divorce, *Reynolds v. Reynolds,* 208 N. C., 428, interpreting the provisions of the acts of 1933 and 1931, which were reënacted by ch. 100, Public Laws of 1937, being controlling.

4. Statutes § 11—

When a statute is repealed by a later statute which reënacts all or some of its provisions, the portions of the original statute which are reënacted continue in force without interruption.

5. Statutes § 5a—

Where a statute is repealed by a later act which reënacts all or some of its provisions, it will be presumed that the provisions reënacted were written with regard to the decisions interpreting the same language in the former act, and such decisions control in interpreting the same language in the later act.

APPEAL by plaintiff from *Grady, J.*, at February Term, 1938, of LENOIR. No error.

This is an action for divorce under provisions of ch. 100, P. L. 1937, in which the plaintiff makes the necessary allegations, including the allegation of two years' separation.

The defendant, answering, admitted that the plaintiff had been a resident of the State of North Carolina for a period of one year, and that the plaintiff and defendant had lived separate and apart for a period of two years. By way of further answer and plea in bar the defendant further alleged that the plaintiff wrongfully and unlawfully abandoned the defendant and his two children and wrongfully, unlawfully and willfully thereafter refused to render any support to them. At the hearing the evidence tended to show that the plaintiff had been indicted and convicted of the crime of abandonment and nonsupport of his wife and his children begotten of her during coverture. The evidence likewise tended to show that the defendant had instituted an action against the plaintiff for subsistence, and upon due hearing an order had been entered requiring the plaintiff to make contribution to the support of his wife and children; that thereafter, upon citation, it was found by the court that the plaintiff had wrongfully and unlawfully abandoned his wife and children; that he had contumaciously failed to make the payments required and had been adjudged in contempt and sentenced to prison.

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

"1. Were the plaintiff and defendant married as alleged in the complaint? A. 'Yes.'

"2. Has the plaintiff resided in the State of North Carolina for one year? A. 'Yes.'

"3. Has there been a separation of husband and wife, and have they lived separate and apart for more than two years? A. 'Yes.'

"4. Has the said separation of husband and wife been due to the criminal and unlawful acts of the husband, as alleged in the answer? A. 'Yes.' "

Joe Dawson for plaintiff, appellant.
J. B. James for defendant, appellee.

BARNHILL, J. Courts are governmental agencies created for the administration of justice. From time immemorial it has been a recognized fundamental policy that their doors are not to be opened to enable one to procure an advantage growing out of or bottomed upon his own wrongful or unlawful act. As said by *Stacy, C. J.*, in *Reynolds v. Reynolds,* 208 N. C., 428: " 'It is very generally held—universally, so far as we are aware—that an action never lies when a plaintiff must base his claim, in whole or in part, on a violation by himself of the criminal or penal laws of the State.' *Hoke, J.*, in *Lloyd v. R. R.,* 151 N. C., 536, 66 S. E., 604. In Waite's Actions and Defenses, Vol. 1, p. 43, the principle is broadly stated, as follows: 'No principle of law is better settled than that which declares that an action cannot be maintained upon any ground or cause which the law declares to be illegal,' citing *Davidson v. Lanier,* 4 Wallace, 447; *Rolfe v. Delmar,* 7 Rob., 80; *Stewart v. Lothrop,* 12 Gray, 52; *Howard v. Harris,* 8 Allen, 297; *Pearce v. Brooks,* L. R. 1 Exch., 213; *Smith v. White,* L. R. 1 Eq. Cases, 626.

"To say that civil rights, enforceable through the courts, may inure to one out of his own violation of the criminal law, and against the very person injured, would be to blow hot and cold in the same breath, or, Janus-like, to look in both directions at the same time. The law is not interested in such double dealing or sleight-of-hand performances; it sets its face like flint in the opposite direction."

While it is a well-settled rule that all questions of public policy are for the determination of the Legislature and not for the courts, it will not be assumed that any statute enacted by the Legislature was intended to override or depart from principles of public policy founded on good morals unless the language of the statute clearly and unequivocally indicates such an intent. The courts will not impute to the Legislature an intent that would be in direct conflict with the very purposes for which the courts are created or would be violative of sound public policy or would lead to manifest injustice in the absence of a direct declaration to that effect in language clear and unmistakable. On the contrary, whenever permissible, the courts will assume that the Legislature intended its acts to be consonant with, and not violative of, existing public policy and good morals.

Plaintiff's action is instituted under C. S., 1659-A as reënacted by ch. 100, P. L. 1937. The statute was originally enacted in 1931, ch. 72, P. L. 1931, and read as follows: "Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of either party, if and when there has been a separation of husband

and wife, either under deed of separation or otherwise, and they have lived separate and apart for five years, and no children have been born to the marriage, and the plaintiff in the suit for divorce has resided in the State for that period." The Legislature of 1933 amended the act by striking out the clause "and no children have been born to the marriage," and by reducing the required period of separation to two years and the period of residence to one year. Ch. 163, P. L. 1933.

The Legislature of 1937 further amended the statute and reënacted the same, omitting the clause "either under deed of separation or otherwise." Thus it appears that the cause of divorce as defined in ch. 100, P. L., 1937, is identical with the statute as originally enacted, except that the time of separation has been reduced from five to two years, the period of residence from five years to one year, and the clauses "and no children have been born to the marriage" and "either under deed of separation or otherwise" are now omitted.

This being the history of the statute, is the unlawful abandonment of the defendant and her children by the plaintiff a valid plea in bar under the decision of this Court in *Reynolds v. Reynolds, supra?* Under universally accepted rules of construction this question must be answered in the affirmative. The prevailing view is that where a statute is repealed and all or some of its provisions are at the same time reënacted the reënactment neutralizes the repeal and the provisions of the repealed act, which are those reënacted, continue in force without interruption, so that all rights and liabilities that have accrued thereunder are preserved and may be enforced. 25 R. C. L., 934. The rule of construction applicable to acts which revise and consolidate other acts is that when the revised and consolidated act reënacts, in the same or substantially the same terms, the provisions of the act or acts so revised and consolidated, the revision and consolidation shall be taken to be a continuation of the former act or acts, although the former act or acts may be specially repealed by the revised and consolidated act, and all rights and liabilities under the former act or acts are preserved and may be enforced. 25 R. C. L., 935.

Likewise, where the terms used in a statute have acquired a settled meaning through judicial interpretation, and the same terms are used in a subsequent statute upon the same subject matter, they are to be understood in the same sense unless by qualifying or explanatory addition the contrary intent of the Legislature is made clear. Such a construction becomes a part of the law, as it is presumed that the Legislature in passing the later law knew what the judicial construction was which had been given to the words of the prior reënactment. 25 R. C. L., 992.

The language of that portion of the statute which was the subject of consideration in *Reynolds v. Reynolds, supra,* is identically the same as

used in the 1933 and the 1931 acts. And so it follows that the interpretation by this Court of that portion of the statute which was reënacted remains authoritative. The 1937 reënactment of the statute squarely met the decision of this Court in *Hyder v. Hyder,* 210 N. C., 486, by striking out the clause of the statute on which the decision was based, but made no attempt to override or negative the decision in *Reynolds v. Reynolds, supra.* That portion of the statute which has been construed by this Court having been reënacted in identical terms, it is conclusively presumed that the Legislature intended such statute to have the meaning, force, and effect theretofore given to it by judicial construction.

The unlawful and wrongful conduct of the plaintiff constitutes a complete bar to his cause of action.

In the judgment below there is

No error.

CHARLES E. LINKER, ADMINISTRATOR OF THE ESTATE OF L. B. LINKER, DECEASED, v. CHARLES E. LINKER, INDIVIDUALLY, AND WIFE, BERTHA A. LINKER; MAE WIDENHOUSE AND HUSBAND, E. A. WIDENHOUSE; NANNIE LEE BARNHARDT AND HUSBAND, L. H. BARNHARDT; J. B. LINKER AND WIFE, JEWEL LINKER; PEARL LINKER HARRIS; ROBERT L. LINKER AND WIFE, FAY LINKER; HELEN G. RITCHIE AND HUSBAND, E. S. RITCHIE; REALTY PURCHASE CORPORATION; EFIRD'S DEPARTMENT STORE, INC.; C. F. LITTLE; SOUTHERN COTTON OIL COMPANY, A CORPORATION; BUCKEYE COTTON OIL COMPANY, A CORPORATION; W. A. NEWELL; E. L. MORRISON, TRADING AS E. L. MORRISON LUMBER COMPANY; MRS. LOU A. TEETER, ADMINISTRATRIX OF THE ESTATE OF M. F. TEETER, DECEASED, AND C. S. McCURDY.

(Filed 13 April, 1938.)

1. Executors and Administrators § 5: Descent and Distribution § 1—

Upon the death of a person intestate his personal estate vests in his administrator and his lands descend to his heirs, subject to be sold only if the personalty is insufficient to pay debts of the estate, and the lands are not an asset of the estate until sold and the proceeds received by the administrator.

2. Executors and Administrators § 13a—

An administrator may sell lands of the estate only if the personalty is insufficient to pay debts of the estate, C. S., 74.

3. Executors and Administrators § 13d—

Where land is sold to make assets to pay debts of the estate, so much of the proceeds of sale as is necessary to pay debts of the estate, is to be treated as personal assets, C. S., 55, but the surplus goes to the heirs as realty in the same manner as if the sale had not been had. C. S., 56.

4. Same: Descent and Distribution § 12—Administrator may not hold heir's share in surplus from sale to make assets to pay heir's debt to the estate.

Where lands are sold to make assets to pay debts, and a surplus remains in the hands of the administrator, the administrator is not entitled to hold the share of an heir in the fund to pay a debt, which is not an advancement, due the estate by the heir, since the heir's right to his share in the surplus is the same as though the land had not been sold. C. S., 56.

5. Descent and Distribution § 14—

When an heir is entitled to a share in the surplus remaining after sale of lands to make assets to pay debts, judgment creditors of the heir whose judgments were docketed prior to the death of the ancestor are entitled to pro rata payment out of the heir's share.

6. Judgments § 19d—Judgment creditors are entitled to share pro rata in property acquired by debtor subsequent to docketing of judgments.

When an heir acquires land or property to be treated as realty subsequent to the docketing of the several judgments against him, the judgment creditors are not entitled to priority in accordance with the date of the docketing of their respective judgments, but are entitled only to application of the property to the judgments pro rata. C. S., 614.

APPEAL by plaintiff and by defendant, Mrs. Lou A. Teeter, Administratrix, from *Rousseau, J.*, at October Term, 1937, of Cabarrus.

Special proceeding to sell land to make assets to pay debts, in which plaintiff and judgment creditors of one of the heirs of intestate controvert disposition of such heir's share of surplus funds.

The parties agree to facts substantially as follows: Charles E. Linker is duly qualified as administrator of L. B. Linker, deceased, who died intestate, possessed and seized of both personal and real property in Cabarrus County, and leaving his son, J. B. Linker, and six others as his only distributees and heirs at law. On the date of the death of L. B. Linker, his son, J. B. Linker, was indebted to him in the sum of $5,199.07—an "unsecured indebtedness, and not advancements." On said date there were judgments against J. B. Linker in favor of M. F. Teeter, W. A. Newell, Buckeye Cotton Oil Co., Standard Oil Co., Southern Cotton Oil Co., C. F. Little, and Efird's Department Store, respectively, in various amounts, duly docketed in Cabarrus County in priority of time in the order named—that of M. F. Teeter having been docketed first. M. F. Teeter is now dead and Mrs. Lou A. Teeter is the administratrix of his estate. There being an insufficiency of personal property to pay the debts of the estate of L. B. Linker, the plaintiff instituted this special proceeding to sell the land of which L. B. Linker died seized in Cabarrus County to make assets to pay debts, and same was duly sold. After applying the proceeds to the payment of the debts there remained a surplus of $463.47 for each of the seven heirs at law. With reference to the J. B. Linker share, it being agreed that he is a nonresident, the

parties contend: (1) Plaintiff, as administrator of L. B. Linker, contends that he has and should exercise the right to retain that share to apply on the indebtedness due by J. B. Linker to his father, the intestate; (2) Mrs. Lou A. Teeter, administratrix of M. F. Teeter, deceased, contends that the whole amount should be applied to the judgment of M. F. Teeter against J. B. Linker, and (3) W. A. Newell and the other judgment creditors contend that the whole amount should be distributed pro rata among and in proportion to the amounts due to all judgment creditors whose judgments were docketed against J. B. Linker at the date of the death of L. B. Linker, irrespective of priorities in date of docketing.

From judgment directing the distribution of the fund in accordance with the third contention the plaintiff, administrator of L. B. Linker, deceased, and the defendant, Mrs. Lou A. Teeter, administratrix of M. F. Teeter, deceased, each appeals to the Supreme Court and assigns error.

Armfield, Sherrin & Barnhardt for plaintiff, appellant.
W. S. Bogle for Mrs. Lou A. Teeter, defendant, appellant.
H. S. Williams for W. A. Newell, defendant, appellee.

WINBORNE, J. Upon the facts as stated these questions arise:

1. Where there is a surplus of proceeds of the sale of land to make assets to pay debts of the estate of an intestate after such debts have been paid, has the administrator of the intestate the right to retain and apply the share of an heir in payment of an indebtedness, not an advancement, due by such heir to the intestate when judgment creditors of such heir hold judgments duly docketed in the county where the land is situated at the date of the death of the intestate?

2. If not, is the judgment creditor whose judgment was first docketed entitled to be paid in full before such other judgment creditors?

The answer to each is "No."

Upon the death of an intestate his personal estate vests in the administrator, and the lands descend to his heirs, subject to be sold, if necessary, to make assets to pay debts of the intestate. *Price v. Askins,* 212 N. C., 583, 194 S. E., 284; *Harris v. Russell,* 124 N. C., 547, 32 S. E., 958; *Avery v. Guy,* 202 N. C., 152, 162 S. E., 217.

"A personal representative has no control of the freehold estate of the deceased unless it is vested in him by will, or where there is a deficiency of personal assets, and he obtains a license to sell real estate for the payments of debts. . . . The heir of the testator is not divested of the estate which the law casts upon him by any power or trust until it is executed." *Floyd v. Herring,* 64 N. C., 409; *Speed v. Perry,* 167 N. C., 122, 83 S. E., 176, and cases cited.

Land is not an asset until it is sold and the proceeds received by the personal representative. *Fike v. Green*, 64 N. C., 665; *Edenton v. Wool*, 65 N. C., 379; *Hawkins v. Carpenter*, 88 N. C., 403; *Wilson v. Bynum*, 92 N. C., 718.

Land of which an intestate dies seized may only be sold when the personal assets of the intestate are insufficient to pay his debts. C. S., 74; *Avery v. Guy, supra.*

C. S., 55, provides that "all proceeds arising from the sale of real property for the payment of debts . . . shall be deemed personal assets in the hands of the executor, administrator, or collector, and applied as though the same were the proceeds of personal assets."

But under C. S., 56, it is provided that "all proceeds from the sale of real estate . . . which may not be necessary to pay debts and charges of administration shall, notwithstanding, be considered real assets, and as such be paid by the executor, administrator, or collector to such persons as would have been entitled to the land had it not been sold."

Applying these principles and statutes to the facts of the present case, an undivided interest in the land of L. B. Linker, immediately upon his death, vests in J. B. Linker, subject to be divested only in the event that the personal assets of the estate be insufficient to pay the debts of the estate, and then only to the extent that it is necessary to use the proceeds of sale of it to pay said debts. The proceeds passed into the hands of the administrator for that purpose only, and only to that extent. Any surplus then reverts to the status of real estate as if the land had not been sold. In *Lafferty v. Young*, 125 N. C., 296, 34 S. E., 444, it is said: "Being the proceeds of realty, the law for the purpose of indicating the channel in which it shall go, by a fiction stamps it with the character of realty."

Plaintiff relies mainly upon the cases of *Wallston v. Braswell*, 54 N. C., 137; *Balsley v. Balsley*, 116 N. C., 472; *Nicholson v. Serrill*, 191 N. C., 96, 131 S. E., 377, and decisions in other jurisdictions. A careful consideration of them shows each to be distinguishable from the factual situation here involved.

A judgment "is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated or which he acquires at any time thereafter, for ten years from the date of the rendition of the judgment." C. S., 614. In the present case it is not contended that any of the judgments are affected by the statute of limitations.

As to priority of the lien of the docketed judgments, in *Moore v. Jordan*, 117 N. C., 86, it is said: "The defendant Lewis contends that,

as was the case under our former system, the lien when it attaches relates back to the day when the judgment was docketed. . . . Neither the court nor counsel have been able to find any decided cases on this question in any of the states except one in Oregon. . . . We are, therefore, to construe our statute, The Code, sec. 435 (C. S., 614), according to its meaning and on general principles of reasoning. . . . There seems to be no reason why priority should be allowed when the title to the land and the several liens occur at the same moment. There is no equitable ground on which to place it, because one judgment debt in the eye of the law is as just as any other, and there is no natural justice in the proposition. . . . Our conclusion is that the proceeds of the land should be applied to the judgments pro rata." *Johnson v. Leavitt,* 188 N. C., 682, 125 S. E., 490.

The administrator will pay the cost out of the fund.

The judgment below is

Affirmed.

BEN A. STIMSON ET AL. V. A. J. PHIFER.

(Filed 13 April, 1938.)

Executors and Administrators § 13a—

A creditor of an heir, certainly in the absence of evidence of fraud and collusion, is not entitled to prevent the executor from selling lands of the estate to make assets to pay debts.

APPEAL by defendant from *Rousseau, J.,* at November Term, 1937, of IREDELL.

Proceeding against land of decedent for assets.

The executor and trustee of the estate of W. J. Stimson, deceased, brings this proceeding, by petition duly filed before the clerk of the Superior Court of Iredell County, for license to sell land of decedent in order to make assets to pay debts and costs of administration.

The defendant is made a party because he is a judgment creditor of the petitioner, individually, who is one of the devisees under the will of the deceased.

From judgment ordering land to be sold the defendant appeals, assigning errors.

Scott & Collier and Land & Sowers for plaintiffs, appellees.
Lewis & Lewis for defendant, appellant.

STACY, C. J. Whether judgment creditor of heir or devisee is necessary or proper party to proceeding against decedent's land for assets is

not before us for decision. See *Linker v. Linker, ante,* 351; *Battle v. Duncan,* 90 N. C., 546; *Byrd v. Byrd,* 117 N. C., 523, 23 S. E., 324. Conceding that, upon proper allegations, such judgment creditor is presently entitled to be heard, *Wadford v. Davis,* 192 N. C., 484, 135 S. E., 353, nevertheless it appears that here he has offered no evidence to support his allegations of fraud or collusion, and his exceptive assignments of error point only to matters available to a coheir or codevisee. *Finger v. Finger,* 64 N. C., 183.

The record as presented requires no disturbance of the judgment.

No error.

JOSEPH F. LOCKEY, EMPLOYEE, v. COHEN, GOLDMAN & COMPANY, EMPLOYER, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER.

(Filed 13 April, 1938.)

1. Master and Servant § 55d—

Whether an accident arises out of and in the course of the employment is a mixed question of law and fact, and the finding of the Industrial Commission upon this point is conclusive if supported by competent evidence, even though the evidence may also warrant an inference to the contrary.

2. Master and Servant § 40e—

An accident arises out of the employment if there is a causal connection between the employment and the accident, and the risk is incidental to the employment and not common to all others in the neighborhood.

3. Master and Servant § 40a—

The Workmen's Compensation Act does not contemplate compensation for every injury an employee may receive during the course of his employment, but only those from accident arising out of and in the course of the employment.

4. Master and Servant §§ 40e, 40f—

As used in the Workmen's Compensation Act, the phrase "in the course of" refers to time, place and circumstances, and the words "out of" relate to the origin or cause of the accident.

5. Master and Servant § 40e—Evidence held to support findings that accident did not arise out of the employment.

The evidence tended to show that plaintiff employee had no regular hours of work, that he went to the employer's plant and performed a job, then went to a cafe, and that as he was getting in his car after leaving the cafe, the night watchman at the plant beckoned to him, and that he started to go to him to aid him, and slipped on a fruit peeling, causing the injury in suit. *Held:* The risk was common to all in the neighborhood and was not incidental to the employment, and the evidence supports

the finding of the Industrial Commission that the accident did not arise out of the employment, and the conclusion of the Superior Court on appeal that the facts found establish plaintiff's right to recover as a matter of law, is error.

APPEAL by defendants from *Harris, J.*, at November Term, 1937, of CRAVEN. Reversed.

This is a claim for compensation under the Workmen's Compensation Act filed by the plaintiff, employee, against Cohen, Goldman & Co., employer, and American Mutual Liability Insurance Company, carrier. The individual Commissioner allowed compensation. On appeal the Full Commission adopted the specific findings of fact by the individual Commissioner, but reversed the finding by the individual Commissioner that "plaintiff's injury resulted from an accident arising out of and in the course of the employment of plaintiff," and denied compensation. On appeal to the Superior Court the judge below entered judgment "that the findings of fact made by Commissioner Wilson and adopted by the Full Commission are adopted by this court, and that thereupon the conclusions of law set forth in the opinion of the Commission filed 10 August, 1937, is set aside, and it is found as a matter of law that the injury to the plaintiff arose out of and in the course of plaintiff's employment." The judgment further provided for compensation, the costs of necessary treatment for said injury, the costs and an attorney's fee for plaintiff's counsel.

The findings of fact by the individual Commissioner, which were adopted by the Full Commission and the court below, are as follows:

"1. That the plaintiff and the defendant employer have accepted the provisions of the compensation law, and that the American Mutual Liability Insurance Company is the insurance carrier.

"2. That the plaintiff sustained an injury by accident arising out of and in the course of his regular employment 19 December, 1936, when he slipped, fell, and fractured his left hip, and that as a result of said injury the plaintiff has been totally disabled since the date of the accident.

"3. That the plaintiff's average weekly wage is $17.00.

"There is some conflict in the evidence in this case as to the activities of the plaintiff immediately preceding his accident, and as to whether he had entered the cafe immediately prior to the accident or whether he had previously gone to the cafe, which was admitted by the plaintiff.

"The Commission feels that it makes no substantial difference. The plaintiff was a faithful employee who worked for the best interest of the employer at hours required by the employer, which were irregular, and even if he had gone to the cafe immediately prior to the accident, he had returned to his vehicle and was in the act of getting in it when

he noticed the beckoning of the night watchman, and it was again in an effort to render service or what he thought was going to be service to his employer that he slipped and fell.

"The doctor testified that in his opinion the plaintiff would be totally disabled to 15 May, 1937, and that there would be no permanent disability. However, the Commission is leaving both of these points open."

The undisputed evidence further shows that the plaintiff had no regular hours, but was subject to call at almost any hour, and that he went to the plant on Sunday afternoon to hang up some canvas so that it might dry in the boiler room; that he finished this job, got in his car, drove through the alley out to the street, parked his car on the left side, went to the cafe, returned to his car, and was in the act of getting in it when the night watchman, who had come to the plant and had tried to get in the front door and could not, due to the door being fastened from the inside, turned and beckoned or spoke to the plaintiff, who is almost deaf. In response to the beckoning of the night watchman the plaintiff started to go to him and in so doing he stepped on a fruit peeling lying on the sidewalk, slipped and fell and fractured his left hip. The night watchman testified that when he went to the door and found it locked "he asked me what was the trouble and I said, 'I don't know, it's fastened on the inside, I reckon; can't get in.' He asked if I wanted him to help and I says 'I don't care.'" It was further in evidence that the plaintiff did not have a key to this door. To the judgment entered, defendants excepted and appealed.

M. S. Dunn and R. E. Whitehurst for plaintiff, appellee.
Sapp & Sapp for defendants, appellants.

BARNHILL, J. The trial judge concluded that the facts found by the Commission established as a matter of law the right of the plaintiff to recover. In this there was error. Even if it be conceded that the facts found will support the conclusion that the plaintiff's injury resulted from an accident arising out of and in the course of his employment, this is not the only reasonable conclusion that may be drawn therefrom. This being true, and the Commission being the judge of the credibility, weight and sufficiency of the testimony, its conclusion must stand. While it was said in *Singleton v. Laundry Co., ante,* 32, that the Workmen's Compensation Act seemed to treat the conclusion that an injury resulted from an accident arising out of and in the course of employment as a question of law, this Court has consistently held that such conclusion is a mixed question of law and fact. When the Industrial Commission concludes that an injury arose out of and in the course of

the employment of a claimant and such conclusion is supported by competent testimony, neither the Superior Court nor this Court may interfere therewith. *Marsh v. Bennett College,* 212 N. C., 662; *Wimbish v. Detective Co.,* 202 N. C., 800. Likewise, when the Commission finds that the evidence is insufficient to support such conclusion and it finds that the injury relied upon by the plaintiff as a basis for compensation did not arise out of and in the course of the employment of the plaintiff, such conclusion must stand unless under no view of the facts found by the Commission such conclusion is warranted.

When an injury cannot fairly be traced to the employment as a contributing proximate cause, or comes from a hazard to which the workman would have been equally exposed apart from the employment, or from a hazard common to others, it does not arise out of the employment. *Walker v. Wilkins, Inc.,* 212 N. C., 627; *Marsh v. Bennett College,* 212 N. C., 662; *Plemmons v. White's Service, Inc., ante,* 148. The injury must come from a risk which might have been contemplated by a reasonable person as incidental to the service when he entered the employment. It may be said to be incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected with the service owing to the special nature of the employment. The Workmen's Compensation Act does not contemplate an award for every injury an employee may receive during the course of his employment. It provides only for compensation for injuries which result from accident arising out of and in the course of his employment.

While the phrase "in the course of" refers to time, place, and circumstances, the words "out of" relate to the origin or cause of the accident. *Harden v. Furniture Co.,* 199 N. C., 733; *Conrad v. Foundry Co.,* 198 N. C., 723; *Hunt v. State,* 201 N. C., 707; *Ridout v. Rose's Stores, Inc.,* 205 N. C., 423; *Chambers v. Oil Co.,* 199 N. C., 28; *Walker v. Wilkins, supra; Plemmons v. White's Service, Inc., supra; Hildebrand v. Furniture Co.,* 212 N. C., 100. Speaking to the subject in *In re Employers' Liability Assurance Corporation,* 102 N. E., 697, the Supreme Judicial Court of Mass. says: "It (the injury) arises 'out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes

from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

The fruit peeling on the street created a hazard to which the plaintiff was exposed apart from his employment and was one common to the neighborhood and all other persons who should use the street. The hazard created thereby cannot fairly be traced to the employment, and it cannot be said that it was a natural incident of the work or a hazard which would have been contemplated by a reasonable person in accepting employment with the defendant. The hazard did not arise out of the exposure occasioned by the nature of plaintiff's employment. It was neither an ordinary nor an extraordinary risk, directly or indirectly connected with the service of plaintiff. We are of the opinion that the Full Commission properly concluded, upon the facts found and the evidence disclosed by the record, that plaintiff's injury "arose neither out of nor in the course of the plaintiff's employment." The conclusion of the court below that the facts found established plaintiff's right to recover as a matter of law cannot be sustained.

Reversed.

JOHN TOLER AND WIFE, SUSAN J. TOLER, v. L. J. FRENCH.

(Filed 13 April, 1938.)

1. Ejectment § 12—Allegations of defective title constitute a defense and not a cross action or counterclaim.

Allegations in the answer that plaintiff's deed was executed pursuant to a conspiracy and fraud between plaintiff and his grantor to deprive defendant of his rights under a contract to convey previously executed by the grantor, constitutes a further defense as a denial of title, notwithstanding its designation in the answer as a "Cross Action."

2. Pleadings § 17—

Objection to an answer on the ground of the insufficiency of a further defense therein alleged may be taken by former demurrer or by demurrer *ore tenus*.

3. Pleadings § 20—

The office of a demurrer is to test the sufficiency of a pleadings, admitting, for the purpose, the truth of the allegations of fact and relevant inferences of fact.

4. Same—

Upon demurrer, a pleading will be liberally construed, and the demurrer should be overruled unless the pleading is fatally defective. C. S., 535.

5. Ejectment § 10—

The defense to an action in ejectment that plaintiff's deed is void for fraud is an equitable defense that must be pleaded, since mere denial of plaintiff's title is insufficient to put him upon notice that his title will be attacked on this ground.

6. Ejectment § 12—Answer held sufficient to raise equitable defense, and granting of plaintiff's demurrer thereto was error.

In an action in ejectment, allegations in the answer that plaintiff's deed was executed as a result of a conspiracy between plaintiff and his grantor to prevent defendant from obtaining title under a contract to convey previously executed by the grantor, and thus to defraud defendant out of his rights under his contract, constitute an equitable defense to the action, and plaintiff's demurrer to the defense is erroneously sustained. Whether the allegations of the defense should be made more definite and whether the grantor should be made a party, are matters addressed to the sound discretion of the trial court.

APPEAL by defendant from *Harris, J.*, at November Term, 1937, of CRAVEN.

Civil action in ejectment and for damages.

Plaintiffs allege that they are owners in fee simple and entitled to the possession of certain specifically described lands of which the defendant is in the unlawful possession, by reason of which they have been damaged in the sum of $300. Defendant denies each of the allegations of the complaint, and "For cross action and for further defense" avers:

"5. That L. L. McClees is the true owner of the property and house in which the defendant L. J. French now lives, and that the said L. L. McClees has heretofore entered into a good, valid, and binding contract to sell the said property to this defendant.

"6. That by numerous correspondence and by written agreement the said L. L. McClees bargained and agreed to sell the said premises to this defendant for the sum of $700, and that this defendant was ready and willing at all times and still is ready and willing to carry out his part of the said contract and agreement, and that this defendant has at all times had the funds available and necessary to carry out the said agreement.

"7. That this defendant is advised, informed, and believes that for some time prior to the entering into a contract of sale between L. L. McClees and this defendant that John Toler, the plaintiff herein, conspired, colluded and connived with the said L. L. McClees to defraud the said L. J. French, the defendant herein, out of his rights under the said contract above referred to.

"8. That as a result of the said conspiracy and connivance above referred to the said L. J. French has executed what purports to be a good and sufficient warranty deed to the said John Toler for the purpose, as this defendant is advised, informed and believes, of removing this property from the reach of this defendant and of depriving him of the possession of a good and valid contract.

"9. That this defendant is advised, informed, believes, and so alleges, that the said John Toler has no real interest in this property above named, but merely permitted himself to be used as a tool in this purported purchase, and that in truth and in fact the said John Toler has paid no good and valid consideration for the property referred to in the complaint, and that the said John Toler is in truth and in fact not the owner of the said property but is the agent of the said L. L. McClees, acting for him in his behalf for the purposes of defrauding the defendant herein and depriving him of such rights as he had under the good and valid contract of the sale heretofore referred to."

Plaintiffs demur to the cross action for that it does not state facts sufficient to constitute a cause of action against plaintiffs.

From judgment sustaining the demurrer defendant appealed to the Supreme Court and assigns error.

M. S. Dunn, D. H. Willis, and R. E. Whitehurst for plaintiff, appellee.
Abernethy & Abernethy for defendant, appellant.

WINBORNE, J. The question: Did the court err in sustaining the demurrer? We so hold.

While in the present case defendant designated his further pleading as a "Cross Action," it is nothing more than a further defense. "The allegation of the defective title is a matter of defense and not of counterclaim." *Bank v. Loughran,* 122 N. C., 668, 30 S. E., 17; C. S., 543; *Hughes v. McNider,* 90 N. C., 248; *Fitzgerald v. Shelton,* 95 N. C., 519.

"As to matter set up as defense the usual ground of demurrer is its insufficiency, and this may be taken by a formal demurrer or demurrer *ore tenus.*" McIntosh, 507, sec. 475.

"The office of demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of the facts contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, are also admitted. . . ." *Stacy, C. J.,* in *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761; *Andrews v. Oil Co.,* 204 N. C., 268, 168 S. E., 228.

Both the statute and decisions of this Court require that the answer be liberally construed, and every reasonable intendment and presumption must be in favor of the pleader. It must be fatally defective before it

will be rejected as insufficient. C. S., 535; *Blackmore v. Winders,* 144 N. C., 212, 56 S. E., 874; *Brewer v. Wynne,* 154 N. C., 467, 70 S. E., 947; *Public Service Co. v. Power Co.,* 179 N. C., 18, 101 S. E., 593; *Anthony v. Knight,* 211 N. C., 637, 191 S. E., 323.

The matters set up are in the nature of an equitable defense and must be pleaded. *McLaurin v. Cronly,* 90 N. C., 50; *Hinton v. Pritchard,* 102 N. C., 94, 8 S. E., 887; *Averitt v. Elliott,* 109 N. C., 560, 138 S. E., 785; *Talbert v. Becton,* 111 N. C., 543, 16 S. E., 322; *Alley v. Howell,* 141 N. C., 113, 53 S. E., 821

In the case of *Mobley v. Griffin,* 104 N. C., 112, 10 S. E., 142, *Avery, J.,* said: "Both under the Code pleadings and the more formal rules applicable in the trial of ejectment it is competent, under a general denial or general issue, to show that any deed offered by a party as evidence of title is void," for among other causes, "fraud in the *factum.*" *Lineberger v. Tidwell,* 104 N. C., 506, 10 S. E., 758; *Helms v. Green,* 105 N. C., 251, 11 S. E., 470; *Gilchrist v. Middleton,* 107 N. C., 663, 12 S. E., 85; *Herndon v. Ins. Co.,* 110 N. C., 279, 14 S. E., 742; *Alley v. Howell,* 141 N. C., 113, 53 S. E., 821; *Higgins v. Higgins,* 212 N. C., 219, 193 S. E., 159.

But in the case *Alley v. Howell, supra, Clark, C. J.,* pertinently said: "Fraud (not in the *factum*), undue influence, or want of consideration are matters foreign to an allegation of legal title, and cannot be put in evidence unless the defendant has notice by appropriate allegations in the complaint that he may come to trial prepared to defend an attack on those grounds. This has been the settled practice and rests upon the principle of fair play, that those matters should be contested at the trial which come within the scope of the allegations. It is true, the averments here omitted were matters of equitable jurisdiction under the former system of pleading, but it is not on that ground that they are required to be pleaded, but because when the plaintiff merely alleges, as here, that they are 'owners and entitled to the possession' the defendant has notice only that his legal title is assailed. For exactly the same reason an equitable defense cannot be proven unless set up in the answer." See also *Averitt v. Elliott, supra.*

Applying these principles, and under liberal interpretation, the allegations of the further defense sufficiently allege an equitable defense to admit of proof. If, however, plaintiff wishes the allegations therein to be made more specific, or if it be found expedient to make L. L. McClees a party, these, or either, may be addressed to the consideration of the court below.

The judgment below is

Reversed.

L. E. BARNHARDT, ADMINISTRATOR OF THE ESTATE OF SAMUEL SMITH, DECEASED, v. CITY OF CONCORD AND THE BOARD OF LIGHT AND WATER COMMISSIONERS OF THE CITY OF CONCORD.

(Filed 13 April, 1938.)

1. Master and Servant § 49—In this action at common law against city for death of E. R. A. worker, demurrer held properly sustained.

This action was instituted by the administrator of an E. R. A. worker who was killed when a ditch along a street in which he was working caved in, the complaint alleging negligence on the part of the city. In a hearing before the Industrial Commission claim for compensation was denied on the ground that intestate was not an employee of the city. *Held:* Defendant city's demurrer on the ground that the Industrial Commission had exclusive jurisdiction was properly sustained. N. C. Code, 8081 (o).

2. Municipal Corporations § 14—Demurrer held properly sustained in action against city to recover for death of employee of independent contractor.

In this action at common law to recover for the death of plaintiff's intestate who was killed in the cave-in of a ditch in which he was working, the complaint alleged that intestate was working under the Emergency Relief Administration, which was an independent contractor, and that the cave-in of the ditch was caused by negligent failure to keep the sides of the ditch shored up, and by defendant city's negligence in permitting traffic along the street beside the ditch and in failing to keep its streets in reasonably safe condition. *Held:* Defendant city's demurrer was properly sustained, since the complaint alleges that intestate was an employee of E. R. A., and that this agency was an independent contractor.

3. Master and Servant § 39b—Whether city could be held under "intrinsically dangerous" doctrine for death of employee of independent contractor, quære.

Intestate was killed in a cave-in of a ditch in a city street in which he was working under the Emergency Relief Administration, which was performing the work as an independent contractor. Whether the Industrial Commission might hold the city liable under the provisions of the Compensation Act under the doctrine that a person may not escape liability for injuries to employees of independent contractors when the work is intrinsically dangerous, *quære.*

APPEAL by plaintiff from *Warlick, J.,* at February Term, 1938, of CABARRUS. Affirmed.

This is a civil action for actionable negligence brought by plaintiff against defendants, alleging damage. Defendants imposed a demurrer which was sustained and plaintiff excepted, assigned error, and appealed to the Supreme Court. The necessary facts will be stated in the opinion.

Armfield, Sherrin & Barnhardt for plaintiff.
Hartsell & Hartsell and Waller D. Brown for defendants.

CLARKSON, J. The plaintiff contends that the sole question in this appeal by the plaintiff is whether or not there was error in the judgment of the court sustaining the demurrer by defendants to the complaint. The pleading of plaintiff sets forth the work by plaintiff's intestate in digging a sewer drain in a street of defendants, negligence of defendants in failing to shore sides of sewer drain, which was about eight feet deep in said street, and in permitting long-continued travel of automobiles and trucks on said street, causing a side of said sewer drain to become loosened, after having failed to shore or brace same, and said loosened part of said street to fall on, crush and kill plaintiff's intestate, and alleging liability of defendants under the above facts, notwithstanding a decision of the North Carolina Industrial Commission on a proceeding brought by dependents of plaintiff's intestate that such intestate, being an ERA worker, was an employee of defendants, the demurrer to the complaint pleading lack of jurisdiction of the Superior Court because of the Workmen's Compensation Act, etc., and that the complaint failed to state a cause of action.

We think that plaintiff's contention cannot be sustained on two grounds: (1) It is alleged in the complaint "That on or about 9 July, 1936, Viola Sherrill Smith, wife of plaintiff's decedent, for herself and other dependents of her deceased husband, Samuel Smith, instituted a proceeding against the city of Concord, North Carolina, self-insurer, and the board of light and water commissioners of the city of Concord, before the North Carolina Industrial Commission for workmen's compensation for the same death injury pleaded in the instant action, which claim was denied by said Commission on 12 November, 1936, with award as follows: 'Upon the finding that the deceased was not an employee of the city of Concord the claim for compensation is denied and the case dismissed.' "

There was no appeal from the judgment of the Industrial Commission, which had jurisdiction.

N. C. Code, 1935 (Michie), sec. 8081(o), reads in part: "Neither the State nor any municipal corporation within the State, nor any political subdivision thereof, nor any employee of the State or of any corporation or subdivision shall have the right to reject the provisions of this article relative to payment and acceptance of compensation, and the provisions of secs. 8081(l), 8081(m), 8081(v), 8081(w), and 8081(x) shall not apply to them," etc.

We have a judgment of the Industrial Commission that plaintiff's intestate "was not an employee of the city of Concord." The city of Concord is out of the picture.

(2) It is further alleged in the complaint: "That the case at bar was begun by summons on 1 April, 1937, and that plaintiff is advised and believes that on the grounds set forth in the complaint, as to the duty by law resting upon the city of Concord and the board of light and water commissioners of the city of Concord, to keep its streets in good repair, and its failure to do so on the facts of the instant action, the plaintiff is entitled to recover in this action on the ground of negligent injury, apart from the fact that plaintiff's intestate was not at the time an employee of the city of Concord within the meaning of the Workmen's Compensation Act, but was working with the ERA, an independent contractor with said city, but at the time a Federal Bureau for relief of unemployment, by order of his superior in ERA, and in said ditch in said street on the occasion and under the circumstances as in his complaint previously set forth."

On this aspect we cannot hold with plaintiff. The complaint alleges that plaintiff was working with the ERA, and alleges that it was an independent contractor. This independent contractor was not made a party to the action and there is no allegation that this agency has the power of being sued.

It has been decided by this Court that a person working for the relief of himself and family and paid with funds provided by the Emergency Relief Administration is not "an employee" of the relief administration agencies within the meaning of the compensation act. N. C. Code, *supra,* 8081 (i), (b); *Jackson v. Relief Administration,* 206 N. C., 274; *Bell v. Raleigh,* 206 N. C., 275; *Shapiro v. Winston-Salem,* 212 N. C., 751.

It may be that the Industrial Commission could have heard the case against defendants on the "intrinsically dangerous" doctrine and held jurisdiction, but this they did not do.

In *Davis v. Summerfield,* 133 N. C., 325 (328), it is said: "There is yet another class of cases where there is an exception to the exemption, and that is where the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, said by *Judge Dillon* to be 'intrinsically dangerous.' There the employer cannot escape liability for an injury resulting from the doing of the work, although the act performed might be lawful. 2 Dillon on Mun. Corp., sec. 1029." *Peters v. Woolen Mills,* 199 N. C., 753; *Teague v. R. R.,* 212 N. C., 33.

We see no error in the judgment of the court below and therefore the judgment is

Affirmed.

IN RE ESTATE OF H. W. MIZZELLE: N. B. MARRINER, ADMINISTRATOR.

(Filed 13 April, 1938.)

1. Executors and Administrators § 21—

When there is a dispute as to who is entitled to personalty of the estate under the canons of descent, it is proper for the personal representative to institute suit to obtain the advice of the court.

2. Descent and Distribution § 3—Where distributees of estate are not of equal degree of kinship, estate should be distributed per stirpes.

Where at the time of intestate's death his sole surviving next of kin are first cousins and children of deceased first cousins, the children of deceased first cousins represent their parents, and the representatives of each deceased first cousin take one share equal with the share of each living first cousin. C. S., 137 (5).

APPEAL by N. B. Marriner, administrator of the estate of H. W. Mizzelle, from *Thompson, J.*, at Chambers. From CHOWAN. Affirmed.

Statement of Facts: H. W. Mizzelle died leaving the personal estate set out in the record. There is neither widow nor children, nor any legal representative of children. All his uncles and aunts predeceased him. The closest kin of the intestate are first cousins. There are seven living first cousins and the issue of six deceased first cousins. The court below held that each living first cousin should take a one-thirteenth (1-13th) of the personal estate and that the legal representatives of each deceased first cousin should take a one-thirteenth (1-13th).

The judgment of the court below is as follows: "This cause came before the undersigned judge of the Superior Court at Chambers, certified by the clerk of the Superior Court of Chowan County, upon the appeal of the administrator and Ebenezer Hardison, Isolene Gardner, Lula Mae Mizzelle, Walter Hardison, Cynthia Lockhart, Adrian Hardison, Dollie Hardison, Grover Hardison, Mollie Keel, Mattie Lou Anderson and Oscar Anderson, and N. B. Marriner, personally, from which it appears that the administrator comes before the court with funds derived from personal property for distribution among a large number of distributees, and that his account is in due form and has been audited and approved, and that the said estate consists solely of personal property; but that he is confronted by conflicting demands by the said distributees as to the proper order and manner of his distribution, presenting whether the distribution should be *per stirpes* or *per capita.* The court is of the opinion that the administrator is entitled to be advised and directed as to that question, and that his petition is properly before the court. It is admitted that wherever the ancestor of any distributee is noted on the family tree as dead, as shown by Exhibit A

attached to the petition and reviewed therein, it means he or she predeceased the intestate. The court, therefore, is of the opinion and so adjudges that the distribution should be *per capita,* as set out in the case of *Ellis v. Harrison,* 140 N. C., 444, and that N. B. Marriner, Mollie Ward, Ebenezer Hardison, Walter Hardison, Grover Hardison, Mollie Keel, Mary Gurkin, and Virginia Bell Cooper should each receive a 1-13th of said personal estate. That Ernestine Mattix and Annie Hoyle shall receive a 1-13th to be equally divided between them. That Willie Holliday, Wilson Holliday, Lizzie Holliday, Ludie Sawyer, and Ebbie Holliday shall receive a 1-13th to be equally divided between them. That Isolene Gardner and Lula Mae Mizzelle shall receive a 1-13th to be equally divided between them. That Cynthia Lockhart, Adrian Hardison, and Dollie Hardison shall receive a 1-13th to be equally divided among them. That Mattie Lou Anderson and Oscar Anderson shall receive a 1-13th to be equally divided between them. It is so ordered and adjudged.

C. E. THOMPSON,
Resident Judge of the First Judicial District."

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

H. S. Ward for administrator, appellant.
N. B. Marriner in propria persona.
Elbert S. Peel and Wheeler Martin for appellees.

CLARKSON, J. There was dispute as to who were entitled to certain funds in the hands of N. B. Marriner, administrator of the estate of H. W. Mizzelle. The administrator urges "the right of this trustee to claim the consideration of the court and have his duty outlined." We think the allegation of the administrator comes within the rule entitling him to advice.

In *Freeman v. Cook,* 41 N. C., 373 (378), *Nash, J.,* said: "The chancellor is the only safe and secure counsellor to trustees." The same principle applies to executors and administrators. *Bank v. Alexander,* 188 N. C., 667.

The question involved: Where all of the uncles and aunts of intestate are dead at time of intestate's death and first cousins are the closest kin of intestate, is the personal estate of intestate to be divided one part to each living first cousin and one part to those that legally represent each dead first cousin? We so hold. The court below was of the opinion and so held, and this we think is correct.

N. C. Code, 1935 (Michie), sec. 137, is as follows: "The surplus of the estate, in case of intestacy, shall be distributed in the following

manner, except as hereinafter provided: (5) If there is neither widow or children, nor any legal representative of the children, the estate shall be distributed equally to every of the kin of the intestate, who are in equal degree, and those who legally represent them."

In *Ellis v. Harrison,* 140 N. C., 444, Alexander Harrison left him surviving as his next of kin Willie and Mary Burt Harrison, two children of a brother who had died before the intestate, and Alexander Brown and five other children of a sister who had also died before the intestate. The two children of the deceased brother claimed that the distribution of the estate should be *per stirpes* and the six children of the deceased sister contended that such distribution should be *per capita,* and this was the single question presented and decided by the Court. The court below gave judgment that the distribution be *per capita,* and the defendants William and Mary Burt Harrison excepted and appealed. At page 445 the Court said: "It will be noted that the fund consists solely of personalty and that the claimants at the time of the intestate's death were and are now all in equal degree—the next of kin of said intestate. In such case our statute of distributions (Revisal, sec. 132, sec. 137 [5], *supra*), and the uniform construction put upon it by our Court require that the fund shall be distributed *per capita. Skinner v. Wynne,* 55 N. C., 41. Representation in this kind of property, when allowed, is only resorted to when it is necessary to bring the claimants to equality of position as next of kin. It is otherwise as to realty."

We do not think *Moore v. Rankin,* 172 N. C., 599, is contrary to the position here taken.

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

Affirmed.

ABERNETHY LAND & FINANCE COMPANY, JULIUS W. ABERNETHY, FOREST SCHRUM, AND LOUIS SCHRUM v. FIRST SECURITY TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF JOHN P. YOUNT, DECEASED, AND ADMINISTRATOR OF THE ESTATE OF WILFONG YOUNT, DECEASED, WADE H. LEFLER, CLERK SUPERIOR COURT, CATAWBA COUNTY, O. D. BARRS, SHERIFF CATAWBA COUNTY, AND JOHN R. IRVIN, JR., SHERIFF MECKLENBURG COUNTY.

(Filed 13 April, 1938.)

1. Actions § 10—

An action is not ended by the rendition of a judgment, but is still pending for the purposes of issuing and recalling execution, determining proper credits, or the amount due thereon, and for other motions affecting the existence of the judgment not involving fraud.

2. Execution § 11—

The proper remedy to recall or set aside an execution or a sale made thereunder and to prevent further proceedings is by motion in the cause and not by independent action.

3. Same: Injunction § 2—

Injunction will not lie to enjoin execution sale on a judgment, since there is an adequate remedy at law by motion in the cause to stay or recall the execution.

4. Execution § 11—Court may consider summons and complaint in action to restrain execution sale as a motion in the original cause.

Where a party brings an independent action to restrain levy and sale under execution, the court may, in its discretion, treat the summons and complaint as a motion in the cause, and should not dismiss the proceedings when the ends of justice demand that the cause be retained for the adjudication of the issues raised, and in this case the cause is remanded with direction that the proceedings be considered and treated as a motion in the original cause.

5. Execution § 21—

When a judgment creditor purchases the land of the judgment debtor at the execution sale for a sum in excess of the judgment, the judgment debtor may require the surplus over the judgment applied to other liens against the land when there are no other junior liens against the land.

APPEAL by plaintiffs from *Olive, Special Judge,* at December Term, 1937, of CATAWBA. Remanded.

This is a civil action instituted by the plaintiffs to restrain a levy and sale under execution issued by the defendant Wade H. Lefler, clerk of the Superior Court of Catawba County, on a judgment in favor of the Consolidated Trust Company and against the plaintiffs and to have said judgment cancelled of record.

On 29 June, 1931, Consolidated Trust Company procured judgment against the plaintiffs for $6,750, interest and costs, which was duly docketed in the office of the clerk of the Superior Court of Catawba County. Thereafter on 6 June, 1932, the First Security Trust Company, as administrator of the estate of John P. Yount, procured a judgment against the plaintiffs and one R. M. Yount for $20,000, interest and costs, which was likewise duly docketed. The First Security Trust Company, administrator, caused execution to issue upon its judgment and certain lands of the corporate plaintiff, situate in Catawba County, were sold thereunder. The plaintiff alleges that prior to said execution sale the defendant administrator entered into an agreement with the Consolidated Trust Company, under the terms of which the said administrator was to buy said property at said sale and pay off and discharge the taxes, assessments and the first judgment; that in consideration thereof the Consolidated Trust Company agreed to withhold

execution on its judgment and to give the defendant administrator an opportunity to resell said property at private sale in parcels and satisfy the prior liens; that pursuant to said agreement the defendant administrator did buy said property for the sum of $31,000, which was an amount sufficient to pay all liens upon said property; that the defendant administrator, from time to time, sold parcels of said land and paid off and satisfied the first judgment lien, but that instead of having the said judgment cancelled it procured an assignment thereof, without recourse, to the First Security Trust Company, administrator of Wilfong Yount, deceased. The plaintiffs further allege that the agreement entered into between the First Security Trust Company, administrator, and the Consolidated Trust Company inured to their benefit as third party beneficiaries and that they are entitled to have said judgment cancelled.

After the assignment of said judgment the First Security Trust Company, administrator, had a transcript of said judgment docketed in the county of Mecklenburg, and procured the issuance of execution thereon, both to the county of Catawba and the county of Mecklenburg, the plaintiff Julius W. Abernethy owning property in Mecklenburg County. The plaintiffs seek to restrain any sale under these executions.

When this case was called for trial, and after the reading of the pleadings, the defendants demurred *ore tenus,* for the reason that the complaint does not contain facts sufficient to constitute a cause of action and the court does not have jurisdiction, and moved to dismiss for that the remedy, if any, is by motion in the cause and an independent action does not lie. Thereupon the court entered the following judgment:

"This cause coming on to be heard, and the defendants moving to dismiss the action for that the remedy of the plaintiffs, if any, is by motion in the case of "Consolidated Trust Co. *v.* Abernethy Land and Finance Co." *et als.,* and not by independent action.

"The court finds that the parties in this action are different from those in the action of the 'Consolidated Trust Co. *v.* Abernethy Land and Finance Co.,' and the defendants' motion is, therefore, allowed and the action is dismissed."

The plaintiffs excepted and appealed.

Chas. P. Pruitt and W. C. Feimster for plaintiffs, appellants.

W. A. Self, C. David Swift, and H. G. Stephens for First Security Trust Company, administrator of John P. Yount estate and of Wilfong Yount estate.

BARNHILL, J. An action in court is not ended by the rendition of a judgment, but in certain respects it is still pending until the judgment is satisfied. It is open to motion for execution, for the recall of an exe-

cution, to determine proper credits and for other motions affecting the existence of the judgment or the amount due thereon. *Mason v. Miles,* 63 N. C., 564; *Faison v. McIlwaine,* 72 N. C., 312; *Mann v. Blount,* 65 N. C., 99; McIntosh, Prac. and Proc., sec. 991.

The court from which the execution issued may, for sufficient cause shown, recall or set aside an execution or a sale made thereunder and prevent further proceedings. This is properly done by a motion in the cause and not by an independent action. When the ground alleged for setting aside a judgment, or for cancelling the same of record, is not based upon fraud the proper remedy is likewise by motion in the cause. *Foard v. Alexander,* 64 N. C., 69; *Chambers v. Penland,* 78 N. C., 53; *Parker v. Bledsoe,* 87 N. C., 221; *Henderson v. Moore,* 125 N. C., 383; McIntosh, Prac. and Proc., sec. 735.

It is clear, then, that the plaintiff cannot maintain this action as an independent proceeding for two reasons: (1) This is an injunctive proceeding and the plaintiffs have an adequate remedy at law by motion in the cause, and (2) the relief sought must be obtained by motion in the original cause and not by independent action.

When, however, a party by mistake brings an independent action when his remedy is by motion in the original cause the court may, in its discretion, treat the summons and complaint as a motion. *Jarman v. Saunders,* 64 N. C., 367; *Craddock v. Brinkley,* 177 N. C., 125. In the administration of justice the courts look to the substance rather than to the form, and proceedings will not be dismissed upon mere technicalities when they may be properly retained for the adjudication of the issues raised. The summons and complaint herein should have been treated as a motion in the original cause, to the end that the issues raised by the pleadings may be determined and the rights of the parties adjudicated. The cause is remanded with directions that these proceedings be considered and treated as a motion in the original cause and the restraining order as recalling the execution pending the final determination of the motion. The clerk is not a proper party, and as to him the action should be dismissed. As the Consolidated Trust Company has assigned its judgment without recourse it is not a necessary party.

As the merits of the case have not been determined by the court below, and the rights of the parties depend upon the nature and extent of the agreement entered into by and between the defendant administrator and the Consolidated Trust Company, we refrain from discussing the other questions of law raised in the briefs. It may be appropriate to say, however, that the present record does not disclose any judgments junior to the one obtained by the defendant administrator, and that if in fact the bid at the execution sale was $31,000, as contended by the plaintiffs, nothing else appearing, the plaintiffs, as a matter of law, are entitled

to have the excess over and above the amount necessary to pay the judgment held by the defendant administrator applied to the satisfaction of the judgment obtained by the Consolidated Trust Company.

It is ordered that this cause be remanded for further proceedings in accordance with this opinion.

Remanded.

LOUIS BARROW, BY HIS NEXT FRIEND, JESSE BARROW, JR., v. RUFUS KEEL AND JAMES TAYLOR.

(Filed 13 April, 1938.)

1. Trial § 22b—

Upon motion to nonsuit, the evidence must be considered in its most favorable light for plaintiff.

2. Trial § 24—

If there is any competent evidence tending to prove the facts in issue, the evidence must be submitted to the jury.

3. Automobiles § 24b—Evidence held sufficient for jury on question of whether driver was acting within scope of employment.

In this action to recover for personal injuries inflicted by the negligent driving of an automobile, plaintiff offered evidence tending to show that the driver was regularly employed by defendants, that defendants were engaged in the tobacco warehouse business, and that they had sent the driver of the car to drum up business near a certain town, that the accident occurred on a direct route from defendant's place of business to the town designated, and that at the time the driver had checks for tobacco sold at defendants' warehouse payable to persons living in the vicinity of the town. *Held:* The evidence, considered in the light most favorable to plaintiff, is sufficient to be submitted to the jury on the question of whether the driver, at the time of the accident, was acting in the course of his employment and in furtherance of defendants' business.

4. Master and Servant § 21a—

A master is liable for injuries caused by the negligence of the servant while acting in the course of his employment and in furtherance of the master's business.

APPEAL by plaintiff from *Grady, J.*, at February Term, 1938, of CRAVEN. Reversed.

W. B. R. Guion and D. L. Ward for plaintiff.
J. B. James for defendants.

DEVIN, J. The plaintiff instituted his action for damages for a personal injury alleged to have been proximately caused by the negligence of the defendants in the operation of an automobile upon the highway.

At the close of the evidence the court below sustained motion for judgment of nonsuit and plaintiff appealed.

It is the accepted rule that upon a motion for judgment of nonsuit the evidence for the plaintiff must be considered in its most favorable light, and if there be any competent evidence tending to prove the facts in issue the case must be submitted to the jury. *S. v. Adams, ante,* 243; *Anderson v. Amusement Co., ante,* 130.

It was not controverted that there was evidence tending to show that the plaintiff, a child, immediately after alighting from a school bus on the highway was struck and injured by an automobile negligently operated at the time, and that the driver of the automobile was one Hester Quinn, an employee of the defendants, but it was denied that the driver was at the time acting within the scope of his employment or engaged in work for or in furtherance of his employer's business, and defendants contend that in this respect plaintiff's evidence failed to support allegations of negligence on the part of these defendants.

The determinative question, therefore, presented by the appeal is whether there was any competent evidence to justify the application of the principle of *respondeat superior* so as to impose liability upon the defendants for the negligence of the driver of the automobile. Upon this point the plaintiff offered evidence tending to show that the defendants were engaged in the leaf tobacco warehouse business in Greenville, North Carolina, and that Hester Quinn was regularly employed by them to do work in and about the warehouse, particularly in facilitating the unloading of tobacco and keeping the time of the laborers on the floor, and that he was so employed before and after the date of plaintiff's injury, which occurred 16 October, 1936. It also appeared that Quinn lived near Newport, North Carolina, some seventy miles distant from Greenville. A witness for plaintiff testified that on the day of plaintiff's injury "Mr. Keel told him (Quinn), and Mr. Taylor, too, to go down and get all the tobacco he could get around Newport, drum the tobacco up to Greenville for sale. I remember the date during the fall of 1936 that my nephew (the plaintiff) was injured in an accident. He (Quinn) was at the warehouse at Keel's and Taylor's. It was on Friday afternoon and I was working in the warehouse and a sale was going on, and I needed some help over on my side of the house where I was working to get some one to help me repack rejected tobacco, and I met Mr. Keel on the floor and I asked him had he seen Hester Quinn and he said no, he had (not) seen him, but that he had sent him on down to Newport to drum tobacco that afternoon. At that time the sale was going on. Mr. Keel said he sent him down to drum tobacco, that he wanted as much tobacco as he could get during the next week."

There was also evidence from another witness that he had seen Quinn, during the tobacco season in fall of 1936, in and around Newport "working, drumming tobacco for Keel and Taylor." The plaintiff further offered evidence tending to show that the place where the plaintiff was struck and injured by the automobile driven by Quinn, near Vanceboro, North Carolina, was on the most direct route from Greenville to Newport. There was evidence that Quinn had with him a couple of checks drawn by Keel and Taylor, payable to persons living in the vicinity of Newport who had that week sold tobacco in defendants' warehouse. The custody of these checks, however, was claimed by Hester Quinn's wife, who was with him in the car at the time. It also appeared that the automobile was Quinn's.

Without expressing an opinion as to the weight or sufficiency of the evidence offered to establish the material facts in support of plaintiff's case, we reach the conclusion that the plaintiff has offered evidence sufficient to entitle him to have his case submitted to the jury, and that there was error in sustaining the motion for judgment of nonsuit.

Under the rule laid down in *Martin v. Bus Line,* 197 N. C., 720, 150 S. E., 501, there was here some evidence that the driver of the offending automobile, Hester Quinn, was at the time of the injury engaged in executing the orders of his employers and in the furtherance of their business, and that the negligent acts complained of were committed by defendants' employee while he was about his employers' business and engaged in work for them.

"It is elementary that the master is responsible for the *tort* of his servant which results in injury to another when the servant is acting by authority or within the scope of his employment and about the master's business." *Parrish v. Mfg. Co.,* 211 N. C., 7; *Waller v. Hipp,* 208 N. C., 117, 179 S. E., 428; *Lertz v. Hughes Brothers, Inc.,* 208 N. C., 490, 181 S. E., 342; *Van Landingham v. Sewing Machine Co.,* 207 N. C., 355, 177 S. E., 126; *Mason v. Texas Co.,* 206 N. C., 805, 175 S. E., 291; *Robertson v. Power Co.,* 204 N. C., 359, 168 S. E., 415; *Dickerson v. Refining Co.,* 201 N. C., 90, 159 S. E., 446; *Lazarus v. Grocery Co.,* 201 N. C., 817, 161 S. E., 553; *Gallop v. Clark,* 188 N. C., 186, 124 S. E., 145.

Upon the evidence offered, the plaintiff was entitled to have his case submitted to the jury on the issues raised by the pleadings, under appropriate instructions from the court, and the judgment of nonsuit must be

Reversed.

RACHEL BRITTAIN WHITAKER v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 13 April, 1938.)

1. Insurance §§ 39, 41—Erroneous instruction as to liability on double indemnity provision held not cured by verdict.

The policy in suit provided for payment of double indemnity in the event insured died of injuries inflicted through external, violent and accidental means, provided such injuries were not self-inflicted, or intentionally inflicted by another. The determinative issues submitted to the jury were, first, as to whether the injuries causing death were intentionally inflicted by another; second, whether they were self-inflicted; and third, whether death resulted from injuries effected solely through external, violent and accidental means. On the third issue the court inadvertently instructed the jury that if insured died of a gunshot wound "intentionally inflicted by" another, the law would regard this as by accidental means, and upon such finding plaintiff would be entitled to double indemnity. *Held:* The negative finding by the jury to the first two issues does not render the erroneous instruction on the third issue harmless, since the third issue is the only one which imports liability under the double indemnity clause.

2. Appeal and Error § 39b—

An erroneous instruction on one issue cannot be cured by the answers to other issues submitted when the issue to which the error related is the one determinative of the rights of the parties.

3. Insurance § 13: Contracts § 8—

The parties are bound in accordance with the terms, provisions and limitations set out in their agreement.

APPEAL by defendant from *Alley, J.*, at November Term, 1937, of HENDERSON.

Civil action to recover on double indemnity clause in policy of life insurance.

On 15 October, 1925, the defendant issued to Joseph Denham Whitaker a policy of life insurance in the face amount of $2,000, payable to plaintiff as beneficiary, and containing double indemnity clause, pertinent provisions of which follow:

"The company will pay the beneficiary . . . double the face amount of this policy . . . provided death results . . . from bodily injury effected solely through external, violent, and accidental means. . . . Except these provisions do not apply . . . in case death results from bodily injury inflicted by the insured himself or intentionally by another person."

The insured was game warden of Henderson County. On the night of 14 November, 1936, he was at a cabin in the vicinity of Pisgah

National Forest for the purpose of apprehending persons unlawfully spotlighting deer. About 4:30 a. m. he was awakened by an automobile which stopped almost in front of the cabin, and with a high-powered spotlight was searching the fields below. The insured and his brother, half-clad, each with pistol in hand, left the cabin and approached the car, the insured being in front,, and as he came up on the driver's side said to the occupants, "Hello, fellows." Whereupon the car surged forward, and immediately a flash of fire was seen, a shot was heard, and the insured stepped backward and said to his brother, "I'm shot," and died immediately thereafter.

Upon denial of double liability, and issues joined, the jury answered the determinative issues as follows:

"1. Did the death of the insured result from bodily injuries intentionally inflicted by another person, as alleged in the answer? Answer: 'No.'

"2. Did the death of the insured result from bodily injury inflicted by himself, as alleged in the answer? Answer: 'No.'

"3. Did the death of the insured result directly and independently of all other causes from bodily injuries effected solely through external, violent, and accidental means while the insured was sane and sober, as alleged in the complaint? Answer: 'Yes.'"

The trial court instructed the jury on the third issue that if the insured died from a pistol or gunshot wound, "intentionally inflicted by some occupant of said car," the law would regard this as by accidental means, and upon such finding they would award double the face amount of the policy. Exception.

Judgment on the verdict for plaintiff from which the defendant appeals, assigning errors.

M. M. Redden for plaintiff, appellee.

Smith, Wharton & Hudgins, J. E. Shipman, and Harkins, Van Winkle & Walton for defendant, appellant.

STACY, C. J. By the express terms of the policy in suit the double indemnity clause is not to apply in case "death results from bodily injury inflicted . . . intentionally by another person." *Jolley v. Ins. Co.*, 199 N. C., 269, 154 S. E., 400; *Matson v. Trav. Ins. Co.*, 74 Am. St. Rep., 368. It is conceded that the trial court was inattentive to this provision in charging the jury on the third issue. *Warren v. Ins. Co.*, 212 N. C., 354. The contention is advanced, however, that, in view of the answers to the first and second issues, the submission of the third issue was unnecessary, and any error committed in respect thereof should be regarded as harmless. *Bradshaw v. Ins. Co.*, 208 N. C., 214, 179

S. E., 665. The difficulty with this suggestion lies in the fact that the third issue is the only one which imports liability under the double indemnity clause, and death resulting from "bodily injury inflicted intentionally by another person" is not covered by the clause, but comes directly within the exception appearing therein. *Clay v. Ins. Co.*, 174 N. C., 642, 94 S. E., 289.

The meaning of the policy is not in dispute nor the law applicable thereto. The contract is of the making of the parties. They have agreed upon its terms, provisions, and limitations. "As a man consents to bind himself, so shall he be bound." *Allsbrook v. Walston,* 212 N. C., 225, 193 S. E., 151; Elliott on Contracts (Vol. 3), sec. 1891. Such is the simple law of contracts. *Gilmore v. Ins. Co.,* 199 N. C., 632, 155 S. E., 565; *Headen v. Ins. Co.,* 206 N. C., 860, 175 S. E., 282. The defendant is entitled to have the issues submitted to the jury under a charge free from error. *Warren v. Ins. Co., supra.* To this end a new trial must be awarded. It is so ordered.

New trial.

STATE v. J. C. FREEMAN.

(Filed 13 April, 1938.)

1. Criminal Law § 41h: Evidence § 17—

A party may not impeach or discredit his own witness.

2. Same—New trial is awarded in this case for error in permitting the State to discredit its own witness.

The State was permitted to recall one of its own witnesses for the purpose of contradicting him, and upon his denial that he had testified otherwise than at the trial upon the preliminary examination, introduced the justice of the peace before whom the preliminary proceedings were had, who, over objection of defendant, testified that the witness had made statements upon the preliminary hearing which were contradictory to his testimony at the trial. *Held:* Defendant's objection to the testimony of the justice of the peace was well taken, and a new trial is awarded, since a party will not be permitted to discredit or impeach his own witness.

3. Criminal Law § 81d—

When a new trial is awarded on one exception, other exceptions relating to matters which may not arise upon the subsequent hearing, need not be considered.

APPEAL by defendant from *Cranmer, J.,* at October Term, 1937, of SAMPSON.

Criminal action tried on two indictments charging defendant with the forgery of and uttering two separate checks.

Defendant pleaded not guilty.
Verdict: Guilty.
Judgment: Eighteen months in State's Prison.
Defendant appealed to the Supreme Court and assigned error.

Attorney-General Seawell and Assistant Attorneys-General McMullan and Willis for the State.
E. C. Robinson and Butler & Butler for defendant, appellant.

WINBORNE, J. That a party cannot discredit his own witness is a well-settled rule of evidence in judicial procedure in this State. *Strudwick v. Brodnax,* 83 N. C., 401; *S. v. Taylor,* 88 N. C., 694; *Gadsby v. Dyer,* 91 N. C., 312; *McDonald v. Carson,* 94 N. C., 497; *Chester v. Wilhelm,* 111 N. C., 314, 16 S. E., 229; *S. v. Mace,* 118 N. C., 1244, 24 S. E., 798; *Smith v. R. R.,* 147 N. C., 603, 61 S. E., 575; *Lynch v. Veneer Co.,* 169 N. C., 169, 85 S. E., 289; *Worth Co. v. Feed Co.,* 172 N. C., 335, 90 S. E., 295; *S. v. Melvin,* 194 N. C., 394, 139 S. E., 762; *Clay v. Connor,* 198 N. C., 200, 151 S. E., 257; *S. v. Cohoon,* 206 N. C., 388, 174 S. E., 91.

For the State's violation of this rule in the present case defendant is entitled to a new trial.

The record discloses that the two checks in question were drawn on the First-Citizens Bank & Trust Company of Roseboro; one, dated 12 January, 1937, for $27.00, purporting to be signed in the name of C. B. Sessoms and payable to the order of and endorsed by W. L. Jackson, and the other dated 16 January, 1937, for $21.00, purporting to be signed in the name of C. B. Sessoms and payable to the order of and endorsed by H. B. Johnson.

State introduced the witness C. B. Sessoms, who testified that he did not sign nor authorize any one to sign either of the two checks. For the apparent purpose of proving the handwriting of the defendant, to be used as a proven specimen for comparison with the handwriting on the checks in question, the witness identified two checks, one dated 6 January, 1937, for $3.00, and the other dated 19 January, 1937, for $4.00, each signed by him and payable to the order of and endorsed by defendant J. C. Freeman. The witness testified that he hired the defendant to carry him to Fayetteville on two occasions; that he paid him with these last two checks; that the defendant filled out the body of each check, and that he, the witness, signed each. He further testified that when he gave defendant the $4.00 check Walter Faircloth was with him. The State then introduced as witness Walter Faircloth, who testified that he had been on a trip with Sessoms and J. C. Freeman; that he did not know Sessoms gave Freeman anything for carrying them; that

he did not see him give him anything; that he did not hear anything said about any money; that he did not see a check given by Sessoms to Freeman, and that "I was in the car but I did not see him give that check."

After offering the testimony of several witnesses with reference to the handwriting on the various checks, the State recalled Walter Faircloth and announced "that it was calling this witness for the purpose of contradicting him." The witness then denied that when testifying at preliminary hearing of this case before Col. George Peterson, justice of the peace, he had testified that he saw C. B. Sessoms sign the $4.00 check, that defendant wrote the balance of it, or that he had seen defendant write either one.

Thereupon the State introduced Col. George Peterson, the justice of the peace, who testified, over defendant's objection, that Walter Faircloth, testifying in the preliminary hearing, said that "on 19 January, 1937, C. B. Sessoms signed a check for $4.00 payable to J. C. Freeman; that C. B. Sessoms said he owed Freeman $4.00, and Sessoms said he was going to pay him by check; that he said that he saw Sessoms sign the check to Freeman for $4.00. . . ." The exception to the introduction of this evidence by the State for the express purpose of contradicting its own witness is well taken.

In *S. v. Taylor, supra,* a similar question under almost identical circumstances was presented. In that case the Court quoted with approval this statement from Greenleaf: "When a party offers a witness in proof of his cause he thereby in general represents him as worthy of belief. He is presumed to know the character of the witness he adduces, and having thus presented him to the court, the law will not permit the party afterwards to impeach his general reputation for truth, or to impugn his credibility by general evidence tending to show him unworthy of belief." The Court closes the opinion by saying: "Concluding, as we have, that the testimony of the justice was offered in this case for the sole purpose of discrediting the witness Harper, we are of the opinion, induced by the authorities cited, that the exception of the defendant was well taken."

In view of the fact that defendant challenges the validity of the grand jury which found the true bills of indictment under which he is charged, it is suggested that new bills be sent before another trial is had.

Other exceptions relate to questions that may not arise again in this case and are, therefore, not considered.

For error discussed herein there will be a

New trial.

STATE v. I. J. SANDERSON.

(Filed 13 April, 1938.)

1. Criminal Law § 11: Intoxicating Liquor § 5c—

The second offense of manufacturing spirituous liquor is a felony. C. S., 3409.

2. Constitutional Law § 26: Intoxicating Liquor § 9a—

A person may be tried on a charge of manufacturing spirituous liquor for the second offense only upon indictment, since the offense is a felony.

3. Criminal Law § 7—

Where a warrant charging a misdemeanor is amended to charge a felony, defendant's plea of the statute of limitations on the misdemeanor count becomes immaterial. C. S., 4512.

4. Same—

Whether a *nolle prosequi* without leave prevents the running of the statute of limitations against the offense charged, *quære*.

5. Criminal Law § 56—

When it appears that defendant was tried and convicted upon a warrant charging a felony, his motion in arrest of judgment should be allowed, since a person may be tried for a felony only upon indictment.

APPEAL by defendant from *Hamilton, Special Judge,* at November Term, 1937, of DUPLIN.

Criminal prosecution tried upon warrant charging the defendant with operating "a whiskey still and having whiskey in his possession for the purpose of sale (amended—this being a second offense for manufacturing whiskey)."

The warrant was issued 16 September, 1935, charging the offense as having been committed on the same day.

On 3 August, 1936, the warrant was amended so as to charge a second offense, making it a felony; whereupon the defendant waived preliminary hearing and was bound over to the Superior Court for trial.

At the October Term, 1936, Duplin Superior Court, a bill of indictment was returned by the grand jury, upon which the solicitor took a *"nol. pros."* at the January Term, 1937, and the cause was remanded to the general county court for trial upon the original warrant.

When the case was reached for trial in the general county court on 11 October, 1937, the defendant moved to dismiss for that the offense charged in the warrant was committed more than two years prior thereto. Overruled; exception.

The defendant was convicted in the general county court and sentenced to twelve months on the roads. From the judgment he appealed to the Superior Court of Duplin County.

Upon the call of the case in the Superior Court the defendant moved to quash and renewed his motion to dismiss. Overruled; exception.

Verdict: Guilty.

Judgment: Two years on the roads.

Motion in arrest of judgment denied.

Defendant appeals, assigning errors.

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

N. B. Boney and R. D. Johnson for defendant.

STACY, C. J. The defendant has been tried upon a warrant charging him with a felony, to wit, the second offense of manufacturing spirituous liquors. C. S., 3409; *S. v. Burnett,* 184 N. C., 783, 115 S. E., 57. For this offense trial may be had only upon a bill of indictment found by a grand jury. *S. v. Hyman,* 164 N. C., 411, 79 S. E., 284.

In this view of the matter the defendant's plea of the statute of limitations, C. S., 4512, on the misdemeanor count becomes immaterial. *S. v. Hedden,* 187 N. C., 803, 123 S. E., 65.

Whether the solicitor can now proceed upon the bill of indictment, the *nolle prosequi* being without leave, is not before us for decision. *S. v. Williams,* 151 N. C., 660, 65 S. E., 908.

The motion in arrest of judgment is well taken.

Judgment arrested.

IN THE MATTER OF THE ADMINISTRATION OF THE ESTATE OF S. WARD BANKS, DECEASED.

(Filed 13 April, 1938.)

Executors and Administrators § 4—In special proceeding to remove administratrix, her rights as distributee may not be determined.

In this special proceeding to remove an administratrix, order revoking letters was issued upon the court's finding that the administratrix was not a resident of the State at the time of her qualification, C. S., 8 (2). The court then adjudicated her right to receive a widow's distributive share of the estate. *Held:* The order of revocation is affirmed, but the adjudication of her right to receive a distributive share is stricken out, since that question was not before the court, her right as a distributee being determinable only in an action or proceeding in which both she and the administrator are parties. C. S., 147.

APPEAL by petitioners in special proceeding from *Frizzelle, Presiding Judge of the Fifth Judicial District,* at Bayboro, PAMLICO County, 9 October, 1937.

Sutton & Greene and Ward & Ward for petitioners, appellants.
Julius Dees and D. L. Ward for respondent, appellee.

SCHENCK, J. This is a special proceeding instituted before the clerk of Pamlico County Superior Court to remove Margaret T. Banks as administratrix of the estate of S. Ward Banks, who died 13 April, 1937. Margaret T. Banks was married to the deceased in 1927. The petition alleges that the said Margaret T. Banks was not entitled to letters of administration for the reason (1) that she had eloped and was living in adultery at the time of the death of S. Ward Banks, (2) that she had procured an absolute divorce from S. Ward Banks in the state of Florida, (3) that she was not a resident of the State of North Carolina at the time of her qualification as administratrix, and (4) that she is not a suitable and competent person to act as administratrix.

Hearing was had before the clerk who entered an order dismissing the proceeding, from which order petitioners appealed to the resident judge.

The cause came on to be heard by the resident judge who found, *inter alia,* that the said Margaret T. Banks was not a resident of the State of North Carolina at the time of her qualification as administratrix, and thereupon vacated the order of the clerk and adjudged that the letters of administration issued to Margaret T. Banks be revoked. C. S., 8(2). To this finding of fact and adjudication there was no exception.

The judge further found as facts (1) that Margaret T. Banks had not eloped and lived in adultery, (2) that the divorce decree entered in the action instituted by her in Florida is null and void, and (3) that she is the widow of S. Ward Banks, deceased, and concluded as a matter of law that she is entitled to receive a widow's distributive share in the estate of said deceased. To these findings of fact and conclusion of law the petitioners reserved exceptions and appealed to the Supreme Court.

The exceptions we think, and so hold, are well taken. This is a special proceeding instituted before the clerk to remove an administratrix, and the question of the right of Margaret T. Banks to share as a distributee of the estate of S. Ward Banks, deceased, was not before the court for decision, for the reason that the estate was not represented in said proceeding.

We therefore conclude that the findings of fact and conclusion of law excepted to should be stricken from the judgment, and that the judgment should be affirmed only in so far as it vacates the order of the clerk and revokes the letters of administration issued to Margaret T. Banks, and it is so ordered.

In modifying the judgment below we do not intimate an opinion upon the question as to whether Margaret T. Banks is entitled to a distributive share in the estate of S. Ward Banks, deceased. Should this question arise by a refusal of the administrator to be appointed by the clerk to recognize Margaret T. Banks as a distributee it must be determined in an action or proceeding (C. S., 147) wherein such administrator and Margaret T. Banks are, respectively, parties.

The judgment as modified by this opinion is affirmed.

Modified and affirmed.

GEORGE C. BUTLER, ADMINISTRATOR, v. NEW YORK LIFE INSURANCE COMPANY.

(Filed 13 April, 1938.)

1. Insurance § 31a—Evidence held to disclose fraud in procuring delivery of policy issued without medical examination.

When the evidence discloses that insured, in a policy issued without a medical examination, failed to disclose, at the time of mailing the initial premium, that she was going to a hospital, and that she failed to inform insurer that she had consulted a doctor and was treated for cancer between the date of the application and the delivery of the policy, the application providing that the policy should not be delivered in such case, a nonsuit in insurer's favor in plaintiff beneficiary's action on the policy is without error, since if insured had not suppressed the truth the policy would not have been delivered. C. S., 6460.

2. Fraud § 2—

A *suppressio veri* by one whose duty it is to speak is equivalent to a *suggestio falsi.*

APPEAL by plaintiff from *Cranmer, J.,* at November Term, 1937, of SAMPSON.

Civil action to recover on a policy of life insurance.

On 13 November, 1933, Lela F. Butler made application to the New York Life Insurance Company for $1,000-policy of life insurance, payable to her estate.

The application is made a part of the policy and contains the following agreement:

"It is mutually agreed as follows: (1) That the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since the time of making this application."

The policy was issued, without medical examination, and delivered 17 December, 1933, in consequence of a letter written 15 December on behalf of applicant, enclosing check for premium and asking that policy be sent, as applicant was going away. The writer testified: "I must have meant that Miss Butler was going to the hospital when I said in the letter she was going away," though this was not stated. In the meantime the applicant had consulted a physician on 1, 3, or 4 December, discovered that she had a cancer, and was taken to the hospital on 16 December. She died 28 May, 1934.

The defendant pleaded violation of the condition attached to the delivery of the policy, and, in addition, that it was secured by fraudulent misrepresentations and concealments.

In response to a question from the court, plaintiff's counsel stated that plaintiff could not refute the testimony concerning consultation by applicant and treatment of her by Dr. Parker on account of her ailment (cancer) on or about 1 and 3 or 4 December, 1933. Whereupon the court dismissed the action as in case of nonsuit.

Plaintiff appeals, assigning errors.

Howard H. Hubbard for plaintiff, appellant.
Rountree & Rountree for defendant, appellee.

STACY, C. J. Plaintiff takes the position that the delivery of the policy, following receipt of the first premium, concluded the contract, in the absence of fraud, *Grier v. Ins. Co.*, 132 N. C., 542, 44 S. E., 28, and that the provisions of C. S., 6460—the policy having been issued without medical examination—preclude a denial of liability except in case of fraud, *Holbrook v. Ins. Co.*, 196 N. C., 333, 145 S. E., 609; and further, that plaintiff's evidence is sufficient to make out a *prima facie* case. *Williamson v. Ins. Co.*, 212 N. C., 377.

The position of the defendant is that the evidence shows a conditional delivery of the policy which, was not met, and that no contract of insurance ensued. *Gardner v. Ins. Co.*, 163 N. C., 367, 79 S. E., 806; *Lancaster v. Ins. Co.*, 153 N. C., 285, 69 S. E., 214; *Perry v. Ins. Co.*, 150 N. C., 143, 63 S. E., 679; *Ray v. Ins. Co.*, 126 N. C, 166, 35 S. E., 246; *Ormond v. Ins. Co.*, 96 N. C., 158, 1 S. E., 796; *McCain v. Ins. Co.*, 190 N. C., 549, 130 S. E., 186, and cases cited.

Without making definite ruling upon the relative merits of these opposing positions as applied to the facts of the instant case, we think it is clear that plaintiff is in no position to insist upon a recovery. Undoubtedly there was a suppression of a material fact, *i.e.*, that applicant was going to the hospital, when the premium was paid, which would have resulted in nondelivery of the policy but for such suppression.

Wells v. Ins. Co., 211 N. C., 427, 190 S. E., 744; *Hayes v. Ins. Co.*, 132 N. C., 702, 44 S. E., 404. Otherwise the case of *Ins. Co. v. Grady*, 185 N. C., 348, 117 S. E., 289, might apply. A *suppressio veri* by one whose duty it is to speak is equivalent to a *suggestio falsi*. *Isler v. Brown*, 196 N. C., 685, 146 S. E., 803; 10 R. C. L., 324.

Moreover, it is conceded that the applicant consulted Dr. Parker and was treated by him for cancer between the date of the application and the delivery of the policy. This fact should have been communicated to the defendant. *Whitley v. Ins. Co.*, 71 N. C., 480.

The record is not such as to call for a disturbance of the judgment of nonsuit.

Affirmed.

STATE v. JIMMIE OLIVER.

(Filed 13 April, 1938.)

1. Bastards § 3: Indictment § 11—

In a prosecution for willful failure and refusal to support an illegitimate child, sec. 1, ch. 228, Public Laws of 1933, an exception on the ground that the indictment failed to charge the specific date in the month in which the offense was alleged to have been committed cannot be sustained. C. S., 4625.

2. Criminal Law § 60—

When the judgment is supported by the verdict, an exception to the judgment cannot be sustained.

3. Criminal Law § 78b—

Assignments of error which are not supported by exceptions duly noted will not be considered.

4. Criminal Law § 78d—

Exceptions which are not set out as assignments of error are abandoned. Rule of Practice in Supreme Court No. 19 (3).

APPEAL by defendant from *Harris, J.*, at November Term, 1937, of PAMLICO. No error.

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

F. C. Brinson for defendant, appellant.

SCHENCK, J. The defendant was tried upon a bill of indictment charging him with violating sec. 1, ch. 228, Public Laws 1933, in that he willfully failed and refused to support his illegitimate child begotten upon one Edna Mae Morton. A verdict of guilty was rendered.

The appellant's statement of the case on appeal consists of the bill of indictment, the charge of the court, the verdict and the judgment. The evidence is not set forth.

The only exceptions noted in the record are (1) to the bill of indictment in that it charges the offense to have been committed on "the ..... day of November, 1937," (2) to the judgment as set out in the record, (3) to the overruling of the motion to set the judgment aside, and (4) to the denial of the motion in arrest of judgment.

The only assignment of error is in the following language:

"No. 1. Since the bill of indictment did not charge any specific date in November, 1937, that the defendant had willfully refused or neglected to support said illegitimate child, and the court had charged the jury as follows, 'The only issue for you to pass on in this case is whether you are satisfied by the evidence, beyond a reasonable doubt, whether he is the father of the child. If you are satisfied that he is the father of the child your verdict will be guilty. If you are not so satisfied your verdict should be not guilty.' And also charged as follows: 'The only thing for you to consider, as I have told you, is whether the defendant is guilty or not guilty, whether he is the father of this child or not. Then it is a matter of the court.' The court erred in signing any judgment under the bill of indictment, charge of the court and verdict of the jury."

The only portions of the assignment of error supported by exceptions noted in the record are those that relate to the bill of indictment not charging any specific date in November, 1937, upon which the offense was committed, and those that relate to the judgment set out in the record. The first of those exceptions cannot be sustained. C. S., 4625. The second of those exceptions cannot be sustained for the reason that the judgment is sustained by the verdict of guilty.

There are in the record no exceptions noted to the charge of the court. The portions of the assignment of error relating to the charge, therefore, cannot be considered in this Court. *Dixon v. Osborne,* 201 N. C., 489; *In re Will of Beard,* 202 N. C., 661.

The exceptions to the overruling of the motion to set the judgment aside and to the denial of the motion for arrest of judgment, are not set out as assignments of error and are therefore abandoned. Rule 19 (3), Rules of Practice in the Supreme Court, 200 N. C., 824.

No error.

LEON SUSKIN v. MARYLAND TRUST COMPANY ET AL.

(Filed 13 April, 1938.)

Process § 6—Order for publication without issuance of attachment held cured by later order for publication and warrant of attachment.

Service of process by publication was ordered without issuance of warrant of attachment, the notice of attachment being served on the garnishee two days later. Upon special appearance and motion to dismiss, a new order for publication of summons and warrant of attachment was issued upon the affidavit already filed. *Held:* The new order was permissible and cured the defects in the original order.

APPEAL by defendants from *Grady, J.*, at February Term, 1938, of CRAVEN.

Civil action for alleged wrongful conversion.

The plaintiff is a resident of Craven County. The defendants are executors and trustees of the estate of Louis B. Suskin, late of the city of Baltimore and State of Maryland. The action is for wrongful conversion of property by the said Louis B. Suskin during his lifetime.

Service of process is sought to be had by attachment of funds and property belonging to the defendants and situate in this State.

On 29 December, 1936, the plaintiff filed affidavit for publication of service which was ordered by the clerk, returnable 15 March, 1937. No warrant of attachment was then issued, but two days later notice of attachment was served on garnishee. The garnishee answered 18 January, 1937, saying that it owed the defendants $150.00 and they were the owners of 197 shares of its capital stock.

On 1 March, 1937, the defendants, through counsel, entered a special appearance and moved to dismiss for want of jurisdiction, alleging that the defendants had not been brought into court by any valid service of process.

Without presently passing upon the defendants' motion made upon special appearance, a new order for publication of summons and warrant of attachment was issued 9 March, 1937, returnable 26 April. Thereafter, on 17 April, 1937, the clerk denied the motion to dismiss. The defendants noted an exception and appealed to the judge.

A second motion to dismiss was filed by the defendants, still on special appearance, for that no valid service of process was obtained by the second order for publication of summons and warrant of attachment.

The motion was granted in favor of the defendants as executors and denied in their capacity as trustees. From this ruling the defendants appeal, assigning error.

R. E. Whitehurst and L. I. Moore for plaintiff, appellee.

W. B. R. Guion for Trust Co. and Sydney R. Traub, trustees, estate of Louis B. Suskin, defendants, appellants.

STACY, C. J. It may be conceded that when the defendants first appeared specially and moved to dismiss for want of any valid service of process, their position was perhaps well taken, no attachment having issued, *Winfree v. Bagley,* 102 N. C., 515, 9 S. E., 198, and had the matter rested there, a dismissal would have been in order. *Finch v. Slater,* 152 N. C., 155, 67 S. E., 264. However, without presently passing upon the defendants' motion to dismiss, a new order for publication of summons and warrant of attachment was issued upon the affidavit already filed. This was permissible under the decisions, *Rushing v. Ashcraft,* 211 N. C., 627, 191 S. E., 332, and it appears to have cured the original defects. *Jenette v. Hovey,* 182 N. C., 30, 108 S. E., 301; *Mills v. Hansel,* 168 N. C., 651, 85 S. E., 17.

The validity of the service of process is the only question presented by the appeal. *Denton v. Vassiliades,* 212 N. C., 513; *Motor Co. v. Reaves,* 184 N. C., 260, 114 S. E., 175. Whether there was error in any other respect is not before us.

The record is not such as to require a disturbance of the judgment.

Affirmed.

STATE v. RALPH JOHNSON.

(Filed 13 April, 1938.)

1. Rape § 8: Criminal Law § 52b—

Testimony of prosecutrix held sufficient to take the case to the jury on the charge of rape, although there were possible inferences from the testimony tending to contradict her, the weight and credibility of her testimony being in the exclusive province of the jury.

2. Rape § 9—Indictment and evidence held to warrant submission of both carnal knowledge of prosecutrix, she being under 12 years of age, and with force against her will.

Where the indictment charges that defendant did ravish and carnally know prosecutrix by force and against her will, she being a child under twelve years of age, it is not error for the court to present to the jury, as applicable to the evidence in the case, both the question of carnal knowledge of prosecutrix when she was under twelve years of age, and carnal knowledge of prosecutrix when she was over twelve years of age by force and against her will. C. S., 4204.

STATE *v.* JOHNSON.

APPEAL by defendant from *Warlick, J.*, at January Term, 1938, of IREDELL. No error.

The defendant was charged with the capital felony of rape. The jury returned a verdict of guilty, and from judgment imposing sentence of death the defendant appealed.

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

J. H. Burke and John R. McLaughlin for defendant.

DEVIN, J. The appellant presents in his brief two questions for decision:

1. Was the evidence sufficient to warrant submission of the case to the jury?

2. Did the court err in its charge to the jury as to the two phases of the crime as charged in the bill of indictment?

1. The State's witness, upon whom the rape is alleged to have been committed, is Margaret Johnson, daughter of the defendant. She was born 12 August, 1925, and was twelve years of age at the time of the trial. She testified that the first time the defendant had intercourse with her was in April, 1937, when she was under twelve years of age; that she pushed him and told him to leave her alone; that he threatened to beat her if she told; that the defendant was 35 years of age. She further testified that other similar acts were committed by the defendant from time to time up to December, 1937, when she told her grandfather; that she told her aunt in the fall.

Though the defendant denied his guilt, and there were possible inferences from the testimony tending to contradict the State's witness, her evidence was sufficient to make out a case of rape and to carry the case to the jury. It was the exclusive province of the jury to determine the credibility of the witness and the weight to be given her testimony. There was no error in denying defendant's motion for judgment as of nonsuit.

2. The appellant assigns as error that the trial judge submitted the case to the jury as if there were two counts in the bill, one charging intercourse when the State's witness was under twelve years of age and the other when she was over twelve years of age, by force and against her will.

The bill of indictment charged that the defendant did ravish and carnally know the witness, Margaret Johnson, by force and against her will, she being a female child under twelve years of age. There was therefore no error in presenting to the jury the elements of the crime of rape defined in the statute (C. S., 4204) and charged in the bill of in-

dictment, as applicable to the evidence in the case. *S. v. Linney,* 212 N. C., 739; *S. v. Puckett,* 211 N. C., 66.

We have examined the other exceptions noted at the trial and not brought forward in the brief, and decide that none of them can be sustained.

In the trial we find

No error.

J. F. A. BRYAN v. OLD COLONY INSURANCE COMPANY AND WILLIE WHITEHURST, ANNIE RAY, MARIE ANDREWS, ETTA WHITEHURST, AND ROBERT WHITEHURST, INTERVENERS;

and

W. C. WHITEHURST, EXECUTOR OF THE ESTATE OF HARRIETT L. BRYAN; AND G. R. WHITEHURST, GUARDIAN OF WILLIE WHITEHURST, ANNIE RAY, MARIE ANDREWS, ETTA WHITEHURST, AND ROBERT WHITEHURST; AND WILLIE WHITEHURST, ANNIE RAY, MARIE ANDREWS, ETTA WHITEHURST, AND ROBERT WHITEHURST, IN THEIR OWN RIGHTS, THE LAST FIVE HAVING BECOME OF AGE, v. AMERICAN EAGLE FIRE INSURANCE COMPANY OF NEW YORK AND J. F. A. BRYAN;

and

G. R. WHITEHURST, GUARDIAN OF WILLIE WHITEHURST, ANNIE RAY, MARIE ANDREWS, ETTA WHITEHURST, AND ROBERT WHITEHURST. AND IN THEIR OWN RIGHTS, WILLIE WHITEHURST, ANNIE RAY, MARIE ANDREWS, ETTA WHITEHURST, AND ROBERT WHITEHURST, v. THE UNITED STATES FIRE INSURANCE COMPANY OF NEW YORK AND J. F. A. BRYAN.

(Filed 13 April, 1938.)

1. Insurance § 17—

The devisee of the fee to property subject to a charge in a certain sum in favor of other beneficiaries under the will, has a separately insurable interest in the property, which he may protect for his sole benefit.

2. Insurance § 24d—

Where the devisee of the fee, subject to a charge in favor of other beneficiaries under the will, takes out a fire insurance policy for his sole benefit, the other beneficiaries are not entitled to an accounting from him for the proceeds of the policy upon the destruction of the premises by fire.

3. Insurance § 17—

The executor of a solvent estate has no interest in real property devised by will, and may not recover upon a fire insurance policy taken out by him on the property, since the estate suffers no loss from the destruction of the building by fire.

4. Reference § 13—

Where the referee makes certain findings, supported by evidence, to which no exceptions are taken and which are approved by the trial court, such findings are conclusive, and the verdict of the jury upon an issue inadvertently submitted in regard to the same matters must be disregarded.

5. Insurance § 22e—Findings that insured did not make agreement to take out additional insurance held conclusive.

Where the referee finds upon supporting evidence that insured did not know that other insurance was taken out on the property by another having an interest therein, and that such other insurance was taken out before insured's policy was issued, and no exceptions are taken to such findings and they are approved by the trial court, the findings on the matter are conclusive, and the verdict of the jury that additional insurance was taken out pursuant to an agreement between insured and such other person, returned upon an issue inadvertently submitted, does not entitle insurer to judgment that the policy sued on was avoidable for such additional insurance.

6. Same—Other insurance issued to person having separably insurable interest does not violate provision against additional insurance.

A policy of fire insurance was issued to the devisee of the fee in property subject to a charge in favor of other beneficiaries under the will. Thereafter the guardian of such other beneficiaries took out a policy to protect the interest of his wards. *Held:* The insurer issuing the policy to the guardian may not avoid liability thereon, on the ground of the additional insurance issued to the owner of the fee, since such additional insurance was not issued to or for the benefit of those insured under its policy. C. S., 6437.

7. Insurance § 24c—

In determining the proportionate liability of several insurers issuing their respective policies on the same property, the amount of insurance issued by one of them should be disregarded when its policy is void because issued to a person having no insurable interest.

8. Same—

The face amount of the policy of one insurer is the correct basis for determining the proportionate liability of another insurer issuing a policy on the same property, even though the parties to such other policy agree to a compromise settlement for less than its face amount.

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

THREE cases, consolidated for trial, heard by *Hamilton, Special Judge,* at November Term, 1937, of PITT. Appeal in first named case by the interveners, in the second case by plaintiffs, and in the third case by the plaintiffs and the defendant United States Fire Insurance Company.

These three actions were instituted to recover upon three policies of fire insurance on the same building, in the town of Bethel, North Carolina, issued by the three named fire insurance companies, as follows: (1) By the Old Colony Insurance Company to J. F. A. Bryan in the

sum of $1,800, (2) by the American Eagle Fire Insurance Company to the estate of Harriett L. Bryan (W. C. Whitehurst, executor) in the sum of $1,000, and (3) by the United States Fire Insurance Company to G. R. Whitehurst, guardian of Willie Whitehurst, Annie Ray, Marie Andrews, Etta Whitehurst, and Robert Whitehurst, in the sum of $1,000. The five persons last named are children of Hettie Whitehurst and G. R. Whitehurst, and, though they are now all of full age, they were treated by all the parties in these transactions as represented by their father and guardian, G. R. Whitehurst. For convenience they will be hereafter denominated the Whitehurst children.

It was admitted that Harriett L. Bryan died in 1930 seized of the lot upon which was located the building insured, and that she devised the same to J. F. A. Bryan in fee, subject to a charge thereon in the sum of $1,500 in favor of the children of Hettie Whitehurst. W. C. Whitehurst was named executor. The will of Harriett L. Bryan imposed no duty on her executor as to the real estate devised. It was also admitted that the building insured was damaged by fire on 30 May, 1935, and before the date of expiration of the three insurance policies sued on.

Actions were instituted by the named insured in each of the policies referred to, and each defendant insurance company denied liability, principally on the ground of breach of conditions as to title and other insurance. In the suit between J. F. A. Bryan and Old Colony Insurance Company the Whitehurst children intervened, alleging lien on the recovery under the policy issued by that insurance company to J. F. A. Bryan by reason of the charge on the property imposed by the will of Harriett L. Bryan in their favor.

It also appeared that prior to the fire G. R. Whitehurst, guardian of the Whitehurst children, and W. C. Whitehurst, executor, had instituted action to enforce the charge on the property devised in the will of Harriett L. Bryan, and that decree of sale was entered and commissioners appointed. The property was bid off at the sale on 27 May, 1935, but the fire occurring 30 May, 1935, proceedings for sale were not completed and no report was made by the commissioners.

By order of court the three cases were consolidated and referred to Hon. W. A. Darden, referee, the parties preserving right to jury trial. The referee, after hearing the evidence, reported his findings of fact and conclusions of law to the court.

The referee found, among other things, that the damage to the building by fire was $2,000; that in the second case, "W. C. Whitehurst, Executor, and others *v.* American Eagle Insurance Company," plaintiffs filed amendment to the complaint, alleging mutual mistake in the policy, in that it should have been written in name of and for benefit of the Whitehurst children, but the referee found there was no evidence of

mutual mistake or equity to entitle plaintiffs to reformation of the policy; that the policy issued by the American Eagle Insurance Company was issued for the benefit of the estate of Harriett L. Bryan, and that W. C. Whitehurst, executor, had fully administered said estate; that the estate was solvent and fully sufficient to pay all creditors without the necessity of administering on the building and lot, and that the executor had sustained no loss or damage by the fire. The amount paid for the premium was tendered and declined.

In the suit of "G. R. Whitehurst, Guardian of Whitehurst children *v.* United States Fire Insurance Company," the referee found that the agent of that insurance company knew at the time of the issuance of the policy that it was for the benefit of the Whitehurst children, and knew the condition of the title to the property and their interest therein, and that the policy was intended to protect their interest in said property. It was also found that the cash value of the dwelling immediately before the fire was $2,800.

The referee concluded, upon the findings of fact made by him, (1) that the policy issued by Old Colony Insurance Company to J. F. A. Bryan in sum of $1,800 was valid, enforceable, and binding on that defendant; (2) that the policy issued by the American Eagle Fire Insurance Company to the estate of Harriett L. Bryan, W. C. Whitehurst, executor, was void and unenforceable at the date of the fire, and (3) that the policy issued by the United States Fire Insurance Company to G. R. Whitehurst, guardian of Whitehurst children, was valid, enforceable, and binding on that defendant.

The referee also concluded that of the total valid insurance on the building of $2,800, the Old Colony Insurance Company was liable for 18/28ths and the United States Fire Insurance Company 10/28ths of $2,000, and that J. F. A. Bryan was entitled to recover of Old Colony Insurance Company $1,285.71 and the Whitehurst children were entitled to recover of United States Fire Insurance Company $714.29.

The referee further held that the Whitehurst children were entitled to a specific lien on the recovery in favor of J. F. A. Bryan for an amount sufficient to satisfy the $1,500 charge imposed by the will of Harriett L. Bryan, after crediting thereon the recovery of $714.29 from the United States Fire Insurance Company.

Exceptions were filed by all parties and jury trial demanded by United States Fire Insurance Company on issues tendered. When the cases came on to be heard in the Superior Court it appeared in the first case, to wit, "J. F. A. Bryan *v.* Old Colony Insurance Company," that J. F. A. Bryan and the Old Colony Insurance Company had agreed on the amount of $900.00 as settlement of the liability of that insurance company to him, and by consent of those parties, and over the objection

of the Whitehurst children, formal issues were submitted to the jury, peremptory instructions given, and judgment signed awarding $900.00 to J. F. A. Bryan, unaffected by any lien in favor of the intervening Whitehurst children. To the judgment in this case the Whitehurst children excepted and appealed to the Supreme Court.

In the second case, that of "W. C. Whitehurst, Executor, and others *v.* American Eagle Insurance Company," the exceptions of the plaintiffs to the referee's conclusions of law were overruled by the trial judge, and judgment was entered dismissing the action as to American Eagle Insurance Company. Plaintiffs appealed.

In the third case, "G. R. Whitehurst, Guardian of Whitehurst Children *v.* United States Fire Insurance Company," issues were submitted to the jury and verdict rendered thereon as follows:

"1. At the issuance of Policy No. 49412 by United States Fire Insurance Company to G. R. Whitehurst, guardian, did J. W. Rook, agent, have notice that there was a charge upon said property in the sum of $1,500 as alleged? Ans.: 'Yes.'

"2. At the time of the application made by G. R. Whitehurst, guardian, to J. W. Rook, did said guardian have notice of other insurance upon said property? Ans.: 'No.'

"3. After the delivery of Policy No. 49412 by the United States Fire Insurance Company to G. R. Whitehurst, guardian, did said guardian and W. C. Whitehurst, executor, enter into an agreement to secure a further policy of insurance upon said property for the protection of the children of Hettie Whitehurst; and as a result of said agreement was a policy issued by the American Eagle Fire Insurance Company? Ans.: 'Yes.'

"4. Did J. W. Rook, agent, have notice of other insurance upon said property at any time prior to the fire? Ans.: 'No.'

"5. At the time that G. R. Whitehurst, guardian, applied to J. W. Rook, agent of the United States Fire Insurance Company, for the policy of insurance in question, did he tell said agent that he was applying for $1,000 of insurance on the property in question for the benefit of his children? Ans.: 'Yes.'

"6. Did the said J. W. Rook, agent of the United States Fire Insurance Company of New York, name G. R. Whitehurst, guardian, as the insured in said policy, for that he thought it was just as good as to name said children as the insured therein? Ans.: 'Yes.'

"7. What was the reasonable market value of the property insured just prior to the fire? Ans.: '$2,200.'

"8. What was the reasonable market value of the property insured immediately after the fire? Ans.: '$200.00.'"

From judgment on the verdict defendant United States Fire Insurance Company appealed, and plaintiffs likewise appealed on account of insufficiency of recovery.

Julius Brown for G. R. Whitehurst, guardian of children of Hettie Whitehurst, and for W. C. Whitehurst, executor of Harriett L. Bryan.

Arthur B. Corey and Albion Dunn for J. F. A. Bryan.

Smith, Wharton & Hudgins, and J. B. James for United States Fire Insurance Company.

Joseph B. Cheshire and Paul F. Smith for American Eagle Fire Insurance Company.

DEVIN, J. The record before us is voluminous, consisting of 394 pages, and there are four appeals and eight briefs. However, the determinative questions presented by the appeals are not many, and their consideration may be confined within comparatively narrow limits.

The cases, three in number, all concern policies of fire insurance issued by three different insurance companies on the same building, loss in each instance payable to persons who claim separate interests therein. The insured named in the policies, or those claiming under them, constitute the plaintiffs in the three suits. The three actions were properly consolidated and tried by a referee. Upon exceptions to the referee's report the cases were heard in the Superior Court, separate judgments entered, and, by appeals duly entered, the cases were brought to this Court. They will be considered in order.

1. In the case of "J. F. A. Bryan *v.* Old Colony Insurance Company" the only question raised by the appeal is the validity of the judgment decreeing recovery for the plaintiff in an agreed amount unaffected by lien thereon claimed by the intervening children of Hettie Whitehurst on account of a charge imposed in the devise of the property under the will of Harriett L. Bryan to J. F. A. Bryan. It appears, however, that J. F. A. Bryan was the owner of the property, subject to a charge thereon in favor of the interveners; that he had an insurable interest therein, and that he procured and paid for insurance for his own protection alone. It is a well recognized principle of law that a mortgagor or owner of property subject to a lien has an interest separately insurable, and that when insurance is effected at his own request and cost and for his own benefit, he is not accountable to the lien-holder for the amount collected from the insurance company in case of loss. *Ins. Co. v. Reid,* 171 N. C., 513, 88 S. E., 779; *Batts v. Sullivan,* 182 N. C., 129, 108 S. E., 511; *Stockton v. Maney,* 212 N. C., 231.

The judgment of the court below in this case was in accord with the decisions of this Court and must be affirmed.

2. In the case of "W. C. Whitehurst, Executor of the Estate of Harriett L. Bryan, and others *v.* American Eagle Insurance Company" the referee concluded, upon the facts found by him, that the insurance policy issued by this defendant to the estate of Harriett L. Bryan was not an enforceable contract, and was invalid for the reason that the estate was solvent, there were no creditors, that the executor representing the estate had no interest in the real property devised to J. F. A. Bryan, had no duty to perform nor risk to protect with respect to it, and suffered no loss when it burned. The return of the premium was tendered. The ruling of the referee was approved and concurred in by the judge, and judgment of nonsuit was entered dismissing the action as to the American Eagle Insurance Company. In this we find no error. *Batts v. Sullivan, supra; Bank v. Assurance Co.*, 188 N. C., 747, 125 S. E., 631.

3. In the case of "G. R. Whitehurst, Guardian of the Whitehurst Children, *v.* United States Fire Ins. Company," where a jury trial was had, the appeal of the defendant insurance company presents two questions for decision: (1) Did the verdict of the jury on the third and fourth issues entitle the defendant insurance company to judgment in its favor, and (2) did the judgment signed correctly apportion this defendant's share of the loss?

While the third issue in form appears to determine that, after the delivery of the policy of the United States Fire Insurance Company sued on, the plaintiff G. R. Whitehurst entered into an agreement with W. C. Whitehurst, executor of estate of Harriett L. Bryan, to secure another policy of insurance on the same building for the protection of the Whitehurst children, and that as a result of such agreement the policy of the American Eagle Insurance Company was issued, and that this was without notice to the agent of the United States Fire Insurance Company, an examination of the evidence and findings of fact reported by the referee, to which no exceptions were filed, and which were approved by the judge and incorporated in his judgment, shows that there was no evidence to support this issue nor any finding of fact upon which judgment for the defendant could properly be based. The facts were to the contrary. The uncontroverted evidence and the approved findings of the referee were to the effect that W. C. Whitehurst, as executor of Harriett L. Bryan, had insured the property in the American Eagle Insurance Company by policy payable to the estate of Harriett L. Bryan in February, 1934, some time before this defendant's policy was issued. It was further found by the referee that when G. R. Whitehurst, guardian, had the policy in the United States Fire Insurance Company issued for the benefit of the Whitehurst children in October, 1934, he did not know the insurance in the American Eagle Insurance

Company was in force. Hence the findings of fact by the referee upon competent evidence, approved and concurred in by the judge, must be regarded as conclusive, and the finding by the jury, upon an issue improperly and inadvertently submitted, disregarded. The motion of defendant United States Fire Insurance Company for judgment on the verdict was properly denied.

The further contention of defendant United States Fire Insurance Company that the insurance was void for breach of the conditions contained in the policy as to other insurance cannot be sustained. The North Carolina statute (C. S., 6437), declaring a standard form of fire insurance policy, names as one of the conditions upon which liability may be avoided the issuance of a policy, "(a) While the insured has any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." This provision is also contained in defendant's policy. But there is no evidence here that the Whitehurst children, who had an insurable interest in the property and who were the insured for whose protection this defendant issued its policy, had any other contract of insurance on this property. Neither by the language of the policy issued by the American Eagle Insurance Company to the estate of Harriett L. Bryan, nor by competent evidence, was it made to appear that any other contract of insurance was at any time issued to or for those insured under the policy of the United States Fire Insurance Company. The referee found that the policy of the American Eagle Insurance Company was issued for the benefit of the estate of Harriett L. Bryan alone.

(2) Was this defendant's proportion of the loss properly determined? The policy of the United States Fire Insurance Company contained this provision: "In case of any other insurance upon the within described property this company shall not be liable, under this policy, for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee, or otherwise."

It follows, therefore, that the insurance policy issued by the American Eagle Insurance Company to the estate of Harriett L. Bryan, having been held invalid and unenforceable for the reason that the executor of said estate, under the facts found in this case, had no insurable interest in the property, the amount of this policy may be disregarded in determining "the whole amount of insurance on said property issued to or held by any other party or parties having an insurable interest therein," and that the court below correctly held as found by the referee that the total amount of valid insurance on the property was $2,800, and that this defendant's proportion thereof was 10/28ths of the loss fixed at $2,000, or $714.29. 14 R. C. L., 1310.

We have examined the other exceptions noted by this defendant at the trial and assigned as error upon appeal and find them without substantial merit. Upon the appeal of the United States Fire Insurance Company we find no error.

In the plaintiffs' appeal in "Whitehurst, Guardian, *v.* United States Fire Insurance Company" the exception to the judgment is based upon the ground that the plaintiffs were entitled to the full amount of the insurance stated in the policy, to wit, $1,000, without reduction on account of the other insurance on the property taken out by J. F. A. Bryan. For the reasons hereinbefore set out this exception cannot be sustained. The terms of the contract of insurance as well as the statute entitle the defendant to thus prorate its liability in proportion to the whole insurance covering the property. And this is determined by the total amount of insurance covering the property rather than by the amount subsequently agreed to be paid in settlement of the other insurance. The facts here were not such as to invoke the application of the principle stated in *Bennett v. Ins. Co.*, 198 N. C., 174, 151 S. E., 98, and *Taylor v. Ins. Co.*, 202 N. C., 659, 163 S. E., 749. Even if the relationship of J. F. A. Bryan, the owner of the property, to the children of Hettie Whitehurst, entitled to a charge thereon, be held to be similar to that of mortgagor and mortgagee, it appears that the plaintiffs accepted the policy of the defendant United States Fire Insurance Company containing the quoted stipulation limiting liability for loss proportionately to the whole amount of insurance covering the property, and there is no evidence that the owner subsequently effected additional insurance thereon without the knowledge and consent of the plaintiffs, or that he thereafter did any act to impair or affect plaintiffs' rights under the policy accepted by them. *Bank v. Ins. Co.*, 187 N. C., 97, 121 S. E., 37; *Ins. Co. v. Varble*, 103 Ky., 758.

In conclusion it may not be improper to say that these cases, complicated by conflicting interests and contentions, seem to have been fairly tried by a careful referee and an able judge, and we find no sufficient reason to disturb the results which have been reached.

In *Bryan v. Old Colony Ins. Co. and others*, judgment affirmed.

In *W. C. Whitehurst, Executor, and others v. American Eagle Insurance Co.*, judgment affirmed.

In *G. R. Whitehurst, Guardian, and others v. United States Fire Insurance Company and another*—on plaintiffs' appeal, no error; on defendant insurance company's appeal, no error.

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

G. L. O'BRIANT v. H. C. BENNETT AND GIBSON ICE CREAM COMPANY.

(Filed 13 April, 1938.)

1. Abatement and Revival § 7—Order extending time for filing complaint for more than 20 days is not void, and action is pending from time of service of summons and such order.

An action is pending from the time of service of summons, and from that time the court is deemed to have jurisdiction of all subsequent proceedings, N. C. Code, 475, 488, and where summons is served, together with application and order extending the time for filing complaint, C. S., 505, the fact that the order extending the time for filing complaint inadvertently extends the time for more than the twenty days permitted by the statute, may render the order irregular or defective, but does not make it void *ab initio*, and such action has priority over an action instituted after such service, and motion to dismiss such action on the ground of another action pending is properly denied. C. S., 475.

2. Pleadings § 1—Trial court has discretionary power to permit plaintiff to file complaint after expiration of statutory time.

Summons was issued in the action prior to the filing of the complaint, plaintiff having filed application for extension of time, C. S., 505, and the application and order allowing extension of time having been served on defendants. The order inadvertently extended the time for more than the twenty days permitted by statute. Defendants moved before the clerk for dismissal of the action for defect in the order extending the time, and the clerk denied the motion and entered order that the complaint be filed *nunc pro tunc*. Appeal from the clerk's order denying the motion was properly heard by the trial court at term, C. S., 600, at which time the trial court found the facts, denied the motion to dismiss, and permitted plaintiff to file the complaint. *Held:* The trial court had the discretionary power to allow the filing of the complaint after the expiration of the time limited, N. C. Code, 536, and judgment refusing the motion to dismiss is without error.

3. Appeal and Error § 37b—

An order of the trial court permitting plaintiff to file complaint after the time limited, C. S., 536, entered in the court's discretion, is ordinarily not reviewable.

APPEAL by defendants from *Williams, J.*, at November Term, 1937, of LEE. Affirmed.

The judgment of the court below, which indicates the controversy, is as follows:

"This cause, being heard by the undersigned Clawson L. Williams, judge presiding over the regular term of the Superior Court of Lee County, and said cause coming on to be heard in its regular order, as calendared, upon motion and special appearance of the defendants Gib-

son Ice Cream Company and H. C. Bennett; after hearing the matter the court makes the following findings of fact:

"1. Summons was issued herein on 6 July, 1937, from the office of the clerk of Superior Court of Lee County, and was served on the defendants on 15 July, 1937; that at the time of the issuance of said summons no complaint was filed in the office of the clerk of this court, but an order was issued by W. G. Watson, C. S. C., extending time for filing complaint for thirty days.

"2. That at the time service of summons was had upon the defendants no copy of a complaint was served or delivered to them with copy of summons; that copy of said complaint was furnished to each of the defendants when it was filed.

"3. That at the time service of summons was had upon the defendants H. C. Bennett and Gibson Ice Cream Company there was served a copy of an application for extension of time, stating the nature and purpose of the suit, signed 'J. C. Pittman, attorney for plaintiff, and an order signed by the clerk of the Superior Court of Lee County purporting to extend the time for filing the complaint from 6 July, 1937, to and including 5 August, 1937; that the extension of time for filing complaint for more than twenty days was through inadvertence.

"4. The complaint in this action was filed herein on 4 August, 1937, and service of complaint upon the defendants was made as required by statute by the clerk mailing copy to each defendant.

"5. That there is now pending in the Superior Court of Guilford County, North Carolina, an action entitled 'H. C. Bennett and Gibson Ice Cream Company *v.* G. L. O'Briant and Durham Herald, Inc.'

"6. That the action now pending in the Superior Court of Guilford County, as above entitled, was instituted by summons issued on 13 August, 1937, and summons and complaint therein filed and served upon the defendants therein, one of said defendants, G. L. O'Briant, being the plaintiff in the instant case; that said action arises out of the same transaction and has the same and identical subject matter; that all of the parties are the same with the exception of the addition of Durham Herald, Inc., as a party defendant; that H. C. Bennett and Gibson Ice Cream Company are parties plaintiff and G. L. O'Briant is party defendant instead of as named in this action.

"7. That on 16 August, 1937, motion upon a special appearance of the defendants was made and filed in this action, and copy mailed for the plaintiff to his attorney of record, Mr. J. C. Pittman, of Sanford, N. C., on said date.

"8. That on 16 August, 1937, W. G. Watson, clerk of Superior Court of Lee County, N. C., entered the following order:

"'ORDER.

North Carolina—Lee County.
In the Superior Court.

G. L. O'Briant v. Gibson Ice Cream Company and H. C. Bennett.

"'This cause coming on to be heard before the undersigned W. G. Watson, clerk Superior Court of Lee County, North Carolina, upon motion of the defendants to dismiss this action for the causes set out in the motion, filed on 16 August, 1937, and it appearing to the court that the motion should not be allowed:

"'Now, therefore, it is hereby ordered that the motion of the defendants to dismiss this action be and the same is hereby denied, and the defendants are allowed thirty (30) days from the date hereof to answer or otherwise plead to the complaint.

"'It is further ordered that the complaint of the plaintiff in this action is hereby ordered to be filed *nunc pro tunc* as of 24 July, 1937. This 16 August, 1937. W. G. WATSON,
Clerk Superior Court.'

"9. That the defendants appealed to the Superior Court from this order; that thereafter the clerk forwarded this matter to Judge Henry A. Grady, judge presiding over the courts of the Fourth Judicial District for the State of North Carolina, for a hearing upon defendants' appeal, which said hearing was set for 8 September, 1937, and transferred to Judge Marshall T. Spears by Judge Grady for hearing on 5 October, 1937, and upon agreement of counsel the said cause was heard by him on said date, at which time he entered an order which remanded the matter to this court for hearing *de novo*, at term time, as appears from said order bearing date of 5 October, 1937, which order is made a part of these findings as if fully set out herein.

"10. That this cause was calendared upon the motion docket of this term of court and came on for hearing, by agreement, before the undersigned, as hereinbefore set out.

"11. That this matter is now properly before this court and that in fairness and justice to the parties involved this action should be retained upon the docket of the Superior Court of Lee County for trial.

"Now, therefore, upon the foregoing findings of fact, and in the exercise of the discretion of the court,

"It is hereby ordered that the motion of the defendants to dismiss this action be and the same is hereby denied, and the complaint of the plaintiff in this action is hereby permitted to be filed on this date or within ten days hereafter, and the defendants are allowed thirty days from the date of filing the complaint in which to answer or otherwise plead to the complaint.

"Done at Sanford, Lee County, North Carolina, this 12 November, 1937. CLAWSON L. WILLIAMS,
Judge Presiding Over the Regular Term of Lee County Superior Court."

To the foregoing order the defendants excepted, assigned error and appealed to the Supreme Court. The defendants made other exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

Smith, Wharton & Hudgins, and K. R. Hoyle and J. C. Pittman for plaintiff.
Silas B. Casey and Sapp & Sapp for defendants.

CLARKSON, J. *Facts:* It is contended by plaintiff that this is an attempted appeal by defendants from an order entered by Williams, judge, allowing complaint to be filed by plaintiff. Plaintiff caused to be issued summons on 6 July, 1937, from Lee Superior Court to Guilford County, and the same was served on defendants. Complaint was not filed until 4 August, 1937. Copies were furnished defendants. On 13 August, 1937, defendants caused summons to issue against plaintiff from Guilford County and filed complaint and caused same to be served in Lee County for precisely the same cause of action but additional party—The Durham Herald, Inc. The first action had not been dismissed and has never been dismissed, but has at all times pended in Lee County Superior Court since 6 July, 1937. On 16 August, 1937, and after having instituted their action in Guilford County, defendants moved in Lee Superior Court to dismiss plaintiff's action because complaint had not been filed within the time fixed by law. This motion was denied by the clerk and defendants appealed therefrom. By order of Judge Spears the whole matter was submitted to judge presiding in Lee Superior Court at November Term, 1937. The judge presiding at such term, in the exercise of his discretion, and so stated to be in his order, allowed plaintiff ten days to file the complaint.

In the present action there is no dispute by defendants that the summons was issued in accordance with N. C. Code, 1935 (Michie), sec. 475. It was duly served on defendants. Section 488 is as follows: "From the time of service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings."

Section 505 is as follows: "The first pleading on the part of the plaintiff is the complaint. It must be filed in the clerk's office at or before the time of the issuance of summons, and a copy thereof delivered to the defendant, or defendants, at the time of the service of summons:

Provided, that the clerk may at the time of the issuance of summons on application of plaintiff by written order extend the time for filing complaint to a day certain not to exceed twenty (20) days, and a copy of such order shall be delivered to the defendant, or defendants, at the time of the service of summons in lieu of a copy of the complaint: *Provided further*, said application and order shall state the nature and purpose of the suit. The clerk shall not extend the time for filing complaint beyond the time specified in such order, except that when application is made to the court, under Art. 44, ch. 12, of the Consolidated Statutes, for leave to examine the defendant prior to filing complaint, and it shall be made to appear to the court that such examination of defendant is necessary to enable the plaintiff to file his complaint, and such examination is allowed, the clerk shall extend the time for filing complaint until twenty (20) days after the report of the examination is filed as required by sec. 902 of the Consolidated Statutes. When the complaint is not filed at the time of the issuance of the summons, the plaintiff shall, when he files complaint, likewise file at least one copy thereof for the use of the defendant and his attorney. When there are more than one defendant the clerk may, by written notice to the plaintiff, require the filing of additional (not to exceed six) copies of the complaint within the time specified in such notice, not to exceed ten days. Such notice may be served by mailing to the plaintiff or his attorney of record."

On 6 July, when the summons was issued, the complaint was not filed at or before the time of the issuance of summons, but the plaintiffs made application before the clerk to extend the time in which to file complaint, stating the nature and purpose of the suit. The clerk in the summons stated: "You are commanded to summon Gibson Ice Cream Company and H. C. Bennett, the defendants above named, if they be found within your county, to appear before the clerk of the Superior Court for the county of Lee, at his office in the courthouse thirty (30) days after 5 August, 1937 (which is the day fixed for filing complaint under the order of court, a copy of which said order appears on the back of this summons and is served herewith), and answer the complaint, which will be filed in the office of the clerk of the Superior Court of said county on or before the said day fixed for filing complaint," etc.

The clerk made an order extending the filing of the complaint to 5 August, 1937. The return of the summons by the deputy sheriff of Guilford County shows: "Served 15 July, 1937, by delivering a copy of the within summons, a copy of the application for extension of time to file complaint, and a copy of the order extending the time for filing complaint, to each of the following defendants," etc.

The complaint of plaintiff was filed on 4 August, 1937. On 16 August, 1937, the defendants made a motion to dismiss the action "That the order hereinabove referred to as signed 'W. G. Watson, clerk Superior Court Lee County,' is void and of no legal effect. That complaint in this action was not filed herein until 4 August, 1937, more than twenty days after the issuance of the summons herein."

The defendants further set forth the suit in Guilford County, brought by defendants against plaintiff and the Durham Herald, Inc., "That the action now pending in the Superior Court for Guilford County as above entitled was duly and regularly instituted, and was so duly and regularly instituted before any action in any other county, including the above entitled action, was duly and regularly instituted; that said action arises out of the same transaction and has the same and identical subject matter."

The clerk denied the motion, "And the defendants are allowed thirty (30) days from the date hereof to answer or otherwise plead to the complaint. It is further ordered that the complaint of the plaintiff in this action is hereby ordered to be filed *nunc pro tunc* as of 24 July, 1937." The defendants appealed to the Superior Court from the order of the clerk. The court below found that "The extension of time for filing complaint for more than twenty days was through inadvertence." The court below, upon the findings of fact and in the exercise of its discretion, denied the motion of defendants to dismiss the action.

N. C. Code, *supra,* sec. 536, is as follows: "The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order to enlarge the time."

In *Smith v. Ins. Co.,* 208 N. C., 99 (102), it is written: "In *Hines v. Lucas,* 195 N. C., 376 (377), is the following: 'The judge has the power to extend the time for filing complaint and his refusal to dismiss the action, under the facts presented, was at least equivalent to an order permitting the filing of complaint. Under the law as now written, when a cause is properly before the judge, he has power, in the exercise of a sound legal discretion, to extend the time for filing pleadings. C. S., 536; *Aldridge v. Ins. Co.,* 194 N. C., 683. While it is true that the *Aldridge case, supra,* and the line of cases therein cited, refer more particularly to filing answer, no sound reason occurs to us why the same power does not exist for enlarging the time for filing complaint. C. S., 536.' *Bowie v. Tucker,* 197 N. C., 671 (673); *Washington v. Hodges,* 200 N. C., 364 (370); N. C. Prac. & Proc. in Civil Cases (McIntosh), secs. 485, 513-14."

The present action was pending when defendants brought the suit against plaintiff and Durham Herald, Inc., in Guilford County, involv-

ing the same subject matter. The present action has priority, as it was then pending. C. S., 475. *Morrison v. Lewis,* 197 N. C., 79; *Atkinson v. Greene,* 197 N. C., 118 (120). The order extending time for filing complaint was perhaps irregular or defective, but not void *ab initio.* We see no substantial right of defendants involved. The suit instituted by them cannot be sustained as the present suit was pending.

In *Morrison v. Lewis,* 197 N. C., 79 (81), we find: "In *Alexander v. Norwood,* 118 N. C., 381, 24 S. E., 119, it was said: 'Where an action is instituted and it appears to the court by plea, answer, or demurrer that there is another action pending between the same parties and substantially on the same subject matter, and that all the material questions and rights can be determined therein, such action will be dismissed.' "

N. C. Code, *supra,* sec. 600, is as follows: "The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding. *The clerk may hear and pass upon motions to set aside judgments rendered by him, whether for irregularity or under this section, and an appeal from his order on such motion shall lie to the judge at the next term,* who shall hear and pass upon such motion *de novo: Provided, however,* nothing in this section shall be construed to affect the rights of innocent purchasers for value in foreclosure proceedings where personal service is obtained." (Italics ours.)

In the *Smith case, supra,* it is said: "Ordinarily an appeal to this Court will be dismissed when taken from a discretionary order in the court below."

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

Affirmed.

J. W. DORMAN v. A. F. GOODMAN AND WIFE, MILDRED M. GOODMAN.

(Filed 13 April, 1938.)

1. Deeds § 7—

The indexing of deeds is an essential part of their registration, C. S., 3560, 3561, but this rule is prospective and not retroactive in effect.

2. Same—Records are notice of all matters which would be discovered from them by careful and prudent examiner.

The purpose of the registration laws is to give notice, and where the index is sufficient to put a careful and prudent examiner upon inquiry,

the records are notice of all matters which would be discovered by reasonable inquiry, but the records are intended to be self-sufficient, and a person examining a title is not required to go out upon the premises and ascertain who is in possession and under what claim, the proviso of C. S., 3309, being applicable only to deeds executed prior to 1 December, 1885.

3. Same—

No notice, however full and formal, will take the place of registration.

4. Same—Deed properly indexed under name of grantee, but indexed under wrong initials of grantor held ineffective as against creditor of grantor.

The deed in question was properly indexed under the name of the grantee, but under the name of the grantor was indexed under the name of "J. L. Crowell" instead of "J. Frank Crowell," who was the grantor therein. There were over a hundred deeds properly indexed under the name of "J. L. Crowell." *Held:* As to a creditor of the grantor the instrument was not indexed, and therefore not registered, it not being incumbent upon the creditor to examine the more than one hundred deeds purporting to be executed by "J. L. Crowell" to ascertain if any had been erroneously indexed, nor to look under the index of grantees to see if any grantee had registered a deed from the debtor. *Ins. Co. v. Forbes*, 203 N. C., 252, cited and distinguished in that in that case the examiner was tracing the title back, and would therefore have had notice of the pertinent instruments.

5. Same—

The increasing complexity of business and the growing number and character of conveyances, make it necessary for the preservation of property rights, that the established rules governing the registration of instruments should not be relaxed, but that instruments should be recorded in strict compliance therewith.

6. Adverse Possession § 9—

A deed is color of title only in accordance with the estate it purports to convey, and a deed conveying a one-half interest is color of title only as to the one-half interest.

7. Deeds § 17—Facts agreed held to constitute good cause of action for breach of warranty of title and against encumbrances.

In this action for breach of warranty of title and against encumbrances, judgment that plaintiff had no cause of action *held* for error, it appearing that plaintiff grantee had obtained title by adverse possession under color only as to a one-half interest in the land, and that the other one-half interest was subject to a judgment in favor of defendant grantor's predecessor in title.

APPEAL by plaintiff from judgment signed 22 November, 1937, by *Pless, J.* From CABARRUS. Reversed.

Action for breach of warranty of title and against encumbrance in defendants' deed to plaintiff, heard upon agreed statement of facts. From judgment for defendants plaintiff appealed.

W. S. Bogle and E. Johnston Irvin for plaintiff, appellant.
Crowell & Crowell for defendants, appellees.

DEVIN, J. This appeal presents two questions for determination:

1. Was the deed to defendants' predecessor in title indexed and cross-indexed on the registry so as to constitute notice to a subsequent judgment creditor?

2. Had plaintiff's title by possession under color ripened into an indefeasible title before the docketing of the judgment?

The facts agreed present this situation:

On 9 December, 1925, J. Frank Crowell, the then owner, conveyed the land in question to D. A. McLaurin by deed recorded the following day. On 10 December, 1925, D. A. McLaurin and wife conveyed a one-half interest in the land to defendant A. F. Goodman, deed duly recorded 15 December, 1925. On 19 April, 1930, D. A. McLaurin and wife conveyed the remaining half-interest in the land to A. F. Goodman by deed recorded 7 May, 1930. On 24 August, 1932, A. F. Goodman and wife conveyed the land to the plaintiff Dorman, by deed with usual warranties, recorded 25 August, 1932. All the deeds referred to were in form sufficient to convey in fee simple and contained the usual warranties, and all the deeds were properly registered, indexed and cross-indexed, with the exception of the deed from J. Frank Crowell to D. A. McLaurin, dated 9 December, 1925. This last mentioned deed was shown on the "grantors" index as being from J. L. Crowell. It was agreed that on the "grantees" index the entry was properly made. In 1926 the Michelin Tire Co. secured two judgments in Stanly County against J. F. Crowell in the aggregate sum of $339.00, and had said judgments duly docketed in Cabarrus County, 26 January, 1934. Execution was issued on said judgments and the land sold by the sheriff in January, 1936, and bid in by the plaintiff for the sum of $600.00, and sheriff's deed therefor received by plaintiff and registered.

It was further agreed "that the deed from J. Frank Crowell to D. A. McLaurin was indexed in the grantor's book under the family name of Crowell and under the initials 'J. L.' Crowell, and that the initials of the grantor in the deed is indexed in the proper column; that said index is so subdivided that a deed from either J. L. or J. F. Crowell would be indexed in the same initial column. It is further stipulated and agreed that there is a person by the name of J. L. Crowell, and that he has made a large number of conveyances, probably in excess of one hundred (stated in the argument to be three hundred), and that all of the same are indexed in the same index book, on the same page, and in the same column in which a conveyance from J. F. Crowell would be prop-

erly indexed, and that the deed in question is indexed in the name of J. L. Crowell."

It was further agreed that the plaintiff and his predecessors in title have occupied the premises in question, under known and visible boundaries and under such color of title as is shown by the conveyances referred to, for more than seven years.

The deed from J. Frank Crowell to D. A. McLaurin was registered and indexed in the manner herein described on 10 December, 1925. Whether the registration and indexing constituted constructive notice to creditors and purchasers for value from J. Frank Crowell depends upon whether the requirements of the statutes and the decisions of this Court effective at that time were complied with. Prior to 1918 the doctrine prevailed in this State that registration itself imparted notice to subsequent purchasers, notwithstanding failure to index it, and that the index was no part of the record (*Davis v. Whitaker,* 114 N. C., 279, 19 S. E., 699). But in *Ely v. Norman,* 175 N. C., 294, 95 S. E., 543, and *Fowle v. Ham,* 176 N. C., 12, 96 S. E., 639, it was definitely decided that the indexing of deeds was an essential part of the registration, "as much so as the indexing of judgments is a part of their docketing." However, it was held in *Fowle v. Ham, supra,* and in *Wilkinson v. Wallace,* 192 N. C., 156 (1926), that the rule requiring indexing as a prerequisite to valid registration was prospective and not retroactive, and that rights of property thereunder were to be determined by the existing law.

The Consolidated Statutes (effective 1919) codified the duties of the register of deeds as to indexing in two sections, numbered 3560 and 3561, as follows: "Sec. 3560. The board of county commissioners, at the expense of the county, shall cause to be made and consolidated into one book a general index of all the deeds and other documents in the register's office, and the registrar shall afterwards keep up such index without any additional compensation."

"Sec. 3561. The register of deeds shall provide and keep in his office full and complete alphabetical indexes of the names of the parties to all liens, grants, deeds, mortgages, bonds and other instruments of writing required or authorized to be registered; such indexes to be kept in well-bound books, and shall state in full the names of all the parties, whether grantors, grantees, vendors, vendees, obligors or obligees, and shall be indexed and cross-indexed, within twenty-four hours after registering any instrument, so as to show the name of each party under the appropriate letter of the alphabet; and reference shall be made, opposite each name, to the page, title, or number of the book in which is registered any instrument. A violation of this section shall be a misdemeanor."

Thus the law stood until 1929 when, by ch. 327, Public Laws 1929, provision was made for the installation of the modern "family" index system. However, the Act of 1929 has no application to the facts of this case.

Since 1918 this Court has considered the question of the indexing of deeds in the following cases:

In *Bank v. Harrington,* 193 N. C., 625, 137 S. E., 712, the Court was evenly divided on the application of the rule to the facts in that case.

In *Clement v. Harrison,* 193 N. C., 825, 138 S. E., 308, where the register of deeds had an alphabetical index with subdivisions of each letter, and registered and indexed a deed of trust from one Harrison under the subdivision "Haa to Hap" instead of under the subdivision "Har to Haz," it was held that this was a substantial compliance with C. S., 3560 and 3561, and the instrument sufficiently indexed to convey a lien superior to that of a subsequently registered and properly indexed deed of trust.

In *Heaton v. Heaton,* 196 N. C., 475, 146 S. E., 146, where the wife was the owner of the land and the mortgage by herself and husband was indexed and cross-indexed in name of the husband only, it was held the mortgage was not properly registered and not good against a subsequent deed duly recorded.

In *West v. Jackson,* 198 N. C., 693, 153 S. E., 257, the deed of trust executed by Jesse Hinton and wife, Nora, who held an estate by entirety, was indexed and cross-indexed in the name of "Jesse Hinton and wife," the name of the wife not appearing upon the index and cross-index. It was held the indexing and cross-indexing was a sufficient compliance with the statute. It was there said: "Upon the other hand, it is insisted that the underlying philosophy of all registration is to give notice, and that hence the ultimate purpose and pervading object of the statute is to produce and supply such notice. Therefore, if the indexing and cross-indexing upon a given state of facts is insufficient to supply the necessary notice, then such indexing ought to fail as against subsequent purchasers or encumbrancers. Nevertheless, it is a universally accepted principle that 'constructive notice from the possession of the means of knowledge will have the effect of notice, although the party was actually ignorant, merely because he would not investigate. It is well settled that if anything appears to a party calculated to attract attention or stimulate inquiry, the person is affected with knowledge of all the inquiry would have disclosed.' *Wynn v. Grant,* 166 N. C., 39, 81 S. E., 949."

Whitehurst v. Garrett, 196 N. C., 154, 144 S. E., 835, related to the indexing of chattel mortgages. It was there held that the indexing and cross-indexing in the chattel mortgage book was a sufficient compliance with C. S., 3561.

In *Story v. Slade,* 199 N. C., 596, 155 S. E., 256, a mortgage not indexed and cross-indexed was held invalid against a subsequent mortgage registered and properly indexed.

Pruitt v. Parker, 201 N. C., 696, 161 S. E., 212, related to indexing chattel mortgages under the Act of 1929. It was held that the priority was determined by the date of indexing and cross-indexing in the General Chattel Mortgage Cross-Index kept by the county.

Watkins v. Simonds, 202 N. C., 746, 164 S. E., 363, was a suit against the register of deeds for damages, instituted by the parties involved in *Heaton v. Heaton, supra.*

In *Ins. Co. v. Forbes,* 203 N. C., 252, 165 S. E., 699, the deed of trust from Emma J. Tucker and husband, S. D. Tucker, to F. J. Forbes, trustee, was indexed and cross-indexed "Tucker, S. D. *et ux.* to F. J. Forbes, Tr." This was held sufficient to constitute first lien on the land. The land belonged to Emma J. Tucker, and subsequent to the execution of the deed of trust to Forbes she and her husband, S. D. Tucker, conveyed to Leona P. Hudson. The deed to Hudson was indexed in name of Emma Tucker and cross-indexed in "S. D. Tucker *et ux.*" Hudson thereafter executed deed of trust to a trustee for the insurance company which claimed priority over the Forbes deed of trust. The Court reasoned thus: "When the examiner of the title to the Hudson land undertook to search the records the first inquiry would be: From whom did the Hudsons get the land? The records answered the inquiry by showing that Emma J. Tucker was a married woman and that her husband was S. D. Tucker, because they were the grantors of Leona P. Hudson in a deed indexed on the grantor's side 'Tucker al Emma to Leona Hudson.' The cross-indexes further disclosed the deed from 'J. B. Hill *et al.* to Emma J. Tucker, recorded on 30 December, 1916. Consequently the abstractor knew from the index that the land was duly conveyed to Emma J. Tucker, and that S. D. Tucker was her husband. Hence an examination of the grantor's cross-index would have revealed the deed of trust to Forbes, trustee, securing the $4,000 note to the National Bank of Greenville and indexed 'Tucker, S. D. *et ux.* to F. J. Forbes, Tr."

Woodley v. Gregory, 205 N. C., 280, 171 S. E., 65, had reference to conveyances registered since the Act of 1929. It was held that a prior deed of trust, indexed and cross-indexed in the full name of one grantor with abbreviations as to the other grantors *"et al.,"* did not constitute sufficient notice to a subsequent purchaser as to the other grantors.

A case somewhat analogous to the case at bar, relating to the cross-indexing of judgments, is *Trust Co. v. Currie,* 190 N. C., 260, 129 S. E., 605, where a judgment in favor of J. A. Currie and against Carey L. Stephens was properly docketed but cross-indexed as "J. A. Quick *v.*

Carey L. Stephens." Subsequently Carey L. Stephens conveyed land to a trustee. It was held that to constitute notice to a subsequent purchaser from the judgment debtor not only the name of the judgment debtor must appear in the cross-index but the name of the plaintiff also.

It is apparent from an examination of these statutes and decisions that the primary purpose of the law requiring the registration and indexing of conveyances is to give notice, and it has been repeatedly stated by those writing on this subject that an index will hold a subsequent purchaser or encumbrancer to notice if enough is disclosed by the index to put a careful and prudent examiner upon inquiry, and if upon such inquiry the instrument would be found.

Applying these principles of law to the facts of the instant case, it is apparent that the failure of the register of deeds to enter on the grantor side of the index the name of J. Frank Crowell, and instead indexing the deed as if it were one from J. L. Crowell, who was the grantor in more than a hundred conveyances on the same page, would not give notice to creditors and subsequent purchasers from J. Frank Crowell that the title was otherwise than still in him. From the standpoint of the creditor or purchaser from J. Frank Crowell, his deed to McLaurin was not indexed, and therefore not registered. There was no evidence that the judgment creditor had knowledge or notice otherwise than shown by the record of the transfer of title from J. Frank Crowell. There is nothing in the statute nor in any decision of this Court that would require an examiner of titles to go out to the premises and ascertain who was in possession of the premises and under what claim. The cardinal purpose of the registration and indexing laws is to provide records that shall of themselves be sufficient, under careful and proper inquiry, to disclose the true state of the title to real estate. The provision in C. S., 3309, for the protection of those in the possession of land at the time of the passage of the Connor Act applied only to deeds executed prior to 1 December, 1885. It is axiomatic that no notice, however full and formal, can take the place of registration. *Collins v. Davis,* 132 N. C., 106, 43 S. E., 579; *Lanier v. Lumber Co.,* 177 N. C., 200, 98 S. E., 593; *McClure v. Crow,* 196 N. C., 657, 146 S. E., 713. The most prudent and careful searcher of titles would not be expected to examine the more than one hundred deeds referred to in the index as having been executed by J. L Crowell to ascertain if by chance one of them had been erroneously indexed, nor, in the absence of knowledge or information or anything to stimulate inquiry or attract attention, to look under the letters in the alphabetical index of grantees to see if any grantee had registered a deed from J. Frank Crowell. That would be a task comparable to the proverbial search for a needle in a haystack.

Error in the record is not presumed. The statute required that the index should "state in full the name of all grantors."

The reasoning in *Ins. Co. v. Forbes, supra,* that the insurance company, in tracing back the title of the person from whom it obtained title, would disclose that the title was derived from Emma Tucker, and that she had previously conveyed to Forbes, is sound from the standpoint of one who is tracing back the title of his grantor whom he knows, but this view is inapplicable to the situation of one who occupies the position of purchaser from or creditor of the original owner and who is examining the record to ascertain if there is a conveyance or encumbrance from such owner, and who has no means of discovering from the index record that the land had been, or to whom, conveyed. The growth of population, the increasing activity and complexity of business, the multiplication of the number and character of conveyances render it necessary for the preservation of property rights, for the security of titles and the accuracy of determining them, that those charged with the duty of recording the instruments of title and encumbrances thereon be held to a strict compliance with the requirements imposed by the statutes and the decisions of this Court. The rules heretofore established should not be relaxed.

2. But the defendants contend that even if the deed from J. Frank Crowell to D. A. McLaurin was not properly indexed so as to constitute valid registration, the plaintiff and those under whom he claims have been in adverse possession of the land under color of title since 1925, for more than seven years prior to the docketing of the Michelin Tire Company's judgments in 1934, and that therefore the plaintiff cannot recover for breach of the warranty in his deed.

Unquestionably, as held in *Glass v. Shoe Co.,* 212 N. C., 70, adverse possession under the registered deed from D. A. McLaurin to A. F. Goodman for seven years would have ripened a good title in the plaintiff, sufficient to defeat his action against the defendant for breach of warranty, but for the fact that the deed relied on as color purports on its face to convey only a one-half interest in the land. Colorable title, under which a good title may be acquired by adverse possession, means a writing which upon its face purports to convey the title to land, but which for want of title in the grantor, or on account of defective mode of conveyance, may not convey the true title. *Barrett v. Brewer,* 153 N. C., 547, 69 S. E., 614; *Williams v. Scott,* 122 N. C., 545, 29 S. E., 877; *Tate v. Southard,* 10 N. C., 119. But the entry under color is effective to ripen a good title only in accordance with the title the instrument purports to convey, and the possession is deemed coextensive only with the limits thereof. The efficacy of the entry and possession under colorable title goes to the extent of the boundaries therein set out and the estate purported to be conveyed and no further. 1 Am.

Jur., 909. In *Carson v. Carson,* 122 N. C., 645, 30 S. E., 4, it was said: "This Court has held that a deed is never color of title for more than it professes to convey. *McRae v. Williams,* 52 N. C., 430."

It follows, therefore, that by possession under the McLaurin deed of 1925 a good title was vested in the plaintiff as to one-half interest in the land only, the title to the other half-interest not having been conveyed until 1930, and that the judgments of the Michelin Tire Co. against J. Frank Crowell, docketed in 1934, constituted an encumbrance as to one-half interest in the land, in breach of the covenants and warranties in the deed from defendants to plaintiff.

The judgment of the court below that the plaintiff had no cause of action against the defendants must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

JOE ELLIS RABIL v. ROSA FARRIS AND JOHN FARRIS.

(Filed 13 April, 1938.)

Judgments § 32—Judgment in action by minor, brought by father as next friend, held not to bar action by father to recover for loss of services.

In an action by a minor, brought by her father as next friend, judgment was entered on the verdict that the minor was not injured by the alleged negligence of defendants. Thereafter the father instituted this action against the same defendants to recover for loss of services of his daughter and medical expenses incurred by him as a result of her injuries, the allegations of negligence in both actions being substantially the same. *Held:* The minor was the real party plaintiff in the prior action, even though it was brought by her father as next friend, and there is no privity between the plaintiffs in the respective actions, and defendants' plea of estoppel by judgment in the second action should have been overruled, the right of action in the father being separate and distinct from the right of action in the daughter, and the term "privity" meaning mutual or successive relationship to the same rights or property.

BARNHILL, J., dissenting.

DEVIN and WINBORNE, JJ., concur in dissent.

APPEAL by plaintiff from *Bone, J.,* at November Term, 1937, of WILSON. Reversed.

T. T. Thorne and Charles B. McLean for plaintiff, appellant.
A. J. Fletcher and Sharpe & Grimes for defendants, appellees.

SCHENCK, J. This is an action by a father to recover damages for expenses incurred and loss of services due to injuries to his infant

daughter, alleged to have been negligently inflicted by the defendants. It is alleged in the complaint that the defendant Rosa Farris owned an automobile and that the defendant John Farris, while operating said automobile as the agent of his codefendant, negligently ran it against and over the infant daughter of the plaintiff and inflicted serious and permanent injury to said daughter, necessitating medical care and nursing for which plaintiff paid, and deprived the plaintiff of the future services of his said daughter.

The answer denied the allegations of negligence; and for a further defense prayed that this action be dismissed for the reason that the plaintiff was estopped from maintaining it by having acted as next friend of his infant daughter, as plaintiff in another action against the defendants in this action, to recover damages for personal injuries negligently inflicted, and that substantially the same allegations of negligence were made in the other action as are made in this action, and that upon trial of the other action the jury found that said infant daughter was not injured by the negligence of the defendants as alleged.

It was agreed by counsel that the court might find the facts relating to the prayer for dismissal and render judgment thereupon. The court found that the former action had been brought by the present plaintiff as the next friend of his infant daughter against the present defendants, and that the allegations of negligence therein were "practically identical" as the allegations of negligence in this case, and that upon trial of the former action the jury answered in the negative the following issue: "Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint," and that judgment was rendered in favor of the defendants from which plaintiff did not perfect appeal, and that said judgment "became final and binding upon the parties to said action and those who were privy thereto"; and that plaintiff's alleged cause of action grew out of the identical facts and circumstances alleged as a basis of the action instituted by the plaintiff as next friend of his infant daughter against the defendants herein.

The court then concluded as a matter of law that "the plaintiff in the present action, having been a party as next friend of his infant child in the first action, and the jury having determined in said action that the defendants were not negligent in respect to the matters alleged against them . . . defendants' plea in bar should be sustained," and ordered and adjudged that the present action be dismissed at the cost of the plaintiff.

To the judgment the plaintiff reserved exception.

The court was in error in holding that the plaintiff in this action, in acting as next friend for his infant daughter as plaintiff in the former action, became a party to such former action and was estopped by the

verdict and judgment therein from maintaining the present action, and that the defendants' plea in bar should, therefore, be sustained.

Ruffin, J., in *George v. High*, 85 N. C., 113, says: "It has been decided by this Court in several cases, and amongst them the cases of *Branch v. Goddin*, 60 N. C., 493; *Falls v. Gamble*, 66 N. C., 455, and *Mason v. McCormick*, 75 N. C., 263, that one who conducts a suit as guardian or next friend for infants is not a party of record, but that the infants themselves are the real plaintiffs."

In *Krachanake v. Mfg. Co.*, 175 N. C., 435, in speaking of the next friend of the infant plaintiff, the Court said: "The father is not, however, a party in the legal sense. He is an officer appointed by the court to protect the interest of his son, who is the real plaintiff (*Hockoday v. Lawrence*, 156 N. C., 322). . . ."

There exists no privity between the plaintiff in this action and the plaintiff in the former action. "The term 'privity' means mutual or successive relationship to the same rights or property." Black's Law Dictionary (2nd Ed.), p. 943. The two actions were not related to "the same rights or property."

"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." *Meacham v. Larus & Brothers Co.*, 212 N. C., 646.

The cases of *White v. Charlotte*, 211 N. C., 186, and *White v. Charlotte*, 212 N. C., 539, relied upon by the appellees, are not applicable to this case. The former case was brought by the father as administrator against the city of Charlotte and Charlotte Park and Recreation Commission for the wrongful death of his intestate and a judgment of nonsuit was sustained upon appeal, "for the reason that there was no evidence at the trial tending to show that the death of plaintiff's intestate was caused by the negligence of the defendants or either of them." The latter case was brought by the father of the infant intestate against the same defendants for loss of the services of his deceased daughter and a judgment of nonsuit was sustained for the reason that "The evidence in this case was substantially the same as in *White v. Charlotte, supra*, 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." No question of estoppel or *res adjudicata* was raised, both cases being dismissed upon a demurrer to the evidence, which was substantially the same in each case.

For the error assigned, the judgment below must be

Reversed.

BARNHILL, J., dissenting: With the conclusion of the majority in this cause I cannot agree. This case is one of first impression in this Court, and the point at issue does not seem to have been often presented to courts of other jurisdictions.

It is true, as stated in the opinion, that in a strict legal sense the plaintiff herein was not a party to the suit instituted by him as next friend for his infant daughter against this defendant to recover damages resulting from the same alleged negligent acts of the defendants. This is not necessary. A person is, and should be, bound by a judgment in a suit in which he has the right to adduce testimony, to cross-examine witnesses, and to appeal from the judgment entered. This is the rule as stated by Greenleaf and by Ruling Case Law.

Speaking to the subject in *Green v. Bogue*, 158 U. S., 478, 39 U. S. L. Ed., 1061, 1070, it is said: "Parties, in the larger legal sense, are all persons having the right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies. 1 Greenl. Ev., sec. 535."

In *Anderson v. Third Avenue R. R. Co.*, 9 Daly, 487, it was held that a judgment in favor of the minor in an action by him suing by a guardian *ad litem* for his injuries was conclusive as to the defendant's negligence in a subsequent action by the father for the loss of his son's services. In *Lindsay v. Danville*, 46 Vt., 144, the husband sued for loss of services and medical expenses incurred on account of the wife's injury through the defendant's negligence, and it was held that a judgment against the defendant in a former joint action by husband and wife for her injury was conclusive in the husband's action as to the defendant's negligence. The Court said, at p. 149, "If the husband would be concluded by an adjudication against the wife, in which he had no part, *a fortiori*, he would be concluded by a judgment to which he was party and had full opportunity to adduce evidence and cross-examine the witnesses of his adversary."

In the language of *Lord Ellenborough*, in the leading case of *Outram v. Morewood et ux.*, 3 East, 346, "The estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which, having been once distinctly put in issue by them or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them." In that case the defendant's wife, Ellen, had been sued for digging coal in the plaintiff's mine; the wife had justified her acts under a claim of right in the coal mine, which had been determined against her. She afterwards intermarried with the defendant Morewood, and continued to dig and remove the coal from plaintiff's mine, and the plaintiff brought a second suit against husband and wife, who attempted to set up the same right and title as in the former suit, and the Court held that both defendants were es-

topped. The case was elaborately argued by *Erskine* on the one side and by *Gibbs* on the other, and the Chief Justice brought to his service his great learning and judicial vigor in a thorough analysis of all the authorities on the subject of estoppel, and seems to have had no doubt that if the wife was estopped by the former judgment against her the husband would be estopped also.

In *Brown v. Mo. P. R. Co.*, 96 Mo. App., 164, 70 S. W., 527, the wife sued, joining the husband as a nominal party. There was judgment in favor of the wife. In a suit by the husband the judgment was held to be *res judicata* against the defendant. *Morris v. Kansas City*, 117 Mo. App., 298, 92 S. W., 908, refers to two suits, one by the husband and one by the wife. Judgment in favor of the wife in her case held as *res judicata* against the defendant in the husband's case. Certainly if a judgment in such cases is *res judicata* against the defendant it should likewise estop the plaintiff who conducted the cause in behalf of his child when he sues in his own behalf.

There is, in fact, but one action, and it is based upon the alleged negligence of defendants. The father recovers nothing that the infant would not be entitled to recover were he an adult. Certain of the damages are awarded the parent by reason of his liability for expenses and care of his child during minority and on account of the fact that the law gives him the earnings of the infant until he arrives at 21 years of age. The main issue in each case is the issue of negligence.

In the instant case the plaintiff, as next friend of his infant child, had full control of the suit instituted by him in behalf of the infant. He had an opportunity, and it was his duty, to control the proceedings, to present all evidence favorable to his infant child, to adduce and cross-examine witnesses, and to appeal from the decision if he was so advised. Having done so, as we may assume that he did, the issue of negligence was answered in the negative. It appears to me as being unconscionable to now permit him to again undertake to establish negligence before another jury to the end that he personally may recover of the defendant. He has no cause of action unless his child was injured by the negligent conduct of the defendants. It has been judicially determined that such injuries as the child received were not the result of any negligence on the part of the defendants. Yet the plaintiff is given an opportunity to seek to recover for his own benefit damages arising out of the conduct of the defendants, which was neither wrongful nor negligent, as has been determined in an action in which this plaintiff was charged with the duty, as the official representative of his child, to present all available evidence tending to establish a right of action.

Fundamentally, there is here but one cause of action which the law divides for procedural convenience solely because the damages are to be

divided between the father and the infant child. On the same set of facts as here an adult plaintiff could bring but one action on the merits. Why then permit two actions contested on their merits, with respect to the same facts, merely because the damages are to be divided between the father and the infant? Under the doctrine of *res judicata* the father should be bound as to the determination of facts in the prior case in which he participated. Since the merits of the prior case were determined against him, there are no damages apportionable to him and, accordingly, he has no cause of action.

There are decisions which are not in accord with those cited. I am of the opinion, however, that sound reason leads to the conclusion that the plaintiff herein should not be permitted to prosecute his action, but that the judgment below should be affirmed.

DEVIN and WINBORNE, JJ., concur in dissent.

C. E. FENNER, A. C. BEANE, J. N. CARPENTER, J. L. JULIAN, C. W. SHEPARD, E. H. HULSEY, AND R. B. FLINN, GENERAL PARTNERS, AND N. L. CARPENTER, SPECIAL PARTNER, TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF FENNER & BEANE, v. FRANCES GREEN TUCKER, ADMINISTRATRIX OF W. A. GREEN, DECEASED.

(Filed 13 April, 1938.)

1. Contracts § 7d—Defendant's evidence held to establish that commissions related to cotton futures, and that contract was void as matter of law.

This action was instituted to recover commissions alleged to be due and advancements made in alleged buying and selling of cotton for the account of defendant's intestate, who was a dealer in sand. Defendant introduced evidence of stipulations of plaintiff brokers that on all "marginal business" the brokers might close out transactions when "margins" are near exhaustion, and that either party might "call" for "margin" in accordance with variations of the market, and a letter written by intestate to the brokers referring to a "call" from plaintiffs' "margin clerk." There was no probative evidence that the parties contemplated actual delivery of the cotton at any time. *Held:* Under the provisions of N. C. Code, 2145, defendant made out a *prima facie* case that the cause of action was founded on illegal contracts in cotton "futures," N. C. Code, 2144, placing the burden of proof on plaintiffs to establish legality, N. C. Code, 4146, and there being no conflicting evidence requiring the submission of the issue to the jury, defendant's motion to nonsuit was properly granted.

2. Same—

Ch. 236, sec. 2, Public Laws of 1931, repealing C. S., 2145, 2146, does not apply to contracts made prior to its enactment, the repealing statute being prospective in effect and not retroactive.

3. Statutes § 7—

Ordinarily, a statute will be given prospective effect only, and will not be construed to have retroactive effect unless such intent is clearly expressed or arises by necessary implication from its terms.

4. Evidence § 6—

The burden of proof constitutes a substantial right.

5. Evidence § 32—

A partner in intestate's firm may not testify as to transactions or communications with intestate in an action by brokers against the estate on a claim for commissions and advancements. C. S., 1795.

6. Evidence § 45—Testimony held to contain mere conclusions and opinions of witness as to intestate's intent.

In this action against an estate by brokers to recover commissions and advancements, defendant administratrix contended that the cause of action was founded upon illegal cotton "futures" contracts. There was no direct competent evidence as to intestate's intent in regard to whether actual delivery of the cotton was contemplated. *Held:* The exclusion of testimony of plaintiff brokers' clerk as to the intent of the parties in regard to actual delivery was properly excluded, it appearing that the testimony was merely the conclusions and opinions of the witness.

7. Contracts § 7d—

The intent of the parties that the merchandise contracted for should not be actually delivered is the cardinal element of a "futures" contract made illegal by N. C. Code, 2144, and the courts will disregard the form and ascertain whether the intent of the parties was to speculate in the rise and fall of the price of the commodity.

APPEAL by plaintiffs from *Hamilton, Special Judge,* at November Term, 1937, of JOHNSTON. Affirmed.

This is a civil action brought by plaintiffs to recover of the defendant the sum of $2,468.51, with interest thereon from 15 September, 1926, at six per cent per annum until paid, on an alleged account for commissions claimed to be due and for moneys claimed to have been paid out and advanced in the alleged buying and selling for the account of the defendant's intestate, W. A. Green, as his alleged brokers and agents, cotton for future delivery, on the New York Cotton Exchange, in the city, county, and State of New York, during the period from 4 February, 1926, to and including 15 September, 1926.

This action was originally commenced against the then defendant, W. A. Green, in July, 1928. At the April, 1932, Term of court plaintiffs submitted to a voluntary judgment of nonsuit, and thereafter, having paid all court costs, recommended said action in October, 1932. This second action is in all respects the same as the first action begun in July, 1928.

Following the recommencement of said action the defendant W. A. Green died, and Frances Green Tucker was duly appointed administratrix of his estate, and as such was duly substituted and made a party defendant for and in the place of the defendant W. A. Green, and said administratrix duly filed her answer within apt time.

In his answer, filed prior to his death, the said W. A. Green admitted that he gave plaintiffs certain orders; that plaintiffs advised him of certain purchases and sale and mailed to him at Selma, N. C., certain confirmations, and that plaintiffs rendered him certain statements, but denied that he was indebted to plaintiffs; and as a further defense pleaded sections 2144, 2145, and 2146 of the North Carolina Code of 1927 (known as the North Carolina Anti-Futures Statutes) as a bar to plaintiffs' right to recover. The administratrix adopted the answer of her intestate, W. A. Green, filed on 23 November, 1932, with respect to each and every allegation.

The case came on for trial at the November Term, 1937, before Hon. Luther Hamilton, special judge, presiding, and a jury. At the close of plaintiffs' evidence defendant moved for a judgment as in case of nonsuit, which motion was granted and judgment entered accordingly. The plaintiffs excepted, assigned error, and appealed to the Supreme Court. The other exceptions and assignments of error made by plaintiffs will be considered in the opinion.

Alfred S. Wyllie and F. H. Brooks for plaintiffs.
Ward, Stancil & Ward for defendant.

CLARKSON, J. At the close of plaintiffs' evidence the defendant in the court below made a motion for judgment as in case of nonsuit. C. S., 567. The motion was allowed and in this we see no error.

The action is to recover for moneys claimed to have been paid out and advanced by plaintiffs to defendant's intestate, as broker or agent, in the purchase of cotton for future delivery upon the New York Cotton Exchange. The defendant in her answer set up as a defense: "That said cotton so agreed to be purchased, or sold and delivered, was not actually delivered at the time of making said agreements to purchase, or sell and deliver, and that this defendant deposited or secured, or agreed to deposit or secure, what are commonly called 'margins' with the plaintiffs. . . . With no intention or contemplation of making any actual delivery of said cotton, but to pay or to receive the difference in price, as aforesaid, in money; and this defendant especially pleads secs. 2144, 2145, and 2146 of the North Carolina Code of 1927, in bar of the plaintiffs' right to recover herein."

Section 2144 declares certain contracts as to "futures" void—"Whereby the parties thereto contemplate and intend no real transaction as to the article or thing agreed to be delivered."

N. C. Code, 1927, sec. 2145, is as follows: *"Prima facie evidence of illegal contract in 'futures.'* Proof that anything of value agreed to be sold and delivered was not actually delivered at the time of making the agreement to sell and deliver, and that one of the parties to such agreement deposited or secured, or agreed to deposit or secure, what are commonly called 'margins,' shall constitute *prima facie* evidence of a contract declared void by the preceding section."

Sec. 2146. *Burden shifted by plea of illegality; pleadings not evidence in criminal action.* When the defendant in any action pending in any court shall allege specifically in his answer that the cause of action alleged in the complaint is in fact founded upon a contract such as is by this chapter made void, and such answer shall be verified, then the burden shall be upon the plaintiff in such action to prove by the proper evidence, other than any written evidence thereof, that the contract sued upon is a lawful one in its nature and purposes, and the defendant may likewise produce evidence to prove the contrary: *Provided, nevertheless,* that any allegation or statement of fact made in any pleading in any such action, or the evidence produced on the trial in any such action, shall not be evidence against the party making or producing the same in any criminal action against such party."

In the *evidence of plaintiffs* is the following: "It is further understood that on all marginal business Fenner & Beane reserve the right to close transactions when margins are near exhaustion without notice." . . . "Either party may call for a margin, as the variations of the market for like deliveries may warrant, which margin shall be kept good."

Also letter from W. A. Green (Sand), 11 March, 1926. In the very body of the letter introduced by plaintiffs we find this statement: "Have just received telegram from *your margin clerk*. . . . My trading has been limited on account of the market being so narrow and as I did not have any cotton with you at the close of business last night is the reason *this call* was made." It is common knowledge that when either party to a contract involving futures refers to *a call* they mean the deposit of more margin. This one statement clearly shows the intention of both of the parties to these *future* transactions; defendant's intestate stated he had no cotton and the plaintiffs knew they could not compel delivery. Defendant's intestate dealt in *sand* and not *cotton*. It is also interesting to note that *this call* was made by the plaintiffs' *"margin clerk."* The evidence was plenary that the dealings between the parties were on margin. There was no probative evidence that the

intent of the parties contemplated at any time actual delivery. This, under the statute, upon same being pleaded, was *prima facie* evidence of illegal contract in futures.

In *S. v. Clayton,* 138 N. C., 732 (735), is the following: "The test which the statute requires is the 'intention not to actually deliver' the articles bought or sold for future delivery. No matter however explicit the words in any contract which may require a delivery, if in fact there is no intention to deliver, but the real understanding is that at the stipulated date the losing party shall pay to the other the difference between the market price and the contract price, this is a 'gambling' contract and is null and void at common law. *Irwin v. Williar,* 110 U. S., 499; *Bibb v. Allen,* 149 U. S., 481; *Clews v. Jamieson,* 182 U. S., 461."

This matter was gone into thoroughly in *Welles & Co. v. Satterfield,* 190 N. C., 89 (94): "Cyc. Law Dictionary, under the head of 'margin,' says see 'gambling contracts,' and under such head defines 'margins': 'Money or collaterals deposited with a broker to protect contracts, usually for future delivery.' . . . 'A payment made on account by a customer to a stockbroker, under an agreement between the customer and the stockbroker in which the stockbroker agreed either to sell or to buy from the customer a certain number of shares of stock, but under which, in fact, no delivery or transfer of shares was contemplated, is known in stockbrokers' parlance as a 'margin.' *McClain v. Fleshman* (U. S.), 106 Fed., 880, 882; C. S., 2145, *supra.*"

Upon conflicting evidence as to whether or not the contract is a gambling one becomes a question for the jury under proper instructions. In the present case we see no sufficient evidence that would carry the case to the jury.

Sections 2145 and 2146 were repealed by Public Laws 1931, ch. 236, sec. 2. The repeal has no effect on this action as the contract sued on was made prior thereto. The language: "That this act shall be in force and effect from and after its ratification." *S. v. Foster,* 185 N. C., 674; *Ashley v. Brown,* 198 N. C., 369 (372). The acts are prospective, not retroactive.

In *Greer v. Asheville,* 114 N. C., 678 (681), it is said: "Unless the legislative intent to the contrary is made manifest, either by the express terms of the statute or by necessary implication arising out of it, it will, as a rule, be held to operate prospectively only—never retroactively." *Hicks v. Kearney,* 189 N. C., 316 (319).

It is well settled in this jurisdiction that the burden of proof constitutes a substantial right.

The plaintiffs contend that the court erred in excluding certain testimony of the witness, John L. Julian, for plaintiffs, and the court erred in excluding certain testimony of the witness William F. Caruso, con-

tract clerk in plaintiffs' New York office. We cannot so hold. Julian was a partner in plaintiffs' firm and he was testifying against one whose lips are sealed in death.

N. C. Code 1935 (Michie), sec. 1795, is as follows: "Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through, or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator, or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee, or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication."

In *Herring v. Ipock,* 187 N. C., 459 (461), it is written: "Exclusion does not apply when witness has no interest in the result of the action. The interest which disqualifies one from testifying under C. S., 1795, *supra,* is a direct, legal, or pecuniary interest in the event of the action. *Helsabeck v. Doub,* 167 N. C., 205; *In re Gorham,* 177 N. C., 275."

The plaintiffs also contend, as stated above, that the court erred in excluding certain testimony of the witness William F. Caruso, contract clerk in plaintiffs' New York office. We cannot so hold. The gist of the illegality of the contract is the intention of both parties not to actually deliver the articles bought or sold for future delivery. The questions and answers of Caruso were directed as to whether the intention of the parties was that the cotton should be actually delivered. We think that the testimony was of no probative force as the intestate's actual intent was not attempted to be shown by direct competent testimony or admissions. From the questions and answers it appears that the answers were merely conclusions and opinions of the witness.

In *Holt v. Wellons,* 163 N. C., 124 (129-130), it is said: "Of course, the law deals only with realities and not appearances—the substance, and not the shadow. It will not be misled by a mere pretense, but strips a transaction of its artificial disguise in order to reveal its true character. It goes beneath the false and deceitful presentment to discover what the parties actually intended and agreed, knowing that 'the knave counterfeits well—a good knave.' It always rejects the ostensible for the real in looking for fraud or a violation of law. The essential inquiry, therefore, in every case is as to the necessary effect of the contract

and its true purpose. We said in *Edgerton v. Edgerton,* 153 N. C., 167: 'The form of the contract is not conclusive in determining its validity, when it is assailed as being founded upon an illegal consideration and as having been made in contravention of public policy. If, under the guise of a contract of sale, the real intent of the parties is merely to speculate in the rise or fall of the price, and the property is not to be delivered, but only money is to be paid by the party who loses in the venture, it is a gambling contract and void.' "

The defendant's intestate dealt in "sand." Such was on his letterhead introduced by plaintiffs. Yet, at the price of cotton during the seven months of dealing between the parties, 4,300 bales of cotton were involved, amounting to $387,000. There is no evidence of any delivery of this cotton, or any attempt to deliver any of it, or any demand for any delivery. On the contrary the witness William F. Caruso testified that there was never any delivery of any of the cotton involved in these transactions.

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

Affirmed.

E. M. MORGAN v. THE TURNAGE COMPANY, INC.

(Filed 13 April, 1938.)

1. Parties § 5—

The trial court has the power to order the joinder of additional parties defendant when the order does not change the cause of action.

2. Appeal and Error § 37b—

Ordinarily, an order making additional parties is not prejudicial, and therefore such orders are usually discretionary and not reviewable.

APPEAL by defendant from *Olive, Special Judge,* at September Term, 1937, of PITT. Appeal dismissed.

Wm. J. Bundy and John Hill Paylor for plaintiff.
Albion Dunn for defendant.

PER CURIAM. The defendant appealed from an order of the court below making additional parties defendant. The power of the judge to make additional parties to an action is well settled, and it does not appear that the order appealed from will change the cause of action or work injustice to the appellant. *Tillery v. Candler,* 118 N. C., 888, 24 S. E., 709; *Mills v. Callahan,* 126 N. C., 756, 36 S. E., 164; *Bernard v. Shemwell,* 139 N. C., 446, 52 S. E., 64; *Joyner v. Fiber Co.,* 178 N. C.,

634, 101 S. E., 373; *Barbee v. Cannady*, 191 N. C., 529, 132 S. E., 281; *Wilmington v. Board of Education*, 210 N. C., 197, 185 S. E., 767.

As was said in *Bernard v. Shemwell, supra*, "It can very rarely happen that making an additional party will be a serious prejudice, and hence such orders are usually discretionary and not reviewable."

Appeal dismissed.

STATE v. BLACKIE FUER, A. B. MEAUX, AND LOUIS HEATH.

(Filed 13 April, 1938.)

False Pretenses § 2—

Evidence *held* sufficient to be submitted to the jury as to each defendant on charges of conspiracy to rob and larceny of a sum of money by trick.

APPEAL by defendants from *Frizzelle, J.*, at January Term, 1938, of LENOIR. No error.

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

J. A. Jones and Louis Rubin for defendants.

PER CURIAM. The defendants appeal from judgment imposing sentence following conviction upon a bill of indictment charging conspiracy to rob with another count for larceny of a sum of money by trick. There was a general verdict of guilty.

Appellants contend that the evidence of conspiracy was insufficient to warrant the submission of that count to the jury and that the court erred in its charge to the jury on the other count. An examination of the record, however, shows that these assignments of error cannot be sustained. *S. v. Herndon*, 211 N. C., 123; *S. v. Anderson*, 208 N. C., 771, 182 S. E., 643; *S. v. Whiteside*, 204 N. C., 710, 169 S. E., 711; *S. v. Wrenn*, 198 N. C., 260, 151 S. E., 261.

According to the State's evidence, the prosecuting witness, a tobacco farmer who had just received $1,000 from the sale of the product of his toil, fell into the hands of these defendants who, unlawfully and craftily conspiring together and by artifice or trick, deprived him of his money. The evidence was sufficient to support the verdict and judgment.

None of the exceptions noted to the ruling of the court or to the charge of the jury can be sustained. In the trial we find

No error.

STATE v. WADDELL HADLEY.

(Filed 13 April, 1938.)

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 the appeal will be allowed, Rule of Practice in the Supreme Court No. 28, but in capital cases this will be done only after an inspection of the record fails to disclose error.

APPEAL by defendant from *Frizzelle, J.*, at February Term, 1938, of SAMPSON.

Motion by State to dismiss appeal of defendant.

Attorney-General Seawell for the State.
No counsel contra.

PER CURIAM. The defendant was tried upon a bill of indictment charging him with the crime of rape. There was verdict of guilty of rape as charged in the bill, 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; *S. v. Robinson*, 212 N. C., 536, 193 S. E., 701), 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 Rule 28 of this Court as to filing briefs. This motion is allowed. *S. v. Kinyon*, 210 N. C., 294, 186 S. E., 368; *S. v. Robinson*, *supra*.

However, as is customary in capital cases, we have examined the record and case on appeal to see if any error appears. The only exceptions presented are without merit. The case on appeal reveals evidence competent and sufficient to sustain the verdict. The charge of the court below fully and fairly presented the case to the jury. To it no exception is taken.

We find no error.

Judgment affirmed and appeal dismissed.

STATE v. SYLVESTER OUTLAW, APSOM OUTLAW, AND LONNIE GARDNER.

(Filed 13 April, 1938.)

Criminal Law §§ 79, 80—

Where defendants docket their appeal, but fail to file briefs, their appeal must be dismissed on motion of the Attorney-General, Rule of Practice in the Supreme Court No. 28, but in a capital case this will be done only after an inspection of the record fails to disclose error.

APPEAL by defendants from *Grady, J.*, at October Term, 1937, of DUPLIN. Appeal dismissed.

Motion by the State to dismiss defendants' appeal.

Attorney-General Seawell for the State.

Norwood B. Boney, Robt. L. West, and Robt. C. Wells for defendants.

PER CURIAM. Defendants were charged in the bill of indictment with rape. The jury returned a verdict of guilty of the felony of rape as to each of the defendants, and thereupon sentence of death was pronounced as to each of the defendants. The defendants docketed their appeal, but did not file brief with the clerk of this Court by 12 o'clock noon on the second Saturday preceding the call of the Sixth District, or at any time subsequent thereto.

The Attorney-General moves to dismiss the appeal. This motion must be allowed. Rule 28 of Rules of Practice in the Supreme Court, 200 N. C., 831-2. However, according to the usual custom of this Court in capital cases, we have examined the record to see if any error appears. In the record we find no error, the judgment is affirmed and the

Appeal is dismissed.

O. W. JARRETT v. KERMIT FLETCHER HOLLAND.

(Filed 13 April, 1938.)

1. Lis Pendens § 5—

A party purchasing property, the title to which is involved in a pending suit, of which he has actual or presumptive notice is bound by the judgment as much as the party to the action from whom he bought.

2. Lis Pendens § 1—

When an action involving title to realty is instituted in the county in which the land lies, the action itself is notice, and no notice under C. S.,

500, is required, but mere description of the land in the complaint is insufficient, it being necessary that its allegations show that title to the land is involved.

3. Mortgages §§ 2, 12—Mortgagee has prior lien to that of judgment against mortgagor for purchase price in absence of notice of lis pendens.

There is no lien for purchase money in North Carolina, and while the judgment debtor cannot claim homestead as against a judgment for purchase money (N. C. Constitution, Art. X, sec. 2), the lien of a mortgage executed to a third person has priority over the judgment lien, when the mortgage is executed prior to the rendition of the judgment and prior to an amendment putting the title to the property in issue.

4. Lis Pendens § 1—Action for recovery of purchase money held not to involve title so as to constitute notice of lis pendens.

This action was instituted in the county in which the land lies to recover balance of the purchase price, the property being described in the complaint. Defendant mortgaged the property to a third person after the institution of the action, but prior to the amendment of the complaint alleging that defendant had agreed to give plaintiff a purchase money mortgage. *Held:* The action, prior to the amendment, did not involve title to the realty, but was for a money recovery only, and the action did not constitute *lis pendens*, and plaintiff, upon recovery of judgment, was not entitled to judgment that the land be sold free from the lien of the mortgage, plaintiff's sole remedy to attack the mortgage being by independent action.

APPEAL by plaintiff from *Rousseau, J.*, at February Term, 1938, of CATAWBA. Affirmed.

This is a civil action in which the court below denied a motion made by the plaintiff, after judgment, for a supplemental order directing the commissioner appointed to sell the lands described in the complaint free and clear of the encumbrance created by a mortgage from the defendant to Mrs. Cordie Holland, executed and recorded prior to the rendition of the judgment.

The complaint alleges that on 16 November, 1935, plaintiff sold to defendant a certain tract of land described in the complaint for the sum of $485.00; that at the time plaintiff delivered deed for said premises to the defendant, the defendant stated that he did not have the full purchase money. It was then agreed that the defendant should pay $140.00 and should pay the balance of $345.00 within one year thereafter; that the plaintiff, relying upon the defendant's promise to pay the balance of the purchase money within one year, delivered deed to the defendant, and that the defendant has failed and refused to pay said amount now due. The complaint contains a prayer for judgment for the amount of the debt and for a decree declaring said judgment a lien upon the lands described in said deed.

At the time of the trial the plaintiff was permitted to file an amended complaint setting up an agreement by defendant to give a purchase money mortgage on the real estate as an additional allegation to the original complaint. At the December Term, 1937, issues were submitted to and answered by the jury as follows:

"1. Did the defendant, at the time of the execution of the deed, or prior thereto, agree with the plaintiff to execute a purchase money mortgage? Answer: 'Yes.'

"2. How long after 16 November, 1935, was the defendant to have to pay the balance of the purchase money? Answer: 'One year.'"

Thereupon the court rendered judgment for the debt and decreed that said judgment was a specific lien upon the lands described in the complaint. A commissioner was appointed to sell the land for the satisfaction of said judgment.

Prior to the rendition of said judgment the defendant executed and delivered to Mrs. Cordie Holland, his mother, a mortgage upon said premises to secure the payment of $1,200, which amount exceeds the value of the land. This mortgage was recorded prior to the rendition of the judgment in the pending cause, but approximately seven months subsequent to the institution of the action.

On 16 February, 1938, plaintiff filed a motion setting out the facts and moving the court that a supplemental judgment or order be issued allowing the commissioner to sell the lands under the prior order, free and clear of the encumbrance of the purported mortgage to Mrs. Cordie Holland. The court below denied the motion of the plaintiff and the plaintiff appealed.

G. A. Warlick, Jr., for plaintiff, appellant.
Louis A. Whitener for defendant, appellee.

PER CURIAM. When a person acquires an interest in property pending an action of which he has notice, actual or presumed, in which the title to the land is in issue, from one of the parties to the action, he is bound by the judgment in the action just as the party from whom he bought would have been. The rule is considered absolutely necessary to give effect to the judgments of courts, because if it were not so held a party could always defeat the judgment by conveying in anticipation of it to some stranger, and the plaintiff would be compelled to commence a new action against him. *Rollins v. Henry,* 78 N. C., 342.

It is likewise true that where the action is instituted in the county in which the land is situate the action itself is notice to those who seek to deal with the property described in the complaint and no notice of *lis*

pendens, under C. S., 500, is required, except the procedure now provided by C. S., 501. *Collingwood v. Brown,* 106 N. C., 362; *Arrington v. Arrington,* 114 N. C., 151; *Rollins v. Henry, supra.* See *Horney v. Price,* 189 N. C., 820.

However, to entitle a litigant to the protection of the *lis pendens* doctrine the suit or action must in some way involve the title to the real estate. The mere description of a tract of land in a complaint in which only a judgment for debt is sought does not give the action the force and effect of a *lis pendens* unless the allegations in the complaint involve the title to lands. Thus it was held in *Threlkeld v. Land Co.,* 198 N. C., 186, that where a mortgagee of lands brings an action to recover on the note secured by the mortgage, and to set aside a deed of the mortgagor but not to foreclose the mortgage, the action is not one affecting the title of land within the meaning of C. S., 500, and the judgment of the lower court canceling and removing the notice of *lis pendens* from the records was affirmed. In *Horney v. Price,* 189 N. C., 820, it was held that an action to recover damages for the breach of an option contract is not an action affecting the title to realty within C. S., 500, and the filing of notice in such case will not affect a purchaser pending that action.

There is no lien for purchase money in North Carolina. *Lumber Co. v. Lumber Co.,* 150 N. C., 282; *Womble v. Battle,* 38 N. C., 182. The mere fact that the complaint alleges that the amount due by the defendant to the plaintiff is the balance of the purchase money for the lands described in the complaint does not convert the action into one involving the title to real estate. It remains simply an action for judgment upon a debt.

While a judgment debtor cannot claim a homestead as against a judgment for purchase money (N. C. Const., Art. X, sec. 2), this does not affect the rights of the mortgagee who acquired an interest in the property prior to the rendition of the judgment, nor can it be said that the pendency of the action at the time Mrs. Holland accepted a mortgage upon the premises gives the plaintiffs any priority. As the action did not involve title to real estate it did not constitute such notice to Mrs. Holland as would bind her and subordinate her lien to the judgment procured by the plaintiff. Up until the very day of the trial there was no suggestion in the pleadings that the defendant had agreed to give a purchase-money mortgage or that the plaintiff was seeking to have it so declared.

Whatever attack the plaintiff may wish to make upon the mortgage accepted by Mrs. Holland must be made in a separate and independent action. Her mortgage was recorded prior to the rendition of judgment in favor of the plaintiff. However binding the judgment may be in

creating a specific lien upon the land described in the complaint, *inter partes,* it creates no lien upon said property in favor of the plaintiff prior to that procured by Mrs. Holland under the mortgage which was executed and recorded before the entry of the judgment.

The court below properly denied plaintiff's motion for an order directing the commissioner to sell the land free and clear of the mortgage held by Mrs. Holland upon the assumption that said judgment was a prior lien.

Affirmed.

STATE OF NORTH CAROLINA ON THE RELATION OF JOHN G. CARPENTER, SOLICITOR OF THE FOURTEENTH JUDICIAL DISTRICT, v. DR. M. F. BOYLES, TRADING AND DOING BUSINESS AS "GREENWICH VILLAGE."

(Filed 4 May, 1938.)

1. Nuisance § 9—

By provision of C. S., 3182, evidence of the general reputation of the place in question is competent in an action to abate a public nuisance.

2. Trial § 1—

The time set for trial of a case is in the sound discretion of the trial court.

3. Pleadings § 19—

The right to demur on grounds other than the failure of the complaint to state a cause of action and want of jurisdiction is waived by failure to demur in apt time, and as to grounds which may be waived it is not error for the trial court to refuse to permit defendant to withdraw his answer and file demurrer. C. S., 518.

4. Same—

Defendant may demur *ore tenus* for failure of the complaint to state a cause of action and for want of jurisdiction at any time, even in the Supreme Court on appeal. C. S., 518.

5. Nuisance § 9: Injunctions § 10—

In an action to abate a public nuisance plaintiff relator is not required to give an undertaking, C. S., 3181, the provisions of C. S., 854, not being applicable.

6. Costs § 1: Appeal and Error § 2—

The refusal of the trial judge to require a prosecution bond in an action to abate a public nuisance is not appealable. C. S., 493.

7. Constitutional Law § 15a: Nuisance § 9—

C. S., 3180, *et seq.*, providing for the abatement of public nuisances by temporary order without bond, and the sale of the personalty and the closing of the property for one year upon the finding of the jury, is constitutional, and does not impinge Art. I, sec. 17, of the State Constitution, or Art. XIV, sec. 1, of the Federal Constitution.

8. Constitutional Law § 10—

C. S., 3180, *et seq.*, providing for the abatement of public nuisances is constitutional as a valid exercise of the police power of the State.

9. Nuisance § 9—Testimony of officer as to complaints against place held competent as corroborative of testimony as to its general reputation.

Where, in an action to abate a public nuisance, testimony of several witnesses as to the general reputation of the place in question is properly admitted, C. S., 3182, testimony of the solicitor of the recorder's court that numerous complaints about the place had been made to him in his official capacity is properly admitted for the purpose of corroborating the other witnesses, and objection thereto on the ground that it was hearsay is untenable.

10. Appeal and Error § 6e—

An objection to a question asked a witness cannot be sustained when no exception to the answer of the witness is taken and no motion to strike out the answer is made.

11. Appeal and Error § 39d—

Error in the admission of evidence may be rendered harmless by the admission of an overwhelming mass of other competent evidence tending to prove the same fact.

12. Witnesses § 5: Appeal and Error § 37b—Court's finding that witness had sufficient mentality to testify is not reviewable.

Whether a witness has sufficient mentality to testify is addressed to the sound discretion of the trial court, and the court's finding after examining a proposed witness that he had sufficient mental capacity to testify to the facts, although he had been adjudged insane at the time of the occurrence of the matters in question, is not reviewable.

13. Trial § 39: Appeal and Error § 6b—

An exception, entered after trial and verdict, to the refusal of the court to submit the issue tendered will not be considered when no exception was taken at the time and no exception taken to the issue submitted.

14. Nuisance § 5—

The definition of a public nuisance as given in the charge held not to contain prejudicial error when construed contextually as a whole.

15. Trial § 36—

A charge will be construed contextually as a whole.

16. Nuisance § 9—

Whether the court should allow defendant in an action under C. S., 3180, *et seq.*, to give bond to cancel the temporary order of abatement so far as same relates to the property, is in the sound discretion of the trial court. C. S., 3186.

17. Same—Evidence that place in question constituted public nuisance held plenary to be submitted to the jury.

The evidence disclosed that defendant operated a tourist camp with filling station, dining room and dance hall in front, and cabins in the rear, that the camp was on highway in a thickly settled rural community, that whiskey and contraceptives were sold, that drunken men and women were

seen nightly at the place, and seen to go in the cabins in pairs and stay for a short time, that the community was constantly awakened at night by loud and boisterous conduct and profanity, that fighting occurred between drunken men and women, with many of both sexes nude or indecently clad, and that the general reputation of the place was bad, *is held* amply sufficient to be submitted to the jury upon the issue of whether the place constituted a nuisance against public morals as defined by C. S., 3180, and to support a judgment for its abatement in accordance with C. S., 3181, in an action brought by the solicitor as relator.

STACY, C. J., BARNHILL and WINBORNE, JJ., concur in result.

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

APPEAL by defendant from *Warlick, J.*, and a jury, at 11 October, 1937, Regular Civil Term, of MECKLENBURG. No error.

The complaint of plaintiff is as follows:

"Plaintiff's relator, John G. Carpenter, solicitor of the Fourteenth Judicial District of North Carolina, complaining of the defendant, alleges:

"1. That plaintiff's relator is now and was at the time hereinafter mentioned the duly elected, qualified and acting solicitor of the Fourteenth Judicial District, State of North Carolina, and is a citizen and resident of Gaston County, North Carolina, which said county is in said Fourteenth Judicial District.

"2. That the defendant is a resident and citizen of Mecklenburg County, N. C.

"3. That the defendant owns and operates a place of business on United States Highway No. 74, known as Wilkinson Boulevard, which said place of business is called 'Greenwich Village' and is several miles west of the city of Charlotte; that upon information and belief said defendant is the owner and proprietor of said business and has been for some time.

"4. That said place of business known as 'Greenwich Village,' owned and operated by the defendant herein, is located in a thickly populated rural community; but there is a great deal of traffic continually passing said place of business; that the neighborhood and vicinity of the 'Greenwich Village' is thickly populated and the activities incidental to the operation of the said business by the defendant are easily seen and observed by citizens traversing said highway, and other residents and citizens in the immediate vicinity thereof.

"5. That upon information and belief said business known as 'Greenwich Village' has been operated and is being operated by the defendant herein in such a way as to constitute a public nuisance and an affront to public morals and decency; that upon information and belief the defendant, his agents and servants, have been and are now engaged in the

business of selling liquor unlawfully and in large quantities; that upon the said premises are several cabins, which are flagrantly used by persons of low repute for the purposes of adultery, assignation, prostitution, lewdness and immorality; that the activities incidental to the business of the defendant in the illegal sale of whiskey and other intoxicants, in the drunkenness, boisterous and disorderly conduct upon said premises, and in the flagrant violation of morality upon said premises have disturbed and affronted decent citizens of Mecklenburg County, and are a menace to public morals; that the defendant has been operating and engaged in said business known as 'Greenwich Village' in such a way as to constitute a public nuisance; that unless said public nuisance is abated the users of the highway and the public generally will continue to be injuriously affected by the intolerable conditions existing in, around, and adjacent to the said establishment of the defendant.

"6. That the buildings, erections and premises, where business is carried on, and the tract of land upon which said buildings are located, together with said business, furniture, fixtures, money, merchandise, stock of goods, and other personal property of the defendant, which may be found in and about the said 'Greenwich Village,' constitute a general public nuisance, and in the interest of public morals and decency should be abated.

"Wherefore, your relator prays—

"1. For an order perpetually enjoining and restraining the defendant from maintaining and operating said 'Greenwich Village' to the end that said public nuisance arising therefrom may be abated; that all fixtures, furniture, musical instruments, personal or movable property used in connection with the said public nuisance shall be removed from the building in which said business is carried on, and that said furniture, and fixtures, and other personal or movable property be sold as by law provided.

"2. That the building in which said business is carried on be ordered closed against their use by the defendant, or any other person or persons, and that they be kept closed for a period of one year unless sooner released, and that the defendant be restrained from leasing said building to any other person or persons, firm or corporation, pending the further orders of this court, for a period of one year, unless otherwise ordered by the court.

"3. That it be provided in said order that the officer moving and selling the movable property be allowed the same fees as he would have been allowed for levying upon and selling like property under execution, and that the officer closing the premises and keeping them closed be allowed a reasonable sum by the court for such services.

"4. That out of the proceeds of the sale of the furniture, fixtures and other movable property, the plaintiff be allowed the costs of this action,

including a reasonable attorney's fee, and the balance, if any there be, be paid to the defendant herein.

"5. For such other and further relief as to the court may seem just and proper. Ralph V. Kidd, Uhlman S. Alexander, Attorneys. Verified 15 September, 1937, by John G. Carpenter, Solicitor, etc."

The defendant denied the material allegations of the complaint and prayed that the temporary order closing his business be dissolved. A temporary restraining order was issued on the verified complaint and affidavits and on the hearing the injunction was continued to the final hearing. The entire place was padlocked until the final hearing, without bond, and the matter was set for trial on 12 October, 1937.

On the trial the issue submitted to the jury and their answer thereto was as follows: "Has the defendant conducted and operated the place of business known as 'Greenwich Village' in such a way as to constitute a nuisance? Ans.: 'Yes.'"

The evidence was to the effect: Jake Culp, a rural policeman, testified, in part: "The reputation of Greenwich Village is bad. I know where it is located. I have had several occasions to go there and also have had several occasions to be called there. On some occasions we found a bunch of drunks fighting and locked up 4 or 5 of them. On several occasions we searched the cabins and got couples out of them and found several pints of liquor there. The couples we got there were nude men and women. I have been there on several different occasions when fighting was going on. I know Dr. Boyles. On some occasions we saw him there when we went there, also John Bingham and colored boys who work there, and another white fellow. Greenwich Village is located two and a half or three miles from Charlotte, on the Wilkinson Boulevard. On the front is a service station, dance hall and barbecue place. Behind it is one line of cabins. You can drive your car on the left and go in the cabins. They have one line of cabins further back, built the same way. The cabins are all at the rear of the main building. There is a dance hall in the front part of the building." J. V. Hamilton, a rural policeman, corroborated Culp.

Mrs. M. P. Randall testified, in part: "I live on Wilkinson Boulevard about 100 feet opposite Greenwich Village, across the street from it. The reputation of Greenwich Village is bad. It opened 18 October, last year, and the morning of the 30th I went over and talked with the man who was running the place, do not know his name. He was in Greenwich Village, said he was in charge of the place. I said my children have been woke up continually for a week or more, since the place has been opened, in the morning at 4 o'clock. It was in the morning at 4 o'clock when I went there. There was a drunken girl there cursing every breath. There was a drunk person lying there and there were men drunk. This girl would let no one touch her. They wanted to take her

to town but she would not go. The manager wanted to call the officers. This was right in their door. They said they would take the girl in or call officers to come and get her. I asked her if she was going to work the next day and she wanted to know if it was any of my business. (Objection by defendant, sustained.) She cursed me and cursed the manager. She called him a s. o. b. time after time. The manager told her that if she called him that again he would slap the fire out of her. I have not gone there any other time. I have seen fights and cursing, one after another, and whiskey bottles in people's hands. I have seen people drive up in automobiles and go in the cabins. I am not on that side of it. I have seen automobiles drive in and out of the place frequently. They would stay different lengths of time. It has been a continual thing from the time they opened. We have been woke up by the cursing and noise over there. (Cross-examination): I can say my husband never drank liquor. He is here to testify against Greenwich Village, judge, I would like to slap his face. (Applauding in court room.) By the court: Do not let anyone clap their hands any more."

Mrs. C. A. Yates testified, in part: "I live on Pruitt Street, approximately 150 yards from Greenwich Village. Its reputation is bad. I live on the cabin side from it. I have one child 5 years old. I have heard and seen drunk men and women there nude. They would come from behind the cabins drunk and urinate there. I have not seen them take a drink, but have seen the effects of it. I have frequently seen automobiles drive up there with men and women and stay 40 or 45 minutes; when they would leave, others would come. I have met Dr. Boyles, have seen him on the premises often, day and night. I have noticed roughness, yelling and drunken men and women using profanity. I could hear this from my house, it would wake the family."

Mrs. H. E. McGinnis testified, in part: "I live directly behind the cabins of Greenwich Village. The edge of my front yard is about 50 feet from the last row of cabins. I have been living there about 9 years. The general reputation of Greenwich Village is bad. I have seen cars with N. C. tags on them, from early morning until all times of the night since the place opened up, going into the cabins, staying 30 to 45 minutes, just a boy and a girl. A drunken man and woman went in the cabins about 6 o'clock. I went to put up my car, saw a woman stumble over the children's playthings, she was so drunk it frightened them. They would wake me up anywhere from 11 at night until 6 in the morning. I have heard profanity of the worst type. I would say the people I saw were from 18 to 25 years old. I have seen Dr. Boyles about the premises from time to time, often when people were going in and out in the daytime, but did not see much at night. I saw a couple go in the cabins two months ago, got out of a taxicab. The driver waited for them about 45 minutes." Mrs. C. L. Rhyne corroborated the above witnesses.

The general reputation of the place was shown to be bad by Rev. E. K. McLarty, County Solicitor Merl M. Long, Bob P. Alexander, Paul Beatty, H. Lucas, H. C. Gurley, Mrs. P. A. Beatty, C. B. Strong, J. Frank Gilreath, Mrs. Clara Thompson, and Mr. and Mrs. C. L. Rhyne.

R. L. Winston testified, in part: "I live about 100 yards beyond Greenwich Village. The reputation of that place is bad. Since it has opened up I have lived 150 yards below there and 150 yards above. One place I lived I was single and have married since. . . . (Cross-examination): I have been there and bought sandwiches and medicine. I couldn't say where the fighting was. It looked like a commotion inside the door. I stopped opposite the door, a fellow came out and two or three followed him, this fellow hit him. I ran across the road and got behind an automobile, peeping at it. Probably 30 or 35 people came out, women, men and all were fighting. This was about 4 or 5 months ago, about 11:30 at night. They did not put anyone out because the cops did not come. A couple went in the woods, and a fellow was behind them with a chair round. He had broken it on someone's head, you could hear the licks from the road. He chased them in the woods from Dr. Boyles' premises. Everybody was running each other. One would fall down and then maybe this fellow would hit him, and he would get up and chase that one. The people who were doing the fighting ran into the woods."

C. T. McWhirter testified, in part: "I am the gentleman who was sent to the Insane Asylum following some trouble at Greenwich Village. I liked three days of spending two months there, was discharged by the officials as being cured. I have not been back there since discharged from there. I was discharged from Morganton the 20th day of September, this year, and am back at work. I was sent there 13 July, 1937. . . . I know where Greenwich Village is located, 5 miles out on the Wilkinson Boulevard. My trouble there was the latter part of May, on Sunday night. I had been there many times before. Q. State whether or not you had seen whiskey sold there? You could get any brand you like if you had the price. You could buy whiskey from the waitresses and darkies. Dr. Boyles, John Bingham and another little fellow were in charge there at the time, and were present when the whiskey was sold. I guess I have been to Greenwich Village 100 times. I did not raise a disturbance every time I went there. I never saw the sign 'No Stags Allowed' until right recently. There was no wire partition there when I went there. I did go on the dance floor, you could not enter without going on the dance floor. I have not raised any disturbance there recently. I did in the last stages, after they captured so much whiskey there. The taxicab driver did not beat me up because I would not pay him. These troubles ran me crazy and that bad liquor out there. I drank all the liquor I could get."

M. H. King testified, in part: "I live two blocks on yonder side of Greenwich Village. I am 17 years old. I went to Greenwich Village on Sunday morning about 10 o'clock after some whiskey. When I walked in Mr. Campbell and a Negro were sitting at a table reading the funny paper. I told them I wanted a half pint of Calvert Special. Campbell sent the Negro in the back after it. I asked him how much it was, he said 80 cents. I gave him one dollar, laid it on the table, put the stuff in my pocket, got 20 cents and went out. I go to Berryhill School. It was two or three months ago that I bought the liquor there, in July, either in July or first of August. I did not drink the liquor, I bought it for another fellow."

W. P. Randall testified, in part: "My home is diagonally across the road from Greenwich Village. From the time it was opened there has been a lot of noise there, would say from one month after it opened. I have seen taxicabs come there, dump out three or four girls, looked like 15 to 18 years old. Some would go in the Village and some run around to the cabins, that is not one time, but many times. It would be just about dark when I would observe this. These were dime taxis from Charlotte. Most of the noise was from midnight until daylight; cursing, swearing, hollering, screaming and just anything that you might say is loud noise. I don't think there have been over five nights in the last five months that I have not been awakened between midnight and 4 o'clock. I am not at home during the day, but sit on the porch in the late afternoon. I have seen Dr. Boyles drive up in his car and those Negroes would take out packages and carry them in the woods. They were about 12 inches square; they would stick them around in brush piles. When cars would come up they would go to the woods and bring something out. Don't know what was in those packages, but that continued all summer."

Dr. M. F. Boyles, the defendant, denied that his place of business was a nuisance and denied the material evidence of plaintiff. He alleged that he sold beer and wine and his evidence was to the effect that he kept an orderly place and had no knowledge of any disorder. He had been practicing medicine for 21 years. He admitted that he had been convicted on technical violation of the Narcotic Act and sentenced to Atlanta Prison for it—he served five months and was pardoned.

Two witnesses testified to his good character. One had known him two years and the other for a year and a half. The defendant testified, in part: "I completed my medical course at Warren, Pennsylvania, in one year. I went to Warren from San Diego, California. I was there a couple of years, went there shortly after I was pardoned from Atlanta. I had been in Gastonia, North Carolina, prior to that time, stayed in Gastonia about 8 years. I was taking courses during that time. I took post-graduate work in New York. I am a practicing physician and my

office is at Greenwich Village. I had blueprints made of my plans before I built Greenwich Village and a filling station was a part of the plan."

P. B. Campbell, a witness for defendant, testified in part: "My duty was in the capacity of clerk, to sell the patent drugs which doctor had there, tooth paste and things like that, and also to see that the place was kept clean and look after the place in general. . . . I have had experience at tourist camps before, one just outside of California. . . . We had many, many tourists, some would take cabins and have dinner served in them. We had music, two automatic Victrolas. We had dancing, but did very little in the daytime. Anyone was privileged to drop a dime or quarter in the piccolo. We did not charge for dancing. We had registered tourists from out West. Many tourists registered there from places I had lived. I have lived practically all over the West. They came occasionally and knew people that I knew. Often we had people who were driving straight through, like for a funeral and they were rushing. In those cases we had people to stay one and one-half or two hours, rest in the afternoon and drive at night. Sometimes they would go in, wash up, come down and eat and leave, were nervous and did not want to rest. We operated as near as possible in hotel style with the facilities that we had there. I came here from Los Angeles, Calif. . . . I am sales clerk, can work in drug store or grocery store. I sold all patent medicines there. The box you show me is suppository, supposed to prevent conception. I never sold any of that stuff out there. It was there when I went there, was part of the stock Dr. Boyles brought there from the other store. I don't know where you order them from."

M. B. Parcell and W. E. Stout, witnesses for defendant, testified that they frequently visited the roadhouse and observed no disorder.

J. H. Bingham testified, in part, for defendant: "I started there a few days before Christmas. My duties in connection with the place were to keep order and be night clerk. I was in the place practically all of the time during the night. We use a card system of registration. We did not permit anyone to register except people that were man and wife. I remember the disturbance that took place there one night out at the service station. There was a bunch of girls and boys and they were pretty well lit up. I told them to get out, that I would not put up with it. They went out and got in a fight right, so I called the police and they came. I remember that Clyde McWhirter was there cutting up and they took him to Morganton. . . . I searched a man and got a pocketbook off of him that he had taken from another man. The only case I know of a man being beaten there was Mr. McWhirter. I remember that Christmas three young girls were brought in Judge Hunter's court and charged with stealing a pocketbook. I don't know

whether the girls were unescorted or not. A fellow, John Threatt, was arrested with them. There is not so much disorder there, when there is I tell them to get out. I have done that several times, would say a dozen. . . . I know that they give Greenwich Village a bad name now, but before this I don't know anything about it having a bad name. It was just like any other roadhouse I was ever in."

The court below rendered the following judgment: "This cause coming on to be heard before Hon. Wilson Warlick, Judge presiding over the 11 October, 1937, Regular Civil Term of Mecklenburg County Superior Court, and being heard before his Honor and a jury, and the following issue having been submitted to the jury and having been answered as hereinafter appears: '(1) Has the defendant conducted and operated the place and business known as "Greenwich Village" in such a way as to constitute a nuisance? Ans.: "Yes."' Now, therefore, upon motion of Ralph V. Kidd and Uhlman S. Alexander, attorneys for plaintiff relator, it is ordered, adjudged and decreed, that the buildings, erections and premises, where the business of the defendant Dr. M. F. Boyles has been carried on under the name of 'Greenwich Village,' and the tract of land, belonging to the defendant, upon which said buildings are located, together with said business, furniture, fixtures, money, merchandise, stock of goods, and other personal property of the defendant, which may be found or which may heretofore have been found in and about the said property of the defendant, known as 'Greenwich Village,' be and they are hereby declared to constitute a general public nuisance pursuant to chapter 60 of the Consolidated Statutes of North Carolina; it is further ordered, adjudged and decreed that the said buildings, erections and premises, and the tract of land upon which said buildings are located be and they are hereby ordered closed against their use by the defendant, or any other person or persons, and that said buildings on the premises known as 'Greenwich Village' shall be kept closed for a period of one year from date hereof, unless sooner released, and the defendant herein is hereby restrained from leasing and forbidden to lease said buildings, erections or premises to any other person or persons, firm or corporation, pending the further orders of this court, for a period of one year from date hereof, unless otherwise ordered by the court." It is further ordered, adjudged and decreed that the defendant be and he is hereby enjoined and restrained from henceforth maintaining and operating said place of business known as "Greenwich Village" to the end that the said public nuisance arising therefrom may be abated; it is further ordered, adjudged and decreed that all fixtures, furniture, musical instruments, or other movable property which have been used by the defendant in conducting the said nuisance shall be removed by the sheriff of Mecklenburg County from the said building in which said business of the defendant has been car-

ried on, and that the sheriff of Mecklenburg County shall sell the said personal and movable property in the manner provided by law for the sale of chattels under execution. It is further ordered, adjudged and decreed that the proceeds of the sale of the personal property of the defendant as is hereinbefore provided shall be applied in the payment of the costs of this action and the abatement of said nuisance, and that out of the proceeds of said sale of personal property the costs and expenses of this proceeding shall be taxed by the clerk and that in said costs shall be taxed the fees of the sheriff of Mecklenburg County which have been incurred in closing and keeping closed said premises, and that said costs shall also include an attorney's fee of $200.00 to be allotted Ralph V. Kidd and Uhlman S. Alexander for their services in prosecuting the said action or proceeding on behalf of the plaintiff relator; and that such amount as may be left of the proceeds of said sale of personal property after the payment of the above enumerated costs and expenses shall be paid to the defendant Dr. M. F. Boyles. It is further ordered, adjudged and decreed that the defendant herein, Dr. M. F. Boyles, shall be taxed with the costs of this action. This 17 October, 1937. Wilson Warlick, Judge presiding."

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

Ralph V. Kidd and Uhlman S. Alexander for plaintiff.
A. A. Tarlton and Tom P. Jimmison for defendant.

CLARKSON, J. N. C. Code, 1935 (Michie), chapter 60, "Nuisances Against Public Morals," section 3180, is as follows: "Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, prostitution, gambling, or illegal sale of whiskey is guilty of nuisance, and the building, erection, or place, or the ground itself, in or upon which such lewdness, assignation, prostitution, gambling, or illegal sale of liquor is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments and contents, are also declared a nuisance, and shall be enjoined and abated as hereinafter provided."

Section 3181: "Whenever a nuisance is kept, maintained, or exists as defined in this chapter, the city prosecuting attorney, the solicitor, or any citizen of the county may maintain civil action in the name of the State of North Carolina upon the relation of such city prosecuting attorney, solicitor, or citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists.

In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor, alleging that the nuisance complained of exists, allow a temporary writ of injunction without bond, if it shall be made to appear to the satisfaction of the judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as complainant may elect, unless the judge, by previous order, shall have directed the form and manner in which it shall be presented. When an injunction has been granted it shall be binding on the defendant throughout the county in which it was issued, and any violation of the provisions of injunction herein provided shall be a contempt, as hereinafter provided."

Subsection 3182 makes provision: When triable; evidence; dismissal of complaint. Section 3183: Violation of injunction; punishment. Section 3184: Order abating nuisances; what it shall contain. Section 3185: Application of proceeds of sale. Section 3187: Attorney's fee may be taxed as costs.

The competent evidence on the trial fully sustains the allegations of the complaint. Under section 3182, in part: "In such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance." The plaintiff introduced many witnesses who testified that the general reputation of the place was bad. The record discloses that Greenwich Village is a tourist camp with 12 cottages on the rear, 2 parking lots for cars and trailers, and a main building which consists of a filling station, drug store, physician and surgeon's office, dining room and kitchen—and part used for dancing hall. It is located on Wilkinson Boulevard and defendant herein is the owner and proprietor of the place.

The defendant appellant's brief sets forth 8 questions involved, which we will consider:

(1) Did the court err in denying defendant's motion to be permitted to withdraw answer and file demurrer?

(2) Did the court err in refusing to require the plaintiff to give bond for costs and an injunction bond?

(3) Did the court err in refusing to dismiss the action as being illegal and unconstitutional?

None of the above contentions of defendant can be sustained. The record discloses the following: "The above case was called for trial Tuesday, 12 October, 1937, at 10 a.m., before his Honor, Wilson Warlick. The defendant comes into court through his counsel, before expiration of 30 days after service of summons, and moves to withdraw answer and file demurrer. Where upon such motion the court finds the following facts: The summons was issued out of Superior Court, Mecklenburg County, 15 September, and was duly served on the defendant on 15 September, and that on the said day and at the time of issuing

summons, the complaint or petition in the cause was filed, and a copy of same was, as prescribed by law, served on the defendant with service of summons, thereupon completing service. Whereupon, thereafter, on 18 September, through his counsel, Tom P. Jimmison and A. A. Tarlton, defendant filed answer to the complaint; thereupon, pleadings being made up before this court, same is transferred by the clerk of this court for trial, and upon demand on defendant to exercise his preference as to setting, the case was set down for trial peremptorily Tuesday, 12 October, 1937, in Regular Civil Court, Mecklenburg County, and on the morning of 12 October, when the case was called for trial, defendant made the above motion. Motion overruled, exception. The court stating to defendant, after selection of the jury, that he has right to demur *ore tenus* to the complaint or petition on the ground that it either did not state the cause of action, or that jurisdiction of the Superior Court is not good. After selection of the following jury: (naming them), and in the absence of the jury, the defendant through his counsel Jimmison and Tarlton demurs *ore tenus* to the cause of action and complaint of the plaintiff, and moves to dismiss for the following reasons:

"1. That it does not appear of record that plaintiff was required to procure an order permitting him to sue *in forma pauperis*, or give any bond, or make deposit for costs before the alleged cause of action was instituted, as required by C. S., 493. Overruled; exception.

"2. That it does not appear of record that an injunction was required by the court, or given by the plaintiff or complainants as a condition precedent to the issuing of injunction, as required by C. S., 854. Overruled; exception.

"3. That the complaint does not state facts sufficient to constitute a cause of action, for that it fails to allege that the defendant is doing or permitting to be done some act, the commission or continuance of which during the litigation would produce irreparable injury to the plaintiff; that said complaint does not allege that the defendant is doing, procuring or suffering some act to be done in violation of the rights of the plaintiff, pertaining to the subject of the action, and tending to render a judgment against defendant ineffectual, that the complaint does not allege that the defendant threatens, or is about to remove, or dispose of his property with intent to defraud the plaintiff, and the complaint utterly fails to allege that the defendant is insolvent, as required by the Consolidated Statutes, before temporary injunction may issue. C. S., 843. Overruled; exception.

"4. That the complaint does not state facts sufficient to constitute a cause of action, for that the alleged cause of action is based upon a statute that is unconstitutional and void, for that it disseizes the defendant of his freehold, liberties, privileges, and deprives him of his property

without due process of law, which is in violation of the rights guaranteed to him by the Constitution of North Carolina, Article I, section 17. Overruled; exception.

"5. That the complaint in the above entitled action does not state the facts sufficient to constitute cause of action, for that the statute upon which the alleged cause of action is based deprives the defendant of his liberty and property, without due process of law, in violation of the rights guaranteed to him under United States Constitution, Article XIV, section 1. Overruled; exception."

It appears from the record that after the complaint and answer were filed the defendant exercised "his preference as to setting, the case was set down for trial peremptorily Tuesday, 12 October, 1937." It is well settled in this jurisdiction that the time set for trial of the case is in the sound discretion of the trial judge.

C. S., 518, is as follows: "If objection is not taken either by demurrer or answer, the defendant waives the same, except the objections to the jurisdiction of the court and that the complaint does not state facts sufficient to constitute a cause of action."

The defendant by filing an answer to the complaint in the Superior Court did not waive his right to demur *ore tenus* to the complaint on the ground that the court had no jurisdiction of the action and that the complaint does not state facts sufficient to constitute a cause of action. *Finley v. Finley,* 201 N. C., 1 (3).

All objections except those on the ground that the court has no jurisdiction of 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 appellant court. *Clements v. Rogers,* 91 N. C., 63 (64).

The court below ruled on defendant's demurrer *ore tenus* that it had jurisdiction of the action and the complaint set forth a cause of action.

The defendant moved to dismiss the action because plaintiff did not comply with C. S., 493, and give bond.

C. S., 3181, *supra,* in part says: "In such action the court, or a judge in vacation, shall . . . allow a temporary writ of injunction without bond." The undertaking in injunction proceedings, C. S., 854, is not applicable. The refusal of the trial judge to require a prosecution bond is not appealable. *Christian v. R. R.,* 136 N. C., 321.

We think the allegations of the complaint and evidence plenary, and state facts sufficient to constitute a cause of action. That Art. I, sec. 17, of the Const. of N. C., and Art. XIV, sec. 1, of the Const. of the United States, are not impinged by the statute under which this action is brought. *S. v. Webber,* 107 N. C., 962, has no bearing on this case. In that case the municipal corporation (Asheville) had no power to

pass the ordinance under which defendant Webber was convicted. The present action is under a State statute and is constitutional in the exercise of the police power. *Daniels v. Homer,* 139 N. C., 219, where the matter is thoroughly discussed by *Clark, C. J.*

In *People ex rel. Lemon v. Elmore,* 256 N. Y., 489, it is held: "A statute authorizing courts of equity upon sufficient proof to issue an injunction against the maintenance of a house of prostitution and to direct the closing of the building in which the nuisance was maintained, for a year, or until the owner shall give bond against the reëstablishment of the nuisance, does not violate the constitutional right of trial by jury." This case is carefully annotated in 75 A. L. R., 1292 (1298), and it is there said: "Decisions subsequent to the previous annotations on this subject have uniformly sustained the constitutionality of statutes conferring upon courts of equity power to abate a public nuisance, although the acts complained of also constitute a crime and no property rights are invaded."

In 46 C. J., p. 796, part sec. 425 (b), it is written: "The legislature may, and sometimes does, confer upon courts the authority to condemn and confiscate the personal property used, or permitted to be used, for the purpose of maintaining the nuisance; to order the personal property used in connection therewith sold, and the proceeds to be applied in payment of the costs; and to order the premises in which the nuisance has been conducted closed for a stated period, in the absence of the giving of the bond as provided in the statute, and the payment of costs."

(4) Did the court err in permitting the introduction of hearsay evidence of Merl M. Long and in denying the defendant the right to explain said evidence? We think not.

The defendant assigns as error the admission of certain testimony of the witness Long, solicitor of the county recorder's court. The witness testified that numerous complaints had been made to him in his official capacity as to conditions at the defendant's place of business. We think that such testimony was competent as corroborative evidence, under the provisions of section 3182, which provides that evidence of the general reputation of the place shall be permissible for the purpose of proving the place a nuisance. The defendant also objected to the following question: "This boy, Lanier, was working for Dr. Boyles at the filling station, was he?" Conceding, but not deciding, that the question was incompetent and the evidence hearsay, an objection to it was overruled and the witness replied: "He said he was." The defendant made no motion to strike out this answer. The record discloses that no exception was entered at the time by the defendant to the answer of the witness, nor was any motion made by defendant to strike said answer from the record. Under these circumstances the defendant cannot now complain of error. (*Ins. Co. v. Boddie,* 196 N. C., 666.) If such was error

it was harmless in view of the overwhelming mass of other evidence in the record as to the flagrant and unlawful use of the premises of the defendant.

(5) Did the court err in permitting the testimony of C. T. McWhirter, an insane person? We think not, under the facts appearing in the record.

The record discloses: "Motion by defendant to strike out the evidence of C. T. McWhirter on the grounds that as it appears of record he is still an inmate, or under the supervision of, the Insane Asylum of Morganton, and that it appears of record that he was crazy at the time of the happenings he testified about. (By the court) 'To the foregoing motion of defendant to strike out the evidence of plaintiff's witness C. T. McWhirter, the court having heretofore found, upon examination of the witness when placed on the stand from questions propounded and answers given, that the witness, though having heretofore been declared insane and subsequently has been released, has mental capacity to testify to the facts, and as such rules the witness to be competent, and having previously so ruled thereupon, disallows the motion at this time to strike out the evidence of C. T. McWhirter.'" This was in the sound discretion of the court below.

It is said in *Lanier v. Bryan,* 184 N. C., 235 (238): "The decision (*Shaw v. Moore,* 49 N. C., 26), approves the doctrine that the witness should have due appreciation of a moral duty to tell the truth, and conforms to the general rule that the judgment of the trial judge on the question of competency of a person who is offered as a witness is a matter of discretion and will not be disturbed on appeal, unless there is an abuse of discretion, or unless the order admitting or rejecting the witness involves the erroneous construction of a legal principle," citing numerous authorities.

(6) Did the court err in refusing to submit the issue tendered by the defendant? We think not.

The record discloses that the defendant tendered an issue, but that he did not except at the time to the refusal of the court to submit the said issue, nor did the defendant except to the issue which was submitted to the jury by the court. The defendant cannot now, after the trial and verdict, except to the refusal of the court to submit the issue which he tendered, he not having excepted thereto at the time. *Greene v. Bechtel,* 193 N. C., 94; McIntosh, Prac. & Proc. in Civil Cases, pp. 545-6, sec. 510.

(7) Did the court err in charging the jury? We think not.

The court charged the jury as follows: "Nuisance can be a public or private nuisance. The nuisance referred to here is a public nuisance. That is a nuisance to the public in general, not a nuisance to one in particular. Nuisance of this character refers to public nuisance, that

is one that is detrimental to the public. A nuisance within the meaning of this statute means—anything which works hurt, inconvenience or damage to another, or which essentially interferes with the enjoyment of life or property to the public in general, near or about the premises. The fact that the acts done may be otherwise lawful does not keep it from being a nuisance." The charge must be considered contextually and not disjointedly. Taking the charge as a whole, we do not think the above excerpt, if error, is prejudicial. It is the combination of the "acts done" that may become a nuisance and the evidence of such is abundant on this record.

(8) Did the court err in refusing to allow the defendant to give bond to abate any nuisance? We think not.

C. S., 3186, says, in part: "The court may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as same may relate to said property." Under the above statute this was in the sound discretion of the court below.

Schenck, J., while on the Superior Court bench, tried the case of *S. v. Everhardt*, 203 N. C., 610. His charge as to what constituted a public nuisance was affirmed by this Court. In that case we cited many authorities, among them (at p. 618) Clark's Crim. Law (2d Ed.), Hornbook Series, part sec. 115, at p. 345, where it is said: "To constitute a public nuisance, the condition of things must be such as injuriously affects the community at large, and not merely one or even a very few individuals. . . . (p. 346). Whatever tends to endanger life, or generate disease, and affect the health of the community; whatever shocks the public morals and sense of decency; whatever shocks the religious feelings of the community, or tends to its discomfort—is generally, at common law, a public nuisance, and a crime. . . . (p. 348). Disorderly houses, including houses of ill fame and drinking or tippling houses, kept in such a way as to annoy and scandalize the public, are nuisances at common law."

The facts in the present case are similar to those in the *Everhardt case, supra.* The defendant in the present case could have been indicted and convicted of the same offense alleged and proved in the *Everhardt case, supra.* C. S., chapter 60, "Nuisance Against Public Morals," under which defendant was tried, provides for the abatement of a nuisance. "An order of abatement shall be entered as a part of the judgment in the cause, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of one year, unless

sooner released," etc. C. S., 3184, "Padlocking" is a rigorous legal cathartic, but, just as in the case of the individual, so in society; at times violent dosages are necessary to rid the body of poisons, also the cancer on the body politic must be removed and destroyed.

The jury found that the defendant Dr. M. F. Boyles, trading and doing business as "Greenwich Village," conducted and operated a place of business in such a way as to constitute a nuisance. The facts, as developed by plaintiff, show the social viciousness of the enterprise. Dr. Boyles was previously convicted of failure to keep proper narcotic records, and was sent to the Federal Prison at Atlanta. Receiving a pardon after only five months, he returned to Charlotte, built "Greenwich Village" in a thickly settled community on Wilkinson Boulevard. This tourist camp quickly developed into a nest of vice, pandering to the lowest and most animal qualities of men and women. Here there was a filling station, a drug store, a physician and surgeon's office, a dining room and a kitchen. In the front of the building there was a dance hall with music from the piccolo. Wine and beer were sold openly, and only slightly less open was the sale of suppositories for the prevention of conception. Liquor was sold there and defendant was a doctor and had theretofore been convicted of selling morphine. The twelve tourist cottages and two parking lots became an inviting assignation place. Taxicabs from Charlotte plied back and forth—always the same story, a man and woman retiring to a cottage for forty or forty-five minutes, then returning to the cab. On several occasions the rural police raided this citadel of iniquity. The revolting scene which greeted them was peopled with fighting and drunk men and women, with many of both sexes nude or indecently clad. There was fighting, yelling and cursing and ribald and indecent profanity on the part of both men and women. Such conduct continued throughout the night. This roadhouse was open day and night and on the Sabbath. This was the history of the spot from the time it was created by the defendant. One witness testified: "I have been living there about nine years. The general reputation of Greenwich Village is bad. I have seen cars with N. C. tags on them, from early morning until all times of the night since the place opened up, going into the cabins, staying thirty to forty-five minutes, just a boy and girl. A drunken man and woman went into the cabins about six o'clock. . . . I went to put my car up, saw a woman stumble over the children's playthings, she was so drunk it frightened them. They would wake me up anywhere from eleven at night until six in the morning. I have heard profanity of the worst type. I would say the people I saw were from eighteen to twenty-five years old. . . . I saw a couple go into the cabins two months ago, got out of a taxicab. The driver waited for them about forty-five minutes." This testimony was corroborated by many. Numerous witnesses swore that the general reputation of the place was bad.

From all the evidence on the part of plaintiff, it was shown that defendant was maintaining a roadhouse on a congested highway in a populated neighborhood and a few miles from the city of Charlotte; the defendant's place of business was one where liquor was sold flagrantly and in large quantities and in violation of law; the defendant permitted the cabins on his premises to be utilized for the purpose of prostitution, lewdness, and assignation; the defendant permitted taxicabs to bring young girls and boys from the city of Charlotte and from other towns and to use his premises for the purpose of immorality and adultery; the general conditions in and around defendant's place of business were detrimental to public morals and were an affront to the good citizens in the neighborhood and community in which the said place was located; under all the evidence the jury was justified in holding that the defendant was maintaining and conducting a nuisance.

Centuries ago the Almighty entered a judgment, "destruction by fire," against two cities in the plain of the Jordan. Today the fire of the law must sometimes be applied by upright citizens to the Sodoms and Gomorrahs that have sprung up along our highways, creating nuisances against public morals. In an age in which the respect for law and order has well-nigh withered away, the power of righteous indignation which springs from deep moral convictions, it is encouraging to find patient and long-forbearing, but upright, citizens aroused against cancerous growths on our social body. They will find the processes of the law ever ready and adequate for such social surgery, all too often necessary to the wholesome health of society.

We see no error in the judgment of the court below.

No error.

STACY, C. J., BARNHILL and WINBORNE, JJ., concur in result.

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

JOSEPH B. CHESHIRE AND CARROLL WEATHERS, TRUSTEES UNDER THE WILL OF JOHN C. DREWRY, SR., DECEASED, v. MARY HARDY DREWRY, MARY HOLT DREWRY, JOHN C. DREWRY, JR., MARY HARDY DREWRY, ADMINISTRATRIX C. T. A. OF JOHN C. DREWRY, DECEASED, JAMES G. HANES, JR., MATTIE A. MANGUM, ET AL.

(Filed 4 May, 1938.)

1. Wills § 33c—

Upon the destruction of the preceding estate before it regularly expires, as where a widow to whom is devised a life estate dissents from the will, the ultimate takers come into the present enjoyment of the property as though the life tenant had died.

2. Same—Where widow, having life estate, dissents from will, remainderman is entitled to immediate enjoyment subject to dower.

Testator devised a life interest in certain property to his wife, and directed that at her death his trustees should convey the property to his son if he was then living, or if his son predeceased his wife or died without issue him surviving, the property to be divided among testator's heirs. The widow dissented from the will, and the property was set aside as her dower. *Held:* Upon the dissent of the widow, the son was entitled to a conveyance of the property by the trustees subject to the widow's dower under the doctrine of acceleration, and upon the son's death during the lifetime of the widow, his sole devisee and legatee is entitled to the conveyance of the fee in the property subject to the dower estate, and this notwithstanding that all other property devised for the benefit of the son was left to him either for life with remainder to his children or in trust for him until he should attain the age of 35, with provision for distribution to his children if he should die before attaining that age.

3. Wills § 33b—Rule in Shelley's case does not apply when will provides that heirs should "share and share alike" in remainder.

The will in question devised certain lands to testator's son for life "and then to be divided equally among his male heirs, they to share and share alike." *Held:* Even if it be conceded that the words "male heirs" should be construed "heirs" under the provisions of C. S., 1734, the addition of the words "share and share alike" prevents the application of the rule in *Shelley's case*, and upon the death of the son, his sole male heir takes the fee in the property by purchase under the will.

4. Trusts § 11: Wills § 33c—The law favors the early vesting of estates.

The will in question set up a residue trust in favor of testator's wife and son, with provision that the trusts should continue until both of the trusts were terminated. The trust in favor of the widow was terminated by her dissent from the will. The trust in favor of the son provided that the property should not vest in fee "or pass any title to him or his heirs until he attains the age of 35 years or dies before that time, leaving issue surviving him." The son died before attaining the age of 35, leaving issue him surviving. *Held:* The trust estate terminated upon the death of the son and the property vested in his children at that time, and the contention that the trust should continue until the son would have attained the age of 35 had he lived, is untenable, there being no expressed intention of the testator that the trust should continue after the death of his son.

5. Wills § 34—

The will in question, construed as a whole, *is held* to devise one-third of the residuary estate in trust for testator's grandson until he reaches the age of 35, to be delivered to him if he should be living at that age.

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

APPEAL by the defendants Mary Hardy Drewry and Mary Hardy Drewry, administratrix *c. t. a.* of John C. Drewry, deceased, A. L. Purrington, Jr., guardian *ad litem* of Mary Holt Drewry and John C. Drewry, Jr., and James G. Hanes, Jr., from *Sinclair, J.*, at January Term, 1938, of WAKE. Affirmed.

Paul F. Smith for plaintiffs.

Manning & Manning for Mary Hardy Drewry, and Mary Hardy Drewry, administratrix c. t. a. of John C. Drewry, deceased.

A. L. Purrington, Jr., guardian ad litem of Mary Holt Drewry and John C. Drewry, Jr., in propria persona.

W. T. Joyner for James G. Hanes, Jr.

SCHENCK, J. This is an action instituted by the plaintiffs, as substituted trustees under the will of John C. Drewry, Sr., wherein they pray "That because of the death of John C. Drewry before he had attained the age of 35 years the plaintiffs are uncertain of their duties as trustees under the said will and of the proper distribution of the assets of the trusts of which they are trustees if the same, or any part thereof, are now distributable, and they therefore pray the court for the construction of said will and an adjudication of the true meaning thereof, and particularly for the advice and instruction of the court upon the following questions: (a) What duty, if any, have the trustees with respect to the 'Times Building' referred to in Item III of the will? (b) Has the $30,000 trust in favor of John C. Drewry now terminated? And (1) if so, to whom is the fund payable; (2) if not, to whom is the income payable, and for how long a time? (c) Has the residue trust terminated? And (1) if so, to whom is the fund payable; (2) if not, to whom is the income payable, and for how long a time? (d) Has the residue trust terminated in part only? And (1) if so, what part has terminated and to whom is that part payable; (2) what part has not terminated and to whom is the income therefrom payable, and for how long a time? (e) What provision should be made to provide the monthly payment of $15.00 per month to Mattie A. Mangum? (f) Upon dissent from the will of John C. Drewry, Sr., by Kittie Holt Drewry, did the $60,000 trust in her favor become a part of the residue trust? (g) To whom is the income from the residue trust fund and the $30,000 insurance trust fund, received or accrued at the time of the death of John C. Drewry, now payable?"

John C. Drewry, Sr., died 2 October, 1916, leaving surviving him his widow, Kittie Holt Drewry, his son, John C. Drewry, and grandson, James G. Hanes, Jr.

John C. Drewry married Mary Hardy and died on 12 September, 1937, twelve days prior to the 34th anniversary of his birth, leaving surviving him his widow Mary Hardy Drewry and two children, Mary Holt Drewry and John C. Drewry, Jr., aged about 12 and 5 years, respectively.

James G. Hanes, Jr., is now just past 21 years of age, and is unmarried.

Mrs. Kittie Holt Drewry, widow of John C. Drewry, Sr., dissented from the will of her husband and has been allotted her dower in his real estate and has received her distributive share of his personal property, the building and storehouse on Hargett Street, between Fayetteville and Wilmington streets, in the city of Raleigh, known as the "Times Building" (mentioned in Item III of the will of John C. Drewry, Sr.), having been allotted as her dower.

John C. Drewry left a will wherein he devised and bequeathed all of his real and personal property to his wife, Mary Hardy Drewry, and, upon failure of the executors therein named to qualify, his widow, Mary Hardy Drewry, was duly appointed and qualified as his administratrix *c. t. a.*

A. L. Purrington, Jr., was duly appointed guardian *ad litem* of Mary Holt Drewry and John C. Drewry, Jr., infant children of John C. Drewry.

John H. Duncan was duly appointed guardian *ad litem* of the unborn children of James G. Hanes, Jr.

The provisions for specific legacies made in the will of John C. Drewry, Sr., have been carried out, and the trusts therein provided have been set up and have been functioning since the death of the testator, with the exception of the trust for the benefit of the widow, Mrs. Kittie Holt Drewry.

The portions of the will of John C. Drewry, Sr., germane to this action are as follows:

"Item III. I give, bequeath and devise to my wife, Kittie Holt Drewry, for and during her lifetime, the net income from my building and storehouse in the city of Raleigh, situated on the south side of Hargett Street, between Fayetteville and Wilmington streets, Raleigh, N. C., known as the Times Building, and direct my Trustee to pay the same to her quarterly. After her death, I direct my Trustee to convey this property to my son, John C. Drewry, Jr., if he be then alive. If he predeceased my wife, or dies without issue surviving, then I direct that this property be divided among my heirs at law. . . .

"Item IV. I give and bequeath to my son John C. Drewry, 'now junior,' who has been a good boy all of his life and who has been a great joy to us, all and every one of my several tracts of land lying and being situate in House Creek Township, Wake County, free of debt—if any mortgage is on the farm at my death, I want it paid off out of my estate—to have and to hold during his lifetime, and then to be divided equally among his male heirs, they to share and share alike. These tracts or parcels of land consist of the one purchased from Miss Rebecca Rogers and others, and contains 125 acres, more or less. Also the tract purchased from Ed Rogers and wife, containing 56 acres, more or less, and two purchased from Allan Rogers and wife, one containing 11 acres,

and the others 19 acres, more or less. Also the land purchased from John Moore and wife, fronting on the Raleigh and Oxford Road, containing 45 acres, more or less, and the adjoining tract purchased from James Shaw, containing 30 acres, more or less. Also the tract purchased by R. S. Rogers and myself from J. C. Freeman, and afterwards purchased by me from R. S. Rogers and wife, and containing 68 acres, more or less. Also the tract purchased at the Commissioner's sale from one of the heirs of Burke Rogers, containing 26 acres, more or less. All of these tracts together containing about 400 acres. It is my desire that my son, John C. Drewry, Jr., shall keep this land during his lifetime, and then divide it equally among his male heirs if he has any, as I want this property to remain in the family, and be known as Drewry Hill Farm. If he has no male heirs, then I desire that it shall be divided equally among the female heirs. Should the said John C. Drewry, Jr., die without issue or without any children then living, the property herein given shall revert to my estate and it or its proceeds become a part of the general trust fund hereinafter provided for.

"Item VI. I give, devise and bequeath to my executor, the Raleigh Savings Bank & Trust Company, whom I hereby constitute and appoint trustee for that purpose, the sum of $120,000.00 for the uses and purposes set out in Paragraphs VII, VIII and IX, and upon the terms and conditions as follows:

"Said trustee shall hold and manage all of said property or the investments into which it may be converted, and receive any income from it, and out of said income to pay the cost and expenses of executing the trust, including any tax or assessment against the trust estate, and pay the net income to the beneficiaries as herein set out.

"Said trustee shall set apart out of the funds and securities in their hands the three separate trusts named in Items 7, 8, and 9.

"Said trustee shall have the right, whenever it sees fit to do so, in its discretion, to change any of the investments of my estate, whether made by me or it, and for that purpose may sell any real estate, stocks or securities or other property, at private or public sale without being required to get an order of court for that purpose. Said trustee shall have the right to convey the property so sold, and to receive the proceeds of sale and reinvest the same, such proceeds of sale and reinvestment to stand in the place of the property so disposed of, and to be held on the same trust as such property so sold and conveyed.

"It is my intention and purpose in constituting the executor of my estate as trustee for my wife Kittie Holt Drewry, my son John C. Drewry, Jr., and my grandson James G. Hanes, Jr., both separately and each one of the three, and afterwards, so far as the residue of my estate is concerned, collectively for the first two of them, and the survivor, that of the trust so created they shall only receive from the trustee

the net income of such trust, and that the legal and managing title shall at all times be in the trustee, and that their interest shall be only a beneficial one, to receive from the trustee the net income, and that they shall not receive or be entitled to the control, management or custody of these trust funds so created.

"After the payment and delivery of the specific devises and bequests, the trustee shall hold the remainder and residue of my estate for the uses and trusts herein set forth, for the benefit of my wife, Kittie Holt Drewry, and my son John C. Drewry, Jr., and the said trustee shall hold, manage and control the ownership of any such trust estate until the time for the termination of the same as set forth in Item XIII.

"The net income from any moneys, property or investments held by my estate which is not designated specifically, shall be divided equally between my wife, Kittie Holt Drewry, and my son, John C. Drewry, Jr., during their life or lives.

"In the event of the trustee hereinafter named declining or failing to act, then a successor trustee shall be appointed by the clerk of the Superior Court of Wake County in the manner prescribed by law for appointing successor trustees, it being my intention and purpose for the trustee at all times to hold the legal title, manage, control and direct this property, and after paying the expenses of the same to pay only the income to the beneficiaries under such trust.

"Item VII. It is my desire and I direct that the sum of $60,000.00 be set aside by my trustee or trustees, and invested by them for the benefit of my wife, Kittie Holt Drewry, during her entire lifetime, and the income from such amount to be paid over to her quarterly for her maintenance and support. Upon her death the sum of $60,000.00 shall become a part of the General Trust Fund of my estate, and be held and invested by said trustee, or trustees, until the final winding up of the same.

"Item VIII. It is my desire, and I so direct, that my trustee or trustees, herein named, shall set aside for the benefit of my grandson, James G. Hanes, Jr., the sum of $30,000.00, which amount shall be held in trust and invested by my trustee or trustees, and the income from such amount be paid over to him, or his guardian quarterly for his maintenance and support.

"When he attains the age of 35 years, this trust shall terminate and cease and the property so held in trust shall be conveyed by the trustee to him.

"If my grandson James G. Hanes, Jr., does not arrive at the age of 35 years or dies before attaining that age, leaving no issue, then I will and direct that his interest and share in this trust fund shall cease and terminate, and it shall revert to and become a part of the residue of my estate and be divided as directed in that section of my will dividing such residue of my estate.

"Item IX. It is my desire, and I do direct that the Raleigh Savings Bank & Trust Company shall hold the $30,000.00 life insurance payable to them for the benefit of my son, John C. Drewry, Jr., which amount shall be held in trust and invested by my said trustee or trustees, and the income therefrom shall be paid to him or his guardian quarterly.

"Item X. Should either my son, John C. Drewry, Jr., or my grandson, James G. Hanes, Jr., die before the final winding up of my estate, leaving surviving him a child or children, the income from such sum as shall have been provided for them, or either of them, and its accumulations, shall be used by said trustee or trustees, for such child or children, as is hereinbefore directed to be used for its or their parent. Should said John C. Drewry, Jr., or James G. Hanes, Jr., die before the final winding up of my estate, without leaving surviving heir or heirs born to them, then the said sum of $30,000.00 set aside for his benefit, and its accumulations, if any, shall become a part of the general fund of my estate, and be held by said trustee or trustees, as other property is held by them, until the final winding up of my estate. It is my desire and my executor or trustee is directed that the property herein given to my wife, son and grandson in Items II, III and IV, and the amounts set apart for their use and benefit in Items VII, VIII and IX in this will shall have precedence over all other gifts, bequests and trusts, whatsoever, and they shall be put in possession of such property or the same shall be set aside for their use and benefit before any other gifts, bequests or trusts shall be considered.

"Item XI. I give and bequeath to the Grand Lodge of North Carolina, Ancient, Free and Accepted Masons, the sum of $10,000.00 in trust, to be set aside by the Grand Lodge and known as the Drewry Memorial Grand Secretary's Fund. . . .

"Item XII. I direct that my trustee, or trustees, shall pay out of the proceeds coming into their hands from my general estate to my sister-in-law, Mattie A. Mangum, the sum of $15.00 each month during her natural life.

"Item XIII. It is my will and desire, and I do direct that the trusts herein created, except that of the Drewry Memorial Grand Secretary's Fund, shall remain in full force and effect as follows: (A) That of my wife, Kittie Holt Drewry, until her death; (B) That for John C. Drewry, Jr., until he reaches the age of 35 years; (C) That for James G. Hanes, Jr.. until he reaches the age of 35 years; (D) The residue trust fund shall be kept alive until the two particular trust funds for Mrs. Kittie Holt Drewry and John C. Drewry, Jr., have each terminated.

"Item XX. It is my will and desire that all property undisposed of under this will and remaining in the hands of my trustee or trustees when said residue shall terminate, shall be divided into three equal parts,

two parts to go to my son, John C. Drewry, Jr., and one part to go to my grandson, James G. Hanes, Jr., their children to inherit their parents' share, if such parent be dead prior to that time. This devise in fee shall not take effect as to John C. Drewry, Jr., or pass any title in fee to him or his heirs until he attains the age of 35 years or dies before that time, leaving issue surviving him. Similarly the devise to my grandson James G. Hanes, Jr., and shall not take effect or pass any title in fee to him or his heirs until he arrives at the age of 35 years, or leaves issue surviving him, should he die before attaining that age.

"Should both John C. Drewry, Jr., and James G. Hanes, Jr., die without leaving issue, it is my will and desire and I hereby give and bequeath to the Board of Trustees of the Drewry Memorial Grand Secretary's Fund, the additional sum of $40,000.00, to augment the fund and be used for similar purposes as the gift theretofore made to them.

"The remainder of my estate, which shall then remain, shall be divided among my heirs at law, according to law.

"Item XXII. I hereby nominate, constitute and appoint as my executor and trustee to take charge of my property and manage my estate and pay over the specific legacies herein disposed of, and to invest and control the funds herein conveyed to them in trust, and to in all respects carry out the intents and purposes of this my last will and testament, the Raleigh Savings Bank & Trust Company of Raleigh."

His Honor entered judgment as follows: "This cause coming on to be heard before his Honor, N. A. Sinclair, Judge presiding over the January, 1938, Term of the Superior Court of Wake County, upon the complaint of the plaintiffs, the cross complaint and answer of Mary Hardy Drewry individually and as administratrix *c. t. a.* of John C. Drewry, deceased, and the answers of A. L. Purrington, Jr., guardian *ad litem* of Mary Holt Drewry and John C. Drewry, Jr., minors, James G. Hanes, Jr., and John H. Duncan, guardian *ad litem* of the unborn children of James G. Hanes, Jr., and the court having heard at length the arguments of Manning & Manning, attorneys for Mary Hardy Drewry, individually and as administratrix *c. t. a.* of John C. Drewry, deceased, W. T. Joyner, attorney for James G. Hanes, Jr., and A. L. Purrington, Jr., and John N. Duncan, guardians *ad litem,* who themselves presented arguments in favor of their wards:

"It is now therefore ordered, adjudged, and decreed:

"(a) That it is the duty of Joseph B. Cheshire and Carroll Weathers, trustees under the will of John C. Drewry, and they are hereby directed to convey the 'Times Building,' referred to in Item III of the will, to Mary Hardy Drewry individually as devised under the will of John C. Drewry, deceased, subject to the dower of Kittie Holt Drewry.

"(b) That the $30,000.00 trust fund in favor of John C. Drewry, deceased, is now terminated and the principal amount thereof, with any

accumulations, is payable to the guardian of Mary Holt Drewry and John C. Drewry, Jr., each of whom is entitled to one-half thereof.

"(c) That the residue trust has now terminated and said trustees are directed to divide the same in three equal parts, one part whereof shall be held by said trustees for the benefit of James G. Hanes, Jr., who is entitled to the income therefrom until he reaches the age of 35 years, and at that time, if he be living, to the principal thereof, and two-thirds of said residue trust shall be payable to the guardian of Mary Holt Drewry and John C. Drewry, Jr., each of whom shall be entitled to an equal share thereof. The trustees are directed to divide the securities comprising the residue trust in kind, so far as that be possible, and to sell such part of such securities as cannot be divided and to distribute the cash proceeds thereof to the parties entitled thereto. If the said James G. Hanes, Jr., should die before reaching the age of 35 years with issue surviving him the principal sum of his share of the residue trust fund shall be payable to such issue. If said James G. Hanes, Jr., should die before reaching the age of 35 years without issue surviving him the principal sum of his share of the residue trust fund shall be paid to the guardian or guardians of Mary Holt Drewry and John C. Drewry, Jr., or to them if they be then of age.

"(d) The trustees shall reserve from the share of James G. Hanes, Jr., in the residue trust fund the sum of $3,000.00, face value, of North Carolina Bonds to provide one-third of the monthly payment of $15.00 per month payable to Mattie A. Mangum and shall likewise reserve from the shares of Mary Holt Drewry and John C. Drewry, Jr., in the residue trust the sum of $6,000.00, face value, of North Carolina Bonds to provide two-thirds of the monthly payment of $15.00 per month payable to Mattie A. Mangum. The amount of income received from the $3,000.00 of bonds reserved from the share of James G. Hanes, Jr., in excess of $5.00 per month shall be paid to the trustees of James G. Hanes, Jr., and the amount of income from the $6,000.00 of bonds reserved from the shares of Mary Holt Drewry and John C. Drewry, Jr., in excess of $10.00 per month shall be paid to the guardian of Mary Holt Drewry and John C. Drewry, Jr. The said trustees are authorized, empowered and directed to encroach on the principal of said bonds, ratably, if that should be necessary to provide the $15.00 per month to be paid to Mattie A. Mangum during her life. Upon the death of Mattie A. Mangum, the $3,000.00 of bonds withheld from the share of James G. Hanes, Jr., in the residue trust shall be delivered to the trustees of James G. Hanes, Jr., or to him if he shall then have reached the age of 35 years and, in the event of his death before reaching said age, to those entitled to his share of the residue trust as set out in section (c) above, and the $6,000.00 of bonds withheld from the shares of Mary Holt Drewry and John C. Drewry, Jr., in the residue trust, or so much thereof

as may then remain, shall be delivered to the guardian of Mary Holt Drewry and John C. Drewry, Jr., or to Mary Holt Drewry and John C. Drewry, Jr., if they shall have attained the age of 21 years. The right is reserved for the trustees to require such contributions from the guardian of Mary Holt Drewry, and John C. Drewry, Jr., and from the trustees of James G. Hanes, Jr., from the funds coming into their hands pursuant to this judgment and under the terms of the will of John C. Drewry, Sr., to provide the monthly payment of $15.00 per month to Mattie A. Mangum should the income from the bonds reserved by the trustees pursuant to this judgment or the principal thereof be insufficient, for any reason, to provide said monthly payments to the said Mattie A. Mangum.

"(e) That upon the dissent of Kittie Holt Drewry from the will of John C. Drewry the $60,000.00 trust in her favor became a part of the residue trust.

"(f) That all income from the residue trust fund and the $30,000.00 insurance trust fund payable to John C. Drewry, received or accrued at the time of the death of John C. Drewry, became the property of Mary Hardy Drewry, administratrix *c. t. a.* of John C. Drewry, deceased, and is now payable to her, and the income from the residue trust received since the death of John C. Drewry on 12 September, 1937, shall be paid one-third to the trustees of James G. Hanes, Jr., and two-thirds to the guardian of Mary Holt Drewry and John C. Drewry, Jr.

"(g) That upon the death of John C. Drewry the title to the Drewry Hill Farm, referred to in Item Four of the will of John C. Drewry, Sr., vested in John C. Drewry, Jr., son of John C. Drewry, deceased (the grandson of the testator), in fee simple.

"It is further considered, ordered and adjudged by the court that the orders heretofore made in this cause directing the payment of moneys to Mary Hardy Drewry, guardian of Mary Holt Drewry and John C. Drewry, Jr., for their maintenance and support pending the termination of this action, be and the same are hereby approved and confirmed by the court.

"The costs of this action shall be paid by the plaintiffs from the funds in their hands as trustees of the residue trust."

A. L. Purrington, guardian *ad litem* of Mary Hardy Drewry and John C. Drewry, Jr., and James G. Hanes, Jr., assign as error, paragraph (a) of the judgment directing the plaintiffs, trustees, to convey the "Times Building" referred to in Item III of the will of John C. Drewry, Sr., to Mary Hardy Drewry, individually, subject to the dower of Kittie Holt Drewry. This assignment of error cannot be sustained.

When Mrs. Kittie Holt Drewry dissented from the will of her husband, John C. Drewry, Sr., the enjoyment of the expectant interest devised in the real estate mentioned in Item III of said will to John C. Drewry,

Jr., was accelerated and he was entitled, under the will, to have had said real estate conveyed to him by the trustees upon the filing of the dissent, and the fee passed to Mary Hardy Drewry by his will. This doctrine of acceleration rests upon the theory that the enjoyment of the expectant estate is postponed for the benefit of the preceding vested estate or interest, and upon the destruction of the preceding estate or interest before it regularly expired the ultimate taker came into the present enjoyment of the property. When a widow declines, by filing a dissent thereto, to take under the will, the decisions hold that the rights and interests of the parties must be considered and determined as if she had died. *Young v. Harris,* 176 N. C., 631.

In *Wilson v. Stafford,* 60 N. C., 646, wherein property was given by will to the wife of the testator so long as she remained his widow, with remainder over to his children, and the widow dissented to the will, it is said: "This was the dissent of the widow and her claiming her share of the property as if he (her husband) had died intestate. The effect of this upon the disposition made for his children in the will must, after the assignment of her dower and the giving her an equal part with the children of the personal estate, be the same as if she had died or married."

In *University v. Borden,* 132 N. C., 477, wherein real estate was devised to the wife of the testator for life with remainder over, and the widow dissented, this Court said: "Mrs. Faircloth (the widow) having dissented from the will and claimed her dower in the realty and her distributive share in the personalty, we are of the opinion that there was an acceleration of the devises, the enjoyment of which under the will was postponed to the time of her death. The will, in so far as provision was therein made for her, operates in the same manner, as to the time of enjoyment by those entitled after her death, as if she had died prior to her husband."

Mary Hardy Drewry assigns as error paragraph (g) of the judgment to the effect that upon the death of John C. Drewry, on 12 September, 1937, the title of the Drewry Hill Farm referred to in Item IV of the will of John C. Drewry, Sr., vested in fee simple in John C. Drewry, Jr., son of John C. Drewry and grandson of the testator, and the failure of the court to hold that the fee in said farm vested in her as the sole beneficiary under the will of John C. Drewry. This assignment of error cannot be sustained.

It is the contention of Mary Hardy Drewry that Item IV of the will of John C. Drewry, Sr., created a fee tail male in her husband, John C. Drewry, which was converted by C. S., 1734, into a fee simple title to the real estate therein described, and that title thereto passed to her under her husband's will. Even if it be conceded that the words "male heirs" should, under the statute, be read "heirs," still the rule in

Shelley's case would not operate to create a fee simple title in John C. Drewry to whom the land is given "to hold during his lifetime," by reason of the superadded words "they (the male heirs) to share and share alike" in the ultimate limitation after the preceding estate. The second syllabus of *Mills v. Thorne,* 95 N. C., 362, which properly interprets the opinion, is as follows: "In this State, when an estate is settled on the ancestor, with remainder to his heirs, 'equally to be divided among them,' or 'share and share alike,' the addition of these words prevents the application of the rule in *Shelley's case,* and the heirs take as purchasers." See, also, *Ward v. Jones,* 40 N. C., 400; *Gilmore v. Sellars,* 145 N. C., 283; *Haar v. Schloss,* 169 N. C., 228; *Welch v. Gibson,* 193 N. C., 684.

A. L. Purrington, guardian *ad litem* of Mary Holt Drewry and John C. Drewry, Jr., assigns as error that portion of paragraph (c) of the judgment wherein the court holds that the residue trust has terminated. This assignment of error cannot be sustained.

The termination of the residue trust is determined by Item XIII of the will of John C. Drewry, Sr., wherein the following language is found "the residue trust fund shall be kept alive until the two particular trust funds for Mrs. Kittie Holt Drewry, and John C. Drewry, Jr., have each terminated." The particular trust fund for Mrs. Kittie Holt Drewry terminated upon her dissent to the will. The particular trust fund for John C. Drewry, Jr., son of the testator, terminated upon his death on 12 September, 1937. That this was the intention of the testator appears from Item XX of the will wherein it is provided: "This devise in fee (having reference to the two-thirds of the residue trust given to John C. Drewry, Jr., upon the termination of said trust) shall not take effect as to John C. Drewry, Jr., or pass any title to him or his heirs until he attains the age of 35 years or dies before that time, leaving issue surviving him." John C. Drewry, Jr., died on 12 September, 1937, before attaining the age of 35, leaving issue, and thereupon the "devise in fee" took effect in his issue, Mary Holt Drewry and John C. Drewry III. There is nothing in the will that indicates that John C. Drewry, Sr., the testator, ever intended the residue trust to be continued after the death of his son, John C. Drewry, Jr., and in the absence of such expressed intention the trust terminated upon his death.

A. L. Purrington, guardian *ad litem* of Mary Holt Drewry and John C. Drewry, Jr., assigns as error that portion of paragraph (c) of the judgment to the effect that James G. Hanes, Jr., is entitled to have one-third of the residue trust held for his benefit until he reaches the age of 35 years and if he be living at said age to then have said one-third delivered to him, and the failure to hold that Mary Holt Drewry and John C. Drewry, Jr., are entitled to the entire principal of the residue trust. This assignment of error cannot be sustained.

This holding is in accord with the provisions of the twentieth item of the will of John C. Drewry, Sr., which reads: "Item XX. It is my will and desire that all property undisposed of under this will and remaining in the hands of my trustee or trustees when said residue shall terminate, shall be divided into three equal parts, two parts to go to my son, John C. Drewry, Jr., and one part to go to my grandson, James G. Hanes, Jr., their children to inherit their parents' share, if such parent be dead prior to that time. This devise in fee shall not take effect as to John C. Drewry, Jr., or pass any title in fee to him or his heirs until he attains the age of 35 years or dies before that time, leaving issue surviving him. Similarly, the devise to my grandson James G. Hanes, Jr., and shall not take effect or pass any title in fee to him or his heirs until he arrives at the age of 35 years, or leaves issue surviving him, should he die before attaining that age."

We are of the opinion that the construction placed upon the will of John C. Drewry, Sr., by the trial judge, as indicated by the judgment entered below, carries out the intention of the testator as gathered from the four corners of the will, modified by his widow's dissent, and the judgment is, therefore, in all respects

Affirmed.

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

E. D. LATTA, JR., EXECUTOR AND TRUSTEE OF THE ESTATE OF EDWARD D. LATTA, SR.; AND EDWARD D. LATTA, JR., INDIVIDUALLY, v. TRUSTEES OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES, AND THE PRESBYTERIAN FOUNDATION, INC.; ASHEVILLE MISSION HOSPITAL; NORTH CAROLINA ORTHOPEDIC HOSPITAL; ACTON LATTA PORCHER AND HUSBAND, WILLIAM H. PORCHER; WILLIAM H. PORCHER, JR.; HARRIET PORCHER; JEANIE LEA FARGASON AND HUSBAND, JOHN T. FARGASON; AND THE UNBORN CHILDREN AND GRANDCHILDREN OF MRS. ACTON LATTA PORCHER, AND OF EDWARD D. LATTA, JR.

(Filed 4 May, 1938.)

1. Executors and Administrators § 21—Evidence held to disclose that payment was made to beneficiary from estate.

The evidence disclosed that a check to testator's daughter was endorsed by her and delivered to testator's widow by the trustee under the will, in order to save interest, and that the widow gave the trustee a receipt stating that the amount was received on account of her interest in the estate. *Held:* The evidence discloses that the amount was paid the widow as a

beneficiary under the will, and her contention that the transaction was a personal transaction between herself and daughter in which the court had no interest, is untenable.

2. Executors and Administrators § 9—Court has jurisdiction to direct administration of trust estates and to protect interests of minors.

In the distribution of a trust estate under a family agreement, containing a provision for the retention of a certain sum by the trustee to pay annuities to minors as directed in the will, the court has plenary jurisdiction to direct that no further sums be paid the beneficiaries under agreement for the distribution of the estate until funds fully sufficient to protect the interests of minor beneficiaries are received by the trustee from the estate and placed in the trust estate for the minors, the order being in the jurisdiction of the court over the administration of a trust estate and in its power to protect the interests of minors.

3. Executors and Administrators § 24—

An agreement of certain devisees for the distribution of their shares in a trust estate merely affects the method of the distribution of the *corpus* of the estate, and the estate remains a trust estate to be administered by the executor and trustee subject to control and power of modification by the court.

4. Same—

The agreement of certain devisees for the distribution of their shares in the trust estate *is held* to show the intent of the parties that the funds were to be distributed in installments ratably in proportion to the interest of each devisee under the agreement.

5. Infants § 1—

In a sense the courts are the supreme guardians of all infants, and in all suits or legal proceedings the powers of a court of chancery may be invoked to protect both their personal and property rights, and, when necessary, the courts will act *ex mero motu* to afford them protection.

6. Executors and Administrators § 24—In distribution of estate under family agreement court should order executor to retain funds amply sufficient to guarantee payment of annuities to infants.

Certain devisees under the will made a contract for the distribution of their shares in the trust estate, which agreement was approved by the court, with direction that the trustee retain a certain sum to guarantee the payment of annuities to certain minors as directed by the will. *Held:* The court should have heard the guardian of the minors upon the question of whether the amount ordered to be reserved was sufficient to guarantee the payment of the annuities to the minors, and the judgment is modified and affirmed in order that the court may investigate and order set apart in trust funds amply sufficient to guarantee to the infants their legacies under the will before any further disbursement of the *corpus* of the estate is made to any person.

7. Same—Wills § 33e—Annuities to beneficiaries not parties to agreement for distribution of trust estate, constitute a charge on whole estate.

Certain devisees entered an agreement for the distribution of their shares in the trust estate set up by the will, which agreement was approved by the court in proceedings duly instituted, in which certain annuitants were not parties. *Held:* The annuitants take under the

will and not under the agreement, and their rights, in effect, constitute a charge on the whole estate, and the court should order adequate trust provisions to be made to guarantee sufficient funds for the payment of the annuities.

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

APPEAL by defendants Jeanie Lea Fargason, John H. Small, Jr., guardian *ad litem* for William H. Porcher, Jr., and Harriet Porcher, and E. J. Hanson, guardian *ad litem* for the unborn children of William H. Porcher, Jr., and Harriet Porcher. Modified and affirmed.

This is a proceedings instituted by the plaintiff executor and trustee of the estate of Edward D. Latta, Sr., in which he seeks the advice and direction of the court in the administration of the estate committed to his charge.

Edward D. Latta, Sr., died in July, 1925, leaving a last will and testament and codicils thereto, which were duly probated and in which the plaintiff was named executor and trustee. The testator, after making certain specific bequests and devises, minor in nature when compared to his estate as a whole, devised all of the residuum of his estate to E. D. Latta, Jr., as trustee, to manage and control the estate and out of the income pay certain annuities as follows: To his widow, Jeanie Lea Fargason, $1,500 per month during her life; to his daughter, Acton Latta Porcher, $1,500 per month during her natural life; to William H. Porcher, Jr., when and after he shall reach the age of 16 years and until he shall reach the age of 30 years, the sum of $3,000 annually, and upon his arrival at the age of 30 years $50,000, to be his absolutely; to any other child born to Acton Latta Porcher, who shall arrive at the age of 16 years, $3,000 annually from and after such child shall arrive at 16 years of age and until it shall arrive at the age of 30, at which time said trustee shall pay said child $50,000; the said Acton Latta Porcher now has a second child, Harriet Porcher, 14 years of age, who is entitled to the benefits of this provision; Elizabeth C. Handley, Emma C. Drayton and Paul McCorkle $75.00 per month each during their respective lives, and Mrs. Carrie T. Johnson $50.00 per month during her natural life. There were other annuities for stated periods which are not material here; also annuities were provided for any unborn child of Edward D. Latta, Jr., and of Acton Latta Porcher. The court below held that these latter devises of annuities were void as being in violation of the rule against perpetuities. The will provided that in the event a child or children of Acton Latta Porcher should die before reaching the age of 30 years, leaving child or children surviving, the annuity of said child should be paid over in equal shares to his or her surviving children until such child or children reach the age of 20 years, at which time the *corpus* of the bequest to his, her or their deceased parents should vest in such surviving grandchild or grandchildren in equal shares.

The will and codicils then provide that all the rest and residue of the income from the residuum of the estate, including that which reverts upon the death of testator's wife and daughter and other legatees and devisees, should be paid annually: one-fourth to the trustees of the General Assembly of the Presbyterian Church in the United States; one-half to the Mission Hospital of Asheville, N. C.; and one-fourth to the Orthopedic Hospital of Gastonia, N. C. The will further provided that after the trustee had fully administered said trust the said trustee or his successor should turn over the *corpus* of the residuum of said estate to said institutions.

Acton Latta Porcher having refused to accept the benefits provided for her in said will and having threatened to caveat the same, she and her step-mother, Jeanie Lea Fargason, the trustees of the General Assembly of the Presbyterian Church, the North Carolina Orthopedic Hospital, Asheville Mission Hospital, and Edward D. Latta, Jr., individually and as executor and trustee, entered into a written agreement in which a distribution of the *corpus* of the estate in lieu of the annuities to said parties to said agreement is provided for as follows: (1) 27½ per cent to the Asheville Mission Hospital; (2) 13¾ per cent to the trustees of the General Assembly of the Presbyterian Church in the United States and the Presbyterian Foundation, Inc.; (3) 13¾ per cent to the N. C. Orthopedic Hospital; (4) 22½ per cent to Mrs. Jeanie Lea Fargason until she has been paid the sum of $325,000, with interest; and (5) the remainder of the said net estate to Acton Latta Porcher, or her legal representatives, except that out of her part of said estate said trustee shall pay the annuities given in said will, other than the annuity given to Jeanie Lea Fargason and the annuity given to Acton Latta Porcher. The agreement further provides that the rights of the grandchildren and great-grandchildren of the testator, annuitants under his will, shall be adjudicated by the court in an action to be instituted, and that so much of such part of said estate to be set aside for Mrs. Porcher as the court shall deem proper shall be held in trust by the said E. D. Latta, Jr., for the benefit of said grandchildren; provided, that said trustee shall annually or oftener pay over to Mrs. Porcher so much of the income from the property so held in trust by him as shall remain in his hands after making such payments to said grandchildren as shall be required by the terms of said decree, and provided further that any part of said trust estate which shall remain in the hands of said trustee after the rights of said grandchildren as fixed by such decree shall have been satisfied shall be transferred and delivered to Mrs. Porcher or her legal representatives absolutely.

The parties to said agreement, in consideration of the terms of said agreement, expressly waive their respective rights to the annuities given in the will.

Pursuant to said agreement, the plaintiff instituted this proceedings and, in his petition filed, fully sets out the facts and requests the court to advise and direct him: (1) As to whether the bequests made to the great-grandchildren of the testator upon the contingency therein set forth are void as being in violation of the rule against perpetuities; (2) as to whether the bequests made to the unborn children of the testator's daughter, Acton Latta Porcher, and the unborn children of E. D. Latta, Jr., are likewise void as being in violation of the rule against perpetuities; and (3) as to whether the contract referred to is a valid and binding obligation between the parties thereto and as to whether the court would authorize and instruct the petitioner to carry out the terms and provisions thereof in final settlement, division and distribution of the net residuum of income and *corpus* of said estate as being in substantial compliance with the spirit and intention of the testator's will.

Thereupon, at the December Special Term, 1927, Mecklenburg Superior Court, Harding, J., entered a decree, after hearing the evidence offered, in which the said agreement was ratified and approved, the devise of annuities to unborn grandchildren and great-grandchildren other than the children of W. H. Porcher, Jr., and Harriet Porcher are adjudged to be void, and the trustee is directed to observe and comply with the terms of said agreement in the settlement of said estate.

In this decree there is no provision made for the protection of the annuitants under the will of the plaintiff's testator other than the children of Acton Latta Porcher. As to them it is provided that out of the share allotted to Mrs. Acton Latta Porcher under said agreement the sum of $125,000 shall be retained by the trustee in trust for the use and benefit of William H. Porcher, Jr., and Harriet Porcher, to be paid over to them or to their children, as the case may be, as provided in said will. It then provided that the trustee shall annually or oftener pay over to Mrs. Porcher so much of the income from the funds so held in trust by him as shall not be required to make the payments to said beneficiaries.

The cause was retained for other and further decrees.

Thereafter, the plaintiff filed a supplemental petition in which the former proceedings are fully recited and the status of the estate at the time of the petition is fully set forth. This petition likewise discloses that substantially all of the liquid assets of the estate have been distributed among the parties to said agreement and that the assets now remaining on hand are composed almost entirely of unimproved, unproductive and nonsalable real estate. The purpose of the petition was to request further time in which to settle said estate.

Mrs. Porcher, answering, admitted the allegations of the petition and set up by way of further answer that the trust fund for her children had

not been created; that in the distribution of the estate $81,450 payable to her under the agreement had been paid to Mrs. Fargason, with her consent, as an advancement to protect her share against the payment of interest, and that she had been charged with interest on sums paid to annuitants under the will. She prayed that the court order the trustee to make no further distribution to Mrs. Fargason until there had been restored to her share the said sum of $81,450, so that it may be used in the establishment of the trust fund for her children, and that the trustee be directed to charge no interest against her share on the annuity payments made in the past, or those to be made in the future.

The defendant Jeanie Lea Fargason replied to the further answer of Mrs. Porcher, setting out fully the terms of the agreement, the disbursements made under the agreement and alleging that the payment of $81,450 to her was made by Mrs. Porcher as a personal transaction between them, with which neither the trustee nor the court was concerned, and praying that no order be made adversely affecting her right to future payments in the distribution of the estate.

John A. Small, Jr., guardian *ad litem* for William H. Porcher, Jr., and Harriet Porcher, and E. J. Hanson, guardian *ad litem* for the unborn children of William H. Porcher, Jr., and Harriet Porcher, answering, admit the allegations of the petition and set forth the terms of the agreement, the nature and amounts of the devises to their wards, and the failure of the trustee to retain the trust fund ordered by the court for the protection of their wards; and in detail further prayed orders of the court to protect their wards, including the requirement that the payment of $81,450 be restored to the estate by Mrs. Fargason to be used in the creation of said trust fund.

Thereupon the court entered its decree, setting forth the facts which show that $550,000 of the estate has been disbursed among the parties to said agreement and that only $6,358.24 has been set apart for the protection of the infants involved, and adjudging (1) that the trustee should make no further payment to Mrs. Fargason until the sum of $81,450 has been restored to the share of Mrs. Acton Latta Porcher from funds which, except for the payment of said sum, would be available for distribution to Mrs. Fargason, and directing the trustee to set apart the trust fund provided in the first decree for the benefit of the infants; (2) directing the trustee to charge no further interest to Mrs. Acton Latta Porcher on account of payment of annuities from the general funds. The court declined to pass upon the question raised by the guardian *ad litem* as to whether or not the sum of $125,000 is an adequate trust fund at this time to protect the interest of the infants. The defendants Jeanie Lea Fargason, John H. Small, Jr., guardian *ad litem*, and E. J. Hanson, guardian *ad litem*, each excepted and appealed.

Cansler & Cansler for plaintiff Edward D. Latta, Jr., Trustee, appellee.

W. S. O'B. Robinson and John M. Robinson for Acton Latta Porcher, defendant, appellee.

Parker, Bernard & Parker for Mrs. Jeanie Lea Fargason, defendant, appellant.

John H. Small, Jr., guardian ad litem of William H. Porcher, Jr., and Harriet Porcher; and E. J. Hanson, guardian ad litem of the unborn children of William H. Porcher, Jr., and Harriet Porcher, defendants, appellants.

BARNHILL, J. Mrs. Fargason excepts to so much of the judgment as prohibits the distribution to her of any further portion of the estate until the payment of $81,450 made to her out of the share of Mrs. Porcher is restored upon the theory that the court was without jurisdiction to make such order for the reason that the payment of said sum to her was a personal transaction between her and Mrs. Porcher. This exception cannot be sustained. The record discloses that check for said sum was issued to Mrs. Porcher, endorsed by her, and delivered to Mrs. Fargason by the trustee as an advancement upon Mrs. Fargason's share under the agreement, to save the payment of interest, and that Mrs. Fargason gave her receipt to the trustee in acknowledgment of the payment of said sum "on account of my interest in the estate of Edward D. Latta." The order of the judge is fully sustained by the facts appearing of record and found by him. The court had full jurisdiction, both by reason of the fact that this proceeding relates to the administration of a trust estate and it involves the interest of infants, over each of which the court has full equity jurisdiction.

The agreement entered into by certain of the devisees under the will of plaintiff's testator merely affects the method of the distribution of the *corpus* of the estate. Under the terms of the will and the provision of the contract it remains a trust estate, to be administered by the plaintiff, executor and trustee. Mrs. Fargason's exceptive assignments of error based upon the contention that the distribution is to be made under the terms of the contract and not under the terms and provisions of the will, and that the contract is binding and cannot be modified or in anywise disturbed by the court, are without merit.

While the agreement does not specifically state that payments under the agreement are to be made to the parties thereto ratably in proportion to the interest of each of such parties under the agreement, it clearly appears from the agreement as a whole that this was the intent of the parties. Distributions were made on three separate occasions on that basis without exception on the part of either person interested. It was not error for the court below to base its order upon the theory that in the distribution to the parties to said agreement there was to be equality

in the amounts to be received by such parties in the ratio of their respective interests in the estate. As to the interest of Mrs. Fargason, there is no error in the decree.

The failure of the court below in any of its decrees to make adequate provision for the protection of the annuitants under the will other than the Porcher children, and the questions presented by the appeal of the guardians *ad litem* give us more concern.

From our earliest history infants have been regarded as entitled to the especial protection of the State and as wards of the court. In a sense courts of chancery are the supreme guardians of all infants and are charged with the protection alike of their personal and property rights. The State is *parens patriæ* of the infants within its borders and the jurisdiction of its courts to protect the interest of infants is broad, comprehensive and plenary. In all suits or legal proceedings of whatever nature, in which the personal or property rights of a minor are involved, the protective powers of a court of chancery may be invoked whenever it becomes necessary to fully protect such rights. When necessary the courts will go so far as to take notice *ex mero motu* that the rights of infants are endangered and will take such action as will properly protect them. Speaking to the subject in *Bank v. Alexander*, 188 N. C., 667, *Adams, J.*, says: "It is unquestionable that courts of equity have general jurisdiction over the property of infants and that infancy alone is sufficient to sustain the right of supervision. The jurisdiction in all cases is complete and may be exercised in order to afford relief wherever it may be necessary to preserve and protect the estates and interests of those who are under age." And in 10 R. C. L., 340, sec. 89, it is stated: "Equity has full and complete jurisdiction over the persons and property of infants and all other persons laboring under legal disabilities. . . . The jurisdiction in all these cases is plenary and potent to reach and afford relief in every case where it may be necessary to preserve their estates and protect their interests."

While under the will of the testator practically all of his estate was to be held in trust, under the agreement entered into by certain of the devisees and the decree of the court, only $125,000, out of an estate valued at more than two million dollars, is to be reserved in trust to protect the infant parties to this proceeding. At the time this order was made it may have then appeared that said sum was fully sufficient for that purpose. It is now a matter of common knowledge, however, that under present conditions the securities in which a trustee is authorized to invest trust money will not produce a net return sufficient to guarantee the payment of the annuities accruing to these infants and the other annuitants. They take under the will and not under the agreement. Those who are *sui juris* having elected to substitute, by agreement, a different mode of payment to them of their interest in the estate, the rights of these infants and the other annuitants in effect constitute a

charge upon the whole estate. It is the duty of the court to require the segregation in the hands of the trustee assets unquestionably adequate to protect their interests.

Although it appears that practically all of the liquid assets of this estate have been disbursed and that practically nothing now remains except unproductive real estate, only the sum of $6,358.24 has been retained in the trust fund created by order of the court. It was error for the court to decline to consider the petition of the guardians *ad litem* in this respect. The judgment below should be modified so as to provide that the trustee shall retain out of the *corpus* of the estate as a whole an amount which the court shall find to be amply sufficient to be set apart in trust to guarantee to these infants their legacies under the will before any further disbursement of the *corpus* is made to any other person.

The record discloses that there are four annuitants, other than the Porcher children, who were not parties to the agreement. These annuitants have not been made parties to this proceeding. It appears that the only provision made for their protection is contained in the agreement, which provides that the trustee shall pay these annuities out of the portion of the estate to be paid to Mrs. Acton Latta Porcher. At the same time the agreement and the decree of the court provide that Mrs. Porcher shall receive all of her share except the $125,000 to be set apart for the benefit of the Porcher children. We do not consider that adequate trust provisions have been attached to the portion of said estate payable to Mrs. Acton Latta Porcher to protect these annuitants. These parties likewise take under the will and not under the agreement and their right is against the whole estate. Adequate provision should be made for their protection. The court below, after adequate investigation, will enter judgment modifying the decree entered in accordance with this opinion.

Modified and affirmed.

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

STATE OF NORTH CAROLINA, ON RELATION OF DAN C. BONEY, INSURANCE COMMISSIONER, v. CENTRAL MUTUAL INSURANCE COMPANY OF CHICAGO.

(Filed 4 May, 1938.)

1. Insurance § 47—Whether policy is a liability or an indemnity contract depends upon intent of parties as expressed in the instrument.

Whether a policy insures against liability to third persons, entitling insured to recover upon the establishment of liability by judgment from risks covered by the policy, or is an indemnity contract entitling insured

to recover only sums actually paid in discharge of such liability, is to be determined by the intent of the parties as expressed in the language of the contract.

2. Same—Policy in suit held to insure against liability and insured was entitled to recover upon rendition of judgment in favor of third person.

The policy in suit insured "against loss from liability" imposed by law upon insured resulting from the operation of the motor vehicles insured, and provided that insurer should have complete control over and should conduct the defense of any action against insured growing out of the risks covered, and that insured should not voluntarily incur any liability or settle any claim covered by the policy except with the written consent of insurer. *Held:* The provision giving insurer exclusive control over and right to conduct the defense of actions against insured is inconsistent with a contract of indemnity against loss actually sustained, and construing the contract as a whole, it entitles insured to recover upon the establishment of liability by judgment on a cause of action arising from a risk covered by the policy, without a showing of payment of any part of the judgment by insured. *Lowe v. Fidelity & Casualty Co.*, 170 N. C., 445, cited and distinguished upon the language of the policy.

3. Insurance § 51—

Where judgment against insured is rendered on a risk covered by a liability contract, claim against the receiver of the insolvent insurer should be allowed on its admitted policy upon proof of the judgment, and where insured has also become insolvent the disposition of payments on the claim by insured's receiver is for the determination of the court.

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

APPEAL by Burlington Trucking Company, claimant, from order disallowing its claim against the receiver of defendant Insurance Company, at September Term, 1937, of WAKE. *Cowper, Special Judge,* presiding. Reversed.

The action was instituted under C. S., 6445, by the Insurance Commissioner for the purpose of having a receiver appointed to administer the special fund deposited by the Central Mutual Insurance Company of Chicago (an Illinois corporation, now insolvent) with the State Treasurer for the payment of the obligations of said Insurance Company to citizens or residents of this State. Paul F. Smith was duly appointed and qualified receiver. Thereafter the Burlington Trucking Company, a North Carolina corporation, a policyholder, filed a claim with said receiver on account of a judgment rendered against said Trucking Company for liability covered by the liability insurance policy of defendant Insurance Company. This claim was disallowed by the receiver on the ground that the claimant had not paid the judgment upon which the claim was based. Upon appeal to the Superior Court, it was adjudged that claimant was entitled only to prove its claim for the actual amount paid upon said judgment, with provision permitting payment of the judgment by installments, the claim to be allowed for the amount of

payments actually made within the limits of the policy. Claimant appealed to the Supreme Court.

Thereafter, it appearing that the claimant, Burlington Trucking Company, had been placed in receivership, the receiver of the Trucking Company was, by order, empowered to prosecute the claim on its behalf.

J. M. Broughton, Thos. C. Carter, and Wm. H. Yarborough, Jr., for appellant, Burlington Trucking Company.

A. L. Purrington, Jr., for receiver of Central Mutual Insurance Company of Chicago, appellee.

DEVIN, J. The question presented for decision by this appeal arose upon the following facts:

The Central Mutual Insurance Company of Chicago (hereinafter called the Insurance Company) issued its policy of insurance to the Burlington Trucking Company insuring it "against loss from liability imposed by law upon assured for damages on account of bodily injuries, including death resulting therefrom, . . . caused by or through the ownership, maintenance or operation of any automobile described in the schedule." The policy required the assured to give within five days written notice of any accident, claim or suit resulting, to forward process to the company, and, when requested, to aid in securing evidence and attendance of witnesses. The policy contained the further provision that "the (Insurance) Company will investigate all accidents and claims covered hereunder, and defend in the name and on behalf of the assured all suits thereon, and will pay . . . the expenses incurred by it in such investigation and defense, but the company reserves the right to settle any such claim or suit. The assured shall not voluntarily assume any liability nor interfere in any negotiations or legal proceedings conducted by the company on account of any claim, nor except at his own cost, settle any claim, nor incur any other expense without the written consent of the company previously given."

During the life of this policy the automobile of the Trucking Company was involved in an accident resulting in the death of Sarah Colston Barry in the State of Virginia. In a suit for damages therefor prosecuted by R. P. Barry, Jr., administrator, in the District Court of the United States for the Western District of Virginia, judgment was rendered 5 December, 1936, against the Trucking Company for $4,000. This suit was defended from the beginning and throughout by the Insurance Company. Following the appointment of the receiver for the Insurance Company, claim under the policy was filed by the Trucking Company for $4,000, with certified copy of the judgment attached. The Trucking Company had paid $700 on the judgment. The receiver rejected the claim for the remainder of the judgment for the reason that the insured

had not paid it. A similar ruling of the Superior Court, on appeal, was based upon the same ground.

Does the policy of insurance in suit constitute a contract of insurance against liability for damages, or only a contract of indemnity against actual loss in the sense of money paid? As a condition precedent to the right to recover on the policy must the assured have paid the judgment?

It has been well said that a policy of liability insurance is either a contract of insurance against liability for loss or damage and is properly called a liability contract, or it is a contract of insurance against loss or damage and is thus called an indemnity contract. Whether it is the one or the other depends upon the intention of the parties as evinced by the phraseology of the agreement in the policy. "Where the policy provides that insured shall immediately notify the company in case of accident or injury, that the company would defend actions growing out of injuries, in the name of insured, and that insured should not settle any claim or incur any expense without the consent of the company, it is generally held to be a policy of indemnity against liability for damages, and is not merely a contract of indemnity against damages." 36 C. J., 1057-8; 14 R. C. L., 1321.

In *Slavens v. Ins. Co.,* 27 Fed. (2nd), 859, construing a policy like the one in the instant case, after citing with approval the statement of the law found in 36 C. J., 1057-8, quoted above, the Court said: "The case at bar comes within the definition quoted. While it expresses the obligation of the company to indemnify the assured against loss from liability imposed by law upon him for damages on account of bodily injuries accidentally sustained, it also contains the condition that the assured shall notify the company of the accident, that he shall not voluntarily assume any liability or settle any claim or incur any expense on account thereof without the consent of the company, and that the company will defend in the name and on behalf of the assured any suit against him to recover damages on account of bodily injuries." A number of cases from different jurisdictions are cited in support of the view expressed by the Court.

In *Malley v. American Indem. Corp.,* 297 Pa., 216, 81 A. L. R., 1322, it was said: "There are two types of indemnity insurance, sometimes called indemnity against liability or 'liability contracts' and indemnity against damage or 'indemnity contracts.' In the first class, the liability of the insured determines enforceability, in the other the policy is only enforceable when the insured has sustained actual loss, as by paying a judgment against him coming within the scope of the policy. The class into which particular policies fall depends on the intention of the parties as shown by their contract. Where the policy, indemnifying insured against loss arising out of legal liability, provides that the insured shall immediately notify the company in case of injury, and the company will defend all suits growing out of injuries, in the name of insured, and

insured will not settle any claim without consent of the company, it is usually held to be a policy of indemnity against liability for damages or an indemnity against liability, and is not a mere contract of indemnity against damages."

In the leading case of *Clark v. Bonsal,* 157 N. C., 270, 72 S. E., 954, construing a liability insurance contract where the insurance was "against loss from liability imposed by law upon the assured for damages," *Hoke, J.,* states the law in these words: "In construing contracts of this character, the courts have generally held that if the indemnity is clearly one against loss or damage, no action will lie in favor of the insured till some damage has been sustained, either by payment of the whole sum or some part of an employee's claim; but if the stipulation is, in effect, one indemnifying against liability, a right of action accrues when the injury occurs or, in some instances, when the amount and rightfulness of the claim has been established by judgment of some court having jurisdiction."

In the elaboration of his opinion, *Justice Hoke* cites *Anoka Lumber Co. v. Casualty Co.,* 63 Minn., 286, and *Sanders v. Frankfort Ins. Co.,* 72 N. H., 485, and refers to those cases as follows: "In the Minnesota and New Hampshire cases, *supra*—and we incline to the opinion that the present policy comes within the principle—it was held that the terms, 'insured against loss from liability arising,' etc., in the first portion of the policy, was so modified by subsequent clauses that it amounted to insurance against liability, and the entire amount could be applied to the employer by appropriate process."

Examining the opinion in *Anoka Lumber Co. v. Casualty Co., supra,* we find that Court, in holding the insurance contract one of indemnity against liability, reasoned as follows: "If the plaintiff is forbidden to settle a claim for an accident of this kind, we fail to see how it is imperative upon him (the assured) to pay a judgment rendered against him upon such a claim as a condition to his right of recovery. The Insurance Company by the terms of its own policy has taken into its own hand the whole machinery for settling such claim, and will not allow the employer (insured) to do it." And in *Sanders v. Frankfort Ins. Co., supra,* it was held that, since the Insurance Company agreed, in the performance of its contract, to defend the suit and to settle with or pay the assured, it plainly provided for the performance of the contract of indemnity before the assured has suffered loss in the sense of actual payment of damages, and that "after taking control of the proceedings in a suit against the assured, the insurer could not thereafter be discharged except by payment of the indemnity to the assured, or securing his discharge from the claim."

In *Hoven v. Steel Co.,* 93 Wis., 201, the Court said: "Again by one of the conditions the Insurance Company assumes entire charge and responsibility of the settlement of the loss and of any legal proceedings

and for the payment of the costs thereof. There is no way provided by which it can be relieved of its liability except by actual payment to the employer (assured) of the full amount for which it could become liable. . . . The provisions in the policy are inconsistent with any reasonable theory other than that the contract of insurance is one of indemnity against liability, and that actual damage is not a condition precedent to the maintenance of an action thereon."

In *Brandon v. Indemnity Co.,* 132 Kan., 68, the contract was held one of insurance against liability rather than one of indemnity against loss, citing *Fritchie v. Extract Co.,* 197 Pa., 401, and *Slavens v. Ins. Co.,* 27 F. (2), 859. In the annotations under this case, reported in 83 A. L. R., 677, a large number of cases from different jurisdictions are collected in support of the statement that by the weight of authority a policy to insure the assured against "loss from liability" is one insuring against liability for damages, and that loss within the meaning of the insuring clause may be sustained without payment having been made and is sustained by the rendition of a judgment against the assured.

From *Indemnity Co. v. Davis,* 150 Va., 778, we quote: "The company was bound by the terms of the policy to indemnify the assured by paying any loss sustained by him 'by reason of the liability imposed by law' in case of injury to or the death of third persons, and to pay as well the court costs in any suit against the assured as also the interest upon any judgment in the suit. The policy also contains the usual stipulation that it will defend 'in the name of and on behalf of the assured all claims or suits for such damage for which the assured is, or is alleged to be, liable.' Under such a policy the cause of action of the assured is complete and the assured can recover upon the contract as soon as the liability of the assured has become fixed and established by a judgment against him, even though he has sustained no actual pecuniary loss or damage at the time he seeks to recover." 31 C. J., 438.

In *Kurre v. Indemnity Co.,* 223 Mo. App., 406, it was held that the words "to indemnify the assured against loss by reason of liability imposed by law" were properly construed as a contract of insurance against liability and not a mere reimbursement contract. In that case it was conceded that the insured had not satisfied the judgment theretofore rendered against it in the action for damages for personal injuries.

In *West v. McMillan,* 301 Pa., 344, it was said: "Where an indemnity contract contains provisions by which the absolute control and determination of loss may be taken from the indemnitee by the company's assuming entire charge of the defense, the company waives its right to insist on a literal enforcement of the indemnity contemplated by the contract, and an action may be sustained by an indemnitee when the loss has been determined by final judgment. The reason for the above conclusion is that the insurer has voluntarily adopted the insured's liability. Having safeguarded its own interests by ascertaining, through

legal channels, that a fair loss has been sustained by its conduct of the trial, it is estopped from denying its own liability, and cannot prevent the indemnitee from recovering, though the indemnitee's liability has not been discharged by payment."

To the same effect is the holding in *Miholevich v. Ins. Co.,* 261 Mich., 495, 86 A. L. R., 633, where the Court said: "Under such a policy, when judgment was rendered against the insured, the amount thereof became due and payable from the insurer to him, and it was the legal duty of the (insurance) company to pay it."

In *Oehme v. Johnson,* 181 Minn., 138, where the insurance was against "loss from liability imposed by law upon the assured for damages as the result of ownership and maintenance or use of such automobile," it was held: "The policy is a liability policy as distinguished from what is sometimes termed an indemnity policy. An obligation to pay follows though the insured has not himself paid the loss in money. The policy does not contain a 'no action' clause such as is found in some policies."

In *Murgic v. Casualty Underwriters,* 245 Ill. App., 361, it was held that, where the policy insured against loss from liability imposed by law for damages on account of injuries due to the operation of an automobile, it was not incumbent upon the insured to prove payment of the judgment before suit. And in *Ravenswood Hospital v. Casualty Co.,* 280 Ill., 103, where the policy insured against loss from liability imposed by law, and liability was incurred, it was held that when the court entered judgment against the insured, the loss on account of such liability was sustained.

The reason for the rule, supported by these authorities, that the provision in the policy for the exclusive control of the defense is an important factor in determining whether the contract is one of insurance against liability or of indemnity only, is well stated by *Bausman, J.,* in *Davis v. Casualty Co.,* 89 Wash., 571: "By taking over the defense the insurer assumes a feature of a liability contract as distinguished from an indemnity contract. When he takes over the defense himself, he will not be heard to say that he has not assumed the position of liability insurer." By conducting the defense to the exclusion of the insured, the insurer waives the right to require prepayment by the insured, and on final judgment against the insured, loss has matured.

In *Brucker v. Casualty Co.,* 326 Mo., 856, it was said: "It (the insurer) undertook to defend any suit. It could not in accordance with that agreement cease that defense when the case was lost. The protection did not stop with the conduct of the suit. It can only stop when judgment against the assured is satisfied. The assured is not protected if he has to pay before he can recover against the insurer. A judgment impairs his credit. It might be sufficient to render him insolvent and drive him out of business. His loss is the liability incurred when he has judgment rendered against him."

The following additional authorities, in support of the ruling in the cases above cited, may be noted. *Fenton v. Ins. Co.,* 36 Ore., 283; *Graff v. Auto Ins. Co.,* 225 Mo. App., 85; *Blanton v. Cotton Mills,* 103 Kan., 118; *Wehrhahn v. Casualty Co.,* 221 Mo. App., 230; *Landaker v. Anderson,* 145 Wash., 660; *Indemnity Co. v. Daues,* 321 Mo., 1035. See, also, annotations and notes of cases in 37 A. L. R., 644.

In *Goerss v. Indemnity Co.,* 223 Mo. App., 316, it was said: "It is elementary and well understood that the financial worth of a person is the value of his property less what he owes, or, in other words, the value of his resources less his liabilities. A loss to a person, as understood in business, is either a decrease in the value of his resources or an increase in his liabilities. There ought to be no question that the word 'loss' is used in this sense in the insuring clause of the policy under review."

"'Loss from liability' literally means loss which arises immediately upon one becoming liable to another, not loss which arises immediately upon such liability being paid or extinguished. 'Liability' is defined in Webster's New International Dictionary as 'that which one is under obligation to pay, or for which one is liable.'" *Maryland Casualty Co. v. Peppard,* 53 Okla., 515.

"Loss does not have an inflexible meaning, and may consist of many different situations of varying gradations. Voluntary or involuntary separation from one's money is not the only criterion of loss. Any shrinkage in value of estate or property may on proper occasions be rightfully so termed." *Malley v. Am. Indemnity Corp.,* 297 Pa., 216.

A contrary conclusion, in construing policies of liability insurance, seems to have been reached in *Casualty Co. v. Williams,* 209 Ky., 626; *Indemnity Co. v. Gosgriff,* 144 Md., 660; *Fidelity Co. v. Williams,* 148 Md., 289; *Indemnity Co. v. Martin,* 224 Ala., 646; *Raptis v. Fidelity Co.,* 109 W. Va., 602. See annotations in 83 A. L. R., 677.

The appellee relies upon *Lowe v. Fidelity & Casualty Co.,* 170 N. C., 445, 87 S. E., 250. In that case, *Brown, J.,* speaking for the Court, used this language: "We are of opinion that the plaintiff is not entitled to recover the $5,000. The contract does not indemnify the assured against liability, but only against actual loss. It is admitted that the judgment has not been paid. That being so, the plaintiff has suffered no loss and cannot recover." However, upon examination of the original record in that case, we find in the insurance policy upon which that action was based this provision: "No action shall be brought against the company under or by reason of this policy, unless it shall be brought by the assured . . . for loss that the assured has actually sustained by the assured's payment in money of a final judgment rendered after a trial in a suit against the assured for damages on account of negligence of the assured." (*Combs v. Hunt,* 140 Va., 627; *Luger v. Wendell,* 116 Wash., 375.) There is no such provision in the policy issued by the Insurance Company in the case at bar, and hence the opinion in *Lowe*

v. Fidelity & Casualty Co., supra, is not controlling or authoritative in the decision of the question presented in this case.

In *R. R. v. Accident Corp.*, 172 N. C., 636, 90 S. E., 763, one Ruffin, a railroad contractor, took out indemnity insurance against liability for negligent injury to his employees. Judgment was recovered by an employee and paid by the railroad. In suit by Ruffin and the railroad against the Indemnity Company the defendant's demurrer was overruled, and the Court said: "The railroad company suffered the loss. Ruffin is responsible to the railroad company for the amount of said loss, and under his indemnity (policy) is entitled to be protected in turn by the Indemnity Company, the defendant."

The statement of the general principles governing the construction of liability insurance contracts set forth in *Clark v. Bonsal, supra,* was quoted in *Hensley v. Furniture Co.*, 164 N. C., 148, 80 S. E., 154, and *Newton v. Seeley,* 177 N. C., 528, 99 S. E., 347.

Applying the principles of law, deducible from the authorities cited, to the facts in the case at bar, we reach the conclusion that when loss from a liability within the coverage of the policy, and against which the Insurance Company has contracted to insure and for which it has received compensation, has been judicially established, the Insurance Company can only be discharged by payment, the ultimate disposition of the fund by the receiver of the insured to be determined by the court. It follows, therefore, that when the claimant filed its claim, based upon the Insurance Company's admitted policy, together with proof of a valid judgment for a liability covered by the policy and within the limit contracted, it was error to disallow the claim.

The judgment of the Superior Court in this respect must be

Reversed.

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

W. E. ODUM v. NATIONAL OIL COMPANY.

(Filed 4 May, 1938.)

1. Master and Servant § 12—Evidence of negligence of owner, resulting in injury to independent contractor in performance of work, held for jury.

Plaintiff's allegations and evidence were to the effect that he was employed as an independent contractor to perform certain work on the roof of defendant's building, that in the performance of the work defendant gave plaintiff permission to use certain scaffolding around the building, that due to a defect in the material of which plaintiff had no knowl-

edge, the scaffolding gave way under plaintiff as he was using it in the performance of the work, causing plaintiff to fall to his serious injury. Defendant alleged and offered evidence to the effect that the scaffolding which fell was built by plaintiff and that plaintiff was guilty of contributory negligence. *Held:* The conflicting evidence was properly submitted to the jury upon the issue of negligence under instructions that the burden was on plaintiff to prove negligence on the part of defendant in failing to exercise due care to select reasonably safe materials for the scaffolding, proximate cause, and that the scaffolding that fell was built by defendant and not plaintiff, and the refusal to submit the issue of contributory negligence, for want of evidence to support it, was not error.

2. Master and Servant § 49—

Where the Industrial Commission refuses compensation on the ground that claimant was an independent contractor and not an employee, the Superior Court has jurisdiction of an action by the independent contractor to recover for the injury upon allegations of negligence.

3. Master and Servant § 4a—Relationship of owner and independent contractor held not changed by contractor's agreement to do additional work.

The relationship of owner and independent contractor is not changed by the fact that the contractor agrees to do additional work of the same nature not covered by the original contract, which additional work is under the contractor's control, including the furnishing of labor and material, the owner being interested solely in the result.

4. Trial § 32—

The refusal to give instructions requested in the language prayed for will not be held for error when the charge, taken as a whole, fully charges the law applicable to the facts.

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

APPEAL by defendant from *Grady, J.*, and a jury, at February Term, 1938, of CRAVEN. No error.

This is an action for actionable negligence, brought by plaintiff against defendant to recover damages.

The complaint of plaintiff alleges in part that defendant is a corporation engaged in selling oil and oil products, both wholesale and retail, within the State of North Carolina, and in connection therewith acquires lands and constructs buildings for the purpose of carrying on said business. "That shortly prior to 22 December, 1936, plaintiff was engaged to assist in the construction of a filling station on State Highway, Route No. 30, at a point about one mile west of the city limits of the city of New Bern, and particularly engaged to cover the roof of said building, and a shed or protruding eaves designated as a canopy, according to the plans and blueprint furnished him by the defendant.

That upon entering said agreement, it was understood between the parties that the scaffolding used in the construction of the walls and understructure of the roof of the building was to be allowed to remain

for the use of the plaintiff in carrying out the work he was engaged to do, and he did use the same and completed the work as originally planned, when, upon request of the defendant, the work contemplated to be done by the plaintiff was extended so as to place an additional canopy, known as a return, extending about eight feet from the eastward edge of said building, and for the purpose of carrying on the additional work, the scaffolding, as hereinbefore stated, erected by the defendant, was permitted to remain for the use of the plaintiff.

That when said plaintiff undertook to carry out the work and place the metal on the return, in accordance with his instructions from the defendant, he went upon said scaffolding, as was necessary for him to do, and, just as he was beginning to perform the work for the defendant, the scaffolding gave way, broke and fell to the ground, carrying the plaintiff to the ground with it and causing plaintiff to fall upon the ground and striking the ground with his head, thereby seriously and permanently injuring plaintiff, which said injury resulted in breaking plaintiff's neck by breaking in two the fifth vertebra. That immediately thereafter plaintiff was carried to the hospital in the city of New Bern, where X-rays were taken and medical treatment administered and it was found that it was necessary to place the plaintiff, from his waist up, in a heavy plaster cast. That said plaintiff was confined to his bed for many weeks and was compelled to wear the plaster cast for a period of more than six weeks. That plaintiff has never recovered fully from said injury, and, for a long period of time after the removal of the plaster cast, was compelled to wear a leather yoke or neck piece in order to support his head. That plaintiff continues to suffer and is informed by eminent physicians attending him that he will continue to suffer because of said injury, permanently, and will never be able to do and perform the kind of work for which he has been trained and in which he has been engaged throughout his life.

That defendant's negligence in failing to furnish plaintiff a safe place to work, as hereinbefore and hereinafter set out, was the sole and proximate cause of the plaintiff's injury, in that said defendant provided an insecure and defective scaffold, which said defects were unknown to the plaintiff at the time he undertook to perform the work, although plaintiff received assurance from the superintendent and agent of the defendant that the said scaffold was secure and altogether a safe place for him to work.

That by reason of the negligence of the defendant, resulting in the injury to the plaintiff as hereinbefore alleged, said plaintiff has suffered serious and permanent physical injury and has been and will be permanently prevented from performing work in which he has heretofore been engaged," etc., and prays for a certain amount of damages.

The defendant denied the material allegations of the complaint and "avers that the plaintiff, after beginning said work, requested permission to use the scaffolding erected at said building and, in addition thereto, the plaintiff, to carry out his work, erected additional scaffolding in and around said building. . . . The defendant avers in this connection, that while performing the work which the plaintiff was undertaking to do, that he did fall from the scaffolding erected by him, causing whatever injury the plaintiff sustained. . . . For a further defense, this defendant says that if this plaintiff was in anywise injured as alleged in the complaint, that said injury was due to his own careless and negligent conduct in the manner of the construction of said scaffolding and his own use of the same, and this defendant pleads such contributory negligence on the part of the plaintiff in bar of any recovery by him in this action."

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. What damages, if anything, is the plaintiff entitled to recover of the defendant? Ans.: '$16,000.'"

On the trial numerous exceptions and assignments of error were made by defendant. The material ones will be considered in the opinion.

H. P. Whitehurst, M. S. Dunn, and R. E. Whitehurst for plaintiff.
Barden & Stith and Dunn & Dunn for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence, the defendant in the court below made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no error.

The evidence on the part of plaintiff was plenary to be submitted to the jury and the evidence sustained the allegations of the complaint. At the conclusion of the reading of the pleadings, the defendant moved the court to dismiss the action on the ground that under the pleadings jurisdiction thereof was with the Industrial Commission under the Workmen's Compensation Act of North Carolina. In considering said motion, the court was furnished with the findings of fact of the North Carolina Industrial Commission and the judgment based thereon: (The facts are set forth.) "Upon the finding that at the time of his injury on 22 December, 1936, the plaintiff was an independent contractor, and not an employee of the defendant employer, the claim for compensation is denied. . . . Upon all the evidence in this case, the Commission finds as a fact that the plaintiff was an independent contractor at the time he sustained his injury, 22 December, 1936. Compensation is denied and each party will pay its own cost."

There was no appeal by either party to the finding of fact and denial of compensation on the ground that "plaintiff was an independent contractor." The opinion was filed on 18 March, 1937. The present action was brought on 18 May, 1937. In the present case there is no evidence that the parties stood in the relationship of master and servant or employer and employee.

N. C. Code, 1935 (Michie), section 8081 (k), is as follows: "From and after the taking effect of this article 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." The above section is not applicable to the facts in the present action.

The material questions involved: (1) Where plaintiff, an independent contractor, was injured by the negligence of the defendant, does the Superior Court have jurisdiction of an action brought to recover damages for such injury? Yes. (2) Where plaintiff, an independent contractor, agreed to extend the contract so as to include a "return" at the corner of the building, does such addition to the contract change the relation as an independent contractor when all of said work was under plaintiff's control, including the furnishing of all necessary labor and material used, and the defendant looked only to the result? No.

There was a conflict in the evidence as to who put up the scaffolding on which plaintiff had to stand to do the work and which fell causing his injury. In the charge of the court below this was left for the jury to determine. Also the question of due care. The court below charged the jury, in part: "The charge in the complaint against the defendant, gentlemen, so far as this first issue is concerned, is that it was guilty of negligence. That is, that it was guilty of failing to exercise due care, that it failed to exercise that degree of care which a man of ordinary prudence would or should exercise under the same or similar circumstances. The care having reference to the building of the scaffold, if it was constructed by the defendant or by its agents, they knowing at the time that it was going to be used by the plaintiff, that he was going to stand upon it while discharging his duties in covering the roof. I charge you that it was the duty of the defendant to use ordinary care in the selection of the material out of which the scaffold was constructed, that is, to use the degree of care which a man of ordinary prudence would use under the same or similar circumstances. And if he fails to do so, that is, if you find that the defendant built the scaffold and failed to exercise that degree of care which it should have exercised under the circumstances, and if such failure on its part was the proximate cause

of the injuries received by the plaintiff, then it would be your duty, gentlemen, to answer the first issue 'Yes.' If you do not so find, it would be your duty to answer it 'No.' Again, in respect to this issue, I charge you, gentlemen, that if the plaintiff has failed to satisfy you by the greater weight of the evidence that the defendant and its agents constructed this scaffold, but, on the other hand, it appears to you that the plaintiff himself built the scaffold, or built that part of it which fell, which gave way and caused him to be injured, then I charge you he cannot recover in this case, because if he undertook to construct the scaffold on which he was going to stand, he being an independent contractor, according to his own contention, and if he built the scaffold to such an extent that it would not bear his weight, but fell as he stood on it and caused him to fall to the ground and injure his neck, then, gentlemen of the jury, as a matter of common sense, he would be responsible for his own conduct and he could not recover out of the defendant." The above charge gives a clear and concise statement of the controversy.

George McDaniel testified, in part: "Mr. Messick (Will Messick, agent for defendant) and his crew put the staging up and Mr. Tosto was among them; that the staging he referred to was a part of the same which fell with Mr. Odum; that witness was standing in the open about 30 feet from Mr. Odum and saw him fall. Upon being questioned as to what caused the staging to fall, he stated the barrow that went out from the building and went up the 2x4 broke; *that it was weak and seemed to be a knotty piece of wood.*"

Alex Tosto testified, in part: "That he put up the staging that fell and was ordered by Mr. Messick to build it; that if Mr. Odum built any part of that staging he didn't see it; that Mr. Odum did not have anything to do with the part that fell, because it was already up. . . . Witness testified that it was the cross barrow that broke, explaining that at the north end of the house there was an upright set off from the house and this was held up and attached to the wall of the house by the cross arm or barrow which supported the floor of the staging, and that this barrow broke in two, letting the stage down and precipitating Mr. Odum to the ground."

Carl Chadwick testified, in part: "That he did not know who put them up; that he did not see Mr. Odum fall, but saw him immediately afterwards and that he examined the staging after Odum fell; that *the board was weak* and the barrow broke, pulling the nails out from the piece that was in the house."

The defendant contends that the issue of contributory negligence should have been submitted to the jury. On the evidence the court below refused to submit the issue for lack of evidence, and in this we think the court was correct.

The defendant's prayers for instructions were not given in the language prayed for, but, taking the charge as a whole, the law applicable

to the facts were fully given by the court below, and the refusal was not prejudicial.

We see no prejudicial error in the admission of evidence complained of by defendant, nor as to the charge of the court below as to damages. The case is mainly one of disputed facts, and the charge, free from error, left the facts for determination by the jury. They found for plaintiff and, on the whole record, we find no prejudicial or reversible error.

No error.

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

CHARLIE HARE AND WIFE, EULA HARE, v. LESLIE WEIL AND LIONEL WEIL, TRADING AS H. WEIL AND BROS.

(Filed 4 May, 1938.)

1. Mortgages § 35a—

A *cestui que trust* has the right to buy in the property at the foreclosure sale in the absence of fraud or collusion.

2. Mortgages § 40: Trusts § 1b: Frauds, Statute of, § 12—Parol agreement to purchase at sale for benefit of debtor creates valid parol trust.

Where a person agrees to purchase at a foreclosure or judicial sale under a parol agreement to hold title for the benefit of the debtor and to reconvey the legal title upon repayment of the amount advanced, a valid, enforceable parol trust is created in favor of the debtor, provided the agreement is made at or before the legal estate passes, and such agreement need not be supported by consideration but may be enforced against a mere volunteer.

3. Frauds, Statute of, § 9: Trusts § 10—Cestui under parol trust may be estopped from setting up equitable title by inconsistent conduct.

While an equitable interest in land may not be conveyed by parol, an equitable interest may be abandoned, released, or waived in favor of the holder of the legal title by conduct positive, unequivocal and inconsistent with an intention to assert such equitable claim, but such waiver or abandonment, being an equitable defense, must be pleaded.

4. Same: Mortgages § 40—Evidence held to establish estoppel against mortgagor to assert that purchaser at sale bought for his benefit.

Plaintiff mortgagors contended that the *cestuis que trustent* in a second deed of trust on the property bought the property at the foreclosure sale of the instrument under a parol agreement to hold title for benefit of plaintiffs and to reconvey to them upon their payment to them of the amount of the bid. Defendant pleaded and introduced in evidence a lease to plaintiffs executed and signed by the parties after the sale, which lease contract contained an option giving plaintiffs the right to purchase within a time stipulated upon terms at variance with the terms of the alleged parol trust. *Held:* The signing of the lease by plaintiffs and the taking

of an option to purchase upon terms at variance with those of the alleged parol agreement, establishes conduct positive, unequivocal, and inconsistent with the claim of title under the alleged parol agreement, and manifests conclusively an intention not to rely thereon, and the lease, though introduced by defendants, clarifies plaintiffs' evidence and supports the granting of defendant's motion to nonsuit.

5. Pleadings § 6—

Matters constituting equitable defenses must be pleaded.

6. Trial § 22b—

While ordinarily defendant's evidence will not be considered in passing upon his motion to nonsuit, where defendant's evidence is not in conflict with plaintiff's evidence, it may be considered in so far as it tends to explain and clarify plaintiff's evidence.

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

APPEAL by plaintiffs from *Grady, J.*, at August-September Term, 1937, of WAYNE.

Civil action to recover title to land under alleged parol trust agreement, and for accounting for rents and profits.

The uncontroverted facts are substantially these: On 27 July, 1928, plaintiffs executed a deed of trust to R. Jack Smith, trustee, in which the lands in question, owned by the *feme* plaintiff, were conveyed to secure an indebtedness of $309.50 due by them to defendants on 1 January, 1929. This conveyance was subject to a prior deed of trust executed by plaintiffs to Southern Trust Company, trustee, to secure an indebtedness to Virginia-Carolina Joint Stock Land Bank. At request of defendants, and under the power of sale contained in the deed of trust to Smith, trustee, he duly advertised and sold the land on 30 August, 1930, in accordance with the terms contained in the deed of trust, when the defendants became the highest bidders at $385.00. Upon the bid being raised, a resale was held on 18 October, 1930, when the defendants again became the purchasers at $415.00, and pursuant thereto and in due time deed was duly made to them by the trustee.

Plaintiffs alleged and offered evidence tending to show that on the date of the deed of trust to Smith, trustee, he was and has been at all times since an employee of defendants; that prior to the first sale, plaintiff Charlie Hare, representing himself and as agent for his wife, the plaintiff Eula Hare, approached the defendant Lionel Weil and informed him that plaintiffs were unable to pay in full the indebtedness due to defendants; that thereupon said defendant stated that if the plaintiffs would not resist the foreclosure under the power of sale contained in the deed of trust to Smith, he would purchase the property at the sale, subject to liens of record, and hold the title to same for plaintiffs until they were able to pay him; that relying upon the defendants' promise to purchase and hold the land, and in consequence thereof, the plaintiffs allowed the land to be sold; that in May, 1933, plaintiffs tendered to defendants the

amount due them and demanded a conveyance of the land; that defendants disavowed the parol trust agreement and refused to make the deed; and that plaintiffs have been at all times since ready, able and willing to comply with the terms and conditions of the trust agreement and to take title to the lands.

On the other hand, the defendants deny that they made any such agreement as alleged by the plaintiffs. Defendants aver that after they became the owners and entitled to the possession of the land in question, they immediately took possession of it and, except for the rental agreement with plaintiffs, they remained in possession thereof up to the date of filing answer. They further aver that they became the owners of the land on 30 October, 1930, and shortly thereafter rented same to plaintiffs by a written agreement of lease on 23 March, 1931, which the plaintiffs signed; that the lease provided that defendants should rent to the plaintiffs for the year 1931; that plaintiffs accepted the tenancy and as such tenants paid a part of the rent specified in the lease; that in January, 1932, the lease expired and plaintiffs moved from the lands; and that by reason of the said tenancy or rental agreement, under which there was an attornment by the plaintiffs to the defendants, the plaintiffs are estopped from questioning or attacking the title of the defendants.

The plaintiff Charlie Hare testified on cross-examination that he did not remember signing the agreement of lease, but admitted his signature thereto, and the same was marked for identification. On being further examined by defendants, he testified that he did not pay one cent of rent for 1931; that he "got off the land in 1932"; that he did not raise the bid on the property after the first foreclosure sale; and did not know who did raise it; that he did not know there was a resale; and that he swore to the complaint.

The court below overruled defendants' motion for nonsuit at close of plaintiffs' evidence. Thereupon defendants, over objection by plaintiffs, offered in evidence the agreement of lease which had been identified by plaintiff Charlie Hare and signed by him and his wife, in which the terms of the lease are set forth as alleged, and in which, among others, this provision appears: "That the parties of the first part (defendants) agree in the event the parties of the second part (plaintiffs) pay to the parties of the first part all of said rental when due that the parties of the first part will upon request so to do by the parties of the second part on or before 5 November, 1931, sell and convey said lands to the parties of the second part on 5 November, 1931, subject to the lien of the debt secured by the deed of trust . . . to Southern Trust Company . . . and subject to all other liens . . . upon the payment to the parties of the first part . . . of a purchase price of $860.00 therefor," plus amount of installments paid to Land Bank, taxes and interest, "it being expressly agreed that in the event the parties of the second part fail to pay said rental when 5 November, 1931, is due, or fail to pay

said purchase price therefor on 5 November, 1931, then and in either of such events, the option contained in this paragraph to purchase said lands shall be null and void."

Defendants further offered in evidence, over objection by plaintiffs, record in office of the clerk of Superior Court of sale and of resale of the property, in which it appears that order of resale was made upon the bid at first sale being raised by plaintiff Charlie Hare.

From judgment as of nonsuit at close of all the evidence, plaintiffs appeal to the Supreme Court and assign error.

John S. Peacock, Scott B. Berkeley, and Charles P. Gaylor for plaintiffs, appellants.

Ehringhaus, Royall, Gosney & Smith and D. C. Humphrey for defendants, appellees.

WINBORNE, J. On the factual situation presented by the record on this appeal, we hold that the judgment as of nonsuit was properly entered.

It is well settled in this jurisdiction that the *cestui que trust* has the right to buy at the trust sale unless fraud or collusion is alleged or proved. *Monroe v. Fuchtler,* 121 N. C., 101, 28 S. E., 63; *Hayes v. Pace,* 162 N. C., 288, 78 S. E., 290; *Winchester v. Winchester,* 178 N. C., 483, 101 S. E., 25; *Simpson v. Fry,* 194 N. C., 623, 140 S. E., 295; *Bunn v. Holliday,* 209 N. C., 351, 183 S. E., 278; *Hill v. Fertilizer Co.,* 210 N. C., 417, 187 S. E., 577; *Bank v. Hardy,* 211 N. C., 459, 190 S. E., 730.

In the present case there is no allegation of fraud or collusion in the foreclosure sale. On the contrary, the plaintiffs affirm the sale, and allege that defendants bought at the sale under a parol trust agreement to hold the land for them.

It is uniformly held to be the law in this State that where one person buys land under a parol agreement to do so and to hold it for another until he repays the purchase money, the purchaser becomes a trustee for the party for whom he purchased the land. Equity will enforce such an agreement. *Cohn v. Chapman,* 62 N. C., 92; *Cobb v. Edwards,* 117 N. C., 244, 23 S. E., 241; *Owens v. Williams,* 130 N. C., 165, 41 S. E., 93; *Avery v. Stewart,* 136 N. C., 426, 48 S. E., 775; *Allen v. Gooding,* 173 N. C., 93, 91 S. E., 694; *Peterson v. Taylor,* 203 N. C., 673, 166 S. E., 800.

In *Owens v. Williams, supra, Furches, C. J.,* said: "Whenever land is conveyed to one party under an agreement that he is to hold it for another, he becomes a trustee, whether this agreement is made at the time of the conveyance or is made before, and the land is conveyed in pursuance of said agreement. This is an express trust and an equitable trust." *Holden v. Strickland,* 116 N. C., 185; *Sykes v. Boone,* 132

N. C., 199, 43 S. E., 645; *Lutz v. Hoyle,* 167 N. C., 632, 83 S. E., 749; *Allen v. Gooding, supra; Rush v. McPherson,* 176 N. C., 562, 97 S. E., 613.

Where purchase has been made at public or judicial sale, and the purchaser who paid the money out of his own funds agreed to hold the land subject to the right of the person, whose land he bought, and to reconvey the legal title upon repayment of his outlay, it has been held generally in this State that a valid parol trust is created in favor of the former owner of the land. *Cobb v. Edwards, supra; Owens v. Williams, supra; Rush v. McPherson, supra; Cunningham v. Long,* 186 N. C., 526, 120 S. E., 81.

Parol trust does not require a consideration to support it. If the declaration is made at or before the legal estate passes, it will be valid even in favor of a mere volunteer. *Pittman v. Pittman,* 107 N. C., 159, 12 S. E., 61; *Blackburn v. Blackburn,* 109 N. C., 488, 13 S. E., 937; *Sykes v. Boone, supra.*

Applying these principles to the facts of the present case, and conceding that there is sufficient evidence upon which to base a parol trust, we are of opinion, and so hold, that the evidence on this appeal clearly shows that the parol trust, if any existed, has been abandoned or released to the defendants by the acts and conduct of the plaintiffs. In *Gorrell v. Alspaugh,* 120 N. C., 362, 27 S. E., 85, *Douglas, J.,* said: "While an equitable interest in land may not be transferred by parol, it may be abandoned or released to holder of the legal title by matter *in pais*—provided such intention is clearly shown." *Wells v. Crumpler,* 182 N. C., 350, 109 S. E., 49. In *Lewis v. Gay,* 151 N. C., 168, 65 S. E., 907, the Court said: "Parties may by parol rescind, or by matter *in pais* abandon" rights in land.

In 65 C. J., 955, it is stated: "A *cestui que trust,* or one claiming to be such, who is competent to act for himself, may be estopped, or waive his right, to enforce a trust in his favor by words or acts on his part which, expressly or by implication, show an intention to abandon, or not to rely upon or assert, such trust, as by acquiescing, with knowledge of all the material facts, in the alleged trustee's acts in dealing with, or disposing of, the property in a manner inconsistent with the existence or continuation of a trust."

In *Banks v. Banks,* 77 N. C., 186: "To constitute an abandonment or renunciation of claim there must be acts or conduct positive, unequivocal, and inconsistent with his claim of title."

Defendants plead as an estoppel the lease agreement of 23 March, 1931. Plaintiffs admit execution of it, and do not challenge its force and effect by pleading fraud or by other equitable defense.

Matters in the nature of an equitable defense must be pleaded. *Toler v. French, ante,* 360, and cases cited. McIntosh, N. C. Prac. & Proc., 483.

The language of this agreement is clear and explicit. A reading of it manifests the clear intention of the plaintiffs to recognize the defendants as the landlord, and to assume for themselves the role of tenants. In addition to this, the agreement shows that plaintiffs took an option to buy the land from the defendants, not at the price paid by the defendants at the foreclosure sale, nor for the amount of indebtedness due by plaintiffs to defendants and secured by deed of trust to Smith, trustee, but at an increased purchase price, plus moneys expended by defendants in keeping up installments on the indebtedness to the Land Bank and for taxes and plus interest. The execution of this agreement is conduct positive, unequivocal and inconsistent with the claim of title under the alleged parol agreement. It is not in harmony with the existence or continuation of the trust, and manifests conclusively an intention not to rely thereon.

While the lease agreement is evidence introduced by the defendant, it is proper to be considered on motion for judgment as of nonsuit under authority of *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598, wherein *Stacy, C. J.*, speaking to the question, said: "In considering the last motion, the defendants' evidence, unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by plaintiff," citing *S. v. Fulcher*, 184 N. C., 663, 113 S. E., 769.

We have considered all other exceptions and find them without merit. The judgment below is

Affirmed.

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

FEDERAL RESERVE BANK OF RICHMOND v. NEUSE MANUFACTURING COMPANY, A CORPORATION; M. G. WALLACE, TRUSTEE, JOHN T. GARRETT, TRUSTEE, AND GURNEY P. HOOD, COMMISSIONER OF BANKS OF THE STATE OF NORTH CAROLINA, IN THE MATTER OF THE LIQUIDATION OF THE RALEIGH BANKING & TRUST COMPANY. (SUE DISHMAN GANT, EXECUTRIX, INTERVENER.)

(Filed 4 May, 1938.)

1. Insurance § 36d—Evidence held insufficient to establish contract by receiver to transfer and assign policy.

Intervener contended, upon supporting evidence, that the receiver of the company that had taken out and paid the premiums on a policy insuring the life of its president, negotiated with insured for the transfer of the policy to insured upon his payment of the asset value of the policy,

that the parties agreed to such transfer upon the approval of the court, and that the receiver agreed to recommend to the court such transfer, that insured died before any order was rendered, and that plaintiff as executrix of insured's estate was entitled to the proceeds of the policy under the contract of assignment. *Held:* Even conceding that the terms for the transfer of the policy were sufficiently definite to constitute a contract, the approval of the court was made a condition precedent, and such approval not having been given, there was no valid and subsisting contract to transfer the policy, and intervener is not entitled to recover the proceeds of the policy from the receiver.

2. Contracts § 11b—

A contract is not effective so long as the parties thereto contemplate that anything should be done before contract relations should be established, and the parties may impose any condition precedent to the effectiveness of the agreement.

3. Receivers § 11—

Even conceding that a receiver may sell a capital asset of the insolvent without the approval of the court, the receiver may make the approval of the court a valid condition precedent to the effectiveness of a contract to sell a capital asset.

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

APPEAL by Sue Dishman Gant, executrix of Kenneth Gant, petitioner, from *Olive, Special Judge*, at November Term (A), 1937, of WAKE. Affirmed.

In the above entitled cause an order was entered by Harris, J., 25 July, 1936, appointing Don P. Johnston receiver for the defendant corporation. On 29 April, 1937, Sue Dishman Gant, executrix of Kenneth Gant, filed a petition in the cause, in which she seeks an order of the court directing the receiver to pay to her the sum of $17,655.22, which represents the net proceeds of a policy of insurance on the life of her testator, in which the defendant Neuse Manufacturing Company was named as beneficiary.

In March, 1919, the Neuse Manufacturing Company applied to the Guardian Life Insurance Company of America for and obtained a policy of life insurance upon the life of Kenneth Gant, who was then, and at all times thereafter until his death, president of said corporation. The Neuse Manufacturing Company was named as beneficiary with the provision in the policy that the beneficiary could not be changed without the consent of the Neuse Manufacturing Company. Said corporation paid all premiums thereon.

On 7 March, 1937, while the receivership was in force, an annual premium in the sum of $701.00 became due, subject to a grace period of thirty days within which to pay the same. The company having borrowed, before the receivership, the sum of $6,740.60 on the policy, interest on said loan in the sum of $337.03 matured on the same date. Under

the participating provisions of the policy a dividend in the sum of $145.50 was due from the company to the beneficiary. On that date the cash or loan value of the policy was $7,738.50. After charging the loan against the cash value there was a net unencumbered cash or loan value of $997.90. After charging the premium and interest maturing on 7 March, 1937, less the dividend, to the cash value of the policy there still remained an unencumbered loan value of $105.37.

Both prior and subsequent to 7 March, 1937, Kenneth Gant and the receiver had discussed a proposal that said policy be assigned to said Kenneth Gant upon the payment of the asset value of the policy. On 15 March, 1937, the receiver having come to the conclusion that it was not advisable for him to undertake to continue to carry said policy, the negotiations were resumed, the asset value of the policy was ascertained as they then understood it, and the receiver agreed that he would assign the policy to Kenneth Gant if, and upon condition that, such transfer was approved by the resident judge. Pursuant thereto, Kenneth Gant wrote a letter to the attorneys for the receiver setting out the facts and stating: "Mr. Don P. Johnston has conferred with me with reference to disposition and my taking over Guardian Life Insurance Policy held by the Neuse Manufacturing Company in the amount of $25,000 on my life. . . .

"I appreciate fully that Mr. Johnston, as receiver, is in no position to carry this insurance and I would much prefer to take the policy over rather than have it lapse or to be transferred to some other purchaser. Mr. Johnston states that it will be necessary for you to draft a court order for this transfer for Judge Harris' approval and signature, all of which I hope meets with your approval."

On 16 March, 1937, counsel for the receiver replied as follows: "I have your letter of the 15th and I think it is the part of wisdom for you to salvage the insurance policy and, of course, Mr. Johnston and I shall be glad to coöperate with you, since it is impracticable for him as receiver to keep the policy in force. Mr. Leach or I will prepare the necessary papers and ask Judge Harris to approve the transfer." Immediately thereafter Kenneth Gant went to a hospital where he was required to undergo an operation, from which he died on the morning of 25 March, 1937. In the meantime, no order had been presented to or approved by the resident judge or any other judge having jurisdiction. While petitioner's testator was critically ill his brother and son tendered $105.37 to the receiver, which tender was refused. After the death of petitioner's testator, the insured, the insurance company paid to the receiver the net sum due in the amount of $17,655.22, which is now held by the receiver subject to the orders of the court.

After a hearing upon the petition, the court below disallowed the petition and denied petitioner's claim and nonsuited and dismissed the petition. The petitioner excepted and appealed.

Smith, Leach & Anderson and M. G. Wallace for Don P. Johnston, Receiver, and Federal Reserve Bank of Richmond, appellees.

Manning & Manning for petitioner, Mrs. Sue Dishman Gant, Executrix of Kenneth Gant, appellant.

BARNHILL, J. At the hearing the petitioner offered the letter of her testator to Willis Smith, counsel for the receiver, and the reply thereto; the memorandum showing the estimated net asset value of the policy; evidence of a tender and the following admission contained in the answer of the receiver: "It is admitted that the said Don P. Johnston as receiver, and the said Kenneth Gant conferred with reference to the disposition of the said policy and the taking over of the same by the said Kenneth Gant, and the said Don P. Johnston, as receiver, and Mr. H. H. Harris, as bookkeeper of the Neuse Manufacturing Company, ascertained that the net interest in equity of Neuse Manufacturing Company in said policy after the payment of the premium then due upon the policy was, in so far as they were able to determine, $105.37 as of the end of the grace period, to wit: The 6th or 7th day of April, 1937, as the policy may determine. The said Don P. Johnston, receiver, says that from time to time, over a period of several months, he and the said Kenneth Gant, deceased, had discussed the taking over of the said policy by the said Kenneth Gant without anything definite being done by either party towards accomplishing the transfer of the policy or the interest therein. That on 15 March, 1937, there was a conference between the said Kenneth Gant and Don P. Johnston, receiver of the Neuse Manufacturing Company, at which time the proposed taking over of the policy by the said Kenneth Gant and the transfer was discussed."

There was also evidence of statements by the receiver that he had been negotiating with Gant for a transfer of the policy, that the receiver intended to recommend the transfer, and that he regarded that the transfer had not been consummated. This was all the evidence offered bearing upon the existence of a contract.

Was there a valid and subsisting contract to transfer said policy? Petitioner's rights depend upon the answer to this question which, upon the record, we are compelled to answer in the negative.

The petitioner alleges a contract to convey and assign the policy of insurance in question. The want of consideration to support the agreement, the indefiniteness of the terms as to who was to be made the new beneficiary and as to when the transfer was to become effective might be mooted to some length. It is unnecessary, however, for us to discuss these features of the claim for the reason that the defense made by the receiver that such negotiations or agreements as were had or entered into between the petitioner's testator and the receiver did not become effective as a contract for the reason that it was stipulated that the

approval of the resident judge should be first obtained as a condition precedent, is well founded and must be sustained.

That a contract is not made so long as in the contemplation of both parties thereto something remains to be done to establish contract relations is too well established to require the citation of authority. "The parties to a written contract may agree that until the happening of a condition which is not put in writing the contract is to remain inoperative." Anson on Contracts (Am. Ed., 318). To like effect are the decisions in *Insurance Co. v. Morehead,* 209 N. C., 174, and the cases there cited. Speaking to the subject in *Bowser v. Tarry,* 156 N. C., 35, it is said: "It is fully understood that although a written instrument purporting to be a definite contract has been signed and delivered, it may be shown by parol evidence that such delivery was on condition that the same was not to be operative as a contract until the happening of some contingent event, and this on the idea, not that a written contract could be contradicted or varied by parol, but that until the specified event occurred the instrument did not become a binding agreement between the parties."

In negotiating a contract the parties may impose any condition precedent, a performance of which condition is essential before the parties become bound by the agreement. A promise, or the making of a contract, may be conditioned upon the act or will of a third person. 13 C. J., 679. *Wellsville v. Miller,* 243 U. S., 6, 61 L. Ed., 559; *Rollins v. Denver Club,* 18 L. R. A. (N. S.), 733; *Insurance Co. v. Morehead, supra;* 12 Am. Jur., 849.

It is not conceded that the receiver was vested with authority, either under the general law or the order appointing the receiver, to dispose of a capital asset without approval of the court. Even so, in the instant case, the receiver did not undertake to exercise any such authority. He elected to make his agreement subject to and on condition that it was approved by the court. This was a valid condition precedent, even if it is assumed that the receiver had power to convey without such approval. The approval of the court not having been obtained, there is no enforceable contract.

The judgment below is

Affirmed.

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

TOWN OF WAKE FOREST v. N. Y. GULLEY, MEREDITH COLLEGE, J. S. STELL, TRUSTEE FOR V. ROYSTER, CLERK SUPERIOR COURT OF WAKE COUNTY, AND E. LLOYD TILLEY, CLERK SUPERIOR COURT OF WAKE COUNTY.

(Filed 4 May, 1938.)

1. Municipal Corporations § 33—Owner signing petition and paying installments without objection waives right to correction of assessments.

The trial court approved the findings of fact of the referee, supported by competent evidence, that defendant property owner signed a petition for public improvements, paid two installments on his assessments without objection, although the assessment roll was properly filed and open to inspection, which would have disclosed all items of the paving charges, C. S., 2712, 2713, and failed to avail himself of the statutory remedy for review and correction of the assessments, C. S., 2714. *Held:* In an action by the municipality to enforce the liens, instituted some eight years after the assessments were made, the findings support the judgment that defendant was estopped to assert that there were errors in the assessments for that certain items were improperly included in the paving charges.

2. Appeal and Error § 37c—

The findings of fact of the trial court in affirming the report of the referee are conclusive on appeal when supported by evidence.

3. Municipal Corporations § 34—

Where judgment is rendered in favor of a municipality in its suit to enforce liens for public improvements, the court in its discretion, in the exercise of its equitable jurisdiction, should give the property owner a reasonable time to pay the assessments and prevent a sale of his property.

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

APPEAL by N. Y. Gulley from *Harris, J.*, at Second October Term, 1937, of WAKE. Modified and affirmed.

This is an action brought by plaintiff against the defendant N. Y. Gulley to recover the sum of $1,019.37, and interest, for street and sidewalk paving in the town of Wake Forest. The plaintiff alleges "There has been paid by the defendant N. Y. Gulley on said assessment on this property the following amounts: 28 November, 1925, $119.10; 6 March, 1928, $200.00; leaving a balance due on 6 March, 1928, of $1,019.37, with six per cent interest thereon from 6 March, 1928, till paid."

Defendant in his answer alleges "That the improvements made on said streets were not made in accordance with any petition filed, and are therefore null and void. . . . Further answering this allegation, defendant denies that plaintiff has any legal right to bring this action in this court to enforce any lien against his land. Wherefore, he prays judgment that he go without day and recover the costs of this action."

The town of Wake Forest, plaintiff in the above styled action, replying to the answer of the defendant N. Y. Gulley, and more particularly to

the further answer and defense of defendants, says: "(1) That the allegations set forth in paragraph 1 of the further answer and defense of the defendants are untrue and the same are therefore denied, that this plaintiff says that the assessments levied against the property of the defendants for street paving, sidewalks, etc., were duly and properly levied under the general laws of the State of North Carolina, and the charter of the town of Wake Forest, and constitute valid, binding and subsisting liens against the property of the defendants, and are now in part past due and unpaid, as set forth in the complaint heretofore filed. (2) Plaintiff says further in replying that it has legal right to bring this action; and further that the defendants were fully cognizant of the making of the local improvements and filed no objection thereto; that they had every opportunity for filing objection, both to the doing of the work and the levying of the assessments, but stood by and allowed the said work to be done, without objection, and not until the present time, eight years after the making of the improvements, have defendants filed any objections or exceptions; that if there were any irregularities in the ordering or making of the improvements, or in the levying of the assessments, which plaintiff denies, defendants, by their failure to file objections or exceptions, and by paying certain of the assessment installments, have waived any such irregularities and are now estopped from setting up and claiming such irregularities as a defense to this action. Plaintiff reaffirms its allegations set forth in its complaint filed herein, and asks that the relief prayed for therein be granted."

N. Y. Gulley in his amended answer sets forth purported errors in the assessment made, indicating same in detail, and alleged: "The account properly stated would be: 'Grading, $60.46; curbstone, $228.80; concrete base, $160.16; asphalt, $129.36; sidewalk, $97.56. Total, $676.34.' This defendant paid: 28 November, 1925, $119.10; 6 March, 1928, $200.00. Wherefore, this defendant prays judgment that the assessment records be corrected so as to make them speak the truth."

Oscar Leach, Esq., was appointed referee in the controversy and his findings of fact and conclusions of law were to the effect that plaintiff recover of defendant the sum of $883.79, with interest from 1 July, 1925. The court below affirmed the report of the referee and ordered that the property be sold, after being advertised for four successive weeks preceding the sale, at noon on Monday, 24 January, 1938, at the courthouse door in Wake County, N. C. Before the referee the defendant N. Y. Gulley contended that the amount due 6 October, 1937, was $538.71, and set forth his contentions in a detailed statement. The defendants duly objected in apt time to the ruling of the court confirming the referee's report, and duly excepted and assigned error to the same. The defendants in apt time duly excepted to the judgment of the court, and to the signing of the same, and appealed to the Supreme Court of North Carolina.

Little & Wilson for plaintiff.

Simms & Simms and N. Y. Gulley, in propria persona, for defendant Gulley.

CLARKSON, J. The referee, among other findings of fact, made the following: "The defendant N. Y. Gulley signed the petition requesting that the improvements be made, and made two payments on the amount assessed against his property at the times and in the amounts following: 28 November, 1925, $119.10; 6 March, 1925, $200.00. . . . The defendant N. Y. Gulley made no objection to or protest against the assessment until after this action was commenced, more than eight years after the assessment was made. However, if there were any errors in the assessment, an examination of the assessment roll before the same was confirmed on 1 July, 1925, or at any time thereafter, would have disclosed such errors, the assessment roll was available for inspection, and the defendants are charged by law with notice of what an examination of the assessment roll would have disclosed. (C. S., 2712, 2713; *Wake Forest v. Holding,* 206 N. C., 425.)"

In the conclusions of law the referee says: "The referee does not find that there were errors in the assessment against the property of the defendant N. Y. Gulley, as contended by the defendants (that is, that the inclusion in the paving charges of such items as interest, storm drainage, real estate, engineering expenses, legal and miscellaneous expense, were erroneous, and that there was error in allocating the cost of paving the intersections as between the town of Wake Forest and the property owners), but finds as a matter of law that by failing to object and avail themselves of the specific remedy for review and correction of the assessment at the time and in the manner provided by law (C. S., 2714), the defendants waived their right to a review and correction of any errors there may have been in the assessment, and are now estopped to show error in said assessment or to have such error, if any, corrected," citing some 19 authorities to sustain his position. The plaintiff, in reply to the further answer of defendant, pleaded estoppel.

In *Wake Forest v. Holding,* 206 N. C., 425, the decision is to the effect: "A property owner signed a petition for public improvements adjacent to his property, and paid two installments of the assessments levied against his property by the town. Upon his death his administrator resisted payment of further installments on the ground that the assessments were void for the reason that the town failed to give notice and hold the hearing required by N. C. Code, 2712, 2713: *Held,* the property owner signed the petition and had notice that the improvements were to be made, and had notice that the assessment roll giving the amount of the assessments against his property was filed in the office of the city clerk, it being required by statute that it be so filed,

N. C. Code, 2713, and by accepting the benefits and paying installments of the assessment without objection, N. C. Code, 2714, he ratified same, the assessment as to him being voidable and not void, and his administrator in his fiduciary capacity is estopped to deny the validity of the assessments." *High Point v. Brown,* 206 N. C., 664 (667); *High Point v. Clark,* 211 N. C., 607 (612).

In *Gurganus v. McLawhorn,* 212 N. C., 397 (411), is the following: "The competent evidence was sufficient for the court below to find the facts 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.,* 212 N. C., 241 (242)."

In the present case there was sufficient competent evidence to support the finding of facts by the referee.

On the whole record we think the defendant N. Y. Gulley is estopped to set up the defense that he now relies on. *Wake Forest v. Holding, supra.* The record discloses that the judgment was for a quick sale of N. Y. Gulley's home to pay this street and sidewalk paving assessment. The judge of the Superior Court, sitting as a chancellor in equity, under all the facts and circumstances of this case has the power to grant a reasonable time for the defendant N. Y. Gulley to pay the assessment. *Alexander v. Boyd,* 204 N. C., 103. Originally many years of equal yearly payments were given. The court below has the discretion, as was given the chancellor in equity, to temper the law with equity. The judgment below should be so modified as to give to N. Y. Gulley a reasonable time within which to pay the assessments and relieve his home from sale.

Judgment modified and
Affirmed.

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

METROPOLITAN LIFE INSURANCE COMPANY, A CORPORATION, v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION.

(Filed 4 May, 1938.)

1. Municipal Corporations § 30—

A charter provision that property assessed for permanent improvements should not be again assessed therefor within ten years is a limitation of power which may be waived by property owners.

2. Vendor and Purchaser § 29—

The purchaser of property takes same subject to all liens valid and enforceable against his vendor.

3. Municipal Corporations § 32—Property owner held to have ratified lien and was estopped to contest its validity.

The charter of defendant city provided that property assessed for permanent improvements should not be again assessed therefor within ten years. Property at a street intersection was assessed for improvements along one street, and within ten years the owner thereof signed a petition for improvement of the other street, requesting that the costs thereof be assessed against his property as provided by law. The improvements were made and he received the benefits, and thereafter he paid two installments of the assessments. *Held:* The conduct of the owner created more than a personal obligation, and constituted a ratification of the lien against the property for the improvements, and he is estopped to contest the validity of the lien.

4. Municipal Corporations § 34—Where lien is valid as against owner at time of transfer, it is enforceable against his successor in title.

Where the owner of property is estopped to contest the existence and validity of a lien against the property for street improvements, a successor in title by foreclosure of a mortgage executed after the assessment was made and put on record, takes title subject to the lien.

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

APPEAL by plaintiff from *Warlick, J.*, at November Term, 1937, of MECKLENBURG. Affirmed.

This is a suit to quiet title under C. S., 1743.

The plaintiff seeks to have canceled of record a purported street assessment lien duly recorded as provided by law against the lands described in the complaint, now owned by the plaintiff, located at the intersection of Kenilworth Avenue and Buchanan Street in the city of Charlotte, to the end that the cloud cast upon plaintiff's title to said land by such purported assessment may be removed.

In 1923 R. N. Capps owned the property described in the complaint. During said year the city made improvements on Kenilworth Avenue, and on 6 December, 1923, confirmed a street assessment against said property for street paving on said street where the said property abuts. This assessment has been fully paid.

In 1926 R. N. Capps, still being the owner of said lot, signed a petition filed with the defendant city, in which it was requested that the city make street improvements upon Buchanan and other streets in the city of Charlotte. It was further requested that the cost of said improvements, exclusive of so much of the cost as is incurred at street intersections, etc., be specially assessed upon the lots and parcels of land abutting directly on the improvements according to the extent of their respective frontage thereon by equal rate per foot of such frontage. The improvements were made by the city and on 29 December, 1926, said defendant confirmed a street assessment against the Capps property for street paving on Buchanan Street where the said property abuts

thereon, which said assessment is payable in ten equal annual installments. The petition signed by Capps appears in the defendant's proper files of such matters and the assessment was duly recorded as provided by law. Said Capps paid the first two installments of said assessment on 10 March, 1928, and 4 July, 1929, respectively.

On 10 March, 1930, R. N. Capps and his wife conveyed said property to the Wachovia Bank & Trust Company in trust to secure an indebtedness to the Metropolitan Life Insurance Company. Default having been made in the payment of the indebtedness secured by said deed of trust, the same was foreclosed and the property was purchased by and conveyed to the plaintiff by deed dated 18 October, 1935. In the trust deed to the Wachovia Bank & Trust Company and in the deed from the trustee to plaintiff no reference is made to said street assessment, the trust deed containing full covenants and warranties of title.

The charter of the defendant, section 67, after providing for the manner for assessing property for street improvements, contains the following provision, to wit: "Where permanent street improvements shall be made the property bearing such assessment shall not be so assessed again until after the expiration of ten years from the date of the last preceding assessment.

The plaintiff alleges that under the charter provisions of the city of Charlotte, a valid street assessment having been made against the Capps property in 1923, the purported assessment in 1936, within ten years after the first assessment, is void and seeks the cancellation thereof as a cloud upon its title.

Jury trial having been waived and the cause submitted to the judge to find the facts and render judgment thereon, the court below found the facts and adjudged that the assessment made in 1926 now constitutes a valid lien on the Capps property described in the complaint to secure the payment of any amount remaining unpaid on said assessment, and that the said Capps and his successors in title are estopped to deny or challenge the validity thereof. The plaintiff excepted and appealed.

John James for plaintiff, appellant.
J. M. Scarborough and B. M. Boyd for defendant, appellee.

BARNHILL, J. The defendant city is authorized to make street improvements under the general law and by the express terms of its charter. The provision in its charter that "Where permanent street improvements shall be made, the property bearing such assessment shall not be so assessed again until after the expiration of ten years from the date of the last preceding assessment," is a limitation of power which may be waived by property owners. *Charlotte v. Alexander,* 173 N. C., 515; *Shepard v. Barron,* 194 U. S., 553; Elliott on Roads and Streets,

Vol. 2, paragraph 733; *Wright v. Davidson,* 181 U. S., 371; *High Point v. Clark,* 211 N. C., 607; McQuillan, Vol. 5, page 836; *Wake Forest v. Holding,* 206 N. C., 425.

Speaking to the subject in *Charlotte v. Alexander, supra,* it is said: "There is no valid reason why citizens who wish to have their property improved by street paving may not expressly waive the charter restrictions and contract with the city to pay the actual cost. There is nothing against public policy in such agreement. On the contrary, it conduces to the general improvement of the municipality. When such contracts are entered into with full knowledge by the property owner the law will not permit him to repudiate it after the work is done and he has received the benefits. . . . In our opinion, it is both good morals and sound law to hold that when a person has accepted the benefits of a contract, not *contra bonos mores,* he is estopped to question the validity of it."

If the assessment constituted a valid lien upon the property as against Capps, then it is a valid lien against his successors in title. *Seattle v. Hill,* 62 Pac., 446; *Cummings v. Karney,* 141 Cal., 156. McQuillan, Vol. 5, page 828, in which the rule is stated as follows: "If the person who owned the property when the assessment was made is estopped from contesting the validity of the assessment, a subsequent purchaser taking with notice of the assessment will be deemed to have taken the property subject to the consequent burden, and cannot question the validity of the assessment."

As the provision of the city charter, upon which plaintiff relies, constitutes a limitation upon power which may be waived, and as a subsequent purchaser acquires property subject to liens thereon which are valid as against his assignor, the plaintiff's rights herein are dependent upon whether the purported assessment was a valid lien against the *locus in quo* as against Capps at the time he conveyed the property.

Capps filed a written petition with the city, which is of public record, in which he requested the improvement of Buchanan Street, and further requested that the total cost of said improvement ordinarily taxable against his property be specially assessed upon his particular lot of land. The improvements were made and he received the benefits thereof. After the assessment was affirmed and duly recorded he ratified the lien thereby created by paying two of the installments thereof. Thus he expressly contracted with the city that the cost of the improvement should constitute a lien upon his property, and ratified the lien after it was created of record. Certainly he could not be heard to contest the validity of the lien thus created. His conduct created more than a personal obligation. It created a specific lien upon his property.

It is to be noted that in *Wake Forest v. Holding, supra,* cited and relied upon by plaintiff, the judgment of the court below to the effect

that the assessment created no lien upon the property of the defendant was reversed.

At the time Capps conveyed the *locus in quo* the assessment lien was of record and constituted notice to the purchaser of the existence of the lien. The Wachovia Bank & Trust Company, trustee, and the plaintiff, as purchaser from the trustee, acquired only such title to the property as was possessed by Capps at the time he executed the trust deed. At the time he executed the conveyance he was estopped to deny that by virtue of his contract relations with the city and his conduct with respect to the improvements and the assessments such assessment constituted a valid subsisting lien upon his property. As to him, and as to his successors in title, the lien is good.

The authorities cited and relied upon by the plaintiff are distinguishable and are not authoritative upon the facts in this case.

The judgment below is

Affirmed.

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

A. N. PEARCE AND WIFE, ADNA ALMA PEARCE, v. M. G. PRIVETTE AND WIFE, MARTHA PRIVETTE.

(Filed 4 May, 1938.)

1. **Pleadings § 20—**

The office of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of fact therein contained and the relevant inferences of fact necessarily deducible.

2. **Same—**

A pleading should be liberally construed upon a demurrer, and every reasonable intendment and presumption made in its favor, and the demurrer should be overruled unless the pleading is wholly insufficient. C. S., 535.

3. **Highways § 14—Petition for establishment of neighborhood public road need not allege right of easement in petitioners.**

Petitioners alleged that they had used a road over defendant's land for fifty years in going from petitioners' farm to the public highway, that such road was the only means of ingress and egress from petitioners' farm to the highway, that respondents had blocked the road, and prayed that if respondents did not open up the road for use by petitioners, that the court appoint a jury of view to lay off a roadway as an outlet for petitioners. Respondents demurred on the ground that petitioners did not allege a right of easement over respondents' land by grant, necessity

or prescription. *Held:* Petitioners are not asserting a vested right over the road barricaded by respondents, and the demurrer should have been overruled, since the petition is sufficient to state a cause of action for the establishment of a neighborhood public road under the provisions of C. S., 3836.

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

APPEAL by plaintiffs from *Sinclair, J.*, at February Term, 1938, of FRANKLIN.

Special proceedings for the establishment of a cartway over the lands of defendants.

Petitioners filed petition before the clerk of the Superior Court of Franklin County and allege in substance: That they are the owners of tract of land in Dunns Township, in said county; that the defendants are the owners of a tract of land in said township, which adjoins and lies east of and between petitioners' land and the public highway known as the Louisburg-Zebulon Road; that for more than fifty years the petitioners and their predecessors in title and the public generally have used for passing and repassing a road which extends across the defendants' land from the petitioners' land and points west thereof to Louisburg-Zebulon Road; "that this roadway is the only outlet which the petitioners have from their farm to said public highway, . . . and said roadway is the only means of ingress to the petitioners' said farm and egress therefrom, and said road and roadway is necessary and essential for continual daily use, as it has been so used throughout the years . . .."; that the defendant M. G. Privette has blocked said roadway, and forbidden and thereby prevents the petitioners to use it; and "7. That as a result of the said blocking and barricading of said roadway by the defendants, . . . they will have no adequate means of transportation affording necessary and proper means of ingress to their said land and egress therefrom, and the petitioners allege that it is reasonable and just and proper that they be permitted to use said roadway which has been blocked by the defendants or have established or provided for them another way or outlet across defendants' said lands to said public highway."

Petitioners upon such allegation pray that, in the event defendants do not remove the barricade and open the roadway for free and uninterrupted use by the petitioners, the court appoint a jury of view, and lay off a roadway as an outlet for and for use by the petitioners.

Defendants demur to the petition for that it does not allege facts sufficient to constitute a cause of action against the defendants in that:

"1. No right to the relief demanded is alleged in the said petition to be in said plaintiffs by virtue of any title to any easement upon the lands of these defendants.

"2. No easement is alleged to be held by the plaintiffs against or upon the lands of the defendants by virtue of any express grant, or estoppel, or way of necessity, or implication or reservation, or condemnation.

"3. No easement is alleged to be held by the plaintiffs against or upon the lands of the defendants arising out of prescription, through uninterrupted, peaceable, clear, notorious and continuous adverse user of any such easement, under claim of right and with intent to use adversely to these plaintiffs or to their predecessors in title, for twenty years.

"4. The said petition does not allege facts sufficient, by any reasonable intendment, to rebut the presumption that the alleged user was solely by permission license and consent, revocable at any time."

From judgment sustaining the demurrer, plaintiffs appealed to the Supreme Court, and assign error.

Yarborough & Yarborough and R. L. McMillan for plaintiffs, appellants.

Charles P. Green for defendants, appellees.

WINBORNE, J. Did the court below err in sustaining the demurrer? We think so.

"The office of demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of fact contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom are also admitted, . . ." *Stacy, C. J.,* in *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761; *Andrews v. Oil Co.,* 204 N. C., 268, 168 S. E., 228; *Toler v. French, ante,* 360.

Both the statute, C. S., 535, and decisions of this Court require that the pleading be liberally construed, and every reasonable intendment and presumption must be in favor of the pleader. It must be fatally defective before it will be rejected as insufficient. *Blackmore v. Winders,* 144 N. C., 212, 56 S. E., 874; *Brewer v. Wynne,* 154 N. C., 467, 70 S. E., 947; *Hartsfield v. Bryan,* 177 N. C., 166, 98 S. E., 379; *Public Service Co. v. Power Co.,* 179 N. C., 18, 101 S. E., 593; *Farrell v. Thomas & Howard Co.,* 204 N. C., 631, 169 S. E., 224; *Scott v. Ins. Co.,* 205 N. C., 38, 169 S. E., 799; *Anthony v. Knight,* 211 N. C., 637, 191 S. E., 323; *Toler v. French, supra.*

Applying these principles to the allegations of the petition, when read in connection with the provisions of C. S., 3836, under which petitioners are proceeding, a cause of action is sufficiently alleged. C. S., 3836, provides in part in so far as it is here pertinent: "If any person . . . shall be engaged in the cultivation of any land . . . to which there is leading no public road or other adequate means of transportation affording necessary and proper means of ingress thereto and egress therefrom, such person . . . may institute a special proceeding as

set out in the preceding section and if it shall be made to appear to the court necessary, reasonable and just that such person shall have a private way to the public road . . . over the lands of other persons, the court shall appoint a jury of view . . . to view the premises and lay off a cartway . . ."

The demurrer appears to be predicated upon the theory that petitioners are asserting a vested right in and to the road which petitioners allege defendants have "barricaded and blocked." Such is not the case. Petitioners allege that this old road has been used for fifty years, and they invite defendants to open it to their use, but, if not, then they pray that a cartway be laid off in accordance with the statute, C. S., 3836. For this purpose, when liberally interpreted, the allegations of the petition are sufficient.

The judgment below is

Reversed.

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

ELIZABETH C. MUNDEN, BY HER NEXT FRIEND, MRS. BESSIE W. COHOON, v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 4 May, 1938.)

1. Evidence § 43d—

Where the physical condition of insured after he had played in a football game is the subject of inquiry, testimony of his declarations at the time to the effect that he felt bad, is competent.

2. Insurance § 41—In action on double indemnity clause, insured's physical condition after alleged accident causing death is subject of inquiry.

Insured died a few hours after playing in a football game. Plaintiff beneficiary contended that the embolus causing death resulted from a blow received while he was playing in the game, and that therefore insured's death resulted from bodily injuries sustained solely through external, violent and accidental means within the terms of a double indemnity clause in the policy. *Held:* The physical condition of insured immediately after the game was a proper subject of inquiry, and testimony of declarations by insured at that time as to his bodily feeling was properly admitted.

3. Trial § 16: Appeal and Error § 39d—

When the trial judge instructs the jury that certain evidence introduced is withdrawn, and that they should not consider it in their deliberations, the admission of such evidence will not be held for error.

4. Appeal and Error § 39d—

An exception to the admission of certain evidence will not be sustained when the evidence is rendered meaningless and its admission harmless by the withdrawal of other evidence upon which it was predicated and which alone gave it meaning.

5. Evidence § 52—

When there is sufficient evidence to support the hypothesis, the fact that there is conflict in the evidence relating thereto does not render the hypothetical question incompetent, and the answer is competent if it is sufficiently definite in regard to the fact in dispute.

BARNHILL, J., dissents.

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

APPEAL by defendant from *Frizzelle, J.*, at October Term, 1937, of PASQUOTANK. No error.

M. B. Simpson and John H. Hall for plaintiff, appellee.
Worth & Horner for defendant, appellant.

SCHENCK, J. This is an action to recover double indemnity on a policy of insurance issued by the defendant upon the life of John Rex Munden, containing a provision, *inter alia,* as follows: The defendant "hereby agrees to pay to the beneficiary or beneficiaries of record under said policy, in addition to the amount payable according to the terms of said policy, the sum of $1,000 upon receipt, at the Home Office of the company in the City of New York, of due proof of the death of the insured, as the result, directly and independently of all other causes, of bodily injuries, sustained solely through external, violent and accidental means . . ."

The defendant has paid into the court for the benefit of the plaintiff, wife of the insured and the person to whom the benefits under the policy had been changed, "the amount payable according to the terms of the policy," but has denied its liability for an additional amount due to the death of the insured resulting from external, violent and accidental means.

The issues submitted and answers made thereto are as follows:

"1. Did John R. Munden, on or about 1 January, 1937, come to his death as the result, directly and independently of all other causes, of bodily injuries sustained solely through external, violent and accidental means? A. 'Yes.'

"2. In what sum, if any, is the defendant indebted to the plaintiff? A. ....."

It was agreed that the court might answer the second issue in the event that the first issue was answered in the affirmative.

Upon the verdict the court entered judgment for the plaintiff for the sum of $1,000, and interest, from which defendant appealed.

All of the assignments of error relate to the rulings of the court upon the admission of the evidence offered by the plaintiff.

The plaintiff's evidence tended to show that the insured participated in a football game on the afternoon of 1 January, 1937; that he received bodily injuries in the course of the game, that at the conclusion of the game, about 4:15 o'clock p.m., he walked seven or eight blocks from the football field to the dressing room, that during this walk and at the dressing room he said he "felt bad" and was complaining, and that soon after leaving the dressing room he still complained of feeling bad; that about 7:30 or 8:00 o'clock p.m. he went to his room and complained of feeling bad and soon asked that a physician be called, that when the physician arrived about 9:00 o'clock he was dead. The evidence further tended to show that upon an autopsy it was found that he died from "an embolus that blocked the artery, the left auricle of the heart."

The first group of assignments of error are to the admission, over objection, of the testimony of the witnesses to the effect that between the time of the conclusion of the game, about 4:15 o'clock p.m., and the time he lapsed into unconsciousness, about 8:30 o'clock p.m., the insured stated he was feeling bad, or words to that effect. Illustrative of the evidence assailed by this group of assignments is the following: "Question: Tell us, in substance, what he said, if anything, between the field, playing field, and the dressing room as you walked along? Answer: He said he felt bad." These assignments of error cannot be sustained. "It is very generally held that when the physical condition of a person is the subject of inquiry, his declarations as to his present health, the condition of his body, suffering and pain, etc., are admissible in evidence." *Howard v. Wright,* 173 N. C., 339 (bottom of p. 342).

The second group of assignments of error are to the admission, over objection, of the testimony of a witness to the effect that about one and one-half hours before his death the insured stated "he thought somebody had kneed him or something" and "I got knocked on the chest" and to permitting a witness to answer a hypothetical question embodying these statements. If the trial judge erred in admitting the evidence assailed by these assignments, such error was cured by his subsequently striking such evidence from the record. There appears in the record the following: "Immediately after the convening of court after the noon session the court instructed the jury: 'Gentlemen of the jury, this morning I admitted in evidence, over the objection of counsel for the defendant, testimony as to statements or declarations made by John Rex Munden, one to the effect that someone had kneed him in the football game and another to the effect that he had received a blow in the chest, or about the body. Upon reflection, I do not think that testimony,

evidence of those declarations, is admissible and I now strike it from the record and ask you gentlemen not to consider it as testimony now, and I also instruct you gentlemen to disregard and not consider the testimony of Dr. Bailey given at the morning session, in answer to hypothetical question asked by counsel for plaintiff to the effect that in his opinion the cause of the embolus was due to some blow received during the football game.' "

When the trial judge instructs the jury that certain evidence introduced is withdrawn, and they shall not consider it in their deliberations, the admission of such evidence will not be held for error. *Ferebee v. R. R.*, 167 N. C., 290; *Raulf v. Light Co.*, 176 N. C., 691.

The third group of assignments of error are to the admission in evidence, over objection, of the testimony of a witness as to what is meant in football parlance by "kneed him." If this evidence was not stricken out by the court it was rendered meaningless and harmless by the striking out of the evidence as to the insured's statement as to being kneed, and these assignments cannot be held for reversible error.

The appellant assigns as error the admission in evidence, over objection, of testimony of a witness to the effect that the insured said a short time before he died, "If I ever play in a football game again, I hope somebody kicks me." This testimony was by the same witness who testified as to insured's statements relative to having been "kneed" and "struck on the chest" and with the latter testimony being stricken from the record the former was rendered meaningless and harmless.

The appellant's assignments of error which relate to the hypothetical question propounded to and answered by an expert witness, a physician, are untenable. While the evidence was conflicting, there was evidence upon which to base the hypothesis that the insured "received a blow by reason of an opposing player falling upon him while he was on his back and that he was assisted from the field, and did not play any more during the game." While the witness' answer to the hypothetical question manifests some hesitancy, it is to the effect that the embolus, which he had theretofore testified he had found, upon an autopsy, to have caused the insured's death, was, in his opinion, due to a blow received in a football game.

The case was submitted to the jury upon a charge to which no exceptions were taken. There was no demurrer to the evidence. We find no prejudicial error in the ruling of the court upon the admission of the evidence. The judgment therefore must be affirmed.

No error.

BARNHILL, J., dissents.

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

EDWARD D. LATTA, JR., EXECUTOR AND TRUSTEE OF THE ESTATE OF EDWARD D. LATTA, SR., AND EDWARD D. LATTA, JR., INDIVIDUALLY, *v.* H. L. McCORKLE AND WIFE, DORA ELIZABETH McCORKLE; MAMIE MAY McCORKLE COOK AND HUSBAND, J. H. COOK; FRED LOUIS McCORKLE, PEARL LEONA McCORKLE WILSON AND HUSBAND, HOLMAN WILSON; IDA LU DELLA McCORKLE McWHIRTER AND HUSBAND, B. P. McWHIRTER; PAUL JONES McCORKLE, HUGH MYERS McCORKLE AND WIFE, NINA RUTH McCORKLE, AND SON, RONNIE MYERS McCORKLE, ROSALIE McCORKLE, EDWARD LEROY McCORKLE, HARRIET ELIZABETH McCORKLE, LOUIS COOK, HILDA MAY COOK, ALICE JACKALINE COOK, ELLA MAY COOK, GRACE COOK, NORA LEE COOK, EVA COOK, JOHNNY MORGAN COOK, GLORIA McWHIRTER; AND ANY UNBORN CHILDREN OR GRANDCHILDREN OF THE SAID H. L. McCORKLE; J. E. STUKES, GUARDIAN AD LITEM FOR ROSALIE McCORKLE, EDWARD LEROY McCORKLE, HARRIET ELIZABETH McCORKLE, LOUIS COOK, HILDA MAY COOK, ALICE JACKALINE COOK, ELLA MAY COOK, GRACE COOK, NORA LEE COOK, EVA COOK, JOHNNY MORGAN COOK, GLORIA McWHIRTER, AND RONNIE MYERS McCORKLE; AND FOR THE UNBORN CHILDREN AND GRANDCHILDREN OF H. L. McCORKLE AND WIFE, DORA ELIZABETH McCORKLE, AND FOR ANY UNKNOWN PARTIES IN INTEREST, AND TRUSTEES OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES AND THE PRESBYTERIAN FOUNDATION, INC.; ASHEVILLE MISSION HOSPITAL, NORTH CAROLINA ORTHOPEDIC HOSPITAL, ACTON LATTA PORCHER AND HUSBAND, WILLIAM H. PORCHER; WILLIAM H. PORCHER, JR., HARRIET PORCHER, JEANIE LEA FARGASON AND HUSBAND, JOHN T. FARGASON; THE UNBORN CHILDREN AND GRANDCHILDREN OF MR. AND MRS. WILLIAM H. PORCHER, AND THE UNBORN CHILDREN AND GRANDCHILDREN OF E. D. LATTA JR.

(Filed 4 May, 1938.)

1. Wills § 33d: Trusts § 5—Trustee held properly directed to pay taxes and preserve property pending termination of trust.

Testator directed his trustee to hold a designated house and lot to give a certain beneficiary a home therein for life, with provision that after the beneficiary's death, the trustee should convey title to certain children and grandchildren of the beneficiary in accordance with a limited discretion in the trustee. No provision was made in this particular provision of the trust for the payment of taxes and costs of repairs on the house. It appeared that the beneficiary was an aged and crippled former employee of testator, that several trusts were set up in the will, that several life annuities were provided for, and the trustee given discretion to manage the estate as testator would have done if living, with power to appoint his successor by deed or will, with provision for the vesting of the *corpus* of the estate after all the trusts had been executed in certain religious organizations. *Held:* An order directing the trustee to pay taxes on the house and lot and to keep same in repair, even though the comparatively small amount necessary therefor would be at the expense of the beneficiaries under the residuary trust, is proper, such construc-

tion of the will being necessary to effectuate the primary purpose of testator to provide a home for life for his aged and crippled employee. C. S., 7985.

2. Executors and Administrators § 24—

Beneficiaries not made parties to an agreement for the distribution of the estate are not effected thereby and their rights must be determined solely by the provisions of the will.

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

APPEAL by plaintiff from *Olive, Special Judge,* at March Term, 1938, of MECKLENBURG. Affirmed.

Robinson & Jones for plaintiff.
Carswell & Ervin and G. E. Fields for defendants.

DEVIN, J. The question presented by this appeal arose upon the petition of the plaintiff, executor and trustee, for advice and instruction relative to the following paragraph of the will of his testator: "I also direct my said trustee to acquire and hold in trust a lot of land located in Dilworth, in the city of Charlotte, fronting fifty feet on Kingston Avenue, and running back with that width one hundred and fifty feet, and known as lot 705 on the map of Dilworth, and to expend thereon the sum of thirty-five hundred dollars in the erection of a residence to be used and occupied by H. L. McCorkle and his family during the term of his natural life, and upon his death, and the death of his wife, my said trustee shall, in the exercise of his absolute discretion, either convey the same to the surviving children of the said H. L. McCorkle and such of his grandchildren, who shall be without living parents at said time, as my said trustee shall select, or he may hold said property in trust for the sole use and benefit of all the grandchildren of said H. L. McCorkle, who may be living at his death, altogether free from the claims of any of his children."

It appears that H. L. McCorkle, a carpenter, had been a faithful employee of the testator for thirty years, that he is now crippled and unable to work, that the taxes on the property above described are due and unpaid for the year 1931 and all subsequent years, and that repairs are necessary to preserve the house during the lifetime of the beneficiary and his wife, and that there are no assets in this particular trust fund except the house and lot, occupied as a home and from which no income is derived.

The will of the plaintiff's testator, in addition to the item above quoted, contains numerous provisions not necessary to be considered in the decision of this appeal. However, it may be proper to state briefly that the testator, after making bequest to his wife, devised the residue

of his estate to Edward D. Latta, Jr., executor and trustee, in trust for the purposes therein set out, including the payment of annuities and legacies to several persons, with provision that the rest of the income be paid to the trustees of the General Assembly of the Presbyterian Church, and certain hospitals, with the further provision that when the trustee or his successor shall have fully administered all the trusts imposed by the will, the *corpus* of the *residuum* should be turned over to the named religious and charitable institutions. Discretion was vested in the trustee to manage the estate in such manner as in his opinion the testator would have managed it if living. Power was given the trustee to appoint by deed or will his successor, and upon his death, without having done so, the Wachovia Bank & Trust Company was designated to carry out the trusts created by the will.

The court below, in addition to the facts recited, found that all specific legacies have been paid and annuities kept up, that the assets remaining in the hands of the trustee amounted to about $139,000 in personalty, in addition to extensive real estate holdings in Charlotte and Asheville, and thereupon adjudged that in order to prevent the loss of the property held in trust as a home for H. L. McCorkle and family the trustee was authorized to use the assets remaining in his hands for the purpose of paying taxes, insurance, and such repairs as were necessary to preserve the building on the lot described, during the continuance of the trust. It was further directed that all amounts of money used for this purpose be taken out of the funds in the hands of the trustee as necessary administration expenses and not charged to any particular share in the residue of the estate.

From an examination of the language in which the trust for the benefit of H. L. McCorkle and family was created, in connection with the circumstances surrounding, it is obvious that the direction to the trustee "to acquire and hold" the lot and erect a dwelling house thereon was for the purpose of providing a home for an aged employee, now unable to work, and for his wife and children. It reasonably appears that unless the taxes are paid the property will pass from the beneficiary and he be left homeless in his old age. This would defeat the purpose of the trust and destroy it entirely. It could not have been so intended by the testator. The direction to the trustee to acquire and hold the property for the purposes declared and to control its ultimate devolution carries the necessary implication that it would be the duty of the trustee to preserve it. The statute (C. S., 7985) imposes the duty upon a trustee having the care and control of property to pay the taxes thereon out of the trust fund in his hands. While there are no funds belonging to this particular provision of the trust, there are funds in the trustee's hands which the court directed him to use for this purpose as other administration expenses.

It is contended by the plaintiff, however, that to require him to pay the taxes and other expenses to preserve this property would make it necessary for him to use income and funds devised in the will as a residuary trust for the benefit of other beneficiaries. But the appellees here are immediate beneficiaries of an active trust wherein the trustee is charged with duties not only with respect to holding the property, but also with duties to be performed by him after the death of H. L. McCorkle and his wife in the conveyance of the property to their children and grandchildren. To permit the title to the property to be lost through sale for unpaid taxes would nullify the manifest intention expressed in the will for the benefit of all those whom he had in mind. Hence, the purpose of the testator in creating the trust should not be allowed to fail by reason of the nonpayment of the comparatively small sums involved, even though it may be at the expense of beneficiaries under a residuary trust.

It may be well to note that the rights of the parties in this proceeding are determinable according to the provisions of the will of Edward D. Latta, Sr., and are not affected by the agreement between the executor and other devisees, and the judgment of Harding, J., thereon, referred to in the case of *Latta v. Trustees of the General Assembly of the Presbyterian Church, ante,* 462, since H. L. McCorkle and the members of his family were not parties to that agreement nor affected by that judgment.

The judgment of the court below upon the petition of the trustee for advice and instruction as to the quoted paragraph of the will is

Affirmed.

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

CITIZENS BANK OF MARSHALL v. LESLIE GAHAGAN ET AL.

(Filed 4 May, 1938.)

1. Deeds § 5—

The redelivery of an unregistered deed to the grantor does not *ipsa facto* reinvest title in the grantor, and an instruction that it does so is erroneous, certainly where it does not appear that the grantees surrendered possession upon its redelivery or that it was a deed of gift.

2. Assignments § 6—Evidence held not to show as matter of law that assignor was owner of funds paid to third person by acceptor.

This action was instituted by an assignee of an heir against the executors under the will to recover for moneys alleged to belong to the heir and to have been wrongfully paid to others by the executors after notice

and acceptance of the assignment. It appeared that the funds were derived from collections made after the death of testator on a purchase money note for standing timber conveyed by testator by timber deed after the execution of the will. Plaintiff assignee failed to establish as a matter of law that the persons to whom the executors made payment did not have an interest in standing timber on part of the lands owned by testator, either under his will or a timber deed executed by him, or that the funds collected on the purchase money note were not derived from timber cut from the tracts of land in which they had such interest. *Held:* An instruction that the payment of the funds to the third persons by the executors after they had accepted the heir's assignment constituted a wrongful diversion of the funds as a matter of law is error entitling the executors to a new trial.

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

APPEAL by defendants from *Johnston, J.*, at October Term, 1937, of MADISON.

Civil action to recover balance due on promissory note executed by Leslie Gahagan to plaintiff, secured by assignment of maker's interest in logging or timber contract, and to hold executors responsible for wrongful conversion or diversion of moneys covered by the assignment.

On 7 May, 1921, Wade Gahagan, father of Leslie Gahagan, published his last will and testament in which he reserved certain timber rights to his "common estate" with directions that his executors sell the timber rights, so reserved, to the best advantage and divide the proceeds, one-fourth to Leslie Gahagan, etc.

The next clause contains the following provision: "I hereby give and bequeath in trust to W. C. Cook, McKinley Cook and Winston Cook, trustees for the benefit of Thomas Cook, Belva Cook Ramsey and Edison Cook, and themselves, as more fully appears in a deed dated 7 May, 1921, all my right, title, claim and interest in and to the properties known as the Walnut Knob and the timber rights on the Gahagan Mill property, belonging to the estate of B. F. Gahagan, deceased. It is furthermore my will and desire that R. M. Gahagan and Lillie Gahagan assist in the just arrangement of the above matter as more fully appears in the above named deed."

On 3 August, 1922, Wade Gahagan joined with others in a timber deed to Luther O. Griffith, conveying all of his standing timber, together with other standing timber owned jointly by himself and the other parties to the deed.

The unpaid purchase price, amounting to $110,000, was secured by deed of trust executed by Luther O. Griffith to A. W. Whitehurst, trustee, who is also cashier of plaintiff bank. The note was made payable at the Citizens Bank of Marshall.

Wade Gahagan died in February, 1923. His will was probated on 5 March, 1923.

By consent of the parties concerned, and agreeably to the provisions of the deed of trust and the will as interpreted by the executors, payments were made by Griffith as the cutting progressed and the moneys deposited in the plaintiff bank to credit of distributees and owners as their interests appeared according to stumpage cut from each tract of land.

Under this procedure, approximately $10,726 was deposited to the credit of McKinley Cook, trustee for the Cook heirs, between 1 July, 1923, and June, 1924, out of moneys collected on the Griffith note.

The trial court instructed the jury that the payment by the executors "to the Cook heirs, after this assignment was made by Leslie Gahagan, was a wrongful disposition of that money . . . that fund, whatever it was should be credited to the Wade Gahagan estate, and if Leslie Gahagan was entitled to one-fourth of it, then by virtue of that assignment, the bank would be entitled to one-fourth of that." Exception.

The court further instructed the jury that the Cook heirs had no interest in the Griffith money, or the Wade Gahagan estate, because the deed of 1 May, 1921, was never put upon record; that it was afterwards returned to Wade Gahagan, who then again became the owner of the property. Exception.

The jury returned the following verdict:

"1. What amount, if any, is due and unpaid to the plaintiff Citizens Bank on the note executed by Leslie Gahagan, dated 23 May, 1924, and described in paragraph 3 of the complaint? A. '$2,424.40.'

"2. Did Leslie Gahagan execute and deliver, for a valuable consideration, to the plaintiff Citizens Bank, an assignment, dated 23 May, 1924, as alleged in paragraph 4 of the complaint? A. 'Yes.'

"3. Did the defendants, executors of Wade Gahagan, have notice of said assignment? A. 'Yes.'

"4. Did the defendants executors recognize, accept, adopt and ratify said assignment? A. 'Yes.'

"5. Did the defendants executors, after notice of said assignment, pay out funds or money of Leslie Gahagan and due to the plaintiff Citizens Bank upon said assignment, to parties other than plaintiff Citizens Bank? A. 'Yes.'

"6. If so, in what amount? A. '$2,424.40.'

"7. What amount, if any, is the plaintiff Citizens Bank entitled to recover of the defendants executors of the estate of Wade W. Gahagan, deceased. A. '$2,424.40.'

"8. What amount, if any, is the plaintiff Citizens Bank entitled to recover of the defendants executors, individually, because of their wrongful conversion or diversion of moneys going to Leslie Gahagan, under the contract of Luther Griffith and assigned by Leslie Gahagan to the Citizens Bank, as alleged in the complaint? A. '$2,424.40.' "

Judgment on the verdict, from which the defendants appeal, assigning errors.

J. Coleman Ramsey and John H. McElroy for plaintiff, appellee.

J. E. Rector, Calvin R. Edney, and Weaver & Miller for defendants, appellants.

STACY, C. J. It is conceded in plaintiff's brief that the settlement of Wade Gahagan's estate would have been subject to no criticism or objection from the plaintiff, but for the assignment by Leslie Gahagan of his interest in the Luther O. Griffith contract. This assignment bears date 23 May, 1924. Payments to the Cook heirs were made prior thereto and shortly thereafter, up to June, 1924, but just how much was paid to them after the execution of the assignment is not readily discernible from the record. Moreover, plaintiff's cashier, who was trustee in the Griffith deed of trust and who handled the matter for the bank, testified that the $10,726 credited or disbursed to the Cook heirs "was deducted from the timber cut from the Cook land." The theory upon which the settlement of the estate proceeded was, that the Cook heirs were entitled to a portion of the funds derived from the Griffith contract, either by reason of the deed of 7 May, 1921 (which does not appear in the record), or by virtue of the will which makes reference to the provisions of this deed.

The trial court took the view, however, that such procedure was not permissible, since the deed was returned to Wade Gahagan without registration. The conclusion is a *non sequitur*. The return of the deed did not *ipso facto* reinvest title in the grantor. *Robbins v. Rascoe,* 120 N. C., 79, 26 S. E., 807; *Lynch v. Johnson,* 171 N. C., 611, 89 S. E., 61. The contrary instruction was erroneous. 8 R. C. L., 987. And, besides, it does not appear that the Cook heirs surrendered possession with the return of the deed; nor is it conceded that the deed was one of gift. *Allen v. Allen,* 209 N. C., 744, 184 S. E., 485.

The plaintiff interposed no objection to the settlement of the estate, albeit it had full knowledge of how the matter was being handled, particularly as its cashier was trustee in the deed of trust and made the disbursements. It is a rule of general acceptance that one who stands by and sees another dealing with property in a manner inconsistent with his own rights, and makes no objection, will be regarded as having abandoned any claim or demand at variance with his silence or acquiescence. *McNeely v. Walters,* 211 N. C., 112, 189 S. E., 114; *Marshall v. Hammock,* 195 N. C., 498, 142 S. E., 776; *Stith v. McKee,* 87 N. C., 389; *Mask v. Tiller,* 89 N. C., 423; *Mason v. Williams,* 66 N. C., 564; *Saunderson v. Ballance,* 55 N. C., 322; *Lentz v. Chambers,* 27 N. C., 587; *Bird v. Benton,* 13 N. C., 179; *Despard v. Despard,* 53 W. Va., 443. Compare *Burnett v. Supply Co.,* 180 N. C., 117, 104 S. E., 137.

However, as this is not an administration suit, *Rigsbee v. Brogden*, 209 N. C., 510, 184 S. E., 24, or one to surcharge and falsify the account of the executors, *Thigpen v. Trust Co.*, 203 N. C., 291, 165 S. E., 720, and estoppel has not been pleaded, we refrain from pursuing the matter further, as a new trial must be awarded on other grounds, *i.e.*, erroneous instructions. It does not follow as a matter of law that payment to the Cook heirs was a wrongful diversion of moneys arising from the timber contract, of which plaintiff can complain. There was error in the court's peremptory instruction to this effect.

The defendants are entitled to another hearing. It is so ordered.

New trial.

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

MRS. JOELLA BARBOUR (WIDOW), MOSES BARBOUR AND JOSEPH BARBOUR, MINOR SONS OF TESSIE BARBOUR, DECEASED, EMPLOYEE, v. THE STATE HOSPITAL, SELF-INSURER, EMPLOYER.

(Filed 4 May, 1938.)

1. Master and Servant § 39a—State employee engaged in farming operations is covered by the Workmen's Compensation Act.

An employee of the State engaged in the cultivation of food crops on lands of the State used by the State Hospital is an employee of the State within the coverage of the Compensation Act, secs. 2 (a), 2 (b), 2 (c), 14 (b), and his death from an accident arising out of and in the course of his employment is compensable.

2. Master and Servant § 37—

The Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees, and its benefits should not be denied by a technical, narrow and strict construction.

STACY, C. J., and WINBORNE, J., dissent.

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

APPEAL by defendant from *Sinclair, J.*, at Second January Term, 1938, of WAKE. Affirmed.

In this cause the parties agree on the following statement of facts:

"1. That Tessie Barbour, deceased, was, on and before 23 April, 1937, employed by the State of North Carolina, at the State Hospital, at Raleigh, North Carolina.

"2. That on 23 April, 1937, said Tessie Barbour received an injury by accident arising out of and in the course of his employment, which injury resulted in his death on 24 April, 1937.

"3. That Joella Barbour, wife, Moses Barbour and Joseph Barbour, two minor sons, are the survivors and sole dependents of said Tessie Barbour, deceased.

"4. That the amount of compensation due said dependents, if anything, is the minimum of seven ($7.00) dollars per week for three hundred and fifty weeks (350), plus burial expenses of two hundred ($200.00) dollars.

"5. That the employment of the deceased, Tessie Barbour, by the State of North Carolina, his duties under such employment, and the acts being performed by him at the time of his said injury, were related to the cultivation of the soil and growing of crops, consisting mainly of foods and foodstuff, on the lands of the State used by the State Hospital at Raleigh, North Carolina. That at the time of the employee's injury, he was engaged in the operation of a tractor propelled by gasoline power upon said lands, and that said tractor ignited or the gasoline tank exploded, throwing burning gasoline upon the body of said employee, and he was thereby mortally burned.

"6. That the only disputed question to be determined is one of law; that is, under the foregoing statement of facts, is the claim of the dependents of said employee compensable under the provisions of the North Carolina Workmen's Compensation Act? Or, in other words, is the injury or death of a farm laborer employed by the State of North Carolina compensable, under the North Carolina Workmen's Compensation Act?

THE STATE HOSPITAL AT RALEIGH,
By A. A. F. SEAWELL, *Attorney-General,*
Per T. WADE BRUTON,
Assistant Attorney-General.

JOELLA BARBOUR,
MOSES BARBOUR, and
JOSEPH BARBOUR, *Claimants,*
By I. O. BRADY, *Attorney.*"

This case came on for review before the Full Commission at Raleigh, North Carolina, 7 October, 1937, upon an appeal by the defendants, in apt time, from the award of Commissioner Jurney.

No evidence was taken. The case was submitted to the Commission on an agreed statement of facts. It is purely a question of law. Section 2 (a) reads, in part: "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 agricultural and domestic service, . . ."

Section 2 (b) reads, in part: "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, including aliens, and also including minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer, *and as relating to those so employed by the State, the term 'employee' shall include all officers and employees of the State, except only such as are elected by the people, or by the General Assembly, or appointed by the Governor, either* with or without the confirmation of the Senate: . . ." (Italics ours.)

Section 2 (c) reads: "The term 'employer' means the State and all political subdivisions thereof, all public and *quasi*-public corporations therein, every person carrying on any employment and the legal representative of a deceased person or the receiver or trustee of any person."

Section 14 (b) reads, in part: "This act shall not apply to casual employment, farm laborers, . . ."

The Full Commission affirms the findings of facts, conclusions of law, and the award of the hearing Commissioner. The defendant will pay the cost of the hearing. T. A. Wilson, Commissioner. Examined and approved by: Buren Jurney, J. Dewey Dorsett."

The defendant took an appeal to the Superior Court. The judgment of the Superior Court is as follows: "This cause coming on to be heard, and being heard before the undersigned judge of the Superior Court of Wake County, at the Second January Term, 1938, on appeal by the defendant from the award of the North Carolina Industrial Commission in favor of the plaintiffs: The court is of the opinion: (1) That Barbour, deceased, was an employee of the State. (2) That the State voluntarily surrendered its right to exemption from the Workmen's Compensation Act. (3) That the statute's exemption of farm laborers was intended for the protection of farmers as an occupational class, and a farm laborer in contemplation of the statute is a man hired to till the soil or do other agricultural work by one whose occupation is that of a farmer. The award of the Commission is affirmed. N. A. Sinclair, Judge Presiding."

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

I. O. Brady and W. T. Joyner for plaintiffs.

Attorney-General Seawell and Assistant Attorneys-General McMullan, Bruton and Willis for defendant.

CLARKSON, J. The question involved: Is the death of a State employee, arising out of and in the course of his employment, while driving

a tractor in the cultivation of food crops on the lands of the State used by the State Hospital at Raleigh compensable under the Workmen's Compensation Act? We think so.

This and other courts of the United States have held that the various compensation acts should be liberally construed so that the benefits thereof should not be denied upon technical, narrow and strict interpretation. The primary consideration is compensation for injured employees. We think the judgment of the court below correct—that the State Hospital employee, Tessie Barbour, deceased, was not a "farm laborer" in contemplation of the statute.

We think the language of the statutes, construed *in pari materia,* and given a liberal construction, is sufficient to affirm the judgment, and there is no necessity to cite authorities to sustain the holding of the court below.

The judgment of the court below is

Affirmed.

STACY, C. J., and WINBORNE, J., dissent.

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

R. C. BROOKS, EMPLOYEE, v. CAROLINA RIM & WHEEL COMPANY, EMPLOYER, AND GREAT AMERICAN INDEMNITY COMPANY, INSURANCE CARRIER.

(Filed 4 May, 1938.)

1. Master and Servant § 40h—

Evidence *held* sufficient to support finding of Industrial Commission that the accident causing injury was not the result of the employee's intoxication, although defendants introduced evidence in conflict therewith. N. C. Code, 8081 (t).

2. Master and Servant § 55d—

The finding of the Industrial Commission upon conflicting evidence supporting both the contention of claimant and of defendants, that the accident was not the result of his intoxication, is conclusive on the courts on appeal.

3. Master and Servant § 39c—Evidence held to support finding that employee was resident of the State at time of the accident.

Claimant testified that he was injured in an automobile accident while he was returning from a salesman's meeting in this State, which he was required to attend, to his home in Florence, S. C. That he had moved his family to Florence temporarily so he could take them to a nearby beach occasionally, and because a certain road he would be required to travel

frequently if he resided in this State was in bad repair, but that his headquarters were in Charlotte, N. C., and that he had not given up his residence in this State. *Held:* The evidence supports the finding of the Industrial Commission that the employee was a resident of the State at the time of the accident, and that he was covered by the Compensation Act. N. C. Code, 8081 (rr).

4. Master and Servant § 41—

The allowance of attorneys' fee to claimant's attorneys in this proceeding *held* authorized by N. C. Code, 8081 (rrr), and defendants' assignment of error thereto is untenable.

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

APPEAL by defendants from *Warlick, J.*, at November Term, 1937, of MECKLENBURG. Affirmed.

John H. Small, Jr., and Walter Hoyle for plaintiff, appellee.
Frank Exum and Fred B. Helms for defendants, appellants.

SCHENCK, J. This cause was heard in the Superior Court of Mecklenburg on appeal by the defendants, employer and insurance carrier, respectively, from an award in favor of the plaintiff, employee, made by the North Carolina Industrial Commission.

The principal assignments of error are to the adoption and affirmation by the court of the findings of fact of the Commission that (1) "the injury by accident to the plaintiff on 19 August, 1936, was not occasioned by the intoxication of the plaintiff," that (2) "the contract of employment was made in this State, that the employer's place of business is in this State, that the plaintiff's residence is in this State, and that he was only temporarily residing in South Carolina, and that his contract of employment was not expressly for services exclusively outside of the State," and that (3) the court concluded as a matter of law that the award of the Commission should be affirmed.

The evidence bearing upon the question as to whether the injury "was occasioned by the intoxication of the employee" so as to bar compensation under sec. 8081 (t), N. C. Code of 1935 (Michie), was conflicting. The plaintiff admitted that about four or five hours before the accident he had taken a "jigger" of whiskey, but denied that the collision between his and another automobile on the highway in which he suffered the loss of an arm was occasioned by his intoxication. There was competent evidence to support the contention of both plaintiff and defendants upon this question, but the Commission having found as a fact that the accident in which the plaintiff was injured was not occasioned by his intoxication, the judge of the Superior Court was bound by such finding, and we are likewise so bound. *Morgan v. Cloth Mills*, 207 N. C., 317; *West v. Fertilizer Co.*, 201 N. C., 556; *Southern v. Cotton Mills Co.*, 200 N. C., 165.

There was ample evidence tending to show that the contract of employment was made in this State, that the employer's place of business was in this State, and that the plaintiff's contract of employment was not expressly for services exclusively outside of the State, and this evidence was practically uncontradicted; but the appellants contend that the finding of the fact that the plaintiff's residence was in this State, and that he was only temporarily residing in South Carolina, in which the accident occurred, was not warranted by the evidence. With this contention we cannot concur. The plaintiff testified: "On 29 August, 1936, the date of the accident, I was a salesman for the Carolina Rim & Wheel Company. I operated in eastern South Carolina. I worked out of Charlotte, which was my headquarters. On the night I was injured I was returning home from a sales meeting in Charlotte, which I had been ordered to attend. At the time of the accident I lived in Florence, S. C. My contract of employment was made in Charlotte, at which time I was living in Charlotte, but at the time I got hurt I had moved down to Florence, S. C., temporarily. I had moved my family down there. My headquarters were in Charlotte. I was to work temporarily in Florence. My living arrangements in Florence were temporary. The purpose of the temporary living arrangement was to be near Myrtle Beach, so I could take my wife and youngster over to the beach occasionally to visit the beach, and because the highway between Monroe and Pageland was in poor condition, and the fact that I had to come here every two weeks made it a hardship to go over that highway. I made my reports in Charlotte and had a lot of things to be attended to in headquarters. I had not abandoned my residence in North Carolina. On 29 August, 1936, at about 10:30 p.m., while returning to my home in Florence from a sales meeting in Charlotte that I had been ordered to attend, I had an accident, as a result of which I lost my arm." In the face of this testimony it cannot be said that there was no competent evidence to support the findings of fact assailed by the exception.

These findings of fact bring the case within the provisions of the Compensation Act although the accident occurred in the State of South Carolina. N. C. Code of 1935 (Michie), sec. 8081 (rr), reads: "Where an accident happens while the employee is employed elsewhere than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if the contract of employment was made in this State, if the employer's place of business is in this State, and if the residence of the employee is in this State; provided his contract of employment was not expressly for service exclusively outside of the State. . . ."

The conclusion of law of the judge of the Superior Court that the award of the Commission should be affirmed is supported by the findings of fact affirmed by him.

The assignment of error that the Commission allowed the plaintiff's attorneys a fee of $125.00 to be taxed in the costs cannot be sustained. Such allowance is authorized by sec. 8081 (rrr), N. C. Code of 1935 (Michie), which reads: "If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this article, shall find that such hearing or proceedings were brought by the insurer, and the Commission or court by its decision orders the insurer to make, or to continue, payments of compensation to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings, including therein reasonable attorneys' fees to be determined by the Commission, shall be paid by the insurer as a part of the bill of costs."

The judgment below is

Affirmed.

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

STATE v. KENNETH TAYLOR.

(Filed 4 May, 1938.)

1. Homicide § 30—Exclusion of evidence held not prejudicial upon the record in this case.

The State contended that defendant killed deceased by crushing her skull beyond recognition, using in his assault several objects, including a stove leg. Defendant pleaded self-defense, contending that deceased threatened to shoot him unless he yielded to her importunities. The State's evidence was to the effect that the gun with which defendant claimed he was threatened was found hanging untouched in its usual place in another part of the house some thirty feet away, and that defendant bore no marks of a scuffle. The jury rejected the plea of self-defense. *Held:* The exclusion of defendant's evidence to the effect that the reputation of the home of deceased was "bad for drinking and frolicking parties" could not have affected the result, and an exception to its exclusion is not sustained.

2. Homicide §§ 25, 27c—Evidence held to warrant refusal of instruction that in no event could defendant be guilty of murder in the first degree.

The State's evidence tended to show that defendant killed deceased by crushing her skull beyond recognition, using in this assault several objects, including a stove leg; that defendant had expressed an intention of going by the home of the deceased on the afternoon in question; that during the struggle deceased was heard to cry out; and that her body indicated the striking of repeated lethal blows after she had been rendered helpless.

Held: There was ample evidence of premeditation and deliberation, and the court's refusal of defendant's request for instructions that in no event could he be found guilty of murder in the first degree, is without error.

3. Homicide § 21—

The dealing of lethal blows after the deceased had been felled and rendered helpless is evidence from which the jury may infer deliberation and premeditation.

4. Homicide §§ 27b, 30—

An exception to an instruction that a killing with a deadly weapon raises a presumption of murder in the second degree will not be sustained when all the evidence shows an intentional killing and defendant pleads self-defense based upon an intentional killing.

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

APPEAL by defendant from *Sinclair, J.*, at October Term, 1937, of FRANKLIN.

Criminal prosecution, tried upon indictment charging the defendant with the murder of one Margaret Alston.

The record discloses that on the afternoon of 26 July, 1937, the defendant killed Margaret Alston in the kitchen of her home by the use of rocks, sticks, bottles and a stove leg. Her head was badly mangled, and her skull fractured in seven or eight different places. "At least two of the wounds on the woman's head were made by the stove leg, judging from the appearance of the wounds. . . . Her head was broken all to pieces. . . . Her head was beat up so badly you could not tell who it was."

The defendant admitted the killing, and pleaded self-defense. His testimony was, that the deceased threatened to shoot him unless he yielded to her importunities, and that in the ensuing struggle "after I had hit her and fractured her skull I continued to hit her because she kept coming after me. . . . Sure, I could see that her skull was broken in like an egg shell."

In rebuttal, the State offered evidence tending to show that there was no gun in the room where the killing occurred. It was found in another part of the house, thirty feet away, hanging on the rack where it was customarily kept. During the struggle, the deceased was heard to cry: "Oh, Lordy! Oh, Lordy! Don't tear my clothes." And a man's voice replied: "Hush your mouth." The evidence is also to the effect that the defendant had expressed an intention of going by the home of the deceased on the afternoon in question. There were no scars, scratches or bruises found on the defendant.

The defendant sought to show that the reputation of the home of the deceased was "bad for drinking and frolicking parties." Objection; sustained; exception.

The defendant requested the court to instruct the jury "that in no aspect of the evidence could they return a verdict of murder in the first degree." Refused; exception.

The defendant also excepted to the charge that a killing with a deadly weapon raises a presumption of murder in the second degree.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

Defendant appeals, assigning errors.

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

Edward F. Griffin and Kemp P. Yarborough for defendant.

STACY, C. J. It is apparent from a careful perusal of the record that the defendant's plea of self-defense was not very impressive to the jury. At any rate, the threat of harm from a gun hanging on a rack in another part of the house thirty feet away was not regarded as immediate, or such as to excuse the brutal killing. The plea was rejected. It is not perceived upon what theory the bad reputation of deceased's house "for drinking and frolicking parties" could have affected the result. The exclusion of this evidence was without significance in the case. *S. v. Hodgin,* 210 N. C., 371, 186 S. E., 495; *S. v. Baldwin,* 184 N. C., 789, 114 S. E., 837; *S. v. Davis,* 175 N. C., 723, 95 S. E., 48; *S. v. Peterson,* 149 N. C., 533, 63 S. E., 87; *S. v. Banner, ibid.,* 519, 63 S. E., 84; *S. v. Hogue,* 51 N. C., 381. The exception is not sustained.

The trial court properly refused the defendant's request to instruct the jury that in no view of the evidence could they find the defendant guilty of murder in the first degree. *S. v. Jones,* 145 N. C., 466, 59 S. E., 353; *S. v. Daniel,* 139 N. C., 549, 51 S. E., 858. There was ample evidence of premeditation and deliberation. *S. v. Bell,* 212 N. C., 20, 192 S. E., 852; *S. v. Buffkin,* 209 N. C., 117, 183 S. E., 543; *S. v. Evans,* 198 N. C., 82, 150 S. E., 678; *S. v. Miller,* 197 N. C., 445, 149 S. E., 590; *S. v. Baity,* 180 N. C., 722, 105 S. E., 200; *S. v. Bynum,* 175 N. C., 777, 95 S. E., 101; *S. v. Walker,* 173 N. C., 780, 92 S. E., 327; *S. v. Lipscomb,* 134 N. C., 689, 47 S. E., 44. The dealing of lethal blows after the deceased had been felled and rendered helpless was evidence from which the jury could infer the defendant's deliberate and premeditated purpose. *S. v. Steele,* 190 N. C., 506, 130 S. E., 308; *S. v. Merrick,* 172 N. C., 870, 90 S. E., 257; *S. v. McClure,* 166 N. C., 321, 81 S. E., 458.

Nor was it error, of which the defendant can complain, for the court to instruct the jury that a killing with a deadly weapon raises a presumption of murder in the second degree. *S. v. Alston,* 210 N. C., 258, 186 S. E., 354; *S. v. Miller, supra.* All the evidence tends to show an

intentional killing. *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387. Indeed, the defendant's plea of self-defense is based upon an intentional killing. *S. v. Robinson, ante,* 278.

The record is free from reversible error. The verdict and judgment will be upheld.

No error.

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

STATE v. LOUIS BAKER.

(Filed 4 May, 1938.)

1. Larceny § 5: Criminal Law § 53c—Instruction held for error as placing burden on defendant to raise reasonable doubt of his guilt.

An instruction that the recent possession of stolen property raises the presumption that the possessor is guilty of larceny of the property, placing the burden on him to offer an explanation sufficient to raise a reasonable doubt of his guilt in the minds of the jurors, *is held* erroneous as placing the burden on defendant to raise a reasonable doubt of his guilt in the minds of the jurors if they should find he had recent possession of stolen property.

2. Larceny § 5—Recent possession of stolen property raises presumption to be considered merely as evidential fact along with other evidence.

The recent possession of stolen property raises a presumption of fact, strong or weak in proportion to the length of time between the larceny of the goods and the finding of them in defendant's possession, but the presumption is to be considered by the jury merely as an evidential fact, along with other evidence in the case, and the burden remains on the State throughout to prove defendant guilty beyond a reasonable doubt.

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

APPEAL from *Bone, J.,* at January Term, 1938, of EDGECOMBE. New trial.

The defendant was convicted upon a bill of indictment charging him with the larceny of a cow, the property of R. A. Parker, on 28 October, 1937. From judgment of imprisonment, the defendant appealed, assigning error.

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

Battle & Winslow and Henry C. Bourne for defendant, appellant.

SCHENCK, J. There was evidence tending to show that the cow of R. A. Parker was stolen from his barn at Conetoe, Edgecombe County, on Thursday night, 28 October, 1937, and that the cow was found in the possession of the defendant, near Goldsboro, Wayne County, on Wednesday, 3 November, 1937. The defendant testified that he bought the cow from the truck of an unknown man just outside of Smithfield, Johnston County, on Monday, 1 November, 1937.

The defendant assigns as error the following excerpt from his Honor's charge:

"Now, gentlemen, there is a rule of law with respect to recent possession of stolen property. There is a presumption arising from such recent possession that the one in whose possession it is found is guilty of the larceny of that property. It is not a presumption of law but a presumption of fact, and is one which may be rebutted. If you find beyond a reasonable doubt, the burden of proof being on the State, that this cow was stolen from Mr. Parker on Thursday, 28 October, and that on the following Wednesday that the same cow was in the possession of the defendant, that would raise a presumption of fact that he was the person who stole the cow. Now that presumption, gentlemen, has the effect of placing upon the defendant the duty of offering an explanation as to the possession. It does not require that he offer such explanation as would satisfy you beyond a reasonable doubt that he did not steal the cow, or such an explanation that would convince you by the greater weight of the evidence that he did not steal the cow, nor does he have the duty of offering such explanation as would satisfy your minds even that he was not a thief, but he is only under the duty to offer such explanation of his possession as is sufficient to raise in your minds a reasonable doubt that he stole the property, and if his explanation is sufficient to raise a reasonable doubt that he is the thief it would be your duty to acquit him."

We think, and so hold, that this assignment of error should be sustained, since it places the burden upon the defendant to raise in the minds of the jury a reasonable doubt as to his guilt, if the jury should find that the cow was stolen on Thursday, 28 October, and was found in his possession on the following Wednesday.

The syllabus in *S. v. Harrington,* 176 N. C., 716, which correctly interprets the opinion, reads: "Where there is sufficient evidence of 'recent possession' of stolen property, the burden still rests upon the State to prove the defendant guilty, throughout the trial, beyond a reasonable doubt; and a charge that the defendant should be acquitted if his explanation raised a reasonable doubt nullifies the duty of the State to exclude such doubt from the minds of the jury, and deprives the defendant of his right to have them pass upon the weight and credibility of the other evidence in the case."

The presumption that the possessor is the thief which arises from the possession of stolen goods is a presumption of fact and not of law, and is strong or weak as the time elapsing between the stealing of the goods and the finding of them in the possession of the defendant is short or long. This presumption is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. The duty to offer such explanation of his possession as is sufficient to raise in the minds of the jury a reasonable doubt that he stole the property, or the burden of establishing a reasonable doubt as to his guilt, is not placed on the defendant, however recent the possession by him of the stolen goods may have been. *S. v. Graves,* 72 N. C., 482; *S. v. Rights,* 82 N. C., 675; *S. v. McRae,* 120 N. C., 608. The burden of establishing the defendant's guilt beyond a reasonable doubt remains upon the State at all stages of the trial.

New trial.

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

C. C. PERRY, ADMINISTRATOR OF THE ESTATE OF JIM BRANCH, DECEASED, v. ROBERT C. DAVIS AND LEGH R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 4 May, 1938.)

1. Appeal and Error § 40e—

Upon appeal from the overruling of a motion to nonsuit, the evidence must be reviewed to ascertain whether there is any competent evidence to support plaintiff's cause of action, considering the evidence in the light most favorable to plaintiff.

2. Trial § 22b—

Upon motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff.

3. Carriers § 15—Conflicting evidence held properly submitted to jury upon question of whether deceased at time of injury was a passenger.

Plaintiff's evidence tended to show that his intestate was a Negro, that there were not at the time any accommodations for Negroes in the passenger station, that intestate entered upon the railroad premises near the passenger and freight station shortly before the train was due to leave, for the purpose of boarding a caboose used as a passenger car which was standing some twenty feet from the station, that while on the railroad yard and on or near a sidetrack between the station and the

caboose, intestate was struck and killed by a freight car which had been set in motion without warning in making a flying switch. Defendants' evidence tended to show that intestate was eighty yards from the passenger station when struck, and not in such place or position as to indicate to defendants that he intended to become a passenger, and that therefore defendants owed intestate no higher duty than that owed a mere licensee. *Held:* The conflicting evidence was properly submitted to the jury, the evidence being sufficient to make out a case in plaintiff's favor on the issue of negligence if the jury should find from the evidence that intestate at the time of the injury was a passenger.

4. Carriers § 21d—

Evidence *held* not to establish contributory negligence as matter of law on part of passenger struck while on the railroad premises by freight car set in motion without warning in making a flying switch.

5. Appeal and Error § 24—

When there is no exception to the charge it will be presumed that the principles of law applicable to the different views of the evidence were correctly and fairly presented to the jury.

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

APPEAL by defendants from *Sinclair, J.*, at November Term, 1937, of FRANKLIN. No error.

This was an action to recover damages for the wrongful death of plaintiff's intestate, alleged to have been caused by the negligence of the defendants, the receivers of the Seaboard Air Line Railway and the engineer operating the locomotive. Issues of negligence, contributory negligence and damage were submitted to the jury and answered in favor of the plaintiff. From judgment on the verdict the defendants appealed.

W. L. Lumpkin, E. C. Bulluck, and W. H. Yarborough for plaintiff.
Edward F. Griffin and Murray Allen for defendants.

DEVIN, J. The appellants' only assignment of error is based upon their exception to the denial of their motion for judgment of nonsuit, entered at the close of the plaintiff's evidence and renewed at the close of all the evidence.

The decision of the question presented, therefore, requires an examination of the testimony offered at the trial in order to determine whether there was any competent evidence to support the plaintiff's allegations, under the established rule that the evidence is to be considered in the most favorable light for the plaintiff.

There was evidence tending to show that plaintiff's intestate, a Negro tenant farmer, came to Louisburg, North Carolina, and entered upon the premises of the Seaboard Air Line Railway Company, near the passenger and freight station, for the purpose and with the intention of

taking passage on the train of the railway company, and at a time shortly before the train was due to leave. The plaintiff's evidence also tended to show that his intestate, while on the railroad yard, was struck by a freight car which had been without warning set in motion by the impact of two other cars released by defendants in making a flying switch, and that as a result he received injuries from which he shortly thereafter died. The defendant Davis was the locomotive engineer operating the train and shifting the cars at the time.

There was also evidence that there was in the railroad station no waiting room for colored people usable at the time (only a few passengers per month departing from the station); that the railroad caboose car used as a passenger coach was placed on a track opposite the station and some twenty feet therefrom; that in the space between the caboose and the station and close to the station and freight platform was a sidetrack, upon which was standing the freight car by which plaintiff's intestate was struck and injured.

It is apparent that if the plaintiff has offered evidence tending to show that his intestate, intending to become a passenger, was at the place usually occupied by those desiring to enter defendant's coach for transportation, and at a place provided by the railway company for passengers, and shortly before the train was scheduled to leave, he would have been in contemplation of law a passenger, and entitled at the hands of the defendants to the degree of care for his safety required by that relationship, and if there was also evidence to show that he was there struck by a car set in motion as the result of the impact of other unattached cars which had been released by defendants in making a flying switch, the case was properly submitted to the jury. *Clark v. Bland,* 181 N. C., 110, 106 S. E., 491; 10 American Jurisprudence, 27; *Ray v. R. R.,* 141 N. C., 84, 53 S. E., 622.

On the other hand, the defendants contend that there was evidence tending to show that plaintiff's intestate was eighty yards from the passenger station and not at a place, or in such a position as to indicate to the defendants that he intended to become a passenger, and that, under these circumstances, the duty which the law imposes upon a carrier with respect to a passenger was not incumbent upon the defendants, and that in the absence of knowledge of, or reasonable ground to anticipate, the presence of plaintiff's intestate at the place where he was struck, they owed him no higher duty than that due a mere licensee. *Gibbs v. R. R.,* 200 N. C., 49, 156 S. E., 138.

However, for the proper determination of the case between these distinctive categories, the evidence seems to be conflicting, and there are permissible inferences from it favorable to the plaintiff's contention. In this state of the case we are unable to say that there was error in submitting the case to the jury under appropriate instructions from the

court. Nor was the evidence of contributory negligence of the plaintiff's intestate so clear and conclusive as to warrant judgment of nonsuit upon that ground. No exception having been noted to the judge's charge, it is presumed that the principles of law applicable to the different views of the evidence were correctly and fairly presented to the jury.

We reach the conclusion that in the trial there was

No error.

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

LOUISE BLAINE, BY HER GUARDIAN, J. NORMAN BLAINE, v. ETTA T. LYLE, ADMINISTRATRIX, ET AL.

(Filed 4 May, 1938.)

1. Physicians and Surgeons § 15f: Damages § 2—Plaintiff is entitled to recover only for damages directly caused by negligence alleged.

Defendant's intestate was a physician and prior to his death treated plaintiff for empyema. Upon a recurrence of the condition over a year later, another operation was performed by another surgeon, and two pieces of metal removed from plaintiff's side. Plaintiff contended that the metal was negligently left in her side by intestate in probing her pleural cavity for pus. *Held:* Plaintiff is entitled to recover only for damages directly caused by intestate's alleged negligence, and an instruction that the jury might consider hospital and medical expenses from the time of her first illness until her complete recovery, some time after the metal pieces had been removed, is error entitling defendant to a new trial, some of the expenses having been incurred in treating plaintiff for her illnesses prior to the time the probing was begun and the occurrence of the alleged negligent act complained of, and there being no evidence that the continuance or recurrence or the condition after the removal of the metal pieces was the result of the alleged negligence.

2. Appeal and Error § 39e—Error in charge on measure of damages held not cured by later correct instruction followed by another erroneous charge.

Error in the charge in failing to confine the measure of damages to those directly resulting from the negligence complained of *held* not cured by a later correct instruction immediately followed by stating the contention of plaintiff as to the amount in a sum computed by including elements of damage not resulting from the wrong, and later followed by another incorrect instruction.

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

BLAINE *v.* LYLE.

APPEAL by defendant administratrix from *Sink, J.*, at December Term, 1937, of MACON.

Civil action for damages, tried upon issues raised by the pleadings, on allegations and denials that plaintiff suffered great injury by reason of the negligence of Dr. S. H. Lyle, since deceased, in allowing a metal probe to drop through a draining sinus into her pleural cavity while treating her for empyema.

On 16 February, 1932, Louise Blaine was taken ill with influenza. She was then eleven years old. Double pneumonia followed, and this later developed into empyema. About the middle of March, 1932, Dr. Lyle made an incision in her left side and inserted a tube for drainage. In treating the plaintiff thereafter, the incision was probed from time to time with a metallic probe to determine whether there was any pus in the pleural cavity. The process of probing was begun in the summer of 1932, and continued until the early spring of 1933. Dr. Lyle died 13 November, 1933, just after dismissing the plaintiff as well.

In August, 1934, there was a recurrence of the empyemic condition. In February, 1935, another operation was performed by Dr. Van Schaick of Florida, who states that he then removed two pieces of metal from plaintiff's side, which plaintiff says is the probe used by Dr. Lyle in 1932 or 1933.

Over objection, plaintiff's mother was allowed to testify as follows: "Q. About how much was the cost of it (her treatment from the time she was taken sick until she was brought back from Florida)? A. $1,500, I would say. I paid Dr. Lyle $582.00, or the estate. That was in the $1,500. I included that in the $1,500."

In instructing the jury on the issue of damages, the court said: "You will recall the various contentions with respect to the suffering and the condition that prevailed from and after February, 1932, through 4 July, 1936." Exception.

There was a verdict for plaintiff, the jury awarding her damages in the sum of $3,500, and from judgment thereon the defendant administratrix appeals, assigning errors.

George B. Patton and J. N. Moody for plaintiff, appellee.

Jones & Jones, G. L. Houk, and Jones, Ward & Jones for defendant, appellant.

STACY, C. J. Conceding that the evidence is sufficient to carry the case to the jury under authority of *Pendergraft v. Royster*, 203 N. C., 384, 166 S. E., 285, and cases there cited, we think a new trial must be awarded for error in allowing the plaintiff to recover hospital and medical expenses from the time she was taken ill in February, 1932. The process of probing did not begin until the summer of 1932, and it con-

tinued through the early spring of 1933. Plaintiff is not entitled to recover for hospital and medical expenses incurred prior to the alleged negligence of which she complains.

It is true, in one instruction the court said, "The plaintiff is entitled to recover for medical and hospital bills to the extent that they may or have been incurred as the proximate result of the injuries complained of." But he immediately added: "She contends they are about fifteen hundred dollars." This contention is based upon the evidence of plaintiff's mother that the total cost of her illness from and after February, 1932, was about $1,500, including $582 paid to Dr. Lyle or his estate.

Moreover, the two metal pieces were removed from plaintiff's side in February, 1935, and there is no evidence that the recurrence or continuance of her empyemic condition was affected by these pieces after their removal. Indeed, the evidence is to the contrary. The court instructed the jury, however, to consider plaintiff's "suffering and the condition that prevailed from and after February, 1932, through 4 July, 1936." So, we cannot say the error was cured or that it was harmless. *Johnson v. R. R.,* 184 N. C., 101, 113 S. E., 606.

In *McCracken v. Smathers,* 122 N. C., 799, 29 S. E., 354, it was held proper for the jury, in a malpractice case, to take into consideration the injury which plaintiff sustained by reason of the unskillful treatment of the case, which would include the loss, pain, inconvenience, diminished earning capacity, suffering and increased delay in effecting a cure, and probability of permanent injury, necessarily consequent upon the injury sustained by the maltreatment. See *Johnston v. Johnston, ante,* 255.

The holding in *Payne v. Stanton,* 211 N. C., 43, 188 S. E., 629, a malpractice case, was, that plaintiff is "entitled to recover compensation only for those injuries which proximately result from defendant's negligent treatment."

The conclusion results that a new trial must be awarded.

New trial.

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

MRS. BEATRICE S. JEFFREYS v. M. B. JEFFREYS.

(Filed 4 May, 1938.)

1. Judgments § 18—Court may not make order substantially affecting rights of parties out of the county and district, except by consent.

A judge of the Superior Court has no jurisdiction to hear a cause or make an order substantially affecting the rights of the parties outside the county in which the action is pending, except by consent, and his

jurisdiction of all matters pending in the district terminates upon the expiration of the six months period during which he is regularly holding the courts of the district, except the settling of cases on appeal, and the like.

2. Same—Where it does not appear that parties agreed thereto, order entered outside of county and district will be vacated.

The trial court entered an order granting alimony *pendente lite*, which order was made outside the county and outside the district after the expiration of the period during which he was regularly holding the courts of the district. *Held:* In the absence of an agreement of the parties appearing of record that the order might be made at such time and place, appellant's exception thereto must be sustained, and the order vacated.

3. Appeal and Error § 22—

The record imports verity, and when the record does not disclose an agreement of the parties that an order might be entered outside the county and district, appellant's contention that no such agreement was made, must prevail.

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

Appeal by defendant from *Sinclair, J.* From FRANKLIN. Remanded.

This is an action instituted by the plaintiff against the defendant for subsistence without divorce under C. S., 1667, and for the custody of children, in which the plaintiff applied for an order allowing her subsistence and counsel fees *pendente lite.*

The notice to appear and show cause why an order allowing subsistence and counsel fees *pendente lite* was returnable at the courthouse in Louisburg, 23 November, 1937. The hearing upon the motion was continued, by consent, to be heard in the city of Raleigh, 17 December, 1937. On said date the parties appeared and submitted evidence by affidavit. After the hearing the judge took the cause under advisement and requested counsel to submit briefs. Thereafter, on 1 January, 1938, the judge signed an order allowing the plaintiff subsistence *pendente lite* and counsel fees. This order was entered in chambers in Fayetteville, out of the county in which the cause of action was instituted and out of the district, after the period during which the judge was regularly riding the Seventh Judicial District had expired. Exceptions to the order and notice of appeal were entered in behalf of the defendant, and the defendant appealed.

M. C. Pearce and Irvine B. Watkins for plaintiff, appellee.
Edward F. Griffin and W. H. Yarborough for defendant, appellant.

BARNHILL, J. While it appears in the order that the parties to the action and their counsel were present and participated in the hearing at

Fayetteville, it is conceded here that none of the parties were present at the time the order was signed and that the only hearing had was at Raleigh, 17 December. The defendant assails the validity of the order and the right of the judge to enter any judgment at the time and place this order was signed.

It is accepted law in this State that a judge of the Superior Court has no authority to hear a cause or to make an order substantially affecting the rights of the parties outside of the county in which the action is pending, except by consent. *Cahoon v. Brinkley,* 176 N. C., 5; *Gaster v. Thomas,* 188 N. C., 346; *Brown v. Mitchell,* 207 N. C., 132. Likewise, when the six months period during which a judge is regularly holding the courts of a district expires his jurisdiction in all matters pending in said district terminates, except in the matter of settling cases on appeal and the like.

The learned and careful judge who made the order appealed from no doubt acted upon the apprehension that it was agreed that he should take the cause under advisement and, after briefs were filed, render judgment at such place and at such time as met his convenience. However, no such agreement appears of record and it is now denied by the defendant that any agreement existed, except that the cause should be heard in Raleigh rather than in Louisburg. The defendant assails the order entered for the reason that there was no such consent. The record imports verity and we are bound by its contents. If it discloses no agreement, we must assume that there was none. This being true, the order entered below must be vacated and the motion reinstated for further proceeding. To that end the cause is

Remanded.

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

DOGGETT LUMBER COMPANY v. PRESTON M. PERRY ET AL.

(Filed 4 May, 1938.)

1. Tender § 2—Failure to accept tender under C. S., 896, works its withdrawal.

When defendants tender judgment for a smaller amount on another and different liability from that alleged in the complaint, and plaintiff does not accept as provided by C. S., 896, the tender is thereby withdrawn, and upon judgment of nonsuit on the cause alleged, plaintiff is not entitled

to judgment for the amount tendered, there being no admission of liability in any amount upon the cause alleged. *Penn v. King*, 202 N. C., 174, cited and distinguished.

2. Appeal and Error § 43—Petition to rehear for modification of judgment held precluded by plaintiff's election of remedies.

Plaintiff, with knowledge of the facts, asserted a lien as a subcontractor under C. S., 2437. Upon ascertaining that the amount due the contractor was insufficient to pay its claim in full, plaintiff asserted a lien as a material furnisher under C. S., 2433, and in its action founded upon C. S., 2433, judgment of nonsuit was entered because of plaintiff's original election to proceed under C. S., 2437. The judgment as of nonsuit was affirmed on appeal. *Held:* Plaintiff's petition to rehear and for a modification of the judgment to take advantage of the provisions of C. S., 2437, is precluded by its second election to maintain the action under the provisions of C. S., 2433.

3. Laborers' and Materialmen's Liens § 10—Where action under C. S., 2433, is dismissed, material furnisher may proceed under C. S., 2437.

When plaintiff is estopped by its election in asserting a lien under C. S., 2437, from asserting a lien under C. S., 2433, and its action brought solely under C. S., 2433, is dismissed as of nonsuit because of such election, plaintiff's remedy is by instituting another action to recover for materials furnished the contractor and used in the construction of the building under C. S., 2437.

DEVIN, J., dissents.

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

PETITION by plaintiff to rehear this case, reported in 212 N. C., 713.

The action is to recover $2,095.28 for materials furnished and used in the construction of a building and to enforce lien as provided by C. S., 2433.

Prior to filing of notice of lien, here sought to be enforced, plaintiff, with full knowledge of the facts, notified the defendants of its claim as a subcontractor under C. S., 2437. This claim was acknowledged, and defendants tendered judgment for $1,257.16, the amount then withheld and unpaid the contractor on the turn-key job. The plaintiff did not accept the tender of judgment as provided by C. S., 896, which worked its withdrawal, and again in open court refused to accept the tender after motion of nonsuit had been allowed. The judgment of nonsuit was affirmed on appeal, because of plaintiff's election of remedies. *Lumber Co. v. Perry*, 212 N. C., 713.

Thereafter, in the Superior Court plaintiff moved for judgment in the sum of $1,257.16 and order to enforce subcontractor's lien. This was resisted because of changed situation and intervening rights. The motion was denied and judgment entered on certificate dismissing the action. The plaintiff thereupon filed this petition for rehearing and for modification of the original judgment.

Guthrie, Pierce & Blakeney for plaintiff, petitioner.
Taliaferro & Clarkson for defendants, respondents.

STACY, C. J. The plaintiff declared on one contract for a stated amount. The defendants tendered judgment on another and different liability for a lesser amount. The tender was not accepted under the statute, C. S., 896, which put it at an end, and it was again refused in open court at the close of the evidence. The plaintiff elected to stand upon the cause of action set out in its complaint and lost. The modification which it now seeks was declined in the trial court and was not advanced on the original hearing here. 3 Am. Jur., 350. Its later motion in the Superior Court was resisted on the ground of rights subsequently intervening. By the same token that plaintiff's first election is binding, as originally held, it would seem that its second ought to prevent another *volte face* in the matter. The case of *Penn v. King,* 202 N. C., 174, 162 S. E., 376, is distinguishable.

If plaintiff's rights have seemingly become entangled in the net of form, due to its elections, we may say that its remedy is an action to recover for materials furnished the contractor and used in the construction of the building. C. S., 2437; *Briggs & Sons, Inc., v. Allen,* 207 N. C., 10, 175 S. E., 838; *Foundry Co. v. Aluminum Co.,* 172 N. C., 704, 90 S. E., 923. The complaint in the present action covers only one cause of action.

Petition dismissed.

DEVIN, J., dissents.

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

T. M. STANBACK, ADMINISTRATOR OF T. C. INGRAM, DECEASED, v. ANNIE HAYWOOD, WIDOW OF W. F. HAYWOOD, C. T. HAYWOOD AND WIFE, MYRTLE HAYWOOD, D. C. HAYWOOD AND WIFE, ADNA HAYWOOD, ET AL.

(Filed 4 May, 1938.)

Appeal and Error § 50—The decision on a former appeal becomes the law of the case, both upon subsequent hearing and subsequent appeal.

When the effect of the decision on a former appeal is that the evidence of a parol contemporaneous agreement alleged by defendants was competent and sufficient to be submitted to the jury, the decision becomes the

law of the case, and it is error for the lower court upon the subsequent hearing upon substantially the same evidence to hold the evidence incompetent and insufficient to be submitted to the jury.

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

APPEAL by the defendants from *Rousseau, J.*, at November Term, 1937, of MONTGOMERY. New trial.

Chas. A. Armstrong, Douglass & Douglass, and Murray Allen for plaintiff, appellee.

R. T. Poole, Stahle Linn, and R. L. Smith & Sons for defendants, appellants.

SCHENCK, J. This was a suit to foreclose a mortgage for $16,000 given to the plaintiff's intestate by the defendants to secure eight notes for $2,000 each, four of which have been paid, and to collect any deficiency after application to the debt of the amount received from the foreclosure sale.

The defendants in their answer admitted the execution of the notes and mortgage referred to in plaintiff's complaint, and in their further defense alleged that contemporaneously with the execution of said notes and mortgage a parol agreement was entered into between them and the plaintiff's intestate to the effect that in the event the defendants were unable to pay the balance due on said notes, said intestate would not foreclose said mortgage, but would accept in full satisfaction of any such balance due a reconveyance to him of the land described in the mortgage securing the notes, which were given for the purchase price of said land.

This case was before us upon an appeal of the plaintiff at the Spring Term, 1936 (209 N. C., 798), and a new trial was granted on account of the insufficiency of the issues submitted to support the judgment awarded, in that they left undetermined the question as to the defendants' inability to pay the balance due on the notes. However, the effect of the opinion was to hold that the evidence introduced by the defendants in support of their allegation of a contemporaneous parol agreement was competent and sufficient to carry the case to the jury upon proper issues presenting the questions raised by such allegation.

This appeal presents the same question which was raised and decided on the former appeal, namely, the competency, and the sufficiency thereof to carry the case to the jury, of the evidence as to the alleged contemporaneous agreement between the plaintiff's intestate and the defendants. The witnesses testified substantially the same at the two trials. This being so, the court was in error in holding that the evidence of these witnesses was incompetent and insufficient to be submitted to the jury. "A decision by the Supreme Court on a prior appeal constitutes the law

of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. *Newbern v. Telegraph Co.*, 196 N. C., 14; *Nobles v. Davenport*, 185 N. C., 162; *Power Co. v. Yount* and *Robinette v. Yount*, 208 N. C., 182 (184)." *McGraw v. R. R.*, 209 N. C., 432 (438).

New trial.

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

ANNETTE M. DAVIS v. JAMES G. DAVIS.

(Filed 4 May, 1938.)

Divorce § 14: Contempt of Court § 2b—Failure to comply with deed of separation approved by consent judgment will not support attachment for contempt.

Pending an action for divorce *a mensa* and for alimony, the parties entered into a compromise settlement and separation agreement which provided that defendant should pay a certain sum weekly for the support of plaintiff and their children, which separation agreement was approved by the court by a consent judgment. *Held:* Defendant's failure to comply with the terms of the separation agreement will not support an attachment of defendant for contempt, since the consent judgment merely approved the agreement and did not order the payment of any sum by defendant. The distinction is pointed out between this consent judgment which merely approved the separation agreement, and consent judgments adjudging the payment of alimony.

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

APPEAL by defendant from *Hill, Special Judge*, at November Term, 1937, of MECKLENBURG. Reversed.

Motion to attach defendant for contempt for failure to pay alimony. From judgment for plaintiff, defendant appealed.

Frank W. Orr and Robert A. Hovis for plaintiff.
Small & Small for defendant.

DEVIN, J. The appeal brings up for review that portion of the judgment below which holds the defendant in contempt of court for refusal to obey the provisions of the judgment previously entered in the cause by Judge McElroy.

The facts material to the decision of the case are not in dispute. It appears that in 1935 plaintiff instituted action against the defendant for divorce *a mensa et thoro* and for alimony. Pending the action, plaintiff and defendant entered into a compromise settlement and separation

agreement, whereby it was agreed, among other things, that defendant should pay $16.75 per week for the support of plaintiff and two children. Thereupon Judge McElroy, on 19 June, 1936, entered a consent judgment wherein it was found that the provisions of the separation agreement were fair and it was adjudged that said agreement be approved, a copy of the agreement being attached to the judgment. Shortly after the rendition of the McElroy judgment plaintiff obtained, in an action for that purpose then pending, an absolute divorce from the defendant, on 24 June, 1936.

In November, 1937, plaintiff filed motion in the action for a divorce *a mensa,* alleging that defendant had reduced the weekly payments provided under the agreement and asking that the defendant be cited to show cause why he should not be attached for contempt. Upon the hearing in the court below upon this motion and defendant's answer thereto, Judge Hill found that defendant received a salary sufficient from which to pay the amount agreed upon, and adjudged the defendant in contempt of court for refusal to obey the provisions of the McElroy judgment.

Undoubtedly, a willful disobedience of the provisions of a judgment of the Superior Court, having jurisdiction of the parties and cause of action, adjudging the payment by the husband of certain sums as alimony for the support of his wife, notwithstanding the judgment was entered by consent and based upon a written agreement, would subject the husband in a proper proceeding to attachment for contempt. *Webster v. Webster, ante,* 135. But this principle cannot be held applicable to the facts in this case, for the reason that Judge McElroy entered no order or judgment requiring the defendant to pay any sum of money or to perform any other act. He merely gave judicial approval to the separation agreement between the parties. It was their contract. The obligation of the defendant to make payments to the plaintiff derived its efficacy from the agreement and not from judgment of the court. The fact that a copy of the agreement was attached to the judgment would show the court's sanction, but there was no order in the judgment requiring compliance with the provisions of the agreement, disobedience of which would subject the defendant to attachment for contempt. C. S., 978 (4). He has, according to plaintiff's allegations, failed to comply with his agreement with her, but for this he may not be adjudged in contempt. Her only remedy, it would seem, would lie in an action for the breach of the contract.

The appellant's assignment of error on this ground must be sustained and the judgment in this respect is

Reversed.

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

ETTA EVANS v. IMPERIAL LIFE INSURANCE COMPANY.

(Filed 4 May, 1938.)

1. Trial § 49: Appeal and Error § 37b—

A motion to set aside a verdict as being against the weight of the evidence is addressed to the discretion of the trial court and is not reviewable, and an exception on the ground that the refusal of the motion was error as a matter of law is untenable.

2. Same—

A motion for a new trial on the ground that the verdict is contrary to the evidence is in the discretion of the trial court.

3. Appeal and Error § 40a—

An assignment of error to the signing of the judgment cannot be sustained when the judgment is supported by the verdict.

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

APPEAL by defendant from *Sinclair, J.*, at January Term, 1938, of WAKE. No error.

Pou & Emanuel for plaintiff, appellee.
Thomas W. Ruffin for defendant, appellant.

PER CURIAM. This is an action instituted by the beneficiary upon a policy of insurance, issued by the defendant upon the life of Lina Evans (Hamm), wherein was provided that "should death of the insured be caused by . . . disease of heart within one year from date of this policy . . . the liability of the company is limited to the amount of premium paid to and received by the company, and no more." The insured died within one year from the issuance of the policy.

The sole question for determination by the jury was whether the death of the insured was caused by a disease of the heart, which was submitted under an appropriate issue and was answered in the negative. From a judgment predicated upon the verdict the defendant appealed.

Evidence was introduced by both plaintiff and defendant in which there was little conflict of facts, but some conflict in expert opinions based upon the facts.

The assignments of error are (1) that the court erred in denying motion to set the verdict aside as a matter of law, upon the ground that all the evidence, taken in its most favorable light to the plaintiff, fails to substantiate the verdict of the jury, (2) that the court erred in overruling motion for new trial, and (3) the court erred in signing the judgment.

". . . a familiar principle of practice forbids a directed instruction in favor of the party upon whom rests the burden of proof. *Cox v. R. R.*, 123 N. C., 604; *House v. R. R.*, 131 N. C., 103, 105." *Yarn Mills v. Armstrong*, 191 N. C., 125. A motion to set aside a verdict as being against the weight of the evidence is addressed to the discretion of the court and is not reviewable. *Hardison v. Jones*, 196 N. C., 712. The granting of a new trial because the verdict is contrary to the evidence is in the discretion of the trial court. *Redmond v. Stepp*, 100 N. C., 212 (220). The judgment is supported by the verdict.

In the record we find

No error.

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

TOWN OF WENDELL v. F. H. SCARBORO AND WIFE, MRS. F. H. SCARBORO; E. T. SCARBORO AND WIFE, MRS. E. T. SCARBORO; AND THE RENFRO-WHITLEY TOBACCO COMPANY, INC.

(Filed 4 May, 1938.)

Limitation of Actions § 11: Taxation § 40c—Amendment making true owner defendant is not continuation of original suit to foreclose tax certificate.

Action by plaintiff municipality to foreclose certain tax sale certificates was instituted against the owners named in the certificates within the time limited (C. S., 8037; Public Laws of 1929, ch. 204). It appeared that the owner named in the certificates had lost title by foreclosure several years prior to the institution of the action and had died; the purchaser at the foreclosure sale was made a party defendant by amendment over six months after the expiration of the time limited. *Held:* The amendment cannot effect continuity with the original action, and judgment dismissing action was proper.

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

APPEAL by plaintiff from *Cowper, Special Judge*, at February Term, 1938, of WAKE. Affirmed.

This was an action to foreclose certain tax sale certificates, heard upon agreed statement of facts. From judgment dismissing the action, plaintiff appealed.

W. H. Rhodes for plaintiff.

Arch T. Allen, Philip R. Whitley, and Thomas A. Banks for defendants.

PER CURIAM. Plaintiff instituted action to foreclose five tax sale certificates issued prior to 6 September, 1926, for taxes on described real property in Wendell for the years 1921 to 1925, inclusive. The property had been listed in the name of F. H. Scarboro, the then owner. However, title to said property had vested in E. T. Scarboro (not a member of the same family), 8 July, 1925, by deed from the trustee following foreclosure sale under the power contained in a deed of trust executed by F. H. Scarboro and wife. Since 1925 E. T. Scarboro has listed and paid the taxes on the property.

F. H. Scarboro died in 1928 leaving him surviving five children and his widow. She and another qualified as administrators of his estate. On 22 November, 1929, summons in this action, on the tax sale certificates, was issued, naming F. H. Scarboro and wife as the parties defendant, and served on Mrs. F. H. Scarboro. On 9 June, 1930, E. T. Scarboro, by order, was made party defendant and summons and amended complaint served on him. He filed answer, pleading, among other defenses, the several statutes of limitation. Under the statute the plaintiff had until 1 December, 1929, to bring its action. A few days prior to that dead line this action was begun, but only F. H. Scarboro and wife were named defendants. At that time F. H. Scarboro had been dead more than a year and his widow had no interest in the property. Thereafter, in June, 1930, the plaintiff could not by making E. T. Scarboro a party defendant effect continuity with the original action against a deceased person so as to prevent the bar of the statute of limitations as to this answering defendant and his grantee. C. S., 8037; Public Laws 1929, ch. 204; *Hogsed v. Pearlman, ante,* 240; *Orange County v. Atkinson,* 207 N. C., 593, 178 S. E., 91; *Beaufort County v. Mayo,* 207 N. C., 211, 176 S. E., 753.

The ruling of the court below was correct, and the judgment dismissing the action is

Affirmed.

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

MRS. L. W. PRIDGEN, SR., v. S. H. KRESS & COMPANY.

(Filed 4 May, 1938.)

1. Negligence § 4d—

The proprietor of a store, while not an insurer of the safety of his customers, owes them the duty to exercise ordinary care to keep the premises in reasonably safe condition and to give warning of hidden dangers ascertainable by him by reasonable inspection and supervision.

2. Same—Proprietor of store held not liable for injuries from fall caused by movement of crowd in the store.

Evidence that a customer in a store was shoved or pushed off balance by the movement of a crowd around a demonstrator of merchandise in the store, resulting in her falling down the steps leading to the basement of the store, without evidence or contention of any unsafe condition in the stairway or lighting, *is held* insufficient to resist defendant's motion to nonsuit, the evidence disclosing that the accident was due not to any negligence on the part of the proprietor but to the movement of the crowd which was not reasonably foreseeable by defendant.

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

APPEAL by plaintiff from *Armstrong, J.*, at February Term, 1938, of MECKLENBURG. Affirmed.

This is an action to recover damages for personal injuries which the plaintiff alleges she sustained as the result of the negligence of the defendant.

The defendant operates a five-and-ten-cent store in the city of Charlotte. There is a basement in its store in which meals are served and a stairway leads from the ground floor to the basement for the use of customers in going to and from the basement. On or about 24 October, 1936, late in the afternoon, the plaintiff entered the defendant's store for the purpose of going to the basement. She noticed a crowd estimated by the witnesses from 100 to 300 persons at or near the head of the steps, listening to an employee of the store who was making a demonstration of Christmas toys. She proceeded to the head of the steps and was there pushed or shoved by the crowd. She lost her balance and fell down the steps, suffering certain personal injuries. The circumstances of the occurrence are described by the plaintiff as follows: "The distance from the front door, which I entered, to the top of the front steps of the stairway leading to the basement is about five or six feet. I went right straight to the steps when I entered the store. At the top of the steps on a little platform, at the time I entered the store, a man was sitting on a stool or something, demonstrating Christmas toys to about 100 or more people crowded around him. The place was crowded. The best I know it was 100 or more. Just as I got to the steps he hollered to them to 'Come up, crowd up, listen for the next demonstration,' and, 'To come up quick.' The crowd rushed right up to him when he said that and that overbalanced me and threw me down the steps. I was at the edge of the top step on the right, just ready to go down when the crowd rushed up."

At the conclusion of the evidence for the plaintiff there was a motion to dismiss as of nonsuit, which was allowed, and judgment was entered accordingly. The plaintiff excepted and appealed.

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

PER CURIAM. It is well established in this jurisdiction that the proprietor of a store, while not the insurer of the safety of customers while on the premises, does owe to such customers the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to give warnings of hidden perils and unsafe conditions in so far as same can be ascertained by reasonable inspection and supervision. In the instant case there is no complaint as to the condition of the stairway or as to the condition of the lights at the time of the accident. The plaintiff relies solely upon her allegations of negligence in respect to the congested crowd at the head of the steps and as to the alleged negligence on the part of the defendant in conducting a demonstration at or near the head of the steps and in calling up the crowd to see the demonstration. Plaintiff saw the demonstration in progress, observed the crowd at the head of the steps and proceeded on into the area that was congested. As a result of the movement of the crowd in response to the call of the demonstrator to come up and see the demonstration she was shoved or pushed in such manner that she lost her balance and fell down the steps.

It would seem to us that this is a casualty of the crowded condition in the store which was not reasonably foreseeable by the defendant. The record fails to disclose any negligent or wrongful act on the part of the defendant or any breach of its duty to the customers in its store. We are, therefore, of the opinion that the judgment of nonsuit was proper.

Affirmed.

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

G. C. McCARN v. GASTONIA 3-CENTA BOTTLING COMPANY.

(Filed 4 May, 1938.)

Food § 16—

Evidence that plaintiff was injured by foreign and deleterious substances which he drank from a bottled drink prepared by defendant, without other evidence of negligence, is insufficient to be submitted to the jury.

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

APPEAL by plaintiff from *Armstrong, J.*, at January Term, 1938, of GASTON.

Civil action to recover of manufacturers or bottler damages resulting from drinking bottled beverage containing noxious substance.

The plaintiff purchased a crate of soda water products known as "3-Centa" from the defendant. On Sunday night, 11 July, 1937, about three hours after supper, he drank part of a bottle which came from this crate, and in one-half hour thereafter became very sick. Examination of the remaining contents of the bottle disclosed that it contained "considerable sediment and slimy-appearing substance." 3-Centa is usually a clear drink.

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning error.

J. L. Hamme for plaintiff, appellant.
John G. Carpenter and Cherry & Hollowell for defendant, appellee.

PER CURIAM. The plaintiff's evidence is not sufficient to carry the case to the jury. *Enloe v. Bottling Co.*, 208 N. C., 305, 180 S. E., 582, and cases cited.

Affirmed.

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

EGBERT SMITH, BY HIS NEXT FRIEND, M. C. SMITH, v. COCA-COLA BOTTLING COMPANY OF HENDERSON, N. C.

(Filed 4 May, 1938.)

1. Food § 4—

A person preparing food, medicines, drugs, or beverages in packages or bottles is charged with the duty of exercising due care in their preparation, and under certain circumstances may be held liable in damages to the ultimate consumer.

2. Food § 15—

While the doctrine of *res ipsa loquitur* is not available to establish negligence on the part of a person preparing food, drugs, or beverages, such negligence need not be established by direct proof, but may be established by substantially similar incidents in reasonable proximity in time.

3. Food § 16—

Evidence of injury resulting from drinking foreign and deleterious substances from a bottled drink prepared by defendant, with evidence that other drinks bottled by defendant at about the same time contained like foreign and deleterious substances, is sufficient to take the case to the jury.

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

SMITH *v.* BOTTLING CO.

APPEAL by defendant from *Sinclair, J.*, and a jury, at November Term, 1937, of FRANKLIN. No error.

This was an action for actionable negligence causing damage, brought by plaintiff against defendant. The plaintiff alleges, in part: "That on 6 August, 1936, the plaintiff Egbert Smith purchased from the said S. N. Rowe a bottle of the Coca-Cola which had been sold and delivered to the said Rowe by the defendant in this action for the purpose of resale and consumption by the public. That the said bottle of Coca-Cola, instead of being pure and wholesome as it was represented to be and the defendant's duty to the plaintiff and to the public required that it should be, contained a quantity of shattered glass, an exceedingly harmful, deleterious and dangerous substance when swallowed by a human being, which the said defendant company had carelessly and negligently permitted to be present in the said bottle. That the plaintiff, who relied upon the representations made by the defendant that the contents of the Coca-Cola so purchased by him were pure and wholesome, undertook to drink the same, and in so doing swallowed a fragment or fragments of said shattered glass before he knew of its presence in the drink which he had bought. That shortly afterwards, the said plaintiff, as a result of having swallowed said fragment of glass, became sick and nauseated and suffered great and excruciating pain," and demanded damages.

The defendant denied the material allegations of the complaint. 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. What damages, if any, is the plaintiff entitled to recover? Ans.: '$1,000.' "

The court below rendered judgment on the verdict. The defendant made several exceptions and assignments of error and appealed to the Supreme Court.

Yarborough & Yarborough for plaintiff.

A. J. Fletcher for defendant.

PER CURIAM. At the close of the plaintiff's evidence and at the close of all the evidence, the defendant in the court below made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions, and in this we can see no error.

In *Hampton v. Bottling Co.*, 208 N. C., 331 (332), it is written: "The decisions of this Court are to the effect that one who prepares in bottles or packages foods, medicines, drugs, or beverages, and puts them on the market, is charged with the duty of exercising due care in the preparation of these commodities, and under certain circumstances may

be liable in damages to the ultimate consumer. *Corum v. Tobacco Co.*, 205 N. C., 213, and cases there cited. The decisions of this Court are also to the effect that while in establishing actionable negligence on the part of the manufacturer, bottler, or packer, the plaintiff is not entitled to call to his aid the doctrine of *res ipsa loquitur*, he is nevertheless not required to produce direct proof thereof, but may introduce evidence of other relevant facts from which actionable negligence on the part of the defendant may be inferred. Similar instances are allowed to be shown as evidence of a probable like occurrence at the time of the plaintiff's injury, when accompanied by proof of substantially similar circumstances and reasonable proximity in time. *Broadway v. Grimes*, 204 N. C., 623; *Enloe v. Bottling Co.*, 208 N. C., 305, and cases there cited." *Blackwell v. Bottling Co.*, 211 N. C., 729.

The evidence in the present action was sufficient to be submitted to the jury. There was "proof of substantially similar circumstances and reasonable proximity of time."

In the judgment of the court below, we find

No error.

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

S. P. TEAGUE ET AL. v. ATLANTIC COMPANY.

(Filed 4 May, 1938.)

1. Master and Servant § 40c—Evidence held to support finding that accident causing death did not arise out of the employment.

Evidence that a stairway was provided for the use of employees, that employees were forbidden to use an empty crate conveyor in going to and from the basement to the first floor, and that an employee, notwithstanding repeated warnings, used the crate conveyor in spite of its obvious danger, resulting in his fatal injury, *is held* to support the finding of the Industrial Commission that the accident causing death did not arise out of the employment.

2. Master and Servant § 55d—

Findings of fact of the Industrial Commission are conclusive on appeal when they are supported by competent evidence.

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

APPEAL from *Armstrong, J.*, at Regular Civil Term, March, 1938, of MECKLENBURG. Affirmed.

The findings of fact by the full N. C. Industrial Commission were:

"(1) The parties to this cause are bound by the provisions of the Workmen's Compensation Act. The deceased employee had never rejected the provisions of the law as far as the record is concerned. The employer has not rejected the provisions of the law, but, on the contrary, has qualified as a self-insurer under the provisions of the law.

"(2) Sarse Eugene Teague, the deceased employee, left wholly dependent upon him for support his father and mother, S. P. and Lizzie Teague.

"(3) The deceased, Sarse Eugene Teague, died as the result of an injury by accident four days after the happening of the said injury by accident.

"(4) The employee Teague's attempt to ride the empty crate conveyor from the basement to the first floor was obviously dangerous.

"(5) The employee Teague's attempt to ride the empty crate conveyor from the basement to the first floor was an attempt either for his own personal convenience or for the thrill of performing a hazardous feat; to do an obviously dangerous thing.

"(6) The empty crate conveyor was obviously designed, intended, and suitable for use only as a means of conveying empty crates from the basement to the first floor, and obviously was not designed, intended or suitable for use to convey a human being from the basement to the first floor.

"(7) On a few occasions when the deceased had ridden the empty crate conveyor in the presence of his foreman or other bossman, he had been warned of the dangers, reprimanded for his action and positively forbidden to do it again.

"(8) The defendant provided, and the employees, including the deceased, ordinarily used, conveniently located stairs as a means of going back and forth between the basement and the first floor of the bottling department.

"(9) The deceased, Teague, and other employees had ridden this empty crate conveyor upon occasions. Such occasions were infrequent and more or less secret, however; that is, when the foreman or bossman were not present.

"(10) No duty of Teague's, the deceased, required him to ride this empty crate conveyor or contemplated that he should ride this empty crate conveyor.

"(11) The average weekly wage of the deceased amounted to $24.75.

"(12) The accident occurred on the premises of the employer during the working time of the deceased, that is, the accident occurred in the course of the employment. It did not, however, arise out of the employment."

The plaintiffs made numerous exceptions and assignments of error and appealed to the Supreme Court.

J. L. Hamme for plaintiffs.
Stewart & Bobbitt for defendant.

PER CURIAM. We think the judgment of the court below correct.

The Full commission cited numerous authorities to sustain its award, and in the final conclusions of law stated: "Under the facts of this case we do not believe that Teague's injury arose out of his employment. In other words, we do not find a causal connection between the conditions under which his work was required to be done and the resulting injury. His injury did not follow as a natural incident of the work. We conclude that there was no causal connection between the conditions under which the work was required to be performed and the resulting injury. Our law requires that an injury must occur both 'in the course of the employment' and 'arise out of the employment.' Neither one alone is sufficient. Under the facts, the decisions, and sound reasoning, Teague's injury certainly did not, in our opinion, arise out of his employment. It appears that the unfortunate young man lost his life by stepping aside from the sphere of his employment and voluntarily and in violation of his employer's orders, for his own convenience or for the thrill of attempting a hazardous feat, attempted to ride on machinery installed and used for another purpose and obviously dangerous for the use he attempted to make of it rather than take the usual course of going from the basement to the first floor by way of the stairs provided and used for that purpose. Compensation cannot be awarded the dependents of the deceased for the above reasons. Compensation is therefore denied. Let an award issue accordingly."

The court below gave judgment as follows: "It is now ordered, adjudged and decreed: (1) That the award made by the North Carolina Industrial Commission, dated 9 February, 1938, this cause being designated before the said Commission by Docket No. 6941, be and is in all respects approved and affirmed. (2) That the findings of fact and conclusions of law set forth in the opinion of the North Carolina Industrial Commission, filed 4 February, 1938, be and are approved and affirmed. That the plaintiffs' claim for compensation be and is denied."

There was plenary competent evidence to sustain the findings of fact made by the Full Commission, which are controlling with us. We think the conclusions of law on the facts found are correct.

The judgment of the court below is

Affirmed.

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

STATE v. ERNEST FOWLER.

(Filed 4 May, 1938.)

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 brief, the motion of the Attorney-General to dismiss the appeal will be allowed, Rule of Practice in the Supreme Court No. 28, but in capital cases this will be done only after an inspection of the record fails to disclose error.

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

APPEAL by defendant from *Sinclair, J.*, at 21 September Mixed Term, 1937, of WAKE.

Motion by State to dismiss appeal of defendant.

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

No counsel contra.

PER CURIAM. The defendant was tried upon a bill of indictment charging him with the crime of rape of a female person under the age of twelve years. There was a verdict of guilty, and judgment of death by asphyxiation. Defendant gave notice of appeal to the Supreme Court, and was permitted to appeal *in forma pauperis*. The court below ordered the county of Wake to pay the necessary costs of obtaining transcript of the proceedings and of preparing the requisite copies of the record and briefs on such appeal. 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; *S. v. Robinson*, 212 N. C., 536, 193 S. E., 701; *S. v. Hadley, ante*, 427, 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 Rule 28 of this Court as to filing briefs. This motion is allowed. *S. v. Kinyon*, 210 N. C., 294, 186 S. E., 368; *S. v. Robinson, supra; S. v. Hadley, supra.*

However, as is customary in capital cases, we have examined the record and case on appeal to see if any error appears. The exceptions

presented are without merit. The record is regular. The case on appeal reveals competent evidence sufficient to sustain the verdict. The charge of the court is not sent up, but the agreed case on appeal discloses that "there are no exceptions to the charge."

We find no error. The judgment is affirmed, and

Appeal dismissed.

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

MISS MAUDE TRIBBLE v. H. P. SWINSON, TRADING AND DOING BUSINESS AS SWINSON FOOD PRODUCTS COMPANY, AND NEAL VITA.

(Filed 4 May, 1938.)

Automobiles § 24c—

Evidence tending only to show that the driver of the truck involved in the accident was employed by defendant and that at the time the truck was loaded with merchandise belonging to defendant fails to make out a case against defendant under the doctrine of *respondeat superior*.

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

APPEAL by plaintiff from *Olive, J.*, at Extra January Term, 1938, of MECKLENBURG.

Civil action to recover damage for injury by alleged actionable negligence.

On 20 August, 1933, plaintiff was injured in a collision at a street intersection in the city of Charlotte, between an automobile owned and operated by Mrs. H. C. Edwards, in which plaintiff was riding, and an automobile operated by the defendant Neal Vita. Plaintiff alleges and offered evidence tending to show that her injury was proximately caused by the negligence of the defendant Vita. She further alleges in substance that at the time of the collision Vita was operating an automobile owned by the defendant Swinson; that Vita was the agent and employee of Swinson; and that he was acting in the scope of his employment, and in furtherance of the business of the defendant Swinson. Defendants denied these allegations. The only evidence offered by plaintiff bearing on the issue thus raised is the testimony of Mrs. Edwards, who said in part: "I did see Mr. Swinson there after Vita went to the Coca-Cola Company and called him. Mr. Swinson did talk to me. . . . He came to me and asked me the particulars concerning the wreck—whose

fault it was, where we hit and all about it. . . . He said, 'My boy is a very good driver.' . . . He said his name was Swinson. He did not say very much concerning the car—only that his products were in the car. I saw what was in the car—sandwiches, all kinds of cakes and the entire back seat was full and part of the front seat. He inquired about it all and was the sole concern of the whole thing. He . . . stated that his boy was a very careful driver, or something to that effect. He said 'his boy' and spoke of it in such terms that I thought it was his boy. He said that his boy was a very careful driver and had never had any wrecks since working for him."

At the close of plaintiff's evidence, motion of defendant Swinson for judgment as of nonsuit was allowed, and plaintiff excepted. Thereupon plaintiff took a voluntary nonsuit as to the defendant Vita. From judgment as of nonsuit as to defendant Swinson plaintiff appealed to the Supreme Court, and assigned error.

Guthrie, Pierce & Blakeney for plaintiff, appellant.
Carswell & Ervin for defendant, appellee.

PER CURIAM. The evidence for plaintiff fails to make out a *prima facie* case on the essential facts necessary under the doctrine of *respondeat superior* to hold the defendant Swinson responsible for the alleged negligent acts or tort of the defendant Vita. These essentials have been stated repeatedly in decisions of this Court, among which are: *Linville v. Nissen,* 162 N. C., 95, 77 S. E., 1096; *Grier v. Grier,* 192 N. C., 760, 135 S. E., 852; *Martin v. Bus Line,* 197 N. C., 720, 150 S. E., 501; *Jeffrey v. Mfg. Co.,* 197 N. C., 724, 150 S. E., 503; *Cole v. Funeral Home,* 207 N. C., 271, 176 S. E., 553; *Van Landingham v. Sewing Machine Co.,* 207 N. C., 355, 177 S. E., 126; *Shoemake v. Refining Co.,* 208 N. C., 124, 179 S. E., 334; *Parrish v. Mfg. Co.,* 211 N. C., 7, 188 S. E., 817; *Liverman v. Cline,* 212 N. C., 43, 192 S. E., 902.

The decision in the *Van Landingham case, supra,* is particularly pertinent to the present case.

Judgment of the court below is

Affirmed.

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

D. T. VANCE v. BENJAMIN PRITCHARD AND JOHN PRITCHARD.

(Filed 25 May, 1938.)

1. Estates § 1—Title to surface and to minerals under the surface may be severed.

Title to the surface of the earth and the minerals under the surface may be severed, and the minerals being a part of the realty, title thereto is governed by the ordinary rules governing title to real property, and when severed the title to the surface and to the minerals constitute two separate estates and the presumption that possession of the surface is possession of the subsoil containing the minerals does not exist.

2. Adverse Possession § 3—When mineral rights have been severed, owner of surface can acquire no title to minerals by exclusive possession of the surface.

When title to the mineral rights has been severed from title to the surface of the earth, the owner of the surface can acquire no title to the minerals by exclusive and continuous possession of the surface, and the owner of the minerals does not lose his title or possession by any length of nonuser, and may be disseized only by the actual taking of the minerals out of his possession.

3. Ejectment § 9—

Plaintiff in ejectment may establish title by connecting defendant with a common source of title and showing a better title from that source, and need not prove the title of the common grantor, since neither party may deny the title of their common grantor.

4. Same—

The rule that when plaintiff in ejectment establishes a common source of title, defendant may not deny the title of the common grantor, since he claims under it, does not apply to an estate reserved by the common grantor and thereby severed from the granted interest in the land.

5. Same—When defendants' deed from common grantor reserves the mineral rights, defendants are not estopped to deny grantor's title to minerals.

Plaintiff established record title to the mineral rights in question from a former owner, and for the purpose of establishing a common source of title, established defendants' chain of title from the same owner, but in defendants' chain of title the deed from the common grantor "excepted and reserved" the mineral rights, but such reservation was left out of *mesne* conveyances, and the deeds to defendants purported to convey the fee in the *locus in quo*. *Held:* The rule that defendant may not deny the title of the common grantor applies only to the quality and quantity of the estate conveyed, and since the deed from the common grantor in defendants' chain of title reserved the mineral rights, defendants are not estopped to deny the common grantor's title thereto.

6. Deeds § 15—Definition of "exception" and "reservation" as used in deeds.

An "exception" as used in deeds means some part of the estate not granted at all or withdrawn from the effect of the grant, while a "reservation" means something issuing or arising out of the thing granted, but the courts will not give strict technical interpretation of the words, but will look to the character and effect of the provisions and effect the obvious intention of the parties.

7. Ejectment § 9—When plaintiff fails to show common source of title as to particular estate in dispute, burden remains on him to prove title.

This action in ejectment involved title to mineral rights in the *locus in quo*. Plaintiff established record title thereto from a former owner, and in order to establish a common source of title, introduced in evidence defendants' chain of title from the same owner. The deed from the common grantor in defendants' chain of title expressly reserved and excepted the mineral rights, but such reservation was left out of *mesne* conveyances and the deeds to defendants purported to convey the fee, and defendants claimed the mineral rights by adverse possession for the required period both under color and without color. *Held:* Since plaintiff failed to show a common source of title as to the mineral estate in controversy, defendants are not estopped to deny the title to the minerals in the common grantor, and the burden on the issue remains on plaintiff, since he must rely for recovery on the strength of his own title, and an instruction that the burden was on defendants to prove by the greater weight of the evidence the adverse possession relied on by them, and that if defendants had failed to so satisfy the jury, the issue must be answered in favor of plaintiff, is error.

8. Appeal and Error § 41—

When a new trial is awarded on one exception, other exceptions need not be considered.

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

CLARKSON, J., dissenting.

APPEAL by defendants from *Clement, J.*, at October Term, 1937, of AVERY. New trial.

This was an action to establish plaintiff's title to the mineral and mining rights in three tracts of land, containing respectively 16⅝ acres, 25 acres, and 26½ acres.

Defendants denied plaintiff's title to the mineral interests in said land, and further alleged title in themselves by reason of 20 years adverse possession of said mineral interests, or seven years adverse possession under color of title.

Plaintiff offered evidence tending to show: (1) Conveyance, in 1912, by Toe River Land & Mining Company to Robert (Bob) Buchanan for 2,180 acres of land (including the *locus in quo*), "excepting and reserving a three-fourths undivided interest in and to the minerals on said land"; (2) deed, dated in 1917, from Bob Buchanan to D. T. Vance, the plaintiff, for said grantor's entire mineral interests in the described 2,180

acres of land; and (3) deed from the sheriff of Avery County under execution against Toe River Land & Mining Company, purporting to convey to plaintiff a three-fourths interest in all minerals in or on the described 2,180 acres of land.

For the purpose of connecting the defendants with the same source of title, the plaintiff offered in evidence the following deeds: (a) From Bob Buchanan to Jeremiah Pritchard, in 1912, for 145 acres (a part of the 2,180 acres and including the *locus in quo*), "reserving and excepting all mines and minerals, with right of ingress and egress. (b) From Jeremiah Pritchard to Walter Hughes, in 1917, for the same 145 acres of land, "reserving all mines and minerals, with right of ingress and egress." (c) From Bob Buchanan, in 1912, to John Pritchard for 26½ acres (included in 2,180-acre tract), "reserving and excepting all mines and minerals, with right of ingress and egress." (d) From Walter Hughes, in 1918, to John S. Pritchard for 16⅝ acres (included in the 145-acre tract) in fee simple, without reservation of minerals or mineral rights. (e) From Walter Hughes, in 1918, to Benjamin Pritchard for 25 acres (included in the 145-acre tract) in fee simple and without reservation of minerals or mineral rights. (f) From John Pritchard, in 1926, to Benjamin Pritchard for the 26½-acre tract, without reservation.

Defendants offered evidence tending to show adverse and continuous use and possession of the mineral interests in and on said lands for more than seven years, and for more than twenty years.

Among other things the court charged the jury as follows:

"The paper title that he (plaintiff) has offered in evidence here, nothing else appearing, would entitle the plaintiff to be declared the owner and entitled to the possession of the mining and mineral interests in this property. . . . The court instructs you that he has offered a chain of title here that would warrant you in answering that issue yes, unless you find that the defendants have acquired title to this property by adverse possession.

"Now, the thing for you to decide and the thing that you must find out from this evidence, is whether these defendants have held adversely under those deeds which are color of title.

"The burden is on the defendants to satisfy you by the greater weight of the evidence that they have acquired title to that land either under color of title for seven years or that they have held it adversely for a period of twenty years. . . . If they have failed to satisfy you by the greater weight of the evidence that they have held that land adversely for a period of twenty years without color of title and they have failed to satisfy you by the greater weight of the evidence that they have held it adversely under color of title for a period of seven years, then it would be your duty to answer that first issue yes."

Upon the issues submitted, the verdict of the jury was as follows:

"1. Is the plaintiff the owner and entitled to the immediate possession of the mineral and mining rights in the property alleged in the complaint? Answer: 'Yes.'

"2. What damage, if any, is the plaintiff entitled to recover? Answer: 'None.'"

From judgment on the verdict defendants appealed, assigning errors in the admission of testimony and in the charge of the court to the jury.

McBee & McBee, J. V. Bowers, John R. Jones, and J. M. Brown for plaintiff.

Burke & Burke, Geo. M. Pritchard, and M. A. James for defendants.

DEVIN, J. The title of the defendants to the surface rights in the land described in the pleadings is not controverted, but the plaintiff seeks to establish his right to the mineral and mining interests in said lands by virtue of deeds and reservations segregating the title to the minerals and mineral rights therein.

The defendants denied plaintiff's title to the mineral interests, and furthermore alleged that they had acquired title to said mineral interests by adverse possession, either under or without color of title, for the statutory periods.

The law as to the relative rights of parties, where mineral and surface rights in land have been severed, was succintly stated by this Court in *Hoilman v. Johnson,* 164 N. C., 268, 80 S. E., 249. It was there said: "It is well settled that the surface of the earth and the minerals under the surface may be severed by a deed, or reservation in a deed, and when so severed, they constitute two distinct estates. *Outlaw v. Gray,* 163 N. C., 325. The mineral interests being a part of the realty, the estate in them is subject to the ordinary rules of law governing the title to real property. The presumption that the party having possession of the surface has the possession of the subsoil containing the minerals does not exist when these rights are severed. *Armstrong v. Caldwell,* 53 Pa. St., 284. The owner of the surface can acquire no title to the minerals by exclusive and continuous possession of the surface, nor does the owner of the minerals lose his right or his possession by any length of nonuser. He must be disseized to lose his right, and there can be no disseizin by any act which does not actually take the minerals out of his possession."

It is well settled that one of the methods by which title to real property may be established is by connecting the defendant with a common source of title and showing a better title from that source. *Mobley v. Griffin,* 104 N. C., 112, 10 S. E., 142; *Prevatt v. Harrelson,* 132 N. C., 250, 43 S. E., 800; *Biggs v. Oxendine,* 207 N. C., 601, 178 S. E., 216.

This is the method which the plaintiff has pursued in the instant case. He offered conveyances purporting to show the derivation of his title to the described mineral interests, in 1912, from the Toe River Land & Mining Company and its grantee, Bob Buchanan, as a common source of title, and offered other deeds to show that from the same source defendants derived their title to the land. However, it will be noted that defendants do not claim the mineral interests in the land under the deed from the Toe River Land & Mining Company, or from Bob Buchanan, nor are they connected in title therewith as to the mineral rights. The mineral interests were expressly excepted by those grantors from the conveyances which they made to those under whom the defendants claim and own the surface rights. It was not until Walter Hughes made his deed, in 1918, to the defendants, and in 1926, when John Pritchard conveyed to Benjamin Pritchard, that the conveyances were made without reservation of minerals and mineral rights, and it was thus attempted to pass title to the entire interest in the land.

Even if plaintiff could connect defendants' chain of title to the mineral interests with the Toe River Land & Mining Company as a common source with his own, the principle stated in *Mobley v. Griffin, supra,* would not apply because of the distinction between a conveyance, in the one instance, and a reservation in the other, of severed interests in the land. Ordinarily the acceptance of a conveyance of land operates as a recognition of the title of the grantor, and where two claim under the same grantor, it is not competent for either to deny the grantor's title; and hence the rule that one who can show a title from the common source superior to that of his adversary, nothing else appearing, makes out a legal title and he need proceed no further to prove the title of the common grantor. But this rule has been held not to apply to the title to an estate or property reserved which is thereby severed from the granted interest in the land.

In *Fisher v. Mining Co.,* 94 N. C., 397, the plaintiffs claimed the minerals and mines as heirs of Chas. Fisher, and offered deeds showing that the defendant derived its title under a deed from Chas. Fisher wherein the minerals were excepted. The plaintiffs in that case contended that the acceptance of the deed by the grantee operated to prevent the defendant from denying the title of the grantor not only to the land conveyed but equally to the property reserved. This Court there said: "If the parties claimed the whole land, extended upward and downward, and all contained within its boundaries, or the same estate in the land, the estoppel would be operative, and the party having the superior title from the common source, would prevail. But such is not the case here. The conveyed and reserved parts are not one and the same thing. The grantor may have had himself, only an estate in the land to transfer, while the reserved minerals may have belonged to another. Precisely

such were the relations of the succeeding owners, each being capable of passing an estate in the land, and not in the mineral deposits below the surface. The estoppel is necessarily confined to the subject matter of the conveyance to which conflicting claims are asserted. There is no repugnancy or antagonism in them, and it is entirely consistent, that one party should have title to the mines, and the other to the lands outside of the mines. Hence, the titles are traced to a common, but not the same source. This view is in accord with adjudged cases."

On rehearing in the same case (*Fisher v. Mining Co.*, 97 N. C., 95) the holding in the former opinion was affirmed, and the Court further said: "It does not appear that either the plaintiffs or their ancestor, Charles Fisher, ever had title to the reserved minerals, which may have belonged to another, and as was said 'the estoppel is necessarily confined to the subject matter of the conveyance, to which conflicting claims are asserted'—in this case, to the land, and not the minerals."

"These cases rest upon the proposition that an estoppel arising out of the acceptance of a deed is restricted to the estate as well as to the *corpus* which it undertakes to transfer." *Fisher v. Mining Co.*, 94 N. C., 397 (401); *Hill v. Hill,* 176 N. C., 194, 96 S. E., 958; *Drake v. Howell,* 133 N. C., 162, 45 S. E., 539.

The deed from the Toe River Land & Mining Company with reference to the mineral rights used the words "excepting and reserving." While there is a distinction between "exception" and "reservation" as used in deeds, the former term meaning some part of the estate not granted at all, or withdrawn from the effect of the grant, and the latter something issuing or arising out of the thing granted, the terms are often used indiscriminately and frequently what purports to be a reservation has the force and effect of an exception when such appears to be the obvious intention of the parties. *Trust Co. v. Wyatt,* 189 N. C., 107, 126 S. E., 93; *Bond v. R. R.,* 127 N. C., 125, 37 S. E., 63; *Snoddy v. Bolen* (Mo.), 24 L. R. A., 507; *Pritchard v. Lewis* (Wis.), 1 L. R. A. (N. S.), 565.

The modern tendency of the courts has been to brush aside these fine distinctions and look to the character and effect of the provision itself. *Moore v. Griffin,* 72 Kan., 164; *Bodcaw Lumber Co. v. Goode* (Ark.), 29 A. L. R., 578, and note; 40 C. J., 971; 18 C. J., 341.

"Where the words 'reservation' and 'exception' are used together, without evincing any definite knowledge of their technical meaning, the intention of the parties must be ascertained from the instrument interpreted in the light of the surrounding circumstances." 18 C. J., 341.

But whether the words used in the deed from the Toe River Land & Mining Company to Buchanan be construed as an exception, or a reservation, or both, the plaintiff's evidence does not connect the defendants' claim of title to the mineral rights, which were "excepted and reserved" in that deed, with a common source, so as to estop defendants from

denying the title of the Land & Mining Company to those mineral rights upon which plaintiff's title depends and from which it is derived. The defendants claim title to the surface of the land under the Toe River Land & Mining Company's deed, but claim title to the mineral rights by adverse possession under color of the Hughes and Pritchard deeds for seven years, or without such color of title for twenty years.

Applying these principles of law, we conclude that the charge of the court below to the effect that the burden was upon the defendants to satisfy the jury by the greater weight of the evidence that they had acquired title by adverse possession, either under or without color of title, for the statutory periods, and that if defendants had failed to so satisfy the jury, they should answer the first issue "Yes," must be held for error and the defendants' exception thereto sustained, since the instruction given proceeds upon the improper assumption that the plaintiff under the evidence offered had shown a clear legal title to the mineral rights alleged.

The evidence here did not warrant the application of the principle set forth in *Power Co. v. Taylor,* 194 N. C., 231, 139 S. E., 381, and cases there cited, where instructions to the jury similar in effect to those in the instant case were held to be proper. In that case the plaintiff had shown a grant from the State and a connected chain of conveyances to itself, constituting a legal title, and defendant alleged and sought only to prove title in himself by adverse possession. There is an obvious distinction between the facts in that case and in the case at bar. Here the evidence may not be held sufficient to change the general rule that the burden of the issue is on the plaintiff, and that he must rely for recovery on the strength of his own title.

As the error pointed out is material and sufficient to require a new trial, we deem it unnecessary to discuss the other exceptions noted in the trial and brought forward in defendants' assignments of error.

New trial.

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

CLARKSON, J., dissenting: Conceding that defendant owns the surface right in the land, where plaintiff traces to the same source the record titles of both plaintiff and defendant to the mineral interests in the land, and also establishes the chronological and record priority of his record title, is the burden thereby cast upon the defendant to satisfy the jury that he has acquired title by adverse possession? The majority answers "No." With this view I cannot agree.

What are the facts which plaintiff's evidence tended to establish? (1) The Toe River Land & Mining Company, owner of the fee simple, conveyed to Bob Buchanan the surface and a one-fourth undivided

interest in the mineral rights. (2) Plaintiff Vance bought from Buchanan his one-fourth undivided interest in the minerals, and at an execution sale secured the remaining three-fourths undivided mineral interests from the Toe River Land & Mining Company. Having rested his claim upon the original title of the Toe River Land & Mining Company, in part through a conveyance of Buchanan, plaintiff offered evidence tending to establish the following transactions, all later in time than the original conveyance of the Toe River Land & Mining Company to Buchanan: (A) Buchanan sold one tract to Jeremiah Pritchard, and another to John Pritchard, and Jeremiah Pritchard in turn sold to Walter Hughes; all of these deeds reserved the mineral interests. (B) Hughes sold to John S. Pritchard and Benjamin Pritchard, but, by failing to reserve the mineral interests, undertook to convey a fee simple title. (C) John Pritchard also sold to Benjamin Pritchard, and likewise failed to reserve the mineral interests. Thus, both Hughes and John Pritchard undertook to convey mineral interests which they did not possess. The record titles of the two defendants to the three tracts rest, by intervening conveyances, upon the assumption that Hughes possessed a fee simple title to these lands. However, this assumption fails; plaintiff's evidence tended to establish that Hughes had no title to the mineral interests which he purported to convey. By two unbroken chains the record titles of both plaintiff and defendant are derived from the Toe River Land & Mining Company. The apparent fact that Hughes, one of the intervening owners of the surface in defendants' chain, wrongfully attempted to convey mineral interests which he did not possess did not thereby break the chain of the record title. It did, however, destroy the possibility of defendants' proving a clear record title to the mining interests, as it then became apparent that Hughes had never received the mineral interests which had much earlier been severed and conveyed to plaintiff's predecessors in title. *Hoilman v. Johnson,* 164 N. C., 268.

Here, on this record, both record titles descend from the Toe River Land & Mining Company. This is not denied. That company by conveyance severed the mineral from the surface rights, thus creating two chains of title. This is not denied. One of these chains—the mineral title—is plaintiff's; the other chain—the surface title (which recently became color of title also as to the mineral interests)—is defendants'. This is admitted. Defendants can only show color of title to the mineral interests by attaching such a claim to the chain which shows their title to the surface. This is not contested. Thus, not alone did the evidence of plaintiff show this dominant title under the "common source" rule, but defendants' claim of adverse possession under color of title likewise bind defendants to the same chain of title which plaintiff showed was insufficient.

In the words of *Ashe, J.* (*Christenburg v. King,* 85 N. C., 230), quoted with approval by *Hoke, J.,* in *McCoy v. Lumber Co.,* 149 N. C., 1 (4), the rule of this jurisdiction is: " 'It is well settled as an inflexible rule, that where both parties claim under the same person, neither of them can deny his right, and then, as between them, the elder is the better title and must prevail. To this rule there is an exception, when the defendant can show a better title outstanding, and has acquired it.' "

Plaintiff relying upon this rule both his own and defendants' record titles to the common source—the Toe River Land & Mining Company—and in so doing established his as the elder title and therefore entitled to prevail. The majority opinion states that this rule does not apply where the fee simple has been severed and two or more competent estates has resulted because there is no estoppel operative in such cases. The error in this position is that the "common source" rule in North Carolina is not dependent upon estoppel. "It must be borne in mind that the general rule applicable to cases like this, is not strictly an estoppel, but a rule of justice and convenience adopted by the courts to relieve the plaintiff in ejectment from the necessity of going back behind the common source, from which he and defendant derive title, and deducing his title by a chain of *mesne* conveyances from the State. *Frey v. Ramsour,* 66 N. C., 466." *Christenburg v. King,* 85 N. C., 230 (234).

In *McCoy v. Lumber Co., supra,* p. 3, it is said: "This is not in strictness an application of the doctrine of estoppel, but is a rule established for the convenience of parties in actions of this character, relieving them of the necessity of going back further than the common source when it is apparent that both parties are acting in recognition of this common source as the true title."

To the same effect, see *Howell v. Shaw,* 183 N. C., 460, 462. Further, "It is not a case strictly of estoppel, but a well settled rule of evidence, founded on justice and convenience. . . . It is the possession of the defendant, under his claim of right or title from the common source, whether by deed or lease, or what is the legal equivalent of a lease, a contract of purchase, that determines the application of the rule as shown by the cases last cited. This does not deprive the defendant of the right to show that he has a better title, even as between the parties claiming only from a common source, or that he has, in some other way, acquired the superior title. *The authorities merely declare that a plaintiff's case is made out when all that appears is that he and the defendant claim under the same common grantor, and the question is one of the state of proof only.*" (Italics mine.) *Bowen v. Perkins,* 154 N. C., 449, 452. Clearly, under our cases, this case is properly not determinable upon reasoning based upon the doctrine of estoppel, but rather upon the effect of a rule of convenience long accepted as a valid means of proving title.

Fisher v. Mining Co., 94 N. C., 397, relied upon by the majority, is not inconsistent with the view here expressed. The question there involved was not the "common source" rule. There the opposing chain of title was offered, not to show "common source," but specifically "to estop the defendant." See p. 398.

In the present case there was no plea of estoppel. Here defendant relied upon two deeds to show *color of title;* the moment these deeds were placed in evidence the defendants' claim attached to a chain running straight back to the original common grantor. In the *Fisher case, supra,* estoppel was pleaded and the court held that tracing title to the same source but not to a common source was insufficient to show estoppel. Not so here. In the present case there is no plea of estoppel; plaintiff merely relies upon an established rule of evidence and practice and the title so proved has been challenged as insufficient. In my opinion there is no place in this case for a discussion of the estoppel doctrine. This case should turn upon the "common source" rule and, in my opinion, plaintiff has fully complied with the requirements of this rule.

Having disposed of the theory of estoppel, it becomes equally clear that the mere fact that defendants' record claim to the minerals cannot be traced further back than Hughes is of no importance. What is important, and determinative of this case, is that defendants claim under Hughes, who in turn claims by *mesne* conveyances under plaintiff's ulterior grantor. Defendants claim under color of title. Color of title exists only by virtue of a deed or deeds. The deed under which defendants claim title is the last link in a record chain of title going back to plaintiff's grantor. In the words of *Montgomery, J.*, in *Ryan v. Martin*, 91 N. C., 464, 469: "If the defendant has the same source of title as the plaintiff, and no other, wherefore need the plaintiff go beyond that as to the defendant? Such an inquiry would be idle. It is plain that no injustice in such case could be done the defendant; and if the rule were otherwise, it might and would in many cases put the plaintiff to great inconvenience and much needless expense. . . . It is not necessary to show that the defendant has a complete title to the land; if there is no title paramount to it, it is sufficient to show that under a valid contract he claims to hold and has possession of the property under the common source. If the defendant has a bond for title, or other contract of purchase, or an unregistered deed for the land, and is in possession thereof, this will be sufficient evidence of a claim under the common source. *It will be presumed that he claims under such contract. The purpose is to show that he claims the property under the common source —that he admits his relation to it and claims under it, without regard to the sufficiency or perfectness of the title.*" (Italics mine.)

Plaintiff in relying upon this rule followed precisely the practice already approved by this Court. In *Warren v. Williford*, 148 N. C.,

474 (477), *Connor, J.*, wrote: "This rule of practice has been recognized and followed in this State too long to require discussion. The plaintiff, therefore, having shown a chain of title from R. G. Williford for the purpose of relieving himself of the necessity of showing title out of the State, introduced the deed from the sheriff to defendant, showing that he also claimed under Williford. This is a common and well settled practice in the trial of actions of ejectment in this State." There (as here) plaintiff showed the superior title of record in himself. There (as the Court should here) the procedure of plaintiff was approved. As was said by *Battle, J.*, in *Johnson v. Watts*, 46 N. C., 228 (231), once the common source of title has been shown by plaintiff, "The defendant, in a case like the present, can defend himself only by showing that he has a better title in himself than that of plaintiff's lessor, derived, either from the person from whom they both claim, or from some other person who had such better title." When plaintiff had offered evidence establishing the common source of title, he made out a *prima facie* title to the mineral interests. The burden of going forward then shifted to defendants. The burden of showing adverse possession rested upon the defendants. In the words of *Chief Justice Stacy*, "But, when the plaintiff has established a legal title to the premises, and the defendant undertakes to defeat a recovery by showing possession, adverse for the requisite period of time, either under or without color of title, the defense is an affirmative one in which the defendant *pro hac vice* becomes plaintiff, and he is required to establish it by the greater weight of the evidence." *Power Co. v. Taylor*, 194 N. C., 231 (233-4), and cases cited. The charge as to the burden of proof is in strict accord with that case. The defendants, in fact, recognized this burden and attempted to prove adverse possession, but, having failed to do so, the jury found against them. "The owner of the surface can acquire no title to the minerals by exclusion and continuous possession of the surface, nor does the owner of the minerals lose his right or his possession by any length of nonuser. He must be disseized to lose his right, and there can be no disseizin by any act which does not actually take the minerals out of his possession." *Hoilman v. Johnson*, 164 N. C., 268 (269). The facts as to the adverse possession were in doubt and, in my opinion, the trial judge properly left this question for the jury. His charge as to the burden of proof was challenged on this appeal. I think his charge in this respect was a correct exposition of the settled law in this jurisdiction.

STATE OF NORTH CAROLINA, ON RELATION OF DAN C. BONEY, INSURANCE COMMISSIONER, v. CENTRAL MUTUAL INSURANCE COMPANY OF CHICAGO.

(Filed 25 May, 1938.)

1. Insurance § 9: Brokers § 6—Broker collecting premium upon representation that insurance had been obtained is estopped to deny coverage.

An insurance broker undertook to obtain liability insurance coverage for its client, represented that the insurance coverage had been obtained and demanded payment of premium, and the client, in reliance on the representation, made no further negotiation with respect to insurance coverage, and paid the premium, which the broker forwarded to the insurer. *Held:* By its conduct and representations, the broker is estopped from denying that its client was protected by the insurance ordered.

2. Subrogation § 1—While volunteer is not entitled to subrogation, the term "volunteer" will be strictly construed.

The doctrine of subrogation is not available to a mere volunteer, but the term "volunteer" being a limitation upon the equitable remedy, should be narrowly and strictly interpreted, and payment by one under compulsion, or under a moral obligation, or under a *bona fide* belief that he is legally liable, is not a voluntary payment.

3. Same: Insurance § 51—Insurance broker paying claims under liability policy in good faith held entitled to subrogation.

An insurance broker represented to its client that it had obtained the liability coverage ordered, and the client, in reliance upon the representation, paid the premium demanded, which the broker forwarded to the purported insurer. Controversy arose between the broker and insurer as to the amount of the premium. Thereafter, the client called upon the broker to defend suits growing out of accidents within the insurance coverage ordered, and upon demand by the broker, the insurer refused to defend same upon the ground that the policy was not its contract. Thereupon the broker defended the actions, and procured settlements, and took an assignment from its client against insurer. The broker paid for the settlements in good faith upon a *bona fide* belief that it was liable to its client if it did not defend and satisfy the suits. *Held:* The findings are sufficient to bring the broker under the protection of the doctrine of equitable subrogation, and the contention that it was a mere volunteer is untenable.

4. Insurance § 51: Assignments § 1—Broker held entitled to maintain action against insurer upon assignment by insured.

An insurance broker represented to its client that it had obtained the liability insurance coverage ordered, and in reliance thereon the client paid the premium demanded, which the broker forwarded to the insurer. Upon the occurrence of accidents within the insurance coverage ordered, the client made demand on the broker to defend suits arising therefrom. Upon demand by the broker, the insurer refused to defend the suits on the ground that the policy was not its contract. Thereupon the broker, *bona fide* believing it was liable to its client if it failed to do so, defended

the suits upon the demand of its client, procured settlements, and obtained an assignment from its client against insurer. *Held:* Even if it be conceded that the broker was a mere volunteer, the broker may maintain an action for reimbursement against insurer on the assignment.

APPEAL by Home Insurance Agency, Inc., claimant, from *Sinclair, J.*, at February Term, 1938, of WAKE. Reversed.

This action was instituted by the State of North Carolina on the relation of Dan C. Boney, Insurance Commissioner, against the Central Mutual Insurance Company of Chicago, an insolvent corporation, for the purpose of liquidating the deposit made with the Insurance Commissioner by the defendant, as required by the statute for the privilege of doing business within the State.

Paul F. Smith was duly appointed receiver and the Home Insurance Agency, Inc., filed with him its claim. The receiver disallowed the claim and reported in connection therewith his reasons therefor as follows: "(1) No valid contract existed between the Central Mutual Insurance Company of Chicago and Thomas-Howard Company. (2) Adequate proof of the amounts of items composing said claim has not been submitted. The claimant is not entitled to share in the funds of this trust for the reasons that: (a) The liability of the insured was extinguished by payment; (b) claimant is a pure volunteer; (c) claimant is not subrogated to Thomas-Howard Company."

The claimant excepted and appealed to the Superior Court.

When the appeal came on to be heard below the claim was submitted upon a statement of facts agreed, from which it appears that:

The Thomas-Howard Company placed an order for automobile liability insurance with the Home Insurance Agency as insurance brokers. The agency placed the application with defendant Insurance Company and it issued its binder and policy. Thereupon the agency notified the Thomas-Howard Company that it was protected and rendered a statement of the premium due. The Thomas-Howard Company forwarded the premium to the agency and it in turn sent the premium to the defendant Insurance Company. By virtue of the policy defendant contracted to "investigate all accidents and defend all suits and actions brought against Thomas-Howard Company based upon any injury to person or damage to property as set out . . . to pay all such personal and property damages within the limits of the policy . . . and save harmless the insured from all costs, attorneys' fees and other expenses which should be incurred, growing out of any such accident or accidents." A dispute then arose between the agency and the defendant as to the correct premium which should have been paid and the policy was returned by the agent to the Insurance Company for correction of an alleged error in the premium. While this controversy was pending certain automobile accidents involving the Thomas-Howard Company

occurred, and the insured called on the Home Insurance Agency to assume the defense of these suits. The agency then notified the defendant Insurance Company to abide by the terms of its policy by defending the suits, but the defendant denied that it was insurer and refused. Accordingly, the agency, upon demand of the insured, and while "acting in good faith upon a *bona fide* belief that in view of its representation of coverage . . . it was liable to Thomas-Howard Company if it did not defend the suits," proceeded to defend the suits and to settle them. Thereupon the agency took from the insured an assignment in writing of its rights against defendant and proceeded to sue defendant. Pending this action a receiver for defendant Insurance Company was appointed. The agency then submitted to a judgment of voluntary nonsuit in its pending action and filed its claim with the receiver, who disallowed the claim for the reasons set out in his report.

The court below sustained the ruling of the receiver and disallowed the claim of the Home Insurance Agency and said claimant excepted and appealed.

Claude V. Jones for Home Insurance Agency, Inc., claimant, appellant.

A. L. Purrington, Jr., for the receiver of the Central Mutual Insurance Company of Chicago, appellee.

BARNHILL, J. While the Insurance Company denied liability and declined to investigate the claims against the insured, or to defend the actions instituted thereon, and the receiver disallowed the claim upon the contention that no valid contract existed between the Central Mutual Insurance Company of Chicago and Thomas-Howard Company, it is now agreed that there was a valid and subsisting binder and policy of insurance issued by the defendant Insurance Company. It is also agreed as to the amounts paid out by the agency in behalf of the insured in settlement of claims against it, which were covered by the Central Mutual policy. It then appears that two of the reasons assigned by the receiver for disallowing the claim no longer exist.

Only one other question remains for determination. Was claimant such a pure volunteer as to be deprived of the right of subrogation? If so, its payment of the claims against the insured extinguished the liability both as against the insured and the insurance company. If not, the claimant is entitled to reimbursement from the insurance company under the doctrine of subrogation and by reason of the assignment of the claims to it.

Under the agreed statement of facts ". . . when Central Mutual agreed to issue its policy as aforesaid and had bound the risk the Home Insurance Agency advised Thomas-Howard Company that it had secured

a policy in Central Mutual and further advised Thomas-Howard Company that it was fully covered in accordance with its order, and Thomas-Howard paid Home Insurance Agency the premium which Home Insurance Agency had advised was due and Home Insurance Agency forwarded premium to Central Mutual." Had the Home Insurance Agency merely informed Thomas-Howard that the defendant had issued a policy in its favor and nothing more, it could be argued that its duty as broker there ended. However, this is not the case. Claimant agency affirmatively assured Thomas-Howard Company that it was "fully covered in accordance with its order," and Thomas-Howard, relying upon this advice, paid the demanded premium for the protection it had ordered. "A broker who fails to perform his duties faithfully becomes liable to his principal for damages suffered as a consequence of his breach of duty. . . . Furthermore, the broker is liable for failure to procure or keep up insurance on the principal's property where he is under a duty to do so." 8 Am. Jur., "Brokers," sec. 98. In 18 A. L. R., at page 1214, the general rule applicable to brokers and agents is stated as follows: ". . . a broker or agent who, with a view to compensation for his services, undertakes to procure insurance on the property of another, and who fails to do so, will be held liable for any damage resulting therefrom." *Elam v. Realty Co.*, 182 N. C., 599, is there correctly cited as one of the cases supporting this rule. In the instant case the broker not only undertook to secure for Thomas-Howard a particular, specified insurance coverage, but Thomas-Howard Company relied upon this assurance, paid the named premium, and made no further negotiation with respect to insurance coverage.

By its own conduct and representations in the course of dealing as broker the Home Insurance Agency was estopped from denying that Thomas-Howard Company was protected by the insurance ordered. "Either the principal or the broker may be estopped by his representations or conduct from repudiating a given transaction between the parties." 9 C. J., "Brokers," sec. 43. As Thomas-Howard Company had not dealt with defendant company but had dealt solely with the Home Insurance Agency and looked to it exclusively for its protection, it naturally turned to that agency when the accident claims were filed. The defendant company then denied the existence of its contract and all liability thereunder. This left the insured without protection contemplated by the policy at a time when it was most needed, except for the intervention of the claimant on the demand of the insured. Even if it be conceded that there was no legal liability resting upon the Home Insurance Agency to intervene and investigate said claims and defend said suits, it was morally bound to do so by reason of its assurance of coverage and the failure of the company with which it had placed the policy to comply with its contract.

The claimant agency, therefore, upon discovering that the defendant did not intend to discharge its contract and realizing that Thomas-Howard had relied upon the agency's representation that defendant had contracted to protect the insured from loss, assumed the obligation of defendant Insurance Company. This was done upon the express demand and request of the insured. It is agreed "that the payments made by Home Insurance Agency in settlement of the suits were wise settlements and resulted in substantial savings; that in all probability verdicts would have been rendered in each case for very much larger amounts if the suits had not been defended and settled."

The claimant now seeks protection and reimbursement under the doctrine of subrogation. *Davison v. Gregory,* 132 N. C., 389; *Moring v. Privott,* 146 N. C., 558; *Bank v. Bank,* 158 N. C., 238. However, "the doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or property of his own." Sheldon, The Law of Subrogation, 2nd Ed., sec. 240. Accordingly, we must determine whether the agency comes within the protection of the doctrine. First, was the agency a volunteer; and, second, if it was a volunteer, has it by assignment brought itself within the protection of the doctrine?

A payment made under compulsion is not voluntary; payment made under a moral obligation, or in ignorance of the real state of facts, or under an erroneous impression of one's legal duty, is not a voluntary payment. 60 C. J., "Subrogation," sec. 27. "If he *bona fide* claims an interest he is not a mere volunteer, and may be subrogated, but he must show that he had or supposed he had some interest to be protected." Quoted with approval by *Walker, J.,* in *Publishing Co. v. Barber,* 165 N. C., 478, 485, from Sheldon, The Law of Subrogation. "He was not an intermeddler, if he acted in good faith, nor was it a mere act of 'unauthorized forwardness' beyond his known obligations and duty. *Sanders v. Sanders,* 17 N. C., 262." *Publishing Co. v. Barber, supra.*

"Cases in our own reports illustrate the doctrine that though the party who makes the payment may, in fact, have no real or valid legal interest to protect, he may yet be subrogated when he acts in good faith, in the belief that he had such interest." *Publishing Co. v. Barber, supra.* In this connection it is agreed ". . . that Home Insurance Agency, acting in good faith upon a *bona fide* belief that in view of its representation of coverage to Thomas-Howard Company, it was liable in damages to Thomas-Howard Company if it did not defend, and further in view of the flat refusal of Central Mutual to pay or defend and the denial by the Central Mutual that it had ever issued a contract of insurance, and further in view of the fact that the suits were pending and

something had to be immediately done to minimize the losses," paid the smaller claims, employed counsel to defend both suits, and finally made a reasonable and satisfactory settlement of the claims.

It is sufficient to invoke the doctrine of subrogation if (1) The obligation of another is paid; (2) "for the purpose of protecting some real or supposed right or interest of his own." 60 C. J., "Subrogation," sec. 113.

"In the law of subrogation, the distinction between a mere volunteer or intermeddler and one who pays in the protection of a right or interest, believed to be good, though it may turn out afterwards to be an invalid one, is well marked by the authorities." *Publishing Co. v. Barber, supra.* The doctrine of subrogation originated in equity; "it is designed to promote and to accomplish justice, and is the mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience, ought to pay." 60 C. J., "Subrogation," secs. 3, 5. It is because of this equitable origin and basis that subrogation "will not be decreed in favor of a mere volunteer, who, without any duty, moral or otherwise, pays the debt of another; for such a person can establish no equity, and can obtain the right of substitution by contract only." 25 R. C. L., "Subrogation," sec. 11. Likewise, it is because of the sound basis of the doctrine in equity and good conscience that the term "volunteer" as an exception or limitation should be narrowly and strictly interpreted to the end that the doctrine of subrogation may be expansively and liberally applied. "It (the doctrine of subrogation) is a remedy which is highly favored and is not so restricted in its application as formerly. The courts are inclined rather to extend than to restrict the principle so that although formerly the right was limited to transactions between principals and sureties, now it is broad and expansive and has a very liberal application. It is no longer confined to cases of suretyship, but the doctrine has been steadily growing and expanding in importance, and becoming more general in its application to various subjects and classes of persons, the principle being modified to meet the circumstances of cases as they have arisen." 60 C. J., "Subrogation," sec. 17. Conceding without deciding that the Home Insurance Agency was not legally obligated to assume the defense of the claims filed against Thomas-Howard Company, it is admitted that the agency was "acting in good faith upon a *bona fide* belief . . . it was liable to Thomas-Howard Company if it did not defend the suits," and that it accordingly settled the claims. This is sufficient to bring the agency under the protection of the doctrine of subrogation in asserting its claim.

Furthermore, the agency paid the claims against the insured at the request and upon the demand of the insured. Even if claimant had been a mere volunteer or intermeddler under the doctrine of subrogation, the

assignment by the Thomas-Howard Company to the claimant of its rights growing out of the policy worked a valid transfer to claimant of the full right to be reimbursed by defendant under the policy. "The general test of assignability has been given, as to whether the claim would survive to or against the personal representative of the decedent. As a general rule, all ordinary business contracts are assignable, and actions for the breach may be in the name of the assignee, unless such assignment is prohibited by law, or would be in contravention of some principle of public policy, or the performance of the contract involved the element of personal skill or credit." McIntosh, N. C. Prac. and Proc., p. 199, and cases cited. "Volunteers, in the absence of some special circumstance upon which they can base their claims, can obtain the equal right to be subrogated only by virtue of an agreement, express or implied, or by request from the debtor to pay, which is in effect an implied contract, or by ratification, or by taking an assignment of the debt." *Publishing Co. v. Barber, supra.* The claimant not only paid in good faith under its representation that the insured was fully covered, but it took an assignment from the insured and is by reason thereof entitled to maintain its action.

We conclude that there was error in the judgment below and that the same should be reversed to the end that the Home Insurance Agency claim may be duly allowed.

Reversed.

E. J. FERGUSON, JR., BY HIS NEXT FRIEND, ERIC J. FERGUSON, v. CITY OF ASHEVILLE,

and

WANDA FERGUSON, BY HER NEXT FRIEND, ERIC J. FERGUSON, v. CITY OF ASHEVILLE.

(Filed 25 May, 1938.)

1. Municipal Corporations § 14—

A municipality is not an insurer of the safety of its streets, but is under duty to exercise due care to see that they are reasonably safe for travel, and is liable for injuries from dangers which can or ought to be anticipated in the exercise of such duty.

2. Same—

The absence of lights or defective lights at a particular place along a street is not in itself negligence on the part of a municipality, but may bear upon the principal question of whether the street at such place is reasonably safe for travel, and the presence of shade trees which diffuse the light is not negligence.

3. Same—

A municipality is not relieved of liability for an obstruction in a street solely by the fact that it was placed there by a third person, but after notice of the obstruction it is under duty to exercise ordinary care to make the street reasonably safe.

4. Same—Evidence held sufficient for jury on question of municipality's negligence in permitting obstruction to remain in street.

The evidence disclosed that the street in question is twenty-five to thirty feet wide, with a curb six to eight inches high, that a "ramp" to enable cars to go from the street to adjacent property was permitted to project from the top of the curb into the street for a distance of over 21 inches, its lower end being even with the street, and that the ramp had been permitted to so remain for a number of years. *Held:* The evidence is sufficient to be submitted to the jury on the issue of the municipality's negligence in failing to exercise due care to keep the street in reasonably safe condition for travel in an action by persons injured in an accident resulting when the car in which they were riding struck the ramp.

5. Same—

In the absence of knowledge to the contrary, a traveler has the right to act on the assumption that a street is in reasonably safe condition for travel, but he must nevertheless exercise due care for his own safety, and is guilty of contributory negligence if he hits an obstruction which he should have seen and avoided in the exercise of due care.

6. Negligence § 19b—

Since defendant has the burden of establishing contributory negligence, his motion to nonsuit upon the issue should be denied when the relevant facts are in dispute or opposing inferences are permissible from plaintiff's proof.

7. Trial § 23—

Contradictions and discrepancies in plaintiff's evidence do not warrant the granting of defendant's motion to nonsuit, and the motion should be denied if plaintiff's evidence, in any aspect, is sufficient to support the cause alleged.

8. Municipal Corporations § 14—Evidence of whether driver should have seen obstruction held conflicting and nonsuit should have been denied.

This action was instituted against defendant municipality by the driver of a car and a guest therein to recover, respectively, for injuries sustained by them in an accident at night, resulting when the car hit a ramp projecting into the street. The driver of the car testified that the ramp was of the same color as its surroundings, that the light from a street lamp was diffused by shade trees, that the lights on his car were "all right" but that he could not see the ramp before striking it. The evidence also disclosed that the ramp had been seen regularly by one walking along the sidewalk, and a photograph introduced in evidence tended to show as a physical fact that the ramp was plainly visible. *Held:* The conflicting evidence raised a question of fact for the jury on the question of the negligence of the driver of the car in failing to see and avoid the

obstruction, pleaded as contributory negligence in his action, and intervening negligence in the guest's action, and defendant municipality's motions to nonsuit should have been denied as to both plaintiffs.

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

APPEAL by plaintiffs from *Johnston, J.*, at September Term, 1937, of BUNCOMBE.

Actions to recover damages for personal injuries inflicted by alleged actionable negligence.

These two actions grew out of the same occurrence. That of E. J. Ferguson by his next friend, Eric J. Ferguson, was instituted in Superior Court, and that of Wanda F. Ferguson by her next friend, Eric J. Ferguson, in the general county court of Buncombe. Upon motion, the latter was transferred to the Superior Court. By consent, the two were consolidated for the purpose of trial.

The plaintiffs allege, and on the trial introduced evidence tending to show, that: On the night of 17 January, 1937, at about seven-thirty o'clock, the plaintiff E. J. Ferguson, aged seventeen years, with his sister, the plaintiff Wanda Ferguson, aged fourteen years, Margaret Horton, aged ..... years, and Jimmie Bartlett, aged fifteen years, entered his automobile in front of the residence of his father, Eric Ferguson, on the west side of Vermont Avenue, in West Asheville, and started for a ride, traveling south along the west edge of said avenue. He was driving the car. After passing beyond the block in which his father lived and over the first intersecting street, Maple Crescent, approximately two hundred yards from where he started, and while traveling twenty to twenty-five miles per hour, the right front wheel of the car struck and mounted a small bridge which the parties call a "ramp," deflecting the car over the curbing and into a tree, tearing up the car and resulting in personal injuries to the plaintiffs.

Vermont Avenue is from twenty-five to thirty feet wide. On the west side there is a concrete curb, six or eight inches high, with concrete footing which extends twenty-four to thirty inches out toward the center of the street, thereby forming a gutter. The remainder of the street is paved with asphalt. The surfaces of the gutter and the paving come together on a level. The street is smooth from curb to curb, and straight.

The "ramp" is constructed of two heavy boards set on and fastened to an iron frame or girders. It is twelve to fourteen feet long and extends to within two or three inches of the asphalt paving. It is so placed that one edge is on a level with the top of the curb and the other beveled to the level of the gutter, thereby forming a floor or bridge for driveway into the adjacent lot, for which purpose it was so placed. It is fastened to iron spikes by chains which act as hinges by which it may

be turned from the street on to the grass plot. More than three years ago city employees were seen lifting the "ramp," cleaning under it and then replacing it. In the grass plot between the sidewalk and the curb, on the west side, there is a row of heavily branched maple trees, described by the witnesses as standing from fifteen to thirty feet apart, and from one to three feet from the curb—one on each side of the "ramp." The one to the south, and with which the car collided, is eight to fifteen feet from the "ramp." There is a small electric light on the west side of the avenue near the corner of Maple Crescent. There is an arc light in the center of the intersection between said avenue and Olney Road, the next street below. The branches of these trees diffuse the rays and obstruct the lights in shining on the "ramp."

Plaintiff E. J. Ferguson, Jr., testified in part that: He and Margaret Horton were sitting on the front seat, and Wanda Ferguson and Jimmie Bartlett on the rear seat. He did not see the "ramp" before he hit it. "You couldn't see the ramp when you were looking for it. It was the same shade as what it sets on. . . . The reason I didn't see the ramp, it is the same as what it sits on. It sets right down low on the street, and you can't tell it from the street." Trees are all around. The street is dark. The street light does not throw light on the "ramp." The lights of the automobile were "all right" and were burning. No other cars were on the street at the time. He had had driver's license about a month, was not accustomed to drive down the avenue, and did not know the "ramp" was there. Miss Horton was lighting a cigarette for him at the time of, or just before the accident. She held it in her mouth while she lit it. The lighted match did not have anything to do with his driving.

Witness J. W. Bartlett, father of Jimmie, testified: That more than three years ago he resided for a year just off Vermont Avenue; that in going to and from his work he walked on the sidewalk on west side of the avenue two to four times each day; and that he saw the "ramp" every time he chanced to look in the direction of its location.

Photographs of the "ramp," exhibited as a part of the record in the Supreme Court, purport to show as a physical fact that the "ramp" is plainly visible.

The plaintiff Wanda Ferguson testified in part: "I was in the back seat. . . . I saw the tree coming, and that is all I can recall."

In each case defendant denies the material allegations of the complaint. In the case of E. J. Ferguson, Jr., by his next friend, defendant pleads contributory negligence in bar of his right to recover. In the case of Wanda Ferguson, by her next friend, defendant pleads the negligence of E. J. Ferguson, Jr., as the proximate cause of the injury, if any, to the guest in the automobile, his sister.

From judgments as of nonsuit, in each case, at close of plaintiffs' evidence, the respective plaintiffs appealed to the Supreme Court and assign error.

Don C. Young for plaintiffs, appellants.

Philip C. Cocke, Jr., and Jones, Ward & Jones for defendants, appellees.

WINBORNE, J. Upon the evidence presented on this appeal we are of opinion that the motion for judgment as of nonsuit was improperly entered in each case.

Consideration thereof raises three questions which are determinative of this appeal: (1) Is there sufficient evidence of negligence on the part of defendant to require the submission to the jury of an issue with respect thereto? (2) Is there such evidence of negligence on the part of the plaintiff E. J. Ferguson, Jr., the driver of the automobile, as to insulate any negligence on the part of the defendant as a matter of law? (3) Is the plaintiff E. J. Ferguson, Jr., guilty of contributory negligence as a matter of law? The first question is answered in the affirmative, and the second and third in the negative. *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108.

(1) The duties and liabilities of a municipal corporation with respect to defects and obstructions in its streets have been the subject of numerous decisions of this Court. "The exercise of due care to keep its streets in a reasonably safe and suitable condition is one of the positive obligations imposed upon a municipal corporation." *Speas v. Greensboro,* 204 N. C., 239, 167 S. E., 807, and cases cited.

In the recent case of *Oliver v. Raleigh,* 212 N. C., 466, 193 S. E., 853, *Barnhill, J.,* pertinently states: "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."

A municipality is not held to the liability of an insurer of the safety of its streets, but only to the exercise of ordinary care and due diligence to see that they are reasonably safe for travel. *Jones v. Greensboro,* 124 N. C., 310, 32 S. E., 675; *Fitzgerald v. Concord,* 140 N. C., 110, 52 S. E., 309; *Smith v. Winston,* 162 N. C., 50, 77 S. E., 1093; *Alexander v. Statesville,* 165 N. C., 527, 81 S. E., 763; *Sehorn v. Charlotte,* 171 N. C., 540, 88 S. E., 782; *Graham v. Charlotte,* 186 N. C., 649, 120 S. E., 466; *Willis v. New Bern,* 191 N. C., 507, 132 S. E., 286; *Michaux v. Rocky Mount,* 193 N. C., 550, 137 S. E., 663; *Pickett v. R. R.,* 200 N. C., 750, 158 S. E., 398; *Speas v. Greensboro, supra; Haney v. Lincolnton,* 207 N. C., 282, 176 S. E., 573; *Oliver v. Raleigh, supra.*

It is only against danger which can or ought to be anticipated in the exercise of ordinary care and prudence that the municipality is bound to guard. *Dillon v. Raleigh*, 124 N. C., 184, 32 S. E., 548; *Fitzgerald v. Concord, supra; Sehorn v. Charlotte, supra.*

"It is not an absolute duty imposed on the corporation to light its streets, and when it does so the placing of the lights is left largely to its discretion." *Rollins v. Winston-Salem*, 176 N. C., 411, 97 S. E., 211, citing *White v. New Bern*, 146 N. C., 447, 59 S. E., 992. In the latter case the Court said: "When the streets of a municipality are otherwise reasonably safe, the weight of authority and the better reason are to the effect that neither the absence of lights or defective lights is in itself negligence, but is only evidence on the principal question, whether at the time and the place where an injury occurred the streets were in a reasonably safe condition."

It is not negligence to have shade trees along streets. Pertinent statements are made in *Rollins v. Winston-Salem, supra*, to which reference may be made.

The duty and consequent liability of a municipality to keep its streets in a reasonably safe condition for persons traveling thereon extends to those cases where the obstruction of the street is brought about by persons other than agents of the city. *Dillon v. Raleigh, supra; Brown v. Louisburg*, 126 N. C., 701, 36 S. E., 166; *Raleigh v. R. R.*, 129 N. C., 265, 40 S. E., 2; *Jones v. Balsley*, 154 N. C., 61, 69 S. E., 827; *Gregg v. Wilmington*, 155 N. C., 18, 70 S. E., 1070; *Guthrie v. Durham*, 168 N. C., 573, 84 S. E., 859; *Ridge v. High Point*, 176 N. C., 421, 97 S. E., 369; *Bowman v. Greensboro*, 190 N. C., 611, 130 S. E., 502.

After the municipality has notice of the existence of an obstruction, the obligation then arises to exercise ordinary care to make the street reasonably safe. *Neal v. Marion*, 129 N. C., 345, 40 S. E., 116; *Revis v. Raleigh*, 150 N. C., 348, 63 S. E., 1049.

In the instant case there is evidence tending to show that the ramp was placed for the purpose of affording an entry for vehicles into the adjacent property. If it were so placed by a third party, the liability of the city, if any, would be only secondary. The city's fault, if any, would not be in the placing of the ramp, but in the failure to exercise its duty to keep the street in a reasonably safe condition.

Tested by these principles, the evidence is sufficient to take each case to the jury on the issue of actionable negligence. Its probative force is a question for the jury.

(2) On the second question a nonsuit may not be granted unless "it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person," *Stacy, C. J.*, in *Smith v. Sink, supra*, and cases cited. *Powers v. Sternberg, ante*, 41.

In the present case there is evidence tending to show that: At the point of the accident the street is straight, level and from twenty-five to thirty feet wide from curb to curb. The ramp extends less than two feet from the west curb. At the time of the accident, there were no other vehicles on the street. Applying the above principle, if, under these circumstances and the conditions surrounding the ramp, the plaintiff E. J. Ferguson, Jr., saw, or by the exercise of reasonable care could have seen the ramp in time to have averted the accident, and the accident followed as a result of his failure so to do, the plaintiff E. J. Ferguson, Jr., would be guilty of such negligence as would insulate any negligence of the defendant in permitting the ramp to remain on the street unguarded, and the defendant would be relieved of liability to both plaintiff E. J. Ferguson, Jr., the driver of the car, and the plaintiff Wanda Ferguson, the guest. On the evidence shown on this appeal, this is a question for the jury.

(3) In the exercise of due care a traveler in the absence of knowledge to the contrary has the right to act on the assumption that the street is in a reasonably safe condition for travel. *Neal v. Marion, supra; Bell v. Raleigh,* 212 N. C., 518, 193 S. E., 712.

Nevertheless, a person traveling on a street is required in the exercise of due care to use his faculties to discover and avoid dangerous defects and obstructions, the care required being commensurate with the danger or appearance thereof. *Rollins v. Winston-Salem,* 176 N. C., 411, 97 S. E., 211; *Russell v. Monroe,* 116 N. C., 720, 21 S. E., 550, and he is guilty of contributory negligence if by reason of his failure to exercise such care he fails to discover and avoid a defect or obstruction which is visible and obvious. *Pinnix v. Durham,* 130 N. C., 360, 41 S. E., 932.

"The burden of showing contributory negligence is on the defendant, and motion for nonsuit may never be allowed on such an issue where the controlling and pertinent facts are in dispute, nor where opposing inferences are permissible from plaintiff's proof." *Hoke, J.,* in *Battle v. Cleave,* 179 N. C., 112, 101 S. E., 555; *Williams v. Express Co.,* 198 N. C., 193, 151 S. E., 197; *Smith v. Sink, supra.*

In *Lumber Co. v. Perry,* 212 N. C., 713, *Connor, J.,* said: "Notwithstanding apparent inconsistencies and even contradictions in the evidence for the plaintiff, when 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 defendant."

There is conflict of evidence presented on this appeal on the question of the alleged negligence of the plaintiff E. J. Ferguson, Jr. He testifies that the ramp was of the same color as that portion of the street on which it rested, and for that reason the ramp could not be seen, though the lights of his automobile were "all right." On the other hand, there

is testimony tending to show that the ramp had been seen regularly by one walking along the sidewalk. Then, too, the photograph introduced to illustrate the testimony tends to show as a physical fact that the ramp is plainly visible. If, at the time of the accident, while operating his automobile with the lights on it in good condition, the plaintiff E. J. Ferguson, Jr., in the exercise of due care, considering the time, place, condition of traffic upon the street, and the location and surroundings of the ramp, saw or by the exercise of ordinary care could have seen the ramp in time to avert the collision, and as a proximate result of his failure to see the ramp the accident followed, he would be guilty of such negligence as would bar his recovery. *Hughes v. Luther,* 189 N. C., 841, 128 S. E., 145; *Weston v. R. R.*, 194 N. C., 210, 139 S. E., 237; *Davis v. Jeffrey,* 197 N. C., 712, 150 S. E., 488; *Williams v. Express Co., supra; Speas v. Greensboro, supra; Lee v. R. R.*, 212 N. C., 340, 193 S. E., 395.

With respect to the negligence of the plaintiff, more than one inference may be drawn from the evidence adduced. This presents a question for the jury.

The judgment below is

Reversed.

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

WACHOVIA BANK & TRUST COMPANY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF R. L. LAMBETH, v. ESTHER D. LAMBETH, CAROLEEN LAMBETH KEITH, HARRY LEE LAMBETH, ROSE LAMBETH FROEMKE, AND HARRY LEIGH DERBY III, DEFENDED HEREIN BY HIS GUARDIAN AD LITEM; CAROL KEITH, HARRY LEE LAMBETH, JR., ROBERT LEE LAMBETH, MINORS, AND ANY AND ALL PERSONS NOW IN BEING AND UNBORN PERSONS WHO ARE OR MAY BECOME CONTINGENT BENEFICIARIES UNDER THE WILL OF R. L. LAMBETH, DECEASED, DEFENDED HEREIN BY THEIR GUARDIAN AD LITEM.

(Filed 25 May, 1938.)

1. Executors and Administrators § 21: Declaratory Judgment Act § 2a—

An executor and trustee may institute an action in the Superior Court to obtain the advice of the court as to whether inheritance taxes should be paid from the *corpus* of the estate or deducted from annuities provided for in the will, and such action may be maintained under the Declaratory Judgment Act, ch. 102, sec. 3, Public Laws of 1931.

2. Taxation § 28—Under facts of this case, inheritance taxes held properly charged against corpus rather than against annuities to beneficiaries.

The will in question transferred the entire estate, with the exception of certain small bequests to designated persons, to the executor and trustee, with provision that the income therefrom be paid to testator's wife and children and grandchild, respectively, in designated ratio, with further provision that upon the death of the grandchild or any one of the children, his annuity should be paid to his surviving bodily heirs, and upon the death of bodily heirs of the first annuitants, the estate should be divided in accordance with the laws of the State. *Held:* The inheritance taxes due the State should be paid from the *corpus* of the trust estate, without adjustment between the named annuitants and the successive contingent annuitants and the contingent takers of the *corpus* of the estate.

APPEAL by defendants from *Hill, Special Judge,* at 21 February, 1936, Civil Term, of GUILFORD. Affirmed.

Paragraph 5 of the complaint of plaintiff is as follows:

"5. That in said will, to which reference is hereby specifically had, the said R. L. Lambeth directed the plaintiff, his executor and trustee, as follows: (Paragraph 2 of Item 3 of said will.)

" 'To pay out of the net income of my estate $400.00 per month to my wife, Essie D. Lambeth; $200.00 per month to my daughter Caroleen Lambeth Keith; $200.00 per month to my son Harry Lee Lambeth; $100.00 per month to my daughter Rose Lambeth Froemke, and $100.00 per month to my grandson Harry Leigh Derby, III, and at the end of the first calendar year after my death, in addition to the above, to pay over out of the net income of my estate one-fourth of the remainder of said net income to my wife, Essie D. Lambeth, one-fourth to my daughter Caroleen Lambeth Keith; one-fourth to my son, Harry Lee Lambeth; one-eighth to my daughter Rose Lambeth Froemke, and one-eighth to her son, my grandson, Harry Leigh Derby, III. Thereafter, the same procedure shall be followed as to monthly income to be paid and annual distribution to be made during the natural life of each of the said beneficiaries.

" '(a) In the event of the death of my wife, Essie D. Lambeth, the monthly income to her hereinbefore provided shall cease, and the income which would have been paid to her if she had lived shall be divided into three parts, one-third to be added to the income of Caroleen Lambeth Keith; one-third to be added to the income of Harry Lee Lambeth; and one-third to be divided into two equal parts, one-half of the same, that is, one-sixth of the whole, to be added to the income of Rose Lambeth Froemke, and one-sixth of the whole to be added to the income of Harry Leigh Derby, III, and at the end of each calendar year the same distribution made as to the additional net income as hereinabove provided.

" '(b) In the event of the death of Caroleen Lambeth Keith, the monthly income and the annual distribution of income shall be continued

for the benefit of and be paid to her bodily heirs during the life or lives of her bodily heirs in being at the time of her death, and to continue during the life or lives of said bodily heirs. In the event of the death of all of her bodily heirs, then the said income and trust herein created for their benefit shall be and become a part of my estate and distributed in accordance with the laws of the State of North Carolina.

" '(c) In the event of the death of Harry Lee Lambeth, the monthly income and the annual distribution of income shall be continued for the benefit of and be paid to his bodily heirs during the life or lives of his bodily heirs in being at the time of his death, and to continue during the life or lives of said bodily heirs. In the event of the death of all of his bodily heirs, then the said income and trust herein created for their benefit shall be and become a part of my estate and distributed in accordance with the laws of the State of North Carolina.

" '(d) In the event of the death of Rose Lambeth Froemke the monthly income and the annual distribution of income shall be continued for the benefit of and be paid to her bodily heirs during the life or lives of her bodily heirs in being at the time of her death, and to continue during the life or lives of said bodily heirs. In the event of the death of all of her bodily heirs, then the said income and trust herein created for their benefit will be and become a part of my estate and distributed in accordance with the laws of the State of North Carolina.

" '(e) In the event of the death of Harry Leigh Derby, III, the monthly income and the annual distribution of income shall be continued for the benefit of and be paid to his mother, Rose Lambeth Froemke, if living, during the remainder of her life, and then, at her death, to the bodily heirs of the said Henry Leigh Derby, III, during the life or lives of his bodily heirs in being at the time of the death of the said Rose Lambeth Froemke, and to continue during the life or lives of said bodily heirs. In the event that the said Rose Lambeth Froemke shall have predeceased the said Harry Leigh Derby, III, and be not living at the time of the death of the said Harry Leigh Derby, III, then, in the event of the death of the said Harry Leigh Derby, III, the monthly income and the annual distribution of income shall be continued for the benefit of and be paid to his bodily heirs during the life or lives of his bodily heirs in being at the time of his death, and to continue during the life or lives of said bodily heirs. In the event of the death of all of his bodily heirs, then the said income shall be and become a part of my estate and distributed in accordance with the laws of the State of North Carolina.' "

Upon hearing of the cause the court below rendered the following judgment:

"This cause coming on to be heard before the Honorable Frank S. Hill, Judge holding the 21 February, 1938, Term of the Superior Court of Guilford County, and being heard, and it appearing to the court that

summons in this cause was duly issued and duly served according to law, and that R. L. Lambeth, deceased, late of Guilford County, North Carolina, left a last will and testament which was duly admitted to probate and duly recorded in the office of the clerk of the Superior Court of Guilford County, and that said will contained the provisions as set forth in paragraph 5 of the complaint filed in this cause (the entire will being as set forth in Exhibit 'A' attached to the complaint), and it further appearing that this action has been brought for the purpose of directing and protecting the executor of said last will and testament in connection with the payment of inheritance taxes to the State of North Carolina upon said estate, and it further appearing that all parties interested are properly before this court; it is, therefore:

"Considered, ordered and decreed that Wachovia Bank & Trust Company, as executor of the estate of the said R. L. Lambeth, deceased, be and it is hereby authorized and directed to pay the inheritance taxes upon said estate out of the *corpus* of said estate, without any adjustment as between the named beneficiaries entitled to receive specified payments of income during their natural lives and the contingent beneficiaries entitled to receive income and/or portions of the *corpus* of the estate, in accordance with the terms and provisions of the said last will and testament, by reason of said payment of said inheritance taxes.

"It is further ordered that the costs of this action be taxed against Wachovia Bank & Trust Company, executor of the estate of R. L. Lambeth, deceased, to be paid as such executor out of the funds of said estate. Frank S. Hill, Special Judge Presiding."

Whereupon, the defendants Carol Keith, Harry Lee Lambeth, Jr., Robert Lee Lambeth, minors, and any and all persons now in being and unborn persons who are or may become contingent beneficiaries under the will of R. L. Lambeth, deceased, defended by their guardian *ad litem,* Franklin S. Clark, objected and assigned error to the signing of the judgment and appealed to the Supreme Court.

Smith, Wharton & Hudgins for plaintiff.
Franklin S. Clark for defendants.

CLARKSON, J. The question involved: Where a testator devises his estate in trust for the net income thereof to be paid to certain named beneficiaries for life, such income payments to be continued to be paid to the bodily heirs of said named beneficiaries during their lives, and thereafter ultimately for the *corpus* of the estate to be distributed in accordance with the laws of the State of North Carolina, should the inheritance taxes presently due the State of North Carolina, be paid out of the *corpus* of the estate, without any adjustment as between the named beneficiaries entitled to receive said income during their natural lives

and the contingent beneficiaries entitled to receive income and/or portions of the estate in the ultimate distribution of the same? We think the inheritance taxes should be paid out of the *corpus* of the estate, under the facts in this case.

In *Mountain Park Institute v. Lovill,* 198 N. C., 642 (645), citing authorities, it is said: "It is well settled that an executor upon whom the will casts the performance of a duty may, when he needs instruction, bring a suit in equity to obtain a construction of the will." *In re Estate of Mizzelle, ante,* 367 (368).

Plaintiff further has the right to maintain this action under chapter 102, sec. 3, Public Laws of 1931, known as the "Uniform Declaratory Judgment Act." *Rountree v. Rountree, ante,* 252.

The estate of R. L. Lambeth, who died testate on or about 19 December, 1936, was estimated to be worth $1,000,000. He bequeathed to his wife, Essie D. Lambeth, a few minor items of personal property, and then devised and bequeathed his entire estate, with this slight exception, to the Wachovia Bank & Trust Company in trust, to be held, preserved and managed for a long period of years, and to pay the income therefrom to his wife and children, including one grandchild which he had adopted, the said income of said estate after the death of those named beneficiaries to be continued to be paid to the bodily heirs of his said children, and after the death of such bodily heirs, for the estate then to be divided in accordance with the laws of the State of North Carolina. It is to be noted that there was a present transfer of the entire estate, with the minor exceptions, to the trustee, with a disposition of small sums to the named beneficiaries, the whole estate to be held for many years, and then subsequently to be divided out in accordance with the laws of North Carolina.

The defendants contend that "It was error for the court below to authorize and direct the inheritance taxes to be paid out of the *corpus* of the estate without any apportionment or proration against the estates of the named beneficiaries for life." We cannot so hold, construing the will as a whole and paragraph 2 of item 3 of said will above set forth. The defendants have an able and carefully prepared brief and the reasoning is persuasive, though not convincing.

It is contended by plaintiff "That the will of the testator should be carried out, and that the payments as indicated by him should be made without any deductions, and in order to carry out the will of the testator, the executor should be permitted to sell a portion of the *corpus* of the estate to pay the tax and continue the specified payments to the beneficiaries without regard to the payment of the tax and without any deductions whatsoever from the payments to be made to said beneficiaries." From the statutes and will we think this contention of plaintiff correct.

The case of *S. v. Bridgers,* 161 N. C., 246, is in many respects similar to the present action.

In the opinion in *Wellman v. Cleveland Trust Co.* (107 Ohio, 267), 140 N. E., 104, construing a similar will and statute, is the following (at p. 108): "It would seem, therefore, that other courts having under consideration inheritance tax statutes similar to ours have been able to interpret the indefinite and seemingly irreconcilable provisions thereof to clearly authorize the payment of the inheritance tax by the executor or trustee out of the *corpus* of the estate, and that, in the absence of any provision of the will, or of the trust agreement, requiring the reimbursing of the principal from income, no such reimbursement can be required by the executor or trustee, the theory being, in cases such as the one here under consideration, where the beneficiaries generally during the life of the trust receive the income in succession, that as between them the reduction of the principal will proportionately reduce the income to each beneficiary in succession, and that as to the remainderman it was the intention that his estate should come to him diminished by the amount of the inheritance tax." *In re Tracy et al.* (179 N. Y., 501), 72 N. E., 519; *In re Diehl* (88 N. J. Eq., 310), 102 Atl., 738.

We think the position here taken is the logical, common-sense view. The judgment of the court below is

Affirmed.

JOHN C. STRICKLAND, ADMINISTRATOR OF THE ESTATE OF FANNY EDWARDS, DECEASED, v. EMMA EDWARDS JOHNSON, FRED G. EDWARDS, LUNER NELSON, MATTIE WILLIAMS, FREMONT EDWARDS, MARY BARKER, WILLIE EDWARDS, LILLIAN G. EDWARDS, MARGUERITE EDWARDS MELVIN, M. L. EDWARDS, JR., A MINOR, SARAH LEE EDWARDS, A MINOR, GLENN W. EDWARDS, A MINOR, FLORENCE HUFFINES, S. L. COCKMAN, THELMA RICHARDSON AND ERNEST COCKMAN, AND S. F. HUFFINES, ADMINISTRATOR C. T. A. OF THE ESTATE OF G. P. EDWARDS, DECEASED.

(Filed 25 May, 1938.)

1. Wills § 33a—

An unrestricted devise of real estate passes the fee, but a general devise of realty does not pass the fee when it clearly appears from the language of the will that the testator intended to convey an estate of less dignity. C. S., 4162.

2. Same—Will in this case held to devise life estate to widow with remainder over to testator's children by his first wife.

It appeared that testator was twice married, and left his second wife, children by his first wife and one child by his second wife him surviving. The will by general devise left his realty to his second wife, "in lieu of her dower," then his personalty to his daughter by his second wife, and

then provided that upon the death of his second wife "that all of her property be sold and the proceeds to be divided between" the children by his first wife, naming them. *Held:* Taking the setting of the parties and construing the will as a whole, it plainly appears that testator did not intend to devise the fee in the realty to his second wife, and she is entitled only to a life estate in the realty with remainder over to his children by his first wife. C. S., 4162.

BARNHILL, J., dissenting.

SCHENCK, J., concurs in dissent.

APPEAL by plaintiff from *Harding, J.*, at 30 August, 1937, Term, of GUILFORD. Affirmed.

This is a civil action brought by plaintiff under the North Carolina Uniform Declaratory Judgment Act for a construction of the will of G. P. Edwards, deceased.

G. P. Edwards died leaving a last will and testament, probated and recorded in the office of the clerk of the Superior Court of Guilford County, in Will Book J, page 292, as follows: "It is my will that my funeral shall be conducted without ostentation, and the expenses thereof together with all my just debts be fully paid. I give, devise and bequeath to my beloved wife, Fanny Edwards, in lieu of her dower my two lots on corner of North Elm Street and Carolina Ave., Nos. ..... I give and devise to my daughter, Emma Edwards, all my personal property. It is my will that at Fanny Edwards' death that all of her property be sold and the proceeds to be divided between Luner Nelson, Mattie Williams, Fremont Edwards, Mary Barker, Luther Edwards, Florence Huffines and Laney Cockman, heirs. Emma Edwards with all personal property. Fred G. Edwards to share in the proceeds one five dollars. G. P. Edwards. (Witnesses) J. E. Smith, J. L. Jones, H. B. Ritter." Proved and probated: 23 August, 1924.

The above will was properly before the court for a construction thereof, and no question of service of process is raised by this appeal; and all interested persons were made parties to the action.

No other evidence was offered by the plaintiff or the defendant, there being nothing but a question of law to decide. After conclusion of argument of counsel for both parties, plaintiff tendered judgment in his favor as set out in the record. The court declined to render judgment for the plaintiff. Judgment was rendered for the named defendants, as set out in the record, as follows:

"This cause coming on to be heard and being heard before the undersigned judge, presiding over Guilford Superior Court, 10 September, 1937, for a construction of the will of G. P. Edwards, deceased, and a declaration of rights thereunder; and, after argument of counsel for plaintiff and defendants, the court being of the opinion that the testator,

G. P. Edwards, devised a life estate to Fanny Edwards in the two lots on the corner of North Elm Street and Carolina Avenue; and that the remainder in said lots was vested in the following persons: Luner Nelson, Mattie Williams, Fremont Edwards, Mary Barker, Luther Edwards, Lawrence Huffines and the heirs of Laney Cockman upon the death of the said Fanny Edwards.

"Now, therefore, it is ordered, adjudged and decreed that Fanny Edwards was devised a life estate in the two lots on the corner of North Elm Street and Carolina Avenue by the terms of the will of G. P. Edwards, deceased, as the same is recorded and probated in the office of the clerk of the Superior Court of Guilford County in Will Book J, page 293; and that the remainder in the said lots was vested in Luner Nelson, Mattie Williams, Fremont Edwards, Mary Barker, Luther Edwards, Florence Huffines and the heirs of Laney Cockman upon the death of Fanny Edwards.

"It is further ordered, adjudged and decreed that the rents heretofore collected and now held by S. F. Huffines, administrator *c. t. a.* of the estate of G. P. Edwards since the death of Fanny Edwards be paid in *per stirpes* shares to the heirs of G. P. Edwards as set forth in the preceding paragraph of this order or their heirs or personal representatives.

"It is further ordered, adjudged and decreed that the cost of this action be taxed against the plaintiff and that the defendants and each of them go without day.

This 21 September, 1937.

WM. F. HARDING,
Judge Presiding."

The plaintiff excepted, assigned error and appealed to the Supreme Court on the ground: "(1) To the action of the court in failing to render judgment for the plaintiff as tendered; (2) to the action of the court in rendering judgment for the defendant, as appears of record."

H. R. Stanley for plaintiff.

A. Stacey Gifford, Barney W. Walker, and Chas. T. Hagan, Jr., for defendants.

CLARKSON, J. This case presents but one question: Did the testator, G. P. Edwards, by his will, intend to convey a fee simple estate in his land to his second wife, Fanny Edwards, or did he intend to convey only a life estate?

The setting: (Admitted on argument and brief.) G. P. Edwards by his first wife had certain children, named in the latter part of his will. By his second wife, Fanny Edwards, he had a daughter, Emma Edwards. There is no question about his personal property—he left it all to his daughter, Emma Edwards.

N. C. Code, 1935 (Michie), section 4162, is as follows: "When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity."

The uniform holdings since the passage of this section has been that an unrestricted devise of real estate passes in fee.

In *McIver v. McKinney,* 184 N. C., 393 (396), citing numerous authorities, it is said: "Nevertheless, it is generally conceded that in the construction of a will the cardinal purpose is to ascertain and give effect to the intention of the testator—not the intention that may have existed in his mind, if at variance with the obvious meaning of the words used, but that which is expressed by the language he has employed. The question is not what the testator intended to express but what he actually expressed in his will, when all its provisions are considered and construed in their entirety."

In *Mangum v. Trust Co.,* 195 N. C., 469 (471), it is said: "The primary purpose of construing a will is to ascertain and give effect to the intention of the maker. The intention of the maker must be ascertained from the whole instrument."

We think the language of the present will comes within the exception of section 4162, *supra,* which reads as follows: "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 setting of the parties and construing the will as a whole, we think the widow was devised a life estate in the two lots and that the remainder was vested in Luner Nelson, Mattie Williams, Fremont Edwards, Mary Barker, Luther Edwards, Florence Huffines and the heirs of Laney Cockman upon the death of Fanny Edwards.

The principle set forth in the case of *Hampton v. West,* 212 N. C., 315, is similar to that in the present action.

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

Affirmed.

BARNHILL, J., dissenting: It does not appear either from the will or the record that G. P. Edwards was married twice or that he had children by his first wife, now deceased, or that Fanny Edwards is his second wife. This is asserted in appellees' brief. The only evidence offered was the will and we are called upon to interpret that instrument to determine whether Fanny Edwards, by its terms, was devised a fee simple estate in the two lots mentioned in the will.

The devise of the real estate to Fanny Edwards is general in terms and our statute, C. S., 4162, converts the gift into a fee estate. In my opinion, the devise does not in plain and express words show an intent to limit this estate and there is no language in the will plainly indicating that the testator intended to convey an estate of less dignity. The original devise, standing alone, being sufficient to convey a fee estate under our statute and decisions, a subsequent clause in the will, expressing a direction for its disposition after the death of the devisee, will not defeat the devise, nor limit it to a life estate. This has been the consistent holding of this Court. *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; *Barco v. Owens,* 212 N. C., 30.

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; *Barco v. Owens, supra.*

"The rule is well settled that in a will no words are necessary to enlarge an estate devised or bequeathed into an absolute fee. On the contrary, restraining expressions must be used to confine the gift to the life of devisee or legatee." Thus the rule has been stated frequently by this Court since *Holt v. Holt,* 114 N. C., 241.

The only language in the will which could be considered as attempting to limit the fee devised to Fanny Edwards is the provision: "It is my will that at Fanny Edwards' death that all her property be sold and the proceeds to be divided," etc. This provision in itself recognizes that the property is hers. The testator seeks to dispose of her property—not his. To me, this is not plain and express words clearly showing an intent to convey an estate to Fanny Edwards less than a fee. The doctrine of election is not invoked and it does not appear whether under this provision the testator attempts to direct the sale of property owned by Fanny Edwards other than that which she received under the will. It is simply an attempt to direct the disposition of the fee devised to Fanny Edwards after her death.

The words "in lieu of dower" contained in the devise to Fanny Edwards cannot possibly be construed as tending to limit the fee. The majority opinion does not attempt to so interpret it. Every devise from a husband to his wife is in lieu of dower whether so expressed or not. Upon the death of the testator the widow must elect whether she shall take under the will or under the statute. If she accepts the devise in the will she thereby relinquishes her dower. If she dissents and accepts

her dower interest the devise immediately becomes inoperative. That the testator stated in the will what the law necessarily writes into it cannot be held to be "plain and express words, clearly showing an intent to convey an estate less than a fee," which the statute requires in order to limit a gift in general terms, which would otherwise convey a fee.

We are not interested in any unexpressed intention of the testator, or his supposed purpose to make provision for any particular set of his children. We are only called upon to interpret the language actually used by him in conformity with our statute and pertinent decisions. In my opinion there is no language in the will which can be interpreted as clearly intending a purpose on the part of the testator to limit the estate conveyed to Fanny Edwards. If we are to follow the statute and the former decisions of this Court which constitute rules of property, the judgment below should be reversed.

SCHENCK, J., concurs in dissent.

C. H. ALLEN AND R. W. ALLEN v. THE ALLEMANIA FIRE INSURANCE COMPANY.

(Filed 25 May, 1938.)

1. Courts § 2a: Pleadings § 22—Amendment alleging affirmative equity beyond recorder's jurisdiction may not be allowed in Superior Court on appeal.

The jurisdiction of the Superior Court on appeal from judgment of a recorder's court is derivative, and therefore, in an action on contract in the concurrent original jurisdiction of both courts, an amendment which sets up an affirmative equity over which the recorder's court has no jurisdiction, may not be allowed in the Superior Court upon appeal.

2. Courts § 7: Equity § 3—Action for reformation is for an affirmative equity beyond jurisdiction of the recorder's court.

While a court without equitable jurisdiction may recognize an equitable defense, it has no jurisdiction to affirmatively administer an equity, and in an action on an insurance policy, a pleading which alleges that the name of another was inadvertently left out of the application, and by mutual mistake his interest was not included in the coverage of the policy with that of the named insured, and prays for reformation of the policy, sets up an affirmative equity beyond the jurisdiction of a recorder's court, and the contention that the reformation was merely an incidental question necessary to the determination of the rights of the parties under the insurance contract over which the recorder's court has jurisdiction, is untenable.

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

ALLEN *v.* INSURANCE CO.

APPEAL by defendant from *Harris, J.*, at Second October Term, 1937, of WAKE.

Civil action to recover on hail insurance policy for damage to tobacco crop.

This action was instituted in recorder's court of White Oak and Buckhorn Townships in Wake County. Plaintiffs filed complaint and allege in substance: That in July, 1936, plaintiff C. H. Allen owned a farm in Buckhorn Township on which the plaintiff R. W. Allen, as tenant, was cultivating twelve acres in tobacco; that defendant, under policy of hail insurance dated 11 July, 1936, and delivered to plaintiffs, insured against loss or damage by hail to the tobacco growing on said twelve acres on the farm of C. H. Allen, not to exceed $150 per acre, or total amount of $1,800; that on 13 July, 1936, while the policy was in effect, said tobacco crop was damaged; that the authorized adjuster and representative of defendant agreed that the percentage of such damage is $451.24; that notice was given and proof of loss furnished to defendant as required under the terms of the policy; and that thereafter and on 30 September, 1936, defendant in letter to plaintiff, R. W. Allen, in whose name the policy was issued, denied liability under the policy.

Defendant filed answer denying the material allegations of the complaint, and avers in substance: That the policy of insurance was never in force; that plaintiffs are not entitled to recover for that in the application "R. W. Allen claimed to have one hundred per cent in twelve acres of tobacco for insurance on which he made application, whereas in fact the said R. W. Allen did not have twelve acres in tobacco, . . . but at most had only two acres"; that this misrepresentation constitutes complete bar to recovery as provided in the application for the insurance executed by R. W. Allen; that the damage to the tobacco was done prior to the application for and issuance of policy of insurance; that C. H. Allen has no insurable interest whatever under the policy and no right to recover thereunder. Defendant tenders return of premium paid.

The cause was heard before judge of recorder's court, who rendered judgment against defendant for amount claimed, with interest. Defendant appealed to Superior Court. At Third June Term, 1937, of Superior Court plaintiffs moved before Spears, J., for permission to amend complaint to set out mistake in the policy. This motion was denied. Thereafter, at the Second October Term, 1937, and after a jury had been drawn and impaneled, plaintiffs again moved to amend the complaint to allege that it was the intention of the parties to include the name of C. H. Allen and his interest in the crop in the application and coverage of the policy, but that by mutual mistake and inadvertence of the defendant's agent only the name and interest of R. W. Allen were included, upon which plaintiffs asked reformation of the policy contract

and renewed prayer for relief. A mistrial was ordered, and by order the amendment was allowed, from which defendant appealed to the Supreme Court and assigns error.

Chas. U. Harris and Wm. B. Oliver for plaintiffs, appellees.
Little & Wilson for defendant, appellant.

WINBORNE, J. The decisive question arising on this appeal is: Where an appeal has been taken to the Superior Court from judgment of a specially created recorder's court in action on contract over which that court has concurrent original jurisdiction with the Superior Court, can the Superior Court permit an amendment to the complaint which sets up an equitable cause of action for the reformation of contract, over which the recorder's court has no jurisdiction? The answer is "No."

The recorder's court of White Oak and Buckhorn Townships, Wake County, created by special act of the Legislature, Public Laws 1917, ch. 282, as amended by Public Laws 1929, ch. 497, is a court of limited jurisdiction, both as to territory and subject matter. The original act, sec. 12½, provides in part that the court "shall have concurrent original jurisdiction with the Superior Court in all civil actions arising out of contract where the sum demanded does not exceed the sum of $500 . . ." It further provides, sec. 14, that "in all civil actions and matters where this Court has jurisdiction and where a justice of the peace does not have jurisdiction, the plaintiff in such actions may bring an original suit, either in recorder's court as prescribed by this act or in the Superior Court of Wake County, at his election . . ."

The recorder's court, in the case before us, had original concurrent jurisdiction with the Superior Court of the cause of action as originally alleged. Having been instituted in the recorder's court, the action is limited in its scope by the jurisdiction with which that court is clothed by the acts of the Legislature creating it. "The rule is where there are courts of equal and concurrent jurisdiction the court possesses the case in which jurisdiction first attaches." *Merrill v. Lake*, 16 Ohio, 373, quoted by *Pearson, C. J.*, in *Childs v. Martin*, 69 N. C., 126. This rule has been applied in numerous cases in this State. *In re Schenck*, 74 N. C., 607; *Haywood v. Haywood*, 79 N. C., 42; *S. v. Williford*, 91 N. C., 529; *Worth v. Bank*, 121 N. C., 343, 28 S. E., 488; *Hambley v. White*, 192 N. C., 31, 133 S. E., 399. See, also, McIntosh, North Carolina Prac. & Proc., p. 62.

In McIntosh, North Carolina Prac. & Proc., p. 65, it is said: "For all courts established by special or general laws, whether the jurisdiction is exclusive or concurrent with the Superior Court, the appellate jurisdiction lies in the Superior Court, as the head of the judicial system below the Supreme Court." *Rhyne v. Lipscombe*, 122 N. C., 650, 29 S. E., 57; *Taylor v. Johnson*, 171 N. C., 84, 87 S. E., 955.

The jurisdiction of the Superior Court on appeal is derivative only. *Barham v. Perry,* 205 N. C., 428, 171 S. E., 614; *Dees v. Apple,* 207 N. C., 763, 178 S. E., 557.

"There is a general rule, frequently approved in our decisions, that if an inferior court or tribunal has no jurisdiction of a cause, an appeal from its decision confers no jurisdiction upon the appellate court," *Adams, J.,* in *Hall v. Artis,* 186 N. C., 105, 118 S. E., 901, citing authorities.

The recorder's court of White Oak and Buckhorn Townships, being without jurisdiction of matters in equity, is without power to administer affirmatively an equity. Therefore, the complaint as amended states a cause of action of which the recorder's court had no jurisdiction. The legal effect is the institution of a new action. Hence, the amendment was improperly allowed. *Capps v. Capps,* 85 N. C., 408; *Hall v. Artis, supra; Perry v. Pulley,* 206 N. C., 701, 175 S. E., 89.

Plaintiff contends that the reformation of the contract of insurance is an incidental question necessary to a proper determination of the principal matter of the action, and that, therefore, the recorder's court must necessarily have jurisdiction. He relies upon the case of *Levin v. Gladstein,* 142 N. C., 482, 55 S. E., 371, and cases therein cited. These cases do not support the contention as applied to the question at hand. In *Levin v. Gladstein, supra,* the plaintiff sued in the justice of peace court on a judgment for $133 obtained in the State of Maryland. The defendant set up the defense that the judgment was obtained by fraud. The Court said: "In view of the frequent decisions of this Court, that while a justice's court has no jurisdiction to administer or enforce an equitable cause of action, a defendant may interpose an equitable defense in that court. In *Lutz v. Thompson,* 87 N. C., 334, *Ruffin, J.,* speaking to the question, said: '. . . And though it cannot affirmatively administer an equity, it may so far recognize it as to admit it to be set up as a defense.'" *Cheese Co. v. Pipkin,* 155 N. C., 394, 71 S. E., 442; *Fertilizer Co. v. Bowen,* 204 N. C., 375, 168 S. E., 211. This is a clear statement of the extent to which the court without equitable jurisdiction may consider matters in equity.

The act creating the recorder's court of White Oak and Buckhorn Townships provides no "system of appeals" to the Superior Court in civil actions. (N. C. Constitution, Art. IV, sec. 12.) However, no question is raised as to the case being properly in the Superior Court on appeal, whether by *certiorari,* or *recordari* (*Taylor v. Johnson, supra*), or otherwise.

The order of the court below allowing the amendments affects a substantial right of the defendant—and the same is

Reversed.

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

STATE v. BEN SIMS.

(Filed 25 May, 1938.)

1. Indictment §§ 2, 13—Denial of male defendant's motion to quash for that women were excluded from jury held not prejudicial.

The male defendant moved to quash the bill of indictment on the ground that it was returned by a grand jury composed entirely of men and that women had been unlawfully excluded therefrom. *Held:* There had been no discrimination against the class or sex to which defendant belongs, and he could not have been prejudiced by the alleged discrimination, and therefore he may not raise the question of the qualification of women to serve as jurors or maintain that the proceeding constituted a violation of the equal protection guaranteed by the Fourteenth Amendment of the Federal Constitution and by Art. I, sec. 17, of the State Constitution.

2. Criminal Law § 41f—Testimony of defendant on cross-examination as to convictions for gambling held some evidence of bad character.

When defendant testifies in his own behalf, the State may impeach his credibility by testimony of witnesses as to his general reputation, and by cross-examination of defendant, as to specific acts, and such cross-examination is not limited to felonies or to crimes involving moral turpitude, but may include any acts tending to impeach his character, and testimony of defendant on cross-examination that he had been arrested for beating a ride on a freight train, and had been repeatedly convicted of gambling, constitutes some evidence of bad character which the court may properly bring to the jury's attention in charging it as to the credibility to be given defendant's testimony.

3. Criminal Law § 53d—

An instruction that "there was evidence tending to show that he (the defendant) is a man of bad character," said while stating the contentions of the State, cannot be held for error as an expression of opinion by the court on the weight or credibility of the testimony in violation of C. S., 564.

4. Criminal Law § 53a—

Evidence of good character of defendant on trial for murder is a subordinate and not a substantive feature of the trial, and the failure of the court to refer thereto in the charge will not ordinarily be held for error in the absence of written request for such instruction. C. S., 565.

5. Criminal Law § 79—

Assignments of error not discussed in appellant's brief are deemed abandoned. Rule of Practice in the Supreme Court, No. 28.

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

APPEAL by the defendant from *Harding, J.*, at October Term, 1937, of GUILFORD. No error.

There was evidence tending to show that the defendant fatally shot the deceased after premeditation and deliberation. There was also evidence tending to show that the defendant fired the fatal shots in self-defense. The issue of the defendant's guilt was submitted to the jury under a charge wherein they were instructed that they might 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 jury returned a verdict of guilty of murder in the first degree, and from judgment of death the defendant appealed, assigning errors.

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

Harry Rockwell and Stern & Stern for defendant, appellant.

SCHENCK, J. Exceptive assignments of error Nos. 1, 2 and 3 assail the court's action in overruling the defendant's motion made in apt time to quash the bill of indictment for the reason that women had been excluded from the jury list.

The court found as facts that women were not placed upon the jury lists in Guilford County and that women were systematically excluded from said lists, even though they may be of good moral character and of sufficient intelligence and may own both real and personal property in said county.

The defendant states in his brief, "Whether this action (the overruling of the motion to quash) was error raises two questions: (1) Whether women are qualified to serve as jurors? and (2) Whether that question can be raised by this defendant?"

We will consider the second question first. The defendant is a male person. Therefore even if it be conceded that there is a discrimination in the exclusion of women from the jury such discrimination could not have been against the class to which the defendant belongs, which, according to the weight of authorities, is a prerequisite to his right to raise the question of prejudice by discrimination. A person who is not included in the class against which there has been a discrimination cannot take advantage of the discrimination by pleading that the proceeding constitutes a violation of the equal protection guaranteed by the Fourteenth Amendment of the Constitution of the United States, and by Article I, section 17, of the Constitution of North Carolina. In the case of *McKinney v. Wyoming,* 16 L. R. A., 710 (30 Pac., 293), wherein the defendant, a male person placed on trial before a jury from which women had been excluded, sought to have the indictment quashed, the Court said: ". . . the very idea of a jury is that the body of men of whom it is composed are the peers or equals of the person whose rights it is selected or summoned to determine, and that they must be of the

same legal status in society as that which he holds. The plaintiff in error asserts a right or privilege of having members of the opposite sex, as well as those of his own sex, to determine his rights, because they are unconstitutionally excluded from enjoying a right granted to them, and not because anyone of his own sex is denied the right. If women have the right, if it is a right, to serve as jurors, and to 'assist in the administration of justice' thereby, it seems that no one but a woman—one of the class or sex whose rights have been invaded—can assert that right. It must be demanded by one who has been denied the equal protection of the law, and a civil or political right or privilege of which she, in common with her sex, has been deprived. The courts will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who, therefore, has no interest in defeating it. Cooley, Const. Lim., 164."

While it has been held that members of the Negro race may successfully demand that they be not placed upon trial upon a bill of indictment found by a jury from which Negroes had been excluded, *Neal v. Delaware,* 26 Law Ed., 567 (103 U. S., 370), we apprehend that it would not be held that a member of the Caucasian race could successfully move to have an indictment quashed because of the exclusion of Negroes from the jury. See also *S. v. Peoples,* 131 N. C., 784.

We are of the opinion, and so hold, that the defendant in this case, being a male person, cannot raise the question as to whether women may serve on the jury by a motion to quash the bill of indictment; and since it is not properly raised, we are not called upon to decide the first question suggested in appellant's brief.

The assignments of error Nos. 1, 2 and 3 cannot be sustained.

Exceptive assignments of error Nos. 24, 25 and 26 assail the following excerpt from the charge: "There is evidence tending to show that he (the defendant) is a man of bad character. You will consider that, but if you believe what the defendant says about it to be true you will give his evidence the same weight as you would if he was not interested."

In order to understand the portion of the charge assailed it is necessary that it be read in connection with what preceded it. The court charged: "The State contends that you ought not to believe what he (the defendant) says because he is interested in your verdict. He is interested. His life is at stake. His liberty is at stake. And because of the interest he has got the State contends he would be moved to give that coloring and accentuation to his testimony that would be of greatest advantage. It is your duty to scrutinize his testimony in the case. There is evidence tending to show that he is a man of bad character. You will consider that, but if you believe what the defendant says about it to be true you will give his evidence the same weight as you would if he was not interested."

The appellant contends that the foregoing excerpt was error because there was no evidence "tending to show that he is a man of bad character," and that it constituted an expression of opinion by the court that a fact had been sufficiently proven.

While it is true the State offered no witness who testified that the defendant was a man of bad character, the State did draw from the defendant on cross-examination as a witness in his own behalf the admission that he had, in 1917, in Knoxville, Tennessee, been arrested for beating a ride on a freight train and was unable to pay a fine of $9.90 and was compelled to serve 30 days, that he was "up for" gambling in Raleigh and was fined $6.55, that he was put in jail three times and fined for gambling in Winston-Salem "over three years ago," and that he "was caught twice for gambling" in Greensboro. In *Edwards v. Price,* 162 N. C., 244, *Clark, C. J.,* says: "The rule as to this matter has been fully settled by many decisions in this Court. It is this: The party himself, when he goes on the witness stand, can be asked questions as to particular acts impeaching his character, but as to other witnesses it is only competent to ask the witness if he 'knows the general character of the party' . . ." See also *S. v. Colson,* 193 N. C., 236.

It is clear that there are two methods of proving the bad character of the defendant when he becomes a witness in his own behalf, first, by witnesses who testify that they know his general character, and, second, by cross-examinations as to particular acts of which the defendant has been guilty, which tend to impeach his character. *S. v. Lawhorn,* 88 N. C., 634. It is not the practice in this jurisdiction to limit the cross-examination for the purpose of impeachment to felonies, or to crimes involving moral turpitude. In fact, cross-examination for the purpose of impeachment is not limited to conviction of crimes. Any act of the witness which tends to impeach his character may be inquired about or proven by cross-examination. *S. v. Davidson,* 67 N. C., 119.

The admissions made by the defendant when a witness in his own behalf was some evidence tending to show that he was a man of bad character to be considered by the jury. The weight to be given to this evidence was for the determination of the jury. This is in effect what the judge charged.

We cannot agree with the contention of the defendant that the portion of the charge assailed constituted an expression of opinion by the court that a fact had been sufficiently proven in violation of C. S., 564. All the court told the jury was that "there was evidence tending to show that he (the defendant) is a man of bad character," and this was said while the contentions of the State were being set forth.

The defendant complains that the court failed to instruct the jury as to evidence tending to show he was a man of good character. There was no request for such instruction, and in the absence of such request

the omission cannot be held for reversible error. "The statute, it is true, requires the judge plainly and correctly to state the evidence and to declare and explain the law arising thereon (C. S., 564), and this requirement has been construed as implying that on all the substantive features of a case a correct charge must be given without regard to a special prayer, but as to subordinate features or particular phases of the evidence a litigant who desires special explanation should make proper request for appropriate instructions. *S. v. Thomas,* 184 N. C., 757; *S. v. Merrick,* 171 N. C., 795; *S. v. Davidson,* 172 N. C., 944; *S. v. Fulford,* 124 N. C., 798; *S. v. Groves,* 119 N. C., 822; *S. v. Varner,* 115 N. C., 745; *S. v. Bailey,* 100 N. C., 528." *S. v. O'Neal,* 187 N. C., 22.

Evidence of the good character of the defendant on trial for murder is a subordinate and not a substantive feature of the trial and the failure of the judge to charge the jury relative thereto will not generally be held for reversible error unless there be a request for such instruction. In this case there was not only no request in writing for such instruction as provided by C. S., 565, but the defendant failed to avail himself of the opportunity extended by the court at the close of the charge to call his attention to "anything omitted."

The assignments of error Nos. 24, 25 and 26 cannot be sustained.

The assignments of error not discussed in this opinion are not set out in the appellant's brief and are therefore taken as abandoned by him. Rule 28, Rules of Practice in the Supreme Court, 200 N. C., 831.

On the record we find

No error.

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

W. T. BROWN v. NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM.

(Filed 25 May, 1938.)

1. Mortgages § 10—

Fixtures annexed by the mortgagor after execution of the mortgage become a part of the security and are subject to the mortgage, but unfixed chattels do not become a part of the realty, and ordinarily the mortgagor is entitled to remove them upon foreclosure.

2. Fixtures § 1—Determination of whether chattels are affixed to the realty.

In determining whether chattels are affixed to the realty, the determining factor is whether the chattels are annexed to the realty so that they have a permanent and fixed position, the manner of annexation not being

controlling, even the weight of the chattel alone being sufficient, and the intent with which the annexation is made is relevant to the question.

3. Mortgages § 42—Evidence that chattels had not been affixed to realty held for jury in mortgagor's action to recover same after foreclosure.

The trustor placed certain chattels on the land after the execution of the mortgage. Foreclosure was had, and defendant *cestui que trust* purchased the property at the sale and took possession, and trustor instituted this action against the *cestui* to recover possession of the chattels or damages for their detention if delivery could not be had. Trustor introduced evidence that some of the chattels were tools and articles of personalty unattached to the freehold, and that the other chattels were a sawmill and shingle mill which were portable in character and which he took from place to place in using them, that they were not affixed and could be removed without injury to the land. *Held:* Plaintiff's evidence, if found to be true, establishes that the tools were unfixed chattels, and the evidence is for the jury on the question of whether the sawmill and shingle mill were fixtures, and the granting of defendant's motion to nonsuit constitutes error.

APPEAL by plaintiff from *Phillips, J.*, at February Term, 1938, of MOORE.

Civil action to recover possession of personal property allegedly wrongfully withheld, and if property cannot be delivered, then for damage.

Plaintiff alleges that he executed and delivered to defendant a mortgage deed or deed of trust on land in Moore County, North Carolina; that, pursuant to foreclosure defendant went into possession of said land in June, 1936; that at that time plaintiff owned the following personal property located in the mill building on said land, to wit: One corn mill complete, one wheat mill complete, cog wheels, tools, a sawmill and a shingle mill, of the reasonable value of $2,000; that defendant had no right, title or interest in said personal property; that practically all of it was purchased by the plaintiff subsequent to the giving of the mortgage or deed of trust; that though plaintiff has demanded of defendant and its agents the return to him of said personal property, it and they have refused to do so, and that defendant has converted same to its own use and wrongfully retains same.

Defendant denied that the property is wrongfully withheld and avers the same consisted of fixtures which were covered by the deed of trust; that the title and ownership thereof vested in defendant upon purchasing the land at the foreclosure sale under the deed of trust on 22 September, 1934, and by deed executed pursuant thereto by Interstate Trustee Corporation, trustee, dated 4 November, 1934, irrespective of whether same was purchased by plaintiff before or after the deed of trust was executed.

On the trial below, plaintiff testified in part: "I had a mill building and other property, on this property at the time they went into posses-

sion of it. . . . There was a lock on the premises when I went away. . . . They were operating the machinery when I went back. . . . I had a corn mill outfit, wheat mill outfit, and a set of chairs, turning lathes and a lot of other tools. I had a sawmill, shingle mill and swing saw edge. This property was placed down there. They were in running position so I could run them, not attached to the building. I had some blacksmith tools, wrenches, steel drum, pump, oil drum, chair tools, lathes and such like as that. Part was in there at the time I executed a mortgage to Joint Stock Land Bank and part was not. I never did give the Joint Stock Land Bank any chattel mortgage on personal property. The sawmill was a portable mill. I had saws or wheels there not connected with the building. The mill wheel was not connected with the building. It was set up on platform. . . . I operated the shingle mill at other places and it was brought back in there and sitting loose and had been operated at other places and was sitting in loose under the shed. . . . I had a couple of shingle saws setting in the loft. None of the tools were connected with or tied down to this house, such as hammers, wrenches and tools that belonged to the blacksmith shop. These tools were taken away from the blacksmith shop and happened to be in the house when this property was taken over. The sawmill was a portable mill moved in there from the woods. It was not made a part of the shop or a part of anything there at the mill. It could be run by power other than water power. It could be moved without tearing down the mill. The sawmill was there when the mortgage was given but the shingle mill was not there. . . . The shingle mill was portable. It was just put in there, and set down on some blocks and saw a while and carried to the woods and saw a while. When it was in the woods it was operated by steam. . . The shingle mill was put there since this loan. . . . I use the grain mill, the flour mill, sawmill and shingle mill for the purpose of manufacturing lumber, shingles and flour for the public."

The witness Edgar Brown, in part: "Neither the shingle mill nor sawmill was bolted to the building in any way. Portable sawmills are fastened by just driving some little wedges. . . . I have seen several things that look like cogwheels, tools and other appliances sitting around in this mill house loose. . . . The sawmill is just a portable mill like you put up and saw wood; just move them about and do two or three hours sawing in one place. . . . The sawmill wasn't in the building; it was on the outside. The shingle mill was also on the outside when I saw it. I know of my own knowledge that he had moved the shingle mill from place to place and let other people use it, and the same thing with the sawmill."

The witness S. L. Brown testified in part: "I know that the shingle mill has been moved out from under there (the shed) and operated at

other places. . . . The sawmill and shingle mill are not fastened down or bolted in any way and *is* just sitting *unkeyed*. Whenever you worked it you would have to set it up the same way, and you would have to fasten it, of course, to keep it from moving around."

From judgment as of nonsuit, entered at the close of plaintiff's evidence, plaintiff appealed to the Supreme Court and assigned error.

Seawell & Seawell for plaintiff, appellant.
J. S. Patterson and W. D. Sabiston, Jr., for defendant, appellee.

WINBORNE, J. Counsel for plaintiff, in brief filed here, state that plaintiff will not contend for the wheat mill and the corn mill, which were located in the mill building at the time of the foreclosure. This question then arises: Are the sawmill, shingle mill, cogwheels and tools so annexed to the land as to be fixtures, or do they retain the status of personal property?

The evidence presented on this appeal with relation thereto raises an issue of fact which should have been submitted to the jury under appropriate instructions.

In the relationship between mortgagor and mortgagee the principle of law applicable to fixtures is well settled. In *Moore v. Vallentine*, 77 N. C., 188, *Pearson, C. J.*, said: "When a mortgagor who is allowed to retain possession . . . makes improvements and erects fixtures, he does so for the purpose of enhancing the value of the property, and having made *this addition to the land*, he is not at liberty to subtract it."

In *Foote v. Gooch*, 96 N. C., 265, 1 S. E., 525, *Smith, C. J.*, said: "A mortgagor left in possession and use, who improves the premises by the erection of new works, and the introduction of new machinery, as a means of enlarging his operations, and intended to be a permanent annexation to the freehold, is not at liberty to impair the increased security provided for his debt by removing them. . . ." *Overman v. Sasser*, 107 N. C., 432, 12 S. E., 64; *Belvin v. Paper Co.*, 123 N. C., 138, 31 S. E., 655; *Pritchard v. Steamboat Co.*, 169 N. C., 457, 86 S. E., 171; *Springs v. Refining Co.*, 205 N. C., 444, 171 S. E., 635.

Fixtures annexed by the mortgagor of land after execution of the mortgage are subject thereto. 26 C. S., 728. *Foote v. Gooch, supra.*

In *S. v. Martin*, 141 N. C., 832, 53 S. E., 874, *Walker, J.*, speaking to the method of changing property, personal in its nature, into realty, said: "There must be some kind of physical annexation of the thing to the land, though the nature and strength of the union is not material, if, in fact, it be annexed. The annexation is in some cases by gravitation alone, or, in other words, the thing is kept in position by its own weight, as in the case of the planks laid down as the upper floor of a gin house and used to spread cotton seed upon, though not nailed or

otherwise fastened to the building. . . . They have, as it were, a permanent and fixed position, and are in a certain sense stationary—not movable, so as to be in one place today and in another tomorrow. 'The very idea of a fixture,' says the Court, in *Beardsley v. Ontario Bank,* 31 Barbour, at p. 630, 'is of a thing fixed or attached to something as a permanent appendage, and implies firmness in position.' "

In *Foote v. Gooch, supra,* it is stated: "The intent with which the annexation is made, enters largely into the question of permanency and the right to remove. . . . The test then is the actual attaching or affixing the articles of personalty to the freehold so that they become parcel of the realty. . . ."

There is evidence in the present case tending to show that when the defendant purchased the land under foreclosure, tools, cogwheels and other articles of personal property unconnected with and unattached to fixtures or to the freehold were in the mill building. If this be true, it is elementary that such articles are personal property.

There is evidence tending to show that the sawmill and shingle mill are portable in character and are not affixed or attached to the realty in the sense of permanency, but in their operations are removed from place to place. If this view be accepted by the jury, then under settled principles of law, the sawmill and shingle mill are personal property. Otherwise they are fixtures.

The judgment of nonsuit below is

Reversed.

THE FIRST NATIONAL BANK OF THOMASVILLE v. M. W. STONE AND WIFE, BONNIE E. STONE.

(Filed 25 May, 1938.)

1. Mortgages § 31c—Commissioner is agent for the court and must report all his acts to the presiding judge who controls and directs sale.

An action to foreclose is essentially equitable in its nature, and a sale under decree is in effect sale by the court, and the commissioner, who acts as agent of the court, must report all his acts to the presiding judge, who alone has power to enter any order or decree and who is required to exercise a sound discretion for the protection of the rights of all the parties, and who directs and controls the sale made under its order by the commissioner appointed by it.

2. Mortgages § 31f—Bidder at sale under decree is but proposed purchaser and has no rights in the land until confirmation.

The last and highest bidder at a foreclosure sale under decree of court is but a proposed purchaser, and the bid constitutes but a proposition to buy and confers no right whatever upon the bidder until accepted and

sanctioned by the presiding judge, but when confirmation is made the bargain is complete and the confirmation relates back and the purchaser takes title as of the date of sale.

3. Mortgages § 31g—Only presiding judge may confirm sale under decree.

The power to confirm a sale under a decree for foreclosure may not be delegated to the commissioner or to the clerk, but confirmation is the act of consent and approval of the court, which it may give or withhold in its discretion within the limitations prescribed by law, but the court may confirm a sale *nunc pro tunc*, in which case the order relates back to the date of sale.

4. Ejectment § 14—Introduction of decree for sale without confirmation of court having jurisdiction held insufficient to show title under the sale.

Plaintiff in ejectment claimed title under decree for foreclosure of a deed of trust on the lands, and introduced in evidence the judgment roll showing decree of sale, sale by commissioner, and approval by the resident judge of the clerk's order of confirmation. *Held:* The evidence fails to show confirmation of the sale by a judge having jurisdiction, and the sale not being valid until such confirmation, and it not appearing that an order of confirmation entered by the trial court was introduced in evidence by subsequent reintroduction of the judgment roll, the evidence fails to show any vested title in plaintiff.

5. Same: Jury § 5—Court must submit issues to jury even when evidence is sufficient to warrant directed verdict in plaintiff's favor.

Even conceding that the evidence in an action in ejectment is sufficient to warrant a directed verdict in plaintiff's favor, the court may not take the case from the jury, find the facts and render judgment thereon, but must submit appropriate issues to the jury under such charge as it deems proper, and its failure to do so is a denial of a substantial right.

6. Appeal and Error § 9—Supreme Court may not consider correctness of order entered in action in which no appeal is taken.

In this action in ejectment plaintiff claimed under deed from the purchaser at a sale under decree of foreclosure of a deed of trust on the lands. Defendant denied the validity of the confirmation of the sale. The court during the progress of the trial entered an order of confirmation of the sale. *Held:* Even though the order of confirmation was entered during the progress of the trial in ejectment, it was in fact entered in the foreclosure action, and the question of the validity of the order of confirmation may be presented only by appeal in that action, and may not be considered on appeal from the judgment in the action in ejectment.

APPEAL by defendant from *Bivens, J.*, at February Term, 1938, of DAVIDSON. New trial.

This is a common law action of ejectment instituted by the plaintiff against the defendants for the possession of the property described in the complaint. The defendants filed answer denying that the plaintiff is the owner or entitled to the immediate possession of said premises.

On 14 February, 1930, defendants executed and delivered to the Page Trust Company a note in the sum of $1,850, secured by trust deed conveying said property to Ford M. Myers, trustee, which trust deed contained full power of sale upon default. On 9 November, 1931, Page Trust Company assigned the said note and the deed of trust securing the same to G. E. Carter. On the same date Ford M. Myers, trustee, transferred and assigned his interest as trustee in the said deed of trust to the said G. E. Carter. Upon default in the payment of said note G. E. Carter instituted an action against the defendants in the Superior Court of Davidson County to foreclose said trust deed. Upon issues being submitted to and answered by the jury in favor of the plaintiff a decree was entered appointing J. M. Daniel, Jr., commissioner, with directions to sell said land for the satisfaction of said judgment. The said commissioner offered said land for sale at public auction as directed on 3 August, 1936, at which time G. E. Carter was the last and high bidder. The commissioner reported the sale to the clerk, who, upon receiving a raised bid, ordered a resale 13 August, 1936. The land was resold 29 August, 1936, at which time G. E. Carter again was the highest bidder. The commissioner reported this sale to the clerk, who, after receiving a raised bid, ordered a resale 9 September, 1936. The land was again resold on 25 September, 1936, and G. E. Carter became the last and highest bidder in the sum of $2,125. The commissioner reported this sale to the clerk, who on 21 October, 1936, entered his decree of confirmation and authorized and directed the commissioner to make deed to the purchaser. The order of confirmation signed by the clerk was in all respects ratified, approved and confirmed on 21 October, 1936, by Sink, Resident Judge, Twelfth Judicial District. The commissioner executed and delivered a deed to said premises to the said G. E. Carter and thereafter on 27 January, 1937, G. E. Carter and his wife executed and delivered to the plaintiff herein a deed for the *locus*. The defendants being in possession of said premises and having refused to surrender the same, this action was instituted 17 December, 1937.

After the jury was impaneled and after the court below ascertained that the defendants were attacking the validity of the foreclosure proceeding on the grounds that there had been no valid confirmation of sale, he, as the judge holding the courts of the Twelfth Judicial District, entered a decree of confirmation, to which the defendants excepted. Thereupon, without the intervention of a jury the court rendered judgment for the plaintiff and against the defendants. The defendants excepted and appealed.

H. R. Kyser, J. Roy Proctor, and Phillips & Bower for plaintiff, appellee.

Don A. Walser for defendants, appellants.

BARNHILL, J. It does not clearly appear from the record that any evidence was offered in the trial below. The case on appeal states: "After the jury was selected, upon inquiry of counsel for defendants by the court, as set forth in the judgment in this action, the court rendered the judgment hereinbefore set out, from which said judgment of confirmation of sale and judgment in this action the defendants, and each of them, excepted and appealed to the Supreme Court." There follows a copy of certain deeds and other documents affecting the title to the premises in controversy. As the judgment cites . . . "and it appearing to the court from the pleadings, the record of evidence offered and the admissions . . ." we may assume that the documentary evidence of title was offered.

The record then presents but one question for decision: Was it error for the court to enter judgment decreeing that the plaintiff is the owner and entitled to the possession of the *locus in quo* without having first submitted an issue to the jury? We must answer this question in the affirmative.

One of the important powers of a court of equity is to direct and control sales made by its order and under its authority through a commissioner of its own appointment. A foreclosure proceeding is essentially equitable in its nature, requiring the exercise of sound discretion by the presiding judge for the protection of the rights of all parties interested. It is an action pending on the civil issue docket in which only the judge holding the courts of the district has power to enter any order or decree. An order entered therein directing the sale of property should direct the commissioner appointed by the court to make the sale and to report the sale to the court for confirmation before conveying the land to the purchaser. *Mebane v. Mebane,* 80 N. C., 34. The commissioner acts as the agent of the court and must report to it all his acts in execution of its order. The bid is but a proposition to buy, and until accepted and sanctioned by the court having jurisdiction, confers no right whatever upon the purchaser. The sale is consummated when that sanction is given and an order for title made and executed. But when confirmation is made the bargain is then complete and it relates back to the date of sale. Confirmation is an act of consent and approval which the court gives to the sale, and, for all practical purposes the court is the vendor in such cases, and, within the limitations prescribed by law, may give or withhold its consent in its discretion. *Harrell v. Blythe,* 140 N. C., 415, 53 S. E., 232. The power to confirm or to reject a bid cannot be delegated to the commissioner, *Mebane v. Mebane, supra,* or to the clerk, *Dixon v. Osborne,* 201 N. C., 489. The court may, however, confirm a sale *nunc pro tunc* and whenever the decree of confirmation is entered the confirmation relates back to the day of the sale and the purchaser receives his title as of that time. *Dixon v. Osborne,* 204 N. C., 480, and cases there cited.

The decree of confirmation entered by the court below while the trial in this cause was in progress does not purport to have been entered *nunc pro tunc,* but was entered as of the February Term, 1938. If we read an unsatisfactory record correctly, this decree was entered after the judgment roll in the foreclosure proceeding had been offered in evidence and the plaintiff had rested its case, and the record fails to disclose that the judgment roll was re-offered after the report of the commissioner and the order of the clerk and the execution of the deed by the commissioner had been ratified and approved by the judge having jurisdiction. Thus it appears that when this judgment roll was offered it constituted evidence only of an authorized sale and the receipt of an offer to purchase. The sale was not valid as such until confirmed. It follows that when the plaintiff rested it had not offered evidence of any vested title in it to the premises in controversy.

Furthermore, it appears that no issue was submitted to the jury, but the judgment entered by the court below contains, among other recitals, the following: "And the court . . . finds as a fact that the plaintiff is now the owner of and entitled to the immediate possession of the lands described in the complaint. . . ." This deprived defendants of a jury trial, to which they were entitled. The jury only may find controverted issues of fact. Conceding without deciding that the evidence was sufficient to warrant a directed verdict upon the pertinent issues raised by the pleadings and the evidence, this does not justify the court in taking the case from the jury, finding the facts and rendering judgment thereon. The burden of the issue rested upon the plaintiff and it was the duty of the court to submit appropriate issues to the jury to be answered by them under such charge as the court deemed proper. In its failure to do so the court deprived the defendants of a substantial right.

The order entered confirming the sale made by the commissioner, while entered during the progress of this trial, was in fact entered in the foreclosure action. The exception of the defendants thereto is not here properly presented. There was no appeal in the foreclosure action based on the exception of the defendants to the entry of this decree of confirmation and we are, therefore, not authorized to consider the same in this cause. We express no opinion thereon.

For the reasons assigned the defendants are entitled to have their cause submitted to a jury.

New trial.

ELIZABETH MULFORD v. COTTON STATES HOTEL COMPANY, TRADING AS KING COTTON HOTEL.

(Filed 25 May, 1938.)

1. **Negligence § 19b—Nonsuit on ground of contributory negligence may be granted only when but one inference can be drawn from evidence.**

Since the granting of a motion to nonsuit on the ground of contributory negligence involves a determination by the court not only that plaintiff was guilty of negligence but also that such negligence was a proximate cause of the injury, such motion should be denied except in exceptional cases strictly within the rule that the motion may be granted only when but one inference may be reasonably drawn from the evidence.

2. **Negligence § 4d—Evidence held not to show contributory negligence as matter of law on part of invitee injured in fall.**

The evidence tended to show that plaintiff, in going from a merchandise exhibit in the hotel operated by defendant, entered the coffee shop in the building from the basement entrance, that the coffee shop was on a higher level than the basement floor, but that the walls were of the same color, that plaintiff negotiated the step to the coffee shop without mishap, but that after lunch, in leaving the coffee shop by the same entrance, she failed to see the difference in the levels and fell to her injury, that the coffee shop was well lighted, but that the route along the basement was very dimly lit. *Held:* Defendant's motion to nonsuit on the ground of contributory negligence should have been denied, since although the evidence discloses that plaintiff negotiated the entrance in safety in entering the coffee shop, it is a matter of common knowledge that the eye detects difference in levels by light and shadow, and that the ability to detect such difference is affected by whether one is facing or going away from light, and that color sometimes plays a part, and therefore, under the circumstances, whether plaintiff should have seen the step and avoided the injury is a question for the determination of the jury.

APPEAL by plaintiff from *Bivens, J.*, at January Civil Term, 1938, of GUILFORD. Reversed.

That part of the evidence which is pertinent to this appeal is substantially as follows:

Plaintiff was a saleswoman in the Ellis Stone Store at Greensboro, and was charged with the duty of purchasing goods for her department. In the performance of that duty she went to the King Cotton Hotel, inspected a stock of goods on exhibit there, and made purchases therefrom. At lunch time she had not completed her purchases, and was invited by the saleswoman in charge of the stock to lunch with her in the hotel coffee shop.

Plaintiff testified that she had never been to the coffee shop before; and that she entered it by the same way she subsequently made her exit. The light was very dim and "dingy" at the entrance of the coffee shop,

and in the basement along the route she had to traverse. The basement floor and the entrance to the coffee shop were on different levels, requiring a step up or down, according as she entered or made her exit. "There was no notice or sign to step down. There was no hand-railing advising you that there was a change in the level."

The plaintiff testified that she, automatically, or subconsciously stepped up that step in entering the coffee shop. The shop was lighted by electricity and daylight, and was "brilliantly lighted in comparison with the basement entrance."

On going out of the coffee shop, she testifies, the exit as it looked to her was very dim. "As I walked out it all looked on the same level to me. I did not see any difference at all."

The plaintiff fell to the floor and was seriously injured.

At the conclusion of the plaintiff's testimony, the defendant moved for judgment as of nonsuit, which motion was allowed, and plaintiff appealed.

Smith, Wharton & Hudgins for appellee.
Herbert S. Falk for appellant.

SEAWELL, J. The defendant frankly admits that there is sufficient evidence of negligence on the part of the defendant to go to the jury, and such admission is in accord with the inferences to be drawn from the evidence. The only question necessary to a decision of this case is: Was the plaintiff, under the evidence, guilty of such contributory negligence as would bar her recovery, and as would justify the court in rendering a judgment of nonsuit?

In support of the contention that the plaintiff was properly nonsuited on the evidence because of her contributory negligence, the defendant points out that plaintiff had once traversed the dangerous passage on her way to the coffee shop, and had sustained her injury only on her return trip from the shop; that she had become so familiar with the surroundings, and particularly the arrangement of the step, the difference in level, the lighting, and other details to which she attributes her injury, that the court must necessarily find that her own negligence contributed to the injury.

This case is typical of the difficulties which sometimes confront the court in passing upon the question whether, under the evidence, there is such contributory negligence as would bar recovery, and justify the court in taking the case from the jury.

From remote times the court has undertaken to declare what is negligence *per se* on the part of a defendant when there is only one reasonable inference to be drawn from the evidence, but has never, as far as we are aware, undertaken to declare, without the intervention of the jury, that such negligence was the proximate cause of an injury. Since *Neal*

v. R. R., 126 N. C., 634, the Court has undertaken to say, in appropriate cases, what is contributory negligence, in law, barring plaintiff's right of recovery, and to dismiss or nonsuit the action accordingly. In doing so the court necessarily passes upon the question of proximate, or contributing, cause as shown by the evidence of plaintiff's conduct. There is suggested, therefore, a danger of invading the province of the jury.

Since counsel insist upon a more liberal exercise of this power of the court, citing borderline cases in support of their contentions, one might get the impression that the court has not been as meticulous as it has intended to be in respecting the prerogatives of the jury.

Since, as stated, on motions of this kind the court must necessarily deal with evidence tending to show the plaintiff's negligence as well as its proximate causal relation to the injury, no mere conviction on the part of the judge, however profound, that the plaintiff ought not to recover upon the evidence because of contributory negligence, should be sufficient to justify taking the case from the jury. The power to take a case away from the jury upon a favorable finding of the court on defendant's affirmative plea of contributory negligence is exceptional and should be exercised only within the strict limits of its charter.

In *Neal v. R. R., supra,* the first case in this State clearly recognizing such power, the condition on which the court may exercise it is thus stated: "But when the defendant demurred to the plaintiff's evidence, *and but one construction can reasonably be drawn from it,* that is, it could not reasonably mean different things, . . . it certainly became a question of law for the court."

The principle is stated in a concurring opinion in that case, as follows: "When the facts are clearly settled, *from which only one inference can be drawn,* the question is then one of law, for the court to decide, and in such case the court should take the case from the jury and direct a nonsuit or verdict as the case may be." This principle has been frequently affirmed as it applies to both the negligence of the defendant and contributory negligence of the plaintiff, when these are subject to determination by the court. *Wadsworth v. Trucking Co.*, 203 N. C., 730, 166 S. E., 898; *Corum v. Tobacco Co.*, 205 N. C., 213, 171 S. E., 78; *Manufacturing Company v. R. R.*, 122 N. C., 881; *Brown v. Durham*, 141 N. C., 249, 53 S. E., 513; *Foy v. Winston*, 135 N. C., 439, 47 S. E., 466; *Tillett v. R. R.*, 118 N. C., 1031; *House v. R. R.*, 131 N. C., 103, 42 S. E., 533, and citations.

Applying the principle here, we find the present case falls entirely without the rule.

Counsel for appellee rely upon *King v. Thackers, Inc.*, 207 N. C., 869, 178 S. E., 95, as paralleling this case in essential parts and strongly supporting the contention that the plaintiff here was properly nonsuited. But in that case the plaintiff saw the dangerous object and stepped into it. Under the evidence in this case, we cannot say that the circum-

stance that plaintiff passed through this way a short while before sustaining her injury could be held, as a matter of law, to have given her such knowledge of the conditions as would make her guilty of contributory negligence on her return trip.

The eye receives impressions through appearances only. It is conceivable that when plaintiff came out of the coffee shop these appearances were quite different—in fact, that is the unavoidable inference from her testimony. Not that the lights had been shifted or altered in their intensity, but the eyes of the observer had been shifted to an opposite direction, and the incidence of the light upon the eye and upon the objects visualized was different. We get our impressions of the shape of objects and the continuity of surfaces largely from the disposition of light and shadow, although color sometimes plays a part. Usually the stereoscopic effect, afforded by vision with both eyes, gives us a sense of perspective—of the relative positions and distances of objects. But this effect is not of much service when we are dealing with flat surfaces, which, under the lighting conditions, may present an appearance of continuity. These things are matters of common knowledge.

Besides this, the plaintiff testified that she came out of a brilliantly lighted room into a dimly lighted basement; and it may be inferred that her eyes had not become accustomed to the difference in illumination when she encountered the step. She elsewhere testified that the floors were uniformly colored, and so were the walls.

We cannot say that, with respect to contributory negligence, there may be drawn from this evidence only one inference, and that unfavorable to the plaintiff. We do not find contributory negligence on the part of the plaintiff established with that clarity that would justify taking the case from the jury.

The judgment of nonsuit is

Reversed.

F. L. JENKINS, FLORENCE J. RAMSEY, McBRIDE JENKINS GIBSON, WILLIE JENKINS HANKS, AND BEULAH JENKINS HELTON v. ROSE'S 5, 10 AND 25c STORES, INC.

(Filed 25 May, 1938.)

Landlord and Tenant § 22—Lessee is not contractually bound to occupy and use demised premises in absence of express agreement in lease.

The lease in question provided for a minimum monthly rental in a designated sum, with provision that lessee should pay in addition thereto five per cent of its gross sales in excess of a stipulated amount made in the store operated in the building. Lessee operated the store in the

building for several years and paid lessors the minimum rent plus five per cent of its sales over the stipulated amount, but for the year in question lessee operated its store in another building in the city, and paid lessors the minimum monthly rent only. This action was instituted by lessors to recover five per cent of gross sales over the stipulated amount made by lessee in its new location upon plaintiffs lessors' contention that the lease, by implication, required lessee to operate its store in lessors' building. *Held:* In the absence of specific provision in the lease contract that lessee should occupy and use the demised premises, lessee is not bound so to do, and lessors are entitled only to the minimum rent stipulated in the contract for the year in question.

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

APPEAL by defendant from *Rousseau, J.*, at November Term, 1937, of IREDELL. Reversed.

Scott & Collier for plaintiffs, appellees.
Perry & Kittrell and Land & Sowers for defendant, appellant.

SCHENCK, J. This is an action to recover a balance alleged to be due on a rental contract for the year 1936. The plaintiffs are the owners of a certain storehouse in the city of Statesville which they leased to the defendant, under a written lease, for the year 1933. The lease was renewed for the years 1934, 1935 and 1936. The rents for the years 1933, 1934 and 1935 have been paid and received, and there is no controversy as to them. $2,400 has been paid and received, without prejudice to other rights, for the year 1936. The plaintiffs allege and contend that there is still due them the sum of $1,248.18 on rent for the year 1936. The defendant alleges and contends that the $2,400 paid and received was a full settlement of the rent due for the year 1936.

The portion of the lease germane to this controversy reads: "(1) The lessors (the plaintiffs) do hereby demise and let unto the lessee (the defendant) and the lessee agrees to take and pay for, as hereinafter provided, for a period of one (1) year, beginning the 1st day of January, 1933, and ending the 31st day of December, 1933, the following described premises: 'The two-story brick building now occupied by the lessee, located on Center Street, in the city of Statesville.' (2) The lessee shall have and hold said property with the privilege of quiet and unmolested possession for the term of one (1) year, as above set forth, for which the lessee agrees to pay as rental five per cent (5%) of the gross sales made by the store operating in said building during the twelve months from January 1, 1933, to December 31, 1933; the lessee guarantees the lessors a minimum rental of two thousand and four hundred ($2,400.00) dollars for said term of one year, which shall be paid in monthly installments of two hundred dollars ($200.00) per month, at

the end of each month, said minimum rental of $2,400.00 to cover the rental of 5% on the first forty-eight thousand dollars ($48,000.00) of sales made by the store in said building, from January 1, 1933, to December 31, 1933, and upon the expiration of said term if said sales shall have exceeded $48,000.00, the lessee shall account to the lessors for and pay over to them the sum of five per cent (5%) on any sales in excess of $48,000.00 so that the total rent paid shall represent 5% on all sales made by the store in said building during the term of this lease."

The defendant retained the premises under this lease during the years 1933, 1934, 1935 and 1936, and paid to the plaintiffs rents for said years in the sums of $3,126.88, $3,609.07, $3,648.18 and $2,400.00, respectively. During the year 1936 the defendant did not operate any store or business in the demised premises, but conducted its business in another location in Statesville.

The difference in the amount of the rent paid and received for the years 1933, 1934 and 1935 and $2,400.00 represents 5% of the gross sales in excess of $48,000.00 made by the store operated by the defendant in the demised premises during said years. There being no sales made from any store operated in said premises during 1936, the defendant contends that the $2,400.00 paid and received was in full settlement of all rent due by it to the plaintiffs for said year. The plaintiffs, on the other hand, contend that under the lease the defendant was bound to conduct, with reasonable diligence, a store in the demised premises during the existence of the lease, and its failure to do so was a breach of the contract of lease, whereby "the plaintiffs were deprived from receiving the rents and profits that would arise and accrue from the reasonable occupancy of the premises by the defendant for the purpose for which it was leased, in an amount of $1,248.18 over and above the minimum rental of $2,400.00 which the defendant paid the plaintiffs for the year 1936. . . ."

It was agreed by the parties that the judge should find the facts without the intervention of a jury, and render judgment thereupon.

When the plaintiffs had introduced their evidence and rested their case, the defendant moved to dismiss the action and for a judgment as in case of nonsuit, and upon refusal of the motion reserved exception, and the defendant again moved to dismiss after all the evidence on both sides was in. The motion was again refused and defendant reserved exception. C. S., 567.

The judge held and adjudged that the plaintiffs were entitled to recover only by virtue of the written contract, and under the written contract they were entitled to recover the sum of $1,061.38, such amount being 5% of the average gross sales from the store operated by the defendant in the demised premises for the years 1933, 1934 and 1935, less the $2,400.00 paid and received for the year 1936. To the judgment the defendant reserved exception.

An examination of the lease fails to show any stipulation or agreement requiring the defendant to operate a store in the demised premises. The lease shows that the plaintiffs very completely protected their interests in any contingency by requiring a fixed minimum rental of $200.00 per month. Whether the defendant operated a store in the building or whether it operated one successfully was no concern of the plaintiffs unless and until there were sales made on the premises in excess of $48,000.00 during the rental year. If the defendant operated at a loss it must continue to pay the $200.00 per month.

The plaintiffs in their brief admit that "there is no express covenant in the lease that the store will be operated," but contend that such covenant is "implied in the very terms of the contract and the nature of the lease." Such does not seem to be the rule.

The rule applicable to the duty of a tenant to occupy or use the premises is thus stated in the annotations of 46 A. L. R., at page 1134: "Apart from the question of liability for waste, it seems that the tenant is under no obligation, in the absence of specific provision therefor, to occupy or use, or continue to use, the leased premises, even though one of the parties, or both, expected and intended that they would be used for the particular purpose to which they seemed to be adapted or constructed." Authorities are cited to sustain the rule as here stated.

In the absence of any specific provision in the contract of lease that the defendant was to occupy the demised premises and was to operate a store therein during the life of the lease, we are constrained to hold that the $2,400.00 paid and received was a full settlement of the rent due for the year 1936, and that his Honor erred in refusing to allow the motion of the defendant to dismiss the action and for a judgment of nonsuit.

Reversed.

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

E. Y. MEACHAM v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 25 May, 1938.)

1. Railroads § 9—Evidence that engine was not seen by driver because of mist and fog held to prevent nonsuit.

The evidence disclosed that the driver of the truck in question was thoroughly familiar with defendant's crossing, and knew there were four regular tracks and a switch track, that the tender of defendant's engine struck the truck while it was being driven over the fourth track. *Held:*

The further evidence that the approaching engine was not seen by the occupants of the truck in time to have avoided the collision because of mist or fog, prevents the granting of defendant's motion to nonsuit.

2. Same—

When visibility is low because of fog or mist, the increased hazard requires commensurate increase in care at railroad grade crossings, both on the part of travelers and the railroad company; heightened attention on the part of travelers, and increased need of timely warning which travelers have a right to expect on the part of the railroad company.

3. Negligence § 1—

The standard of care required remains that of the reasonably prudent man, the degree of care required under all circumstances being that which he would exercise under the exigencies of the occasion.

4. Railroads § 9—Held: Under evidence court should have charged, as requested, that driver was contributorily negligent unless vision was obstructed by fog.

When the evidence tends to show that the driver of the truck involved in a collision at a grade crossing during the daytime was thoroughly familiar with the crossing, but that he did not see defendant's approaching engine because of mist or fog, the trial court should give, in substance at least, defendant's request for instruction to the effect that the jury should answer the issue of contributory negligence in the affirmative unless it found that the driver's vision was obstructed by fog.

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

APPEAL by defendants from *Finley, Emergency Judge,* at October Special Term, 1937, of MECKLENBURG.

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

Plaintiff was injured about 9 o'clock on the morning of 7 November, 1935, at a railroad crossing in Salisbury, N. C., when the truck he was driving was struck by the tender of an engine operated by the corporate defendant, with Joe Lee the engineer in charge.

Plaintiff testified that he was employed as a truck driver for the Air Reduction Sales Company of Charlotte and was engaged in delivering oxygen and acetylene cylinders on the morning in question; that E. R. Waller, his helper, was sitting on his right in the cab seat; that it had been raining, but had stopped or was misting and there was a heavy fog; that he could see "through this mist that morning" 75 or 100 feet; that he was thoroughly familiar with the crossing and its four regular tracks, plus a switch track, making five in all; that he knew a regular train or shifting engine might be coming across the tracks at any time as the crossing was near the shifting yards of the corporate defendant; that he stopped about ten feet from the switch track, looked and listened and heard nothing; that he next stopped about ten feet of the first track,

looked and listened, and did not hear or see anything; that he then started up again, traveled a distance of forty or fifty feet in low gear at a speed of three or four miles an hour, and was struck by the tender of a shifting engine on the fourth track. "As to whether I looked south (to plaintiff's right and in the direction of the engine), I glanced that way. . . . I glanced south after I started up. I don't know exactly where I was when I glanced south, but it was something like between the first and second tracks. After that I didn't look south any more, looked to my left. I never did see the engine with which I collided. I didn't see the train at all."

Plaintiff's helper testified that he kept a close lookout down the tracks in the direction of Salisbury or towards the south; that he first saw the tender of the engine when the front wheels of the truck were about the fourth track; that he couldn't tell whether the engine was moving or standing still on account of the fog; that it was within 50 or 65 feet before he was able to determine that it was moving—backing up; that no bell or whistle, signal or warning of any kind was given of its approach; that its speed was from 40 to 50 miles an hour; that he called out to the plaintiff to "look out" just before it hit the truck.

The evidence on behalf of the defendants tends to show quite a different state of facts. The engineer testified that he saw the truck and thought it would stop; that he gave the usual signals, and applied the emergency brakes when he discovered the truck was on the fourth track; that the rain had ceased falling and while there was some slight mist, there was no fog; that he was running around fifteen or twenty miles an hour and "I think the truck was making about the same speed, around 12 to 15 miles an hour. . . . The truck did not stop—didn't make any halt whatever."

The motions for nonsuit were overruled, and in apt time the defendants requested the court to instruct the jury that "unless you find the plaintiff's vision was obstructed by a fog, you should answer the second issue (contributory negligence), 'Yes.'" Refused; exception.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff.

From judgment on the verdict, the defendants appeal, assigning errors.

D. E. Henderson, H. L. McCormick, and Charles S. Rhyne for plaintiff, appellee.

W. T. Joyner and John M. Robinson for defendants, appellants.

STACY, C. J. The one circumstance which saves the case from nonsuit, *Godwin v. R. R.*, 202 N. C., 1, 161 S. E., 541; *Eller v. R. R.*, 200 N. C., 527, 157 S. E., 800, and carries it to the jury, *Dancy v. R. R.*, 204 N. C., 303, 168 S. E., 200; *Butner v. R. R.*, 199 N. C., 695, 155

S. E., 601, is the presence of evidence tending to show low visibility from fog or mist. *Parker v. R. R.*, 181 N. C., 95, 106 S. E., 755; *Johnson v. R. R.*, 163 N. C., 431, 79 S. E., 690; *Morrow v. R. R.*, 146 N. C., 14, 59 S. E., 158. Compare *Loflin v. R. R.*, 210 N. C., 404, 186 S. E., 493; *Weston v. R. R.*, 194 N. C., 210, 139 S. E., 237; *Lee v. R. R.*, 180 N. C., 413, 105 S. E., 15. Opaqueness of the atmosphere, if established, increased the need of timely warning which the plaintiff had a right to expect, *Quinn v. R. R., ante*, 48, and heightened the need of attention on his part. *Lee v. R. R., supra.* Due care, *i.e.*, commensurate care under the circumstances, was required of both. *Small v. Utilities Co.*, 200 N. C., 719, 158 S. E., 385. The accepted standard under varying conditions is the conduct of the reasonably prudent man. *Cole v. R. R.*, 211 N. C., 591, 191 S. E., 353. "The standard is always the conduct of the reasonably prudent man, or the care which a reasonably prudent man would have used under the circumstances. *Tudor v. Bowen*, 152 N. C., 441, 67 S. E., 1015. The rule is constant, while the degree of care which a reasonably prudent man exercises varies with the exigencies of the occasion." *Diamond v. Service Stores*, 211 N. C., 632, 191 S. E., 358.

It follows, therefore, that the case should have been made to turn on the finding of this fact in accordance with the defendants' prayer. *Lee v. R. R.*, 212 N. C., 340; *Lincoln v. R. R.*, 207 N. C., 787, 178 S. E., 601; *Harris v. R. R.*, 199 N. C., 798, 156 S. E., 102.

Speaking to the mutual and reciprocal duties of trainmen and travelers on approaching a public crossing, in *Moore v. R. R.*, 201 N. C., 26, 158 S. E., 556, *Adams, J.*, delivering the opinion of the Court, said: "When approaching a public crossing the employees in charge of a train and a traveler upon the highway are charged with the mutual and reciprocal duty of exercising due care to avoid inflicting or receiving injury, due care being such as a prudent person would exercise under the circumstances at the particular time and place. 'Both parties are charged with the mutual duty of keeping a careful lookout for danger and the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty.' *Improvement Co. v. Stead*, 95 U. S., 161, 24 Law Ed., 403, cited in *Cooper v. R. R.*, 140 N. C., 209. On reaching the crossing and before attempting to go upon it, a traveler must use his sense of sight and hearing—must look and listen for approaching trains if not prevented from doing so by the fault of the railroad company; and this he should do before entering the zone of danger. *Johnson v. R. R.*, 163 N. C., 431; *Holton v. R. R.*, 188 N. C., 277; *Butner v. R. R.*, 199 N. C., 695. This, as we understand it, is the prevailing rule. At any rate it is observed and has often been applied by this Court."

Plaintiff makes the point that the requested instruction is too narrow in that it omits the use of the word "mist" in connection with the word "fog." It is true some of the witnesses speak of the "mist," others of the "fog," and in several instances, perhaps both words are used, but it is conceded that the two were employed interchangeably throughout the trial. The gist of the prayer is, that unless plaintiff's vision was obstructed or obscured, he ought not to recover, because admittedly he drove directly in front of an on-coming engine, which he should have seen but for the atmospheric condition. *Bullock v. R. R.*, 212 N. C., 760; *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598; *Coleman v. R. R.*, 153 N. C., 322, 69 S. E., 251; *Cooper v. R. R.*, 140 N. C., 209, 52 S. E., 932. We think the substance of the instruction should have been given. *Parks v. Trust Co.*, 195 N. C., 453, 142 S. E., 473; *Baker v. R. R.*, 144 N. C., 36, 56 S. E., 553.

The case lends itself to much writing, as was said in *Eller v. R. R., supra,* but, in the end, it all comes to the single question whether the requested instruction should have been given. We are constrained to hold that it should. This necessitates another hearing.

New trial.

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

F. B. GURGANIOUS v. J. M. SIMPSON, CORONER, DR. P. A. SHELBURNE, DR. H. C. WARWICK, DR. ROY M. SMITH, AND REICH FUNERAL HOME, INC.

(Filed 25 May, 1938.)

1. Dead Bodies § 5—

A father may maintain an action for the wrongful mutilation of the dead body of his son, including mutilation by unauthorized autopsy.

2. Coroners § 2—

A coroner has no authority to perform an autopsy in cases where there is no suspicion of foul play. C. S., 1020; ch. 209, Public Laws of 1933 (N. C. Code, 5003 [1]).

3. Public Officers § 8—

As a general rule, a public officer is not protected from liability on account of his office when the act complained of is outside the scope of his duties, and a public officer is charged with observing the legal limitations upon his authority, especially where rights of third persons are involved.

4. Dead Bodies § 5—Coroner and physicians performing unauthorized autopsy may be held liable for wrongful mutilation.

Both the coroner and physicians performing an autopsy on a dead body, under the coroner's direction, may be held liable by the father of the deceased for wrongful mutilation when the autopsy is ordered by the coroner on his own initiative solely to ascertain the cause of death without suspicion of foul play, since in such case the coroner is without authority to order the autopsy, and his direction therefor can confer no immunity upon the physicians.

5. Same—

Evidence that agents of a funeral home merely failed to object to the performance of an unauthorized autopsy by physicians under direction of the coroner, is insufficient to establish a cause of action against it for wrongful mutilation.

APPEAL by plaintiff from *Hill, Special Judge,* at February Term, 1938, of GUILFORD.

Affirmed as to defendant Reich Funeral Home.

Reversed as to defendants Simpson, Shelburne, Warwick, and Smith.

Action to recover damages for mutilation of the dead body of plaintiff's son. An unauthorized autopsy is alleged. The county coroner, three physicians and an incorporated funeral home are joined as parties defendant. At the close of plaintiff's evidence judgment of nonsuit as to all defendants was entered, and plaintiff appealed.

Paul Strickland and Wm. L. Robinson for plaintiff, appellant.
Hines & Boren and Sapp & Sapp for defendants, appellees.

DEVIN, J. The right of a father to prosecute an action for damages for the wrongful mutilation of the dead body of his son has been established by the decisions of this Court (*Kyles v. R. R.,* 147 N. C., 394, 61 S. E., 278; *Floyd v. R. R.,* 167 N. C., 55, 83 S. E., 12; *Morrow v. R. R., ante,* 127), and this principle has been extended to include an action based upon an unauthorized autopsy. *Stephenson v. Duke University,* 202 N. C., 624, 163 S. E., 698. The right to bury the dead is generally treated as a *quasi* right of property, and the mutilation of the body held actionable. *Kyles v. R. R., supra; Larsen v. Chase,* 47 Minn., 307.

Here the plaintiff's evidence shows that the autopsy on the body of plaintiff's son was performed by reputable physicians, at a funeral home, by the direction of the county coroner. There is no suggestion that any of these were acting otherwise than in good faith. Under these circumstances will an action for damages lie against them, or any of them? Let us examine the facts upon which liability is claimed.

It appears from the evidence offered by the plaintiff that the body of his minor son was discovered in the Y. M. C. A. swimming pool, in Greensboro, apparently drowned. The plaintiff lives in Wilmington. None of the next of kin of deceased were in the county. The coroner was called in, and he, upon finding no water in the lungs and neck unbroken, had the body removed to the funeral home of one of the defendants, and called in three physicians to make an autopsy to determine the cause of death. The autopsy revealed that death was due to an acute heart attack. It was testified that the defendant Simpson (the coroner) had said "he had the autopsy performed to determine the cause of death, that he had no suspicion of foul play, that no inquest was held." The admission in the answer of the defendant physicians, that they were requested and directed to perform the autopsy "for the purpose of determining the cause of death," was offered in evidence. Admittedly no permission from the father of the deceased, nor any of his kin, was asked or obtained. The father testified he would not have given his consent if it had been requested. He further testified that knowledge of the autopsy on the body of his son shocked and unnerved him equally with the news of his death. There was no evidence that the defendant funeral home offered objection to the autopsy being made, or did anything to prevent it.

The duties and powers of a coroner are prescribed by C. S., 1020. It is apparent from an examination of this statute that no authority is there given the coroner in cases where he does not suspect foul play and where no inquest is held or jury summoned, upon his own initiative, to cause an autopsy to be performed merely to ascertain the cause of death of a person. This statute authorizes an investigation "whenever it appears that the deceased probably came to his death by the criminal act or default of some person," and in such case empowers the coroner "to summon a physician or surgeon and to cause him to make such examination as may be necessary whenever it appears to such coroner as proper to have such examination made."

The right to perform an autopsy is expressly limited by ch. 209, Acts of 1933 (codified in Michie's N. C. Code as section 5003 [1]), where it is provided: "The right to perform an autopsy upon the dead body of a human being shall be limited to cases specially provided by statute or by direction or will of the deceased; cases where a coroner or the majority of a coroner's jury deem it necessary upon an inquest to have such an autopsy; and cases where the husband or wife or one of the next of kin or nearest known relative or other person charged by law with the duty of burial, in the order named and as known, shall authorize such examination or autopsy."

By C. S., 4518, in cases of homicide, the prosecuting officer for the State may direct a *post mortem* examination of the deceased.

It follows that an unauthorized autopsy to determine the cause of death where foul play is not suspected, though ordered by the coroner under color of his office, is in violation of the rights of the next of kin of the deceased, and that the coroner is not protected by the official capacity in which he purports to act. The duty to ascertain the limits of his authority and to observe the law, particularly where the rights of others were affected, was incumbent upon this defendant.

The general rule is that when an officer goes outside the scope of his duty he is not entitled to protection on account of his office, but is liable for his acts like any private individual. 46 C. J., 1043; *Moffitt v. Davis*, 205 N. C., 565, 172 S. E., 317; *Coty v. Baughman*, 50 S. D., 372; 48 A. L. R., 1205; 52 A. L. R., 1447.

It also follows that the physicians who performed the autopsy at the direction of the coroner, upon his request that this be done merely to determine the cause of death, and without the consent of the next of kin, are equally unprotected from liability for an unauthorized invasion of the rights of those injuriously affected. *Woods v. Graham*, 140 Minn., 16.

There was no testimony that the agents of the defendant funeral home did more than fail to offer objection to the action of the coroner by whom the body was brought to its home, and it is not perceived how this evidence can be held sufficient to impose liability for an unauthorized autopsy performed by others and with which it had nothing to do.

It may be noted, in justice to the defendants, that the plaintiff's evidence shows that the autopsy was carefully performed, that there was no mutilation of the body other than an incision sixteen inches long, carefully closed and sewn, and that this did not show when the body was clothed for burial. It also appeared that the marks on the body were but little more than those which would have been rendered necessary in the ordinary process of embalming.

While the defendants doubtless have available testimony tending to controvert the plaintiff's case in material particulars, on a motion for judgment of nonsuit the uniform rule is that the evidence must be considered in its most favorable aspect for the plaintiff. Viewed in this light, we reach the conclusion that as to defendant Reich Funeral Home, Inc., the judgment of the Superior Court should be affirmed, and that as to the defendants Simpson, Shelburne, Warwick and Smith, the judgment of nonsuit should be reversed.

Affirmed as to defendant Reich Funeral Home.

Reversed as to defendants Simpson, Shelburne, Warwick and Smith.

STATE v. ERNEST FEYD.

(Filed 25 May, 1938.)

1. Burglary § 9—

Evidence in this case *held* sufficient to be submitted to the jury on charge of burglary in the first degree.

2. Burglary § 10c: Criminal Law § 53d—Evidence held to require submission of question of guilt of lesser degrees of the crime charged.

The State's evidence tended to show that defendant broke and entered the dwelling house in question at night while same was occupied as a sleeping apartment, stole some money and ran when the female occupant discovered him and screamed. Defendant contended, upon supporting evidence, that at the time he was too drunk to know where he was or what he was doing. The court instructed the jury that defendant might be convicted of burglary in the first degree, or of burglary in the second degree, if they found that the room was unoccupied, but if they found defendant was too drunk to form felonious intent they should return a verdict of not guilty. *Held:* The instruction required the jury to find the defendant guilty of burglary in the first degree or not guilty, since there was no evidence that the room was unoccupied, and defendant is entitled to a new trial for error of the court in failing to instruct that defendant might be found guilty of breaking and entering otherwise than burglariously, C. S., 4235, or of an attempt to commit the offense. C. S., 4640.

3. Criminal Law § 81c—

Error in failing to submit the question of defendant's guilt of lesser degrees of the crime charged is not cured by a verdict of guilty as charged in the indictment.

4. Criminal Law § 81d—

When a new trial is awarded on one exception, other exceptions relating to matters not likely to arise on the subsequent hearing need not be determined.

APPEAL by defendant from *Harding, J.*, at November Term, 1937, of GUILFORD. New trial.

The defendant was convicted of burglary in the first degree, and from judgment imposing sentence of death, he appeals.

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

Sol Bernard Weinstein and James E. Coltrane for defendant.

DEVIN, J. The bill of indictment charged the defendant with feloniously and burglariously breaking and entering, in the nighttime, the dwelling house of Mary E. Kinsland and Helen G. Moore in the city of

Greensboro, the house being then actually occupied by them as a sleeping apartment, and that the breaking and entry was with the intent to steal, and also to ravish the named occupants.

The defendant's motion for judgment of nonsuit was properly denied. The testimony offered at the trial was sufficient to support the charge, both of the unlawful breaking and entry and of the felonious intent in both the particulars alleged in the bill.

Miss Mary E. Kinsland testified, in substance, that she and Miss Moore occupied the same apartment, and that on the occasion alleged they went to bed about 11:30 p.m., and that the doors leading into the hallway and into their apartment were closed but not locked; that she was awakened about 4:00 a.m. by the presence of someone (later identified as the defendant) lying beside her on the bed; that she screamed and the man ran; that forty cents was missing from her pocketbook; that the man's coat, shoes and overalls were on the floor at the foot of the bed. The State also offered evidence tending to show that the defendant was found about 7:30 the same morning asleep under a bed in a house not far away, and that he had forty cents in his pocket; that he told the officers that he and another man entered the apartment through the door, looking for money, that both of them entered the apartment.

The defendant testified and offered evidence tending to show that he was in such a drunken condition on the night in question that he did not know where he was or what he was doing, and that he thought he was going home and did not remember going into any house. He denied making the statements to the officers. The State's witnesses, however, testified the defendant ran from the apartment when discovered, that he was not drunk when arrested three and a half hours later, and that the other man was not with him at the time of the entry.

The defendant, among other exceptions, assigns as error the failure of the learned judge who presided over the trial to permit the jury to consider a less degree of the crime of burglary or a lesser offense cognizable under the bill of indictment (C. S., 4640), and that he charged the jury in effect that they could only return a verdict of guilty of burglary in first degree or not guilty. While it is true the court charged the jury that if they found the dwelling house was unoccupied, they should convict the defendant of burglary in second degree, there was no evidence to support that view. All the evidence tended to show that the house was actually occupied at the time of the entry charged. But the defendant contends that there was evidence from which the jury might have found that the entry was otherwise than by a burglarious breaking, constituting the lesser offense defined by C. S., 4235, and that the jury should have been so instructed. In support of this position

defendant cites *S. v. Allen,* 186 N. C., 302, 119 S. E., 504, and *S. v. Spain,* 201 N. C., 571, 160 S. E., 825.

In the *Allen case, supra,* the bill of indictment and the facts were very similar to those in the instant case. There the evidence showed that the defendant, in the nighttime, entered the dwelling house by raising a window, and crawled under the bed of Mrs. Allen, and that she was awakened by his putting his hand on her. The defendant offered evidence that he was so drunk he did not know where he was or what he was doing. The court stated the principles of law applicable to the different phases of the evidence under the bill of indictment, as follows: "It is a well recognized rule of practice with us that where one is indicted for a crime, and under the same bill it is permissible to convict him of 'a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime' (C. S., 4640), and there is evidence tending to support a milder verdict, the prisoner is entitled to have the different views presented to the jury, under a proper charge, and an error in this respect is not cured by a verdict convicting the prisoner of the crime as charged in the bill of indictment, for in such case it cannot be known whether the jury would have convicted of a less degree or of an attempt if the different views, arising upon the evidence, had been correctly presented to them by the trial court. *S. v. Williams,* 185 N. C., 685, and cases there cited. The number of verdicts which the jury may render on an indictment for burglary in the first degree, under our present procedure, must be determined by the evidence and the manner in which the bill of indictment is drawn. . . . Under the last form just mentioned (charging breaking and entry with intent to commit a felony, and also charging commission of the felony), the prisoner may be convicted of burglary in the first degree, or of burglary in the second degree, depending on whether or not the dwelling house was actually occupied at the time, or of an attempt to commit either of said offenses, or he may be convicted of a nonburglarious breaking and/or entering of the dwelling house of another, under C. S., 4235, or of an attempt to commit said offense, though the State may fail to prove the commission of the felony as charged."

In *S. v. Spain, supra, Stacy, C. J.,* applying the rule stated in the *Allen case, supra,* uses this language: "But it seems that the case might have been submitted to the jury on the charge of breaking or entering the dwelling house in question, other than burglariously, with intent to commit a felony or other infamous crime therein, contrary to the provisions of C. S., 4235, or of an attempt to commit such offense. *S. v. Spear,* 164 N. C., 452, 79 S. E., 869; *S. v. Fleming, supra* (107 N. C., 905). It is provided by C. S., 4640, that upon the trial of any indictment the prisoner may be convicted of the crime charged therein, or of a

less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime. *S. v. Ratcliff, supra* (199 N. C., 9); *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187; *S. v. Brown,* 113 N. C., 645, 18 S. E., 51." *S. v. Walls,* 211 N. C., 487.

In the case at bar the judge charged the jury to the effect that if the State had failed to satisfy them beyond a reasonable doubt that defendant broke and entered the room, occupied as a sleeping apartment, in the nighttime, or that he had at the time the intent to commit the felony of larceny or rape, they could not convict him; that if they found beyond a reasonable doubt that the defendant broke and entered the occupied sleeping apartment, in the nighttime, with intent to commit the felonies charged, they should convict him of burglary in first degree, but if they found the room was unoccupied, they could not convict him of burglary in first degree, but of burglary in second degree. But that if they found he was too drunk to understand what he was doing and was unable to form in his mind any purpose or intent to steal or rape, they should return a verdict of not guilty. Thus the jury was given no alternative but to return a verdict of guilty of burglary in first degree (there being no evidence whatever that the room was unoccupied) or not guilty. The charge failed to accord to the defendant the right to have the jury consider the phase of a nonburglarious entry, or of an attempt to commit the offense under the rule laid down in the *Allen* and *Spain cases, supra.* The defendant having been convicted of a capital felony, we must regard the error pointed out as material, necessitating a new trial.

As the questions presented by defendant's other assignments of error may not be raised on another trial, we deem it unnecessary to discuss them.

New trial.

J. B. KENNEDY v. HIGH POINT SAVINGS & TRUST COMPANY AND MRS. SUSIE E. MILLIKIN, ADMINISTRATORS C. T. A. OF ESTATE OF J. ED MILLIKIN, DECEASED.

(Filed 25 May, 1938.)

1. Cancellation of Instruments § 15—

In an action to cancel or rescind a contract of sale for fraud, upon return or tender of the property received, the buyer is entitled to recover the price paid.

2. Fraud § 13—In action for fraud, plaintiff is entitled to recover the difference between real value and value if article were as represented.

Plaintiff instituted this action to recover for alleged fraud in the sale of a mortgage and note secured thereby, alleging that he was induced to purchase same by fraudulent representations that the mortgage and note

were good and the property would bring more than the amount of the note, when in fact the *feme* mortgagor had denied she had signed same to the knowledge of plaintiff's transferor. *Held:* The measure of damages plaintiff is entitled to recover upon a favorable verdict upon the issue of fraud is the difference in the actual value of the mortgage and note and their value if they had been as represented, and a charge of the trial court giving the jury no other guide as to the measure of damages except an instruction that they might consider the amount of the purchase price paid by plaintiff, is error entitling defendants to a new trial.

3. Appeal and Error § 41—

When a new trial is awarded on one exception, other exceptions relating to matters not likely to arise on a subsequent hearing need not be considered.

APPEAL by defendants from *Harding, J.*, at November Term, 1937, of GUILFORD. Reversed.

The action was instituted in the municipal court of the city of High Point. Judgment was there rendered upon verdict in favor of the plaintiff and the defendants appealed to the Superior Court of Guilford County, assigning errors. The judge of the Superior Court overruled all the assignments of error and affirmed the judgment of the municipal court.

Defendants, preserving their exceptions noted in the trial court, appealed to the Supreme Court.

M. W. Nash for plaintiff, appellee.
Frazier & Frazier for defendants, appellants.

DEVIN, J. The plaintiff's cause of action was based upon allegations of fraudulent representations made by defendants' testator, J. E. Millikin, whereby plaintiff was induced to purchase at the price of $1,238.42 a note and mortgage on real property purported to have been executed by G. W. Payne and wife, Elizabeth Payne. There was testimony tending to show that J. E. Millikin fraudulently represented to the plaintiff, as an inducement to the purchase, that the note and mortgage were good and that the property embraced in the mortgage would sell for more than the debt thereon, whereas the said Millikin knew that the papers had not been signed by Elizabeth Payne, and that she denied liability thereon. There was also evidence tending to show that the mortgage had no appreciable value, and that no bids were placed on the property when offered for sale under foreclosure, and that plaintiff, having borrowed the money from a bank to pay the purchase price of the note and mortgage and having placed the papers as collateral to his note therefor, had judgment taken against him on his note to the bank, his homestead

laid off and the excess sold and proceeds in the sum of $400 applied by the bank to its judgment.

The defendants denied that the representations relied on were made by their testator, or that the note and mortgage were in any respect invalid, and further, that the plaintiff was aware of the fact that Elizabeth Payne denied she had signed the papers. It appears that the date of the purchase of the note and mortgage by plaintiff, and the transfer and assignment of the papers by J. E. Millikin was 6 July, 1931, and that G. W. Payne, the husband of Elizabeth Payne, had died in March, 1931. It does not appear that Elizabeth Payne had more than a dower interest in the property after the death of her husband, or right of possession for life under C. S., 4103. It appears that neither Elizabeth Payne nor the estate of G. W. Payne is solvent.

The issues submitted to the jury by the court were these:

"1. Was the plaintiff induced to purchase the note and mortgage set out in the complaint by the false and fraudulent representations of J. Ed Millikin?

"2. What damage, if any, is the plaintiff entitled to recover?"

The defendants assigned as error that the trial judge charged the jury upon the second issue as follows:

"Now, the court charges you, gentlemen of the jury, if you come to answer this second issue, that it is a matter for you to say how much the plaintiff in this case has been damaged. You have a right to take into consideration what was the consideration involved in the transaction between the plaintiff and the deceased, J. Ed Millikin, and, if you have been satisfied by the greater weight of the evidence on this second issue that the plaintiff has been damaged, then it is a matter left for you to say how much he has been damaged, and you may take into consideration the sum of $1,238.42, when you come to pass upon that question, and the court charges you that whatever amount you award in answer to this issue, if you come to answer this issue, then the plaintiff in this case would be entitled to recover interest on whatever sum you find he is entitled to recover from 6 July, 1931."

The exception to this portion of the charge should have been sustained by the judge of the Superior Court.

The charge of the trial court as to the measure of damages in an action based upon fraud in the sale of personal property, under the allegations and testimony in this case, cannot be upheld. How much the plaintiff had been damaged was left to the jury to determine, with no definite guide other than the instruction, "You may take into consideration the sum of $1,238.42 when you come to pass upon this question."

Ordinarily, when the buyer has been induced by fraudulent representations to purchase property, he is entitled to rescind the contract upon return or tender of the property received, and to recover the price

paid. *May v. Loomis,* 140 N. C., 350, 52 S. E., 728. But when the property is retained by the purchaser, or cannot be redelivered, it is established by the uniform decisions of this Court that the measure of his damages is the difference between the real value of the property and the value it would have had if it had been as represented. *Lunn v. Shermer,* 93 N. C., 164; *Hoke v. Whisnant,* 174 N. C., 658, 94 S. E., 446; *Morrison v. Hartley,* 178 N. C., 618, 101 S. E., 375; *Wolf Co. v. Mercantile Co.,* 189 N. C., 322, 127 S. E., 208; *Frick Co. v. Shelton,* 197 N. C., 296, 148 S. E., 318.

The general rule is stated in Corpus Juris as follows: "The measure of damages sustained by the purchaser, when a purchase has been induced by fraud, is, according to the weight of authority, the difference between the real value of the property purchased and the value which it would have had had the representations been true." 27 C. J., 92.

Though not material to the decision of this appeal, it may be interesting to note that the trial in the municipal court was had in May, 1936, and that defendants' motions to set aside the verdict and for new trial were continued by the court, with consent of the parties, until the conclusion of an action which the court suggested should be brought by the bank against Elizabeth Payne to foreclose the mortgage, in order to determine the question of the validity of the papers. The trial of the suggested action, in the Superior Court of Guilford County, resulted in judgment for the bank (Elizabeth Payne not appearing at the trial either in person or by attorney). Decree of foreclosure was entered March Term, 1937, and the property sold, but, as was reported, "in view of the large amount of taxes and street assessments against said property, the highest bid that could be obtained for said land was $100," subject to the encumbrances. Presumably this amount was applied on the bank's judgment against the plaintiff. Notwithstanding the result of these proceedings, which were carried on pending the motion to set aside the verdict in the case under review, the trial judge declined to set aside the verdict and signed the judgment appealed from on 4 June, 1937.

As the error in the judge's instruction to the jury in the trial court, hereinbefore pointed out, is material, requiring a new trial, we do not deem it necessary to decide the other questions presented by the assignments of error, as they may not arise upon another hearing. The judgment of the Superior Court is reversed, with directions that the cause be remanded to the municipal court of the city of High Point to the end that a new trial be had.

Reversed.

HERBERT C. GRIGGS AND WIFE, COLON B. GRIGGS, v. H. BATTLE GRIGGS AND WIFE, ESSIE S. GRIGGS.

(Filed 25 May, 1938.)

1. Appeal and Error § 40f—

Upon appeal from judgment sustaining a demurrer, the Supreme Court will examine the allegations of the complaint to ascertain if they are sufficient, under the rule of liberal construction, to state a cause of action.

2. Fraud § 9: Reformation of Instruments § 7—

In an action for reformation of a deed for fraud, the facts constituting the alleged fraud must be set up with such particularity as to show all the elements of actionable fraud, including fraudulent intent.

3. Same—Allegations held insufficient to allege actionable fraud.

The complaint alleged that plaintiffs signed a certain deed believing same conveyed only certain designated real estate, that the deed also conveyed plaintiffs' interests in certain estates, that the attorney representing both plaintiffs and the grantees read only the part of the deed purporting to convey the designated real estate, told the male plaintiff that it was all right to sign same, and gave same to him to obtain the *feme* plaintiff's signature, that in reliance upon the representations plaintiffs signed same without reading its provisions. *Held:* In plaintiffs' action for reformation for mistake induced by fraud, defendants' demurrer was properly sustained, the complaint failing to allege the essential element of fraudulent intent, or any trick or device to prevent plaintiffs from reading the instrument, or mistake on the part of either.

4. Debt, Action of, § 2: Bills and Notes § 24—Mere allegation that defendant is indebted to plaintiff without stipulating facts held insufficient.

For a first cause of action plaintiff alleged that he executed deed to defendant and received purchase money notes, that the deed conveyed not only the property grantors intended to convey, but also grantors' interest in other realty, and sought reformation of the deed for mistake induced by fraud. For a second cause of action plaintiff alleged that defendant was indebted to plaintiff in a stipulated sum with interest. *Held:* Defendant's demurrer to the second cause of action was properly sustained, since if the debt declared on referred to the notes alleged in the first cause of action, there is no allegation that they were executed by defendant, nor is it alleged that the debt was for the land intended to be conveyed, and if the debt were for the interests sought to be stricken from the deed, plaintiffs are seeking inconsistent remedies.

APPEAL by plaintiffs from *Phillips, J.*, at March Term, 1938, of ANSON. Affirmed.

Action for reformation of deed on the ground of fraud and mistake, and for the recovery of an alleged debt. Defendants' demurrer for failure to state a cause of action and for improper joinder of causes of action was sustained, and plaintiffs appealed.

Vann & Milliken and Barrington T. Hill for plaintiffs.
J. C. Sedberry for defendants.

DEVIN, J. The case comes to us upon appeal from a judgment sustaining a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and for improper joinder of causes of action.

This makes it necessary that we examine the allegations of the complaint, under the rule requiring liberal construction, in order to determine whether a cause of action has been sufficiently set out. The material facts alleged may be stated as follows:

As a first cause of action, it is alleged that plaintiffs are residents of Robeson County, and that defendants reside in Anson County; that on and prior to 15 August, 1934, Fred J. Cox, an attorney of Wadesboro, represented plaintiffs in the matter of the sale of certain real property in Wadesboro; that plaintiff Herbert C. Griggs and defendant H. Battle Griggs (who are brothers) each owned an interest in the estates of Henry Haynie and Sarah A. Griggs, and that defendant had retained the same attorney to collect his interest in these estates. The plaintiffs further allege in their complaint:

"That on or about 15 August, 1934, the plaintiffs, at the instance of the said Cox, who was acting for the defendant H. Battle Griggs, or within the scope of his authority as attorney for H. Battle Griggs, executed a certain paper writing in the form of a deed which, as they thought and believed, conveyed only their interests in the Wadesboro property. That the said paper writing was prepared by the said Cox at the instance of the defendant H. Battle Griggs, and when the said Cox undertook to read same to the plaintiff Herbert C. Griggs, he read only the part of said paper writing purporting to convey the Wadesboro property, told the said plaintiff that the paper writing was a deed for the Wadesboro property, that it was perfectly safe and all right for him to sign same, advising him to sign it immediately, have his wife to sign it, and return it to him at once as he was in a hurry to get back to Wadesboro.

"That at the same time and as evidence of the debt due plaintiff Herbert C. Griggs for the purchase price of said real estate interests, the said Cox delivered to the plaintiff Herbert C. Griggs four promissory notes under seal in the sum of $500.00, each dated 15 August, 1934, and maturing on 15 November, 1934, 1935, 1936, and 1937, bearing interest from maturity of each at the rate of six per cent per annum, and that Fred J. Cox requested this plaintiff to endorse the note due 15 November, 1937, and retained and kept same as his compensation for services rendered or to be rendered the plaintiff as his attorney.

"That as a result of the fraud and deceit of the defendant H. Battle Griggs, by and through the said Cox, being lulled into security by their confidence in the said Cox to the knowledge of H. Battle Griggs, these plaintiffs did not read the said paper writing and signed same without reading it, upon the advice of the said Cox, who was acting for the said H. Battle Griggs, and unknown to these plaintiffs the said paper writing undertook to convey to the defendant H. Battle Griggs, not only the Wadesboro property hereinbefore mentioned, but also all right, title and interest of the plaintiffs in and to the property of every kind and description, including real, personal and mixed, that may be coming to them or either of them from the estate of Henry Haynie, deceased, or the estate of Sarah A. Griggs, deceased, which they would not have conveyed by said paper writing except as a result of the fraud and deceit practiced upon them."

By this action plaintiffs are seeking to have the deed executed by them on 15 August, 1934, reformed by striking from the description of the property therein conveyed plaintiffs' interest in the Haynie and Griggs estates, and this on the ground of mistake on the part of the plaintiffs and fraud on the part of defendants. *Dameron v. Lumber Co.*, 161 N. C., 495, 77 S. E., 694. The demurrer raises the question whether sufficient facts are alleged to constitute a cause of action for this purpose.

It is an elementary rule of pleading that the mere allegation that an act was induced by fraud is insufficient. The facts constituting the fraud must be set out with such particularity as to show all the necessary elements of actionable fraud which would entitle the pleader to relief. The facts relied upon to constitute fraud, as well as the fraudulent intent, must be clearly alleged. *Willis v. Willis*, 203 N. C., 517, 166 S. E., 398; *Colt v. Kimball*, 190 N. C., 169, 129 S. E., 406; *Bank v. Seagroves*, 166 N. C., 608, 82 S. E., 947. Here it is alleged that plaintiffs' own attorney, in reading the deed to them, failed to call their attention to the fact that other property, in addition to the Wadesboro lots, was included in the description of property conveyed. It is further alleged that the attorney was at the time acting also for the defendants, and that he told the plaintiff it was perfectly safe for him to sign the deed, and advised that he have his wife sign it and return it to the attorney. It is also stated in the complaint that plaintiff did not read the paper writing and signed it without reading it; and that at the same time, as evidence of the debt due plaintiff "for the purchase price of said real estate interests," the said Cox delivered to plaintiff four notes in the sum of $500.00 each, and that plaintiff endorsed one of the notes which the attorney retained as compensation for his services to plaintiff.

There is no allegation of fraudulent intent on the part of the defendants or the attorney. No mistake on the part of either is alleged. It does not appear by whom the notes were signed, but it is stated that they

were received by plaintiff in consideration of "said" real estate interest, apparently referring to the real estate conveyed by the deed. The failure of the plaintiff to read the paper writing he signed and to understand what he was conveying must be attributed to his own negligence. No trick or device is alleged. *Lumber Co. v. Sturgill,* 190 N. C., 776, 130 S. E., 845; *Newbern v. Newbern,* 178 N. C., 3, 100 S. E., 77; 53 C. J., 926. A consideration of the allegations of the complaint, therefore, leads us to the conclusion that the plaintiffs have failed to state facts sufficient to constitute a cause of action for fraud on the part of defendants, which, coupled with mistake on plaintiffs' part, would entitle them to the equity of reformation.

For a second cause of action plaintiffs allege: "That the defendant H. Battle Griggs is indebted to the plaintiff Herbert C. Griggs in the sum of $500.00, with interest on same from 15 November, 1934; $500.00, with interest from 15 November, 1935; and $500.00, with interest from 15 November, 1936."

The second cause of action attempted to be set up in the complaint is equally vulnerable. It is not alleged in what manner or for what cause the defendant H. Battle Griggs is indebted to the plaintiff Herbert C. Griggs. A complaint which merely states that the defendant is indebted to plaintiff, and that the debt is due, is demurrable. McIntosh Prac. & Proc., 388-9; *Moore v. Hobbs,* 79 N. C., 535; *Webb v. Hicks,* 116 N. C., 598, 21 S. E., 672. If the debt declared on is that referred to in the sixth paragraph of the first cause of action, as evidenced by notes given for the purchase of real estate interests, it is not alleged that the notes were executed by defendant H. Battle Griggs. If it be contended that the debt is for the purchase of the Wadesboro property, it is nowhere so alleged. If the consideration of the alleged debt of H. Battle Griggs be the purchase price of the real estate interests asked to be stricken from the deed in the first cause of action, the pleading falls within the condemnation of *Smith v. Land Bank, ante,* 343, and *Lykes v. Grove,* 201 N. C., 254, 159 S. E., 360, as improperly uniting causes of action and seeking inconsistent remedies.

The inclusion in the judgment of an order striking out the complaint, because it constituted a material change from the cause of action alleged in a former complaint as to which a demurrer had previously been sustained, becomes immaterial at this time, since the only pleading of the plaintiffs before the court has been overthrown by the judgment sustaining the demurrer. See *Zagier v. Zagier,* 167 N. C., 616, 83 S. E., 913.

The judgment sustaining the demurrer is

Affirmed.

CONSOLIDATED REALTY CORPORATION v. F. R. HOUSTON.

(Filed 25 May, 1938.)

1. Deeds § 3—Clerical error in transcribing commissioner's name held not fatal defect.

The commissioners' deed in sale for partition was correctly indexed and cross indexed, and the names of the commissioners properly appeared in the body of the instrument, but the signature of one of the commissioners was erroneously transcribed as "W. R. Whitmire" instead of "W. R. Whitson." *Held:* The irregularity was a mere clerical error, calculated to mislead no one, and is not a fatal defect.

2. Same—Error in order of probate in designating county and state of notary taking acknowledgment held not fatal defect.

The order of probate of the assistant clerk, immediately following the certificate of acknowledgment of the notary public, erroneously designated the notary as of the county of probate, although the certificate of acknowledgment, which was in due form, correctly stated that the notary was of a designated county of the State of Virginia in which the acknowledgment was taken. *Held:* The irregularity was a mere clerical error, calculated to mislead no one, and is not a fatal defect.

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

APPEAL by defendant from *Johnston, J.*, at March Term, 1938, of HENDERSON.

Controversy without action submitted on an agreed statement of facts to determine right of parties to specific performance.

The plaintiff being under contract to convey to the defendant building and lot situate in the city of Hendersonville, 130 South Main Street, known as the Lyerly Garage Building and lot, duly executed and tendered deed therefor, sufficient in form to convey valid, fee simple title, with full covenants of warranty, and demanded payment of the purchase price, as agreed. The defendant declines to accept the deed and refuses to make payment, contending that the title offered is defective.

It is stipulated that plaintiff's title is good, unless defective by reason of the following deeds, by, through and under which it claims:

"4. That there is of record in Book 112, at page 445, of the records of deeds for Henderson County, an instrument purporting to be a deed from W. R. Whitson and Hugh LeBarbe, commissioners, to Fred L. Johnson *et al.*, grantees, bearing date 30 March, 1922, and recorded 11 May, 1922, and which purports to convey the property mentioned and referred to above, and which said instrument is fully sufficient in form to pass the title to said property, provided the following irregularity or defect does not vitiate same. The same appears to have been

regularly executed by Hugh LeBarbe, commissioner, and the name of the grantor, W. R. Whitson, commissioner, properly appears in the body of the instrument and also in the certificate of acknowledgment, which appears to have been taken before John H. Cathey, clerk of the Superior Court of Buncombe County. However, at the place for the signatures the name "W. R. Whitmire" appears upon the recorded instrument instead of the name "W. R. Whitson," which is the only objection made to said instrument. In this connection, it is also agreed that a special proceeding was regularly conducted in the Superior Court of Buncombe County to have sold for partition among the heirs of one F. M. Johnson the lands of which the said Johnson died seized and possessed, and which were situated both in the counties of Buncombe and Henderson, and that a properly certified copy of said proceeding was duly filed and is now of record in the county of Henderson. That in said proceeding the said W. R. Whitson and Hugh LeBarbe were appointed commissioners to sell said lands, duly reported said sales to the court, and in their said reports certified that they had sold the said lands which are the subject of this controversy to the grantees named in the deed herein mentioned, and that they had executed deed therefor to the purchasers at the sale in compliance with the order and decree of the court. It is also agreed that the said deed herein referred to is cross indexed on the records of Henderson County, in the name of W. R. Whitson and not in the name of W. R. Whitmire.

"5. That there is an instrument of record in Book 129, at page 111, of the records of deeds for Henderson County, purporting to be a deed from H. R. Loar and wife, Laura H. Loar, to A. R. Hanson, of date 9 September, 1924, recorded 13 September, 1924, purporting to convey the said property above mentioned, and which purports to have been acknowledged before Earl Dixon, a notary public of the State of West Virginia, and county of Preston, and which said deed is in all respects in due form to convey the title to said property, provided the probate of said deed is sufficient to authorize its registration. It appears from the face of the deed that the grantors at the time of its execution were residents of the county of Preston and State of West Virginia, and the certificate of the notary public who took the acknowledgment is as follows:

" 'State of West Virginia, County of Preston—*ss.*

" 'I, Earl Dixon, a notary public in and for the above county and State, do hereby certify that H. R. Loar and Laura H. Loar, his wife, personally appeared before me this day and acknowledged the due execution by them of the annexed deed of conveyance, and the said Laura H. Loar being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that

she signed the same freely and voluntarily without fear or compulsion of her husband, or any other person, and that she doth still voluntarily assent thereto.

" 'Therefore, let the same, with this certificate, be registered.

" 'Witness my hand and notarial seal, this 9 day of Sept., A.D. 1924.

(L. S.) EARL DIXON, (Seal)

Com. ex. Mch. 9, 1925. *Notary Public.'*

"The order of probate of the assistant clerk of the Superior Court of Henderson County, North Carolina, which immediately follows the certificate of acknowledgment of the notary public is as follows:

" 'State of North Carolina, Henderson County.

" 'The foregoing certificate of Earl Dixon, a notary public of Henderson County, and State of N. C., is adjudged to be correct. Therefore, let the foregoing deed, with these certificates, be registered.

" 'This 13 day of September, 1924.

J. L. PACE,

Asst. Clerk Superior Court.'

"The defect and irregularity complained of is that the certificate of acknowledgment shows the notary public who took the acknowledgment of the grantors to be a notary public of the State of West Virginia and county of Preston, whereas, the certificate of probate states that said notary public is a notary public of Henderson County and State of North Carolina. It is agreed that said deed is duly cross indexed upon the index records of Henderson County, and it is also agreed that at the time said deed was probated there was no notary public in Henderson County by the name of Earl Dixon."

It is further agreed that the originals of both of these deeds have been lost, or destroyed, and that they cannot now be found or located.

The court being of opinion, upon the facts agreed, that the deed tendered is sufficient to convey full and complete fee simple title to the premises described in the statement, entered judgment accordingly, from which the defendant appeals, assigning error.

Daniel M. Hodges for plaintiff, appellee.

J. E. Shipman for defendant, appellant.

STACY, C. J. We agree with the trial court that the irregularities here in question are mere clerical errors, calculated to mislead no one, and that they ought not to be regarded as fatal defects in the title offered.

The decision in *Lane v. Royster,* 118 N. C., 159, 24 S. E., 703, is authority for holding that the error in transcribing the signature of one

of the commissioners, W. R. Whitson, as "W. R. Whitmire," was so obviously a mistake as to mislead no one and that it ought not to affect the title. In the cited case, a mortgage executed by "Patrick Lane and wife, Zilpha Lane," was recorded as having been signed by "Patrick Savage and wife, Zilpha Savage." This was held to be a clear inadvertence. To like effect is the decision in *Smith v. Lumber Co.*, 144 N. C., 47, 56 S. E., 555, where the register of deeds, by patent inadvertence, omitted to copy the signatures at the end of the deed.

In the case at bar, it is admitted that the commissioners' deed is regularly registered in all other respects and that it is properly cross indexed in the name of "W. R. Whitson." See, also, *Mitchell v. Bridgers,* 113 N. C., 63, 18 S. E., 91.

In respect of the irregularity appearing in the clerk's fiat to the deed from H. R. Loar and wife to A. R. Hanson, it is sufficient to say that the case of *Kleybolte v. Timber Co.*, 151 N. C., 635, 66 S. E., 663, is ample authority for upholding this registration. Speaking to a similar inadvertence in that case, *Walker, J.*, delivering the opinion of the Court, said: "The certificates are all before us, and *we* can see that they *are* 'in due form.' It may be true that the certificate of the clerk of the Supreme Court of New York, as to the authority of the notary public, was unnecessary, but it will be observed that the clerk makes two adjudications—first, that the certificate of the said clerk is 'in due form and according to law'; and, second, that 'the foregoing and annexed deed of trust is adjudged to be duly proven.' From what source could the clerk of the Superior Court of Swain County have derived any knowledge of the due execution of the deed, or of its probate, except from the certificates of the notary? The clerk of the Supreme Court of New York did not certify to either fact, but simply to the official character of Edward Carroll, Jr., as a notary. We are as competent to pass upon the correctness of the certificates as the clerk, or, at least, I suppose we are, and we should be. If he adjudges the execution of the deed to have been duly proven and orders it to be registered, and acts upon certificates which, in fact, as we can plainly see, are in due form, how vain and idle to argue that he has not 'substantially' complied with the law." See, also, *Cozad v. McAden,* 150 N. C., 206, 63 S. E., 944.

The judgment decreeing specific performance upon the facts agreed will be upheld.

Affirmed.

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

RICHARD PATTERSON v. H. T. ALLEN.

(Filed 25 May, 1938.)

1. Election of Remedies § 3—Owner whose property has been converted may waive the tort and sue on contract.

Plaintiff alleged that defendant agreed to cut timber from plaintiff's land under an agreement that plaintiff was to receive one-half the lumber cut, that defendant cut lumber and wrongfully disposed of same. *Held:* The allegations are sufficient to support an action on implied contract, and they will be so construed when necessary to support recovery.

2. Limitation of Actions § 12a—Complaint held sufficient to support cause ex contractu so that bar of statute was repealed by part payment.

While part payment will not repeal the bar of the statute on a cause of action *in tort*, the complaint is held sufficient to allege an action *ex contractu* under the rule that a person whose property has been wrongfully converted may waive the tort and sue on contract, and the court's charge on the effect of part payment on the cause *ex contractu* *is held* without error.

3. Evidence § 19—

The plea of the bar of the statute of limitations is neither criminal nor immoral and such plea cannot be used to impeach defendant.

4. Evidence § 22—

Although the plea of the statute of limitations may not be used to impeach defendant, questioning defendant as to the *bona fides* of his plea *is held* not beyond the latitude allowed in cross-examination, and not to constitute reversible error.

5. Evidence § 27—

When a witness denies any independent recollection of the matters upon which he is called to testify, the exclusion of his testimony is without error, nor may such witness read to the jury tally sheets identified by him when they are not evidence in themselves.

APPEAL of the defendant from *Armstrong, J.*, at November Term, 1937, of RICHMOND. No error.

The plaintiff sued to recover an amount claimed to be due him as the value of lumber manufactured from logs cut upon his premises by defendant, under a contract whereby plaintiff was to receive one-half of the lumber cut. He alleged that the defendant wrongfully disposed of the lumber and at a later date paid him $10.00 on account.

The defendant denied the contract as stated, and alleged that he cut the timber under an agreement to pay $2.00 a thousand feet for it, which he paid in full. He also pleaded the statute of limitations.

Both parties introduced evidence in support of these contentions.

From the judgment upon a verdict in favor of the plaintiff, the defendant appealed.

Jones & Jones for appellee.
Sedberry & Garrett for appellant.

SEAWELL, J. The defendant here insists that the plaintiff has sued for the conversion of certain lumber belonging to him and, defendant having interposed the plea of the statute of limitations, a payment to the plaintiff subsequent to the conversion would not have the effect of repelling the bar of the statute, since, as defendant contends, the action is in tort and not *ex contractu.*

It is well established, however, that "when a man's property has been wrongfully converted, . . . the owner is allowed to waive the tort and sue on contract." *Sanders v. Ragan,* 172 N. C., 612, 616; *Stroud v. Ins. Co.,* 148 N. C., 54, 56. Reading the complaint, it might in its terms be considered sufficient in an action on the implied contract, and we think, if necessary to sustain the judgment, it should be so considered.

It is doubtful whether the plaintiff's cause of action could be properly grounded on conversion, since there had been no division of the lumber, and the part to which he might have had the right to immediate possession was not identified. *Rooks v. Moore,* 44 N. C., 1.

The instructions given to the jury, as to the effect of partial payment in repelling the statute of limitations, were free from error in this view of the case, and appropriate both to the pleadings and the evidence.

The defendant objected to questions propounded to him on cross-examination relating to his purpose in pleading the statute of limitations.

The plea of the statute of limitations is neither criminal nor immoral, and where a witness has interposed such a plea in another case, this cannot be used as evidence to impeach him. *Cecil v. Henderson,* 119 N. C., 422. In this case, however, we do not think that counsel for plaintiff went beyond the latitude allowed in cross-examination by asking the defendant as to the *bona fides* of his plea. It proved not a very successful method of "purging the conscience" of the defendant, but we do not consider it reversible error.

The objections to portions of the testimony of Leo Carr are, we think, not tenable. The witness denied any independent recollection of the matters upon which he was called to testify. As the tally sheets identified by him were not evidence of themselves, he could not be permitted to read them and relay their contents to the jury. We think that the jury was not misled by the remarks of the judge excluding this evidence.

We have examined the other exceptions in the record and are unable to find a satisfactory reason for disturbing the result in this case. We find

No error.

EDITH DYER v. JOHN W. DYER.

(Filed 25 May, 1938.)

1. Contempt of Court § 5: Appeal and Error § 37e—

The court's finding that petitioner's continued refusal to pay alimony was willful, supports the court's judgment refusing to grant the petition for release for financial inability to pay, and the finding is conclusive on appeal when supported by evidence.

2. Contempt of Court § 2a—

Criminal contempt is the commission of an act tending to interfere with the administration of justice, C. S., 978, while civil contempt is the remedy for the enforcement of orders in the equity jurisdiction of the court, C. S., 985, and the willful refusal to pay alimony as ordered by the court is civil contempt.

3. Contempt of Court § 6—Power to punish for civil contempt is not limited to thirty days imprisonment.

Punishment for civil contempt is not limited to thirty days imprisonment, C. S., 981 not being applicable to civil contempt, and a petition for release from imprisonment for willful refusal to pay alimony on the ground that the court exceeded its authority in not limiting the imprisonment to thirty days, is properly refused, but defendant need not serve indefinitely and may obtain his discharge upon a proper showing under appropriate proceedings.

APPEAL by defendant from *Bivens, J.*, at February Term, 1938, of GUILFORD. Affirmed.

The defendant was committed to jail in a civil proceeding as for contempt, in disobeying the order of the court by refusal to pay alimony. The order under which he is incarcerated does not describe any definite term of imprisonment but requires him to be confined in jail "until he has made the payments required under said judgment of 27 April, 1934, and until he complies with the order of this court, or is otherwise discharged according to law."

At a subsequent time, after having remained in jail for thirty days, the defendant, conceiving himself to be improperly detained, filed a petition in the cause before Bivens, J., at February Term, 1938, of Guilford Superior Court, setting up his financial and physical inability to comply with the judgment, asking a modification thereof, and asking for his release, both upon the ground of his inability to pay and because of the fact, as contended by him, his original confinement was under an order made in excess of the constitutional and statutory authority of the court, in that the court could only have confined him in prison for a contempt in this connection for thirty days, which time had elapsed.

The petition was heard by Bivens, J., evidence was taken, and the judge refused to release defendant from prison, finding as a fact that his continued refusal to pay alimony was willful. From this judgment defendant appealed.

R. T. Pickens for plaintiff, appellee.
Gold, McAnally & Gold and C. N. Cox for defendant, appellant.

PER CURIAM. The defendant petitioned in the pending cause asking for a modification of the original order granting alimony and for his discharge because of his inability to pay it.

The defendant is bound by the facts adversely found by the court below upon competent evidence, and is not entitled to relief in this Court. *Lodge v. Gibbs,* 159 N. C., 66, 69; *Bank v. Chamblee,* 188 N. C., 417, 124 S. E., 748. His contention that the court was without power to make an order, the effect of which might be to confine him in jail for more than thirty days, is without merit. *Green v. Green,* 130 N. C., 578, 41 S. E., 784; *Cromartie v. Comrs.,* 85 N. C., 211.

Criminal contempt is a term applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. C. S., 978. Civil contempt is a term applied where the proceeding is had "to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties." 12 Am. Jur., Contempt, section 6. Resort to this proceeding is common to enforce orders in the equity jurisdiction of the court, orders for the payment of alimony, and in like matters. In North Carolina, such proceeding is authorized by statute. C. S., 985.

The contempt with which we are dealing in the present case falls within the latter category and is unaffected by C. S., 981, prescribing a thirty-day limit to imprisonment for contempts falling within the provisions of the preceding sections. *Green v. Green, supra; Cromartie v. Comrs., supra; Thompson v. Onley,* 96 N. C., 9, 5 S. E., 120.

One who is imprisoned for contempt in an alimony case need not serve indefinitely. There are other proceedings under which he might obtain his discharge upon a proper showing. Under this proceeding, however, such relief may not be given.

The judgment is therefore

Affirmed.

COUNTY BOARD OF EDUCATION OF GUILFORD COUNTY AND W. C. COBLE, TREASURER OF COUNTY BOARD OF EDUCATION OF GUILFORD COUNTY, *v.* CITY OF HIGH POINT AND IRVIN S. INGRAM, CLERK OF THE MUNICIPAL COURT OF THE CITY OF HIGH POINT.

(Filed 25 May, 1938.)

Courts § 6b: Schools § 33: Counties § 13—

By provision of Art. IX, sec. 5, the clear proceeds of fines collected by the clerk of a municipal court belong to the county school fund, and the clerk is not entitled to retain a percentage thereof as his fees, regardless of the provisions of public-local laws relating to his compensation.

APPEAL by defendants from *Bivens, J.*, at March Term, 1938, of GUILFORD. Affirmed.

This is a controversy without action, tried in the Superior Court of Guilford County upon an agreed state of facts, of which the following are immediately pertinent to this appeal:

The criminal division of the municipal court of the city of High Point imposed, assessed, and collected fines, from and including October, 1935, to and including September, 1937, and remitted the sum so collected, less five per cent, or the sum of $1,178.23, to the treasurer of the School Fund. The clerk of the municipal court aforesaid retained this sum as commissions due the clerk and, upon demand, refused to pay it over.

The agreed statement of facts points out chapter 659, Public-Local Laws 1913, relating to the creation of the city of High Point, and an amendment thereto—chapter 669, Public-Local Laws 1927, as follows: "The officer (the clerk) shall perform all duties in said High Point municipal court as provided in the Superior Court, and receive therefor the same fees allowed for the same service performed in the Superior Court." It was further pointed out in the agreed statement of facts that, under section 3903 of the Consolidated Statutes, fees for clerks of the Superior Court are allowed as follows: "Five per cent commission shall be allowed the clerk on all fines, penalties, amercements, and taxes paid the clerk by virtue of his office." The contention of the defendants, as stated in the agreed facts, is that chapter 569, Public-Local Laws 1913, was amended by chapter 669, Public-Local Laws 1927, and that said chapter 569 is repealed by chapter 669 where there is conflict; and that by section 5 (n) of chapter 669 the clerk of the municipal court of the city of High Point is entitled to a commission of five per cent on all fines, penalties, amercements and taxes paid by virtue of his office. It is contended further that section 3903 of the Consolidated Statutes, and chapter 669, Public-Local Laws of 1927, are not unconstitutional, and entitle the clerk to retain commissions.

The court below rendered judgment in favor of the plaintiffs, and defendants appealed.

D. Newton Farnell, Jr., and B. L. Fentress for appellees.
G. H. Jones for appellants.

SEAWELL, J. In the view taken of this case by the Court here, it is unnecessary to compare and interpret the several public-local statutes cited and quoted.

We do not think the question is an open one in this State. The Constitution of North Carolina, Article IX, section 5, provides as follows: "County school fund; proviso. All moneys, stocks, bonds, and other property belonging to a county school fund; also the net proceeds from the sale of estrays; also the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal or military laws of the State; and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State: Provided, that the amount collected in each county shall be annually reported to the Superintendent of Public Instruction."

This section was passed upon by this Court in *S. v. Maultsby*, 139 N. C., 583, and the term "clear proceeds," as there used, judicially defined: "By 'clear proceeds' is meant the total sum less only the sheriff's fees for collection, when the fine and costs are not collected in full." This case must be considered as completely determinative of the matter, and the defendants will not be allowed to retain the commissions. The judgment, therefore, must be

Affirmed.

ATLANTIC COAST LINE RAILROAD COMPANY v. H. T. THROWER, TRADING AS THROWER TILE AND MARBLE COMPANY.

(Filed 25 May, 1938.)

Venue § 8a—Court must determine motion to remove as a matter of right before it may proceed further in the cause.

When neither party resides in the county in which the action is instituted, defendant's motion to remove to the county of his residence must be allowed as a matter of right, C. S., 469, 470 (1), and the court must dispose of such motion before proceeding further in the case, and it is error for the court to retain the cause for trial upon plaintiff's motion

founded upon the convenience of witnesses and the promotion of the ends of justice, C. S., 470 (2), although after proper removal the court may hear plaintiff's motion.

APPEAL by defendant from *Spears, J.*, at January Term, 1938, of CUMBERLAND. Reversed.

This is a civil action instituted by the plaintiff to recover of the defendant the sum of $568.60, the amount of an unpaid check delivered by the defendant to the plaintiff and $1.50 protest fees.

The plaintiff has its principal place of business in the State of North Carolina at Wilmington, N. C., and the defendant is a resident of Mecklenburg County. Before the expiration of the time to answer the defendant duly filed a motion in writing, praying the court for an order transferring and removing the action for trial from Cumberland County to the Superior Court of Mecklenburg County. Thereupon, the plaintiff filed a motion that the court retain the action in Cumberland County for that: "(2) The convenience of witnesses and the ends of justice would be promoted by retaining this action for the trial in this court, for the reason that:" and the motion then sets out pertinent facts in support thereof.

The cause came on to be heard before the undersigned judge on appeal from the clerk, at the January Term, 1938, Cumberland Superior Court, and the judge entered an order, after finding the facts, as follows: "It is, therefore, ordered and adjudged that the motion for change of venue filed by the defendant be denied; and the court in its discretion retains the cause for trial in the Superior Court of Cumberland County, North Carolina, for the convenience of witnesses and to promote the ends of justice." The defendant excepted and appealed.

Rose & Lyon for plaintiff, appellee.
Guthrie, Pierce & Blakeney for defendant, appellant.

BARNHILL, J. C. S., 469, provides: "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." This is the portion of the statute pertinent to this controversy. C. S., 470, provides: "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."

Considering the statutes *in pari materia* it has been consistently held by this Court that where the plaintiff is not a resident of the county in which an action is instituted, or is not otherwise entitled to maintain the action therein as a matter of right, the defendant may require the removal of the cause to the county of his residence by complying with the terms of the statute. When the motion to remove to the county of the residence of the defendant, the action not having been brought in the proper county, is made, the question of removal is not one of discretion, but "may" means *shall,* or *must,* and it becomes the duty of the judge to remove the cause. *Pelletier v. Saunders,* 67 N. C., 261; *Jones v. Statesville,* 97 N. C., 86; *Mfg. Co. v. Brower,* 105 N. C., 440.

Speaking to the subject in *Roberts v. Moore,* 185 N. C., 254, *Hoke, J.,* says: "While it is clear from a perusal of section 470 that this question of venue is not in the first instance jurisdictional, and may be waived by the parties, and the decisions construing the section so hold, these decisions are also to the effect that where the motion to remove is made in writing and in apt time, the question of removal then becomes a matter of substantial right, and the court of original venue is without power to proceed further in essential matters until the right of removal is considered and passed upon. And any such judgment entered before that should be set aside on motion or appeal as being contrary to the course and practice of the court. Assuredly so, then (when) the material facts alleged in support of the motion to remove are practically admitted. *Brown v. Cogdell,* 136 N. C., 33; *Mfg. Co. v. Brower,* 105 N. C., 440; *Jones v. Statesville,* 97 N. C., 86."

Upon the admitted facts and the facts found by the court, to which there is no exception, Mecklenburg County is the proper venue for the trial of this action. When the defendant duly and in proper time filed his motion in writing for the removal of this cause to Mecklenburg County it then became the duty of the court to pass upon and decide the question thus raised before proceeding further in the cause in any essential matter affecting the rights of the defendant. Pending a determination of this question the court was without authority to entertain the motion made by the plaintiff. On the admitted facts defendant's motion should have been allowed and an order removing the cause to Mecklenburg County should have been entered. By considering and allowing the plaintiff's motion in its discretion the court below, in effect, by the exercise of discretion, denied the defendant a substantial right to which he is entitled as a matter of law.

The plaintiff, if it so elects, still has the right to file its motion in the Mecklenburg Superior Court and it will then become the duty of the judge presiding to determine whether the cause should be sent back to Cumberland County for the convenience of witnesses under the second subsection of C. S., 470.

This may seem to require a circuitous method of finally determining the venue for the trial of this cause when and after the plaintiff has been heard upon its motion, if it elects to renew it, in the Mecklenburg Superior Court. Be that as it may, we are required to interpret and declare the law as it is written—not as we may think it should be.

The judgment of the court below denying the motion of the defendant must be held for error.

Reversed.

STATE v. NAPOLEON JONES.

(Filed 25 May, 1938.)

1. Criminal Law § 53g—

An assignment of error to the statement of the contentions cannot be sustained in the absence of an exception entered at the time.

2. Gaming § 5—Evidence held sufficient to be submitted to jury on charge of operating a lottery.

Evidence that numerous lottery tickets and lottery ticket books were found in the store operated by defendant is sufficient to be submitted to the jury in a prosecution under C. S., 4428, and defendant's contention that there was no evidence that he was in charge of the store is untenable when the record discloses that several witnesses referred to the *locus in quo* as defendant's place of business.

3. Gaming § 4—

The possession of lottery tickets sufficient to raise *prima facie* evidence of the violation of C. S., 4428, need not be actual physical possession, and they need not be found on defendant's person, it being sufficient if they are found in his place of business under his control.

APPEAL by defendant from *Pless, Jr., J.*, at January Term, 1938, of GUILFORD. No error.

This is a criminal action instituted in the municipal court of the city of Greensboro by warrant charging that the defendant did unlawfully, willfully open up, set on foot and operate a lottery in violation of C. S., 4428. From a judgment of guilty in the municipal court the defendant appealed to the Superior Court.

On 10 November, 1937, officers searched the building occupied by the defendant and in which he operated a business known as the Sweet Shop. They found a paper sack containing lottery tickets under the stove. They also found two new books of tickets in the showcase in a box and one book under a cigar box in the showcase. William Day and Alex McConnell were in the front of the store and one of them was copying from one of the lottery ticket books. William Stevenson ran out the

back door. A few minutes after the officers made the search the defendant appeared, but no tickets were found on his person.

The cause was submitted to the jury, which, for its verdict, found that the defendant is guilty as charged. From judgment pronounced thereon the defendant appealed.

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

Stern & Stern and R. D. Douglas, Jr., for defendant, appellant.

BARNHILL, J. The defendant excepts to certain portions of the charge. These exceptive assignments of error are directed to the alleged erroneous statement of contentions and no exception was entered at the time. These assignments cannot be sustained.

The only other exceptive assignment of error is directed to the refusal of the court to grant the defendant's motion as of nonsuit entered at the conclusion of the State's evidence, the defendant having offered no evidence in rebuttal. In support of this contention the defendant insists that the evidence tended only to show that he was the legal owner of a store in the business district of the colored section of Greensboro in which lottery tickets were found and that there was no evidence showing that the defendant had anything whatsoever to do with said store other than that he was the legal owner thereof. That is, the defendant contends that there is no evidence tending to show that the defendant was operating said place of business. This contention is not supported by the record. Witnesses testified: "The defendant Jones was not at his place of business when I arrived." "It is called the Sweet Shop. He (the defendant) sells cigarettes and cigars, candy, cold drinks and shoeshines." "I, with other officers, went to the place of business of the defendant." "It was in Napoleon Jones' place of business." "The defendant came into his place of business less than ten minutes after Mr. Taylor and I arrived." "Napoleon Jones came into his place of business about the time that we got up to the front door where officers Murphy and Taylor were." This evidence was amply sufficient to support a finding that the defendant was in actual charge of the place of business in which lottery tickets were found.

C. S., 4428, after defining the crime for the commission of which the defendant stands indicted, provides: ". . . and the mere possession of such tickets shall be *prima facie* evidence of the violation of this section." Under this section it is not necessary for the State to show that the defendant had lottery tickets in his actual possession and upon his person at the time charged. Personal property is in the possession of a person whenever it is in his custody and control and subject to his disposition. This Court has repeatedly held, in cases involving the

unlawful possession of intoxicating liquors, that where the evidence discloses that liquor was found upon premises owned or in the possession of the defendant and frequented by him in such manner and to such an extent that it is reasonable to conclude that it is probable that he had knowledge of the presence of such property upon his premises, it is sufficient evidence to be submitted to a jury for it to determine whether the defendant in fact was in possession of such property or knowingly permitted it to be and remain upon his premises. Here, others were openly in possession of butter and egg lottery tickets in defendant's place of business, and two unused books of tickets were found in a box in his showcase and another book was found under a cigar box in the showcase. This evidence is uncontradicted and was amply sufficient to justify the submission of the case to the jury.

The court properly denied defendant's motion for judgment as of nonsuit. In the trial below we find

No error.

JAMES STROUD, BY HIS NEXT FRIEND, CHARLES B. CAUDLE AND J. A. STROUD, v. THE SOUTHERN OIL TRANSPORTATION COMPANY.

(Filed 25 May, 1938.)

1. Pleadings § 20—

A demurrer cannot be sustained if plaintiff is entitled to recover on any aspect of the case presented in the complaint.

2. Appeal and Error § 40f—

Upon appeal from judgment sustaining a demurrer, the Supreme Court is required to decide solely whether the complaint is sufficient to allege a cause of action on any aspect, and it will not consider the merits of the controversy.

3. Negligence § 16—Complaint held to allege actionable negligence, the relationship between the parties being determinable upon the trial.

Plaintiff alleged that he was employed at a filling station, that defendant's agents drove a truck into the station for servicing, that the truck was of the dual wheel type, requiring a long valve stem for safety, but that the long stem on defendant's truck had been changed to a short stem, requiring plaintiff to put his hand in the narrow space between the tires in servicing the inside tire, that when plaintiff did so, the flange of the inner wheel flew loose and crushed his hand, that the flange was in a dangerous condition because the truck had been driven on a slack tire which gave no support to the flange, or because of the improper adjustment of the flange, or its worn and defective condition, that defendant's agents knew or should have known of the dangerous condition and invited

or permitted plaintiff to service the tire without giving warning thereof. *Held:* The complaint is sufficient as against demurrer, the relationship between the parties, whether bailment, employment or independent contractor, being determinable upon the trial.

APPEAL by defendant from *Phillips, J.*, at March Term, 1938, of ANSON. Affirmed.

In the court below the defendant demurred to the complaint upon the ground that it did not state a cause of action against it.

In narrative form, the principal allegations of the complaint relating to the appeal are substantially as follows:

The plaintiff was employed at a filling station, and it was his duty, among other things, to service automobiles brought to the station for that purpose by pumping air into the tires until the right pressure had been obtained. This was, in so far as the filling station was concerned, a free service.

The agents of the defendant drove a truck upon the premises of the filling station to have a slack tire inflated, placed it in proper position, and, at the request of the defendant's agents, the plaintiff undertook the service required.

The truck was of the dual wheel type—that is, it had two wheels on each end of the axle, with their separate tires close together. The tire which plaintiff was requested to inflate was on the inside wheel on the left rear side.

It was alleged that long valve stems are uniformly and commonly used for the tires of such inner wheels, as a safety device, and to prevent the necessity of putting the hands or fingers between the wheels or tires, which is alleged to be a dangerous place; and that this truck had been originally equipped with such a long valve stem, but was now without it.

In attempting to attach the air hose to the short valve stem of the inner tire tube, it was necessary for plaintiff to put his hands into the narrow space between the wheels. While he was doing so, the rim or flange of the inner rear wheel "flew loose," and crushed his hand, amputating some of the fingers.

It is alleged that the truck had been driven around twenty miles on a slack tire, and that by reason of the displacement so caused, or the unsupported condition of the flange, or improper adjustment thereof, or the worn and defective condition of the flange, a dangerous condition was caused and permitted to exist. That all of these things were known, or should have been known, to defendant's agents, and that in disregard or neglect of defendant's duty to inform the plaintiff, they negligently invited and permitted him to service the tire in ignorance of its dangerous condition, thus proximately causing his injury.

Upon a judgment overruling the demurrer, the defendant appealed.

E. A. Hightower for plaintiff, appellee.
J. Laurence Jones and J. L. DeLancy for defendant, appellant.

SEAWELL, J. If the plaintiff is entitled to recover on any aspect of the case presented in his complaint, the demurrer cannot be sustained. *Kirby v. Reynolds,* 212 N. C., 271; *In re Trust Company,* 207 N. C., 802, and cases there cited. In that event, it is immaterial for the purpose of a decision in this Court how the relationship between plaintiff and defendant should be classified. *Trust Co. v. Webb,* 206 N. C., 247, 250. It may be necessary on the trial of the case to determine whether that relation arises out of bailment, employment as master and servant, or independent contract, all of which theories are presented in the argument, and the evidence may throw more light on these questions than we now have. But it is not the practice of the Court to consider the merits of the controversy upon an appeal from a judgment overruling a demurrer to the complaint. *Furniture Co. v. R. R.,* 195 N. C., 636, 143 S. E., 242.

It is sufficient to say that we cannot reach the conclusion that the plaintiff is not entitled to recover under any aspect of his complaint, liberally construed, upon which supporting evidence may be properly submitted. *Rodwell v. Coach Co.,* 205 N. C., 292, 171 S. E., 100; *Joyner v. Woodard & Co.,* 201 N. C., 315, 160 S. E., 288.

The judgment overruling the demurrer is

Affirmed.

H. P. PARNELL AND HIS WIFE, LUCY M. PARNELL, v. H. C. IVEY AND HIS WIFE, FLORA IVEY.

(Filed 25 May, 1938.)

Judgments § 23—

In setting aside a judgment under C. S., 600, the court is required to find the facts not only in regard to the excusable neglect relied on, but also the facts in regard to meritorious defense, and a finding of a "meritorious defense" without finding the facts showing a meritorious defense, is insufficient.

APPEAL by plaintiffs from *Hamilton, Special Judge,* at October Term, 1937, of CUMBERLAND. Error.

The issues submitted to the jury indicate the controversy. These issues and the answers thereto were as follows:

"1. Did the defendants, on or about 23 November, 1927, convey, by deed to the plaintiffs, in fee simple, for a valuable consideration, a tract

of land and farm in Cumberland County, containing 50 acres, more or less? Ans.: 'Yes.'

"2. Did the defendants, in said deed, covenant and warrant to the plaintiffs that said lands and farm were free and clear from all liens and encumbrances? Ans.: 'Yes.'

"3. Were said lands and farm, at the time of the execution and delivery of said deed, free and clear from all liens and encumbrances? Ans.: 'No.'

"4. If not, what amount of valid liens existed thereon at the date of said delivery of said deed on 23 November, 1927? Ans.: '$850.00.'

"5. What amount of money have the plaintiffs been compelled to pay said lifeholder for the satisfaction of said lien and redemption of said lands? Ans.: '$301.20.'

"6. What amount of damages, if any, are the plaintiffs entitled to recover of the defendants in this action? Ans.: '$301.20, and interest from 31 December, 1934.' "

The court below rendered judgment for plaintiffs on the verdict. The defendants made a motion, under N. C. Code, 1935 (Michie), sec. 600, to set aside the judgment. The court below rendered the following findings: "The court finds as a fact that defendants' counsel was not furnished copy of court calendar, did not know court was in session, though his name appeared on the calendar as attorney of record, and is excusable under attending circumstances, and that defendants have a meritorious defense to the pending action."

The plaintiffs excepted, assigned error to the above findings and also made other exceptions and assignments of error and appealed to the Supreme Court.

R. L. Godwin for plaintiffs.
L. L. Levinson and J. R. Barefoot for defendants.

CLARKSON, J. Section 600, *supra,* is, in part: "The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect," etc.

In *Hooks v. Neighbors,* 211 N. C., 382 (385), is the following: "In order to set aside a judgment for mistake, surprise, or excusable neglect, there must be a showing of a meritorious defense so that the courts can reasonably pass upon the question whether another trial, if granted, would result advantageously for the defendant. *Bank v. Duke,* 187 N. C., 386; *Hill v. Hotel Co.,* 188 N. C., 586; *Fellos v. Allen,* 202 N. C., 375. A judgment may be set aside under this section if the moving party can show excusable neglect and that he has a meritorious defense.

Dunn v. Jones, 195 N. C., 354, 356; *Chevrolet Co. v. Ingle,* 202 N. C., 158; *Bowie v. Tucker,* 206 N. C., 56, 59."

The court below as to the attorney found the facts. As to meritorious defense the finding was "and that defendants have a meritorious defense to the pending action." This is not sufficient; there should be a finding of the facts showing a meritorious defense. See *Clayton v. Clark,* 212 N. C., 374; *Meece v. Commercial Credit Co.,* 201 N. C., 139.

In the judgment of the court below there is

Error.

STATE v. BEN LEWIS.

(Filed 25 May, 1938.)

1. Homicide § 18—Evidence held to establish proper predicate for admission of testimony of dying declarations.

Evidence that the victim of an assault was taken to a hospital immediately after being shot, that after about 25 days he was discharged therefrom because of improved condition, that he was returned to the hospital a week after his discharge, suffering from a hemorrhage, that he then showed signs of shock and showed anxiety about his condition, and was given oxygen by means of a catheter, that he stated three days after being readmitted that he was going to die and that he had no hope of living, respectively, before making the statements sought to be introduced in evidence, and that he died three days thereafter, *is held* to establish proper foundation for the admission of testimony of his statements as dying declarations.

2. Criminal Law § 81c—

Where defendant admits the fatal shooting, and the jury returns a verdict of guilty of manslaughter, the admission of testimony of declarations by deceased to the effect that defendant shot him without excuse while he was unarmed, would seem harmless.

APPEAL by defendant from *Bivens, J.,* at March Term, 1938, of GUILFORD.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Herbert Tinsley.

On 5 December, 1937, the defendant shot Herbert Tinsley with a pistol, the bullet entering the upper region of the chest. Tinsley was carried to the hospital immediately and remained there until 1 January, 1938, when he was discharged on account of improvement in his condition. He returned to the hospital on 8 January, due to hemorrhage in the pleural cavity, "was pale, showed signs of shock such as produced sweating, shortness of breath, weakness and a certain amount of anxiety

about himself, about his condition." Oxygen through the nose by means of a catheter, usually used as a last resort, and other medication, were instituted, but to no avail. He died 14 January.

On 11 January, after stating to police officer Holt that he was "going to die," Tinsley said: "Bennie shot me for nothing. He said I had a gun but I did not have a gun." This was reported to Captain Brannock, who returned with Holt to see the deceased later in the same day. After again stating to the officers that "he did not think there was any hope for him to live" and that he "trusted in the Lord," he repeated his statement that Bennie Lewis shot him and that he, Tinsley, had no weapon of any kind.

These statements were admitted as dying declarations, over objection of the defendant, and they constitute the only exceptive assignments of error.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's Prison for a period of not less than seven nor more than ten years.

Defendant appeals, assigning errors.

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

Stern & Stern and Spencer B. Adams for defendant.

STACY, C. J. The single question for decision is whether proper foundation or predicate was laid for the introduction in evidence of the dying declarations of the deceased. The defendant relies upon *S. v. Stewart,* 210 N. C., 362, 186 S. E., 488, for a negative answer. We agree with the Attorney-General that the case is controlled by the decisions in *S. v. Triplett,* 211 N. C., 105, 189 S. E., 123; *S. v. Carden,* 209 N. C., 404, 183 S. E., 898; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604, and cases there cited. The foundation is sufficient. *S. v. Wallace,* 203 N. C., 284, 166 S. E., 716; *S. v. Mills,* 91 N. C., 581; Wigmore on Evidence, sec. 1440.

Moreover, the dying declarations of the deceased appear to have had but little, if any, weight with the jury. The shooting was admitted and the jury returned the following verdict: "We find the defendant not guilty of murder in the first degree; not guilty of murder in the second degree; but we find him guilty of manslaughter."

The exceptions are not such as to vitiate the trial.

No error.

STATE v. EMPIE BALDWIN.

(Filed 25 May, 1938.)

Criminal Law §§ 73a, 80—Appeal in this case dismissed for failure of defendant to serve statement of case on appeal within time allowed.

When defendant, convicted of a capital crime, gives notice of appeal, but it appears from certificate of the clerk after expiration of the time allowed for service of statement of case on appeal, that nothing has been done toward perfecting the appeal, the motion of the Attorney-General to docket and dismiss will be allowed, nothing appearing on the face of the record to defeat the motion.

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

MOTION by State to docket and dismiss appeal.

Attorney-General McMullan for the State.

STACY, C. J. At the January Term, 1938, Columbus Superior Court, the defendant Empie Baldwin, *alias* Eppie Baldwin, was tried upon an indictment charging him with rape, which resulted in conviction of the capital felony and sentence of death. From this judgment, the defendant gave notice of appeal and was allowed the statutory time to serve statement of case, which time has expired, and the clerk certifies "that nothing has been done towards perfecting the appeal, and the time for statement of case has expired." *S. v. Watson,* 208 N. C., 70, 179 S. E., 455. Accordingly, the Attorney-General has moved to docket and dismiss the appeal under Rule 17, as the case was due to be heard on Tuesday, 3 May, 1938, at the call of the docket from the Eighth District, the district to which the appeal belongs. *S. v. Moore,* 210 N. C., 459, 187 S. E., 586. Nothing appears on the face of the record to defeat the motion, hence it must be regarded as well taken and allowed. *S. v. Robinson,* 212 N. C., 536.

Judgment affirmed. Appeal dismissed.

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

STATE v. B. R. HARRIS.

(Filed 25 May, 1938.)

1. Criminal Law § 31a—Witness may testify that in his opinion defendant was under influence of intoxicating beverages.

In a prosecution for drunken driving, it is competent for a State's witness to testify that in his opinion defendant was under the influence

of intoxicating beverages, the testimony being competent under the exception to the general rule that opinion evidence is competent when from the nature of the subject under investigation, no better evidence can be obtained.

2. Same—Competency of opinion evidence in general.

To the general rule that opinion evidence is incompetent there are at least three exceptions: Opinions of experts, opinions on the question of identity, and opinions received from necessity because from the nature of the subject under investigation no better evidence can be obtained.

3. Automobiles § 29—

In a prosecution for drunken driving, C. S., 4506, an instruction that defendant was under the influence of intoxicating liquor if he had drunk enough to make him act or think differently than he would have acted or thought if he had not drunk any, regardless of the amount he drank, *is held* without error.

4. Criminal Law § 53d—

An instruction that there was "some evidence tending to show" a fact in issue cannot be construed as an expression of opinion by the court as to whether the fact was fully or sufficiently proven.

5. Criminal Law § 53f—

A slight inaccuracy in stating the evidence will not be held for reversible error when the matter is not called to the court's attention in apt time to afford opportunity for correction.

6. Criminal Law § 53a—

The failure of the court to instruct the jury that it was their duty to recollect the evidence and not be guided by the recollection of the court or anyone else, will not be sustained in the absence of a request to so charge.

7. Criminal Law § 56—

A motion in arrest of judgment for the reason that the warrant upon which defendant was tried was not signed by the proper officer is correctly denied when defendant makes a general appearance in court, such appearance being a waiver of any objection predicated upon any irregularity in the warrant.

APPEAL by defendant from *Harding, J.*, at December Term, 1937, of GUILFORD. No error.

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

Gold, McAnally & Gold for defendant, appellant.

PER CURIAM. The defendant was convicted in the municipal court of the city of High Point of operating an automobile upon the public highway while under the influence of intoxicating liquors, C. S., 4506, and appealed to the Superior Court of Guilford County, where upon a

trial *de novo* he was again convicted and appealed to the Supreme Court, assigning errors.

The first assignment of error is to the court's permitting the State's witness, over objection, to testify that in his opinion the defendant was under the influence of intoxicating beverages. This assignment cannot be sustained. To the general rule that the opinion evidence is incompetent there are three, at least, well recognized exceptions: First, opinions of experts; second, opinions on the question of identity; and third, opinions received from necessity, *i.e.*, when from the nature of the subject under investigation, no better evidence can be obtained. *S. v. McLaughlin*, 126 N. C., 1080. We think, and so hold, that the evidence assigned as error falls within the third category.

The second assignment of error assails that portion of the charge which reads: "If a man is under the influence of intoxicating liquor he has got enough to make him think or act or do differently from what he would think or act if he did not have it, whether it is a spoonful or a quart, whether it is a bottle of beer or a quart of liquor." This instruction is in substantial accord with the definition of "under the influence of an intoxicant" approved in *S. v. Dills*, 204 N. C., 33, and cannot be held for reversible error.

The third assignment of error assails that portion of the charge which reads: ". . . there is some evidence tending to show both—that he was intoxicated at that time, and said to his friend that he was going back to the City Park, and at that time his friend stated to him he was so drunk he was going to take him home and put him to bed." We cannot see wherein this instruction impinges the provision of C. S., 564, that "no judge, in giving a charge to a petit jury, . . . shall give an opinion whether a fact is fully or sufficiently proven, . . ." The judge used the expression that there was "some evidence tending to show" that the defendant was intoxicated at a given time. This cannot be construed as expressing an opinion that the fact of the defendant's intoxication was fully or sufficiently proven. If there was a slight inaccuracy in the statement of the evidence, it cannot be held for reversible error in the absence of the inaccuracy being called to the attention of the judge at the time, and thereby affording an opportunity to correct it. *S. v. Sterling*, 200 N. C., 18.

The fourth assignment of error is to the court's failure to charge the jury that it was their duty to recollect the evidence and not be guided by the recollection of the court or anyone else. This assignment cannot be sustained in the absence of a request to so charge.

The fifth assignment of error is to the action of the court in overruling the motion of the defendant to set aside the verdict. This assignment is dismissed in appellant's brief with the comment that it is formal.

The sixth assignment of error is to the court disallowing a motion in arrest of judgment for the reason that the warrant was not signed

by the proper officer. This assignment cannot be sustained, since it appears from the record that the defendant entered a general appearance, both in the municipal court and in the Superior Court. Such an appearance was a waiver by the defendant of any objection predicated upon any irregularity in the warrant. "He could not take his chance of acquittal on a trial on the merits and, if convicted, urge that he was not in court. In both civil and criminal cases, if the party answers the complaint without objection to the process or its service, he waives all objection thereto." *S. v. Turner,* 170 N. C., 701.

In the trial we find

No error.

STATE OF NORTH CAROLINA EX REL. G. DUDLEY HUMPHREY, GUARDIAN OF ERNEST T. WATERS, AN INCOMPETENT, v. AMERICAN SURETY COMPANY AND UNITED STATES FIDELITY & GUARANTY COMPANY.

(Filed 25 May, 1938.)

1. Principal and Surety § 18—

A surety who has notice of proceedings for accounting as against the principal and an opportunity to appear and defend, but elects not to do so, but has the proceeding dismissed as to it, it is bound by the account stated and the judgment rendered against the principal.

2. Limitation of Actions § 5—

An action instituted against the surety in a guardianship bond is not barred when instituted within three years from the principal's failure to pay over upon demand the amount found to be due upon accounting.

3. Guardian and Ward § 24—Relator in action against principal in guardianship bond need not attach copy of the bond to the complaint.

In an action against the surety in a guardianship bond, instituted after failure of the principal to pay the amount found due upon accounting, plaintiff relator need not allege the conditions of the bond nor attach copy of the bond to the complaint, since the bond is of record and if its terms do not provide liability upon the breach alleged, our statutory provisions, which become a part thereof, do provide for such liability.

4. Same—Accounts filed by guardian are only prima facie correct and are not binding on the ward or successor guardian.

Allegations that the principal in a guardianship bond had failed to pay to the successor guardian the amount found to be due upon accounting for which judgment against the principal had been rendered in judicial proceedings in which defendant surety had full opportunity to appear and defend, sufficiently states a cause of action against the surety, the account filed by the principal in the bond being only *prima facie* correct and not binding upon the ward or the successor guardian.

5. Guardian and Ward § 23—

Sureties on successive bonds given by a guardian are jointly and severally liable for default of the guardian, and judgment may be taken against one before the cause is at issue against the other, plaintiff relator having no interest in the right of the sureties to contribution between themselves.

6. Same—

The fact that a successive guardianship bond is marked by someone "substitute bond" does not affect the rule of the joint and several liability of the sureties in the successive bonds to plaintiff relator upon default of the principal.

APPEAL by defendant American Surety Company from *Spears, J.*, at October Term, 1937, of NEW HANOVER. Affirmed.

This is a civil action instituted by the relator to recover of the defendant the penal sum of its guardianship bond to be discharged upon the payment of the amount adjudged to be due by the principal.

Hugh N. Pace qualified as guardian of plaintiff's ward in 1928, giving bond in the sum of $1,000, signed by Union Indemnity Company as surety. The said surety having become insolvent, the guardian, in July, 1933, gave a new bond in the sum of $1,000 with the defendant American Surety Company as surety thereon. This bond was marked "substitute bond." In January, 1935, the said guardian filed another bond in the sum of $1,500 with the defendant United States Fidelity & Guaranty Company as surety thereon. This bond was likewise marked "substitute bond."

Thereafter, on or about the first day of January, 1936, said Pace resigned as such guardian and the relator was appointed guardian of Ernest T. Waters 19 February, 1936.

The former guardian having failed to account to the relator for the estate in his hands belonging to the ward, the relator filed a petition before the clerk asking for an accounting by the said Pace. A copy of the petition and order of the clerk entered thereon was duly served upon each of the defendants. Each defendant thereupon entered a special appearance and moved to dismiss the proceeding as to them. The motion having been denied by the clerk, the defendants appealed and said motion was allowed in the Superior Court.

An account was duly stated and it was ascertained and adjudged that the former guardian was indebted to his former ward in the sum of $865.49, with interest from 1 January, 1937, together with the costs of the proceedings.

The said Pace having failed to account for and pay over to the relator the amount adjudged to be due, this action was instituted against the sureties upon his bonds. Time was granted the defendant United States Fidelity & Guaranty Company within which to file answer. At the October Term, 1937, the appealing defendant having filed answer and

the cause not being at issue as to the United States Fidelity & Guaranty Company, the plaintiff moved for judgment upon the pleadings.

After the court had announced its judgment, granting the motion for judgment upon the pleadings, but before the said judgment was actually signed, the appealing defendant filed a motion: (1) In the nature of a demurrer *ore tenus*, for that complaint does not state a cause of action; (2) for the submission of issues to the jury; (3) for a reference; (4) for an order adjudging that neither defendant is bound or estopped by the account stated between Pace as guardian and the relator when neither defendant was party to said suit for an accounting, or before the court, and (5) for a denial of the motion of relator for that it is irregular and improper for the court to take up and hear this proceeding by piecemeal, or until after the other defendant has filed its answer.

Judgment was duly rendered in favor of the plaintiff upon the pleadings and the American Surety Company excepted and appealed.

E. K. Bryan for plaintiff, appellee.
John D. Bellamy & Sons for defendant, appellant.

PER CURIAM. There is no valid defense set up in the defendant's answer. It was given notice of and, by the service of a copy of the petition and order, made party to the proceeding for an accounting. On its own motion said proceeding was dismissed as to this defendant. It had full knowledge of the proceedings and an opportunity to appear and defend. It elected not to do so. It cannot now complain that judgment was rendered against the principal in the bond, to which the principal did not except and from which he did not appeal.

The amount due by the former guardian having been duly ascertained, his failure to account for and pay over to the relator the amount adjudged to be due was a breach of the bond which is sufficiently alleged in the complaint. This breach occurred within three years next prior to the institution of this action. Defendant's plea of the statute of limitations is without merit.

The defendant complains that a copy of the bond is not attached to the complaint and the conditions thereof are not alleged, so that it does not appear what the conditions of the bond are. The bond was executed by the defendant and is of record. It has full knowledge of its contents. If the terms of the bond itself do not provide for liability upon the breach alleged, the provisions of our statutes in relation to guardianship bonds are by law written into the bond. It follows that the allegations of the complaint are sufficient to set out a cause of action.

The accounts filed by the former guardian are only *prima facie* correct and are not binding upon the ward or its successor guardian. It has been ascertained in a judicial proceeding in which this defendant had full opportunity to appear and defend that said accounts were not correct

and the amount actually due by the former ward has been ascertained and judgment thereon rendered against him. This is duly alleged in the complaint.

Where a guardian gives 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; *Adams v. Adams,* 212 N. C., 337. There was no petition by this defendant to be relieved from its bond and no order relieving said defendant or permitting the substitution of a new bond. The mere fact that the bond of the United States Fidelity & Guaranty Company was marked by someone "substitute bond" does not affect the rule which makes these defendants jointly and severally liable for the default of the principal in said bonds.

This defendant complains that judgment is rendered against it before the cause is at issue as against the other bondsman, and assigns as error the judgment of the court against this defendant before the United States Fidelity & Trust Company filed its answer. This assignment is without merit. While this defendant is entitled to contribution from the codefendant, and an accounting as between the two defendants may, on proper pleadings filed, be had in this action, there is no reason why the plaintiff should be delayed in the recovery of judgment against this defendant merely because it is delayed in procuring a judgment against the cosurety. The amount recovered, including interest and costs, exceeds the penal sum of this defendant's bond. For that reason we could hardly assume that the plaintiff will not also proceed against the other defendant in due time. He is not interested in the right of contribution as between the defendants and should not be delayed until that question is determined.

We have carefully examined the defendant's exceptive assignments of error and in none of them do we find any substantial merit. The judgment below is

Affirmed.

SAMUEL W. GUYES v. C. T. COUNCIL AND GERMAIN BERNARD, PARTNERS, TRADING AND DOING BUSINESS UNDER THE STYLE AND FIRM NAME OF BC REMEDY COMPANY.

(Filed 25 May, 1938.)

Trial § 29a—Form of instruction as to answering of issues held sufficiently full in view of amount of evidence and complexity of case.

While ordinarily the trial court should instruct the jury separately as to the facts it must find in order to answer each of the issues in the affirmative, where there is a great deal of evidence and numerous ele-

ments constituting the causes of action alleged, it will not be held for error for the trial court to explain the law, recount the evidence, explain what facts would constitute the respective causes of action, state the respective contentions of the parties, and charge the jury as to each issue to answer it affirmatively if the plaintiff had satisfied it by the greater weight of the evidence of the facts essential to establish that particular cause of action as theretofore explained by the court.

APPEAL by plaintiff from *Phillips, J.,* at October Term, 1937, of GUILFORD. No error.

This is an action instituted by the plaintiff against the defendants to recover compensation for personal injuries alleged to have been caused by the negligence and the fraud and deceit of the defendants, who are the manufacturers of a certain proprietary medicine sold under the name of BC.

The defendants manufacture BC, a proprietary medicine, and sell the same to drug stores, soda fountains, filling stations and other retail businesses, for resale to the public. The plaintiff alleges that the defendants, in their advertisements in newspapers and other periodicals and by radio and in the directions upon the packages in which the medicine is sold, and otherwise, falsely represent the medicine to be safe and reliable for use by human beings, without depressing or bad after effects, harmless and nonhabit forming, and that it may be taken with the absolute assurance that it does not contain narcotics. The plaintiff also alleges that the manufacture and sale of BC, containing poisonous and injurious drugs, by defendants without making known and giving warning of the dangerous nature and effect thereof, constituted actionable negligence. He likewise alleges that the advertisements in question constituted negligence and that the defendants were negligent in publishing the directions for use of the preparation; that the preparation was misbranded in violation of the statute and that such misbranding constituted negligence.

The plaintiff offered evidence which he contends tends to support said allegation of negligence and similar allegations in the complaint. The defendants denied the allegations of fraud and deceit and of negligence and offered evidence tending to contradict and rebut the testimony offered by the plaintiff, and tending further to show that said medicine is harmless, is not misbranded, is not narcotic, and is not habit-forming.

At the conclusion of the evidence issues were submitted to and answered by the jury as follows:

"1. Was the plaintiff injured through the negligence of the defendants, as alleged in the complaint? Answer: 'No.'

"2. Was the plaintiff injured through the fraud and deceit of the defendants, as alleged in the complaint? Answer: 'No.'

"3. What compensatory damages, if any, is the plaintiff entitled to recover? Answer: .....

"4. What punitive damages, if any, is the plaintiff entitled to recover? Answer: ....."

Upon the coming in of the verdict the court below rendered judgment that the plaintiff have and recover nothing in this action, and that he be taxed with the costs, and the plaintiff excepted and appealed.

Guthrie & Guthrie, Hobgood & Ward, and Francis I. Anderson for plaintiff, appellant.

Fuller, Reade & Fuller for defendants, appellees.

PER CURIAM. The plaintiff has abandoned all except one of his assignments of error and presents to us for decision but one question: Does the charge of the court meet the requirements of that part of C. S., 564, requiring a trial judge to "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon?"

The court below gave an extended charge, which consumes more than forty-eight pages of the printed record, in which he carefully and correctly defined what constitutes fraud and deceit as those terms are related to the evidence in the cause. He likewise defined negligence as that term relates to the evidence relied upon by the plaintiff. That is, he explained to the jury what facts would constitute fraud and deceit and what facts would constitute negligence under the allegations and evidence in the cause. He then recapitulated the evidence, witness by witness. This was followed by a full statement of the contentions of the respective parties.

Then, after explaining the burden of proof, the court charged the jury directly upon the issues substantially as shown by his charge on the second issue, which, after quoting the issue, is as follows: "If the plaintiff has satisfied you by the greater weight of the evidence that he was injured through fraud and deceit of the defendants, bearing in mind and remembering the definition of fraud and deceit and other rules of law applicable that the court has heretofore more fully explained to you, then you will answer the second issue 'Yes,'; otherwise, 'No.'"

While the better practice may require the judge to state in his charge to the jury that if it finds certain recited facts which the plaintiff contends are established by the evidence they would answer the issue in the affirmative, otherwise in the negative, so that the jury may thus get an immediate picture of the facts necessary to support an affirmative answer to the issue, we cannot hold the method pursued by the court below is a violation of the provision of C. S., 564. There was much evidence offered and numerous elements enter into and constitute a part of the alleged fraud and deceit and alleged negligence. It would be difficult, if not impossible, for a judge to intelligently explain to the jury the controverted issues except in the manner adopted by the court below.

The plaintiff has had his cause submitted to a jury under a charge which fully explains the law and the evidence, and the jury has rendered a verdict adverse to him. His exceptive assignment of error cannot be sustained.

No error.

E. O. HINKLE v. ANDREW W. (W. A.) WALKER AND WIFE, MARTHA J. WALKER, J. H. GREER AND J. D. REDWINE, LEXINGTON PERPETUAL BUILDING & LOAN ASSOCIATION, J. A. McCRARY, TRUSTEE FOR LEXINGTON PERPETUAL BUILDING & LOAN ASSOCIATION, JOHN A. McCRARY AND MARGARET McCRARY, EXECUTORS OF CHARLES E. McCRARY, AND P. R. RAPER, EXECUTOR OF EMERY E. RAPER.

(Filed 25 May, 1938.)

1. Executors and Administrators § 8—

Upon the death of the owner of land title thereto vests either in his devisees or his heirs at law, but not in his executor.

2. Mortgages § 31b—Devisees or heirs at law of deceased holders of record title must be made parties in action to foreclose mortgage.

In an action to foreclose a mortgage, the joinder of the executors of the holders of the record title, who were dead at the time of the institution of the action, without the joinder of their devisees or heirs at law, fails to state a cause of action either against the executors or against those through whom record title was derived, and defendant appellants' demurrer *ore tenus* in the Supreme Court is allowed.

3. Executors and Administrators § 8—

An adjudication that persons dead at the time of the institution of the action were the owners of the fee in the land in controversy is error.

APPEAL by the plaintiff from *Bivens, J.*, at February Term, 1938, of DAVIDSON.

J. M. Daniel, Jr., for plaintiff, appellant.
Don A. Walser for defendants, appellees.

PER CURIAM. This is an action to foreclose a mortgage on real estate. The plaintiff alleges, *inter alia*, that the record title of the land sought to be sold is in the names of Charles E. McCrary and Emery E. Raper, now dead. The complaint further alleges that Charles E. McCrary and Emery E. Raper derived title through the foreclosure of a deed of trust executed by the former owners of the land sought to be sold, Andrew W. (W. A.) Walker and wife, Martha J. Walker, to J. A. McCrary, trustee for Lexington Perpetual Building & Loan Association. The defendants

Lexington Perpetual Building & Loan Association, J. A. McCrary, trustee of Lexington Perpetual Building & Loan Association, John A. McCrary and Margaret McCrary, executors of Charles E. McCrary, and P. R. Raper, executor of E. E. Raper, filed answer in which they deny the validity of the mortgage sought to be foreclosed for the reason that it was not properly indexed. In the Supreme Court said answering defendants demurred *ore tenus* to the complaint for that neither the heirs at law nor the devisees of said Charles E. McCrary or Emery E. Raper are named in the complaint or made parties defendants, and for that reason the complaint does not state facts sufficient to constitute a cause of action against the demurring defendants.

If the record title to the land sought to be sold is in the names of Charles E. McCrary and Emery E. Raper, and they are both dead, then it follows that either their heirs at law or devisees succeeded to their title, and that the complaint does not state a cause of action against the executors of those in whose names is the record title, nor against those through whom such record title is derived. Title to land of decedents does not vest in their executors but in their heirs at law or devisees. The demurrer is therefore sustained.

The plaintiff, appellant, excepts to the judgment entered on the cross action of the defendants, which contains the following: "It is further ordered, adjudged and decreed that Charles E. McCrary and Emery E. Raper are the owners in fee simple of said property, free and clear of the mortgages hereinbefore referred to, said property being more particularly described as follows": (Here follows the description of the land described in the complaint.) The error of this adjudication is obvious. Charles E. McCrary and Emery E. Raper, both being dead at the time of the institution of this action, could not be adjudged to be the owners of the land sought to be sold.

The demurrer is sustained and the judgment on the cross action is Reversed.

VIRGINIA TRUCK GROWERS MANUFACTURING CORPORATION v. MOORE COUNTY MUTUAL EXCHANGE.

(Filed 25 May, 1938.)

Appeal and Error § 24—

Appellant excepted to a preceding question but did not except to the question eliciting the testimony complained of, or to the testimony. *Held:* The competency of the testimony is not presented for decision, since only exceptive assignments of error will be considered. Rule of Practice in the Supreme Court, No. 19 (3).

MANUFACTURING CORP. *v.* MUTUAL EXCHANGE.

APPEAL by plaintiff from *Armstrong, J.*, at December Term, 1937, of MOORE.

Civil action to recover on alleged contract for fertilizer sold and delivered on consignment.

Plaintiff alleges that between the dates of 6 March, 1934, and 3 July, 1934, it sold and delivered to defendant, on consignment, fertilizers of various kinds at the aggregate price of $18,903.66, of which there is a balance of $1,371.57 due after demand and payment refused. Defendant denies the allegations of the plaintiff and avers that it purchased and received on consignment from Producers Mutual Exchange of North Carolina fertilizer of the amount alleged upon the express contract and agreement that it would retail same for a selling commission of $1.50 per ton, and that it had fully accounted to the said exchange. On the trial below the parties offered evidence tending to support their respective contentions. The case was submitted to the jury upon the single issue of indebtedness. There was verdict and judgment for defendant, from which plaintiff appealed to the Supreme Court, and assigns error.

Johnson & McCluer for plaintiff, appellant.
Mosley G. Boyette for defendant, appellee.

PER CURIAM. Appellant expressly abandons all assignments of error except that relating to Exception No. 5, which is untenable. The assignment covering this exception is in this language: "Jack Blue, witness for the defendant, appellee, testified: 'I was employed by the Moore County Mutual Exchange during the year 1934 as bookkeeper. I was present in January, 1934, when Mr. Miles of the Producers Mutual Exchange of Durham came there.' Q. Did you hear a conversation between Mr. Miles and Mr. McCrimmon with respect to the Moore County Mutual Exchange handling fertilizer for Mr. Miles during 1934? Objection; overruled; and plaintiff excepts, and this is plaintiff's Exception No. 5. A. Yes, sir. R., p. 25." The question alone is not objectionable. The answer is harmless.

Plaintiff discusses the competency of the testimony of the witness as to what the conversation was. But the record fails to show exception to the separate question eliciting same or to the statement by the witness of the substance of the conversation, and there is no assignment thereon. Exceptive assignments of error, and none other, are considered on appeal. Rule 19, sec. 3, of Rules of Practice in the Supreme Court, 200 N. C., 824; *In re Will of Beard,* 202 N. C., 661, 163 S. E., 748; *S. v. Bittings,* 206 N. C., 798, 175 S. E., 299.

We find

No error.

R. FRANK SEAY v. AMERICAN SAVINGS LIFE INSURANCE COMPANY.

(Filed 25 May, 1938.)

Appeal and Error § 49—When Supreme Court is evenly divided in opinion the judgment of lower court becomes law of the case and is controlling.

When the judgment of the lower court is affirmed on appeal because the Supreme Court is evenly divided in opinion, the judgment of the lower court becomes the law of the case and is determinative of the rights of the parties upon a second action instituted by the same plaintiff on the same contract against the successor of the defendant company.

APPEAL by plaintiff from *Bivens, J.,* at March-April, 1938, Civil Term, of GUILFORD. Reversed.

This action was brought by plaintiff against defendant to recover $1,190 commissions on insurance premium renewals. The defendant denied liability.

In the agreed statement of facts is the following: "10. That if the plaintiff, under the terms of the contracts in question, is entitled to commissions or renewals paid the Sentinel Life Insurance Company or the defendant after the contract of agency was terminated, and if the plaintiff is entitled to recover against the defendant American Savings Life Insurance Company, then the plaintiff is entitled to recover judgment against the defendant in the sum of $1,190, but if the plaintiff, under the terms of the contracts, is not entitled to commissions on renewals paid the Sentinel Life Insurance Company or the defendant after the contract of agency was terminated, or if the plaintiff is not entitled to recover of the defendant American Savings Life Insurance Company, then the plaintiff is not entitled to recover judgment against the defendant in any amount, and the plaintiff's action should be dismissed, and he should be taxed with the costs."

The judgment of the municipal court was as follows: "This cause coming on to be heard, and being heard upon pleadings, the agreed statement of facts and argument of counsel, and after consideration of the same, the court being of the opinion that upon said agreed statement of facts that the plaintiff is not entitled to recover in this action. It is therefore, upon motion of attorneys for defendant, ordered, adjudged and decreed that the plaintiff take nothing by his action, and that the same be dismissed, and that the costs be taxed against the plaintiff. This 24 January, 1938. Lewis E. Teague, judge municipal court of the city of High Point."

To the signing of the foregoing judgment, the plaintiff excepted, assigned error, and appealed to the Superior Court of Guilford County.

The judgment of the Superior Court was as follows: "This cause

coming on to be heard on appeal from a judgment signed in the municipal court of the city of High Point in said cause and being heard upon the plaintiff's assignments of error No. 1 and No. 2 as appearing in the case on appeal, and it appearing to the court that said exceptions and assignments of error should be overruled and the judgment of the trial court sustained: It is therefore, upon motion of attorneys for the defendant, ordered, adjudged and decreed that said assignments of error be and they are each hereby overruled, and the judgment of the High Point municipal court is sustained and the costs of this appeal taxed against the plaintiff. This 1 April, 1938. E. C. Bivens, Judge Presiding, 12th Judicial District."

To the overruling of the plaintiff's assignments of error, and each of them, and to the signing of the foregoing judgment, the plaintiff excepted, assigned error, and appealed to the Supreme Court.

R. T. Pickens and Jones & Fisher for plaintiff.
Roberson, Haworth & Reese for defendant.

PER CURIAM. In the case of *Seay v. Ins. Co.*, 208 N. C., 832, is the following: "Civil action to recover agent's commissions on insurance premium renewals, 'paid to and accepted by the (defendant) company, while this (agency) contract is in force . . . limit 9 years.' The defendant sought to terminate its agency contract with the plaintiff, prior to the expiration of the ninth renewal of some of the policies written by plaintiff. This suit is to recover commissions on such renewals up to the 9th on each policy. Judgment of nonsuit was entered in the municipal court of the city of High Point, which was reversed on appeal to the Superior Court of Guilford County. From the ruling of the Superior Court the defendant appeals, assigning error. (*Per Curiam*): The Court being evenly divided in opinion, *Clarkson, J.*, not sitting, the judgment of the Superior Court is affirmed and stands, according to the uniform practice of appellate courts, as the decision in this case, without becoming a precedent," citing many authorities.

This action is being prosecuted by the same plaintiff, against the successor of the same defendant, for recovery under the same contract as that considered in the former action. The plaintiff pleads *res judicata*. The judgment of the Superior Court in the former action, unchanged on appeal, is determinative of the plaintiff's right to recover under the contract in this action, and hence the judgment of nonsuit is reversed.

We think what was said in the above case is applicable to the present action, and the judgment of the court below is

Reversed.

STATE v. JOE LIBBY.

(Filed 25 May, 1938.)

1. Intoxicating Liquor § 9b—

The presence of empty whiskey bottles around a defendant's store and filling station constitutes some evidence that whiskey had been consumed on the premises and tends to assist in establishing that defendant possessed whiskey for the purpose of sale.

2. Intoxicating Liquor § 9c—Evidence of illegal possession of intoxicating liquor for purpose of sale held sufficient for jury.

Evidence that over a gallon of whiskey in pint bottles with unbroken seals was found on defendant's premises, that defendant admitted owning the whiskey, and that empty whiskey bottles were found around premises, *is held* sufficient to be submitted to the jury on a charge of illegal possession of intoxicating liquor for the purpose of sale. Ch. 49, Public Laws of 1937, N. C. Code, 3379, 3411 (j).

APPEAL by defendant from *Harding, J.*, and a jury, 6 December, 1937, Special Criminal Term, of GUILFORD. No error.

The defendant was arrested on a warrant duly sworn out charging him "That at and in said county of Guilford, Morehead Township, on or about 15 September, 1937, Joe Libby did unlawfully, willfully and feloniously (have) possession of eleven pints of taxed paid whiskey for the purpose of sale, contrary to the form of the statute and against the peace and dignity of the State."

The defendant was tried, convicted and sentenced in the municipal court on the warrant and appealed to the Superior Court. The defendant was tried before a jury in the Superior Court and found guilty, judgment was pronounced that defendant be confined in the common jail of Guilford County for a period of eight (8) months to be assigned to work under the supervision of the State Highway and Public Works Commission, as provided by law. From the judgment defendant appealed to the Supreme Court.

The evidence on the part of the State tended to show that defendant had a place of business, selling cold drinks, sandwiches and beer on the High Point Road near Greensboro, N. C. He had a double and single cabin for tourists. The building consisted of four rooms and the kitchen. The sheriff, deputy sheriff and another, with a search warrant, went to the defendant's place of business. The defendant was there. O. D. Apple, deputy sheriff, testified that when he went in the back door two girls were standing in the kitchen near the sink. They were working there. One of them put something in the sink. The sink had water in it and contained cooking utensils, pans, etc. In a washstand drawer in

a cabin, about 12 feet from the main building, were found four pints of branded whiskey on which the seal had not been broken nor cap removed. In going back to the kitchen one of the girls was pretending to be washing some pans and things, he ran his hand in the water and found a pint of Calvert whiskey. In the yard near the back door was a car, claimed by one of the girls working for defendant. There were found six pints in the dash-door pocket of the car. In the back of the grounds there were found a number of empty pint bottles, liquor bottles of different brands, Calvert, Crab Orchard, Cream of Kentucky, Wilkens Family, and any number of empty bottles found on the grounds, some of which showed to be fresh and some to have been there some time. The two girls stated in defendant's presence that they were working for him and lived in one room in the double cabin—the room in which four pints of whiskey were found. The defendant stayed in the single cabin located five or six feet from the double cabin.

The witness Apple testified further: "After we found all of the whiskey and got through searching and the two girls came in and claimed part of the whiskey, Mr. Phipps and Mr. Ballinger and myself told them all three to get ready to go, that they were under arrest, that if they had any dressing to do to get ready, that we would have to take them up and demand a bond for them. At that time Joe Libby spoke up and said, 'There is no need of that.' I said, 'Joe, all I can do is what they said. They said part of the liquor belonged to them and you operate the place here.' He said, 'I will claim all of the liquor. It was mine.' I said, 'Do you want to sign a written statement to that effect?' and he said he would and I wrote out the statement and he signed it. . . . Q. What statement, if any, did the defendant make with reference to the ownership of the liquor? Ans.: As I said a bit ago, he stated the whiskey was his. Q. You testified the defendant signed a statement—is this the statement he signed (showing witness paper)? Ans.: Yes, sir."

The statement was as follows: "I Joe Libby hereby admit that all eleven (11) pints of whiskey found on premises belong to me and girls have nothing to do with it. (Signed) Joe Libby. Witness: Joe S. Phipps, O. D. Apple—9/15/37."

Joe S. Phipps, sheriff of Guilford County, corroborated Apple and testified, in part: "After they had found some whiskey I went down and stood and talked with defendant. . . . I asked Joe 'Why is it you persist in having liquor around your place, or handling whiskey?' He made the remark: 'In business,' he said, 'all filling stations in business are handling whiskey and if you don't you can't get along without it.'"

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

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

Younce & Younce for defendant.

PER CURIAM. The defendant introduced no evidence and at the close of the State's evidence made a motion for judgment as in case of nonsuit. N. C. Code, 1935 (Michie), sec. 4643. The court below overruled this motion and in this we can see no error.

There was testimony that upon the premises operated by the defendant there was found more than a gallon of whiskey. He admitted that such whiskey belonged to him. The empty bottles strewn around the store constitute evidence that whiskey had been consumed upon the premises and tended to assist in establishing that the defendant possessed whiskey for the purpose of sale.

Chapter 49, Public Laws 1937, sec. 14, is as follows: "It shall not be unlawful for any person to transport a quantity of alcoholic beverages not in excess of one gallon from a county in North Carolina coming under the provisions of this act to or through another county in North Carolina not coming under the provisions of this act; *Provided,* said alcoholic beverages are not being transported for the purposes of sale, and provided further that the cap or seal on the container or containers of said alcoholic beverages has not been opened or broken. Nothing contained in this act shall be construed to prevent the transportation through any county not coming under the provisions of this act, of alcoholic beverages in actual course of delivery to any Alcoholic Beverage Control Board established in any county coming under the provisions of this act."

N. C. Code, 1935 (Michie), sec. 3379, in part, is as follows: "It is unlawful for any person, firm, association or corporation by whatever name called, to have or keep in possession, for the purpose of sale, any spirituous, vinous or malt liquors, and proof of any one of the following facts shall constitute *prima facie* evidence of the violation of this section. (1) The possession of a license from the Government of the United States to sell or manufacture intoxicating liquors; or (2) the possession of more than one gallon of spirituous liquors at any one time, whether in one or more places," etc. *S. v. Atkinson,* 210 N. C., 661.

Section 3411 (j) is as follows: "The possession of liquor by any person not legally permitted under this article to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this article. But it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such liquor is for the personal consumption of the owner thereof, and his family

residing in such dwelling, and of his *bona fide* guests when entertained by him therein."

The court below charged the law applicable to the facts. On the evidence the jury found defendant guilty. We see no error in the court below allowing the witness Apple to testify to matters complained of by defendant. We see no prejudicial or reversible error in the charge of the court below taken as a whole and not disconnectedly. On the record we see no new or novel proposition of law.

In the judgment of the court below we find

No error.

STATE v. HAYNES WILCOX.

(Filed 25 May, 1938.)

Criminal Law § 53d—

Objection to the charge on the ground that the court unduly emphasized the contentions of the State, amounting to an expression of opinion on the facts, held untenable, since the charge construed as a whole stated only contentions legitimately arising on the evidence and inferences properly deducible therefrom. C. S., 564.

APPEAL by defendant from *Spears, J.*, at February Term, 1938, of ROBESON. No error.

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

McKinnon, Nance & Seawell, F. E. Carlyle, and McLean & Stacy for defendant.

PER CURIAM. The only assignments of error we are asked to consider relate to the judge's charge. The appellant states the question involved as follows: "Did the court in the charge express an opinion on the facts, contrary to the provisions of section 564, Consolidated Statutes?"

It is urged that the learned judge who presided over the trial of this case inadvertently fell into the error of unduly emphasizing the State's contentions, amounting to the intimation of an opinion on the facts, and that for this a new trial should be awarded, citing *S. v. Rhinehart*, 209 N. C., 150, 183 S. E., 388. However, an examination of the charge as a whole leads us to the conclusion that only contentions legitimately arising on the evidence offered and inferences properly deducible therefrom were stated to the jury. The duty of the judge, under the provi-

sions of the statute, to state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon, without expressing an opinion, directly or indirectly, whether a fact is fully or sufficiently proven, seems to have been adequately performed in this case, and the defendant has no just cause of complaint. *S. v. Proctor, ante,* 221.

No error.

JAMES F. GIBSON, BY HIS NEXT FRIEND, JOHN W. GIBSON, v. THOMAS W. GORDON.

(Filed 25 May, 1938.)

1. Judgments § 35—

An estoppel by prior judgment between the parties on the same cause of action is properly pleaded in the answer.

2. Same: Evidence § 37—

Upon a plea of estoppel by prior judgment between the parties, the record itself in the former action, being in existence, is the only evidence admissible to prove its contents.

3. Judgments § 4—

The procedure in attacking a consent judgment on the ground that a party thereto was a minor or *non compos mentis* and incapable of consenting, is by motion in the cause.

4. Judgments § 33b—

When a consent judgment of a minor or a person *non compos mentis* recites that the court investigated the facts and found that the settlement was just and reasonable, the finding is conclusive and the judgment is a bar to a subsequent action on the same cause of action.

APPEAL by plaintiff from *Harding, J.,* at November Term, 1937, of GUILFORD.

Civil action to recover damages for alleged actionable negligence.

Plaintiff by his next friend, duly appointed, alleges that he was injured 7 March, 1935, as the proximate result of the actionable negligence of the defendant and is thereby damaged.

Defendant denies the material allegations of the complaint, and as further defense pleads in substance that on or about 29 July, 1935, plaintiff James F. Gibson, by his duly appointed next friend, Lillie Gibson, instituted an action against the defendant in the Superior Court of Davidson County, North Carolina, to recover damages on the same cause of action alleged in the present action; that plaintiff filed complaint, which with summons was served upon defendant as provided by law; that defendant appeared and filed answer; that thereafter plaintiff

came into court and represented that he could prosecute the action without a next friend, whereupon an order was made making him a party individually; that thereupon plaintiff filed a duly verified complaint on 10 October, 1935, to which defendant filed answer; that the case came on for hearing at the October Civil Term, 1935, of the Superior Court of said county and was heard before Shaw, Judge presiding, by whom final judgment was signed with the written consent of plaintiff individually, and defendant, through their attorneys of record; that the said judgment was entitled: "James F. Gibson, by his next friend, Mrs. Lillie Gibson, and James F. Gibson, plaintiffs, *v.* Thomas W. Gordon, defendant," and recites: "It appearing to the court that all matters in controversy have been compromised and settled between the plaintiffs and defendant and that the defendant has agreed to pay the plaintiffs the sum of one thousand dollars ($1,000) in full settlement of all matters alleged in the complaint, and the court having heard the evidence and counsel and after thorough investigation by the court the above settlement is found to be just and reasonable and a fair and equitable settlement for the plaintiff, James F. Gibson"; and that all matters in the present action were finally determined and adjudicated in the former. Defendant, thereupon, specifically avers that plaintiff is estopped by the judgment roll and judgment in the said former action, which are pleaded as an estoppel.

In reply, plaintiff denied that the alleged judgment is *res adjudicata;* and alleges that the judgment in the former action in Superior Court of Davidson County was purely formal; that the action was "instituted and carried on only to give apparent sanction to the alleged settlement without proper or ample judicial investigation of the facts and circumstances surrounding said matters and things, upon which the right or extent of the alleged recovery is based"; that plaintiff was then mentally incompetent and incapable of consenting to a settlement; that in his deranged condition plaintiff refused to permit his wife as next friend to control the suit, and forced a settlement without consent of next friend; that defendant knew "the plaintiff was seriously and permanently injured and knew that the plaintiff was coercing and forcing plaintiff's wife to allow said alleged settlement therein, . . ." and knew that the court had no knowledge of such fact, and: "that in making settlement, under these circumstances, defendant deceived the court and practiced a fraud on the plaintiff and on the court."

Upon the case being called for trial, defendant moved to dismiss the action for that the plaintiff is estopped by the said judgment of Shaw, J., in the former action.

Defendant introduced in evidence the judgment roll and judgment in the former action in the Superior Court of Davidson County; and also

check of the clerk of said court payable to James F. Gibson for $1,000, "For judgment of James F. Gibson *v.* Thomas W. Gordon"; and endorsed by James F. Gibson and by Phillips and Bower, attorneys of record for plaintiff therein. Objection by plaintiff. Exception.

The court below finds the facts with respect to the former action to be as alleged in the further defense of defendant; that the defendant paid the amount of the judgment and all costs into the office of the clerk of Superior Court of Davidson County; that the clerk thereafter, by check, paid James F. Gibson the sum of $1,000; and that James F. Gibson and his attorneys endorsed the check. The court, being of opinion that the judgment in the former action is *res adjudicata* as to the matters and things alleged in the complaint in the present action, and that the plaintiff herein is estopped from maintaining the action, entered judgment dismissing same, from which plaintiff appeals to the Supreme Court and assigns error.

Gaston A. Johnson and D. H. Parsons for plaintiff, appellant.
Sapp & Sapp for defendant, appellee.

PER CURIAM. Careful consideration of the assignments presented in the record on this appeal fails to disclose error.

The record and judgment in the former action are relied upon as a bar to recovery in the present action between the same parties upon the same cause of action. The plea of estoppel on that ground is properly and distinctly pleaded as a defense. *Harrison v. Hoff,* 102 N. C., 126, 9 S. E., 638; *Blackwell v. Dibbrell,* 103 N. C., 270, 9 S. E., 192; *Stancill v. James,* 126 N. C., 190, 35 S. E., 245.

The record itself in the former action, being in existence, is the only evidence admissible to prove its contents. *Gauldin v. Madison,* 179 N. C., 461, 102 S. E., 851; *Little v. Bost,* 208 N. C., 762, 182 S. E., 448.

If in the former action plaintiff were sane and capable of consenting to the judgment, he is bound by his consent evidenced by his signature and by that of his attorneys. *Cason v. Shute,* 211 N. C., 195, 189 S. E., 494, and cases cited. If it be contended that he did not consent or were incapable of consenting, the proper procedure in attacking such judgment is by motion in the cause. *Cason v. Shute, supra.*

Where consent judgment, entered in an action by a minor, or by a person *non compos mentis,* by his next friend, in compromise of claim for damages for injury by actionable negligence, recites that the court has investigated the facts and that the settlement is just and reasonable, such judgment is binding upon the minor or the person *non compos mentis,* and constitutes a bar to later action against the same party on the same cause of action. *Oates v. Texas Co.,* 203 N. C., 474, 166

S. E., 317. If the plaintiff in the former action had not regained his sanity, the judgment therein shows upon its face that the court investigated the facts and found that the settlement is just, reasonable, fair and equitable.

The judgment below is

Affirmed.

MRS. IRENE HOFFMAN v. CLINIC HOSPITAL, INCORPORATED, AND FREDERICK L. WALKER.

(Filed 25 May, 1938.)

1. False Imprisonment § 1—

Involuntary restraint and its unlawfulness are the two essential elements of false imprisonment, and such restraint may be caused by threats as well as by actual force, but such threats must be sufficient to induce a reasonable apprehension of force.

2. False Imprisonment § 2—Evidence held insufficient to show express or implied force sufficient to sustain action for false imprisonment.

Evidence that the manager of a hospital told plaintiff, a patient in the hospital, she could not leave until she had paid her bill, that she remained there a short period of time, believing she could not go, but then left, nevertheless, in the hospital's wheel chair without any force or show of force being offered to prevent her going, *is held* insufficient to show an express or implied threat of force, and defendant hospital's motion to nonsuit was properly granted.

APPEAL by plaintiff from *Hill, Special Judge,* at February Term, 1938, of GUILFORD. Affirmed.

Robert A. Merritt and J. A. Kleemeier, Jr., for plaintiff.
Sapp & Sapp for defendant Clinic Hospital, Inc.

PER CURIAM. The plaintiff instituted her action against the Clinic Hospital, Incorporated, and Frederick L. Walker, its manager, to recover damages for false imprisonment or unlawful detention of her person in the hospital. At the close of the evidence motion for judgment of nonsuit as to the defendant hospital was allowed and the action as to it dismissed. Judgment was entered against defendant Walker, but no appeal was taken. It is admitted that the defendant Clinic Hospital, Incorporated, is a charitable hospital operated not for gain but for benevolent purposes.

The plaintiff testified that she entered the hospital for treatment on 7 December, 1937. She said: "I planned to go home on Tuesday, 14 December. He (Mr. Walker) came to my room and talked to me

about the bill. I told him I did not have the money and he said that I could not leave the hospital until the doctor's bill and the hospital was paid in full. . . . Mr. Walker came to my room on Thursday, 16 December. Mr. Walker said he would not let me go home until the bill was paid. As a result of Mr. Walker's statement at this time in my room I did not go home." Witness testified that she had been advised by her physician that she could go; that she was too weak to walk and had to be taken out in a wheel chair. "By reason of Mr. Walker's advice given on Wednesday and Thursday I did not think I could go. I thought by what Mr. Walker said I could not leave the hospital until the bill was paid. Mr. Walker is manager of the hospital. I did not see him when I left. I did not leave until Thursday night around 9:00 o'clock. Mr. Walker never did tell me then that I could go, but I went. Mr. Walker said I could not leave, but I did go. No one put their hands on me and no one undertook to restrain me by any kind of force. Nobody touched me and nobody threatened me."

False imprisonment is the illegal restraint of one's person against his will. It generally includes an assault and battery, and always, at least, a technical assault. Involuntary restraint and its unlawfulness are the two essential elements of the offense. Where no force or violence is actually used, the submission must be to a reasonably apprehended force. The circumstance, merely, that one considers himself restrained in person is not sufficient to constitute a false imprisonment unless there is in fact a reasonable ground to apprehend a resort to force upon an attempt to assert one's liberty. To constitute false imprisonment there must be an exercise of force, or express or implied threat of force, by which in fact the person is deprived of his liberty and compelled to remain where he does not wish to remain. The restraint of the person may be caused by threats, as well as by actual force, if the words are such as to induce a reasonable apprehension of force. *Parrish v. Mfg. Co.*, 211 N. C., 7; *Riley v. Stone*, 174 N. C., 588, 94 S. E., 434; *Powell v. Fibre Co.*, 150 N. C., 12, 63 S. E., 159; 11 R. C. L., 791; 25 C. J., 453.

Applying these principles of law to the plaintiff's testimony, it is apparent that neither force nor threat of force was employed to prevent her from leaving the hospital, and though she testified that she thought she could not leave the hospital until the bill was paid, nevertheless, without paying the bill, she departed from the hospital, without restraint by word or act, in the hospital's wheel chair. For these reasons, we conclude that the judgment of nonsuit as to the Clinic Hospital, Incorporated, was properly entered.

Judgment affirmed.

CORA LEE TAYLOR, ADMINISTRATRIX OF THE ESTATE OF J. H. TAYLOR, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 25 May, 1938.)

Railroads § 9—Evidence held insufficient to establish doctrine of last clear chance in failure of defendant to stop train before serious injury.

Intestate was thrown upon the "cow-catcher" of defendant's engine after it had struck intestate's car. Plaintiff sought recovery upon the contention that defendant was negligent in failing to stop the train before intestate had been hurled therefrom to his death, and that the facts established that defendant had the last clear chance to avoid the serious injury and death of intestate. Judgment as of nonsuit is affirmed on appeal upon authority of *Batchelor v. R. R.*, 196 N. C., 84.

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

APPEAL by plaintiff from *Bone, J.*, at November Term, 1937, of EDGECOMBE. Affirmed.

This is an action for actionable negligence—death by wrongful act—brought by plaintiff against defendant for killing plaintiff's intestate at a railroad crossing in Rocky Mount, N. C., on 19 November, 1935, at 7:15 a.m. N. C. Code, 1935 (Michie), section 160.

In the plaintiff's amended complaint it is alleged as negligence of defendant that it failed "(d) To keep a proper lookout so as to be aware that the plaintiff's intestate had been hit by defendant's engine and was precariously hung upon the 'cow-catcher' of said engine; and (e) to stop its locomotive after having struck the car of the plaintiff's intestate and before the defendant had hurled the plaintiff's intestate to his death, the said defendant having brought about the death of the plaintiff's intestate by its wrongful conduct and having under all the facts the last clear chance to avoid the serious injury and death of said intestate."

The defendant denied the material allegations of the complaint and set up the plea of contributory negligence. The defendant admitted the municipal ordinance of Rocky Mount as to the speed limit.

The plaintiff contends that there was at least evidence to be submitted to the jury on the last clear chance doctrine. The court below, at the close of plaintiff's evidence, on motion of defendant, sustained a motion for judgment as in case of nonsuit. C. S., 567. The plaintiff excepted, assigned error and appealed to the Supreme Court.

B. H. Thomas and Battle & Winslow for plaintiff.

F. S. Spruill, Gilliam & Bond, Thos. W. Davis, and V. E. Phelps for defendant.

PER CURIAM. The present case comes within the rule laid down in *Batchelor v. R. R.*, 196 N. C., 84, relied on by defendant.

The judgment of the court below is

Affirmed.

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

NATHAN COLE v. J. N. BRYANT.

(Filed 25 May, 1938.)

1. Trial § 4: Appeal and Error § 37b—

A motion for continuance is addressed to the sound discretion of the trial court, and the denial of the motion is not reviewable in the absence of abuse of discretion.

2. Trial § 11: Appeal and Error § 24—

When there is no exception to the court's finding that the parties consented to a consolidation of the actions for trial, an exception to the order of the court consolidating the actions will not be sustained.

APPEAL by defendant from *Spears, J.*, at October Term, 1937, of NEW HANOVER. No error.

R. G. Grady for plaintiff, appellee.

Wm. F. Jones for defendant, appellant.

PER CURIAM. Three separate actions by the plaintiff to recover of the defendant attorneys' fees for services rendered in three separate cases were consolidated for the purpose of trial. The principal assignments of error urged on appeal are, first, to the refusal of the court to allow a motion for a continuance of the cases, and, second, to the order of the court consolidating the actions for trial.

The first assignment of error cannot be sustained, since the continuance of a case rests in the sound discretion of the trial court and is not reviewable, in the absence of an abuse of discretion. McIntosh, N. C. Practice & Procedure, par. 502, pp. 529-30. We find no abuse of discretion in the refusal to allow a continuance in the instant cases.

The second assignment of error cannot be sustained for the reason that the court finds as a fact in the judgment that the cases were consolidated by consent, the language being as follows: "The above entitled causes, coming on for hearing before his Honor, and a jury, by consent of the plaintiff and defendant, the three separate independent suits by

the plaintiff against the defendant having been consolidated and tried as one case." There is no exception to this finding.

We have examined the other exceptive assignments of error discussed in the appellant's brief and find no prejudicial errors.

No error.

HAZEL LEE MITCHEM v. DR. W. D. JAMES ET AL.

(Filed 25 May, 1938.)

Physicians and Surgeons § 15e—

Nonsuit *held* properly granted in this action against physician for alleged malpractice in failing to properly set the bones in plaintiff's broken leg.

APPEAL by plaintiff from *Phillips, J.*, at February Term, 1938, of RICHMOND.

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

Following an automobile accident on 23 March, 1935, the plaintiff was taken to the Hamlet Hospital with a broken leg. Dr. W. D. James attended her, set the bones, placed her leg in a plaster cast, and she left the hospital on 2 April. Plaintiff returned for treatment once a week for four or five weeks thereafter.

On 26 February, 1936, the plaintiff had the bones of her leg refractured and reset at the North Carolina Orthopedic Hospital, Gastonia, N. C. Dr. W. M. Roberts, who performed this operation, testified for the plaintiff as follows: "I could not say that any physician had improperly treated her. . . . She had what we call a mal-union. I found this mal-union and corrected it. . . . I would not say that a physician had improperly set it and I would have no opinion as to whether it was properly set. . . . It is a rare thing that we get a perfect juncture of two bones. I won't say we don't strive for it, but if we do not get it it doesn't disturb us." The doctor further testified that the plaintiff had a slight natural bow in the other leg—not enough to call her bow-legged—and for this reason he did not try to get the injured one straight, and that her injured leg is just about as good now as the other one. She walks with a slight limp.

From judgment of nonsuit entered at the close of plaintiff's evidence, she appeals, assigning error.

Seawell & Seawell for plaintiff, appellant.

U. L. Spence for defendants, appellees.

PER CURIAM. We agree with the trial court that if plaintiff's own expert witness cannot say she was improperly treated and has no opinion as to whether the broken bones were properly set, the evidence is not such as to require its submission to the jury. The case is not unlike *Ferguson v. Glenn*, 201 N. C., 128, 159 S. E., 5.

Affirmed.

STATE v. N. L. LAWRENCE.

(Filed 15 June, 1938.)

1. Criminal Law § 68a—

The State may appeal from a judgment of not guilty rendered on a special verdict. N. C. Code, 4649.

2. Constitutional Law § 8: Photographers § 1—Legislature, in exercise of police power, may regulate practice of photography.

The practice of photography requires the exercise of skill, and the occupation involves certain fire hazards and is susceptible to fraudulent acts on the part of dishonest photographers in faking photographs, and since photographs are widely used in evidence and in advertising, and inaccurate photographs may be the subject of damage suits, the General Assembly may, within the constitutional limitations, provide for the regulation and licensing of photographers in the interest of the public welfare in the exercise of the police power, to the end that only those photographers possessing the required degree of skill and moral character may be licensed.

3. Constitutional Law § 8—

What professions and occupations should be subject to regulation in the exercise of the police power is largely in the discretion of the Legislature.

4. Constitutional Law § 6b—

A statute will not be declared unconstitutional unless it so clearly violates a constitutional provision that no reasonable doubt can arise.

5. Constitutional Law §§ 12, 15a—Act regulating practice of photography does not create monopoly nor violate due process clause.

Ch. 155, Public Laws of 1935 (N. C. Code, 7007 [1] to [29]), providing for regulating and licensing photographers, sets up sufficiently definite standards of competency, ability and integrity, and requires the licensing board to issue licenses to all applicants who meet these qualifications without discrimination, an applicant having recourse at law for any arbitrary acts of the board, and the statute does not violate due process of law, sec. 1, Fourteenth Amendment of the Federal Constitution, Art. I, sec. 17, of the Constitution of North Carolina, nor deprive any person of fundamental, inalienable rights, Art. I, secs. 17 and 29, nor create a monopoly in contravention of Art. I, sec. 31, of the State Constitution.

6. Same—Act providing for regulation and licensing of photographers does not set up arbitrary standards for examining applicants.

N. C. Code, 7007 (11), providing that the board of examiners may require proofs as to the business record of an applicant for photographer's license does not set up an unconstitutional method of ascertaining the qualifications of an applicant, the "business record" not being of itself a test to be applied by the board, but being merely a suggested source which the board may consider in determining the applicant's competency, ability and integrity.

BARNHILL, J., dissenting.

SEAWELL, J., concurs in dissent.

APPEAL by the State from *Phillips, J.*, on special verdict, at January Term, 1938, of FORSYTH. Reversed.

The defendant was indicted for violating the "Photography Act."

The important provisions of chapter 155, Public Laws 1935, "An act to regulate and control the practice of photography." N. C. Code, 1935 (Michie), sections 7007 (1)-(29).

Section 7007 (1) contains definitions.

Section 7007 (2) provides for the establishment of a State Board of Photographic Examiners to be appointed by the Governor. Subsequent sections provide for its organization, hearings, rules and public record of its proceedings.

Section 7007 (10), "The board shall provide for the examination of applicants who desire to practice photography in this State . . . and issue certificates of registration and licenses to practice photography to anyone who shall qualify as to *competency, ability and integrity.*" Provision is made for temporary certificates until the next examination.

Section 7007 (11) provides that as a prerequisite to examination the board shall have the power to require proofs as to "technical qualifications, business record and moral character of such applicant."

Section 7007 (13) provides for applications upon forms prescribed by the board and examination fees. "All applicants must appear for examination at the time and place designated by the board and shall present such references and credentials as the board may require and shall give satisfactory evidence as to their competency and fitness to conduct the practice of photography based on their technical knowledge, their business record and their moral character."

Section 7007 (17)—Licenses are not transferable and may not be issued to any person, firm or corporation doing business under an assumed or fictitious name.

Section 7007 (18)—Photographers who have been continuously engaged in the practice of photography and/or photo-finishing in North Carolina for one year next preceding the passage of the act are entitled to a license upon application without examination upon the payment of a specified fee.

Section 7007 (19) provides for annual license fees ($5.00 in the case of a photographer having an established place of business and $3.00 in the case of employees of established places of business).

Section 7007 (20) prohibits the sale or solicitation of orders for photographic products except by registered license photographers.

Section 7007 (23) provides for the revocation of licenses upon the following grounds: (a) Failure to pay annual license, with liberal provisions for reinstatement; (b) fraud or unethical practices, willful misrepresentation, or upon being found guilty under the laws of North Carolina of any crime involving moral turpitude. Provision is made for notice to accused photographer of charges, which charges must be filed in writing and under oath with the board, representation by counsel, public hearing, attendance of witnesses and stenographic report of proceedings, which shall constitute a record of the board, with provision for an appeal to the Superior Court.

Section 7007 (24)—Violation of the provisions of this chapter is made a misdemeanor and certain fine and imprisonment imposed.

Section 7007 (28)—Exemptions: (a) Newspaper photographers not otherwise selling photographs. (b) Photographs made for experimental purposes or for personal use and pleasure and not sold. (c) Photographs made by employees of State and Federal governments and their political subdivisions or by schools, colleges, universities or other State institutions making photographs for public use in connection therewith and not selling such photographs. (d) Medical practitioners, hospitals, or other institutions making photographs for clinical, surgical or medical purposes. (e) Motion picture photographers.

Section 7007 (29)—The act is made applicable only to cities and towns having a population of more than twenty-five hundred. Photographers whose products retail at unit price of not more than ten cents are exempted.

The State contends that the special verdict establishes all necessary facts to support a verdict of guilty, to wit, practice by the defendant of still commercial portrait photography and photography in other branches without applying for or securing a license and the selling of such products in Winston-Salem, a city of more than 75,000 persons, at unit prices in excess of ten cents per picture by the use of coupons.

The special verdict was as follows:

"In the Superior Court, 10 January Term, 1938.

"The jury, for its verdict, finds: That N. L. Lawrence, a resident of Forsyth County, North Carolina, on or about 16 April, 1937, at and in the county of Forsyth, North Carolina, and within the corporate limits of the city of Winston-Salem, a city at that time having a population in excess of 75,000 persons, did engage in the general business of portrait

photography and did practice general portrait photography and photography in other branches; that is to say, did engage in the profession, occupation or avocation of taking and producing still portrait photographs for hire and profit and selling the same in the State of North Carolina, at unit prices in excess of ten cents per picture, without first having obtained a license to practice photography from the State Board of Photographic Examiners and without being duly licensed and registered by said State Board of Photographic Examiners to practice photography in the State of North Carolina, and without first having filed an application with the State Board for a license to practice photography and without having practiced photography or photo-finishing continuously in the State of North Carolina for one year next preceding the enactment of chapter 155 of the Public Laws of 1935; that the defendant, in the practice of photography, from time to time has issued and sold coupons; that the defendant has paid the State and local license taxes required and authorized by the Revenue Act. If, upon the foregoing facts the court be of the opinion that the defendant is guilty, the jury so finds; otherwise, it finds him not guilty. The court being of the opinion that the defendant is not guilty, the jury so finds not guilty for its verdict. F. Donald Phillips, Judge Presiding."

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

Attorney-General McMullan, Manly, Hendren & Womble, and W. P. Sandridge, amicus curiæ for the State.

Parrish & Deal for defendant.

CLARKSON, J. N. C. Code, 1935 (Michie), section 4649, is as follows: "An appeal to the Supreme Court may be taken by the State in the following cases; and no other: Where judgment has been given for the defendant—(1) Upon a special verdict. (2) Upon a demurrer. (3) Upon a motion to quash. (4) Upon arrest of judgment."

The sole question presented on this appeal: Is chapter 155 of the Public Laws of 1935 (N. C. Code, *supra*, section 7007 [1]-[29])—"An act to regulate and control the practice of photography"—constitutional? We think so.

The defendant contends that this statute providing for the regulation and licensing of photographers in North Carolina is unconstitutional and void: In that it violates the Constitution of the United States, Fourteenth Amendment, section 1, which provides: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law," etc. Also that it violates the following provisions of the Constitution of North Carolina: Article I, section 1: "That we hold

it to be self-evident that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." Article I, section 17: "No person ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land." Article I, section 29: "A frequent recurrence to the fundamental principles is absolutely necessary to preserve the blessings of liberty." Article I, section 31: "Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed." We cannot so hold.

In *S. v. Warren*, 211 N. C., 75 (79), the act was not a general State act and was declared unconstitutional. This Court in that case said: "The State can, no doubt, in a State-wide act, make reasonable regulations in regard to the real estate business."

The following are some of the professions and occupations regulated in a similar manner by the statutes of this State: Doctors, lawyers, accountants, contractors, pilots, pharmacists, osteopaths, trained nurses, chiropodists, veterinarians, dentists, architects, barbers, cosmetologists or beauticians, engineers, optometrists, chiropractics, embalmers, real estate brokers and salesmen, midwives.

It goes without saying that photography requires skill. It involves, of course, the use of chemicals, celluloid and other combustible materials and there is a certain fire hazard involved. Photographs, photostats and other means of reproducing likenesses are in general use. They are used every day in the courts to illustrate sworn testimony. Photographs are especially used in railroad and automobile accident cases. The detection of forgeries and altered instruments, finger printing, and kindred matters are accomplished by photography. Such photographs greatly enlarged are frequently used as evidence in the courts. Photographs are commonly used in advertising as taking the place of samples and, therefore, dishonest photographs can lend themselves to the perpetration of fraud. Fake photography and careless and inaccurate photography have been the subject of damage suits. Photography in newspapers and magazines is now used as never before.

In 6 Ruling Case Law, part sec. 199 (Constitutional Law), p. 203 *et seq.*, is the following: "However difficult it may be to render a satisfactory definition of 'police power,' there seems to be no doubt that it extends to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals, to the restraint and punishment of crime, and to preservation of the general welfare of the community. Various phrases are used to describe the matters in reference to which it may be exercised. It has been frequently said that it extends to a protection of the public health, safety

and morals, to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state, and likewise to the promotion of the comfort and welfare of society, and to the enhancement of the public convenience and the general prosperity. It has therefore been stated that, as a general principle, legislation is valid which has for its object the promotion of the public health, safety, morals, convenience, or general welfare, or the prevention of fraud, immorality, or oppression. It has also been said that the police power includes the right of the state to prescribe regulations for the good order, peace, protection, comfort, and convenience of the community, for the preservation of good order and the public morals, the promotion of domestic tranquillity, and the comfort and quiet of all persons; and in general that it extends to the enactment of all such wholesome and reasonable laws, not in conflict with the constitution of the state or the United States, as they may deem conducive to the public good." 11 Amer. Jur., pp. 1027, 1044.

The matter of police power has been thoroughly discussed in many decisions in this State in reference to professions and occupations.

In *S. v. Call,* 121 N. C., 643 (646), it was said: "It is not to be questioned that the law-making power of a state has the right to require an examination and certificate as to the competency of persons desiring to practice law or medicine (citing authorities); to teach, to be druggists, pilots, engineers or exercise other callings, whether skilled trades or professions, affecting the public and which require skill and proficiency (citing authorities). To require this is an exercise of the police power for the protection of the public against incompetents and impostors, and is in no sense the creation of a monopoly or special privilege. The door stands open to all who possess the requisite age and good character and can pass the examination which is exacted of all applicants alike."

In *S. v. Lockey,* 198 N. C., 551 (556)—(Barber Act)—we said: "The police power is elastic, stretching out to meet the progress of the age."

The matter is largely in the discretion of the General Assembly as to what professions and occupations are within the police power of the State and subject to regulation. Of course, due regard must always be had to the provisions of the Constitution of the United States, 14th Amendment, sec. 1, and Constitution of North Carolina, Art. I, sec. 8, and the other provisions before mentioned.

It is equally well settled that no act of the General Assembly ought to be declared violative of any constitutional provision unless the conflict is so clear that no reasonable doubt can arise. *Coble v. Comrs.,* 184 N. C., 342; *Gunter v. Sanford,* 186 N. C., 452; *S. v. Yarboro,* 194 N. C., 498; *Plott v. Ferguson,* 202 N. C., 446; *Glenn v. Board of Education,* 210 N. C., 525.

The act provides that the board shall issue certificates and licenses "to anyone who shall qualify as to *competency, ability and integrity.*" Section 7007 (10). These are laudable standards. They are not too vague and indefinite. Competency and ability are required to guard against imposition of an unskilled photographer upon the public which we think is a proper object for the exertion of the police power. Integrity is required to guard against fraud, unethical dealings and sharp practices. The board is required to issue licenses to all applicants who meet these qualifications. It is true that the board is left with discretion to determine competency and ability (by examination—written, oral or practical), and integrity (by furnishing proofs, section 7007 [11]). Proofs are required of lawyers seeking an examination. Particular objection was levied to the reference in the act to the "business record" of applicants, referred to in section 7007 (13). As we read this section, business record is not of itself a test to be applied by the board, but it is a suggested source from which the board may determine the integrity, competency and ability of an applicant. The business record of a photographer is some evidence, or at least a proper subject for the board to consider in applying the three standards enumerated by the Legislature: (1) Competency. (2) Ability. (3) Integrity. The door is open to any applicant possessing these qualifications. Of course, it is true that the Board of Photographic Examiners may conceivedly act arbitrarily in a given case, but so may the Board of Law Examiners, or anyone of the other numerous boards established by the General Assembly. The law furnishes redress in such a case.

In *S. v. Lockey, supra,* p. 554, we find: "The defendant contends that the General Assembly had no authority to create an expense and arbitrarily and unreasonably classify the citizens and taxpayers of the State and unjustly place the whole burden upon a few thousand of a particular class—the barbers. He further contends that the act makes a further arbitrary and unreasonable classification among the barbers themselves in making the act applicable to towns of 2,000 or more population. We think the act constitutional and not arbitrary." *Roach v. Durham,* 204 N. C., 587 (592).

Taking the entire act and considering it as a whole, we cannot hold it unconstitutional. We cannot say that it is arbitrary or unreasonable or an unconstitutional delegation of legislative authority. We think the conclusion in the brief of the State correct: "It is submitted that the Legislature of North Carolina is the proper division of the State's government to determine in the first instance the need of regulating a given occupation. The Legislature has determined upon good and sufficient ground . . . that it is in the public interest to regulate the licensing and practice of photography. Such regulation falls within the

letter, *S. v. Call, supra,* and the spirit of the police power, and further that the act contains proper standards of classification, is not arbitrary and should be upheld."

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

Reversed.

BARNHILL, J., dissenting: Does the General Assembly have power to create an administrative agency with power to deprive a citizen of the right to practice one of the ordinary and usual trades, such as commercial photography? The majority view answers this question in the affirmative. From this result I am compelled to dissent, as I do not find the reasoning of the majority opinion convincing either as to the present state of the law on the subject or as to the social utility and desirability of the legal theory there propounded.

The decision of the Court is predicated largely upon the doctrines of *S. v. Warren,* 211 N. C., 75; *Roach v. Durham,* 204 N. C., 587; and *S. v. Lockey,* 198 N. C., 551. The former declared unconstitutional a local law seeking to regulate real estate brokers in contravention of a State-wide, revenue, licensing act applicable to such brokers; although *dicta* in that opinion indicate that such a State-wide act would be upheld, the Court there expressly declined to pass upon the question. The *Warren case, supra,* is, therefore, authority only for what it holds, nothing more. The *Roach case, supra,* upheld a State-wide plumbers licensing act as a constitutional effort to promote the "health, comfort and safety of the people." The *Lockey case, supra,* upheld the State-wide barbers licensing act as a valid exercise of the police power "in the protection of the health of the public." The soundness of the *Roach* and *Lockey cases, supra,* is beyond question, as the acts considered in both of these cases bore directly upon the protection of public health, a matter clearly constituting a valid exercise of the police power. However, neither of these cases constitutes authority permitting the General Assembly by administrative licensing to deprive a tradesman or workman of the right to exercise a usual and ordinary trade or calling.

The constitutional limits of the power of the General Assembly to regulate vocations through licensing has heretofore been limited strictly to the professions, with the possible exception of barbering, in which case the protection of the public health was so obviously involved. Regulation by licensing of the practice of medicine and surgery (*S. v. Van Doran,* 109 N. C., 864; *S. v. Call,* 121 N. C., 643), of dentistry (*S. v. Hicks,* 143 N. C., 689), of osteopathy, chiropractic, and suggestotheraphy (*S. v. Siler,* 169 N. C., 315), and of accounting (*S. v. Scott,* 182 N. C., 865), has been approved as constitutional. The power of the General Assembly to indicate qualifications of attorneys has long been recognized (*Ex parte Schenck,* 65 N. C., 353; *Kane v. Haywood,*

66 N. C., 1; *In re Applicants for License,* 143 N. C., 1), but the question as to the constitutionality of the State Bar Licensing Act has not yet been passed upon (see *In re Parker,* 209 N. C., 693; *In re West,* 212 N. C., 189). With the exception of barbering, all of these vocations whose regulation has been upheld are distinctly professional in nature, are achieved only after thorough schooling, involve a peculiarly personal trust relationship to their clientele, and imply necessarily a distinct reliance upon the individual knowledge, judgment and skill of the practitioner. The regulation of business and professions through administrative licensing has heretofore been limited to those professions having a direct and positive relation to the health, safety, or morals of the community. The trade of photography bears no genuine resemblance to any of the professions indicated; nor can it be considered on a parity with barbering, since the normal and usual practice of the trade has no necessary relationship to either health, safety, or morals. Granted that a careless use of chemicals might endanger health, that a blundering and ignorant use of the dark-room might cause a serious fire, and that a venal photographer might specialize in the production and sale of fraudulent or obscene photographs, these are exceptional instances and abuses of power and are no more inherent in the trade of photography than in any other usual and ordinary calling or occupation.

The limits heretofore recognized with respect to the regulation of business by administrative licensing were not accidental. In *S. v. Lockey,* 198 N. C., at p. 558, *Clarkson, J.,* cites with approval the words of *Sutherland, J.,* in *Liggett Co. v. Baldrige,* 278 U. S., 105, 111-112, as follows, "The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment (in this case his business as a property right) only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare." In the same case, at p. 113, *Sutherland, J.,* continued, "A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' *Burns Baking Co. v. Bryan,* 264 U. S., 504, 513, 44 S. Ct., 412, 413 (68 L. Ed., 813, 32 A. L. R., 661). See, also—(citing many U. S. Supreme Court cases)." Likewise, in *S. v. Warren,* 211 N. C., 75, the limitation on the exercise of the police power was recognized in the following quotations, there quoted with approval, "In *Rawls v. Jenkins,* 212 Ky., 287 (279 S. W., 350), at p. 292, it is said, 'If occasional opportunity for fraud is to be the test, then there is no reason why every grocer, every merchant, every automobile dealer, every keeper of a garage, every manufacturer, and every mechanic who deals more frequently with the public in general, and whose opportunities for fraud are far greater than those of the real

estate agent or salesman, may not be put on the same basis. If that be done, then only those who, in the opinion of certain boards or the courts, have the necessary moral qualifications will be permitted to engage in the ordinary occupations of life. The result will be that all others who fail to establish their moral fitness will not only be deprived of their means of livelihood, but will become a burden either on their families and friends or the community at large. In our opinion, the right to earn one's daily bread cannot be made to hang on so narrow a thread. Broad as is the police power, its limit is exceeded when the state undertakes to require moral qualifications of one who wishes to engage or continue in a business which, as usually conducted, is no more dangerous to the public than any other ordinary occupation of life. As said of the real estate agent in *Hager, State Auditor, v. Walker,* 128 Ky., 1, 107 S. W., 254, 15 L. R. A. (N. S.), 195, 129 Am. St. Rep., 238: 'The occupation taxed is essentially a harmless one. It has none of the features requiring police regulation, and there is no reason why the police power should be invoked concerning it.'" What is there said concerning real estate agents and salesmen is equally applicable here to photographers.

The right to license upon examination necessarily implies the power to exclude by refusing to grant such license. The power to exclude men from the ordinary and usual trades and callings common to all communities is the power to deprive men of the right to earn an honest livelihood. The right to earn a livelihood is "fundamental, natural, inherent and inalienable, and is one of the most sacred and most valuable rights of a citizen. A person's business occupation or calling is 'property' within the meaning of the constitutional provisions as to due process of law and is also included in the right to liberty and the pursuit of happiness. The right of a person to pursue a calling consistent with proper and reasonable police regulations which the particular situation may sanction, cannot be taken away by legislative enactment. The common businesses and callings of life, the ordinary trades and pursuits which are innocent in themselves and which have been followed in all communities from time immemorial, must, therefore, be free in the United States to all alike upon the same terms. . . . Moreover, it has been held that the right to choose one's occupation includes the right to be free from unlawful interference or control in the conduct of it." 11 Am. Jur., "Constitutional Law," s. 336. The discretionary power to control admission to an ordinary trade or calling has never existed in the General Assembly. "Regulation of occupations cannot be valid where it amounts to an arbitrary or unwarranted interference with the right of the citizen to pursue any lawful business. It is dependent upon a reasonable necessity for its exercise to protect the health, safety, morals or general welfare of the state, and unless an act restrict-

ing the ordinary occupations of life can be shown to fall within these objects of the police power, the act is void. If a lawful business is of a beneficial character, and not dangerous to the public, either directly or indirectly, it cannot be subjected to any police regulation whatever. . . . Such pursuits as agriculture, merchandise, manufacturing, and industrial trades cannot be dealt with at will by the Legislature. As to them the power of regulation is comparatively slight when they are conducted and carried on upon private property and with private means." 11 Am. Jur., "Constitutional Law," ss. 285-286. "The right of a citizen to pursue any of the ordinary vocations on his own property and with his own means, can neither be denied nor unduly abridged by the Legislature, for the preservation of such right is the principle purpose of the Constitution itself. In such cases, the limit of legislative power is regulation, and that power must be cautiously and sparingly exercised, unless the business is of such character as places it within the category of social and economic ills." Quoted with approval in 2 Cooley's Constitutional Limitations, 8th Ed., p. 1329, from *Ex Parte Dickey*, 76 W. Va., 576, 85 S. E., 781, L. R. A., 1915-F, 840.

This photographers licensing act can only be justified, if at all, as a valid exercise of the police power. As Willis has so accurately stated, "There are two main requirements of a proper exercise of the police power: (1) There must be a social interest to be protected which is more important than the social interest in personal liberty, and (2) there must be, as a means for the accomplishment of this end, something which bears a substantial relation thereto." Constitutional Law, p. 728. This is essentially class legislation put forward by a particular group of tradesmen to the end that those now within the trade may limit newcomers seeking to enter the field of their livelihood. The advocates of the measure insist that its approval will necessarily make available to the public more skilled and more honest photographers. In return for this vague promise of greater public service the established photographers will be given a virtual monopoly of the trade and with it such incidentals as the power to control prices and the character of their services. The "social interest" which this law would tend to protect is a very general one, so evanescent in its characteristics as to belong in the realm of metaphysics and psychic phenomena. On the other hand, the very real and positive benefits to the particular group at the expense of the loss of liberty of citizens generally is quite tangible. In order that a trade guild with state-granted powers of exclusion be established, a serious and dangerous abridgement of one of the most precious rights of American citizens—the right to earn a livelihood—is advocated.

Written into our organic law is a strong repulsion for special privileges and monopolies. In our Bill of Rights we find, "No man or set of men are entitled to exclusive or separate emoluments or privileges

from the community but in consideration of public service," reinforced by the principle that "perpetuities and monopolies are contrary to the genius of a free state and ought not be allowed." N. C. Constitution, Art. I, ss. 7, 31. Our legal tradition in dealing with business and trade has been marked by an effort to encourage free enterprise, free alike from domination by government and monopoly. Our working theory has been that under a competitive economic system, prices, the quality of the product, and the type of service rendered will be sufficiently determined by the forces of free competition. By and large, the uncontrolled market place has proven itself a fair arbiter which has encouraged initiative and stimulated the sale of the best pecuniary values. The task of government has been largely that of an umpire whose duty it was to assure the free play of effective, open competition. Except in those businesses and professions marked peculiarly with some social interest or public service, experience has shown that a very limited interference with business is socially desirable.

Old truths are valuable ballast and the experienced mariner does not cast them overboard at the first suggestion of some passenger new to the ways of the sea. In our rapidly changing social and economic life it may become necessary to advance the banner of the police power into new and as yet unknown territory, but I am convinced that the instant case is not one demanding that the old and recognized boundaries of the police power be ignored. Almost every trade and calling is tinged with some element of social interest or public service, for if the work has no social utility it rarely survives. However, few trades or callings are so essentially vested with a social interest as to justify their establishment, by legislative grant, as close-knit, self-governing, trade monopolies having the power to exclude those seeking to compete with veterans of the craft. The life of our society is not yet so thoroughly regimented that the right to work and earn an honest living in the trade of one's choice is dependent upon the approval of some bureau, commission, or examining board, itself interested perhaps in excluding new workers from its own crowded vineyard. Nor am I yet convinced that it would be better so. The view of the majority in this case, in my opinion, goes well beyond the previously approved limits of the valid exercise of the police power in this State.

While photography requires some skill, it is the same type of skill required by other trades and vocations. Such danger as arises from the use of chemicals, celluloid and other combustible materials, is to the individual and not to the public as a whole. The fire hazard, if any, is not near so great as that resulting from the operation of dry cleaning plants, gasoline stations and other ordinary trades. Photographs, it is true, are used in evidence. However, as stated in the majority opinion, they are used only to illustrate sworn testimony. They are not admis-

sible in evidence until or unless some witness has first sworn that they correctly represent the objects or conditions they purport to portray. If there is perjury it arises out of the testimony of the witness and not out of the use of the photograph. The photograph merely makes more intelligible to the jury the evidence of the witness.

There are those lacking in moral character connected with all trades and callings. Good morals cannot be created by legislation. The mere fact that some who are photographers have an opportunity to perpetrate frauds is not unusual. The quality of a photograph can more easily be detected by the lay public than can the quality of cloth or other articles of merchandise, particularly when such merchandise is of a mechanical composition, such as watches and automobiles. I am, therefore, unable to conceive how the practice of photography has such a rational and substantial relationship to social needs or to public health, safety and good morals as to make it a subject of legislation under the police power of the State.

SEAWELL, J., concurs in dissenting opinion.

JOHN H. CUTTER AND WIFE, GRACE KING CUTTER; GEO. KING CUTTER AND WIFE, NANCY BELL CUTTER; MARY ANNE CUTTER DAVIS AND HUSBAND, BURTON SPARLING DAVIS, JR., v. AMERICAN TRUST COMPANY, TRUSTEE; JOHN HASTINGS CUTTER, 3RD, A MINOR; LINDA RICHARDSON CUTTER, A MINOR; AND BURTON SPARLING DAVIS, 3RD, A MINOR; AND ANY AND ALL CHILDREN WHO MAY HEREAFTER BE BORN UNTO GEO. KING CUTTER AND MARY ANNE CUTTER DAVIS.

(Filed 15 June, 1938.)

1. Process § 5—Proceeding for modification of trust agreement is in rem, and nonresident beneficiary was properly served by publication.

This suit was instituted to modify a trust agreement. The trust estate consisted of policies of life insurance in the hands of the trustee, and the court had jurisdiction of the trustor and trustee. *Held:* The insurance policies are choses in action and are therefore personalty with *situs* at the domicile of the owner, and the suit is a proceeding *in rem*, since it relates to the administration of the trust, and a nonresident beneficiary of the trust was properly brought into court by publication or substituted service under the provisions of C. S., 491.

2. Trusts § 4—Substitute trustee may be appointed in accordance with terms of instrument without special proceeding or approval of the court.

When a trust agreement provides for the appointment of a substitute trustee by the clerk of the Superior Court upon incapacity of the original

trustee, the clerk's appointment of a substitute in strict conformity with the terms of the instrument is sufficient, and neither a special proceeding nor the approval of the court is necessary.

3. Trusts § 5—Instrument held to authorize substitute trustee to borrow on insurance policies to pay premiums.

The trust property in question consisted of life insurance policies. The trust agreement empowers the trustee to borrow on the policies to pay premiums, and further provides that any duly appointed substitute trustee should have the same power in regard to the management of the trust property as the original trustee. *Held:* Under the terms of the instrument a duly appointed substitute trustee has authority to borrow on the policies to pay premiums thereon.

4. Same—Court of equity has jurisdiction to modify terms of trust agreement when necessary to preserve trust estate.

This action was instituted by trustor and beneficiaries of the trust against the trustee to obtain a modification of the trust agreement in regard to the investment of the trust funds. All parties having a vested or contingent interest in the trust estate were made parties and are properly before the court. The court found that the modification sought, because of changed conditions and the exigencies of the circumstances, was necessary in order to preserve the *corpus* of the trust for the beneficiaries. *Held:* The findings are sufficient to invoke the equitable jurisdiction of the court, and its judgment granting the modifications sought is affirmed.

APPEAL by defendant American Trust Company, trustee, from *Armstrong, J.*, at Regular 7 March, 1938, Term, of MECKLENBURG.

Civil action to change, alter and amend administrative features of life insurance trust agreement.

This action was instituted by the trustor, John H. Cutter, and his wife and their son and daughter, against the trustee and the grandchildren of the trustor for the purpose of having the administrative provisions of the trust agreement changed to the end that the trustee be given much broader power in reference to the nature of the investments which could be made of the funds realized from the policies of insurance upon the death, or other maturity or surrender of any policy.

The parties waived jury trial and agreed that the judge presiding find all facts necessary for a determination of the cause, and upon such findings of fact to declare the law thereon and enter judgment in accordance therewith, subject to right of appeal to the Supreme Court.

The court heard evidence, and upon the evidence and from the record in the cause and from the allegations and admissions of the pleading, found substantially the following facts:

"1. That all parties plaintiff are properly before the court, and that all parties defendant have been duly served with summons in this cause as by law provided and are before the court.

"2. That James O. Moore, Esq., of the Mecklenburg County bar, has, by an order entered in this cause, been duly appointed as guardian *ad litem* for the minor defendants, John Hastings Cutter, 3rd, and Linda Richardson Cutter and Burton Sparling Davis, 3rd, and of any and all children who may hereafter be born unto either George King Cutter or Mary Anne Cutter Davis, and that said guardian *ad litem* has been duly served with copies of the complaint and summons in this cause and has filed answer on behalf of the said minor defendants now in being or hereafter to be born, admitting the allegations of the complaint and joining in the prayers for relief as set forth in the complaint.

"3. That American Trust Company, trustee, has filed answer in this cause, as appears in the record.

"4. That plaintiff John H. Cutter is 58 years of age; that Grace King Cutter is his wife, and George King Cutter, whose wife is Nancy Bell Cutter, and Mary Anne Cutter Davis, whose husband is Burton Sparling Davis, Jr., are the only children of the said John H. Cutter. That George King Cutter was born 29 September, 1912, and that John Hastings Cutter, 3rd, who was born 26 July, 1935, and Linda Richardson Cutter, who was born 30 June, 1937, are the only children of the said George King Cutter. That Mary Anne Cutter Davis was born 3 December, 1915, and that Burton Sparling Davis, 3rd, who was born on 15 August, 1936, is the only child of the said Mary Anne Cutter Davis.

"5. That American Trust Company is a corporation duly organized under the laws of North Carolina, and is duly authorized and empowered to act as trustee in a fiduciary capacity.

"6. That during the month of November, 1932, plaintiff John H. Cutter executed and delivered to Independence Trust Company, a North Carolina corporation then authorized and empowered to act as trustee in a fiduciary capacity, the life insurance trust agreement."

Simultaneously therewith he deposited with the trustee several policies of insurance upon his life in the total amount of $196,000, which he constituted the subject matter of the trust and referred to as the trust estate. The agreement provided in part:

"The insured hereby grants, bargains, sells, transfers, assigns and sets over the aforesaid trust estate, with any additions thereto that may hereafter be made, to the trustee, subject to the following conditions and limitations:

"1. The trustee shall hold, manage, invest and reinvest the trust estate and shall collect the income. The policies of insurance held by the trustee hereunder shall be payable to the trustee and to that end the insured agrees to execute assignments, changes of beneficiaries and any other instruments which may be necessary.

"2. The trustee is hereby invested with all right, title and interest in and to the policies and authorized to exercise and enjoy all rights

therein and beneficial interests thereunder as fully and effectually as the insured. The insurance companies are hereby authorized and directed to recognize the trustee as fully entitled to all rights and interest under the policies, and any receipts, releases and other instruments duly executed by the trustee, in connection with the said policies, shall be binding and effective. It is distinctly understood that the insured fully realized that he is, by this instrument, giving to the trustee full title to the trust estate, and that he has no right to revoke, change, alter, or modify this agreement in any manner, under any circumstances, it being the intent of the insured to make this instrument irrevocable."

The agreement further provides that "upon the death of the insured, or other maturity or surrender of any policy," the trustee shall collect the proceeds thereof and "hold, manage, invest and reinvest the principal thereof" in bonds of the United States, the State of North Carolina, or any county or city located in North Carolina of sufficient rating to be classed at the time of purchase as legal investments for savings banks of the State of New York. The agreement further provided that the entire net income from the fund thus created shall be paid to the plaintiff, Mrs. Grace King Cutter, wife of said John H. Cutter, so long as she may live, for the use of herself and George King Cutter and Mary Anne Cutter, now Mary Anne Cutter Davis, son and daughter of the insured, trustor. Upon the death of his wife, Grace King Cutter, the fund is to be divided into two equal shares—one share to be held for the sole use and benefit of said Mary Anne Cutter, "so long as she may live," paying to her the entire net income in either monthly or quarterly installments, as may seem advisable. The other share to be held for the sole use and benefit of said George King Cutter and the income paid to him until he shall reach the age of 30 years, when one-third of such share shall be delivered to him. Then from that time the income from the remaining two-thirds shall be paid to said George King Cutter until he reaches the age of 35, when the trustee shall deliver to him "the entire balance remaining in his share of this fund—free from trust."

The agreement further provides that the son and daughter of the trustor, respectively, shall have the right to instruct the trustee by an instrument in writing, or by last will and testament, as to distribution of the *corpus* of the share of each. The agreement further provides that, in the event of the failure of either to give instructions, and in the event of his or her death without issue his or her share would go to the other. There is no express provision as to distribution of the remainder after the life estates to the son and daughter of the trustor in the event of the death of one or both of them leaving issue.

The agreement further provides:

"5. Should the insured or the beneficiaries named herein, or any other person, firm or corporation fail to pay premiums on policies herein set

out, the trustee in its sole discretion may pay such premiums, either by executing policy lien notes, or by borrowing sufficient funds for this purpose. Should the trustee elect to borrow or advance funds for the payment of premiums, the trustee shall, out of the first money coming into its hands, from any source constituting a part of this trust estate, repay such loans or advances with interest. It is understood and agreed that the trustee, in accepting this trust, does not agree to pay premiums on life insurance policies covered by this instrument. However, the trustee shall use its best efforts to keep all of the life insurance covered by this instrument in force.

"6. The said trustee has no right to resign this trusteeship. However, should, for any reason, the trustee become incapacitated or unable to continue to serve in the capacity of trustee, then the then clerk of the Superior Court of Mecklenburg County, North Carolina, shall consult and advise with the executive officers of the Independence Trust Company or the persons who were the last executive officers of said company, and after ten (10) days written notice to the beneficiaries of this trust, shall appoint a sound and reliable trust company as trustee to succeed the Independence Trust Company, which trustee shall hold and dispose of the *corpus* and income therefrom, upon the same terms, conditions, uses and trust, as the original trustee."

"John H. Cutter, the trustor, received no consideration for said trust agreement, but the same was entirely voluntary on his part."

"7. That on or before 10 February, 1934, said Independence Trust Company having become insolvent and having ceased to engage in business and being no longer qualified to act in a fiduciary capacity, the clerk of the Superior Court of Mecklenburg County, North Carolina, in a special proceeding pending in said court, entitled, 'In the matter of John H. Cutter Life Insurance Trust—Independence Trust Company, Trustee,' and after due notice and proceedings as provided in said life insurance trust agreement entered an order in said special proceeding nominating and appointing said American Trust Company as trustee under the said life insurance trust agreement in lieu and stead of the said Independence Trust Company, and that said American Trust Company accepted such appointment as trustee and agreed to act, and is now acting as trustee under the said life insurance trust agreement, and that there were delivered to the said American Trust Company, trustee, the life insurance policies then in force and covered by the said trust agreement as listed on the schedule attached to the complaint in this cause, marked Exhibit B, being the only property then belonging to the said trust estate, and that said American Trust Company now holds the said life insurance policies listed on the schedule attached to the complaint, marked Exhibit B, which policies compose the entire assets of the said trust estate, and that other than funds which may be borrowed upon the

said life insurance policies, said American Trust Company, trustee, has in the said trust estate no funds, property or other resources wherewith to pay the premiums upon the said insurance policies as such premiums become due and payable; that such funds as may be borrowed upon the said policies from time to time will not be sufficient wherewith to pay the premiums upon said policies and keep the said policies in force, and that unless the plaintiff John H. Cutter furnishes, or there is received from some other source contributions of cash, from time to time for the purpose of supplementing such funds as may be borrowed upon the said policies so as to enable the trustee to pay the premiums thereon, the said policies will lapse and become of no further force and effect on account of nonpayment of premiums thereon, in which event the whole trust estate will fail.

"8. That from time to time since its appointment as substitute trustee under the said insurance trust agreement, defendant American Trust Company, as trustee under the said trust agreement, has joined with plaintiff John H. Cutter in executing such notes and other paper writings as were necessary to borrow funds upon the said life insurance policies for the purpose of paying the premiums thereon, all of which sums so borrowed have been applied to the payment of premiums upon the said policies upon which such loans were obtained, respectively, and that it was necessary for the preservation of the trust estate that the loans be obtained and the avails thereof so applied. There is attached to this judgment, marked Exhibit No. 1, a list of the loans so obtained by the said trustee in collaboration with the said John H. Cutter, being the loans adverted to by the court in this finding of fact.

"9. That at the time of the execution and delivery of the trust agreement, plaintiff John H. Cutter was in such financial condition as led him reasonably to believe and expect that he would be able to advance and pay the premiums upon the said life insurance policies, and at the same time to service and retire the indebtedness against the portion of his estate not included within the trust agreement. That the said John H. Cutter owns a large number of valuable pieces of real estate in the uptown section of the city of Charlotte, all of which are now subject to outstanding mortgages, and that conditions have now so radically changed since the execution and delivery of the life insurance agreement that the said John H. Cutter finds himself in the position of being unable to carry and pay the premiums upon the life insurance policies now held in said trust and at the same time to make such payments upon the mortgage debts against other property as will, in the event of his death in the natural course of events, leave his estate in such shape that same can be protected for his wife and children, and that the said John H. Cutter is unwilling to continue to pay the premiums upon said policies of life insurance unless the provisions of said life insurance

trust agreement with respect to the powers and rights of the trustee thereunder to invest and reinvest such funds as may be held in such trust shall be so changed, altered and amended as to permit the trustee under the said life insurance trust agreement to use and invest the funds belonging to same after the death of the said John H. Cutter in such way and manner as in the opinion of the trustee may be reasonably necessary and advisable to produce an income adequate to protect and preserve the remaining estate of the said John H. Cutter. That the plaintiffs, other than John H. Cutter, and the defendants, other than American Trust Company, are the natural objects of the bounty of the said John H. Cutter, and in the event of his death will be vitally interested in the preservation of his estate and are also vitally interested in the preservation of said life insurance trust estate.

"10. That the plaintiffs have requested that the said life insurance trust agreement be changed and amended as set forth in paragraph numbered 11 of the complaint filed in this cause, and that the personal defendants, through their regularly appointed guardian *ad litem*, have joined in the request for the alteration and amendment of the said life insurance trust agreement as set forth in paragraph numbered 11 of the complaint.

"11. That the said John H. Cutter has heretofore executed a will and placed it in the custody of American Trust Company, and that the beneficiaries under said will, if it becomes effective, will be the same as the beneficiaries under said life insurance trust agreement, and that they will also be the beneficiaries of the estate of John H. Cutter in case he dies intestate.

"12. That it is necessary to change, alter and amend the said life insurance trust agreement in the respects set forth in paragraph 11 of the complaint in order to properly preserve the said trust and at the same time in order to properly preserve and protect the interests of the beneficiaries thereunder in the estate of the said John H. Cutter, in which they, as the natural objects of his bounty, are and will be deeply interested."

"Upon the foregoing findings of fact, the court does hereby, as a matter of law, order, adjudge and decree as follows:

"(a) That the appointment by the clerk of the Superior Court of Mecklenburg County of American Trust Company as trustee under the aforesaid insurance trust agreement in lieu and stead of Independence Trust Company, the original trustee therein, be and the same hereby is in all respects fully ratified, approved and confirmed.

"(b) That the actions of said American Trust Company, trustee, in joining with the said John H. Cutter in obtaining loans upon various of the policies held in the said life insurance trust and applying the avails of such loans toward the payment of the premiums upon such policies,

all as set forth on the statement hereto attached, marked Exhibit No. 1, be and they hereby are in all respects fully ratified, approved and confirmed.

"(c) That said American Trust Company, as trustee under said life insurance trust agreement, be and it hereby is fully authorized and empowered, from time to time, to borrow or cause to be borrowed upon the life insurance policies held in the said trust such sums as in the opinion of the said trustee may be necessary and desirable to use towards the payment of the premiums upon such policies and to apply any and all funds so borrowed towards the payment of premiums upon such policies as such premiums may become due and payable, with full power and authority in the trustee, and in its discretion, to borrow upon any one or more of said policies for the purpose of paying premiums not only upon the policy or policies so borrowed upon, but also for the purpose of paying premiums upon any others of the said policies.

"(d) That all of the beneficiaries of said life insurance trust agreement who are now in being and are *sui juris* having consented to and requested the amendment of said life insurance trust agreement as set forth in paragraph numbered 11 of the complaint, and the minor defendants who are now in being and who are not in being, but who might, by some possibility, be interested in said trust, having through their duly appointed guardian *ad litem* requested the amendment and modification of said trust agreement as hereinbefore referred to, and the court having found, and now finding, that it is for the best interests of all present and future beneficiaries under said life insurance trust agreement and necessary for the preservation of said trust that the said life insurance trust agreement be so amended and changed; thereupon the court holds that, in its chancery jurisdiction, in order to preserve said life insurance trust and to prevent the entire failure of same, the court has the power to approve and to make binding upon any parties who may possibly be interested in said trust the modification of said life insurance trust agreement set forth in paragraph 11 of the complaint, and that, under the circumstances and the foregoing facts, said power should be exercised in this case.

"(e) The court is of the opinion that this is such a voluntary trust as under C. S., 996, may be revoked or modified by the trustor with the consent of all the beneficiaries having a vested interest, and that the plaintiffs are all the persons having a vested interest, but is of the opinion that it is not necessary to so hold because in any event the court is of the opinion that it has power, in the exercise of its equitable jurisdiction over trusts, to modify the powers of the trustee under the trust instrument as prayed for in the complaint and that the power should be exercised in this case.

"It is therefore ordered, adjudged and decreed that the said life insurance trust agreement executed and delivered by John H. Cutter, which bears date of 19 September, 1932, and a copy of which is attached to the complaint in this cause, marked Exhibit A, be and the same hereby is changed, amended, modified and altered by striking out therefrom the paragraph numbered 3, including subparagraphs (a), (b), (c) and (d) thereof, reading as follows (these relate to investing funds as hereinbefore stated; hence, recital thereof is omitted), and inserting therein in lieu of the sections so stricken out the following provisions, to wit:

"3. Upon the death of the insured, or other maturity or surrender of any policy, the trustee shall proceed to collect and receive the proceeds of the said policies, and the trustee shall be vested with and exercise the following powers and duties with respect to the trust estate, to wit:

"(a) To manage, hold, handle, control, improve, pledge, mortgage, lease without limit, or sell and convey any of the said trust property, whether received as principal or income, in such manner, at such prices, and upon such terms as it may deem best; and shall likewise have full power and authority to invest and from time to time reinvest any funds received or held by it, in such real estate, personal property, stocks, bonds, mortgages or other securities as the trustee, in its discretion, may deem advisable, it being the intention of the grantor to relieve the trustee from all restrictions placed by law upon investments and reinvestments made by trustees, and to confer upon the trustee such full and discretionary powers of investment and reinvestment as the trustee would possess if it were itself the individual owner of the trust estate.

"(b) To participate in any reorganization, consolidation or merger of any corporation the stocks, bonds or other securities of which may be at any time held in trust, and to receive and to continue to hold upon the trusts hereby created, any stocks, bonds or other securities which may be allotted to the trustee by reason of its participation in any such reorganization, consolidation or merger.

"(c) To make divisions and distributions in kind or in cash, or partly in kind and partly in cash, and the determination of the trustee as to the fairness and equality of any such distribution shall be conclusive upon all persons entitled to receive any share of the trust estate.

"(d) To compromise, settle or arbitrate any claim or demand in favor of or against the trust estate.

"(e) To purchase real estate, stocks, mortgages, bonds and other securities and property from any estate at such prices as it may determine. In like manner to loan to the executor or other representative of any estate, such sums, and upon such securities as may seem to the trustee, wise in its uncontrolled discretion.

"(f) To exercise conversion or subscription rights appurtenant to any stocks, bonds or other securities at any time held in trust, and to use

such portion of the principal of the trust estate as may be necessary therefor, or in the discretion of the trustee to sell any such rights.

"(g) All stock dividends and all realized appreciation in the value of stocks, bonds or other securities, resulting from sale or other disposition thereof, shall be considered principal and not income.

"(h) The trustee shall not be required to set up any sinking or other fund to amortize or absorb the premium at which any property may have been purchased or may be held by the trustees.

"(i) The trustee shall not be liable for loss or depreciation in value of any of the trust property or for any investments or reinvestments which it may make, or may continue to hold, unless it shall have failed to act with reasonable care; nor shall the trustee be under any obligation to make payments or premiums, dues, assessments or other charges which may become payable on or in respect to any life insurance policies held in trust, or any life insurance policies heretofore or hereafter deposited with it, nor shall it be liable for loss resulting from the failure to make any such payments.

"(j) The trustee shall not be responsible for inability to enforce collection of the proceeds of any life insurance policy held in trust, nor shall it be under any responsibility to bring suit to collect the proceeds of any insurance policy held in trust, unless it shall have been indemnified to its full satisfaction.

"(k) Any payment from the principal of the trust estate by a beneficiary and/or beneficiaries shall be deemed a termination of this trust to the extent of the amount so paid."

One of the minor defendants, to wit, Burton Sparling Davis, 3rd, is a nonresident, and substitute service was obtained upon him by the sheriff of Ulster County, New York.

From the above judgment the defendant American Trust Company, trustee, appealed to the Supreme Court, and assigns error.

Taliaferro & Clarkson for plaintiffs, appellees.
Robinson & Jones for defendants, appellants.

WINBORNE, J. The appellant presents these questions: (1) Is the defendant Burton Sparling Davis, 3rd, nonresident infant, through substituted service of summons, properly before the court? (2) Is the appointment of American Trust Company as substitute trustee valid? (3) Is the order authorizing the trustee to continue to borrow money upon the policies of insurance held under the trust agreement valid? (4) Did the court have authority to modify the provisions of the trust agreement as set out in the judgment? The answer to each is "Yes."

1. Where the person on whom service of summons is to be made "is a nonresident, but has property in this State, and the court has jurisdic-

tion of the subject of the action," or "where the subject of the action is real or personal property in this State, and the defendant has, or claims, or the relief demanded consists wholly or partly in excluding him from any actual or contingent lien or interest therein," notice of summons may be published. C. S., 484 (3), (4). When the place of residence is known and the same is made to appear by affidavit, substitute personal service may be made. C. S., 491. Such service was personally made on Burton Sparling Davis, 3rd. Guardian *ad litem* has been duly appointed for him and has answered. If it be conceded that the said minor has a contingent interest in the subject matter of the trust, is the present proceeding *in rem?*

As evidence of debt or damages recoverable thereon, the policies of insurance are choses in action. 32 C. J., 1093. A chose in action is personal property. 50 C. J., 763. The *situs* of personal property is at the domicile of the owner. *McLean v. Hardin,* 56 N. C., 294; *Trust Co. v. Doughton,* 187 N. C., 263, 121 S. E., 741; *McGehee v. McGehee,* 189 N. C., 558, 127 S. E., 684. By the trust agreement here, the insurance policies are made the subject matter of the trust. The court has jurisdiction of the trustee, the holder of the legal title to the policies. They are in its possession. The proceeding relates to the administration of the trust. Consequently, the suit is a proceeding *in rem, Ferguson v. Price,* 206 N. C., 37, 173 S. E., 1, in which summons may be served by publication of notice, or by substituted service.

2. The appointment of the American Trust Company as substitute trustee is in strict compliance with the provisions of section six of the trust agreement, in which the procedure is prescribed by the creator of the trust. A special proceeding is not required. The approval of the court was unnecessary. The appointment is good without it. Nevertheless, the approval gives judicial sanction.

3. Under section five of the trust agreement the original trustee is authorized to borrow money on the policies of insurance held under the agreement for the purpose of raising funds with which to pay premiums thereon. Section six provides that a trustee, appointed as therein provided to succeed the trustee named, "shall hold and dispose of the *corpus* and income therefrom, upon the same terms, conditions, uses and trust as the original trustee." Under this provision the American Trust Company, having been duly and regularly appointed substitute trustee, is vested with the powers of the original trustee.

4. We are of opinion that the action of the court in modifying the administrative provisions of the trust agreement is proper in the exercise of its equitable jurisdiction. "The regulation and enforcement of trusts is one of the original and inherent powers of a court of equity." 21 C. J., 116. "A court of equity has the power to do whatever is necessary to be done to preserve the trust from destruction, and in the exercise

of this power it may, under certain unusual circumstances, modify the terms of the trust to preserve it but not to defeat or destroy it. The courts are slow to exercise their power even to modify the terms of a trust, and will only do so when it clearly appears to be necessary. . . . So in a case where the income of the trust property is insufficient to pay the taxes, and the body of the estate is in danger of being lost entirely, the court will order the sale of all or a part of it in order to preserve it as far as possible." 26 R. C. L., 1283; 80 A. L. R., 117. This power is recognized in this State. In the case of *Trust Co. v. Nicholson,* 162 N. C., 257, 78 S. E., 152, *Allen, J.,* said: "There is high authority for the position that conditions like those before us annexed to estates, limiting the powers of trustees or *cestui que trust,* if valid, do not prevent the court of equity from ordering a sale of property contrary to such condition. . . ." Then he quotes from *Custis v. Brown,* 29 Ill., 230: "Exigencies often arise not contemplated by the party creating the trust, and, which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency."

In Bogert on Trusts and Trustees, 1796, it is said: "The directions of the settlor as to methods of management are of secondary importance. The primary consideration is the end which he had in mind, the benefits and advantages which he desired to confer upon the beneficiaries named. In any case where there is real necessity for a revision in methods and machinery for accomplishing settlor's fundamental purposes, equity has power to alter the terms of management in order that it may perform its vital function of bringing to the *cestuis* the results to which they are entitled by the terms of the investment."

In the case in hand the court makes full findings of fact showing the changed conditions and the necessity for modifying the administrative features of the trust agreement in order that the *corpus* of the trust be preserved for the beneficiaries. On these findings the equitable jurisdiction of the court is properly exercised. All parties, who could possibly be affected are either in, or are represented in, court.

We deem it unnecessary to discuss the right to modify under the authority of C. S., 996, as the court below did not base its decision thereon.

The judgment below is

Affirmed.

NANTAHALA POWER & LIGHT COMPANY v. THE COUNTY OF CLAY, AND W. M. ANDERSON, CHAIRMAN OF THE BOARD OF COMMISSIONERS, AND J. P. COLEMAN AND J. W. MILLER, MEMBERS OF THE BOARD OF COMMISSIONERS OF CLAY COUNTY, AND R. E. CRAWFORD, AUDITOR OF CLAY COUNTY, AND J. M. TIGER, SHERIFF, TAX COLLECTOR, AND TREASURER OF CLAY COUNTY.

(Filed 15 June, 1938.)

1. Taxation § 4—What are "necessary expenses" of county is question for courts.

What class of expenses constitute "necessary expenses" of a county within the meaning of Art. VII, sec. 7, is a judicial question for the determination of the courts, and whether they are needed in a particular county is for the determination of the governing authorities of the county.

2. Taxation § 3—What is "special purpose" within meaning of Art. V, sec. 6, is question for courts.

What is a "special purpose" within the meaning of Art. V, sec. 6, of the State Constitution is a matter for judicial rather than legislative determination, since such purpose for which an unlimited tax may be levied with the special approval of the General Assembly must also be a "necessary expense" of the county within the meaning of Art. VII, sec. 7, which involves both questions of law and fact.

3. Statutes § 5b—

When a statute is constitutional in part and unconstitutional in part, the constitutional provisions will be given effect when they are separable from the unconstitutional provisions.

4. Same: Taxation § 3—Courts cannot separate purposes for which tax is levied when item for which tax is levied combines several purposes.

While ordinarily when a statute is constitutional in part and unconstitutional in part, only the unconstitutional provisions will be disregarded, when an item for the levy of taxes includes both general and special expenses, the entire item in excess of the constitutional limitation, Art. V, sec. 6, must fail, or if an item combines both a special and an unnecessary expense, the item must fail in its entirety.

5. Counties § 12—

The county commissioners may amend their records to speak the truth to show which items of taxation are levied for special and which for general purposes, when the records fail to show separately the purposes of a levy but combine several purposes as a unit.

6. Taxation § 3—Item held to include purpose not having special approval of Legislature, and therefore item fails as in excess of limitation.

Defendant county levied taxes up to the 15-cent limitation for general county purposes and in addition thereto levied taxes for the purposes of "commissioners' pay, expense and board, courthouse and grounds, and county attorney's fees." *Held:* No special approval of the Legislature being shown for county attorney's fees, the entire item must fail, and

furthermore, the other purposes included in the item are for general county expenses and not for a special purpose within the meaning of Art. V, sec. 6.

7. Same—Determination of what are general and special expenses of a county.

Items of expense which are of a constantly recurring nature in the ordinary functioning of the county are not for special purposes for which an unlimited tax may be levied with the special approval of the Legislature, and therefore the expenses of the county commissioners, and expenses in running the courthouse and care of its grounds are for general purposes, while the purchase or building of a courthouse may be a special purpose.

8. Same—Item held to include purpose which may not be adjudicated as necessary or unnecessary expense or for special or general purpose.

Defendant county levied taxes up to the 15-cent limitation for general county purposes, and in addition thereto levied a tax for "upkeep of county buildings, courthouse, county home, poor and paupers, and incidental purposes." *Held:* The court may not determine whether the "incidental expenses" are for a necessary or unnecessary purpose, or for a general or special purpose, or how much of the tax is for "incidental expenses," and therefore the entire item is void as not being for a special purpose with special approval of the Legislature within the meaning of Art. V, sec. 6.

9. Same—Farm agent's salary is for necessary expense of county and constitutes a special purpose having special approval of Legislature.

The encouragement of agriculture is a fundamental objective of the State government, Art. III, sec. 17; Art. IX, sec. 14, and a levy of a tax by a county to pay the county farm agent's salary is for a special purpose having the special approval of the Legislature, C. S., 4666, 4689 (a), 1297 (40), within the meaning of Art. V, sec. 6, for which a tax in excess of the 15-cent limitation may be imposed.

10. Same—

A county tax levy to pay the county accountant's salary is for a special purpose having the special approval of the Legislature (County Fiscal Control Act, Public Laws of 1927, ch. 146), within the meaning of Art. V, sec. 6, of the State Constitution.

11. Same—

Ordinarily, the expenses of listing taxes, holding elections, holding courts, caring for and feeding jail prisoners are general and are not special expenses of the county, and under the facts of this case such purposes are held general expenses, and the tax rate therefor may not exceed the 15-cent limitation imposed by Art. V, sec. 6.

12. Taxation § 38c—Protest in strict compliance with statute is necessary in order for taxpayer to maintain action to recover taxes paid.

Plaintiff made anticipatory payment of taxes under C. S., 7971 (92), (8), in order to take advantage of the discount. After levy of taxes by the county, plaintiff paid the balance of taxes levied against its property and gave written notice that all the taxes were paid under protest. In an action under C. S., 7880 (194), to recover the taxes paid, *held*, the antici-

patory payment was not made under protest, there being no written protest at the time of that payment, C. S., 7979, a strict compliance with the statute being necessary in an action to recover taxes paid.

13. Same: Payment § 8—When neither debtor nor creditor directs application of payment, law will make application to unsecured debt.

Since a debtor may direct application of payment, and if neither debtor nor creditor makes application before institution of suit, the law will apply a payment to the unsecured or most precariously secured debt, when a taxpayer makes anticipatory payment not under protest, and thereafter pays under protest the balance of the taxes levied against his property, in his action under C. S., 7880 (194), to recover the taxes the entire amount paid under protest may be recovered when unlawful levies equal such amount, and the recovery will not be limited to the proportionate part which the unlawful levies bear to the entire tax levy, since it will not be presumed that the county intended to make an unlawful levy or that the taxpayer intended to pay tax illegally levied.

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

APPEAL by plaintiff and by defendants from *Ervin, J.*, at November Term, 1937, of CLAY.

Action for recovery of *ad valorem* taxes alleged to have been assessed illegally, and paid under protest.

The parties waived a trial by jury and by consent agreed that court should hear the evidence, find the facts and render judgment in accordance therewith.

The court made findings of fact substantially as follows: On 30 August, 1936, the defendant Clay County, through its duly authorized board of commissioners, levied a tax for the year 1936 at the rate of $1.90 on the $100 property valuation, made up of sixteen separate items. The purpose and amount of the first twelve aggregating sixty-seven cents are involved in this action. They are as follows: (1) County commissioners' pay, expense, and board, county courthouse and grounds, and county attorney's fees, *five cents;* (2) tax listing expense, *four cents;* (3) expense of holding elections, *three cents;* (4) sheriff's salary and expense of office, *ten cents;* (5) register of deed's salary and expense of office, *five cents;* (6) clerk Superior Court, salary and expense of office, *five cents;* (7) county accountant's salary, *five cents;* (8) county farm agent's salary, *four cents;* (9) upkeep county buildings, courthouse, county home, poor and paupers, and incidental purposes, *five cents;* (10) holding courts, expense of jail and jail prisoners, *fifteen cents;* (11) miscellaneous expense of county government not otherwise set forth, *two cents;* and (12) emergency tax for distribution to each of above funds, *four cents.*

Plaintiff listed for taxation for said year real and personal property of assessed valuation of $149,397, the tax on which at the above rate of $1.90 amounts to $3,838.55. Prior to the levy and assessment of taxes

for the year 1936, on 30 June, 1936, and in order that it might receive a discount of three per cent of the taxes, allowed for anticipatory payment, plaintiff paid $2,183.16, less discount to the county accountant, who was duly authorized agent of said county. Receipt therefor contains recital that payment is "to apply on its taxes levied by Clay County, North Carolina, for the current year 1936," and that "it is understood that when levy shall have been fixed then an adjustment of any excess or deficiency in this amount shall be made between the parties hereto." After the levy as aforesaid, and on 30 September, 1936, plaintiff paid to proper officer of Clay County the balance of the tax levied upon the property of plaintiff as aforesaid for the year 1936, to wit, $655.39. At the time of this payment, plaintiff notified defendants that the payment then being made, and the anticipatory payment, were made under protest for that the twelve items of the tax levy hereinabove specified contravene the provisions of Art. V, sec. 6, of the Constitution of North Carolina, and are void. In the written protest plaintiff sets forth that the first payment having been made prior to the tax levy, there was no opportunity to determine whether or not the levies would be legal or illegal, and, hence, it makes protest at the first opportunity. On 29 October, 1936, pursuant to and in accordance with the terms of C. S., 7880 (194), and C. S., 7979, plaintiff demanded of defendants the refund of $776.86, the amount paid by it on account of alleged excessive, unconstitutional and void levy of fifty-two cents of the sixty-seven cents total of the twelve items in controversy. Plaintiff instituted this action on 5 April, 1937, for the avowed purpose of recovering the sum demanded as above stated upon the grounds specified.

Plaintiff offered evidence tending to show that written notice was served upon defendants to produce evidence of the approval of the Director of Local Government to levy tax under C. S., 1297 (83¼), and requested the court to find, upon failure of defendants to produce such evidence, that no such approval was obtained. The court, however, finds as a fact that the board of commissioners of Clay County secured the approval of said director. The court states that this finding is made "solely upon the basis of the presumption of the regularity of the acts of public officers, and such other presumptions as the law raises in such cases." Plaintiff excepts.

None of the taxes contested by the plaintiff were authorized by any vote of the people of Clay County.

Upon these findings of fact, and the contentions of the parties, the court below concluded as matters of law in substance that:

(1) In so far as the taxes assessed and collected exceed fifteen cents on the $100 valuation, the board of commissioners of Clay County purported and undertook to levy such taxes under the provisions of chapter 7 of Public Laws of 1923, of chapter 441 of Public Laws of

1931, and chapter 330 of Public Laws of 1935, as embodied in subdivisions 8½ and 8¾ of C. S., 1297, of chapter 41, Public-Local Laws of 1935, and of section 6 of chapter 146 of Public Laws of 1927, and that the said statutes are a constitutional exercise of the legislative power under Art. V, sec. 6, and Art. VII, sec. 7, of the Constitution of North Carolina. Exception by plaintiff.

(2) The purpose for which each of the items of the tax levy declared to be valid is a necessary expense within the meaning of Art. VII, sec. 7, of the North Carolina Constitution. Exception by plaintiff as to Item 8.

(3) As to the rate per $100 property valuation for each purpose, the court held that: (a) The levies specified in Items 4, 5, 6 and 11, being made under the provisions of Art. V, sec. 6, of the Constitution, were not for special purposes, and are valid only to the extent of the fifteen cents constitutional limitation, and are invalid to the extent of the excess —seven cents.

(b) The levy specified in Item 12, under the authority of section 6 of chapter 146 of Public Laws of 1927, is invalid for that the statute does not authorize the imposition of the tax.

(c) The levy specified in Item 3, being made under the provisions of subsection 6 of section 1 of chapter 41 of the Public-Local Laws of 1935 authorizing a levy "for election expense two cents," is "for a special purpose" with "special approval" of the General Assembly under the provisions of Art. V, sec. 6, of the Constitution and is valid to the extent of two cents, but invalid as to the one cent excess in rate. Plaintiff excepts to that part of this ruling declaring valid the two cents rate.

(d) The levies specified in Items 1, 2, 7 and 8, being made under subsections 2, 3, 4 and 5 of section 1 of chapter 41 of Public-Local Laws of 1935, are for special purposes with the special approval of the General Assembly and are within statutory limitations, and within the purview of Art. V, sec. 6, of the Constitution, and valid. Exception by plaintiffs.

(e) The levy specified in Item 9, under the authority of provisions of the acts of Legislature embodied in subsection 8½ of C. S., 1297, is for a special purpose with the special approval of the General Assembly, and is within the statutory limitation, and within the purview of Art. V, sec. 6, of the Constitution, and valid. Exception by plaintiff.

(f) The levy specified in Item 10, under the combined authority of C. S., 1297 (8¾), for five cents of the rate, and subsection 1, section 1, chapter 41, Public-Local Laws 1935, for ten cents, is for special purpose and with the special approval of the General Assembly, and is within the statutory limitation and within the purview of Art. V, sec. 6, of the Constitution. Exception by plaintiff.

(4) Pursuant to the above rulings on the validity of rates for tax purposes, the tax assessed against defendant is invalid to the extent of twelve cents on the $100 valuation, or $179.28. Exception by plaintiff and by defendants.

(5) The anticipatory payment 30 June, 1936, was not paid under protest within the meaning of the statute relating thereto, C. S., 7880 (194), but that the payment of 30 September, 1936, was in strict compliance therewith. Exception by plaintiff.

From judgment in accordance with such rulings, the plaintiff and the defendants appealed to the Supreme Court and assign error.

Black & Whitaker for plaintiff.

J. D. Mallonee, J. D. Mallonee, Jr., and T. C. Gray for defendants.

PLAINTIFF'S APPEAL.

WINBORNE, J. The State Constitution provides the fundamental authority for, and prescribes the limitation upon, the levying of county taxes.

Article VII, section 7, reads in part: ". . . No county, city or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein. . . ."

Article V, section 6, provides in part: "The total of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by *special* or *general* act. . . ."

The subject of the authority to levy taxes has been discussed in numerous decisions of this Court. The law is well settled. In the case of *Glenn v. Comrs.*, 201 N. C., 233, 159 S. E., 439, speaking with reference to authoritative decisions interpreting Article V, section 6, and Article VII, section 7, of the Constitution of North Carolina, *Stacy, C. J.*, summarized the law as follows: "1. That within the limitations fixed by Article V, section 6, the county commissioners of the several counties may levy taxes for the necessary expenses of the county without a vote of the people or special legislative approval. (Citing cases.) 'Taxation for State and county purposes combined cannot exceed the constitutional limitation for their necessary expenses and new debts. . . . If what are often miscalled the "necessary expenses" of a county exceed the limitation prescribed by law, the necessity cannot justify the violation of the Constitution.' *French v. Comrs.*, 74 N. C., 692.

"2. That for special purposes and with the special approval of the General Assembly, the county commissioners of the several counties

may exceed the limitations of Article V, section 6, without a vote of the people; provided, the special purposes so approved by the General Assembly are for the necessary expenses of the county. (Citing cases.) . . . 'Such "special purposes" must be of the ordinary purposes of the county, such as that to build a courthouse, a public jail, or an important bridge, as to which it may be deemed necessary to create a special fund.' *Merrimon, J.*, in *Jones v. Comrs.*, 107 N. C., 264.

"3. That for purposes other than necessary expenses, whether special or other, taxes may not be levied by the county commissioners of any county either within or in excess of the limitations fixed by Article V, section 6, except by a vote of the people under special legislative authority. (Citing case.) (See, also, *Palmer v. Haywood County*, 212 N. C., 284, 193 S. E., 668; *Sing v. Charlotte, ante*, 60, 195 S. E., 271.)

"4. That a tax 'to supplement the general county fund' (*R. R. v. Reid*, 187 N. C., 320, 121 S. E., 534), or 'to provide for any deficiency in the necessary expenses and revenue of said respective counties' (*R. R. v. Comrs.*, 178 N. C., 449, 101 S. E., 91), or 'for the purpose of taking up a note in bank by the predecessor board and other current expenses' (*R. R. v. Cherokee County*, 177 N. C., 86, 97 S. E., 758), or to meet 'the current expenses of said county in said years' (*Williams v. Comrs.*, 119 N. C., 520, 26 S. E., 150), or 'to borrow money for the necessary expenses of the county and provide for its payment' (*Bennett v. Comrs.*, 173 N. C., 625, 92 S. E., 603), is not for a special purpose within the meaning of the Constitution. . . ."

What are necessary expenses is a question for judicial determination. The decisions in this State uniformly so hold. The courts determine what class of expenditures made or to be made by a county come within the definition of a necessary expense. The governing authorities of the county are vested with the power to determine when they are needed. *Sing v. Charlotte, supra*, and cases cited.

Likewise, what is a "special purpose" within the meaning of Article V, section 6, of the Constitution is a matter for judicial, rather than legislative, determination. In *Glenn v. Comrs., supra*, it is said: "As a 'special purpose' for which an unlimited tax may be levied with the special approval of the General Assembly and without a vote of the people must also be a 'necessary expense' of the county, which latter includes both law and fact, and, as used in the Constitution and municipal resolutions is a matter for judicial, rather than legislative, determination—it follows that what constitutes a special purpose within the meaning of the Constitution must ultimately be decided by the courts."

In the case in hand it is pertinent to note there is no levy for general county purposes, and that the court below treated items 4, 5, 6 and 11 as for general purposes and limited the levy to the fifteen cents constitutional limitation, and declared the excess invalid and unconstitu-

tional. Hence, each of the items now challenged is levied as for a *special purpose.*

Plaintiff challenges on this appeal the constitutionality and validity of the tax levy of Clay County for the year 1936 only as to these items for these purposes (for convenience numbered as they appear in tax levy): (1) Commissioners' pay, expense and board, courthouse and grounds, and county attorney's fees; (2) tax listing expense; (3) expense of holding elections; (7) county accountant's salary; (8) county farm agent's salary; (9) upkeep county buildings, courthouse, county home, poor and paupers, and incidental purposes; (10) holding courts, expense of jail and jail prisoners.

Applying the principles hereinbefore stated to the controverted items of the tax levy these questions arise: (1) Which, if any, are for purposes, constitutional and unconstitutional, valid and invalid, inseparably combined? (2) Which, if any, lack special approval of the General Assembly? (3) Which, if any, are not for necessary expenses within the meaning of Article VII, section 7, of the Constitution? (4) Which, if any, are for special purposes within the meaning of Article V, section 6, of the Constitution?

Questions 1 and 2. *Items 1 and 9:* A statute may be constitutional in part, and in part unconstitutional. The general rule is that if a statute contains invalid or unconstitutional provisions, the part which is unaffected by those provisions, or which can stand without them, must remain. If the valid and invalid are separable, only the latter may be disregarded. *R. R. v. Reid, supra.* But in the levy of taxes if the board of commissioners combines in a particular item both general and special expenses beyond the constitutional limitation, that item must fall to the extent it exceeds that limitation. Or, if the board combines in a particular item the expenses of both a special and an unnecessary expense, that item must fall in its entirety. This subject has been before the court several times. Boards of commissioners have been permitted to amend their records to speak the truth in cases where levies have been made for general and special purposes separately but recorded as a unit in an amount exceeding the constitutional limitation. However, if the record correctly records the levy as actually made, the board has no power to amend. *R. R. v. Reid, supra; R. R. v. Forbes,* 188 N. C., 151, 124 S. E., 132; *R. R. v. Cherokee,* 194 N. C., 781, 140 S. E., 748; *R. R. v. Cherokee,* 195 N. C., 756, 143 S. E., 467; *R. R. v. Lenoir County,* 200 N. C., 494, 157 S. E., 610.

The board of commissioners of Clay County is a party to the present action. In answer filed it is not contended that an error has been committed in designating the purposes covered by the several items, or in combining the purposes in the separate items: As to *Item 1:* No special legislative approval is shown for attorney's fees. What part of this

item is to cover that expense the record does not disclose. This brings the entire item into confusion as a special purpose, and renders it void. However, all the expenses set forth therein are general. The board of county commissioners is the governing and tax levying authority. Its functions are general in every aspect, and the expenses of the board are constantly recurring. While the expense of building of courthouse may be special, the expense of running it after it is built is general. While the purchase of the courthouse grounds may be special, the care of the grounds is a general expense. Therefore, each of the purposes included in this item is a general expense and comes within the limitation of Article V, section 6, of the Constitution.

It will be noted in *Item 9* that "incidental" purposes are commingled with other purposes therein included. It does not appear what the incidental purposes are, whether necessary or unnecessary expenses, or whether expenses for general or special purposes. Nor does it appear what part of the levy is for "incidental purposes." It may be all or any part. Manifestly, it cannot be recognized as a "special purpose." Thus the inclusion of it condemns the entire item. The levy is indivisible and void. *R. R. v. Reid, supra.*

Question 3. *Item 8:* Of the questions raised on this appeal plaintiff contends that the county farm agent's salary, Item 8, is not only not a necessary expense, but is not a special purpose. As a necessary expense this is the only item questioned.

In defining "necessary expense," it is said in *Henderson v. Wilmington,* 191 N. C., 269, 132 S. E., 25, "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," p. 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 p. 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. . . ." *Sing v. Charlotte, supra.*

We have only to refer to the Constitution to find that agriculture has a place in the fundamental plan and organization of the State government. Article III, section 17, provides: "The General Assembly shall establish a Department of Agriculture, Immigration and Statistics under such regulations as may best promote the agricultural interests of the State. . . ." C. S., 4666. "This simply directs the Legisla-

ture to do so, leaving to it the largest latitude of regulation." *Cunningham v. Sprinkle,* 124 N. C., 638, 33 S. E., 138. Then, under "Education," Article IX, section 14, provides: "As soon as practicable after the adoption of this Constitution the General Assembly shall establish and maintain, in connection with the University, a department of agriculture. . . ."

In keeping with the constitutional mandate, the General Assembly has created and established a Department of Agriculture and prescribed for it duties and regulations. And among other things, it is provided that: "The boards of commissioners of the several counties have power . . . to coöperate with the State and national departments of agriculture to promote the farmers coöperative demonstration work, and to appropriate such sums as they may agree upon for the purpose." C. S., 1297 (40). "The Commissioner of Agriculture is authorized to conduct coöperative work with the United States Department of Agriculture and the county commissioners in gathering and disseminating information concerning agriculture. . . ." C. S., 4689 (a).

This coöperative work is carried on through the county farm agent, and at the joint expense of national, State and county governments. (Agricultural Extension Work Act. U. S. C. A Title 7, sections 341-348, and amendments.) The work purports to be an exercise by the county of a portion of the State's delegated sovereignty, and may be regarded as a necessary expense. The character of the work is in a special field. The Legislature, having given special approval to the levy, we see no reason why it should not be classified as a special purpose.

Question 4: In addition to *Item 8,* we are of opinion and hold that the levy for accountant's salary, *Item 7,* is for a special purpose. The position and duties of county accountant were created under the County Fiscal Control Act, Public Laws 1927, chapter 146. The declared purpose of this act is "to provide a uniform system for all the counties of the State by which the fiscal affairs of the county and subdivisions thereof may be regulated, to the end that accumulated deficits may be made up, and future deficits prevented, either under the provision of this act or under the provisions of any other laws authorizing the funding of debts and deficits, and to the end that every county in the State may balance its budget and carry out its function without incurring deficits." The office of county accountant with prescribed duties was created with this special purpose in view. The duties of county accountant constitute a "governor" by which the speed of the spending motor of county government is regulated. The duties are special in character, and are in addition to the functions of other offices pertaining to the ordinary operation of county government. As to the expenses of the position in Clay County, the Legislature has given special approval, and no good reason appears why it should not be considered a special expense. This is the ground upon which it is challenged.

The purposes of Items 2, 3 and 10, the listing of taxes, holding of elections and holding of courts are general expenses recurring regularly in the ordinary course of and as necessary steps in the orderly operation of county government. Caring for and feeding jail prisoners is a general expense continuous and ever present. Under the well established principles hereinbefore stated, these are not special purposes. Taxes therefor may be levied only within the constitutional limitation. There may be circumstances under which these items would be expenses for special purposes, but such circumstances do not arise in the present case.

It is appropriate to say that counties must live within their income, and budget their general expenses to fit their income. The Constitution prescribes the limitations.

The plaintiff contends that the court erred in ruling that the anticipatory payment was not paid under protest within the meaning of the statute relating thereto. C. S., 7880 (194); C. S., 7979. We think that the ruling is correct and so hold. In order to get the advantage of discount allowed for early payment, plaintiff made payment on 30 June, 1936, under provisions of C. S., 7971 (92), (8). No protest was filed at the time of the payment. Protest on 30 September, 1936, when balance of taxes were paid, is not sufficient.

However, as plaintiff, after demand, brings this action under the provisions of C. S., 7880 (194), it must show strict compliance with the provisions of that statute. Even a substantial compliance is not sufficient.

In *R. R. v. Brunswick County,* 198 N. C., 549, 152 S. E., 627, speaking to the subject of C. S., 7979, the Court said: "Ordinarily, where an action is authorized by statute, and can be maintained only because of statutory authority, the provisions of the statute must be strictly complied with. A substantial compliance is not sufficient." See, also, *R. R. v. Reidsville,* 109 N. C., 494, 13 S. E., 865; *Wilson v. Green,* 135 N. C., 343, 47 S. E., 469; *Blackwell v. Gastonia,* 181 N. C., 378, 107 S. E., 218.

The statute limits plaintiff's recovery to the amount paid under protest.

The judgment below, on plaintiff's appeal, modified in accordance with this opinion, is affirmed.

Modified and affirmed.

DEFENDANTS' APPEAL.

Defendants challenge the correctness of the rule applied by the court below in ascertaining the amount which plaintiff is entitled to recover by reason of invalid tax levy. The court held that twelve cents of the levy is invalid, and fixed the amount of recovery by multiplying the total valuation by twelve. Defendants contend that, in view of the fact

that only $655.39 of the total tax assessed was paid under protest, the plaintiff should recover only a proportionate part of amount illegally assessed. The receipt for the anticipatory payment discloses that it was "to apply on its (plaintiff's) taxes levied in Clay County, North Carolina, for the current year 1936." It will not be presumed that the county will make an illegal levy—nor that taxpayer intended to pay tax illegally levied. It is manifest that the taxpayer directed the application of payment. But if not, the record fails to disclose how the county made application. The law with respect to application of payment on debts is clearly established.

The debtor, at the time of making payment, has a right to direct its application. If debtor fails to apply payment, creditor may make application at any time before suit. But if neither debtor nor creditor applies payment, it will be applied to unsecured or most precariously secured debt, or according to intrinsic justice or the equity of the case. *Lee v. Manly,* 154 N. C., 244, 70 S. E., 385; *Stone Co. v. Rich,* 160 N. C., 161, 75 S. E., 1077; *French v. Richardson,* 167 N. C., 41, 83 S. E., 31; *Supply Co. v. Plumbing Co.,* 195 N. C., 629, 143 S. E., 248; *Dixon v. Osborne,* 204 N. C., 480, 168 S. E., 683; *Baker v. Sharpe,* 205 N. C., 196, 170 S. E., 657.

These principles are based upon the existence of a valid debt.

The judgment of the court below on defendant's appeal is

Affirmed.

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

STATE v. M. W. EPPS.

(Filed 15 June, 1938.)

1. Intoxicating Liquor § 9c—Evidence held sufficient for jury on charges of illegal possession for sale and transporting intoxicating liquor.

Evidence tending to show that defendant was apprehended while driving a car owned by him, that he fled the scene with his companion in the car when it bogged down in the mud, and that three and a half gallons of untaxed liquor was found in the car, *is held* sufficient to be submitted to the jury on the charge of illegal possession of intoxicating liquor for the purpose of sale and on the charge of unlawfully transporting intoxicating liquor, as charged in the bill of indictment.

2. Criminal Law § 81c—

When a defendant is charged in two counts in the bill of indictment with separate offenses of the same grade, and the jury returns a verdict of

guilty as to both counts, error in the trial of one count is harmless and does not entitle defendant to a new trial when such error does not affect the verdict on the other count.

3. Intoxicating Liquor § 4b—

An instruction to the effect that defendant would be guilty of illegal possession and transportation, whether he was driving or not, if he were present in his car, aiding and abetting his companion, and had in his constructive possession and under his control the intoxicating liquor, is without error, since actual physical possession is not necessary for conviction.

4. Criminal Law § 34b—

The fact that defendant fled the scene when his car containing intoxicating liquor was stopped by officers is a competent circumstance to be considered by the jury.

5. Intoxicating Liquor § 9a—

An indictment charging defendant with unlawful possession of intoxicating liquor for the purpose of sale, contrary to the form of the statute in such cases made and provided is sufficient, the provisions of N. C. Code, 3379, not having been repealed by ch. 49, Public Laws of 1937.

6. Intoxicating Liquor § 4c—

The "A. B. C. Act," ch. 49, Public Laws of 1937, does not repeal the Turlington Act, N. C. Code, 3411, since the two acts are not in conflict, and the later act repeals only prior laws inconsistent therewith, and therefore only provisions of the Turlington Act in conflict with the later act are repealed.

7. Statutes § 10—

Repeals by implication are not favored, and a later act will not repeal a former act unless the two are irreconcilable and repeal by implication is necessary, and a general repealing clause in the later act repealing prior acts in conflict therewith, strengthens the application of this rule.

8. Intoxicating Liquor § 7b—Provisions of Turlington Act in regard to transportation not inconsistent with A. B. C. Act are in effect.

The transportation of intoxicating liquor for the purpose of sale other than to an Alcoholic Beverage Control Board, and the transportation of intoxicating liquor having the cap or seal on the containers opened or broken, are not permitted by ch. 49, Public Laws of 1937, and therefore the provisions of the Turlington Act in regard to transportation in such cases are still in effect.

9. Intoxicating Liquor § 9a—

An indictment for illegal possession and transportation of intoxicating liquor need not negative the conditions under which intoxicating liquor may be possessed for the purpose of sale and may be transported, since the exceptions are matters of defense.

10. Indictment § 9—

Provisos which constitute exceptions withdrawing an act from the condemnation of the statute constitute defenses and need not be negatived in the indictment, while provisos which add a qualification without which the act is not condemned by the statute relate to essential elements of the offense which must be set out in the indictment.

11. Intoxicating Liquor § 9e—Instruction need not charge as to legal transportation when there is no evidence that transportation was legal.

When defendant relies exclusively upon an alibi, and does not contend or offer evidence that the intoxicating liquor found being transported in his car, he being present, was legal or was being transported legally, the court need not charge upon the exceptions relating to the legal transportation of liquor, the exceptions being matters of defense, and the instruction on the count of transportation being without error, error, if any, on the charge of illegal possession in failing to fully explain the effect to be given C. S., 3379, does not entitle defendant to a new trial.

12. Criminal Laws § 81c—

Defendant may not complain that the court failed to instruct the jury in regard to "*prima facie* evidence," the term involved in the case, since such failure, if error, is in defendant's favor, the charge not being in violation of C. S., 564.

13. Intoxicating Liquor § 1—

Under the second section of the 21st Amendment to the Federal Constitution, any state can prohibit the transportation or importation of intoxicating liquors into its territory.

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

APPEAL by defendant from *Armstrong, J.*, and a jury, at November Term, 1937, of SCOTLAND. No error.

The defendant was indicted on the following bill of indictment:

"State of North Carolina—Scotland County.
Superior Court, August Term, A.D. 1937.

"The jurors for the State upon their oath present that M. W. Epps, late of the County of Scotland, on the 8th day of April, in the year of our Lord one thousand nine hundred and thirty-seven, with force and arms, at and in the county aforesaid.

"*First Count.* And the jurors for the State upon their oaths do further present that M. W. Epps, late of the aforesaid county, on the said date, with force and arms, at and in said county aforesaid, did willfully and unlawfully have in his possession for the purpose of sale a quantity of spirituous, vinous, fermented, malt liquors and intoxicating bitters, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

"*Second Count.* And the jurors for the State upon their oaths do further present that M. W. Epps, late of the aforesaid county, on said date, with force and arms, at and in the county aforesaid, did willfully and unlawfully transport a quantity of spirituous, vinous, fermented, malt liquors and intoxicating bitters, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State. Pruette, Solicitor."

The defendant pleaded not guilty.

Lamar Smith, witness for the State, testified, in part: "On the night of 8 or 9 April of this year, I saw the defendant M. W. Epps. I did not know him personally at the time. I was then a deputy sheriff of Scotland County, and Mr. Todd and I had parked out on the road that goes up to Mrs. Cooper's place. As we waited there, we saw this car come up a little way out of the field. It got about as far as from here to the back of the courthouse from where the road comes into the public road, and we cut off our lights, and pulled up pretty close to him, and he stopped, and we did too. I jumped out of the automobile, and started toward his car; and he put it in reverse, and started backing; and I ran up beside the automobile, and shined my flashlight on him. There were just two men in the car. Epps was operating it, and there was just one man with him. They kept backing down the road pretty fast, and I was running along beside the car, and Mr. Todd was coming with his car. It had been raining; the ground was fresh plowed; and he kind of lost control of the car, backed up in the field, and bogged down. He jumped out of the car, and they ran. The car belonged to Epps, and, after the men ran, we found seven half-gallons of bootleg whiskey in the automobile. The next morning I saw the defendant back of the courthouse about eight-thirty o'clock, and he was arrested about ten minutes after that."

F. H. Todd, who was also a deputy sheriff and with Lamar Smith, corroborated him. The defendant did not take the stand in his own behalf, but several witnesses were introduced by him to establish an alibi.

The county of Scotland has not voted under the "A. B. C. Act."

The jury "upon their oath say that the said M. W. Epps is guilty thereof in manner and form as charged in the indictment." The defendant was sentenced: "Shall be confined in the common jail of Scotland County for a period of eleven months, to be assigned to work upon the roads of North Carolina as provided by law. It is further adjudged by the court that the defendant's automobile shall be confiscated and sold by the following order (setting same forth)."

The defendant made several exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

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

Jennings G. King for defendant.

CLARKSON, J. At the close of the State's evidence and at the close of all the evidence, the defendant in the court below made motions for judg-

ment as in case of nonsuit. N. C. Code, 1935 (Michie), section 4643. The court below refused these motions and in this we can see no error.

The evidence, as before set forth, was plenary to be submitted to the jury on the bill of indictment containing two counts. The defendant was convicted on both counts.

"In *S. v. Toole,* 106 N. C., 736, it is said: 'There having been a general verdict of guilty on two counts, for offenses punishable alike, it is immaterial to consider, as to the other count, whether there was error committed or not, unless it was such error as might or could effect the verdict of guilty on the second count. . . . If it is a general verdict of guilty upon an indictment containing several counts, charging offenses of the same grade, and punishable alike, the verdict upon any one, if valid, supports the judgment, and it is immaterial that the verdict as to the other counts is not good, either by reason of defective counts, or by the admission of incompetent evidence, or giving objectionable instructions as to such other counts, provided the errors complained of do not affect the valid verdict rendered on this count.' *S. v. Newton,* 207 N. C., 323 (328). Where a verdict refers to only one of several counts in an indictment, it amounts to an acquittal upon counts not referred to. *S. v. Hampton, ante,* 283 (284)." *S. v. Coal Co.,* 210 N. C., 742 (749).

The defendant excepted and assigned error (which cannot be sustained) to the following portion of the charge of the court below: "If the defendant was there in this car—if the car belonged to him or if it didn't belong to him—if he was there aiding and abetting and counseling and advising Goins or any other person in the possession and transportation of this liquor, whether he was driving or not, he would be just as guilty as the person who was driving; that is, he wouldn't actually have to have the liquor on his person, if he had it in his constructive possession or in his car or under his control, he would be guilty, and it would make no difference whether he was driving the car or not."

In *S. v. Davenport,* 156 N. C., 596 (614), is the following: "A person aids and abets when he has 'that kind of connection with the commission of a crime which, at common law, rendered the person guilty as a principal in the second degree. It consisted in being present at the time and place, and in doing some act to render aid to the actual perpetrator of the crime, though without taking a direct share in its commission.' Black's Dict., p. 56, citing Blackstone, 34. An abettor is one who gives 'aid and comfort,' or who either commands, advises, instigates, or encourages another to commit a crime—a person who, by being present, by words or conduct, assists or incites another to commit the criminal act (Black's Dict., p. 6); or one 'who so far participates in the commission of the offense as to be present for the purpose of assisting, if necessary; and in such case he is liable as a principal.' 1 McLain Cr. Law, sec. 199." *S. v. Jarrell,* 141 N. C., 725; *S. v. Cloninger,* 149 N. C., 572;

S. v. Powell, 168 N. C., 135; *S. v. Hart,* 186 N. C., 582 (584-5); *S. v. Baldwin,* 193 N. C., 566; *S. v. Ritter,* 197 N. C., 113 (115); *S. v. Anderson,* 208 N. C., 771 (785-6); *S. v. Casey,* 212 N. C., 352 (354); *S. v. Ray,* 212 N. C., 725 (731).

In *S. v. Meyers,* 190 N. C., 239 (243), *Varser, J.,* says: "If the liquor was within the power of the defendant, in such a sense that he could and did command its use, the possession was as complete within the meaning of the statute as if his possession had been actual. The possession may, within this statute, be either actual or constructive." *S. v. Norris,* 206 N. C., 191 (197).

The evidence was to the effect that "the car belonged to Epps, and, *after the men ran,* we found seven half-gallons of bootleg whiskey in the automobile."

In *S. v. Dickerson,* 189 N. C., 327 (331), it is said: "The fact that immediately after the discovery of a crime, the person charged with its commission fled, is admitted as a circumstance to be considered by the jury. *S. v. Nat,* 51 N. C., 114."

The Attorney-General (now a member of this Court), in his able and well prepared brief, says: "Counsel for defendant has raised for the first time the question of whether or not the bill of indictment in this case charges the defendant with an offense. The first count of that bill provides in substance that the defendant did 'willfully and unlawfully have in his possession for the purpose of sale' a quantity of intoxicating liquors. The second count charges that he did 'willfully and unlawfully transport a quantity' of intoxicating liquors." He then goes on (citing statutes and authorities) and contends that both counts are good under the law now in existence in this State. In this we think he is correct.

First Count. Did defendant "willfully and unlawfully have in his possession for the purpose of sale a quantity of spirituous, vinous, fermented, malt liquors and intoxicating bitters, contrary to the form of the statute in such cases made and provided," etc. Under the evidence we think so, and the jury so found.

N. C. Code, 1935 (Michie), section 3379, in part, is as follows: "It is unlawful for any person, firm, association or corporation, by whatever name called, to have or keep in possession, for the purpose of sale, any spirituous, vinous or malt liquors, and proof of any one of the following facts shall constitute *prima facie* evidence of the violation of this section: (1) The possession of a license from the government of the United States to sell or manufacture intoxicating liquors; or (2) the possession of more than one gallon of spirituous liquors at one time, whether in one or more places," etc.

In *S. v. Tate,* 210 N. C., 168 (169), *Stacy, C. J.,* for the Court said: "Under C. S., 3379, which is not in conflict with the New Hanover County Alcoholic Beverage Control Act, ch. 418, Public Laws 1935, and

therefore not repealed thereby (*S. v. Langley,* 209 N. C., 178), the possession of more than a gallon of spirituous liquor is *prima facie* evidence of its possession for the purpose of sale. *S. v. Hammond,* 188 N. C., 602, 125 S. E., 402; *S. v. Bush,* 177 N. C., 551, 98 S. E., 281. Hence, the evidence was sufficient to carry the case to the jury and to warrant a conviction. *S. v. Ellis, ante,* 166." *S. v. Atkinson,* 210 N. C., 661; *S. v. Libby, ante,* 662, is similar to the present case. C. S., 3379, is applicable to all the counties in the State. *S. v. Langley, supra.*

The *Second Count:* Did defendant "willfully and unlawfully transport a quantity of spirituous, vinous, fermented, malt liquors and intoxicating bitters, contrary to the form of the statute in such cases made and provided," etc.? Under the evidence, we think so, and the jury so found.

N. C. Code, *supra,* section 3411 (a): 1. "The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, . . . by whatever name called, containing one-half of one per centum or more of alcohol by volume, which are fit for use for beverage purposes," etc.

Section 3411 (b): "No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as authorized in this article; and all the provisions of this article shall be liberally construed to the end that the use of intoxicating liquor as beverage may be prevented," etc.

Section 3411 (j): "The possession of liquor by any person not legally permitted under this article to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this article. But it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such liquor is for the personal consumption of the owner thereof, and his family residing in such dwelling, and of his *bona fide* guests when entertained by him therein."

The above sections are taken from the "Turlington Act," Public Laws 1923, ch. 1. In the *Langley case, supra,* it was held that ch. 493, Public Laws 1935, known as the "Pasquotank Liquor Act" did not repeal sec. 3379, *supra.* Section 25 of the act says: "All laws and parts of laws inconsistent with the provisions of this act are hereby repealed." Ch. 49, Public Laws 1937, known as the "A. B. C. Act," sec. 27, says: "That chapters four hundred eighteen (New Hanover Act) and four hundred and ninety-three be and the same are hereby repealed, except as referred to in this act, and all other laws and clauses of laws in conflict herewith to the extent of such conflict are hereby repealed."

It was urged in the *Langley case, supra,* that the Pasquotank Liquor Act purported to be exclusive and to take care of all situations arising in the counties under the act. *Connor, J.,* for the Court, held otherwise,

saying that the law constituted an extension and, to some extent, modification of the existing law, but that it did not effect a repeal of that law and was State-wide in its application.

In ch. 49, Public Laws of 1937, it is to be noted that there is no clause specifically repealing the Turlington Act or any other provisions of the law relating to intoxicating liquor. Of course, the statute does contain the usual general repealing clause. However, it has been held that such a clause does not operate to repeal an existing act unless the two acts are utterly irreconcilable. Repeals of statutes by implication are not favored, and, to work a repeal, the implication must be necessary. *S. v. Perkins,* 141 N. C., 797; *Bunch v. Comrs.,* 159 N. C., 335; *S. v. Foster,* 185 N. C., 674; *Hammond v. Charlotte,* 205 N. C., 469.

In *S. v. Foster, supra,* at p. 677, it is written: "It is well said, 25 R. C. L., p. 912, 'The common formula in a repealing clause that "all acts and parts of acts in conflict herewith are hereby repealed" implies very strongly that other acts on the same subject are not repealed.' In Black on Interpretation of Laws, 579, p. 351, it is said: 'Repeals by implication are not favored. A statute will not be construed as repealing prior acts on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand and to comprise in itself the sole and complete system of legislation on that subject.' "

Chapter 49, Public Laws 1937 (A. B. C. Act), section 14, is as follows: "It shall not be unlawful for any person to transport a quantity of alcoholic beverages not in excess of one gallon from a county in North Carolina coming under the provisions of this act to or through another county in North Carolina not coming under the provisions of this act: *Provided, said alcoholic beverages are not being transported for the purposes of sale,* and provided further that the cap or seal on the container or containers of said alcoholic beverages has not been opened or broken. Nothing contained in this act shall be construed to prevent the transportation through any county not coming under the provisions of this act, of alcoholic beverages in actual course of delivery to any Alcoholic Beverage Control Board established in any county coming under the provisions of this act." We think the A. B. C. Act and the acts in reference to wine and beer repeal the Turlington Act where there is a conflict.

It is urged on behalf of the defendant that both of the counts contained in the bill of indictment are defective, for the reason that they fail to negative the conditions under which intoxicating liquors may be possessed for the purpose of sale and may be transported.

In *S. v. Norman,* 13 N. C., 222 (226), the rule is stated as follows: "We find in the acts of our Legislature two kinds of provisos—the one in the nature of an exception, which withdraws the case provided for

from the operation of the act, the other adding a qualification, whereby a case is brought within that operation. Where the proviso is of the first kind it is not necessary in an indictment, or other charge founded upon the act, to negative the proviso; but if the case is within the proviso it is left to the defendant to show that fact by way of defense. But in a proviso of the latter description the indictment must bring the case within the proviso." *S. v. Blackley,* 138 N. C., 620; *S. v. Connor,* 142 N. C., 700; *S. v. Hicks,* 143 N. C., 689; *S. v. Hicks,* 179 N. C., 733; *S. v. Johnson,* 188 N. C., 591; *S. v. Hege,* 194 N. C., 526; *S. v. Lefler,* 202 N. C., 700.

This problem has arisen in connection with our statutes relative to intoxicating liquors. In *S. v. Wainscott,* 169 N. C., 379, a motion in arrest was made on the grounds that the bill of indictment charging the defendant with the sale of intoxicating liquors failed to allege that he was "other than a druggist." The Court held that this was a matter of defense. This was based upon *S. v. Moore,* 166 N. C., 284, where the Court discussed the rule at length. And in *S. v. Hicks, supra* (179 N. C., 733), it was held that an indictment for selling whiskey is sufficient "without negativing the conditions under which it may be lawfully sold."

No error was committed in connection with the charge of the court below as to transporting illegal liquor. The court stated that, "If the State has satisfied you from the evidence and beyond a reasonable doubt that the defendant did possess and transport intoxicating liquors on this night in question, and you so find beyond a reasonable doubt, it would be your duty to return a verdict of guilty as charged in the bill; but, if the State has failed to so satisfy you, it would be your duty to return a verdict of not guilty." This portion of the charge is correct. The jury understood what defendant was indicted for and the language of their verdict is clear: "Upon their oath say that the said M. W. Epps is guilty thereof in manner and form as charged in the indictment." There is no evidence in the record to show that the whiskey found in the defendant's car was legal or was being transported legally. This was a matter for the defense. As no error was committed relative to this phase of the case, the defendant is not entitled to a new trial, even if it be found that the trial court erred in not explaining the effect to be given C. S., 3379. It is to be remembered that the verdict in this case was general and on both counts. *S. v. Robbins,* 123 N. C., 730; *S. v. Ellis,* 200 N. C., 77; *S. v. Anderson,* 208 N. C., 771. It is to be noted in this connection that the defendant relied entirely upon an alibi, and made no effort to establish that he came within any of the exceptions in the statutes before mentioned. The indictment is not fatally defective and defendant's motion for arrest of judgment is without merit. *S. v. Efird,* 186 N. C., 482; *S. v. Callett,* 211 N. C., 563.

The defendant in his brief says: "As to the charge contained in the bill of possessing intoxicating liquors for the purpose of sale, I very frankly say to the court that I am not entirely satisfied in my own mind that this count is fatally defective. The Act of 1937 seems to contemplate that no person shall sell, or keep for sale, any intoxicating liquors, except those persons expressly authorized in the act. Certainly this was the intent of the members of the General Assembly. If that be the correct construction, then it may be that this count is sufficient, and that it is a matter for the defendant to show, by way of defense, that he was one of that class authorized by law to have intoxicants in his possession for the purpose of sale. This was the ruling of the court under previous statutes which excepted druggists and duly licensed medical depositories from the operation of the law." The defendant's doubt is well founded.

In *S. v. Ellis,* 210 N. C., 166 (168), it is written: "A *prima facie* showing carries the issue to the jury and is sufficient to warrant, but does not compel, a conviction. *S. v. Russell, supra* (164 N. C., 482); *S. v. Barrett, supra* (138 N. C., 630); *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398. It is only when the *prima facie* case of the statute is adminiculated by circumstances which point unerringly to the defendant's guilt, and perforce require his conviction, if believed, that a peremptory instruction is permissible. 5 Wigmore on Evidence, sec. 2495. It was on this theory that the instructions were upheld in *S. v. Langley,* 209 N. C., 178, and *S. v. Rose,* 200 N. C., 342, 156 S. E., 916."

The defendant complains that the court below should have charged the law in reference to *prima facie* evidence. If error, the defendant cannot complain, as it was in his favor. The court below did not violate C. S., 564.

The second section of the 21st Amendment to the Constitution of the United States is as follows: "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Under this section, any state can prohibit the transportation or importation of intoxicating liquors into its territory.

The case was well argued by defendant's attorney—who had an able brief—he was persuasive but not convincing.

In the judgment we find no prejudicial or reversible error.

No error.

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

STATE v. WILLIAM (BILL) PAYNE AND JOHN WASHINGTON (WASH) TURNER.

(Filed 15 June, 1938.)

1. Criminal Law § 29a—

In criminal cases every circumstance that is calculated to throw any light upon the supposed crime is permissible.

2. Criminal Law § 34b—

Flight is competent evidence to be considered by the jury in connection with other circumstances in passing upon the question of guilt.

3. Homicide § 21—

Flight is not evidence of, and may not be admitted to prove premeditation and deliberation.

4. Criminal Law § 48b—

When evidence is competent for any purpose, it would be error to exclude it.

5. Homicide § 20: Criminal Law § 34b—Under facts of this case evidence of flight held competent to show motive and malice.

Defendants, charged with murder, admitted shooting deceased, but pleaded not guilty. The evidence tended to show that defendants were fugitives from justice and that deceased was an officer of the law and was killed in a shooting encounter with defendants after he had pursued them for a number of miles in an automobile in attempting to arrest them, and that the circumstances were such that defendants knew deceased was an officer and was attempting to arrest them. There was also evidence of statements made by defendants to the effect that they would never be captured alive and would shoot any officer attempting to arrest them. The State, for the purpose of showing flight, offered in evidence alleged confessions made by defendants, each admitted only against the defendant making it, and direct testimony as to escapes from arrest made by defendants following the homicide in question, including a shooting encounter with another officer. Defendants objected thereto on the ground that flight is not evidence of premeditation and deliberation, and that defendants had admitted the shooting. *Held:* The evidence of flight was competent to show the state of mind of defendants at the time of the homicide upon the question of motive and malice, and also upon the question of identity, the identity of defendants not having been definitely established until defendants made the alleged confessions objected to.

6. Criminal Law § 29b—

Objection to evidence on the ground that it tended to establish guilt of offenses separate and distinct from the crime charged is untenable when the evidence of such other offenses tends to show defendants' state of mind at the time of the commission of the crime charged.

7. Homicide §§ 20, 21—Evidence of threats against class to which deceased belonged is competent to show malice, premeditation and deliberation.

Evidence of threats made by defendants in a prosecution for homicide is competent to show premeditation and deliberation and previous express

malice, and while such threats must be directed toward deceased with sufficient definiteness to connect them with the crime charged, when defendants are fugitives from justice, evidence of malice against all officers and threats to kill any officer attempting to arrest them and to die rather than be taken into custody, is competent in a prosecution of defendants for murder of an officer attempting to arrest them.

8. Same—

The fact that the first alleged threat was made by defendants some three or four years prior to the homicide does not render evidence of such threat incompetent when it appears that the threat was repeated up to the very time of the homicide, since the remoteness of the threat goes to its weight and not its competency.

9. Homicide § 17—Evidence of articles found in defendants' car held competent to show plan and design.

Evidence of articles taken from defendants' car after the homicide, including pistols, guns, shells, bullets, tools, etc., is competent to show a design and plan, and the fact that the articles were found several months after the date of the crime does not render the evidence incompetent, the remoteness in time affecting only its probative force.

10. Homicide § 11—Self-defense is not available to one killing officer to prevent lawful arrest.

The evidence disclosed that defendants were fugitives from justice and shot and killed an officer attempting to arrest them, that defendants refused to stop their car although commanded to do so and although pursued by the officer in a police car with the siren open, and that defendants knew deceased was an officer and was attempting to arrest them. *Held:* Deceased was acting in the line of his duty in attempting to arrest defendants, and defendants' resisting arrest was unlawful, C. S., 2621 (62) (a), (151) (e) (g), and the plea of self-defense is not available to defendants.

11. Homicide § 3—

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation, C. S., 4200.

12. Homicide § 16—

The intentional killing of a human being with a deadly weapon implies malice, and, if nothing else appears, constitutes murder in the second degree.

13. Homicide § 25—Evidence held sufficient to be submitted to the jury on question of guilt of murder in the first degree.

Evidence that defendants had escaped from the State's Prison and were fugitives from justice, that they had express malice against all officers of the law and had threatened to kill any officer attempting to arrest them and to resist arrest even to the death, and that they shot and killed an officer of the law as he was attempting to arrest them, that defendants knew deceased was an officer and that defendants were unlawfully resisting arrest, that after the homicide defendants repeatedly escaped arrest and were involved in a shooting encounter with another officer in avoiding arrest and had made elaborate plans for flight and escape, *is held* sufficient to be submitted to the jury as to each defendant on the question of guilt of murder in the first degree.

14. Criminal Law § 81c—

Alleged error must be prejudicial in order to entitle defendants to a new trial.

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

APPEAL by defendants from *Alley, J.*, at January Term, 1938, of BUNCOMBE.

Criminal indictment charging defendants with the murder of George Penn.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

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

J. Walter Haynes, Jones, Ward & Jones, and W. D. Siler for defendants.

WINBORNE, J. The record on this appeal covers three hundred forty-two pages and contains six hundred and eighty-eight exceptions. Some of the exceptions have been abandoned; the others have been grouped in fifty-two assignments of error. Some of them are formal; others, manifestly untenable, require no further elaboration on well settled principles of law relating thereto. The remainder may be fairly treated in a few groups.

The defendants each pleaded "Not guilty."

On the trial below the State introduced evidence tending to show this narrative: George Penn, a State Highway patrolman, was killed in the late afternoon of Sunday, 22 August, 1937, on the farm and near the barn of Van Patton on Webb Creek in Buncombe County, at the end of a nine or more miles automobile chase of defendants, fugitives from justice as felons under sentence for robbery. The chase began at a truck and bus weighing station, sponsored by the U. S. Bureau of Public Roads and conducted by the State Highway Commission as a unit in a State-wide road life survey. The station was located on U. S. Highway No. 70, about midway between the junction of that highway with U. S. Highway No. 74, which leads to Chimney Rock, and the bridge entrance into the village of Sayles Bleachery opposite the municipal golf course, east of Asheville. All automotive vehicles were being stopped for information. By means of distinctive signs the traffic each way was warned to slow up, stop and "Obey Patrolman." At the place there were a State Highway truck and a State Highway patrol car, distinctively marked, four employees of State Highway Commission, and three State Highway patrolmen, including George Penn—dressed in regulation patrol uniforms.

Two men, later ascertained to be the defendants, approached the station from the west, but, being without driver's license and in a stolen blue Ford sedan automobile, turned in the line of traffic at distance from the station variously described as fifteen feet to two hundred yards, and drove away at a rapid rate of speed in the direction from which they came. Patrolman Penn called out "Halt," three times. Defendants did not stop. Penn set out in pursuit in the patrol car. The chase was over the bridge, into and through the Sayles Bleachery village, up the hill, over the railroad bridge, down to and out the old Fairview-Biltmore road to U. S. Highway No. 74, thence along the highway about six miles toward Chimney Rock, and thence on the Webb Creek dirt road three miles to Van Patton's barn. The Ford and the patrol car were seen traveling at a very high rate of speed, and were heard at several points along the route. The patrol car with siren blowing was close behind the Ford at every point they were seen from bridge entrance to the Bleachery to the barnyard of Van Patton. In the beginning the two men were riding the front seat of the Ford. But near the top of the hill before reaching the railroad bridge one of them was seen crouched down between the front and back seats. As the cars came to U. S. Highway No. 74, the man in the rear seat of the Ford was shooting at the patrol car. Five or six shots were heard.

As the cars approached Van Patton's place, the Ford turned off the main road into the private roadway that leads to and ended at Patton's barn and garage building. It was driven up to the corner of the barn and to the very edge of a field of average growth corn which surrounded the barn. The patrol car stopped fifty yards away. Patton testified that he didn't see the officer get out of the patrol car, but he saw him after he was on the ground. He was dressed in officer's uniform. "Just after I saw him on the ground, I heard a shot. That was the patrol shot. I think he was the first man shot. The others opened on him then . . . and kept it up until I saw him fall. . . . The shots came from right at the barn as near as I could tell. . . . I could not tell how many shots I heard from the barn. They shot so fast. Half a dozen or something more. . . . He (officer) was standing behind his car when he fell. . . ." Then after one of the men had walked down to where the officer lay on the ground, they turned the Ford around and, in attempting to go out by the patrol car, stuck in a ditch. They then used the patrol car to get out. Then they left carrying the officer's pistol with them. The legs of the officer were in the ditch and showed sign of being run over by the car. At the barn four empty 12-gauge shotgun shells and two rifle cartridge shells and clip were found. The clip and cartridge shells were found near a post at the upper side of the barn, at which there were tracks "where men stood" and a "mark on a plank that sticks out by the post that looked as if he had laid his gun

down. Looked as if he used it for a rest. That was in direct line with . . . the officer's body. . . ."

There were bullet holes in the front, the windshield and the top of the patrol car. The men made their escape, but the blue Ford was located that night. There were fresh bullet holes in the trunk on the rear, and a shotgun was in the back seat. Finger prints were taken. Then the hunt began, resulting in the arrest of the defendants at Sanford, North Carolina, on 3 January, 1938. Later defendants, separately, confessed the shooting.

The State, over defendants' objection and for purpose of showing flight, offered testimony of alleged confessions of the defendants and direct testimony as to escapes of the defendants from arrest by officers following the homicide in question up to the time of their arrest. Sheriff Brown testified that Turner admitted that in December, 1937, he and one Bolen Bird engaged in a shooting encounter with State Highway patrolmen in New Hanover County. Patrolman Sloan was permitted to describe the occurrence, a four-mile running chase, in which Turner shot at the officers with a high-powered rifle and pistol, and made his escape. The pistol and rifle were offered in evidence. Other testimony was offered by witnesses to show that on several occasions following the killing of Penn, Payne and Turner evaded arrest. Sheriff Brown testified that Turner stated that he had a boat near Southport for use in case he ran into a "dead end." Further statements of Turner and Payne and of other witnesses were admitted to the effect that Turner and Payne spent some time at a tourist camp at Myrtle Beach, South Carolina, with one Smith, who had escaped with them from State's Prison, but that they left there when Smith shot an officer. The court admitted the evidence solely for the purpose of showing flight and then only against defendant who made the confession. The jury was so instructed.

In criminal cases every circumstance that is calculated to throw any light upon the supposed crime is permissible. *S. v. Case,* 93 N. C., 546; *S. v. Dickerson,* 189 N. C., 327, 127 S. E., 256; *S. v. Lawrence,* 196 N. C., 562, 146 S. E., 395.

Flight is competent evidence to be considered by the jury in connection with other circumstances in passing upon the question of guilt. *S. v. Malonee,* 154 N. C., 200, 69 S. E., 786; *S. v. Hairston,* 182 N. C., 851, 109 S. E., 45; *S. v. Stewart,* 189 N. C., 340, 127 S. E., 260; *S. v. Steele,* 190 N. C., 506, 130 S. E., 308; *S. v. Adams,* 191 N. C., 526, 132 S. E., 281; *S. v. Mull,* 196 N. C., 351, 145 S. E., 677; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. Lawrence, supra; S. v. Tate,* 161 N. C., 280, 76 S. E., 715.

In *S. v. Tate, supra,* it is stated: "But such flight or concealment of the accused, while it raised no presumption of law as to guilt, is competent to be considered by the jury in connection with other circumstances."

In *S. v. Steele, supra, Varser, J.,* said: "Subsequent actions, including flight, . . . are competent on the question of guilt."

Flight is not evidence of and may not be admitted to prove premeditation and deliberation. *S. v. Foster,* 130 N. C., 666, 42 S. E., 284; *S. v. Tate, supra; S. v. Westmoreland,* 181 N. C., 590, 107 S. E., 438; *S. v. Collins,* 189 N. C., 15, 126 S. E., 98; *S. v. Stewart, supra; S. v. Steele, supra; S. v. Graham,* 194 N. C., 459, 140 S. E., 26; *S. v. Lewis,* 209 N. C., 191, 183 S. E., 357.

Consequently, the defendants contend that having confessed to the shooting of the deceased, the door is closed to the State to introduce evidence of flight. The record discloses, however, that the identity of the defendants was not definitely known until after their arrest in January, 1938, and then only through the alleged confessions. The only independent testimony was that of the witness Van Patton, who from the witness stand identified Turner as one of those at his barn at the time of the shooting. It is appropriate to remember that on being arraigned the defendants pleaded not guilty.

"The circumscribed admission of the defendants should not be invoked as a means of excluding evidence material to the State's proof of the essential elements of the crime charged in the indictment." *S. v. Galloway,* 188 N. C., 416, 124 S. E., 745.

The present case is distinguishable from the factual situation in *S. v. Foster,* 130 N. C., 666, 41 S. E., 284.

Defendants contend that the evidence of flight was prejudicial in that it tended to show other offenses against the criminal law. If the evidence were competent for any purpose, it would be error to exclude it. *S. v. Goff,* 117 N. C., 755, 23 S. E., 355; *S. v. Graham, supra; S. v. Galloway, supra.*

In *S. v. Miller,* 189 N. C., 695, 128 S. E., 1, the Court said: "It is undoubtedly the general rule of law with some exceptions that evidence of a distinctly substantive offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other." Citing authorities. Then, continuing—"But to this there is the exception, as well established as the rule itself, that proof of the commission of other like offenses is competent to show the *quo animo,* intent, design, guilty knowledge, or *scienter* where such requirements are so connected with the offenses charged as to throw light upon the question." To like effect are: *S. v. Simons,* 178 N. C., 679, 100 S. E., 239; *S. v. Stancill,* 178 N. C., 683, 100 S. E., 241; *S. v. Crouse,* 182 N. C., 835, 108 S. E., 911; *S. v. Dail,* 191 N. C., 231, 131 S. E., 573; *S. v. Hardy,* 209 N. C., 83, 182 S. E., 831; *S. v. Ray,* 209 N. C., 772, 184 S. E., 836; *S. v. Batts,* 210 N. C., 659, 188 S. E., 99; *S. v. Flowers,* 211 N. C., 721, 192 S. E., 110; *S. v. Smoak, ante,* 79, 195 S. E., 72.

We think the evidence of the occurrences in which the defendants made their escapes singular from the State Prison and subsequent evasions of arrest are competent as tending to show the state of mind of the defendants at the time of the killing of George Penn, at the end of a running gun battle in an attempt to escape arrest by him. In their confession the defendants separately admit that they knew that an officer was pursuing them and that they heard the siren on his automobile.

The State, also over objection by defendants, offered testimony tending to show threats: (1) In 1933 or 1934, while in prison, the defendant Turner stated on different occasions "that he did not have any use for any officers at all, . . . if he ever got out and got behind a .45 that it would then be on." (2) About ten days prior to the homicide defendant Turner, with Payne standing near by, stated that "he wanted a driver's license so he would be protected in case he got stopped. He said he was not going to stop and if anybody ever tried to set him in again he would kill them, or any damn law either." (3) On Sunday next before 22 August, 1937, Turner, after stating that "his wife had him set in one time, had him took back," expressed desire to torture her with mosquitoes and then to beat her to death, and, on being asked if he would like to die that way, he said he "wouldn't mind it if he could take a couple of those s. o. b.'s with him."

Evidence of threats are admissible and may be offered as tending to show premeditation and deliberation, and previous express malice, which are necessary to convict of murder in the first degree. *S. v. Tate, supra; S. v. Shouse,* 166 N. C., 306, 81 S. E., 333; *S. v. Graham, supra; S. v. Miller, supra; S. v. Wishon,* 198 N. C., 762, 153 S. E., 395; *S. v. Casey,* 201 N. C., 185, 159 S. E., 337.

"General threats to kill not shown to have any reference to deceased are not admissible in evidence, but a threat to kill or injure someone not definitely designated are admissible in evidence where other facts adduced give individuation to it." *S. v. Shouse, supra.*

"Threats made by a person against one of a class are admissible on a prosecution for committing a crime against another one of the same class." 8 R. C. L., 187; *S. v. Ellis,* 101 N. C., 765, 7 S. E., 704; *S. v. Hunt,* 128 N. C., 584, 38 S. E., 473; *S. v. Burton,* 172 N. C., 939, 90 S. E., 561; *S. v. Baity,* 180 N. C., 722, 105 S. E., 200; *S. v. Miller,* 197 N. C., 445, 149 S. E., 590; *S. v. Casey, supra.*

The fact that the first alleged threat was made three or four years prior to the homicide does not make such evidence incompetent as a matter of law. As the judge told the jury, the remoteness goes only to the weight of the evidence and not to its competency. 8 R. C. L., 187; *S. v. Merrick,* 172 N. C., 870, 90 S. E., 257.

In *S. v. Johnson,* 176 N. C., 722, 97 S. E., 14, *Brown, J.,* said: "We might hesitate to admit evidence of threats, made two years before the

homicide, if they stood alone, although threats made twelve months prior were admitted in *S. v. Howard,* 82 N. C., 624, without evidence of continuing threats. In this case there is evidence of continuing and repeated threats up to six months before the homicide . . .," cited in *S. v. Wishon, supra,* wherein the Court said: "Evidence of the threat first made is competent at least in corroboration." *S. v. McDuffie,* 107 N. C., 885, 12 S. E., 83.

In the case in hand there is evidence tending to show threats on the very day the homicide took place—showing the state of mind of the defendants with respect to being returned to prison—a fixed determination to resist even unto death.

Testimony was introduced, without objection, tending to show that both Payne and Turner had made statements to the effect that they had rather die than go back to prison; that a few days prior to 22 August, 1937, at a tourist camp near Asheville, Payne said to Turner: "You are going to keep on and get us caught messing around with these women," to which Turner replied that "he didn't give much of a damn because he was not going back to Caledonia (prison) anyway because it was a 'living hell'"; and that on the morning of 22 August, 1937, the witness Estelle Miller told defendants "that they had better quit messing around here, . . . that they would get us in trouble and get in trouble, too, and Bill said that was right, that he had tried to get Jack (Turner) to quit messing around here so much and Jack said he didn't care, that he would never be took back alive nohow, to where he came from—he hated to kill anybody but he would before he would be took back; he would rather die as to go back."

The State also offered in evidence each article taken from the automobile in which the defendants were riding at the time of their arrest on 3 January, 1938, in Sanford, North Carolina, including pistols, automatic shotgun, pistol holster, many pistol bullets, shotgun shells, loaded with buckshot, crowbar, sledge hammers, bolt cutter, breast drill, brace and bit, claw hammers, screwdrivers, wrenches, steel chisel, cold chisel, steel punch, files, hack saw, cushion, green and pink blankets, quilts, odd gloves, flashlight and personal effects of the defendants. Objections thereto cover nearly two hundred exceptions. Counsel for defendants complain that these articles were introduced item by item and displayed on tables in the presence of the jury to the great prejudice of defendants. In the case of *S. v. Fogleman,* 204 N. C., 401, 168 S. E., 536, speaking to the subject, *Adams, J.,* said: "The exceptions are without merit. Evidence of this character is admissible on the principle that it tends to show a design and plan. The existence of such design or plan may be proved circumstantially as well as by direct utterance. . . . If the gun, the shells and the several implements in the prisoners' car

had been discovered immediately after the homicide, evidence of the fact would unquestionably have been competent." In the present case the remoteness from the date of the crime does not impair the competency of the evidence, the probative force of which was a matter for the consideration of the jury.

Defendants insist that the court erred in that part of the charge in which defendants' plea of self-defense was submitted to the jury. Under the evidence presented on this appeal, it is clear that the plea is not well taken and the court could very properly have refused to submit it to the jury.

"When a man puts himself in a state of resistance, and openly defies the officers of the law, he is not allowed to take advantage of his own wrong, if his life is thereby endangered, and to set up the excuse of self-defense." *S. v. Garrett,* 60 N. C., 148; *S. v. Horner,* 139 N. C., 603, 52 S. E., 63; *S. v. Durham,* 141 N. C., 741, 53 S. E., 720; *S. v. McClure,* 166 N. C., 321, 81 S. E., 458; *S. v. Miller, supra.*

In *S. v. Horner, supra,* the Court said: "He (defendant) admits the homicide with a deadly weapon, thereby taking upon himself the burden of showing that he was acting in self-defense. The deceased was acting strictly in the line of his duty in endeavoring to make the arrest and the prisoner was, upon his own showing, avoiding if not resisting arrest. The principle governing the case is thus stated in *S. v. Garrett,* . . . quoted as above . . . The application of this principle to prisoner's testimony sustains his Honor in saying to the jury that he was guilty of manslaughter at the least. . . . The prisoner knew that deceased was a deputy sheriff and that he had a warrant for his arrest. It was his duty to submit to arrest, and in resisting it, with a gun in his hand, it is not open to him to say that he acted in self-defense. Conceding that, as he was going away from the officer, refusing to submit to arrest, the officer was not justified in shooting him to make the arrest, does not affect his right to kill. If there was a necessity to shoot the deceased to save his life, it was the result of his unlawful act in resisting the mandate of the law. The position of the prisoner is similar in this respect to one who brings on or provokes a difficulty, and in the progress of it kills. It is not *se defendo* because he brought on the necessity. . . . The power and right of the officer in making arrests . . . is not the test of the prisoner's guilt. It may be that the prisoner was right in saying that both acted hastily, but he was in the wrong in refusing to submit to arrest, and the law fixes the responsibility for the homicide upon him. If the killing is of malice, it is murder; if premeditated, it is murder in the first degree—in no aspect is it in self-defense."

To the same effect is *S. v. Durham, supra.* It is there said: "In this State we have a statute (Laws 1889, ch. 51) which enacts that 'any person who willfully and unlawfully resists, delays or obstructs a public officer in discharging or attempting to discharge a duty of his office shall be guilty of a misdemeanor.' (C. S., 4378.) At the time he killed the deceased the defendant was engaged in an unlawful act, not only *malum in se* (being in armed resistance to the process of the State), but an act directly connected with and which finally resulted in the death of the officer; for it is plain that had the defendant himself not resisted the law but submitted to arrest, there would have been no homicide by anyone."

In *S. v. McClure, supra,* the Court said: "The assault upon the deceased (officer) was not an offense against the individual, but one against the public, for this reason the authorities generally support the position that it is the right of peace officer to arrest, without warrant, one who assaults him . . . and the officer did not lose the right in this case because the prisoner had walked off, according to the evidence of one witness, thirty or forty feet, and to that of another fifty to seventy-five yards."

In the present case it is clear that Patrolman George Penn, the deceased, was acting in the line and discharge of his duty and within his rights as an officer in attempting to arrest the defendants. He had the right to arrest without a warrant. But be that as it may, the defendants were in open defiance of the law. They admit, in their confession, that they knew the deceased was an officer; that they heard the siren on his automobile; that they turned in line of traffic in the face of the warning to drive slow, stop, and "Obey Patrolman"; that one of the defendants shot at deceased in the chase; that they were riding in a stolen automobile, and had no license to operate it. C. S., 2621 (151), (e), (g). Also, their refusal to obey the siren and stop, C. S., 2621 (62), (a), constituted a continuing offense in defiance of the law. The evidence also shows them to be escaped felons and that, in escaping from prison, they forcibly took and carried away the superintendent and other persons, which in law is a felony. On the facts presented on this record, the plea of self-defense is not open to them.

It is pertinent to note that "any citizen of North Carolina shall have authority to apprehend any convict who may escape before the expiration of his term of imprisonment, whether he be guilty of a felony or misdemeanor, and retain him in custody and deliver him to the director of prisons." Public Laws 1933, ch. 172, sec. 21; C. S., 7748 (q).

Murder in the first degree is the unlawful killing of human being with malice and with premeditation and deliberation. C. S., 4200; *S. v. Thomas,* 118 N. C., 1113, 24 S. E., 535; *S. v. Benson,* 183 N. C., 795, 111 S. E., 869; *S. v. Steele, supra.*

The intentional killing of a human being with a deadly weapon implies malice and, if nothing else appears, constitutes murder in the second degree. *S. v. Terrell,* 212 N. C., 145, 193 S. E., 161; *S. v. Robinson, ante,* 273, 195 S. E., 824; *S. v. Mosley, ante,* 304, 195 S. E., 830.

"The additional elements of premeditation and deliberation, necessary to constitute murder in the first degree, are not presumed from a killing with a deadly weapon. They must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree can be rendered against the prisoner." *S. v. Miller, supra.*

"Premeditation means 'thought beforehand' for some length of time, however short." *S. v. McClure, supra; S. v. Benson, supra; S. v. Steele, supra.*

"Deliberation means that the act is done in cool state of blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation." *S. v. Benson, supra; S. v. Steele, supra.*

Tested by these well settled principles, the evidence presented on the case in hand is sufficient to be submitted to the jury, and to sustain the verdict. In addition to evidence of threats against officers, of a declared purpose to resist arrest at the risk of their own lives, of their preparation, of their ruthless conduct, of their defiance of law, and other evidence bearing on the question, the defendant Payne, on being asked after his arrest why he shot Officer Penn, said: "He had it coming to him, he was a damned fool."

We have carefully examined all other exceptions and find no reversible error. Even if there be technical error in some of the rulings and in the course of the trial, this alone would not work a new trial. "We are convinced, from a searching scrutiny of all that transpired on the hearing, to which exceptions have been taken, that substantial justice has been done."

In the judgment below we find

No error.

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

C. V. JONES, ADMINISTRATOR C. T. A., D. B. N., OF THE ESTATE OF J. B. WARREN, DECEASED, MARGARET FARTHING CRISP AND HUSBAND, ROUNTREE CRISP, WILLIAM P. FARTHING AND WIFE, GAYNELLE TEER FARTHING, MRS. JENNIE REDMOND AND HUSBAND, W. P. REDMOND, *v.* WALTER WARREN AND WIFE, FRANCES WILLARD WARREN, J. B. MASON, R. P. READE, TRUSTEE, DEPOSITORS NATIONAL BANK OF DURHAM, N. C., C. B. SHERMAN AND W. K. RAND, LIQUIDATING TRUSTEES OF THE FIRST NATIONAL BANK OF DURHAM, N. C., A. A. McDONALD, C. A. McDONALD, L. P. McLENDON, TRUSTEE, CITIZENS NATIONAL BANK OF DURHAM, ATLANTIC INVESTMENT COMPANY, W. S. LOCKHART, TRUSTEE, THE MORRIS PLAN INDUSTRIAL BANK OF DURHAM, N. C., J. R. TURNAGE, DURHAM INDUSTRIAL BANK, SUSAN ELIZABETH WARREN, A MINOR, JAMES W. WARREN, A MINOR, CITY OF DURHAM, DURHAM COUNTY, A. C. CAVEDO, CITY TAX COLLECTOR, J. J. LAWSON, COUNTY TAX SUPERVISOR, W. T. POLLARD, COUNTY TAX COLLECTOR, A. J. POLLARD, BANK OF COOLEEMEE, AND ALL OTHER HEIRS AT LAW, DEVISEES, LEGATEES AND BENEFICIARIES, WHETHER IN ESSE OR NOT IN ESSE, OF THE ESTATE OF J. B. WARREN, DECEASED, AND S. J. BENNETT, GUARDIAN AD LITEM FOR SUSAN ELIZABETH WARREN AND JAMES W. WARREN, MINORS, AND GUARDIAN AD LITEM FOR ALL OTHER HEIRS AT LAW, DEVISEES, LEGATEES AND BENEFICIARIES, WHETHER IN ESSE OR NOT IN ESSE, OF THE ESTATE OF J. B. WARREN, DECEASED.

(Filed 15 June, 1938.)

1. Executors and Administrators § 8: Descent and Distribution § 1—Land descends to heirs pending execution of power of sale by executor.

The will directed the executor to sell the residue of the realty, and divide the proceeds of sale into three equal parts to be held for the benefit of, and paid to each of executor's three children or heirs of the children. *Held:* Pending the execution of the power of sale by the executor, or the administrator with the will annexed, the land descended to the heirs.

2. Executors and Administrators § 9—

An administrator with the will annexed has all the rights and powers, and is subject to the same duties, as if he had been named executor in the will. N. C. Code, 4170.

3. Executors and Administrators § 15f: Descent and Distribution § 15—Mortgages executed by heir pending execution of power of sale by executor held equitable liens against heir's share of proceeds of sale.

The will in question directed the executor to sell the residue of the realty, divide the proceeds of sale into three parts, and directed that one part be given and bequeathed to testator's son. The son executed several mortgages on all the residuary lands of the estate, and more than a year after the execution of the last mortgage, several judgments were docketed against the son. The administrator with the will annexed sold the residuary real estate, and the assignee of the first docketed judgment claimed priority in the proceeds of sale belonging to the son. *Held:* The land descended to the heirs pending the execution of the power of sale by the

administrator with the will annexed, and the mortgage liens attached to the son's interest therein, and upon sale, the mortgages constituted an equitable lien against the son's share in the proceeds, and the mortgages have priority over the later docketed judgments, the order of priority being determined by the date of registration of the mortgages.

4. Appeal and Error § 40a—

It will be presumed on appeal, nothing else appearing, that the court found facts supporting its judgment.

APPEAL by A. J. Pollard from *Parker, J.*, at May Civil Term, 1937, of DURHAM. Affirmed.

J. B. Warren died testate in Durham County in 1913, and in his will he appointed J. B. Mason and Walter Warren as his executors. All of the legacies and devises made by J. B. Warren in the first twelve items of his will have been carried out and completed.

Item 13 of the will is as follows: "All the remainder and residue of my estate consisting of real estate, farming implements, farm products, horses, cows, and other property of whatever nature or kind, not herein specifically disposed of, I direct, authorize and fully empower my executors to sell, deliver and convey, to the best advantage, at either public or private sale, for cash or on credit, and as they may find advantageous sales thereof, and convert the same into money, and until such sales are made, I authorize and empower my executors to rent the real estate and collect the rents therefor, and out of the proceeds of such sales and out of any money that I may have on hand or in bank at my death, I direct my executors to pay my funeral expenses, the costs and charges of administration, all of my just debts and the pecuniary legacies in this will given and bequeathed, and the net balance to divide into three equal parts, one of these parts, or one-third of the said net balance, I direct my executors to pay to my son, Walter, and I give and bequeath the same to him. Another of the parts, or one-third of said net balance, I direct my executors to deposit in the Citizens National Bank of Durham, on four per cent interest certificates, if the said bank shall then be paying so great a rate of interest on deposits; if not, then I direct its investment in bonds of the United States, or the State of North Carolina, or in good and solvent county or municipal bonds, or other securities authorized by the United States Government to be accepted as security for the circulation of national banks, to be invested in such of the above securities that can be purchased at par and bear the highest rate of interest, and the net income received from such investment of the said one-third part, I direct my executors to pay to my daughter Jennie Redmond during her natural life and at her death, to deliver the securities in which said one-third shall be invested, to the survivor or survivors of my children, share and share alike, and to the issue of such as may be dead leaving issue, such issue to represent the deceased parent. The other

part, or one-third of said net balance, I direct my executors to deposit in the Fidelity Bank of Durham, on four per cent interest certificates, if the said bank shall then be paying so great a rate of interest on deposits; if not, then I direct its investment in the same class of securities as herein in this item directed for the investment of the share given for the use of my daughter Jennie Redmond, and the net income received from such investment of the said one-third part, I direct my executors to pay to my daughter Bessie T. Farthing during her natural life, and at her death to deliver the securities in which said one-third shall be invested, to such of her children as shall then be living, if they be of age, if not of age, then to the guardian of those under age, embracing the child or children of any deceased child or children, to whom I give and bequeath the said principal."

After the probate of the will, the executors named therein, J. B. Mason and Walter Warren, qualified as executors and acted as such until November, 1931, when they resigned and C. V. Jones was duly appointed, qualified and since that date has been acting as administrator *c. t. a., d. b. n.,* of the said will of J. B. Warren.

The three beneficiaries mentioned in Item 13 of the will, to wit: Walter Warren, Jennie Redmond and Mrs. Bessie T. Farthing, were all the children of J. B. Warren. Walter Warren and Mrs. Jennie Redmond are living and are parties to this action. Mrs. Bessie T. Farthing is dead. She left a will by which she devised and bequeathed her entire estate to her two children, William P. Farthing and Mrs. Margaret Farthing Crisp, both of whom, together with their wife and husband, respectively, are parties to this action.

At the time of their resignation as executors in 1931, the said J. B. Mason and Walter Warren had not sold the real estate comprising the residue of the J. B. Warren estate and referred to in Item 13 thereof. However, on 15 October, 1930, Walter Warren, in his individual capacity, and not as executor of the estate, borrowed $15,750 from the Bank of West Durham and executed and delivered note and deed of trust to secure it. This deed of trust was registered 15 October, 1930, in Durham County, where all the land left by the late J. B. Warren is situated. On 8 December, 1930, Walter Warren, in his individual capacity borrowed $15,300 from Citizens National Bank of Durham and executed and delivered his note and deed of trust to secure it. This deed of trust was registered 11 December, 1930, in Durham County, where all the land described therein is situated. On 1 August, 1931, Walter Warren, in his individual capacity, borrowed $3,000 from the Morris Plan Industrial Bank of Durham, and executed and delivered his note and deed of trust to secure it. This deed was registered on 4 August, 1931, in Durham County, where all the land described therein is situated. On the same date, to wit: 1 August, 1931, Walter Warren, in his

individual capacity, borrowed $5,000 from Durham Industrial Bank, and executed and delivered his note and deed of trust to secure it. The property described in this latter deed of trust is the same as that described in deed of trust given to secure his debt to Morris Plan Industrial Bank. This deed of trust was registered on 5 August, 1931, in Durham County, where the land described therein is situated. This is a second deed of trust.

Each one of the four deeds of trust above referred to described land which belonged to the residuary estate of J. B. Warren.

After all of the deeds of trust were registered, and more than a year after the most recent deed of trust was registered, a judgment was docketed against Walter Warren, in his individual capacity, in an action brought against him by Gurney P. Hood, N. C. Commissioner of Banks, *ex rel.* the Merchants Bank of Durham, in the sum of $5,500. This was docketed on 10 October, 1932, in Durham, Durham County. This judgment was later assigned to A. J. Pollard, the appellant in this case at bar. On 21 November, 1932, 1 March, 1934, 8 October, 1934, and 1 September, 1936, respectively, four other judgments were docketed in Durham County against Walter Warren, in his individual capacity.

The administrator *c. t. a., d. b. n.,* was ordered to sell all residuary property at public auction on 14 April, 1937. This was done by the administrator *c. t. a., d. b. n.,* and on 1 June, 1937, all the sales were confirmed by the court.

The judgment of Parker, J., rendered on 1 June, 1937, holding the deeds of trust constitute equitable assignments which should be paid from the Walter Warren one-third of the net proceeds derived from the sale of the land described in said deeds of trust, and that such deeds of trust were entitled to priority over the judgments later docketed, to the extent of the proceeds derived from the sale of the land included in the respective deeds of trust. The administrator *c. t. a., d. b. n.,* was directed by said judgments to disburse the net one-third of the proceeds derived from the sales belonging to the Walter Warren share in accordance with the order of priority.

The pertinent language in all the deeds of trust is as follows: "And whereas, said parties of the first part desire to secure and provide for the payment of said note at maturity, and to also provide for the prompt payment of interest thereon, as it matures according to the tenor of said note. . . . In order to carry out the intention expressed in the premises, the said parties of the first part have given, granted, bargained and sold, and do by these presents give, grant, bargain, sell, alien, assign and convey unto said party of the second part and his heirs and assigns; The following land, lying and being in Durham Township, in Durham County, in said State, and bounded and described as follows, to wit: (describing same)."

A. J. Pollard excepted and assigned error to the judgment as signed, and appealed to the Supreme Court. The necessary facts will be set forth in the opinion.

Victor S. Bryant and Wm. P. Farthing for plaintiffs.

Hedrick & Hall and L. P. McLendon for Citizens National Bank and Morris Plan Industrial Bank.

Basil M. Watkins for Durham Industrial Bank.

R. O. Everett for Harvey Harward, Trustee in Bankruptcy of Walter Warren.

Julius C. Smith, E. C. Bryson, and Forest A. Pollard for defendant A. J. Pollard.

CLARKSON, J. Is the claim, the subject matter of this action, held by A. J. Pollard, assignee of Gurney P. Hood, Commissioner of Banks, founded upon a judgment docketed subsequent to the registration of the deeds of trust held by the appellee banks, superior to the claims of the appellee banks? We think not.

The judgment of the court below, in part, is as follows: "It is further ordered, considered, adjudged and decreed that the mortgages or deeds of trust heretofore given by Walter Warren referred to in the petition filed in this action do not constitute liens or encumbrances upon any of the real estate described in said deeds of trust or mortgages or in or against any undivided interest therein, but are merely equitable assignments of the interest of Walter Warren in and to the net proceeds derived from the sale of said real estate, and further that none of the judgments against Walter Warren constitute liens or encumbrances against any of the real estate owned by the estate of J. B. Warren, whether described in the complaint or not."

In the judgment rendered by the court below, under the facts and circumstances of this case, we think the right result has been reached. It may be that the liens of the deeds of trust attached to the land until sold and followed the proceeds.

N. C. Code, 1935 (Michie), section 4170, in part, is as follows: "An administrator with the will annexed has all the rights and powers, and is subject to the same duties, as if he had been named executor in the will."

In Item 13 of the will, above set forth, it is said, in part: "All the remainder and residue of my estate consisting of real estate," etc., is to be disposed of and one-third given and bequeathed to Walter Warren.

In *Ferebee v. Proctor*, 19 N. C., 439 (446), *Ruffin, C. J.*, said: "If the will does not devise the land, but creates a power to sell it, then, upon the execution of the power, the purchaser is in under the will, as if his name had been inserted in it as devisee. But, in the meantime, the land descends, and the estate is in the heir. The power is not the estate, but

only an authority over it, and a legal capacity to convey it. These are elementary maxims. But it is supposed that the testator had disposed of this land by directing a sale of it absolutely, and a division of the proceeds, so as to turn it out and out, as it is called, into personalty; and that this defeated the descent. When sold, the estate of the heir will certainly be divested; but such a provision in the will is only the creation of a power; it is a disposition of the proceeds of the land, but not a disposition of the land itself; and that consequently descends. The doctrine of conversion is purely equitable. The law knows nothing of it. A court of equity, by considering that as done which ought to be done, deals with land ordered to be sold as if it were sold. But a court of law always looks upon land as land, and has regard only to the legal title, which is unaffected by any power, whether it be a naked one, or coupled with an interest, or a trust until the power be executed." *Speed v. Perry,* 167 N. C., 122 (129).

In the *Speed case, supra* (p. 130), it is written: "The rule which we have just mentioned is well expressed in *Beam v. Jennings,* 89 N. C., 451. In that case, *Justice Ashe,* with his usual clearness and vigor of style, has stated the final conclusion in this Court upon the question whether, when a power of sale is conferred in a will, the land descends to the heirs or vests in the devisees until the power is fully executed. He remarks that, 'On this question there is, in the decisions of the courts and among the text-writers, considerable diversity of opinion. Some hold, with whom is Mr. Hargrave, in his note on Coke Litt., 113, that whether the devise be to the executors to sell the land, or that the executors shall sell, or that the land be sold by the executors, a fee simple will be vested in the executors; but in Sugden on Powers, 133, and Williams on Executors, 579, it is laid down that until a sale by the executors, where a power of sale of land is given by the will, the land descends in the interim to the heirs at law.' He then approves what is said by *Chief Justice Ruffin* in *Ferebee v. Proctor, supra*" (quoted above). *Barbee v. Cannady,* 191 N. C., 529; *Hoke v. Trust Co.,* 207 N. C., 604.

This action was commenced 23 September, 1933, some 20 years after the death of J. B. Warren. It will be noted that J. B. Warren directed the executor to pay his son Walter (Warren) one-third of the net balance "I give and bequeath the same to him." Suppose the executor or his successor had never sold the "remainder and residue" of the real estate, what would become of it? Who owned it? "The land descends in the interim to the heirs at law." We think the four deeds of trust before mentioned, which were duly recorded, from their language gave a lien on the real estate, and when sold and converted into money an equitable lien in their favor attached to same and the judgment purchased by the appellant Pollard was subject to the liens of said deeds of trust.

In *Munds v. Cassidey,* 98 N. C., 558 (563), we find it written: "The instrument is unmeaning unless the construction put upon it embraces the moneys to which the assignors would become entitled when the conversion is made by the executor."

R. O. Everett, Esq., was permitted upon his application to file brief as attorney for Harvey Harward, trustee of Walter Warren, bankrupt. From the view we take of this case, the trustee in bankruptcy has no interest in this controversy. The liens were acquired long before Warren's adjudication of bankruptcy, 18 June, 1937.

It will be noted that the trustees in the deeds of trust were careful and distinguished attorneys of long practice at the bar: R. Percy Reade, L. P. McLendon and W. S. Lockhart. They took these deeds of trust to secure large sums of money, relying no doubt on the decisions of this and other courts as followed by the learned and able judge in the court below.

The court, by consent and acquiescence of all parties, has found the facts and entered a final judgment. It will be presumed, nothing else appearing, that the court has found facts which will support the judgment. The judgment of the lower court should be sustained for the reason that the law, as interpreted by the courts of this State and others, is to the effect that the deeds of trust given by Walter Warren constituted equitable assignments of his interest in the proceeds of the sale of the property described therein, and that the judgment creditors have no lien against the land; and further, that the order of priority of registration of the deeds of trust is the correct rule to follow as between the mortgage creditors and judgment creditors of Walter Warren.

Upon the entire record, we think, for the reasons given, the judgment of the court below should be

Affirmed.

GENERAL MOTORS ACCEPTANCE CORPORATION v. T. T. EDWARDS AND MID-SOUTH MOTORS, INC.

(Filed 15 June, 1938.)

1. Infants § 4—Conflicting evidence as to age held for jury upon plea of defense of infancy and counterclaim seeking disaffirmance of contract.

This action was instituted for recovery of a truck and judgment for balance due on note given as part of the purchase price. The truck was sold under claim and delivery and the proceeds credited on the note. Defendant purchaser contended he was under age at the time of the sale, and set up the defense of infancy and filed a counterclaim seeking to disaffirm the contract. The purchaser and his mother and father testified to facts tending to establish his minority, and introduced in evidence a

book and Bible to corroborate them. Plaintiff offered in evidence a signed statement of the purchaser made in the prior purchase of another truck, showing the purchaser of age at the time of the prior sale, that the purchaser's father was present at the time the statement was signed and made no objection, and other corroborating evidence. *Held:* The conflicting evidence was properly submitted to the jury on the issue of the purchaser's age at the time of the contract in question, and the jury's verdict that the purchaser was over 21 years of age at that time is upheld.

2. Trial § 32—

When a requested instruction is modified, and, as given, is without error, and another requested instruction is given in substance, an exception to the court's failure to give the requested instructions as written, will not be sustained.

3. Trial § 33—

Inaccuracies in the statement of the contentions of the parties must be brought to the court's attention in time to afford opportunity for correction in order to be considered on appeal.

4. Evidence § 16: Trial § 29d—Instruction in regard to weight to be given testimony by parties interested in the verdict held without error.

A charge that plaintiff contended that defendant and his witnesses were interested in the outcome of the action, that the quality of their testimony was such that the jury ought not to believe it, and that the jury ought to take the fact of their interest into consideration in weighing their testimony, but that the jury should remember the court's instruction as to the weight to be given the testimony of interested witnesses, will not be held for error when the court's prior instruction on the point is without error, the word "quality" in the statement of the contention being used not in the sense of natural superiority but as to the weight to be given to interested witnesses.

5. Trial § 36: Appeal and Error § 43—

An instruction will be construed as a whole, and portions of the charge, even if slightly objectionable when standing alone, will not entitle appellant to a new trial if the charge as a whole is not prejudicial.

6. Trial §§ 29d, 33—Contention that jury should take into consideration evidence of good character of witness in passing on credibility held proper.

When plaintiff offers evidence of the good character of its witness, a contention that the jury should take such evidence into consideration in passing upon the weight of the witness' testimony, is proper, and objection that the court did not instruct the jury in like manner with reference to the evidence of the good character of defendant's witnesses is untenable, the record disclosing that the court fully gave like contentions of defendant.

APPEAL by defendant T. T. Edwards from *Armstrong, J.*, and a jury, at December Term, 1937, of MOORE. No error.

This was a civil action for the recovery of a truck and for judgment on note, in which defendant T. T. Edwards set up a defense of infancy

at time contract was made and a counterclaim against plaintiff and his codefendant, Mid-South Motors, Inc. From an adverse verdict and judgment, T. T. Edwards appealed to the Supreme Court.

The jury having been selected, sworn and impaneled, the pleadings were read, the witnesses duly sworn and the following evidence offered and agreements made by and between the counsel:

"By consent of counsel for plaintiff and defendants, it is agreed that the first issue is to be answered Yes. It is agreed between the parties hereto that the contract sued on in this action, dated 5 March, 1936, was duly executed by the defendant T. T. Edwards on the date of the execution of said contract the defendant T. T. Edwards paid to the Mid-South Motors, Inc., the sum of $287.45 as the initial payment on the purchase price of the truck sold and delivered to T. T. Edwards on the date of the execution of said contract, and that the said T. T. Edwards, on 5 April, 1936, paid $53.77; 5 May, 1936, $53.77; 5 June, 1936, $53.77; and on 5 July, 1936, paid the sum of $53.77, the last four payments aggregating the sum of $214.66, being paid to the General Motors Acceptance Corporation. It is further agreed between the parties hereto that the balance due on said contract by the defendant, provided the jury should find that it is a valid and binding contract, is $430.16, with interest from 16 November, 1936, this balance to be credited with the gross sale price of the Chevrolet truck, to wit: $300.00."

The judgment of the court below was as follows: "This cause coming on to be heard and being heard at December, 1937, Civil Term of the Superior Court of Moore County, North Carolina, before the undersigned judge and a jury, sworn and impaneled to try the cause, upon the following issues:

" '1. Did the defendant T. T. Edwards execute the conditional sales contract on 5 March, 1936, as alleged in the complaint? Ans.: "Yes," by consent.

" '2. Was the defendant T. T. Edwards at said time a minor, as alleged in the defendant T. T. Edwards' answer? Ans.: "No."

" '3. What sum, if anything, is the plaintiff entitled to recover of the defendant T. T. Edwards? Ans.: "$130.16."

" 'What sum, if anything, is the defendant T. T. Edwards entitled to recover of his codefendant, the Mid-South Motors, Inc? Ans.: "Nothing."

" '5. What sum, if anything, is the defendant T. T. Edwards entitled to recover of the plaintiff? Ans.: "Nothing." '

"According to stipulations made and agreed to between the parties to this action in the trial of this case, all of the aforesaid issues, except issue No. 2, were answered by consent. The jury, for its verdict, answer the second issue 'No.'

"It is therefore, upon motion of the General Motors Acceptance Corporation, plaintiff, and the Mid-South Motors, Inc., defendant, considered, ordered and adjudged that the defendant T. T. Edwards take nothing in this action, and that the plaintiff General Motors Acceptance Corporation have and recover $130.16, with interest from this date until paid, against the defendant T. T. Edwards, same being the balance of the purchase price of said motor truck, after entry of proper and agreed credits, and it is further ordered and adjudged that the defendant T. T. Edwards and the surety on his prosecution bond, if any, pay the cost of this action to be taxed by the clerk of this court. Frank M. Armstrong, Judge Presiding."

The defendant T. T. Edwards 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.

S. R. and K. R. Hoyle for T. T. Edwards.
Mosley G. Boyette for plaintiff and defendant Mid-South Motors, Inc.

CLARKSON, J. T. T. Edwards, the defendant, disaffirmed his contract, demanded judgment for what he had paid on the truck (which was seized by plaintiff under claim and delivery—not replevined), and set up the defense of infancy. All the issues were answered by consent of the parties to the controversy except the second: "Was the defendant T. T. Edwards at said time a minor, as alleged in the defendant T. T. Edwards' answer?" This issue was submitted to the jury by consent and was answered "No."

"In *Chandler v. Jones,* 172 N. C., 569 (572), *Allen, J.,* says: 'The contract of an infant is voidable and not void, and it may be either ratified or disaffirmed upon attaining majority at the election of the infant. If money is paid to an infant upon a contract and it is consumed or wasted, the infant may recover the full amount due under the contract.' *Rawls v. Mayo,* 163 N. C., 177; *Hogan v. Utter,* 175 N. C., 332; *Gaskins v. Allen,* 137 N. C., 430; *Baggett v. Jackson,* 160 N. C., 31. See *Faircloth v. Johnson,* 189 N. C., at p. 431. The defense of infancy must be set up in the answer, and if not pleaded will be considered as waived. *Hicks v. Beam,* 112 N. C., 642." *Cole v. Wagner,* 197 N. C., 692 (699). See *Morris Plan Co. v. Palmer,* 185 N. C., 109; *Hight v. Harris,* 188 N. C., 328; *Coker v. Bank,* 208 N. C., 41.

The determination of the controversy depended on the jury's answer to the second issue. T. T. Edwards testified that he was 21 years of age on 15 April, 1936. The truck was purchased on 5 March, 1936; at that time he was not asked how old he was and he did not tell his age. That he bought a truck prior to this time, in 1935, from Mid-South Motors, Inc., his codefendant in this action. The mother and father of T. T.

Edwards testified that he was born on 15 April, 1915. A book and the Bible were offered in evidence to corroborate them. The plaintiff and defendant Mid-South Motors, Inc., contradicted the evidence of T. T. Edwards and introduced O. L. Seymour, vice president and manager of Mid-South Motors, Inc., who testified that he was with the business on 15 March, 1936, and sold the truck to Edwards. That prior to that time he had sold a truck to Edwards. That Edwards made the customary down payment and the balance was financed through the plaintiff. He testified that he asked Edwards certain questions as to his birth and Edwards said he was born 4/15/1914. Seymour then made entry on the statement as follows: "Customer's full name—T. T. Edwards. First— Surname— Date of birth—4/15/1914. Color—White. (This was signed.) Undersigned warrants the truth and accuracy of foregoing information. Customer signs—T. T. Edwards." The witness Seymour further testified: "He (Edwards' father) was present when he bought the other truck. I am talking about the truck T. T. Edwards bought from my company in 1935. Q. Was T. T. Edwards at that time asked by you as to what his age was and a statement taken just as in this case? Ans.: Yes, sir. And his age was recorded, and there was no contention at that time by his father, who was present, that he was under age."

E. B. Bowman testified: "I saw T. T. Edwards sign his name down there on the line indicated for the customer to sign on statement which has been identified as defendant Mid-South Motors, Inc., Exhibit No. 1."

The general reputation of O. L. Seymour, T. T. Edwards and his father and mother were proved to be good. There was no plea of ratification or estoppel and the case was tried on the theory that if the jury found that T. T. Edwards was a minor he was entitled to judgment for the payments he had made on the truck. Plaintiff had seized the truck under claim and delivery and same had not been replevied. On this aspect the court charged the jury as follows: "Now, on this second issue, gentlemen of the jury, which is the only one you are concerned with in this case, the burden of proof is on the defendant T. T. Edwards to satisfy you from the evidence and by the greater weight thereof that he was a minor on 5 March, 1936, and that is the question necessary for you to decide in this case—whether or not on this day the defendant T. T. Edwards was a minor."

There was no objection to the charge as to the burden of proof. We see no merit in the exceptions and assignments of error made by T. T. Edwards challenging the correctness of the court below's admitting evidence of alleged oral declarations of the said Edwards as to his age and questionnaire alleged to have been signed by him. The issue was one of age. Edwards now says he was one month and 10 days under age when he got the truck and signed the contract. The vendor, O. L. Seymour, testified that he told him the date of his birth was 15 April,

1914, and signed a statement to that effect, and "Warrants the truth and accuracy of foregoing information." The question of the truth or falsity of a matter does not depend on whether the testimony was given by a minor or adult. If it is competent its credibility is for the jury. We think the evidence competent to contradict the testimony of T. T. Edwards and his witnesses, and the issue of age was for the jury to determine.

The defendant T. T. Edwards prayed the court below to give two special instructions. The first was modified and explained and as given we see no prejudicial error. The second was declined as written, but the substance given in the charge. In this we see no error. *Odum v. Oil Co., ante,* 478 (483-4).

The court below in its charge said: "The plaintiff says and contends, gentlemen of the jury, that on the day this contract was made and executed, to wit: 5 March, 1936, that the defendant in this case appeared to be a man who had reached his majority, that is, 21 years of age, and that they had dealt with him before and says and contends that he made representations to them before that he was 21 years of age and the plaintiff says and contends that on this day in question in answer to a form that it was necessary to fill out before this contract could be entered into, the defendant T. T. Edwards told Mr. Seymour he was 21 years of age and answered certain other questions, so the plaintiff says and contends, gentlemen of the jury, that the defendant now is trying to disaffirm this contract and get out of an obligation and recover the money he has paid out on account of the fact of his minority and his claim that on the day in question he was not of age, and the plaintiff says and contends you ought not to believe that (that you ought to find from the facts and circumstances in this case that the defendant was of age on the day in question, 5 March, 1936)."

The defendant T. T. Edwards excepted and assigned error to the above, which we cannot sustain. He contended that "It is submitted to the jury that plaintiff contended appellant was impeached because he pleaded his minority," etc. That he was asserting a legal right which he was justified in doing without "inadversion or criticism," and "Neither the court below nor this Court, as courts, and as ministers of the law, can be wiser than the law itself; and cannot in an official capacity entertain or express views at variance with the law as written."

Edwards likewise contends that the charge is inaccurate in other respects as to the appearance of Edwards that he was 21 years of age. That the witness had dealt with him before and he made representations to them that he was 21 years of age. It will be noted that the court below gives all the matters complained as contentions: "The plaintiff says and contends, gentlemen of the jury," etc.

In *S. v. Sterling,* 200 N. C., 18 (23), it is written: "Slight inaccuracies in the statement of the evidence by the court in its charge to the jury, not called to its attention at the time, cannot be held as prejudicial error."

In *S. v. Barnhill,* 186 N. C., 446 (450), citing numerous authorities, is the following: "If the recitals of the court were incorrect as to the facts of the case, it was the duty of the defendant to call the court's attention to it, so that the correction could be made then and there. If this was not done at the time, the defendant cannot complain and wait and except when the case is made up on appeal." *S. v. Sinodis,* 189 N. C., 565 (571); *Sorrells v. Decker,* 212 N. C., 251. In *Smith v. Hosiery Mill,* 212 N. C., 661, the facts are different and that case is inapplicable.

The defendant Edwards excepted and assigned error (which cannot be sustained) to the following portion of the charge: "Now, on the other hand, gentlemen of the jury, the plaintiff in this case, the General Motors Acceptance Corporation, says and contends that you ought to answer this issue No; that is, that T. T. Edwards was over 21 years of age on 5 March, 1936. It says and contends that the defendant in this case has failed to carry the burden of proof which the law places on him, that is, to satisfy you, by the greater weight of the evidence, that he was under 21 years of age. That is, the plaintiff says that the quality of this evidence is such that you ought not to believe it and believe it by the greater weight of the evidence, plaintiff saying and contending first, gentlemen of the jury, that the defendant and all of his witnesses are interested and likely to testify along the line of their own interest and that of the defendant, he being their son, so plaintiff says and contends first, that when you go out to weigh the evidence you ought to take that into consideration; that they are interested in the outcome of this verdict. You will recall the instructions which the court gave you relative to the evidence of interested witnesses." The above portion of the charge objected to was a contention and based on the evidence. Edwards contends that "His Honor charged the jury, attempting to do so as a contention, that they might infer something was the matter with the 'quality' of appellant Edwards' evidence," etc.

The court below had theretofore charged the jury: "The law says, gentlemen of the jury, or it is said by reason of our law, that it is the duty of the jury to look into and examine the evidence of interested witnesses because an interested witness might testify along the line of his or her own interest, if you find they are interested; however, it is said by reason of the law after you examine and look into an interested witness' testimony, if you find such interested witness is telling the truth then his or her evidence is entitled to the same weight and credit as that of a disinterested witness. Also it is said by reason of our law, gentle-

men of the jury, that a person of good character is more apt to tell the truth than a person of bad character and, therefore, it is said by reason of the law, that when you go to weigh the credibility and weight of a witness' testimony whose character has been proved good or bad it is proper for you to give consideration to character evidence; that is, it is not substantive evidence in the case but it goes to the weight and credit and the witness whose character has been shown to be good or bad, so it is proper for you to consider character evidence in arriving at the truth in this case." This part of the charge was not objected to. The word "quality" complained of by Edwards was used not in the sense of natural superiority, but as to the weight given to interested witnesses.

In *In re Mrs. Hardee*, 187 N. C., 381 (382-3), it is written: "We are unable to agree with propounder's interpretation in its entirety, or to conclude that this instruction, taken in connection with other portions of the charge, should be held for reversible error, even if slightly objectionable, standing alone. It is now settled law that the charge of the court must be considered and examined by us, not disconnectedly, but as a whole, or at least the whole of what was said regarding any special phase of the case or the law. The losing party will not be permitted to select detached portions of the charge, even if in themselves subject to criticism, and assign errors as to them, when, if considered with other portions, they are readily explained, and the charge in its entirety appears to be correct. Each portion of the charge must be considered with reference to what precedes and follows it. In other words, it must be taken in its setting. The charge should be viewed contextually and not disjointedly. Any other rule would be unjust, both to the trial judge and to the parties."

The appellant's exception and assignment of error which complains that the court improperly charged the jury with respect to the good character of the witness Seymour. This was a proper contention as evidence was offered of the good character of the witness. It is contended that this was error because the court did not refer to the good character of appellant and his witnesses. This is not borne out by the record. Appellant, in his brief, complains that the court did not in this connection, or elsewhere, charge or refer to similar evidence of the defendant Edwards' good character and that of his witness. With respect to this the court charged as follows: "So, on this issue, gentlemen of the jury, the defendant T. T. Edwards says and contends you ought to answer this second issue Yes; that is, that he was under the age of 21 years at the time he executed this contract on 5 March, 1936. He says and contends, gentlemen of the jury, first, that both he and his witnesses are men and women of good character, and that men of good character and women of good character are more apt to tell the truth than people of bad character and, therefore, he says and contends that

he has testified to you that he knows his age and he says that on 5 March, 1936, he lacked a month and ten days of being 21 years of age, and says that he was born on 15 April, 1915, and therefore, upon a simple matter of calculation, it being admitted that this contract was executed on 5 March, 1936, that would make him less than 21 years of age, and therefore he says and contends that he has testified to that fact and that he is a man of good character and, therefore, you ought to find that he was less than 21 years of age on that date." The issue was a simple one to determine the age of T. T. Edwards. Taking the charge as a whole, we can see no prejudicial or reversible error.

No error.

HAROLD W. WELLS, A RESIDENT AND TAXPAYER OF THE CITY OF WILMINGTON, NORTH CAROLINA, SUING FOR HIMSELF AND IN BEHALF OF ALL OTHER TAXPAYERS SIMILARLY SITUATED WHO DESIRE TO COME IN, MAKE THEMSELVES PARTIES TO THIS CAUSE AND CONTRIBUTE TO THE COST THEREOF, v. HOUSING AUTHORITY OF THE CITY OF WILMINGTON, NORTH CAROLINA, AND THE CITY OF WILMINGTON, NORTH CAROLINA.

(Filed 15 June, 1938.)

1. Municipal Corporations § 1—

What is a "public purpose" for which the General Assembly may create a municipal corporation is a question for the courts to determine upon the basis of the end sought to be reached and the means used, rather than statutory declarations.

2. Same—

The necessity of bringing the government closer to the people in congested areas progressively demands, in order to meet new conditions, further refinement and subdivision in the instrumentalities of government.

3. Same—

The ownership of the instrumentalities by which its purpose is to be served does not detract from the public or municipal character of the agency employed.

4. Same—The establishment of housing authorities under ch. 456, Public Laws of 1935, is for a public purpose.

"Slum clearance" to rehabilitate crowded and congested areas in cities and towns where conditions conducive to disease and public disorder exist, is a public purpose, for which the Legislature may create municipal corporations, and housing authorities established under ch. 456, Public Laws of 1935, are for such governmental purpose.

5. Constitutional Law § 4—Our State Constitution is a limitation of powers.

Our State Constitution does not attempt to define the field of governmental authority, but is a limitation of powers, within which limitations

the General Assembly, as representative of the people, may act, and an attempt by the Legislature to assert those powers must be liberally construed.

6. Constitutional Law § 6b—

The courts will not declare an act of the General Assembly unconstitutional where there is reasonable doubt.

7. Municipal Corporations § 1—Term "municipal corporation" should be liberally construed.

The term "municipal corporation" should not be construed narrowly to include only cities, towns, counties and school districts, as the Constitution contemplates a broader construction of the term, Art. VII, Art. VIII, sec. 1, and in its broader sense the term includes all public corporations exercising governmental functions within the constitutional limitations.

8. Same—Housing authority created under ch. 456, Public Laws of 1935, is a municipal corporation.

A housing authority created under ch. 456, Public Laws of 1935, is for a public governmental purpose, and is given powers greatly in excess of those which might be given any private enterprise, including many powers not dissimilar to those exercised by cities and towns in regard to zoning, streets and sidewalks, and eminent domain, Michie's Code, 6243 (9), and such authority has all substantial *indicia* of a public corporation in the powers granted, method of its creation, sec. 6243 (4), appointment and terms of its membership and provisions to prevent fraudulent practices on their part and for removal for misconduct, sec. 6243 (5), (7), (8), and such authority is a municipal corporation within the contemplation of the Constitution.

9. Constitutional Law § 4—

The method for selecting membership of a housing authority created under ch. 456, Public Laws of 1935, does not constitute an unconstitutional delegation of authority.

10. Taxation § 19—

Since a housing authority created under ch. 456, Public Laws of 1935, is a municipal corporation created for a public, governmental purpose, its property is exempt from State, county and municipal taxation.

11. Municipal Corporations § 24—City or town may convey property to housing authority within its territory.

The power of a city or town to convey land is governed by statute, and by express terms of sec. 3, ch. 408, Public Laws of 1935, a municipal corporation is given authority to convey land to a housing authority within its territory with or without monetary consideration in consideration of the benefit to be received by the city or town from the activities of the municipal housing authority.

12. Taxation § 9—City is not liable on bonds of housing authority.

A city or town is not liable on the bonds of a housing authority within its territory, it being expressly provided that neither the State, nor the city or town shall be liable, sec. 14 (b), ch. 456, Public Laws of 1935, and the authority not being an agency of the city or town so as to contravene this express statutory provision.

WELLS *v.* HOUSING AUTHORITY.

PLAINTIFF appealed from *Sinclair, J.*, at May Term, 1938, of NEW HANOVER. Affirmed.

In his complaint, plaintiff admitted compliance with the procedure laid down in the Housing Authorities Act and the organization of the Commission itself. He alleges, however, that the act is unconstitutional, in that it comprehends no public purpose, and that the agency set up under it is not a municipal corporation within the meaning of the Constitution, but a corporation merely for private gain, engaged in a private enterprise; that its incorporation in the manner set out in the statute was unconstitutional; that the city of Wilmington cannot, under authority of chapter 408, Public Laws of 1935, convey to the Housing Authority any of its property with or without consideration. That the Housing Authority is an agent of the city of Wilmington and the city will be responsible for its bonds and other obligations. That defendant Wilmington Housing Authority has represented that its property will be exempt from taxation and has arranged to borrow about $700,000, and build apartments and dwellings for rent, and the city intends to make to it conveyances and donations of city property; that carrying into effect the scheme proposed will destroy the value of real estate in the city and take the property of plaintiff without due process of law, and do irreparable injury to plaintiff and other taxpayers like situated.

Plaintiff asked for a permanent injunction to restrain defendants from proceeding under the cited laws.

The answer denies the parts of the complaint alleging unconstitutionality in the Housing Authorities Act and in the operation of chapter 408, Public Laws of 1935, and avers that defendant Housing Authority is a municipal corporation under the Constitution; that its property will be free from taxation by the State, county, and municipalities; that it is an independent municipality and the city of Wilmington will not be liable for its obligations.

Upon the hearing, Sinclair, Judge, found all the facts and legal inferences in favor of the defendants and dismissed the action, and plaintiff appealed.

Aaron Goldberg for plaintiff, appellant.
William B. Campbell and Alan A. Marshall for defendants, appellees.

SEAWELL, J. The plaintiff contends that chapter 456 of the Public Laws of 1935, known as the Housing Authorities Act of 1935, is unconstitutional, since the purposes sought to be accomplished by the act are not of a public nature, that the body created under it has not been given any governmental function and is not a municipal corporation; that the city of Wilmington is without power to convey any of its property to this corporation, and that the property, in the hands of the corporation, if conveyed, would not be exempt from taxation.

These contentions are somewhat sketchily supported by argument and citations in the brief, and counsel for plaintiff made no oral argument. Perhaps, as sometimes happens in "friendly suits," his function in this case is similar to that of the "devil's advocate" at the canonization of a saint. But the decision of the case will have an effect beyond the immediate litigation, and the matters involved must have that careful consideration their importance demands.

Is the act under consideration constitutionally valid, and is the agency set up for its administration a municipal corporation within the meaning of the Constitution?

The case of *Webb v. Port Commission,* 205 N. C., 663, is very similar to the case at bar, and must be considered as decisive of most of the questions raised, but there is a difference in the declared purpose of the two acts which merits attention.

The court accepted without question that the purpose of the Port Commission Act was public in its nature and a proper subject for the exercise of governmental power, stating the proposition as follows: ". . . the Port Commission of Morehead City is not a private or business corporation, but is a public corporation created by the General Assembly as an agency of the State, *to perform a well recognized governmental function, to wit: to provide facilities for the transportation of goods, wares, and merchandise, both into and out of the State by means of carriers over land and water.*" *Webb v. Port Commission, supra.*

The purpose of the Housing Authorities Act is to accomplish "slum clearance"—to rehabilitate crowded and congested areas in cities and towns where insanitary and other conditions exist conducive to disease and public disorder, menacing the safety and welfare of society. In this the plaintiff insists there is no public purpose justifying the exercise of the governmental function.

Our attention is directed to the fact that in the statute the Housing Authority is declared to be "a public body and body corporate and politic, exercising public powers." Ordinarily, courts will not permit a simple declaration of the Legislature to give a character to a body, or a transaction, which appears to be inconsistent with the facts of the case. In an analogous matter, the courts have declined to permit the Legislature to declare what is "a necessary purpose" under Article VII, section 7, of the Constitution, holding this to be a matter for the courts. *Sing v. Charlotte, ante,* 60; *Glenn v. Commissioners,* 201 N. C., 233.

In the same manner the Court will determine what is a "public purpose," looking to the end sought to be reached and to the means to be used, rather than to statutory declarations to aid its decision. *Webb v. Port Commission, supra.*

The powers given to the agency created under the Housing Authorities Act are not dissimilar to those given to towns and cities in the Constitu-

tion and laws, particularly chapter 56 of the Consolidated Statutes, relating to municipal corporations. Under the powers given such municipal corporations to enact ordinances for the welfare and safety of their inhabitants, a town, within reasonable limitations, may zone its territory and designate what areas may be devoted to business and what to residence; where noisome or offensive occupations may be carried on and where they may not; may close places where practices are carried on in violation of law; may designate what kind of buildings may be erected in given localities; and, generally, may regulate numerous matters where necessary to the public welfare or safety. Any or all of these powers might be vested in a separate municipal authority, if convenience required, without offending against any constitutional principle of which we are aware.

The same necessity that prompted the subdivision of political authority, in the creation of cities and towns, to the end that government should be brought closer to the people in congested areas, and thus be able to deal more directly with problems of health, safety, police protection, and public convenience, progressively demands that government should be further refined and subdivided, within the limits of its general powers and purposes, to deal with new conditions, constantly appearing in sharper outline, where community initiative has failed and authority alone can prevail.

It is not questioned that it is a proper function of government to promote the health, safety, and morals of its citizens. The Housing Authorities Act depends for its validity, as a proper exercise of governmental authority, upon its declared objective in removing a serious menace to society, not disconnected with political exigency, in the populous areas to which it applies.

It differs in one particular from the usual type of municipality—the ownership of the instrumentalities by which the public purpose is to be served. But we cannot see that such ownership detracts from the public or municipal character of the agency employed. *Webb v. Port Commission, supra, p.* 673; *Willnon v. Powell,* 91 Cal. Ap., 266 P., 1029.

The State cannot enact laws, and cities and towns cannot pass effective ordinances, forbidding disease, vice, and crime to enter into the slums of overcrowded areas, there defeating every purpose for which civilized government exists, and spreading influences detrimental to law and order; but experience has shown that this result can be more effectively brought about by the removal of physical surroundings conducive to these conditions. This is the objective of the act, and these are the means by which it is intended to accomplish it.

The written Constitution has no direct pronouncement as to the scope of governmental authority—does not define the field in which it must be exercised. It is far from comprehensive of the governmental power of

the State. Our Constitution, as has been so frequently pointed out, is a constitution of limitations, where powers not surrendered expressly or by necessary implication are reserved to the people, to be exercised through their representatives in the General Assembly. *Yarborough v. Park Commission,* 196 N. C., 284, 291. An attempt by the Legislature to assert those powers must be treated liberally to effectuate its purpose. No matter from what source the power may be derived, the Court, by precedent at least, is not permitted to declare an act of the General Assembly void where there is reasonable doubt. *Coble v. Commissioners,* 184 N. C., 342; *Gunter v. Sanford,* 186 N. C., 452; *Webb v. Port Commission, supra,* 677.

If, then, the act comprehends a public purpose, the agency created under it falls within the authority of *Webb v. Port Commission, supra.* While the term "municipal corporation" is not directly applied by the Court to the Port Commission in that case, it is very clear that the Court meant to include it within that term as used in the Constitution. This is the interpretation put on the opinion of the Court in a strong dissenting opinion written by *Justice Brogden,* at page 687. Indeed, the Court could not have arrived at its conclusion without so holding.

In the *Port Commission case,* there is set up an extensive parallel between the powers and functions and corporate incidents of the Port Commission on the one hand and the elements of an approved definition of a public corporation on the other, and in the light of that comparison the constitutionality of the act was sustained. We can find no substantial *indicia* of a public corporation listed in that case that are not present in the act now under consideration, and in this respect we consider *Webb v. Port Commission, supra,* an authoritative precedent in the case at bar.

The act under which the Housing Authority is created provides for notice and hearing of its creation—sec. 6243 (4), Michie's Code of 1935—and an investigation of the facts in order to ascertain whether or not the conditions exist under which the public authority may be exercised; the appointment of the membership of the authority under sec. 6243 (5), is made by the mayor of the town or city, and these members are given definite terms of 1, 2, 3, 4, and 5 years to begin with, with a following term of five years each, and there are provisions for filling vacancies. They are charged with the general duty of enforcing all the provisions of the Authorities Law, which are far from strictly proprietary in their character. Effective measures are taken under sec. 6243 (7), to prevent fraudulent practices or advancement of self-interest; members of the Commission are subject to removal for misconduct in office; sec. 6243 (8). Attention is directed to sec. 6243 (9), defining the powers of the "Authority." The paragraph is far too long to be quoted, but a reading of it assures us that powers exercised by this Authority are

more than those which might be given by the Legislature in aid of any private enterprise. They have to do with investigations and reports regarding conditions existing in any part of the territory within their jurisdiction, form practically a planning board to work in coöperation with the city or municipality, as to the installation, opening or closing of streets, roads, roadways, alleys, sidewalks or other places and facilities in connection with a project, and are authorized to acquire municipal property, to be devoted to the Housing Project; and to arrange with the city or municipality for zoning or rezoning any part of the city or municipality in aid of the project. It is further authorized to deal with the Federal Government with regard to projects; to issue bonds; to buy, lease, and construct buildings, with other powers incident to the legal ownership and control of the properties operated, not necessary to mention here. Under sec. 6243 (11), and sec. 6243 (38), and sec. 6243 (40), the Authority has the right to acquire property by eminent domain. Section references are to Michie's Code of 1935.

The selection of the membership on the board, in the manner provided in the act, does not constitute an unconstitutional delegation of authority.

In plaintiff's brief, *Southern Assembly v. Palmer,* 166 N. C., 75, is cited as authority for the position that the term "municipal corporation" in the Constitution must be confined to municipal corporations proper—so-called—as cities and towns, and to *quasi*-municipal corporations such as counties, school districts, etc. This case was strongly presented in *Webb v. Port Commission, supra,* and not found as authority for this position. The distinction was not necessary in the *Southern Assembly case,* since the Court was pointing out the difference between corporations created essentially for a private purpose and corporations created for a public purpose, holding that the Southern Assembly belonged to the former class and, therefore, was not entitled to the tax immunity afforded municipal corporations under the Constitution.

In *Smith v. School Trustees,* 141 N. C., 143, 150, in which the opinion was written by the same eminent jurist who wrote the opinion in *Southern Assembly v. Palmer, supra,* a broader significance is insisted upon and *Currier v. District Township,* 62 Iowa, 102, is quoted with approval as follows: "The word 'municipal,' as originally used in its strictness, applied to cities only, but the word now has a much more extended meaning, and when applied to corporations, the words 'political,' 'municipal,' and 'public' are used interchangeably."

In further support of this view, as pointed out in the same case, Article VII of the Constitution includes within the category of municipal corporations not only municipal corporations as cities, towns, and counties, but "other municipal corporations" as well. So, also, the title of Article VIII, section 1, which must be read into the text to give the intended classification significance, refers to "corporations other than municipal," thus classifying all public corporations as municipal.

Referring to Article V, section 5, of the Constitution, there is nothing in the context which suggests the necessity of a departure from the ordinary rule of construction requiring that the same meaning shall be given to a term wherever used in the same act, since all these provisions of the Constitution were enacted and adopted at the same time and are supposed to be interrelated.

But we need not become lost in a maze of definitions and lose the object of pursuit. The principle on which the exemption rests requires that we apply the broader interpretation of the term "municipal," as laid down in *Smith v. School Trustees, supra.* It was intended that the government in its public service should not be embarrassed or impeded by any duty levied upon the instruments used to carry its purposes into effect, and to give that intention effect the exemption must be extended to all municipal corporations without legalistic distinction.

Applying again the principle that courts may not declare an act of the Legislature unconstitutional in a case of doubt, we find that the Housing Authorities Act under consideration is a constitutional exercise of a legislative power and that the agency therein set up is a municipal corporation within the meaning of the provisions of the Constitution which we have discussed. *Webb v. Port Commission, supra; Black v. Hirsh,* 256 U. S., 135; *New York City Housing Authority v. Mueller,* 1 N. E. (2), 153.

It follows as a corollary to this that the property of the Housing Authority is exempt from State, county, and municipal taxation. Under this decision, the property of the Housing Authority would be held for a public purpose.

Does the city of Wilmington have authority to convey to the Housing Authority its property, with or without consideration?

The powers of cities and towns in this respect are governed by statute. Chapter 408 of the Public Laws of 1935 was enacted to adjust the relationships and regulate the dealings between housing authorities and the municipalities to which their benefits may be, in part at least, extended. Section 3 of this chapter directly gives to cities and towns within the territory of the Housing Authority the power to convey or lease property to such Authority with or without consideration. We think the phrase "without consideration" must be taken to mean a consideration of monetary value. The Legislature had the right to consider the benefit received by the municipality in carrying out the purposes of the act as supplying such want of monetary consideration.

Will the city of Wilmington be liable for the payment of indebtedness and obligations of the Housing Authority?

There is an express provision to the contrary in section 14 (b) of the act, in which it is provided that neither the State nor the city or munici-

pality shall be liable. We find no implications of agency between the city and the Housing Authority which would contravene this express provision. *Williamson v. High Point, ante,* 96; *Brockenbrough v. Comrs. of Charlotte,* 134 N. C., 1.

For the reasons foregoing, the plaintiff is not entitled to injunctive relief, and the judgment of the court below is

Affirmed.

STATE v. R. T. BRYANT.

(Filed 15 June, 1938.)

1. Homicide § 27f—Instruction on question of self-defense held erroneous in failing to explain law in case of nonfelonious assault.

The court correctly instructed the jury upon the right of a person upon whom a murderous assault is made and who is without fault, to stand his ground and kill his adversary, if necessary, in his self-defense. Defendant's evidence tended to show that he struck and fatally cut deceased only after defendant had retreated a number of feet, had fallen over an oil tank, and deceased was on top of him cutting him with a knife. *Held:* It was error for the court to have failed to further instruct the jury upon defendant's right, if they should find deceased was making a nonfelonious assault upon him, to exchange blow for blow, and though under duty to retreat, to kill his assailant if necessary in his self-defense after he had retreated with his "back to the wall," the law on this phase of the case being a substantive feature arising on the evidence.

2. Criminal Law § 53a—

It is error for the court to fail to charge the law applicable to a contention of defendant upon a substantive feature of the case arising upon the evidence, even in the absence of a special prayer for instructions.

3. Homicide § 27f—Charge held for error in failing to instruct that necessity should be determined by jury upon facts as then appearing to defendant.

The court charged that a person may use such force as reasonably appears necessary to repel an attack and save himself from death or great bodily harm. *Held:* The instruction is susceptible to the interpretation that the amount of force and the reasonableness of the necessity should be determined upon the facts and circumstances as they appeared at the time of trial, and is erroneous in failing to instruct the jury that the amount of force and the necessity to act should be determined by the jury upon the facts and circumstances as they appeared to the defendant at the time of the assault.

4. Criminal Law § 81c—

Conflicting instructions on a substantive feature of the case entitles defendant to a new trial, since it must be assumed on appeal that the jury were influenced in coming to a verdict by that portion of the charge which was erroneous.

5. Criminal Law § 81d—

When a new trial is awarded for certain errors committed in the trial, other exceptions need not be considered.

APPEAL by defendant from *Phillips, J.*, at November Term, 1937, of FORSYTH.

Criminal action on indictment charging defendant with the murder in the second degree of one Glenn Riggs.

The defendant pleaded not guilty and relied upon the plea of self-defense.

The deceased, Glenn Riggs, received knife wounds inflicted by the defendant near midnight on 14 May, 1937, at the Valley View or Staley's Filling Station on a highway near Winston-Salem, North Carolina, and died as a result thereof on the second day thereafter.

In order to properly understand the evidence it is well to get the setting at the time of the killing. The filling station building is situate east and west facing a highway—whether east or west the evidence does not disclose. It consisted of two connecting rooms each with a door on the front. In front of and about ten feet from the building is a line of pumps. On the north end is a gasoline pump. South of it is an ice cream box. On the south end there is an oil tank with pump on top. From the gasoline pump on the north to the oil tank on the south is about twenty-five feet. From the door of the south room to the space between the north gasoline pump and ice cream box is about sixteen or seventeen feet. Cars were in front of the line of pumps, leaving narrow way between the cars and pumps. Defendant's car was near the north pump. Deceased and defendant were in the south room.

The defendant and Robert Rond, in defendant's automobile, came to the filling station about 11 o'clock at night. The deceased and Ralph Hendrix came soon afterwards. Others were there. Deceased had drunk some beer and the defendant had drunk some beer. Everybody was in good humor, laughing and joking until after deceased proposed to defendant and others that they "pitch in" and buy a pint of liquor. Then the deceased tried to get the defendant to put in a dollar. The defendant made some remark to the effect that he didn't believe deceased had any money. There is evidence that deceased became angry and called the defendant a G—— d—— liar. There is evidence that the defendant cursed the deceased. There is evidence that the defendant had out his knife and told the deceased that if he would go out in the highway "he would cut him in little pieces." The defendant denied this. There is evidence that the manager of the filling station told the deceased and the defendant that if they wanted to argue, to go on the outside. Some of the State's testimony tends to show that immediately the manager opened the door and the defendant started out; that de-

ceased followed and jumped on defendant from behind and struck him several times; and that deceased kept following the defendant as he backed until defendant fell over the oil tank, when deceased jumped on him and then was mortally cut.

The defendant testified that he saw that the deceased was mad, and he turned away, bought a glass of beer, and at the moment he was finishing drinking the beer, Robert Rond, who was out in the car, called out, "Come on, let's go, Mr. Bryant; I'm ready," to which defendant replied: "All right, I'm coming," turned around, set the mug down and started out the door to go home; and that at that time the deceased was sitting on a stool with his elbows on the counter.

Defendant testified: "I will say it was three or four minutes from the time Glenn cursed me and I drank the beer until I went out to go home."

State witness Ralph Hendrix testified: "Glenn told him he was a damned liar. I don't know as either one of them did anything then."

State witness Charlie Butner testified: "Mr. Bryant was drinking a mug of beer. He finished drinking that after this cussing. . . . He walked about three steps over to the counter and set it down. . . . It gave Gilmer (the manager) time to come down from the kitchen to the end of the counter and open the door. . . . He (Bryant) . . . turned and walked out . . . with his hands down by his side and went on out in a normal manner. . . . Glenn jumped on his back. . . . Mr. Bryant gave a twist of his shoulders and they were apart. . . . Glenn hit Mr. Bryant right up beside the head then. He hit him hard enough so it popped. . . . Glenn was behind him and come around long armed and hit him. . . . Mr. Bryant went on until he got between the column and the ice cream compartment. When he got through them he kind of turned up toward the car, and then Glenn got in front of him and headed him off from his car. . . . Then Mr. Bryant backed right along in front of the gas tanks and columns."

Defendant further testified: "Just as I stepped out at the door—I didn't know Mr. Riggs was behind me at all—he jumped on my back and came right under my chin and cut that place where it took six stitches to sew up. . . . My back was next to him. . . . After he cut me on the throat, I throwed him off my back and turned with my face to him. He hit me three times in the side of the head as I backed to the car. . . . I did not hit him. I did not strike at him. . . . I backed across the driveway and tried to get to my car. I backed all the way across the driveway by the north pump, between it and the ice cream freezer. I backed through there. . . . Mr. Riggs was coming right on after me hitting at me with that knife. After I got through the tanks I backed down south between the cars and the tanks. . . . Mr. Riggs was coming right on after me, and when I fell over that tank

backwards, that is when he stabbed me in the leg. He come right down on me and hit me with his left hand. My knife slipped out of my pocket and I grabbed it open and cut at him a time or two. . . . When I fell over the tank my hands and feet were up in the air. . . . I never did cut at him until he stabbed me in the leg and come down on me and hit at me. I did not cut him until I was flat on my back. . . . While I was backing I hollered and told them he was cutting me all to pieces and to get him off of me. Nobody seemed to take hold or help me or anything. I did not cut at him to kill him. My reason for cutting him was I was down on my back and bleeding, and thought I was already dead . . . God knows I didn't mean to kill him. . . . I done my best to get away from him."

Defendant contends (1) that he had abandoned any argument with deceased while in the building and by answering Rond, "All right, I'm coming," followed by his leaving the room, he gave the deceased notice of his withdrawal; (2) that after deceased had feloniously assaulted him, he retreated sixteen or seventeen feet toward his car, and on being cut off from it by deceased, he retreated twenty-five feet more until he fell, and that in that retreat he gave deceased further notice of his withdrawal from any altercation with him, and that he cut the deceased only after he had "retreated to the wall," lying flat on his back on the ground. Some of the witnesses testified that they did not see a knife in the hands of deceased.

Verdict: Guilty of manslaughter.

Judgment: Not less than seven years nor more than ten years in State's Prison at hard labor.

Defendant appealed to the Supreme Court, and assigns error.

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

Fred S. Hutchins, H. Bryce Parker, and J. P. Rumley for defendant, appellant.

WINBORNE, J. The record discloses error affecting substantive rights of the defendant which necessitates a trial *de novo*.

Defendant excepts, *inter alia:* (1) To the failure of the court to declare and explain the law arising on the evidence in the case. (2) To that portion of the charge, after stating the principle with respect to the right of a man, who without fault himself is murderously assaulted, to stand his ground and fight in self-defense, in which the court summed up as follows: "In order to have the benefit of this principle of law, the defendant must show that he was free from blame in the matter, that the assault upon him was with felonious intent, with intent to kill, and that he took the life only when it was necessary or apparently so to protect himself."

The statement of law is correct as applied in the case of a felonious assault. But, having so charged, it was the duty of the court to go further and explain the principle of law applicable in case of nonfelonious assault. The jury might have found that a felonious assault was not made, but that a nonfelonious assault, even with a deadly weapon, was made.

In *S. v. Hough,* 138 N. C., 663, 50 S. E., 709, *Brown, J.,* said: "There is a distinction made by the text writers in criminal law which seems to be reasonable and supported by authority, between assaults with felonious intent and assaults without such intent. 'In the latter the person assaulted may not stand his ground and kill his adversary if there is any way of escape open to him, though he is allowed to repel force by force and give blow for blow. In the former class, where the attack is made with a murderous intent, the person attacked is under no obligation to fly, but may stand his ground and kill his adversary, if need be.' 2 Bishop's Criminal Law, sec. 6333, and cases cited. It is said in 1 East Pleas of the Crown, 271, 'A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors by violence to commit a felony such as murder, rape, burglary, robbery, and the like, under either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing it is called justifiable self-defense.' The American doctrine is to the same effect. See *S. v. Dixon,* 75 N. C., 275." *S. v. Glenn,* 198 N. C., 79, 150 S. E., 663.

In the case of *S. v. Blevins,* 138 N. C., 668, 50 S. E., 763, speaking to the subject, *Hoke, J.,* 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 kill his assailant and it is necessary to do so in order to save his own life or protect his person from great bodily harm, it is excusable homicide, and will be so held (*S. v. Harris,* 46 N. C., 190; *S. v. Dixon, supra; S. v. Hough, ante,* 663); this necessity, real or apparent, to be determined by the jury on the facts as they reasonably appeared to him. True, as said in one or two of the decisions, this is a doctrine of rare and dangerous application. To have the benefit of it, the assaulted party must show that he is free from blame in the matter; that the assault upon him was with felonious purpose, and that he took life only when it was necessary to protect himself. It is otherwise in ordinary assaults, even with deadly weapons. In such case a man is required to withdraw if he can do so, and to retreat as far as consistent with his own safety. *S. v. Kennedy,* 91 N. C., 572. In either case, he can only kill from necessity. But, in the one, he can have that necessity deter-

mined in view of the fact that he has a right to stand his ground; in the other, he must show as one feature of the necessity that he has retreated to the wall."

"When the judge assumes to charge and correctly charges the law upon one phase of the evidence, the charge is incomplete unless it embraces the law as applicable to the respective contentions of each party, and such failure is reversible error," *Brown, J.*, in *Real Estate Co. v. Moser,* 175 N. C., 255, 95 S. E., 498; *S. v. Bost,* 189 N. C., 639, 127 S. E., 926.

The failure of the court to instruct the jury on this substantive feature of the case arising on the evidence is prejudicial. This is true even though there is no special prayer for instruction to that effect. *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501; *S. v. Bost, supra; S. v. Thornton,* 211 N. C., 413, 190 S. E., 758; *School District v. Alamance County,* 211 N. C., 213, 193 S. E., 31; *S. v. Robinson, ante,* 273, 195 S. E., 824.

3. Defendant excepts to that portion of the charge which reads: "The means of force which a person is justified in using in self-defense depends upon the circumstances of the attack and must in no case exceed the bounds of mere defense and prevention, but if the one attacked uses such means of force only as is necessary or as reasonably appears to be necessary to repel the attack and save himself from death and great bodily harm, and death of his assailant ensues, it is justifiable and excusable homicide."

The error here is in the clause "as reasonably appears to be necessary." The reasonableness of the apprehension of the necessity to act and the amount of force required must be judged by the jury upon the facts and circumstances *as they appeared to the defendant at the time* of the killing.

The charge is in the present tense, and might have been understood by the jury to mean as the facts and circumstances appeared at the time of the trial. Being susceptible of that construction, we must assume that the jury so understood it.

In *S. v. Barrett,* 132 N. C., 1005, 42 S. E., 832, 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 the 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." (Italics ours.) Thus it appears that the jury must determine the reasonableness of the facts and circum-

stances *as they appeared to the party charged* at the time of the killing. *S. v. Blackwell,* 162 N. C., 672, 78 S. E., 316; *S. v. Marshall,* 208 N. C., 127, 179 S. E., 427; *S. v. Terrell,* 212 N. C., 145, 193 S. E., 161; *S. v. Robinson, supra; S. v. Mosley, ante,* 304, 195 S. E., 830, and cases cited.

The court had correctly stated the law in other portions of the charge. However, "it is well settled that when there are conflicting instructions upon a material point, a new trial must be granted. As the jury are not supposed to be able to determine when the judge states the law correctly and when incorrectly. . . . We must assume that in passing upon the motion for new trial the jury were influenced in coming to a verdict by that portion of the charge which was erroneous." *Edwards v. R. R.,* 132 N. C., 99, 43 S. E., 585; *S. v. Mosley, supra.*

As the case goes back for new trial for the errors treated, other exceptions upon which the defendant relies need not be considered. *S. v. Stephenson,* 212 N. C., 648, 194 S. E., 81; *S. v. Robinson, supra.*

For the reasons stated, the defendant is entitled to a

New trial.

STATE v. ELLEN HARRIS.

(Filed 15 June, 1938.)

1. Criminal Law § 2—

"Willful," as used in a criminal statute, means something more than an intention to do a thing; it implies the doing of an act purposely and deliberately, without authority or careless whether one has the right to do the act or not, in violation of law.

2. Carriers § 18b—Evidence held not to show willful violation of provision for segregation of races on bus.

The evidence disclosed that defendant, a Negro, entered a bus as a passenger, passed several vacant seats in the front of the bus, and took a seat on the last seat on the aisle in the rear immediately in front of the long rear seat in the back of the bus, that thereafter a white passenger got on the bus when all seats were occupied except the seat beside defendant and seats on the long rear seat, that he and the conductor requested defendant to move back to the long rear seat, and that she refused to do so, but offered to leave the bus if her money were refunded. N. C. Code, 3537, provides that Negroes shall occupy the last vacant seat in the aisle nearest the rear, and that the willful violation of the provisions of the statute should constitute a misdemeanor. *Held:* The evidence fails to disclose a willful violation of the provisions of the relative statutes by defendant, and in a prosecution thereunder her motion to nonsuit should have been allowed. N. C. Code, 3536, 3537, 3539 (a).

3. Statutes § 8—

Criminal statutes are to be strictly construed.

STATE *v.* HARRIS.

APPEAL by defendant from *Williams, J.*, and a jury, at March Term, 1938, of DURHAM. Reversed.

This is a criminal action, tried before his Honor, C. L. Williams, Judge presiding, and a jury, at the March Term, 1938, of the Superior Court of Durham County. The defendant Ellen Harris was tried upon a warrant charging her with violating C. S., 3536, 3537, and 3539 (a), relating to the seating of white and Negro passengers upon vehicles operated for hire.

The warrant sworn out in the recorder's court of the city of Durham read as follows: "J. B. Harris, being duly sworn, on information, says that Ellen Harris, on or about 12 February, 1938, with force and arms, at and in the county aforesaid, and within Durham County, did unlawfully, maliciously and unlawfully occupy a certain seat in the front part of a bus operated by the Durham Public Service Company, and did then and there fail and refuse to move from said seat when requested to do so by the operator of said bus, against the statute in such case made and provided and against the peace and dignity of the State. J. B. Harris, Complainant." Jurat.

The defendant was tried on this warrant in the recorder's court and from a verdict of guilty and judgment appealed to the Superior Court. In the Superior Court the warrant was amended to read as follows: "That the said Ellen Harris did then and there unlawfully and willfully enter and occupy a seat in a bus operated for hire by the Durham Public Service Company, which seat was not the first seat nearest the rear of said bus that was vacant at the time and unoccupied, she, the said Ellen Harris, being a colored person."

The defendant was tried and convicted on the amended warrant. The judgment of the court was a fine of $10.00, plus the cost of the court. 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 McMullan and Assistant Attorneys-General Bruton and Willis for the State.

C. J. Gates and Edward R. Avant for defendant.

CLARKSON, J. The defendant was convicted and judgment pronounced against her for violating the following statutes construed *in pari materia:*

N. C. Code, 1935 (Michie), sec. 3536: "All street, interurban and suburban railway companies, engaged as common carriers in the transportation of passengers for hire in the State of North Carolina, shall provide and set apart so much of the front portion of each car operated by them as shall be necessary, for occupation by the white passengers

therein, and shall likewise provide and set apart so much of the rear part of such car as shall be necessary, for occupation by the colored passengers therein, and shall require as far as practicable the white and colored passengers to occupy the respective parts of such car so set apart for each of them. The provisions of this section shall not apply to nurses or attendants of children or of the sick or infirm of a different race, while in attendance upon such children or such sick or infirm persons. Any officer, agent or other employee of any street railway company who shall willfully violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court."

Section 3537: "Any white person entering a street-car for the purpose of becoming a passenger therein shall, if necessary to carry out the purposes of the preceding section, occupy the first vacant seat or unoccupied space in the aisle nearest the front of the car, and any colored person entering such car for a like purpose shall occupy the first vacant seat or unoccupied space in the aisle nearest the rear end of the car; Provided, however, that no contiguous seats on the same bench shall be occupied by white and colored passengers at the same time unless and until all the other seats in the car shall be occupied. Any person willfully violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. He may also be ejected from the car by the conductor and other agent or agents charged with the operation of such car, who are hereby vested with police powers to carry out the provisions of this action."

Section 3539 (a): "The provisions of sections 3536-3539 are hereby extended to motor buses operated in the urban, interurban or suburban transportation of passengers for hire, and to the operator or operators thereof, and the agents, servants, and employees of such operators."

At the close of the State's evidence, the defendant in the court below made a motion for judgment as in case of nonsuit. C. S., 4643. This motion was overruled and in this we think there was error.

Section 3536, *supra,* was passed by the General Assembly in 1907 and 1909, and section 3537 was passed in 1907. In reference to street cars, etc., the law has been in force for over 30 years and no case has ever come to this Court. In 1933 the street car, etc., provision was extended to motor buses operating in the State.

In *Corporation Commission v. Interracial Com.,* 198 N. C., 317 (320), is the following: "It has long been the settled policy of this State, promulgated through the legislative branch of the government, to have separation or segregation of the white and Negro races with equal accommodations, in the public institutions of the State, and by public service corporations. Separate schools for the white race and Negro

race; separate asylums and other institutions for the afflicted Negroes in the State, separate reformatories, etc. In the cities and towns that have them, separate parks, separate libraries, etc. By public service corporations, separation and segregation on railroad trains, steamboats, street cars, separation and segregation in the railroad and steamboat companies' passenger stations. *S. v. Williams,* 186 N. C., 627. In recent years, since the construction of hard-surfaced and dependable roads in the State, the bus line has become one of the most important carriers of passengers. We think the Corporation Commission has full and plenary power, under the present law, to see to it that the bus lines provide separate accommodations for white and Negro passengers, and separate bus station facilities. This matter is left largely to the discretion of the Corporation Commission as to the manner and method. As to separate apartments in the buses or separate buses run for the accommodation of the white and Negro races, this is a matter for the Corporation Commission to determine, taking into consideration the terminals of the lines, population, economical conditions. The matter should be worked out in good faith by the Corporation Commission, taking all things into consideration, for the best welfare of the white and Negro races, so that justice can be accomplished in this racial condition that exists among us—a duty that the State owes to all of its citizens." This case was annotated in the American Law Reports, 66 A. L. R., p. 1197.

In the present case the bus carried white and Negro passengers. The bus seated 25 persons. It had an aisle down the center, with seats (two persons each) on either side of the aisle. Across the rear was a long seat sufficient to seat five persons. The defendant, when she entered the bus, paid her fare at the front and immediately went down the aisle to the rear of the bus and took a seat on the last seat for two persons on the aisle—the seat in front of the rear seat which would accommodate five persons. Later Mr. and Mrs. R. B. Jones came in the bus. Mrs. Jones took a vacant seat—the only vacant seat left except the seat beside defendant and the long seat across the rear of the bus. Mr. Jones requested the defendant to move back to the long seat in the rear, where there was a vacant seat, so that he might occupy the seat which the defendant had. This she refused to do, although requested to do so by Mr. Jones and the bus driver, but stated that she would get off the bus if her fare was refunded.

It will be noted that the act, section 3537, reads: "Any white person entering a street car for the purpose of becoming a passenger therein shall, if necessary to carry out the purposes of the preceding section, occupy the first vacant seat or unoccupied space in the aisle nearest the front of the car, and any colored person entering such car for like purpose shall occupy the first vacant seat or unoccupied space in the *aisle* nearest the rear end of the car," etc.

Mr. Jones, under the proviso to section 3537, had his right: "Provided, however, that no contiguous seats on the same bench shall be occupied by white and colored passengers at the same time unless or until all of the other seats in the car shall be occupied." The act provides, "Any person willfully violating the provisions of this section shall be guilty of a misdemeanor," etc.

In *S. v. Whitener,* 93 N. C., 590 (592), *Ashe, J.,* says: "Conceding it to have been unlawful, it does not follow that it was *willful.* The word 'willful,' used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing of the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute." *S. v. Cook,* 207 N. C., 261; *S. v. Coal Co.,* 210 N. C., 742 (754).

The defendant, when she entered the bus, walked down the aisle passing some four seats on either side of the aisle and took the fifth seat in front of the five-passenger seat across the rear of the bus. Jones testified: "She was on the bus when I got on. She was seated on the last seat except the long seat in the back. When I got on the bus there was room for one passenger besides my wife excepting the long seat at the back. When we entered the bus my wife took a seat about middle way up, which left only the long seat close to the rear and then the half seat beside the defendant. There was room for me to sit down there. There was no available seat across the aisle from where the defendant was sitting."

Criminal statutes are to be construed strictly. Under the facts and circumstances of this case, we do not think the defendant intended to willfully violate the provisions of this act.

The attorneys for the defense in their argument commended the act as one to bring peace between the races. North Carolina's policy in regard to the Negro is segregation and separation with justice, under the Constitution. It has been the means of promoting a friendly relationship and to a great extent brought peace and good will between the sensible elements of the races in this State. This question of separation and segregation was settled long ago.

"And Abram said unto Lot, Let there be no strife, I pray thee, between me and thee, and between my herdmen and thy herdmen; for we be brethren. Is not the whole land before thee? Separate thyself, I pray thee, from me; if thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand, then I will go to the left."—Genesis, ch. 13, vs. 8, 9.

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

Reversed.

GUILFORD COUNTY v. ESTATES ADMINISTRATION, INC., ADMINISTRATOR OF ESTATE OF G. A. GRIMSLEY, DECEASED; HARRY B. GRIMSLEY AND WIFE, LUCY ESTES GRIMSLEY; CORRINNE JUSTICE GRIMSLEY (WIDOW), W. HENRY HUNTER, GUARDIAN AD LITEM OF CYNTHIA GRIMSLEY, WM. T. GRIMSLEY, JR., ROBERT J. GRIMSLEY AND CORRINNE GRIMSLEY, MINORS; H. W. SCHIFFMAN.

(Filed 15 June, 1938.)

1. **Taxation § 33—Lien for taxes has priority over other liens.**

The lien upon real estate for taxes is preferred to all other liens upon such real estate, and continues until paid with interest, penalties and costs, C. S., 7987, which lien is continued in favor of the holder of the certificate of sale by subrogation, C. S., 8036, 8037.

2. **Taxation § 40b—**

The purchaser of a tax sale certificate is subrogated to the lien for taxes, and may foreclose same by civil action in the nature of an action to foreclose a mortgage. C. S., 8037.

3. **Taxation §§ 33, 40b: Executors and Administrators § 16—County purchasing certificate for taxes assessed prior to death of insolvent acquires first lien, which it may foreclose by civil action.**

After the death of insolvent intestate, certain land of the estate was sold for taxes assessed prior to the death of intestate, and the county became the purchaser for want of other bidder, C. S., 8015, and received certificate of sale, C. S., 8024. *Held:* The county acquired a first lien on the land, C. S., 7980, 7987, 8036, prior to the claims of the administrator, widow, heirs at law, and judgment creditor of intestate, which lien the county may foreclose by civil action in the nature of an action to foreclose a mortgage, C. S., 8037, and the provisions of C. S., 93, that taxes should be paid by the personal representative in the third class of priority has no application to the statutory action to foreclose the tax sale certificate.

4. **Executors and Administrators § 20: Taxation § 40b—Tax sale certificate may be foreclosed pending administration.**

The right of the personal representative to sell lands of the estate subject to such liens, statutory and otherwise, as exist at the time, in order to make assets to pay debts when the personalty is insufficient, does not prevent the holder of a tax sale certificate against lands of the estate for taxes assessed prior to the death of insolvent intestate from foreclosing same in a civil action, in the nature of an action to foreclose a mortgage, during the pendency of the administration.

APPEAL by defendant "Estates Administration, Incorporated," administrator of Geo. A. Grimsley, from *Bivens, J.*, at 21 March, 1938, Term, of GUILFORD.

Civil action to foreclose tax sale certificate.

The parties waived jury trial and submitted an agreed statement of fact with agreement that the court might find such additional facts as are required for a determination of the issues arising on the pleadings.

The pertinent facts so found by the court are: In the year 1934, county taxes in the sum of $16.61 were duly assessed upon certain lands in Guilford County, North Carolina, owned by and regularly listed in the name of Geo. A. Grimsley, who died intestate and insolvent on 28 March, 1935, resident of Forsyth County, North Carolina. Defendant Estates Administration, Incorporated, was duly appointed administrator of the estate of said intestate, in the latter county.

On 3 June, 1935, at a sale of real estate for the nonpayment of county taxes for the year 1934, the plaintiff became the purchaser of the said Grimsley lands, and received from the tax collector of Guilford County, and now holds, a certificate of sale therefor.

This action was instituted within the time limited by statute. Defendants are the administrator, widow, heirs at law and judgment creditor, respectively, of the said Grimsley. Summons and complaint have been duly served upon all defendants. Notice of action has been published as required by law. Complaint is filed setting forth essential allegations. Only the defendant administrator has answered. If the taxes be paid in full, payments to creditors will be reduced. In consequence, the clerk of Superior Court of Forsyth County refuses to permit administrator to pay 1934 taxes in full. Payment thereof has not been made, but the 1935 taxes, which were assessed after the death of intestate, have been paid.

From judgment declaring that the tax, interest and cost constitute a first lien upon the lands, superior to any claim or interest of the defendants, ordering sale and appointing commissioner to sell, with directions as to application of proceeds of sale, defendant administrator appealed to the Supreme Court and assigns error.

D. Newton Farnell, Jr., and B. L. Fentress for plaintiff, appellee.

Vaughan & Graham and Winfield Blackwell for defendants, appellants.

WINBORNE, J. Where, at a sale of real estate for nonpayment of county taxes, duly assessed prior to the death of an insolvent taxpayer, and after his death the county becomes purchaser for want of other bidder (C. S., 8015), and receives certificate of sale (C. S., 8024), does the county thereby acquire a first lien on such land (C. S., 8036)? If so, can the county maintain a civil action to foreclose on such certificate (C. S., 8037)?

Each question is answered in the affirmative. The authorities, statutory and judicial, support this decision.

The lien of State, county and municipal taxes in each year attaches to all real estate of the taxpayer situated within the county or municipality in which the tax list is made and placed in hands of proper officer for collection. This lien is preferred to all other liens upon such real estate, and continues until such taxes, interest, penalties and costs shall be paid. C. S., 7987. Public Laws 1929, ch. 306. *New Hanover County v. Whiteman,* 190 N. C., 332, 129 S. E., 808; *Shale Products Co. v. Cement Co.,* 200 N. C., 226, 156 S. E., 777. The holder of a certificate of sale is subrogated to the right of the State, county or other municipality for the taxes for which the real estate was sold, and has "the right of lien against the real estate described in the certificate as in case of mortgage." The holder is entitled to a judgment for the sale of such real estate for the satisfaction of whatever sum there may be due upon such certificate. The relief on the certificate may be afforded "only in an action in the nature of an action to foreclose a mortgage." C. S., 8037. *New Hanover County v. Whiteman, supra; Shale Products Co. v. Cement Co., supra.* The right of foreclosure by civil action "is the sole right and only remedy to foreclose the same." *Orange County v. Wilson,* 202 N. C., 424, 163 S. E., 113; *Wilkes County v. Forester,* 204 N. C., 163, 167 S. E., 691; *Logan v. Griffith,* 205 N. C., 580, 172 S. E., 348; *Rigsbee v. Brogden,* 209 N. C., 510, 184 S. E., 24. In *Logan v. Griffith, supra, Brogden, J.,* said: "The applicable statutes create a lien for purchasers at tax sales, and also prescribe the procedure for enforcing said lien. 'Foreclosure' is the process provided for turning the lien into *money.*"

The statutes are plain, explicit and understandable and need no interpretation. Under these statutes and decisions of this Court the taxes levied by Guilford County became a lien upon the lands in question superior to all other liens theretofore or thereafter created upon said lands, except as to taxes, if any, due to State or municipality. Through the certificate of sale this lien is continued in the county by way of subrogation. The county has the right of foreclosure, and that right is the only right the county has to enforce the lien of the certificate of sale, for the collection of the tax. The county may pursue this course at its election. *Rigsbee v. Brogden, supra.*

Defendant administrator contends that in the present case, the estate being insolvent, "the taxes assessed on the estate of deceased previous to his death" are relegated to the third class by the statute providing for payments of the debts of the estate. C. S., 93. With this we do not agree. In *Rigsbee v. Brogden, supra,* the Court held that taxes on a life estate assessed previous to the death of the taxpayer are entitled to preferential payment out of the personalty left by him, but that the tax sales certificate itself is not provable as a preferred claim against the estate of the deceased. The court added, however, that "Foreclosure and redemption are the pertinent remedies of the individual holder of the certificate and the owner of the land."

If defendants' contention should be accepted, then, upon the death of a taxpayer, C. S., 93 would strike down numerous statutes which are applicable to the taxpayer while living. C. S., 93 would run counter not only to the tax lien created under C. S., 7987, the lien of tax sale certificate provided under C. S., 8036, and the subrogation and right of foreclosure as in case of a mortgage as prescribed in 8037, but to C. S., 7980. This last statute requires that in judicial proceeding for the sale of land the judgment shall provide for payment of taxes, and in sales under powers granted taxes shall be paid out of the proceeds. It further provides that a failure to pay the tax shall not vacate or affect this lien, but that such lien shall be discharged only to the extent that payment is actually made.

Under defendants' contention, on the death of the taxpayer, a transition takes place, and the lien of the mortgage goes into first place, and that of the taxes into third place. Manifestly, the Legislature did not so intend. C. S., 93 deals with the administration of personal estates. ". . . The personal property of any deceased person shall be liable in the hands of any executor or administrator for any tax due by any testator or intestate. . . ." C. S., 8008. C. S., 93 provides the order for payment of debts out of the personal property. Upon the death of the taxpayer the 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. *Price v. Askins,* 212 N. C., 583, 194 S. E., 284; *Linker v. Linker, ante,* 351, 196 S. E., 329. If the personal estate be insufficient to pay debts of the estate, the administrator, by appropriate proceeding, may resort to the sale of the land, burdened, however, with such liens, statutory or otherwise, as exist at the time. But this right does not prevent the holder of the tax sale certificate from foreclosing in civil action in the nature of an action to foreclose a mortgage during the pendency of the administration of the estate. Nothing said in *Rierson v. Hanson,* 211 N. C., 203, 189 S. E., 502, militates against this position.

Defendant relies upon the case of *Fertilizer Co. v. Bourne,* 205 N. C., 337, 171 S. E., 368. As was said in the case of *R. R. v. Reid,* 187 N. C., 320, 121 S. E., 534, "If we apply the statement of *Chief Justice Marshall* that 'every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered' " (*U. S. v. Burr,* 25 Fed. Cases, 165), we must conclude that there is nothing in *Fertilizer Co. v. Bourne, supra,* that militates against our present position. The lien of a certificate of tax sale and the right to enforce such lien by foreclosure were not there involved.

The judgment below is

Affirmed.

MERCHANTS BANK (ORIGINAL PARTY PLAINTIFF), AND A. J. POLLARD, ASSIGNEE OF THE MERCHANTS BANK (ADDITIONAL PARTY PLAINTIFF), v. C. H. WEAVER AND B. K. FOX.

(Filed 15 June, 1938.)

1. Banks and Banking § 7a—

When a general deposit is made in a bank, title to the money passes from the depositor to the bank, forming a general fund for the payment of depositors, and the depositor owns a credit account with the bank under the relation of debtor and creditor.

2. Execution § 3—Conceding that money from particular fund is exempt, upon deposit thereof, credit account with bank is subject to execution.

Conceding that money received by a judgment debtor through the North Carolina Industrial Commission from the Insurance Fund of the State of New York as compensation for permanent disability for injury received while the debtor was employed in the State of New York is exempt from execution in supplemental proceedings in this State, when the debtor makes a general deposit of money so received, the credit account with the bank is subject to execution.

3. Courts § 11—

Laws of another State in regard to exemption of personal property from execution have no extra-territorial effect and are not controlling in regard to personal property within this State, since an exemption relates to the remedy and is subject to the law of the *forum*.

APPEAL by defendant C. H. Weaver from *Ervin, Special Judge,* at February Term, 1938, of DURHAM. Affirmed.

This is a proceedings supplemental to execution instituted by the plaintiff, A. J. Pollard, upon a judgment against the defendant, C. H. Weaver, in which said defendant's deposit account in the Bank of Chapel Hill in the sum of $1,136.69 was attached or seized.

The plaintiff, Merchants Bank, procured a judgment against the defendants in the sum of $500.00 and costs, which judgment was duly docketed in Durham County. The liquidating agent of the Merchants Bank, for a valuable consideration, transferred and assigned said judgment to A. J. Pollard. Pollard had a transcript of said judgment docketed in Orange County and procured the issuance of execution to said county. He likewise instituted proceedings supplemental to execution, and notice was issued to the Bank of Chapel Hill under the statute. Upon its being made to appear to the clerk that the defendant had a credit account with said bank in the sum of $1,136.69, the clerk issued an order requiring the said bank to pay said sum into the office of the clerk and directing that all of said sum in excess of $500.00, personal property exemption, be paid to the judgment creditor as a credit on said judgment.

On appeal, it appearing that the defendant claimed that said deposit account was exempt from execution or seizure for that it was a part of the proceeds of a settlement received by him from the Industrial Commission of the State of New York under an award to him for permanent disabilities, which award under the laws of the State of New York is exempt from all claims of creditors, the Judge found the facts in respect thereto and adjudged that said credit account is subject to execution and attachment in this proceedings. It was thereupon ordered that the Bank of Chapel Hill pay over to the defendant, C. H. Weaver, as his personal property exemption the sum of $500.00 and that the said bank pay over the remaining portion of the fund to the clerk of the Superior Court of Durham County, to be applied on the judgment in this cause. To said judgment the defendant excepted and appealed.

Forrest A. Pollard for plaintiff, appellee.
H. A. Whitfield and S. M. Gattis, Jr., for defendant, appellant.

BARNHILL, J. The defendant, in 1930, while temporarily residing in the State of New York and while engaged in industrial employment as a mechanic for the General Motors Corporation, suffered personal injury, resulting in a permanent disability. He was awarded compensation for said injury by the Industrial Commission of the State of New York and thereafter from July, 1930, to November, 1937, received said compensation in monthly installments. In November, 1937, the Industrial Commission of the State of North Carolina, at the request of the Industrial Commission of New York, held a hearing to consider and ascertain said Weaver's physical condition and to determine whether it would be just and fair to settle his claim by a lump sum payment. The North Carolina Industrial Commission reported to the New York Industrial Commission, recommending a lump sum settlement of said claim by the payment of $4,000. Thereupon, said claim was settled by the payment to the defendant of the sum of $4,000 out of the State Insurance Fund of the State of New York, which payment was made through the Industrial Commission of the State of North Carolina. A part of this money was deposited in the Bank of Chapel Hill and the deposit credit of $1,136.69, which is in controversy in this proceedings, represents the balance of said deposit now due the defendant.

Under the laws of the State of New York the money paid to the defendant in settlement of his claim is exempt from all claims of creditors. We are not required, however, to determine whether this exemption follows the money into the State of North Carolina and is now available to the defendant. The defendant has parted with the money and now owns a credit account with the Bank of Chapel Hill. This is a solvent credit purchased with the money received by him.

The relation between a bank and a depositor is that of debtor and creditor. *Reid v. Bank*, 159 N. C., 99, 74 S. E., 746; *Graham v. Warehouse*, 189 N. C., 533, 127 S. E., 540; *Trust Co. v. Rose*, 192 N. C., 673, 135 S. E., 795; *Trust Co. v. Spencer*, 193 N. C., 745, 138 S. E., 124; *Woody v. Bank*, 194 N. C., 549, 140 S. E., 150; 58 A. L. R., 725. Under "general deposit," creating relation of debtor and creditor, money passes from depositor to bank, forming general fund for payment of depositors. *Corporation Commission v. Bank*, 193 N. C., 696, 138 S. E., 22. The title to a general deposit passes to the bank. *Wall v. Howard*, 194 N. C., 310, 139 S. E., 449; *Land Bank v. Bank*, 197 N. C., 526, 150 S. E., 34.

The World War Veterans Act provides that "the compensation, insurance and maintenance and support allowance payable under parts II, III and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under parts II, III and IV; and shall be exempt from all taxation." Interpreting this section, this Court, in *State Hospital v. Bank*, 207 N. C., 697, held that when the funds received from a veteran under this provision of the Federal law have been invested in securities, the property thus acquired was not exempt from taxation under the provisions of said act. The Court quoted with approval from the opinion of *Justice Cardozo* in *Trotter v. Tennessee*, 290 U. S., 354, 78 L. Ed., 358, as follows: "We think it very clear that there was an end to the exemption when they (the moneys paid as compensation) lost the quality of moneys and were converted into land and buildings. The statute speaks of 'compensation, insurance, and maintenance and support allowance payable' to the veteran, and declares that these shall be exempt. We see no token of a purpose to extend a like immunity to permanent investments, or fruits of business enterprises. Veterans who choose to trade in land, or in merchandise, in bonds, or in shares of stock, must pay their tribute to the State. If immunity is to be theirs, the statute conceding it must speak in clearer terms than the one before us here." Petition for writ of *certiorari* in this case was denied by the Supreme Court of the United States. *Security National Bank, guardian, petitioner, v. State of North Carolina, ex rel. State Hospital for the Insane at Raleigh*, 295 U. S., 761; 79 L. Ed., 1704.

Even if it be conceded that defendant can plead the exemption provisions of the New York Workmen's Compensation Act and that the same is available to him in this State, such exemption is not shifted from the money to property acquired by him through the use of said money. Any exemption to which the defendant might be entitled under the laws of the State of New York, or to which he is entitled under the laws of this State, extends only to the money received in compensation for his injuries. When he elects to part with the money the exemption ceases.

It neither follows the money into the hands of the person to whom it is paid, nor attaches to the newly acquired property.

It might be well to note in passing that "the dominion of a state over personal property within its borders is complete and its right to regulate its transfer and subject it to process and execution in its own way and by its own laws is unquestioned." 5 R. C. L., 927. "Exemption laws are a protection only against executions issued in the state where the claimant resides. They have no extra-territorial effect." *Sexton v. Insurance Co.*, 132 N. C., 1; *Balk v. Harris*, 122 N. C., 64; 45 L. R. A., 257. "Exemption laws are not a part of the contract; they are a part of the remedy and subject to the law of the forum." *R. R. v. Sturm*, 174 U. S., 710, and cases there cited. Speaking to the subject in *Goodwin v. Claytor*, 137 N. C., 225, it is said: "The right of exemption under the laws of Virginia cannot be enforced here. It is well settled that exemption laws have no extra-territorial effect. They are not, in respect to the question now under consideration, a part of the contract, but relate only to the remedy, and the right to an exemption is, therefore, subject to the law of the forum." To hold otherwise would be but to concede that the State of New York by its laws can exercise direct jurisdiction and authority over personal property within the State of North Carolina and exempt it from execution whenever such money is received from or through a court of the State of New York.

The judgment below is

Affirmed.

MARTHA JOSEPHINE O. SEBASTIAN, EXECUTRIX, v. HORTON MOTOR LINES.

(Filed 15 June, 1938.)

1. Automobiles § 12c—Failure to stop before entering through street intersection is not negligence per se.

The failure of defendant's driver to come to a complete stop before entering a through street intersection is not negligence *per se*, but only evidence of negligence to be considered with other facts in the case, such holding being a necessary corollary to the provision of ch. 407, Public Laws of 1937, sec. 120; N. C. Code, 2621 (305), that failure to stop before entering a through street intersection should not be considered contributory negligence *per se*, but only evidence to be considered with the other facts in the case upon the issue of contributory negligence.

2. Negligence §§ 1, 11—

There is no essential difference between negligence and contributory negligence; contributory negligence being merely the negligence of the plaintiff, who becomes defendant, *pro hac vice*, upon the issue of contributory negligence.

3. Death § 8—Court may not instruct jury what the age of testate was or that his life expectancy was a stated number of years.

In an action for wrongful death, an instruction that, according to the mortuary table, testate's age being a stated number of years, his life expectancy was a certain number of years, is error as being an expression of opinion by the court as to the sufficiency of the proof of the fact of age and the life expectancy, contrary to C. S., 564.

4. Automobiles § 12e—While motorist may assume that others will stop before entering through street intersection, he must use due care for own safety.

While a motorist traveling along a through street may assume that other motorists will stop before entering the intersection from a side street, he remains under duty to conform to the rule of the reasonably prudent man, and an instruction that intestate, who was driving along the through street, had a right to assume that defendant's truck would stop before entering the intersection from a side street, *is held* erroneous for failing to further instruct the jury on the issue of contributory negligence as to whether intestate acted with due care in keeping with the exigencies of the occasion upon evidence that the truck had almost passed through the intersection before intestate reached same, and that intestate, notwithstanding, attempted to pass in front of the truck.

APPEAL by defendant from *Bivens, J.*, at February Term, 1938, of GUILFORD.

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

Plaintiff's husband and testator, Dr. S. P. Sebastian, was killed in the early morning of 24 June, 1937, at the intersection of Benbow Road and Washington Street, Greensboro, N. C., when defendant's truck and trailer, driven by J. S. Poteat, collided with the Plymouth coupe operated by the deceased.

It is in evidence that by ordinance of the city of Greensboro, passed pursuant to authority contained in the Motor Vehicle Law, "Washington Street from Macon Street to McConnell Road" was designated a "Through Highway" with a lawful rate of speed not exceeding thirty miles an hour, and that upon the surface of the traveled portion of Benbow Road immediately before entering the intersection with Washington Street is the word "S T O P" in large letters painted upon the ground.

The evidence is conflicting as to the speed of both vehicles when they entered the intersection. The defendant's driver testified: "When entering that intersection I slowed my truck down to almost a standstill and placed it in second gear and looked in both directions. . . . I did not see anything. . . . I would not say I came to a complete stop, but almost. At the time I entered the intersection I was not

traveling over six or eight miles an hour. . . . When I was almost across the street this car came running right in front of me. I cut slightly to the right and his rear fender and wheel hung the left-hand side of my bumper."

There is other evidence that the truck entered the intersection around 30 or 40 miles an hour and that it was running too fast to stop.

The speed of Dr. Sebastian's car is variously estimated from 10 or 15 to 40 miles an hour. "It looked like it turned to the left and tried to get in front of the truck. . . . It did not stop. It looked like it tried to go in front of the truck. In fact, he did try to get in front of the truck. . . . The truck was going south and it was on its right-hand side of the street. It had nearly passed through the intersection. It lacked 7 or 8 feet of having passed through. Dr. Sebastian pulled his car to his left."

The following excerpt from the charge forms the basis of one of defendant's exceptive assignments of error:

"The court charges you that if you are satisfied by the greater weight or preponderance of the evidence that the driver of this truck failed to stop at this 'Stop' sign and entered this intersection, that under the law that would be negligence *per se*, or negligence in itself."

Again, in respect of the mortuary table, the jury was instructed as follows: "The court charges you that his expectancy according to this table of mortality, as read to you by the court, the age of Dr. Sebastian being 61 years, that his expectancy is 13.5 years." Exception. The court had previously instructed the jury: "You have a right to consider this statute in making up your verdict, but you are not bound by it."

The following instruction, given in response to a request from the jury, is also assigned as error:

Juror: "There is one point of law, I believe, the jury is not entirely clear on, and that is the question of whether or not Dr. Sebastian in approaching this intersection had a right to assume from the fact that there was a 'Stop' sign on Benbow Road that this truck would stop before entering the intersection, and just what right that assumption would give him."

The Court: "Gentlemen of the jury, this being a street designated by the statute or ordinance of the city of Greensboro as a stop street, any person operating a motor vehicle on Washington Street had a right to assume that any person operating a motor vehicle on Benbow Road would come to a stop before entering Washington Avenue."

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff, the damages being assessed at $28,500.

From judgment on the verdict, the defendant appeals, assigning errors.

R. R. King, Jr., S. B. Adams, and Moseley & Holt for plaintiff, appellee.

Cochran & McCleneghan and Sapp & Sapp for defendant, appellant.

STACY, C. J. There are a number of exceptions appearing on the record, but we deem it unnecessary to consider them *seriatim* as rulings upon the following will suffice to dispose of the present appeal.

First: Was it error for the court to instruct the jury that if the driver of defendant's truck failed to stop at the "S T O P" sign on Benbow Road before entering the intersection with Washington Street, a through highway, "under the law that would be negligence *per se*, or negligence in itself"? The law as presently written answers the question in the affirmative.

It is provided by ch. 407, Public Laws 1937, sec. 120, that the State Highway Commission with reference to State highways, and local authorities with reference to highways under their jurisdiction, may designate main traveled or through highways by erecting at the entrance thereto, from intersecting highways, signs notifying drivers of vehicles to come to a full stop before entering or crossing such designated highway, "and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. That no failure so to stop, however, shall be considered contributory negligence *per se* in any action at law for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence."

If the failure to come to a full stop before entering or crossing a through highway in obedience to any such sign duly erected is not to be considered contributory negligence *per se* on the part of a plaintiff in any action at law for injury to person or property, but only evidence of such negligence, we think it follows as a necessary corollary or as the rationale of the statute, that where the party charged is a defendant in any such action, the failure so to stop is not to be considered negligence *per se*, but only evidence thereof to be considered with other facts in the case in determining whether the defendant in such action is guilty of negligence. 1937 Supp. to N. C. Code of 1935 (Michie), sec. 2621 (305); *Keller v. R. R.*, 205 N. C., 269, 171 S. E., 73. Indeed, it may not be inappropriate to say that in an action at law for injury to person or property, the plaintiff therein becomes defendant, *pro hac vice*, upon the issue of contributory negligence. There is really no distinction, or essential difference, between negligence in the plaintiff and negligence in the defendant, except that in an action like the present, the negligence of the plaintiff is called contributory negligence. *Liske v. Walton*, 198 N. C., 741, 153 S. E., 318. The criterion for establishing both is the

same. *Moore v. Iron Works,* 183 N. C., 438, 111 S. E., 776. The same standard applies alike to both. *Pearson v. Luther,* 212 N. C., 412. Hence, according to the rule of equality, if a given act is not to be regarded as contributory negligence *per se* on the part of a plaintiff in any action at law for injury to person or property, the same act ought not to be regarded as negligence *per se* on the part of a defendant in any such action. See *Smith v. R. R.,* 200 N. C., 177, 156 S. E., 508; *S. v. Satterfield,* 198 N. C., 682, 153 S. E., 155; *Weston v. R. R.,* 194 N. C., 210, 139 S. E., 237; *Kimbrough v. Hines,* 180 N. C., 274, 104 S. E., 684. Nothing was said in *Headen v. Transportation Co.,* 211 N. C., 639, 191 S. E., 331, which militates against this position. The question presently presented was not raised in the *Headen case, supra.* The rulings there are accordant herewith.

It will be observed that this exception is not concerned with section 103 of the Motor Vehicle Law, ch. 407, Public Laws 1937, which deals with speed restrictions and *prima facie* evidence arising from speeds in excess of the restrictions therein set out. *Woods v. Freeman, ante,* 314.

Second: Is there error in the instruction, "according to this table of mortality . . . the age of Dr. Sebastian being 61 years, . . . his expectancy is 13.5 years"? It is not perceived wherein the instruction here challenged differs from the one held to be erroneous in *Hubbard v. R. R.,* 203 N. C., 675, 166 S. E., 802, or the one disapproved in *Trust Co. v. Greyhound Lines,* 210 N. C., 293, 186 S. E., 320.

In the instant case, the court made definitive the age of the deceased, as well as his expectancy, and thus expressed an opinion as to the sufficiency of the proof of both facts. This runs counter to C. S., 564, which prohibits the judge from expressing any opinion as to "whether a fact is fully or sufficiently proven." *Cogdill v. Hardwood Co.,* 194 N. C., 745, 140 S. E., 732. The instruction was calculated appreciably to augment the recovery, which it undoubtedly did.

Third: Is there error in the instruction given in response to a request from the jury, that Dr. Sebastian "had a right to assume that any person operating a motor vehicle on Benbow Road would come to a stop before entering Washington Avenue"?

In the circumstances of the case, we are constrained to think that this instruction may have misled the jury in its consideration of the second issue.

It is true, there are expressions in a number of cases seemingly in support of the charge, notably *Hancock v. Wilson,* 211 N. C., 129, 189 S. E., 631; *Jones v. Bagwell,* 207 N. C., 378, 177 S. E., 170; *Cory v. Cory,* 205 N. C., 205, 170 S. E., 629; and *Shirley v. Ayers,* 201 N. C., 51, 158 S. E., 840, and ordinarily the instruction might not be objectionable, but here, there is evidence tending to show that the truck "had nearly passed through the intersection" before the deceased reached it,

and then he undertook to pass in front of the moving truck by turning to his left. *Powers v. Sternberg, ante,* 41. Whether this was in keeping with the exigencies of the occasion should have been submitted to the jury on the issue of contributory negligence. *Meacham v. R. R., ante,* 609.

Notwithstanding Dr. Sebastian's right to expect compliance with the law on the part of the driver of defendant's truck, *Quinn v. R. R., ante,* 48, still this did not lessen his own obligation to conform to the rule of the reasonably prudent man, which was still required of him. *Meacham v. R. R., supra; Powers v. Sternberg, supra.*

The case is an important one. Both sides are greatly interested in the result. A painstaking investigation of the record leaves us with the impression that the above instructions, assigned as errors, weighed too heavily against the defendant.

New trial.

JERRY A. JONES AND FIDELITY & CASUALTY COMPANY v. RANEY CHEVROLET COMPANY.

(Filed 15 June, 1938.)

1. Pleadings § 20—

Upon demurrer, the allegations of the complaint are to be taken as true, and are to be construed liberally in favor of the pleader.

2. Automobiles § 7—Complaint held to state cause of action in favor of guest in car against dealer for alleged defective brakes.

The complaint alleged in substance that plaintiff was an invited guest in an automobile, that because of defective brakes, the car was wrecked, resulting in serious injury to plaintiff, that defendant dealer sold the car to the owner with whom plaintiff was riding, and that the dealer advertised and represented that the car was equipped with good, reliable brakes when it knew that said automobile had brakes defective in material and workmanship, and that the defects would naturally result in the brakes becoming applied in an emergency manner in the ordinary operation of the car, causing the operator to lose control over the car. *Held:* The complaint alleged negligence, and injury to a passenger in the car as a proximate result of the alleged negligence and facts from which injury might have been foreseen, and defendant dealer's demurrer to the complaint should have been overruled.

APPEAL by the plaintiffs from *Cranmer, J.,* at March Term, 1938, of NEW HANOVER. Reversed.

Albert W. Cowper, Poisson & Campbell, and J. A. Jones for plaintiffs, appellants.

E. K. Bryan and Burney & McClelland for defendant, appellee.

SCHENCK, J. This is an appeal from a judgment sustaining a demurrer upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

The complaint alleges that the General Motors Corporation (not a party to this action) was and is engaged in the manufacture of automobiles for the use of the general public, said automobiles being designed and constructed to carry several passengers other than the operators thereof; that among the automobiles so manufactured was the Chevrolet automobile constructed for the purpose of carrying passengers over the public highways of the various states, including the public highways of New Hanover County, North Carolina; that the General Motors Corporation designed and constructed said Chevrolet automobiles so that "they could be used and were used, to the knowledge of the defendant (Raney Chevrolet Company), for carrying of passengers and guests by the owners and operators of said automobiles," and that such use was general throughout the United States, and that such automobiles were "so operated and used, to the knowledge of the defendant" in New Hanover County; that among the equipment used in the construction of the Chevrolet automobile by the General Motors Corporation, and forming a part of the standard equipment, was four-wheel brakes, and that "a substance, referred to as lining, formed a part thereof," and that said brakes were the means of controlling the operation of said automobiles upon the highways, "to the knowledge of said defendant"; that the defendant knew "that automobiles equipped with defective or inferior braking apparati endangered the owners and operators of said automobiles, their invited guests and other persons riding in said automobiles"; that the General Motors Corporation carried on its business in New Hanover County through the defendant Raney Chevrolet Company at Wilmington, North Carolina, said defendant acting as agent and distributor of the Chevrolet automobile for the General Motors Corporation, and was so acting on 30 July, 1934; and

"11. That the said General Motors Corporation constructed its Chevrolet automobiles and particularly those coming within the model of the Chevrolet coach, Motor No. M-803399, Serial No. 9CC03-1459, with inferior and defective brakes, in that the material used in the construction of said brakes, and particularly the substance or material referred to as the brake lining, was of an inferior and defective material or substance, said brakes being defective, both in material and in workmanship; in that the said brakes were so constructed and installed that the lining, being of inferior and defective material, was exposed to such an extent that water splashing from the surface of the road, in the normal operation of the automobile during, or immediately following, an ordinary shower of rain, became wet, the lining being of such an inferior

and defective substance and material that it was absorbent and expanded upon coming in contact with water or other liquid substance and, on account of the fact that the mechanical construction of the brakes was such that, upon the expansion of the lining or the tightening of the braking equipment on any one of the four wheels of the said automobile, all of the brakes would automatically be applied in an emergency state, thus rendering the operation and control of the automobile impossible, by the operator or driver thereof, and constituted said automobile a dangerous instrumentality when it was undertaken to be operated upon the public highways.

"12. That, as the plaintiff is advised, believes and so alleges, the braking equipment of the said Chevrolet automobiles manufactured by the General Motors Corporation and sold by it through the defendant Raney Chevrolet Company were so defective in material and workmanship and the automobiles so equipped were such dangerous instrumentalities that the said General Motors Corporation undertook to require all its dealers, among whom was the Raney Chevrolet Company, to have the owners of said automobiles equipped with the said defective brakes, as hereinbefore described, returned to them by the owners thereof and repaired, by the installation of material and equipment free from defects, either in construction or workmanship.

"13. That, as plaintiff is advised, believes and so alleges, the Raney Chevrolet Company sold a 1933 model Chevrolet coach, Serial No. 9CC03-1459, Motor No. M-803399, to J. P. Riggs on 18 June, 1934, which said automobile, as the plaintiff is advised, believes and so alleges, was equipped with inferior and defective braking equipment, that is, defective in material and workmanship as hereinbefore described in this complaint.

"14. That, as the plaintiff is advised, believes and so alleges, the sale of said automobile to the said J. P. Riggs by the defendant was with the knowledge on the part of the said defendant of the defective and dangerous condition of said automobile, having particular reference to its braking equipment and arrangement, and that said automobile so equipped with brakes defective in workmanship and material was a dangerous instrumentality and subjected the said J. P. Riggs and those whom he might invite to ride with him, the general public and particularly this plaintiff, to serious danger, and endangered the life and limb of the said J. P. Riggs, purchaser, his invited guest, the general public and particularly this plaintiff or any other person or persons whom the said J. P. Riggs might permit to ride with him upon the public highways of North Carolina in said automobile.

"15. That in addition, as the plaintiff is advised, believes and so alleges, to the implied warranty resulting from the manufacture and

sale of automobiles to be used by the general public upon the public highways of the State and thoroughfares in North Carolina and elsewhere, the said defendant advertised its said Chevrolet automobile as being equipped with dependable and reliable brakes, free from defect in material and workmanship, including the automobile hereinbefore described as having been purchased by J. P. Riggs, and the defendant specifically warranted the said automobile when it was sold and delivered to the said J. P. Riggs to be in a good mechanical state of repair, with adequate brakes, free from defects in material and/or workmanship."

The complaint further alleges that on 30 July, 1934, the plaintiff was injured while riding as an invited guest in the automobile purchased by J. P. Riggs from the defendant, and that at the time the automobile was being operated by J. P. Riggs in a careful and prudent manner, and because the brakes suddenly and without warning, due to defective material and workmanship, became applied in an emergency state, and, in spite of the efforts of the operator to the contrary, the automobile was hurled off the road, inflicting upon the plaintiff serious and permanent injury.

The complaint further alleges that the corporate plaintiff, the Fidelity & Casualty Company, has paid and is paying to the plaintiff, Jerry A. Jones, as an employee of the Tide Water Power Company, under a policy of liability insurance issued to said power company by said casualty company under the provisions of the North Carolina Workmen's Compensation Act, and that said casualty company is entitled to be subrogated to the rights of the plaintiff Jones, to the extent of its payments to him, in such recovery as he may make in this cause.

We are of the opinion, and so hold, that his Honor erred in sustaining the demurrer. Upon the demurrer the allegations of the complaint are to be taken as true, and are to be construed liberally in favor of the pleader. The complaint in effect alleges that the defendant sold to J. P. Riggs a passenger automobile to be used upon the public highways of New Hanover County, that at the time of the sale the automobile had defective brakes—defective in material and workmanship, and that notwithstanding the defect was known to it, the defendant "advertised" and represented to the purchaser that said automobile was equipped with dependable and reliable brakes; and that while being operated by the purchaser in a careful and prudent manner said automobile, due to defective brakes, wrecked, thereby injuring the plaintiff, who was riding therein as an invited guest of the purchaser. The allegation of the selling and delivery of an automobile with an advertisement and representation that it was equipped with reliable and dependable brakes when it was known that said automobile had defective brakes is an allegation of negligence; and the fact that such alleged negligence might proxi-

mately cause injury to a passenger in said automobile is an event that might, in the exercise of reasonable care, have been foreseen.

An interesting discussion of the liability of the seller of a defective and unsafe automobile for injury or damage caused thereby is found in the Annotation contained in 99 A. L. R., on pages 240 *et seq.*

The judgment below is

Reversed.

JOHN H. KALTE AND WIFE, ELIZABETH E. KALTE, v. CITY OF LEXINGTON.

(Filed 15 June, 1938.)

1. Trial § 11: Courts § 2d—In proper instances, Superior Court may consolidate for trial appeals from justice of the peace.

When plaintiff institutes several actions in the same right in the court of the justice of the peace against the same defendant, which might have been united except for the jurisdictional limitation of the justice's court, and a common defense is set up as to each cause, the Superior Court, upon appeal of the several actions, may consolidate same for trial.

2. Municipal Corporations § 48: Justices of the Peace § 4—Pleadings must be written and verified in action against city in justice's court.

While ordinarily a pleading may be verified or not, and in an action instituted in the court of a justice of the peace the pleadings may be written or verbal, when an action against a city on a money demand is instituted in a justice's court the pleading must be written and verified, since C. S., 1330 requires that in an action against a city on a money demand the complaint must be verified, and defendant city's motion to nonsuit should be allowed when the action is instituted by summons without written pleadings.

APPEAL by defendant from *Bivens, J.*, at February Term, 1938, of DAVIDSON.

Civil actions to recover on interest coupons on bonds.

On 18 October, 1937, plaintiff instituted eighteen civil actions in justice of the peace court of Davidson County. In each the summons is to answer complaint for the nonpayment of an interest coupon on bond of the city of Lexington due to plaintiffs. In six of the actions the amount demanded is $23.75, and in twelve $25.00. Formal complaint is not filed, but there appears on the face of each summons these words: "Notice served, payment demanded and refused 11 October, 1937."

On 21 October, 1937, defendant filed demurrer in each action for that the summons does not state a cause of action in that plaintiff has failed to comply with the provisions of: (1) C. S., 1330, relative to filing claims with municipalities, and (2) Private Laws 1933, ch. 70, relative

to requirement in filing claims against the city of Lexington. The demurrers were overruled without prejudice to defendant filing answers. In answer filed in each case defendant denies the general allegations of the summons, and sets up (1) the pendency in Superior Court on appeal of an action on the coupon described in the summons, and (2) the plea of multiplicity of actions, based on one item, the sum of $442.50, in accordance with claim filed with the board of commissioners of the city of Lexington, an amount beyond the jurisdiction of the court of justice of the peace.

From judgment rendered in favor of plaintiffs in each action, defendant appealed to the Superior Court, where, on motion of plaintiffs, and over defendant's objection, the court, in the exercise of discretion, consolidated all of the actions for the purpose of trial. Thereupon defendant demurred to the summons as complaint in each case. Overruled. Exception.

On the trial plaintiffs offered evidence tending to show that they own certain Street Improvement Bonds and certain Water and Light Bonds of the city of Lexington, and past due unpaid interest coupons thereon, on which the actions respectively are based; that on 11 October, 1937, the plaintiffs presented in person to the mayor and city council in regular meeting assembled, a written demand for payment duly sworn to before a notary public, in which the eighteen interest coupons were listed separately as to number, maturity and amount with the character and number of bond; and that, in writing duly signed, receipt of the claim was acknowledged and, "Upon consideration of same by said board, same was refused."

Defendant offered testimony tending to show only that on 18 October, 1937, plaintiffs took nonsuit in five actions pending on appeal in the Superior Court; that plaintiffs are taxed with the cost and that same is not paid. There is no evidence tending to identify any of the matters therein involved with the subject matter of the consolidated cases.

Defendant's motion for nonsuit was denied. Upon peremptory instruction there was verdict for plaintiff on the single issue of indebtedness. From judgment thereon defendant appealed to the Supreme Court, and assigns error.

C. N. Cox for plaintiff, appellees.
P. V. Critcher for defendant, appellant.

WINBORNE, J. Upon the facts presented on this appeal the decisive questions are: (1) Did the court below err in consolidating the cases for the purpose of trial? (2) In an action in justice of the peace court on debt against a city, is the plaintiff required to file a verified com-

plaint and set forth the allegations in compliance with C. S., 1330? (3) Was refusal of motion for judgment as of nonsuit error?

We answer the first issue "No" and the second and third "Yes."

1. A consolidation may be ordered where the plaintiff in the same right institutes several actions against the same defendant on several causes of action which he might have united in one, and a common defense is set up to all. *Buie v. Kelly,* 52 N. C., 266; *Hartman v. Spiers,* 87 N. C., 28. Other cases bearing upon the subject are: *Wilder v. Greene,* 172 N. C., 94, 90 S. E., 439; *Ins. Co. v. R. R.,* 179 N. C., 255, 102 S. E., 417; *Henderson v. Forrest,* 184 N. C., 230, 114 S. E., 391; *Blount v. Sawyer,* 189 N. C., 210, 126 S. E., 512; *Fleming v. Holleman,* 190 N. C., 449, 130 S. E., 171; *Rosenmann v. Belk-Williams Co.,* 191 N. C., 493, 132 S. E., 282; *Trust Co. v. Green,* 204 N. C., 780, 168 S. E., 529; *Hewitt v. Urich,* 210 N. C., 835, 187 S. E., 759.

2, 3. Ordinarily, it is correct to say that in actions brought in a court of a justice of the peace the parties have an election to plead either orally or in writing, but the conclusion does not follow in an action against a municipality—requiring verified complaint. C. S., 1330, provides in part that "every such action (against municipalities) shall be dismissed unless the *complaint is verified* and contains" the allegations therein specified.

In McIntosh Prac. and Proc., page 369, it is said: "In certain proceedings a verification is required as an essential part of the pleadings—(among others)—in an action against a county or municipal corporation." In *Nevins v. Lexington,* 212 N. C., 616, 194 S. E., 293, an action in the court of a justice of the peace in which written verified complaint was filed, this Court said that C. S., 1330, is applicable to that action.

If the complaint in an action against a municipality must be verified in order to save it from dismissal, it follows that the pleading must be in writing and verified, regardless of the court in which the action is instituted.

Ordinarily, in actions brought in the Superior Court or other court of record, where the pleadings are required to be in writing, the plaintiff may verify his complaint or not according to his election, but such election is not open to a plaintiff in an action against a municipality requiring verified complaint. Otherwise, C. S., 1330, would be without meaning. This statute applies to "every such action" against a municipality, without reference to the amount involved or the court in which the action is brought.

The judgment below is

Reversed.

STATE v. JOHN ERNEST HOWIE, ALIAS HOWARD.

(Filed 15 June, 1938.)

1. Criminal Law § 41c—

In this prosecution for rape, testimony of prosecutrix that she told her mother about the attack *held* properly admitted for the purpose of corroborating the witness.

2. Criminal Law § 29c—Evidence of guilt of another is incompetent when it raises only an inference.

In a prosecution for rape, testimony of defendant that another man had made threats to get him out of the way, and was seen talking to the prosecutrix before the commission of the alleged crime, introduced for the purpose of showing that such other man and the prosecutrix "framed" defendant, *is held* properly excluded, since it creates only an inference.

3. Criminal Law § 41b—

Upon cross-examination of defendant, the State may ask him whether he is under indictment for other crimes.

4. Criminal Law § 41c—

A police officer was permitted to testify as to prosecutrix' identification of defendant out of a line of suspects. Defendant objected thereto on the ground he was not present. *Held:* Whether defendant heard the accusation is a matter for the jury, and the testimony was competent for the purpose of corroborating prosecutrix.

5. Criminal Law § 53g—

Objection to the statement of the contentions of the State must be made at the time in order to be considered on appeal.

6. Criminal Law § 78d—

An assignment of error must be supported by an exception in order to be considered on appeal.

7. Rape § 10—

Exception to the judgment of the court upon the verdict of guilty of rape for failure of the judgment to show upon its face that defendant is a male person of the age of responsibility is untenable when no contention of incapacity is made on the trial, incapacity being a matter of defense.

8. Criminal Law § 79—

Exceptions not set out in the defendant's brief, or in support of which no reason or argument is stated or authority cited, will be deemed abandoned. Rule of Practice in the Supreme Court, No. 28.

APPEAL by defendant from *Phillips, J.*, at January Term, 1938, of FORSYTH.

Criminal indictment charging defendant with the crime of rape upon one Mrs. Margaret Wilkins.

The State offered evidence tending in brief to show that: About four o'clock on the afternoon of 20 November, 1937, while the prosecutrix, a married woman, living with her husband and mother of a child, was walking upon the streets of Winston-Salem, from the home of her mother-in-law to the home of her mother, where her child was visiting, the defendant whom she did not know, met her and asked if she wanted a taxi. She told him no, and passed on. Then, as she proceeded, a block or more away and while walking a nearer way across the colored school grounds, the defendant again met and accosted her, and by threat of violence caused her to enter an automobile parked in nearby street and ride with him to a secluded place out in the country where he ravished her. He brought her back into the city and let her out. On the trip defendant forced her to lie down on the seat with her head in his lap. As she left the automobile she looked at the license number, and then went into a furniture store, a short distance away, where she obtained paper and pencil on which she wrote the license number and kind of automobile. She then went to and told her mother what had happened. Policemen were called. The license number was turned over to them. On Monday, following, the owner of the automobile was arrested, and in consequence of information given by him the defendant was arrested. That afternoon from a group of seven Negro men lined up in police station, the prosecutrix identified the defendant as her assailant. The prosecutrix was highly nervous when she went into the furniture store, and throughout the night. She was examined by a doctor whose testimony tended to corroborate her testimony as to the act.

The defendant denied that he committed or had any knowledge of the crime. Defendant offered evidence tending to establish an alibi, on which he relied.

Verdict: Guilty of the crime of rape as charged.

Judgment: Death by asphyxiation.

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

W. Reade Johnson for defendant, appellant.

WINBORNE, J. The record fails to reveal error. Defendant sets forth several assignments of error, to which we advert *seriatim.*

(1) Prosecutrix was permitted to testify that she told her mother about the attack. The court admitted the testimony only for the purpose of corroborating the witness, for which purpose it is competent. *S. v. Broadway,* 157 N. C., 598, 72 S. E., 987; *S. v. Spencer,* 176 N. C., 709, 97 S. E., 155; *S. v. Journegan,* 185 N. C., 700, 117 S. E., 27.

(2) In support of his contention that he did not commit the crime, and for the purpose of showing that, if the crime were committed, it

was done by another, defendant offered to show that another Negro man, Matthew Simpson, who wanted to marry a Negro girl by whom defendant had a child, had been heard to tell the girl, "If you don't marry me, you won't do anybody else any good. If I marry you I will get Ernest (the defendant) out of the way and he won't know how I done it and you won't." That, thereafter, and on some Saturday afternoon in November, 1937, the prosecutrix was seen on a street in Winston-Salem talking to Simpson, from whom she received a piece of paper, and then walked off. This testimony, upon objection, was properly excluded. It is defendant's contention that Simpson was using prosecutrix "to frame him." If the evidence be accepted, it creates only an inference. In *S. v. Smith,* 211 N. C., 93, 189 S. E., 175, it is said: "While under certain circumstances it has been held by this Court competent for the defendant to introduce evidence tending to show that someone else than he committed the crime charged, *S. v. Davis,* 77 N. C., 483, it is well settled that such evidence is not admissible unless it points directly to the guilt of the third party; evidence which does no more than create a inference or conjecture as to such guilt is inadmissible."

(3) On cross-examination, over objection, defendant was asked if he and another were indicted for raping Helen Thompson on 30 October. Later in his testimony defendant admitted, without objection, that he is indicted, has been tried in police court and bound over on charge of raping her.

But in any event such questions on cross-examination are proper under the decisions of this Court. In *S. v. Maslin,* 195 N. C., 537, 143 S. E., 3, after reviewing the decisions of this State, the Court said: "Questions of this kind have been generally indulged in the practice, and permitted in the trial courts, and if the decisions heretofore cited are to be recognized as the law, it is manifest that there was no error in overruling the exception on this point."

(4) On the question of identification, Lieut. Ledwell, a policeman, testified that the prosecutrix walked up the line of men, came back and said, "The one on the end is the man." I says, "Go back and point him out." She walked back up in front of Ernest Howie and says, "There is the man there." Defendant contends there is no evidence tending to show that the above incident occurred in the presence of defendant. The conversation occurred in the same room, not more than ten feet from the line of men. Whether defendant heard the accusation is a matter for the jury. *S. v. Wilson,* 205 N. C., 376, 171 S. E., 338. The testimony is competent for the purpose of corroborating the testimony of the prosecutrix in identifying the defendant. *S. v. Mansell,* 192 N. C., 20, 133 S. E., 190.

(5 and 6) These assignments relate to statement by the court of portions of the State's contentions. There is testimony upon which the

contentions are fairly based. But, if objectionable, the defendant should have called the matter to the attention of the court at the time so that the court could correct any error. Objection after verdict comes too late.

(7) There is no exception upon which to base this assignment.

Assignments 8, 9 and 10 are formal.

(11) Objection is made to the judgment for that it does not show upon its face that the defendant is a male person above the age of responsibility for crime. In the testimony of the witnesses the defendant is referred to as a man. During the trial no contention was made that the defendant was immune from crime upon the grounds of lack of capacity. This is a matter of defense. In the absence of evidence tending to show immunity of defendant, it is unnecessary for the court to advert to it. *S. v. Arnold,* 35 N. C., 184; *S. v. McNair,* 93 N. C., 628; *S. v. Walker,* 193 N. C., 489, 137 S. E., 429.

Other exceptions not set out in the brief of defendant, appellant, or in support of which no reason or argument is stated or authority cited, will be deemed to be abandoned. Rule of Practice in the Supreme Court No. 28.

Though there is no motion for nonsuit, it is proper to say that the evidence reveals a case for the jury. The court fully, fairly and correctly presented the case to the jury in a charge to which there is no tenable exception. We have considered every exception and find

No error.

STATE v. MELVIN PETREE.

(Filed 15 June, 1938.)

1. Homicide § 30—

When there is no motion to nonsuit in a prosecution for homicide, the sufficiency of the evidence of premeditation and deliberation to warrant the submission of the question of guilt of murder in the first degree is not presented for review.

2. Homicide § 25—

Evidence in this case held sufficient to be submitted to the jury upon the question of defendant's guilt of murder in the first degree.

3. Homicide § 30—

The contention of error in the court's charge on the questions of premeditation and deliberation and on the plea of self-defense must be presented for review by proper exceptions to the charge.

4. Homicide § 27b—

When the court fully charges the law on the burden of proof it is not required that the court repeat "beyond a reasonable doubt" in the portion of the charge relating to the consideration to be given evidence of motive.

5. Homicide § 10—

The evidence tended to show that defendant shot and killed the male companion of his estranged wife while they were seated in a cafe. *Held:* An instruction that if defendant killed deceased with malice and premeditation and deliberation, and did it on account of his wife, the crime would be murder in the first degree, is without error.

6. Homicide § 27g—

Instruction on question of conviction of lesser degrees of the crime charged *held* without error.

7. Homicide § 27f—

An exception to the court's instruction that if the jury found from the evidence that defendant killed in his proper self-defense, as theretofore defined by the court, then its verdict would be not guilty, *held* untenable.

APPEAL by defendant from *Phillips, J.*, at November Term, 1937, of FORSYTH. No error.

This is a criminal action in which the defendant was tried under a bill of indictment charging him with the capital felony of murder.

The defendant and his wife had separated. On 14 September, 1937, the defendant went to the Central Sandwich Shop looking for his wife. She was sitting on one of the stools at the counter with Ozzie Collins. The deceased was sitting on a stool next to the defendant's wife. When the defendant walked in he remarked: "I have run down on you all again." He then called to his wife and she went to him. In the conversation which followed she remarked to the defendant: "Melvin, this man is nothing to me." The deceased then said: "No sir, mister, that lady ain't nothing to me." The defendant then shot twice. One bullet struck the deceased back of the left ear, causing almost instant death. All of the evidence other than that of the defendant tends to show that the deceased did not get up from the stool on which he was sitting until he was shot. The defendant, however, testified that the deceased arose and started towards him, making a motion as if to put his right hand in his hip pocket, and that he, the defendant, then shot.

There was a verdict of guilty of murder in the first degree. From judgment pronounced thereon the defendant appealed.

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

A. B. Cummings for defendant, appellant.

BARNHILL, J. In his brief filed on this appeal the defendant contends that there are three questions of law presented for determination, to wit:

"(1) Was there sufficient evidence of premeditation and deliberation to warrant submission of murder in the first degree?

"(2) Did the court err in its charge of premeditation and deliberation in failing to apply the law to the particular facts of this case?

"(3) Did the court err in applying the law to the facts relative to the defendant's plea of self-defense?"

There is no exceptive assignment of error in the record which presents either one of these questions for determination. There was no motion for judgment as of nonsuit. Therefore, the sufficiency of the evidence is not challenged. However, it is not inappropriate to say that the evidence is amply sufficient to be submitted to a jury on the question of defendant's guilt or innocence on the charge contained in the bill of indictment. There are certain exceptions to portions of the charge of the court. Neither one of these exceptions involves either the alleged failure of the court to properly charge the jury on premeditation and deliberation, or on the defendant's plea of self-defense. Nor do they present the alleged failure of the court to properly apply the law to the facts developed by the evidence.

Exception No. 1 is to the following portion of the charge:

"It is not necessary, Gentlemen of the Jury, to show a motive for the commission of a crime, where motive is not of its essence, but the jury may consider the presence or absence of motive as established by the evidence as tending to establish or negative malice or deliberation or premeditation."

This assignment of error cannot be sustained. The court fully charged the jury as to the law on the burden of proof and it was not required to repeat "beyond a reasonable doubt" in that portion of the charge excepted to.

Exception No. 2 is to the following portion of the charge:

"Court further charges you, Gentlemen of the Jury, if the defendant in this case fixed in his mind prior to the killing the firm, fixed design and intention to kill and after doing so, he premeditated within the meaning of the law and deliberated within the meaning of the law, and with malice he killed, and did it on account of his wife, it still would be murder in the first degree."

This portion of the charge contains a correct statement of the law.

Exception No. 3 is directed to a portion of the charge which reads as follows:

"If you find from the evidence and beyond a reasonable doubt that the defendant shot and killed the deceased with malice and with premeditation and deliberation, as heretofore defined and explained to you by the court, then, Gentlemen of the Jury, it would be your duty to return a verdict of guilty of murder in the first degree, and that would be your verdict. If you fail to find the defendant guilty of the capital crime of murder in the first degree, then by your verdict say whether you find the defendant guilty of murder in the second degree, which is

the unlawful killing of a human being by another with malice, but without premeditation and deliberation. If you find the defendant guilty of murder in the second degree, that would be your verdict. If you fail to find the defendant guilty of murder in the first degree or murder in the second degree but do find that the defendant unlawfully killed the deceased, not with malice, not with premeditation, not with deliberation, but unlawfully killed him, then your verdict would be guilty of manslaughter."

In this statement of the law we can see no error.

Exception No. 4 is as follows:

"But, on the other hand, if you find from the evidence in the case, Gentlemen of the Jury, that the defendant neither killed with malice, nor with premeditation, nor with deliberation, nor unlawfully, but that the defendant killed in proper self-defense of his life and person, as heretofore defined and explained to you by the court, then, Gentlemen of the Jury, your verdict would be not guilty."

We are unable to discover any merit in this exception.

Defendant's other exceptions are formal.

We have carefully examined the record proper and find no error therein. Defendant's exceptive assignments of error as herein set forth in detail present no meritorious cause for disturbing the verdict. It follows that there was no error in the trial and the judgment is affirmed.

No error.

ELLA HOUSTON v. THE CITY OF MONROE.

(Filed 15 June, 1938.)

1. Municipal Corporations § 14—Evidence held insufficient to establish liability on part of city for pedestrian's fall on walkway across street.

The evidence tended to show that plaintiff was seriously injured when she fell on the walkway across a street at a bowl-shaped dip or depression 11 inches wide and 13 inches long and from 1¼ to 2½ inches deep at its lowest point, that the street lights were burning, that plaintiff was familiar with the crossing, having passed that way a short time before, and that she could have seen the situation had she been looking, but that she was not looking where she was going. *Held:* The evidence fails to establish liability on the part of the city, and its motion to nonsuit should have been allowed.

2. Same—

A municipality is not an insurer of the safety of its streets and sidewalks.

3. Negligence §§ 19a, 19b—

While a motion to nonsuit on the issue of negligence or contributory negligence often presents difficult questions, when it appears from all the evidence that plaintiff ought not to recover, it is the duty of the court to take the case from the jury.

APPEAL by defendant from *Harding, J.*, at February Term, 1938, of UNION.

Civil action to recover damages for personal injuries sustained by plaintiff when she fell on one of the public streets in the city of Monroe, due to a depression or hole in the walkway crossing the street.

The record discloses that after dark on the evening of 22 January, 1937, the plaintiff and two companions, who lived in Monroe, walked several blocks to the home of a friend where a death had occurred, and on their return between 9:30 and 10:00 o'clock, while traversing the same way they had gone earlier in the evening, the plaintiff fell on the hard-surfaced walkway crossing Windsor Street, and was severely injured. She stepped in a hole or bowl-shaped depression 11 inches wide and 13 inches long and from 1¼ to 2½ inches deep at its lowest point. There is a white line indicating the existence of the walkway across the street. The crosswalk was at least seven feet wide.

One of plaintiff's companions testified: "The place where Miss Ella stepped was the shape of a tin pan exactly. I would say it was two inches deep at the deepest point, and it shallowed out towards the edge just like a bowl."

The other companion testified: "I observed nothing unusual about the condition of the streets or the lights. I pass that place almost daily myself and have been doing so for years. I don't remember whether she fell in a hole or not. I just remember that it was an outline of unevenness."

The condition in the crosswalk was described by other witnesses as (1) "just a dished out place. It was cracked on the outside and a little at the bottom." (2) "It wasn't a hole, just a sunken in place, more of a dip, dropped down about an inch and a quarter as if a heavy truck had smashed it in, a concave depression, right by the side of the white line."

The street lights were burning, and there was a white-way light at the intersection.

Plaintiff testified: "The lights were poor and I was in the middle, and I think the shadow of their skirts would keep me from seeing the hole."

On cross-examination she said: "I have been passing this corner going up street all my life. I didn't notice anything unusual about the crossing when we crossed and were going up town. I suppose the same lights were burning when we came back. . . . Well, I don't know which way I was looking. I don't know if I was looking in the street where I was walking. Certainly I would have seen the hole if I had been

looking. . . . I guess I said that if I had been looking where I was going, I could have seen the hole, if you say I did. Yes, I said I was not looking, and I was not; and I didn't know anything until I stepped in the hole."

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff.

From judgment on the verdict defendant appeals and assigns as error the refusal to nonsuit.

Vann & Milliken for plaintiff, appellee.
E. Osborne Ayscue for defendant, appellant.

STACY, C. J. The description of the place in the crosswalk where plaintiff fell, according to her own witnesses, ranges all the way from "an outline of unevenness" to a dip or depression, tin pan or saucer-shaped, 11 or 13 inches in diameter, 2½ inches deep at the center, and it tapered out to nothing or "shallowed out towards the edge just like a bowl." Plaintiff was familiar with the intersection. She knew the condition of the crosswalk, and could have seen the situation had she been looking, but she was not looking where she was going. She and her companions had passed over the intersection only a short time before. The defendant alleges in its answer that "a reasonable and ordinary inspection of the street would not have revealed the existence of the depression."

In the circumstances thus disclosed by the record, we are constrained to hold that the demurrer to the evidence should have been sustained, if not upon the principal question of liability, then upon the ground of contributory negligence. *Burns v. Charlotte,* 210 N. C., 48, 185 S. E., 443. See *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108. A city is not an insurer of the safety of its streets and crosswalks. *Ferguson v. Asheville, ante,* 569; *Oliver v. Raleigh,* 212 N. C., 465; *Fitzgerald v. Concord,* 140 N. C., 110, 52 S. E., 309.

The principle upon which the case rests is stated in 13 R. C. L., 398-399, as follows: "The existence of a hole or depression, or a material inequality or unevenness, or a gap in a sidewalk or crosswalk may constitute such negligence on the part of a municipality as will render it liable to pedestrians for injuries caused thereby. . . . But a municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to mere convenient travel, and slight inequalities or depressions or differences in grade, or a slight deviation from the original level of a walk due to the action of frost in the winter or spring, and other immaterial obstructions, or trivial defects which are not naturally dangerous, will not make a municipality liable for injuries occasioned thereby. The fact that

the surface of a walk may have become uneven from use, or that bricks therein may have become loose or displaced by the action of the elements, so that persons are liable to stumble or be otherwise inconvenienced in passing, does not necessarily involve the municipality in liability, so long as the defect can be readily discovered and easily avoided by persons exercising due care, or provided the defect be of such a nature as not of itself to be dangerous to persons so using the walk. So it has been held that a municipality is not liable for injuries to a pedestrian resulting from slipping or stumbling over a niche left in a sidewalk around a growing tree, from which the tree has been removed, or over a piece of stone projecting slightly above the level of a crosswalk."

The cases of *Bell v. Raleigh,* 212 N. C., 518; *Absher v. Raleigh,* 211 N. C., 567, 190 S. E., 897; *Doyle v. Charlotte,* 210 N. C., 709, 188 S. E., 322; *Sehorn v. Charlotte,* 171 N. C., 540, 88 S. E., 782; *Foster v. Tryon,* 169 N. C., 182, 85 S. E., 211; *Alexander v. Statesville,* 165 N. C., 527, 81 S. E., 763; *Neal v. Marion,* 129 N. C., 345, 40 S. E., 116; *Russell v. Monroe,* 116 N. C., 720, 21 S. E., 550, cited and relied upon by plaintiff, are all distinguishable by reason of different fact situations. It would be supererogatory to point them out in detail. There is no debate as to the general principles applicable to the case. *Diamond v. Service Stores,* 211 N. C., 632, 191 S. E., 358. "A serious and troublesome question is continually arising as to how far a court will declare certain conduct of a defendant negligence and certain conduct of a plaintiff contributory negligence and take away the question of negligence and contributory negligence from the jury"—*Clarkson, J.,* in *Moseley v. R. R.,* 197 N. C., 628, 150 S. E., 184. Nevertheless, when it appears from all the evidence that the plaintiff ought not to recover, it is the duty of the court to say so. *Love v. Asheville,* 210 N. C., 476, 187 S. E., 562; *Powers v. Sternberg, ante,* 41; *Rollins v. Winston-Salem,* 176 N. C., 411, 97 S. E., 211; *Foy v. Winston,* 135 N. C., 439, 47 S. E., 466; *Pinnix v. Durham,* 130 N. C., 360, 41 S. E., 932.

We are cited to the case of *City of Richmond v. Rose,* 127 Va., 772, 82 S. E., 561, as upholding a recovery on a similar state of facts, but an examination of the cited case discloses a fact situation more nearly parallel to that appearing in *Absher v. Raleigh, supra.* Much that is said by the Virginia Court in the *Rose case, supra,* if not all that is said in the valuable opinion rendered therein, is in full accord with our own decisions.

Plaintiff has sustained serious and permanent injuries as a result of her fall, but our conclusion is that the record fails to establish liability therefor on the part of the defendant.

Reversed.

THOMAS B. WOODY AND WIFE, BEATRICE S. WOODY, v. W. R. CATES.

(Filed 15 June, 1938.)

1. Wills § 33c—

A devise to C. for life and no longer, and at her death "to her children then living and to the issue of such children as may be dead, *per stirpes*," conveys a contingent remainder to C.'s children, dependent upon their being alive at her death.

2. Wills § 46: Estoppel § 1—Contingent remainderman held estopped by his deed executed prior to death of life tenant.

Although a contingent remainderman, who is one of a definite class named as ulterior takers after the termination of a life estate, may not convey his interest in fee by deed executed prior to the happening of the contingency, but upon the death of the life tenant, his interest vests, and his title inures to the benefit of his grantee by estoppel.

3. Estoppel § 1—

A deed of trust purporting to convey all interest of the trustor in the land, and empowering the trustees to convey the fee upon foreclosure, although containing no covenants of title, will estop the trustor, upon conveyance of the property by the trustees under foreclosure, from denying title.

4. Same—

When a contingent remainderman survives the life tenant, upon which contingency his title is made to depend, his heirs take through him and not by purchase under the will, and his heirs are estopped by his deed, executed prior to the happening of the contingency, purporting to convey his entire interest.

APPEAL by defendant from *Ervin, Special Judge,* at January Term, 1938, of PERSON. Affirmed.

This was a controversy without action concerning the title to land, the subject of a contract to convey. From judgment for plaintiffs that the title was good, the defendant appealed.

Burns & Burns for plaintiffs, appellees.
F. O. Carver for defendant, appellant.

DEVIN, J. The determination of the question of title presented by this appeal turns upon the construction of the following clause of the will of Josephus Younger, probated in 1902: "I give and devise to my daughter, Maria Carver, during her life and no longer, 300 acres of land (describing it). After the death of my daughter, Maria Carver, I devise the property in this paragraph named to her children then living and to the issue of such of her children as may be dead, *per stirpes.*"

It is admitted that Maria Carver had two children, J. G. Moore (by a former marriage) and Willie E. Carver. J. G. Moore died before his mother, leaving a widow and five children. By proper conveyances plaintiffs acquired title to the interest in the land which descended to the issue of J. G. Moore.

In 1923 Maria Carver and her husband, J. H. Carver, and her son, Willie E. Carver, conveyed to trustees the entire interest of the grantors in the described land for the purpose of securing a debt due by J. H. Carver and Willie E. Carver. The deed of trust empowered the trustees to convey the land in fee simple to the purchaser at foreclosure sale. By proper deed from the trustees pursuant to foreclosure under the power, and by connected chain of conveyances, the title acquired thereunder passed to the plaintiffs. Maria Carver died in 1936. Willie E. Carver survives and has living children. Subsequent to the execution of the deed of trust above mentioned, Willie E. Carver was divorced from his wife.

Was the deed executed by Willie E. Carver during the lifetime of Maria Carver sufficient to convey title to the interest in the land which otherwise would have descended to him at the death of Maria Carver under the will of Josephus Younger?

The devise in remainder to the children of Maria Carver was contingent upon their being alive at her death. Ordinarily, when the remainder is contingent a fee simple title will not pass by the deed of the parties prior to the happening of the contingency upon which the limitation depends, for until the event has occurred it cannot be known who will take. *Mercer v. Downs,* 191 N. C., 203, 131 S. E., 575; *Irvin v. Clark,* 98 N. C., 437, 4 S. E., 30.

But when the limitation is by way of contingent remainder or an executory devise and the person who is to take is certain, an assignment of the contingent interest, being what is termed a "possibility coupled with an interest," will be upheld in equity upon the happening of the event, and the devolution of the property. *Watson v. Smith,* 110 N. C., 6, 14 S. E., 640; *Kornegay v. Miller,* 137 N. C., 659, 50 S. E., 315; *Smith v. Moore,* 142 N. C., 277, 55 S. E., 275; *Beacom v. Amos,* 161 N. C., 357, 77 S. E., 407; *Scott v. Henderson,* 169 N. C., 660, 86 S. E., 603; *Hobgood v. Hobgood,* 169 N. C., 485, 86 S. E., 189; *Lee v. Oates,* 171 N. C., 717, 88 S. E., 889; *Bourne v. Farrar,* 180 N. C., 135, 104 S. E., 170.

"A warranty deed by one having only a contingent remainder in land passes the title, by way of estoppel, to the grantee, as soon as the remainder vests by the happening of the contingency upon which such vesting depends." *Foster v. Hackett,* 112 N. C., 546 (headnote), 17 S. E., 426.

Willie E. Carver could not, during the life of his mother, convey a good title because his title was contingent upon his being alive at her

death. But having executed a deed for the land during the life of his mother, upon her death, his title became indefeasible and it inured to the benefit of his grantees, since he is estopped by his deed. While there is no express warranty in his deed, yet his conveyance is of his entire interest in the land, and he therein empowers his grantees (trustees), upon foreclosure, to convey the land in fee simple, which was thereafter done.

In *Williams v. R. R.*, 200 N. C., 771, 158 S. E., 473, *Adams, J.*, speaking for the Court, states the principle as follows: "Where a grantor executes a deed in proper form intending to convey his right, title and interest in land, and the grantee expects to become vested with such estate, the deed, although it may not contain technical covenants of title, is binding on the grantor and those claiming under him, and they will be estopped to deny that the grantee became seized of the estate the deed purports to convey." To the same effect is *Crawley v. Stearns*, 194 N. C., 15, 138 S. E., 403.

In *Weeks v. Wilkins*, 139 N. C., 215, 51 S. E., 909, it was said: "Where the conveyance purports, as in this case, to pass a title in fee to the entire body of land, the grantor is estopped thereafter to say it does not. The consensus of all the authorities is to the effect that where the deed bears upon its face evidence that the entire estate and title in the land was intended to be conveyed, and that the grantee expected to become vested with such estate as the deed purports to convey, then, although the deed may not contain technical covenants of title, still the legal operation and effect of the deed is binding on the grantors and those claiming under them, and they will be estopped from denying that the grantee became seized of the estate the deed purports to vest in him."

The reason for the rule and the distinction between an estoppel by deed and a rebutter dependent upon warranty is pointed out in *Olds v. Cedar Works*, 173 N. C., 161, 91 S. E., 846; *Baker v. Austin*, 174 N. C., 433, 93 S. E., 949.

Applying the principles deducible from these decisions to the facts agreed in the instant case, it would seem that Willie E. Carver, a child of Maria Carver, was ascertained as one of the ultimate takers under the will of Josephus Younger, contingent upon his outliving his mother, and, though his title was subject to be defeated by his death before his mother, his assignment of his entire interest by deed resulted in the vesting of a good title in his grantees upon his surviving his mother.

Since Willie E. Carver outlived his mother, in the event of his death, his heirs could only claim through him, and not under the will, and hence would be estopped by his deed.

We conclude that the court below has correctly held that the deed tendered by plaintiffs is sufficient to convey the land described in fee simple, and that the judgment must be

Affirmed.

J. R. HOSKINS, A. C. DAVIS AND WIFE, MATTIE B. DAVIS, *v.* BEN V. MAY.

(Filed 15 June, 1938.)

Wills § 33f—Will and codicil held to convey land to devisee generally with power of disposition, carrying the fee simple.

Testatrix devised the land in question to her two sons for the term of their natural lives, remainder to their children and their heirs should any survive them, with further provision that if either son should die without bodily heirs the land should go to the survivor, and if both should die without bodily heirs, the land should go to testatrix' daughters. By codicil, testatrix stated she had decided that each of her children should take what she had given them in the item and do with it as they wished. *Held:* The codicil revoked the item of the will except for the purpose of designating the devisees and the land devised, and substituted in place of the contingencies therein set up the provision that the devisees "take . . . and do with it as they wish," which includes the right of disposition, and the devise to the sons being general, the power of disposition carries the fee to them.

APPEAL by defendant from *Bone, J.*, at April Term, 1938, of ALAMANCE. Affirmed.

A. C. Davis for plaintiffs, appellees.
Long, Long & Barrett for defendant, appellant.

SCHENCK, J. This is an action for specific performance of a contract to purchase lands heard upon an agreed statement of facts. The defendant contracted to purchase certain lands in Alamance County from the plaintiffs. The plaintiffs have tendered deed sufficient in form to convey a fee simple title to said lands to the defendant and demanded of him the agreed purchase price. The defendant has declined to accept the deed and pay the purchase price, alleging that the plaintiffs did not own the lands in fee simple and therefore could not convey a fee simple title thereto.

It is agreed "that the plaintiffs, A. C. Davis and wife, Mattie B. Davis, have acquired the interest in the said lands by conveyance from J. R. and Benjamin Hoskins and quitclaim deeds have been executed between the plaintiffs and the said Benjamin Hoskins, whereby the said lands are divided, and the interest of Benjamin Hoskins in the lands sold the defendant has been acquired by the plaintiffs."

Joseph R. Hoskins and Benjamin Hoskins derived such interest as they have or had in the lands contracted to be sold and purchased by virtue of the will of their late mother, Mary L. Hoskins. It is further

agreed "that the sole question arising upon the pleadings in this cause and upon the agreed statement of facts is whether the plaintiff J. R. Hoskins, and his brother, Benjamin Hoskins, were given a fee simple title in and to the lands in question under Item One of the will of Mary L. Hoskins and the codicil thereto, or only a life estate therein."

The portions of the will of Mary L. Hoskins and codicil thereto germane to this case are as follows:

"I, Mary L. Hoskins of Summerfield Guilford County state of North Carolina being of sound mind and memory do declare this to be my last will and testament.

"I. I give and devise to my sons Joseph R and Benjamin Hoskins my farm known as the Boon place in Alamance Co., N. C. containing about 163 acres share and share alike for the term of their natural lives remainder to their children and their heirs should any survive them. If one of them should die without bodily heirs then it is my will that the whole of said tract of land go to the surviving brother should both die without bodily heirs I will said tract of land to go to my daughters Nell and Kathryne share and share alike. . . .

"In witness whereof I the said Mary L. Hoskins do hereunto set my hand and seal this the 4th day of March 1910.

MARY L. HOSKINS (Seal)

"Since writing the above I have decided that it is now my will for each one of my children to take what I have given them mentioned in the above writing and do with it as they wish. . . .

"January 20th 1914 MARY L. HOSKINS."

The trial court adjudged that Joseph R. Hoskins and Benjamin Hoskins took under the will and codicil a fee simple title to the lands involved and, since it appears that the plaintiffs have acquired the interest of Benjamin Hoskins in said property, the court further adjudged "that the said plaintiffs are seized and possessed of fee title in and to the said real property and can convey such a title to the defendant, and that upon their executing and delivering a good and sufficient deed which shall convey to the defendant the entire fee title in and to the said real property, with full covenants of warranty, then they shall have and recover of the defendant the full purchase price of the said land in the sum of $2,982, and upon the payment of the said purchase price, plaintiffs will deliver said deed."

From the judgment the defendant appealed, assigning said judgment as error.

The assignment of error cannot be sustained.

Under the provisions of the first item of the will Joseph R. and Benjamin Hoskins were devised a life estate in the "farm known as the Boon place in Alamance Co." However, the manifest effect of the

codicil, which is inconsistent with a life estate, is to revoke the provisions of the first item of the will to all intents and purposes except for the purpose of identifying the devisees and the lands to which the codicil refers—the life estate and the contingencies created by the first item are revoked and substituted therefor is the provision that the devisees are "to take what I have given them mentioned in the above writing and do with it as they wish." The provision "to take . . . and do with it as they wish" includes the right of disposition, and the right of disposition carries a fee simple. As was said by *Adams, J.*, in *Roane v. Robinson*, 189 N. C., 628, at p. 631, ". . . with a single exception, to which we shall advert, in the words of *Chancellor Kent*, 'We may lay it down as an incontrovertible rule that where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee.' *Jackson v. Robbins*, 16 John. Rep., 537; Kent's Com., 35, 586; *Batchelor v. Macon*, 69 N. C., 545; *Williams v. Parker*, 84 N. C., 90; *Fellowes v. Durfey*, 163 N. C., 305; *Smith v. Creech*, 186 N. C., 187; *O'Quinn v. Crane, ante*, 97. As pointed out in *Carroll v. Herring, supra* (180 N. C., 369), the exception to the 'incontrovertible rule,' which has been referred to, arises 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 such case the devisee for life does not take an estate in fee."

The will and codicil in the instant case do not fall within the single exception to the "incontrovertible rule," since the effect of the codicil is to revoke the life estate and contingencies created in the first item of the will and to substitute therefor another provision, rather than to retain the life estate and contingencies first created and annex thereto an additional provision.

The judgment of the Superior Court is

Affirmed.

W. H. LIVINGSTON v. C. L. LIVINGSTON ET AL.

(Filed 15 June, 1938.)

Trial § 43—Jury may not be allowed to change verdict after its discharge for the term.

The jury returned an affirmative answer to the issue at trial, and the case being the last for the term, the court discharged the jury. Fifteen minutes later, the court, upon being informed that the jury through an affirmative answer decided the case in favor of one of defendants, permitted the jury to retire and change the answer to the issue from "Yes" to "No." *Held:* The action of the trial court amounted to setting aside

the verdict first rendered. and it appearing that the mistake of the jury was as to the legal effect of the first rendered verdict, and not an error of fact, the second verdict is without legal sanction, and a *venire de novo* is ordered. The distinction between permitting the jury to correct an error before its discharge, and permitting it to change its verdict after its discharge is pointed out.

APPEAL by plaintiff from *Pless, J.*, at November Term, 1937, of CALDWELL.

Petition for partition.

It is alleged in the petition that the plaintiff and defendants, as heirs at law of J. M. Livingston, are tenants in common of certain lands situate in Caldwell County—the share of each being specifically set out and designated as an undivided interest therein—and it is further alleged that, during the lifetime of the deceased, deeds of gift constituting advancements were made to two of his children, namely, T. R. Livingston and Mrs. P. V. Land, which plaintiff asks to be taken into consideration in dividing the land. *Vannoy v. Green,* 206 N. C., 80, 173 S. E., 275.

Upon denial interposed by the widow and children of T. R. Livingston that the deed to him constituted an advancement, the matter was transferred to the civil issue docket, and tried upon the following issue:

"Was the land in question advanced by J. M. Livingston to T. R. Livingston in his lifetime?"

After deliberating for approximately forty-five minutes, the jury returned the issue answered "Yes," which was received by the court as the verdict and ordered recorded. This being the last contested case for the term, the jury was instructed that they might prove their attendance in the clerk's office downstairs, and be discharged. About fifteen minutes later, the court was informed that the jury had thought the answer "Yes" was deciding the case in favor of Mrs. Livingston. Whereupon the jury was immediately called back into the box, and in response to an inquiry from the court, "one of the jurors stated they had agreed to decide the case for Mrs. Livingston and had thought that the answer 'Yes' constituted a decision in her favor."

Upon further inquiry, the court found "that the jury had not been tampered with or influenced in any manner, and had not discussed or conversed about the case with anyone, except that one juror had responded to a question in the clerk's office as to how the case had been decided, 'that it had been decided in favor of Mrs. Livingston.'" Over objection of plaintiff, the jury was thereupon permitted to retire and change the word "Yes" to "No." The issue was then recorded as having been answered in the negative. Exception.

From judgment on the verdict as last recorded, the plaintiff appeals, assigning errors.

Pritchett & Strickland for plaintiff, appellant.
Max C. Wilson for defendants, appellees.

STACY, C. J. The action of the court in respect of the verdict amounted in law to setting it aside and granting a new trial. *Mitchell v. Mitchell,* 122 N. C., 332, 29 S. E., 367. The second response of the jury is without legal sanction.

It is true, in *Lumber Co. v. Lumber Co.,* 187 N. C., 417, 121 S. E., 755, upon which the court's action is sought to be sustained, the jury, after separating over the noon recess, was allowed to reassemble and to correct an error in calculation, but that case is quite unlike this one, and rests upon a different principle. Correcting an error before the discharge of the jury is not the same as changing a verdict after its discharge for the term. *Willoughby v. Threadgill,* 72 N. C., 438.

"Where there has been a mistake in writing an answer to an issue, so that it does not express the actual agreement of the jury, the judge may allow them to correct it. . . . But this must be the correction of a verdict rendered, and not the rendering of a new verdict, because they were not satisfied with what they had done." McIntosh, N. C. Prac. and Proc., p. 666.

In the instant case, the issue submitted to the jury was really a collateral one. The jurors were not primarily concerned with its effect upon the rights of the parties. They answered the issue as they intended to answer it, "Yes," thinking, it is true, that such answer "constituted a decision in favor of Mrs. Livingston." But whether the case should ultimately be decided in favor of the plaintiff or Mrs. Livingston was not for them to determine. *Bundy v. Sutton,* 207 N. C., 422, 177 S. E., 420. The error, if any they made, was an error of law and not one of fact. *Little v. Larrabee,* 2 Greenleaf (Me.), 37, 11 Am. Dec., 43. They did what they intended to do, but misconceived the legal effect of their action. They were not aware of any mistake or error on their part even after the matter had been called to their attention, and not until the legal effect of the verdict was explained to them did they express any desire to change it. *Alston v. Alston,* 189 N. C., 299, 126 S. E., 737; *Lipscomb v. Cox,* 195 N. C., 502, 142 S. E., 779. See *Oil Co. v. Moore,* 202 N. C., 708, 163 S. E., 879; *Coxe v. Singleton,* 139 N. C., 361, 51 S. E., 1019.

The plaintiff is entitled to a *venire de novo.* It is so ordered.

Venire de novo.

BERTHA W. COLLINS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF FURMAN G. COLLINS, v. SECURITY MUTUAL LIFE INSURANCE COMPANY.

(Filed 23 March, 1938.)

Appeal and Error § 38—

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the Superior Court will be affirmed without becoming a precedent.

APPEAL from *Hamilton, Special Judge,* at October Term, 1937, of HARNETT. Affirmed.

This is an action to recover on the double indemnity clause in a life insurance policy issued by the defendant to Furman G. Collins, now deceased. The plaintiff contended that the evidence was sufficient to carry the case to the jury upon the issue as to whether the death of the insured resulted directly or indirectly from bodily injury effected solely through external, violent and accidental means. The defendant contended that the evidence was insufficient for that purpose. The trial judge held with the plaintiff and the jury answered the issue in favor of the plaintiff. From judgment predicated upon the verdict, the defendant appealed, assigning error.

Simms & Simms for plaintiff, appellee.
J. M. Broughton for defendant, appellant.

PER CURIAM. The Court being evenly divided in opinion, *Connor, J.,* not sitting, the judgment of the Superior Court is affirmed, as the disposition of this appeal, without becoming a precedent, in accord with the practice of the Court. *Martin v. R. R.,* 208 N. C., 843.

Affirmed.

MRS. ARMETTA RANKIN, WIFE OF BENNIE RANKIN, DECEASED, PLAINTIFF, v. BROWN MANUFACTURING COMPANY, EMPLOYER, AND TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 13 April, 1938.)

APPEAL by plaintiff from *Warlick, J.,* at January Term, 1938, of CABARRUS. Affirmed.

This is a proceedings for compensation under the provisions of the North Carolina Workmen's Compensation Act. It was before this Court on a former appeal at the Fall Term, 1937, and is reported in 212 N. C., 357. The facts are therein fully set out.

W. S. Bogle and E. Johnston Irvin for plaintiff, appellant.
Guthrie, Pierce & Blakeney for defendants, appellees.

PER CURIAM. The facts found by the Full Commission tend to show that the employee suffered an injury by accident, which did not result from his employment. The conclusion of the Commission that the employee, of whom the plaintiff is the dependent, did not suffer an injury by accident arising out of and in the course of his employment is sustained by the evidence. It would seem that this is the only reasonable conclusion to be drawn from the evidence and the findings of the Commission.

The judgment below is

Affirmed.

SAMUEL B. WELLS v. JEFFERSON STANDARD LIFE INSURANCE COMPANY, A CORPORATION.

SAMUEL B. WELLS, ADMINISTRATOR OF THE ESTATE OF MARY NICHOLSON WELLS, v. JEFFERSON STANDARD LIFE INSURANCE COMPANY, A CORPORATION.

MARTHA J. NICHOLSON v. JEFFERSON STANDARD LIFE INSURANCE COMPANY, A CORPORATION.

(Filed 13 April, 1938.)

Appeal and Error § 38—

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the Superior Court will be affirmed without becoming a precedent.

APPEAL by plaintiffs from *Hamilton, Special Judge,* at August Term, 1937, of DUPLIN. Action by plaintiffs against defendants on certain insurance policies. Affirmed.

Oscar B. Turner and Norwood B. Boney for plaintiffs.
Beasley & Stevens and Smith, Wharton & Hudgins for defendant.

PER CURIAM. The Court being evenly divided in opinion, *Connor, J.*, not sitting, the judgment of the Superior Court is affirmed, as to the disposition of this appeal, without becoming a precedent, in accord with the practice of the Court. The practice has been so long and well settled that we need not cite authorities.

Affirmed.

JOHN J. MILLS AND WIFE, SUDIE MILLS, v. MARY E. JONES.

(Filed 13 April, 1938.)

Appeal and Error § 38—

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the Superior Court will be affirmed without becoming a precedent.

APPEAL from *Grady, J.*, at February Term, 1938, of PITT.

This is an action wherein the plaintiffs filed complaint which they contend stated a cause of action to graft a parol trust upon a deed taken by the defendant from a commissioner appointed to foreclose a mortgage, and which the defendant contends failed to state facts sufficient to constitute a cause of action. The court held with the contention of the defendant and entered judgment sustaining the demurrer filed, from which judgment plaintiffs appealed, assigning error.

Jack Spain and Albion Dunn for plaintiffs, appellants.
J. B. James for defendant, appellee.

PER CURIAM. The Court being evenly divided in opinion, *Connor, J.*, not sitting, the judgment of the Superior Court is affirmed, as the disposition of this appeal, without becoming a precedent, in accord with the practice of the Court. *Collins v. Ins. Co., ante,* 800.

Affirmed.

HINES O. WADFORD v. GREGORY CHANDLER COMPANY.

(Filed 4 May, 1938.)

Master and Servant § 21a—Evidence held insufficient to support doctrine of respondeat superior.

Defendant company rented a tractor and driver for work on an E. R. A. project, the truck and driver being under the direction and control of the E. R. A. superintendent. Plaintiff, an employee of the Emergency Relief Administration, instituted this action to recover for injuries inflicted by said truck and driver. *Held:* Judgment of nonsuit was properly entered on authority of *Liverman v. Cline,* 212 N. C., 43.

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

APPEAL by plaintiff from *Hamilton, Special Judge,* at January Term, 1938, of WAKE.

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

It is alleged in the complaint that the plaintiff was employed by the "North Carolina Employment Relief Administration" (*Vinson v. O'Berry*, 209 N. C., 287, 183 S. E., 423) as truck foreman in charge of the Pullen Park Lake Project; that the defendant corporation rented to said "administration" a tractor and driver; and that on 13 June, 1935, plaintiff was injured by the negligence of the driver of defendant's truck.

It is in evidence that the "E. R. A. supervisor had full authority to direct the operation of the Gregory Chandler equipment, tell them what to do, when to start to work, how to do it, and where to go. . . . Mr. Matthews, the E. R. A. supervisor, directed the work; gave orders to the foremen. Mr. Gregory wasn't there" when plaintiff was hurt.

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

Douglass & Douglass, J. M. Broughton, and Wm. H. Yarborough, Jr., for plaintiff, appellant.

Thos. W. Ruffin for defendant, appellee.

PER CURIAM. Affirmed on authority of *Shapiro v. Winston-Salem*, 212 N. C., 751, and *Liverman v. Cline*, 212 N. C., 43, 192 S. E., 849.

Affirmed.

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

T. T. FRADY AND H. G. CLEMENT v. CAROLINA MOUNTAIN POWER CORPORATION AND DUKE POWER COMPANY.

(Filed 4 May, 1938.)

Appeal and Error § 38—

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the Superior Court will be affirmed without becoming a precedent.

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

APPEAL by defendant Duke Power Company from *Alley, J.*, at September Term, 1937, of RUTHERFORD. No error.

McRorie & McRorie and Morgan & Storey for plaintiffs, appellees.

Edwards & Edwards, W. S. O'B. Robinson, Jr., C. W. Tillett, and J. H. Marion for defendant, appellant.

PER CURIAM. A judgment of nonsuit was entered as to the defendant Carolina Mountain Power Corporation, from which no appeal was taken.

The action, as it relates to the appellant Duke Power Company, was instituted by the plaintiffs to recover for damage to their lands and crops on Rocky Broad River alleged to have been caused by the negligent operation of its dam by the appellant. The land of the plaintiff Frady was located on Rocky Broad River and was being farmed by the plaintiff Clement on shares. On 16 October, 1936, the land and the crops thereon were damaged by the overflow of the river. The dam operated under lease by the appellant was on Rocky Broad River about eight miles up stream from the land of the plaintiff Frady. The plaintiffs allege that the damage to their land and crops was directly and proximately caused by the negligent operation by the appellant of said dam, in that the appellant negligently allowed the waters from the rains to gradually accumulate in the lake above the dam until the waters therein had risen to the crest of and was overflowing a portion of said dam, and after such accumulation of such waters the appellant negligently opened the floodgates of said dam, thereby suddenly releasing great volumes of water from said lake, which added great volumes of water to the already swollen condition of the stream below the dam, that the water so released so accelerated the flow of the stream and so increased the amount of water therein as to cause the stream to overflow the plaintiffs' land and crops, thereby damaging and destroying same.

The appellant, while it admits that the water accumulated in the lake till it overflowed the spillway before the floodgates were opened, and that it opened its floodgates and allowed the water to flow through them, denies that in so doing it acted negligently.

The court being evenly divided in opinion, *Seawell, J.*, not sitting, the judgment of the Superior Court is affirmed, as the disposition of this appeal, without becoming a precedent, in accord with the practice of the Court. *Mills v. Jones, ante,* 802.

No error.

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

STATE v. C. M. HART.

(Filed 25 May, 1938.)

Chattel Mortgages § 10—

Warrant, as amended, and evidence *held* sufficient to support conviction for unlawfully disposing of chattels purchased under conditional sales contract. C. S., 4287.

APPEAL by defendant from *Harding, J.*, at October Term, 1937, of GUILFORD. No error.

This is a criminal action in which the defendant is charged with having unlawfully made disposition of personal property embraced in a lien with intent to hinder, delay or defeat the rights of the holder of said lien under the provisions of C. S., 4287. The warrant was issued out of the municipal court of the city of High Point. From a verdict of guilty in said court the defendant appealed to the Superior Court.

On 3 January, 1937, the defendant executed to J. D. Ross a title retaining note for the purchase price of one diamond ring and one 21-jewel Bulova watch. As additional security, this title retaining note undertook to also convey household furniture. This note was payable in monthly installments beginning 1 March, 1937.

The defendant having made only two monthly payments, the holder of said lien in July, 1937, demanded the return of the ring and watch to be sold to satisfy the lien. At that time the defendant told the prosecuting witness that he had pawned the ring and did not have the watch. Thereupon the prosecuting witness issued the warrant upon which the defendant was tried.

The jury returned a verdict of guilty. The defendant excepted to the judgment pronounced thereon and appealed.

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

Whicker & Whicker for defendant, appellant.

PER CURIAM. There was ample evidence to be submitted to the jury. The defendant's contention, made first at the trial, that he had lost the watch and that his wife had pawned the ring without his knowledge or consent were matters in defense rejected by the jury.

The warrant as amended is fully sufficient to charge the violation of C. S., sec. 4287, and defendant's demurrer thereto cannot be sustained. Likewise, the court fully and correctly charged the law applicable to the evidence and the contentions based thereon. The defendant's exceptions thereto cannot be sustained.

In the trial below we find

No error.

JOSHUA A. JACKSON v. ADDISON HEWLETT, JR., ADMINISTRATOR OF THE ESTATE OF ESTELLE WRIGHT.

(Filed 25 May, 1938.)

Husband and Wife § 4b—

A wife's contract with her husband to repay him for sums expended by him in the repair and improvement of her real estate is void unless in writing and acknowledged in the manner prescribed by C. S., 2515.

JACKSON *v.* HEWLETT.

APPEAL by plaintiff from *Spears, J.*, at December Term, 1937, of NEW HANOVER. Judgment affirmed.

John D. Bellamy & Son for plaintiff, appellant.
C. D. Hogue and Addison Hewlett, Jr., for defendant, appellee.

PER CURIAM. Plaintiff instituted his action against the administrator of the estate of his divorced wife for the recovery of certain amounts expended by him for repairs and improvements placed upon the house of his said wife. It was alleged that the expenditures were made in 1918, shortly before the marriage, upon her oral promise to pay therefor.

Plaintiff and defendant's intestate were married in 1918, and were divorced in 1933. Thereupon the defendant's intestate removed to the State of Massachusetts, and died in 1935. Defendant pleaded the statute of limitations, and also that the alleged contract to pay was void for failure to comply with C. S., 2515. Judgment was rendered for defendant and plaintiff appealed.

If the contract for repayment to the plaintiff was made prior to the marriage in 1918, action thereon was barred by the statute of limitations, and, if made subsequent to the marriage, it was invalid because not in writing and acknowledged in the manner prescribed by C. S., 2515. In either event, plaintiff's action was properly dismissed.

Judgment affirmed.

STATUTES RELATING TO RULES OF COURT

C. S., 1421. *Power to make rules of Court.* The Justices of the Supreme Court shall prescribe and establish from time to time rules of practice for that Court, and also for the Superior Courts. The clerk shall certify to the judges of the Superior Court the rules of practice for such court, to be entered on the records thereof in each county.

(*In Calvert v. Carstarphen*, 133 N. C., 25, Clark, C. J., delivering the opinion of the Court, it was said: "The rules of the Supreme Court are mandatory, not directory. Walker v. Scott, 102 N. C., 487; Wiseman v. Commissioners, 104 N. C., 330; Edwards v. Henderson, 109 N. C., 83. As the Constitution, Art. I, sec. 8, provides that 'The legislative, executive, and **Supreme Judicial Powers** of the Government ought to be forever separate and distinct from each other,' the General Assembly can enact no rules of practice and procedure for this Court, which are prescribed solely by our Rules of Court. Herndon v. Ins. Co., 111 N. C., 384; 18 L. R. A., 547; *Horton v. Green*, 104 N. C., 400; Rencher v. Anderson, 93 N. C., 105. The practice and procedure in the courts below the Supreme Court are prescribed by the Legislature, as authorized by the Constitution, Art. IV, sec. 12 (*S. v. Edwards*, 110 N. C., 511), except that, as to such lower courts, when the Legislature fails to provide the practice and procedure in any particular, this Court can do so. The Code, sec. 961; Barnes v. Easton, 98 N. C., 116; Cheek v. Watson, 90 N. C., 302.")

See, also, S. v. Crowder, 195-335; Womble v. Gin Co., 194-577; Cooper v. Comrs., 184-615; Cox v. Lbr. Co., 177-227; Phillips v. Jr. Order, 175-133; S. v. Goodlake, 166-434; Porter v. Lbr. Co., 164-396.

C. S., 1421 (a). *Supreme Court to prescribe rules. Rules to conform to law.* The Supreme Court is hereby vested with the power to prescribe from time to time the modes of making and filing proceedings, actions, and pleadings, and of entering orders and judgments and recording the same, and to prescribe and regulate the practice on appeals to the Supreme Court, and in the trial of actions in the Superior Court, and before referees: *Provided*, no rule or regulation so adopted shall be in conflict with this law or any of the provisions of the Consolidated Statutes of 1919. Such rules as may be adopted by the Supreme Court shall be printed and distributed by the Secretary of State as are the Reports of the Supreme Court.

RULES OF PRACTICE

IN THE

SUPREME COURT OF NORTH CAROLINA

REVISED AND APPROVED FALL TERM, 1937

(Annotated by W. P. Stacy.)

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RULES

(Rules 1, 2, 3, 3 (A), 3 (B), 3 (C), Obsolete.)

4. Appeals—How Docketed.

Each appeal shall be docketed from the judicial district to which it properly belongs, and appeals in criminal cases from each district shall be placed at the head of the docket for the district. Appeals in both civil and criminal cases shall be docketed each in its own class, in the order in which they are filed with the clerk.

APPEALS STATUTORY AND ALLOWED ONLY FROM FINAL JUDGMENTS OR ORDERS AFFECTING SUBSTANTIAL RIGHTS.—*Caudle v. Morris,* 158—594; *Moore v. Hinnant,* 87—505; *Merrill v. Merrill,* 92—657; *Lutz v. Cline,* 89—186; *S. v. Keeter,* 80—472.

DISMISSED IF ONLY MOOT QUESTION PRESENTED.—*Rousseau v. Bullis,* 201—12; *Kistler v. R. R.,* 164—365.

5. Appeals—When Heard.

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term fourteen days before entering upon the call of the docket of the district to which it belongs, and stand for argument in its order; if not so docketed, the case shall be continued or dismissed under Rule 17, if the appellee file a proper certificate prior to the docketing of the transcript.

The transcript of the record on appeal from a court in a county in which the court shall be held during the term of this Court may be filed at such term or at the next succeeding term. If filed fourteen days before the Court begins the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued, unless by consent it is submitted upon printed argument under Rule 10.

Appeals in criminal cases shall each be heard at the term at which they are docketed, unless for cause or by consent they are continued: *Provided, however,* that an appeal in a civil case from the First, Second, Third, Eighteenth, Nineteenth, Twentieth, and Twenty-first districts which is tried between first day of January and the first Monday in February, or between first day of August and fourth Monday in August, is not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

See C. S., 629 *et seq.,* and annotations thereunder.

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ABANDONMENT OF APPEAL.—*Pruitt v. Wood*, 199—788; *Jordan v. Simmons*, 175—537; *Avery v. Pritchard*, 93—266.

SUPERIOR COURT MAY ADJUDGE APPEAL ABANDONED.—*Pentuff v. Park*, 195—609.

6. Appeals—Criminal Actions.

Appeals in criminal cases, docketed fourteen days before the call of the docket for their districts, shall be heard before the appeals in civil cases from said districts. Criminal appeals docketed after the time above stated shall be called immediately at the close of argument of appeals from the Eleventh District, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

See C. S., 4647 *et seq.*, and annotations thereunder.

DOCKETING SAME AS CIVIL CASES.—*S. v. O'Kelly*, 88—609.

DISMISSED IF DEFENDANT FLEES OR IS "IN THE WOODS."—*S. v. Devane*, 166—281; *S. v. Keebler*, 145—560; *S. v. Jacobs*, 107—772.

NO APPEAL EXCEPT FROM FINAL JUDGMENT.—*S. v. Nash*, 97—514; *S. v. Hazel*, 95—623.

(1) *Appeal Bond.* If a justified appeal bond (except in pauper appeals) is not filed with the transcript, as required by section 647, Consolidated Statutes, the appeal will be dismissed.

FAILURE OF SURETY TO JUSTIFY.—*S. v. Wagner*, 91—521.

(2) *Pauper Appeals.* See Rule 22.

STATUTORY REQUIREMENTS COMPULSORY AND JURISDICTIONAL.—*S. v. Marion,* 200—715; *S. v. Smith,* 152—842.

DIFFERENT IN CIVIL AND CRIMINAL CASES.—C. S., 649 and 4651; *S. v. Gatewood,* 125—694.

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(3) *When Appeal Abates.* See Rule 37.

(4) *Appeal Dismissed if Transcript Not Printed or Mimeographed.* See Rule 24.

MUST DOCKET RECORD.—*S. v. Farmer,* 188—243; *S. v. Johnson,* 183—730; *S. v. Trull,* 169—363.

7. Call of Judicial Districts.

Appeals from the several districts will be called for hearing in the following order:

From the First, Twentieth, and Twenty-first Districts, the first week of the term.

From the Second and Nineteenth Districts, the second week of the term.

From the Third and Eighteenth Districts, the fourth week of the term.

From the Fourth and Seventeenth Districts, the fifth week of the term.

From the Fifth and Sixteenth Districts, the seventh week of the term.

From the Sixth and Fifteenth Districts, the eighth week of the term.

From the Seventh District, the tenth week of the term.

From the Fourteenth District, the eleventh week of the term.

From the Eighth and Thirteenth Districts, the thirteenth week of the term.

From the Ninth and Twelfth Districts, the fourteenth week of the term.

From the Tenth and Eleventh Districts, the sixteenth week of the term.

In making up the calendar for the two districts allotted to the same week, the appeals will be docketed in the order in which they are received by the clerk, but only those from the district first named will be called on Tuesday of the week to which the district is allotted, and those from the district last named will not be called before Wednesday of said week, but appeals from the district last named must nevertheless be docketed not later than 14 days preceding the call for the week.

Carroll v. Mfg. Co., 180—660.

8. End of Docket.

At the Spring Term, causes not reached and disposed of during the period allotted to each district, and those for any other cause put to the

foot of the docket, shall be called at the close of argument of appeals from the Eleventh District, and each cause, in its order tried or continued, subject to Rule 6.

At the Fall Term, appeals in criminal cases only will be heard at the end of the docket, unless the Court for special reason shall set a civil appeal to be heard at the end of the docket at that term. At either term the Court in its discretion may place cases not reached on the call of a district at the end of some other district.

9. Call of Docket.

Each appeal shall be called in its proper order. If any party shall not be ready, the cause, if a civil action, may be put to the foot of the district, by the consent of the counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; otherwise, the first call shall be peremptory; or at the first term of the Court in the year a cause may, by consent of the Court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the Court shall otherwise direct. Appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

NO DAILY CALENDAR.—*Pruitt v. Wood,* 199—788; *Lunsford v. Alexander,* 162—528.

10. Submission on Printed Arguments.

By consent of counsel, any case may be submitted without oral argument, upon printed briefs by both sides, without regard to the number of the case on the docket, or date of docketing the appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket; but the Court, notwithstanding, may direct an oral argument to be made, if it shall deem best.

An appeal submitted under this rule must be docketed before the call of appeals from the Ninth District has been entered upon, unless it appears to the Court from the record that there has been no delay in docketing the appeal, and that it has been docketed as soon as practicable, and that public interest requires a speedy hearing of the case.

(Note.—A compliance with this rule does not require a formal motion, but merely the filing with the printed record and briefs an agreement signed by counsel for both sides, that the case may be considered without oral argument.)

NECESSITY OF BRIEF.—*Mills v. Guaranty Co.,* 136—255.

11. Briefs Not Received After Argument.

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. Briefs Regarded as Personal Appearance.

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were a personal appearance by counsel.

OPPOSITION TO CONTINUANCE.—*Dibbrell v. Ins. Co.*, 109—314.

13. When Case May Be Heard Out of Order.

In cases where the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the Attorney-General, assign an earlier place on the Calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the Court, at the instance of a party to a cause that directly involves the right to a public office, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him, or in other cases of sufficient importance, in its judgment, may make the like assignment in respect to it.

TITLE TO PUBLIC OFFICE.—*Caldwell v. Wilson*, 121—423.

14. When Cases May Be Heard Together.

Two or more cases involving the same question may, by order of the Court, be heard together, but they must be argued as one case, the Court directing, when the counsel disagree, the course of argument.

15. Appeal Dismissed If Not Prosecuted.

Cases not prosecuted for two terms shall, when reached in order at the third term, be dismissed at the cost of the appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, at any time thereafter, not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

RULE MANDATORY.—*Wiseman v. Commissioners*, 104—330.

SUPERIOR COURT MAY ADJUDGE APPEAL ABANDONED.—*Pentuff v. Park*, 195—609.

16. Motion to Dismiss Appeal—When Made.

A motion to dismiss an appeal for noncompliance with the requirements of the statute in perfecting an appeal must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record, or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel, to that effect, or unless the Court shall allow appropriate amendments.

DISMISSAL OF APPEAL.—*Pruitt v. Wood,* 199—788; *Martin v. Chambers,* 116—673; *Wiseman v. Commissioners,* 104—330.

BURDEN ON APPELLANT TO SHOW DILIGENCE.—*Simmons v. Andrews,* 106—201; *S. v. Goldston,* 201—89.

17. Appeal Dismissed for Failure to Docket in Time.

If the appellant in a civil action, or the defendant in a criminal prosecution, shall fail to bring up and file a transcript of the record fourteen days before the Court begins the call of cases from the district from which it comes at the term of this Court at which such transcript is required to be filed, the appellee may file with the clerk of this Court the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled, with his motion to docket and dismiss at appellant's cost said appeal, which motion shall be allowed at the first session of the Court thereafter, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause: *Provided,* that such motion of appellee to docket and dismiss the appeal will not be considered unless the appellee, before making the motion to dismiss, has paid the clerk of this Court the fee charged by the statute for docketing an appeal, the fee for drawing and entering judgment, and the determination fee, execution for such amount to issue in favor of appellee against appellant.

(1) *Appeal Docketed by Appellee When Frivolous and Taken for Purposes of Delay.* The transcript of an appeal which is obviously frivolous and appears to have been taken only for purposes of delay, may be docketed in this Court by appellee before the time required by Rule 5, and if it appears to the Court that the appellee's contention is correct, the appeal will be dismissed at cost of appellant.

(NOTE—Motion made under this rule is not effectual if filed after appeal has been docketed, although appeal was docketed after time required by Rule 5.)

LACHES OF APPELLANT.—*Brock v. Ellis,* 193—540; *Baker v. Hare,* 192—788; *Rogers v. Asheville,* 182—596; *Carroll v.*

Mfg. Co., 180—660; *Johnson v. Covington*, 178—658; *Cox v. Lumber Co.*, 177—227; *Murphy v. Electric Co.*, 174—782; *McNeill v. R. R.*, 173—730.

LACHES OF APPELLEE.—*Mitchell v. Melton*, 178—87; *McLean v. McDonald*, 175—418; *Gupton v. Sledge*, 161—214; *Barbee v. Green*, 91—158.

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APPELLEE MAY PROCEED IN SUPERIOR COURT.—*Pentuff v. Park*, 195—609.

18. Appeal Docketed and Dismissed Not to Be Reinstated Until Appellant Has Paid Costs.

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for that purpose, as allowed by Rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid or offered to pay the costs of the appellee in procuring the certificate and in causing the same to be docketed.

As to costs on appeal, see C. S., 1, 256 *et seq.*, and also C. S., 646 *et seq.*

Pruitt v. Wood, 199—788.

19. Transcripts.

(1) *What to Contain and How Arranged.* In every transcript record of an action brought to this Court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, orders, and every document constituting the transcript shall be identified by a proper title or heading, and shall be arranged to follow each other

in the order the same took place, when practicable. The pages shall be numbered, and on the front page of the record there shall be an index in the following or some equivalent form:

	PAGE
Summons—date	1
Complaint—first cause of action	2
Complaint—second cause of action	3
Affidavit for attachment, etc.	4

It shall not be necessary to send as a part of the transcript, affidavits, orders, and other processes and proceedings in the action not involved in the appeal and not necessary to an understanding of the exceptions relied on. Counsel may sign an agreement which shall be made a part of the record as to the parts to be transcribed, and in the event of disagreement of counsel the judge of the Superior Court shall designate the same by written order: *Provided,* that the pleadings on which the case is tried, the issues, and the judgment appealed from shall be a part of the transcript in all cases: *Provided further,* that this rule is subject to the power of this Court to order additional papers and parts of the record to be sent up.

See C. S., 643, 644, and 645.

IMPERFECT OR INCOMPLETE TRANSCRIPT.—*Waters v. Waters,* 199—667; *Schwarberg v. Howard,* 199—126; *S. v. McDraughon,* 168—131; *Hobbs v. Cashwell,* 158—597; *Cressler v. Asheville,* 138—482; *Sigman v. R. R.,* 135—181; *Wiley v. Mining Co.,* 117—489; *Jones v. Hoggard,* 107—349.

ORGANIZATION OF COURT MUST APPEAR ON TRANSCRIPT.—*S. v. May,* 118—1204.

ENTRY OF APPEAL MUST APPEAR ON RECORD.—*Walton v. McKesson,* 101—428; *R. R. v. Brunswick County,* 198—549; *Mfg. Co. v. Simmons,* 97—89.

TRANSCRIPT MUST SHOW JURISDICTION AND BEFORE WHOM CASE TRIED.—*Spence v. Tapscott,* 92—576; *S. v. Butts,* 91—524.

FAILURE TO INDEX.—*Redding v. Dunn,* 185—311; *Kearnes v. Gray,* 173—717; *Sigman v. R. R.,* 135—181.

PURPOSE OF RULE.—*Waldo v. Wilson,* 177—461.

(2) *Two Appeals.* When there are two or more appeals in one action it shall not be necessary to have more than one transcript, but the statements of cases on appeal shall be settled as now required by law, and

shall appear separately in the transcript. The judge of the Superior Court shall determine the part of the costs of making the transcript to be paid by each party, subject to the right to recover such costs in the final judgment as now provided by law.

TWO RECORDS UNNECESSARY.—*Pope v. Lumber Co.*, 162—208; *Hagaman v. Bernhardt*, 162—381.

(3) *Exceptions Grouped.* All exceptions relied on shall be grouped and separately numbered immediately before or after the signature to the case on appeal. Exceptions not thus set out will be deemed to be abandoned. If this rule is not complied with, and the appeal is not from a judgment of nonsuit, it will be dismissed, or the Court will in its discretion refer the transcript to the clerk or to some attorney to state the exceptions according to this rule, for which an allowance of not less than $5 will be made, to be paid in advance by the appellant; but the transcript will not be so referred or remanded unless the appellant file with the clerk a written stipulation that the appeal shall be heard and determined on printed briefs under Rule 10, if the appellee shall so elect.

APPEAL FROM JUDGMENT ONLY.—*Casualty Co. v. Green*, 200—535; *Owens v. Hines*, 178—325; *Hoke v. Whisnant*, 174—658; *Ullery v. Guthrie*, 148—418; *Wilson v. Lumber Co.*, 131—163.

ERROR ON FACE OF RECORD PROPER.—*Rogers v. Bank*, 108—574.

RULE MANDATORY.—*Thresher Co. v. Thomas*, 170—680; *Wheeler v. Cole*, 164—378; *Pegram v. Hester*, 152—765; *Davis v. Wall*, 142—450; *Hicks v. Kenan*, 139—337; *Sigman v. R. R.*, 135—181; *Brinkley v. Smith*, 130—224.

EXCEPTIONS MUST BE SPECIFIC.—*Rawls v. Lupton*, 193—428; *McKinnon v. Morrison*, 104—354; *Harrison v. Dill*, 169—542; *Boyer v. Jarrell*, 180—479.

HOW ASSIGNMENTS MADE.—*Cecil v. Lumber Co.*, 197—81; *Rawls v. Lupton*, 193—428; *Merritt v. R. R.*, 169—244; *Porter v. Lumber Co.*, 164—396; *Jones v. R. R.*, 153—420; *McDowell v. Kent*, 153—555; *Smith v. Mfg. Co.*, 151—261; *Thompson v. R. R.*, 147—413.

EXCEPTIVE ASSIGNMENTS OF ERROR, AND NONE OTHER, CONSIDERED.—*In re Beard*, 202—661; *Rawls v. Lupton*, 193—428; *S. v. Freeze*, 170—710.

COURT WILL NOT MAKE VOYAGE OF DISCOVERY THROUGH RECORD.—*Cecil v. Lumber Co.*, 197—81.

DISMISSED FOR FAILURE TO FOLLOW RULE.—*Merritt v. Dick*, 169—244.

PRACTICE IN REGARD TO EXCEPTIONS SUMMARIZED.—*Taylor v. Plummer*, 105—56.

(4) *Evidence to be Stated in Narrative Form.* The evidence in case on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. When this rule is not complied with, and the case on appeal is settled by the judge, this Court will in its discretion hear the appeal, or remand for a settlement of the case to conform to this rule. If the case is settled by agreement of counsel, or the statement of the appellant becomes the case on appeal, and the rule is not complied with, or the appeal is from a judgment of nonsuit, the appeal will be dismissed. In other cases the Court will in its discretion dismiss the appeal, or remand for a settlement of the case on appeal.

STENOGRAPHER'S NOTES INSUFFICIENT.—*Casey v. R. R.*, 198—432; *Rogers v. Asheville*, 182—596; *Brewer v. Mfg. Co.*, 161—211; *Skipper v. Lumber Co.*, 158—322; *Bucken v. R. R.*, 157—443; *Cressler v. Asheville*, 138—483.

RULE MANDATORY.—*Pruitt v. Wood*, 199—788; *Carter v. Bryant*, 199—704; *Bank v. Fries*, 162—516.

PAUPER APPEALS.—*Skipper v. Lumber Co.*, 158—322.

(5) *Unnecessary Portions of Transcript—How Taxed.* The cost of copying and printing unnecessary and irrelevant testimony, or any other matter not needed to explain the exceptions or errors assigned, and not constituting a part of the record proper, shall in all cases be charged to the appellant, unless it appears that they were sent up at the instance of the appellee, in which case the cost shall be taxed against him.

(6) *Transcripts in Pauper Appeals.* See Rule 22.

(7) *Maps.* Nine copies of every map or diagram which is a part of the transcript of appeal, and which is applicable to the merits of the appeal, shall be filed with the clerk of this Court before such appeal is called for argument.

FILING COPIES OF PLAT.—*Stephens v. McDonald*, 132—135.

PRINTING EXHIBITS.—*Hicks v. Royal*, 122—405; *Fleming v. McPhail*, 121—183.

(8) *Appeal Bond.* See Rule 6 (1).

See C. S., 646 *et seq.* and 1256 *et seq.*
Pruitt v. Wood, 199—788.

(9) The prosecution bond given in every case shall be sent up with the transcript of the record. Such bond shall be justified and the justification shall name the county wherein the surety resides.

(10) *Insufficient Transcript.* If a transcript has not been properly arranged, as required by subsection (1) of this rule, the appeal shall be

dismissed or referred to the clerk to be properly arranged, for which an allowance of $5 shall be made to him. If the appeal is not dismissed, and is so referred to the clerk, it shall be placed for hearing at the end of the district, or the end of the docket, or continued as the Court may deem proper.

Pruitt v. Wood, 199—788.

20. Pleadings.

(1) *When Deemed Frivolous.* Memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

Plott v. Construction Co., 198—782.

(2) *When Containing More Than One Cause of Action.* Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

PROPER JOINDER MUST APPEAR ON FACE OF PLEADING OR FROM FACTS ALLEGED.—*Mfg. Co. v. Barrett,* 95—36; *Allen v. Jackson,* 86—321; *Lykes v. Grove,* 201—254.

(3) *When Scandalous.* Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from the record, or reformed; and for this purpose the Court may refer it to the clerk, or some member of the bar, to examine and report the character of the same.

SCANDALOUS, IMPERTINENT, AND IRRELEVANT MATTER STRICKEN OUT.—*Hosiery Mill v. Hosiery Mills,* 198—596; *Ellis v. Ellis,* 198—767; *Mitchell v. Brown,* 88—156; *Powell v. Cobb,* 56—1.

(4) *Amendments.* The Court may amend any process, pleading, or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper parties to any case, where the Court may deem it necessary and proper for the purpose of justice, and on such terms as the Court may prescribe.

See C. S., 547 and 1414, and annotations thereunder.

AMENDMENT NOT ALLOWED TO GIVE LIFE TO A LIFELESS PROCEEDING.—*Hunt v. State,* 201—37.

21. Exceptions. (See, also, Rule 19 [3]).

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or, in case of a ruling of the court at chambers and not in term-time, within ten days after notice thereof, appellant shall file the said exceptions in the office of the clerk of the court below. No exceptions not thus set out, or filed and made a part of the case or record, shall be considered by this Court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment. When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; 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.

See C. S., 570 and 590, and annotations thereunder.

MUST BE CLEARLY STATED.—*Myrose v. Swain,* 172—223; *Rogers v. Jones,* 172—156; *Carter v. Reaves,* 167—131; *Spruce Co. v. Hunnicutt,* 166—202; *Thompson v. R. R.,* 147—412.

DUTY OF ATTORNEY.—*McLeod v. Gooch,* 162—122; *Allred v. Kirkman,* 160—392; *Worley v. Logging Co.,* 157—490.

JUDGE'S CHARGE.—*S. v. Jones,* 182—781; *Bank v. Pack,* 178—388.

RULE MANDATORY.—*In re Bailey,* 180—30; *Thresher Co. v. Thomas,* 170—680; *Hoggs v. Cashwell,* 158—597.

CORROBORATIVE AND CONTRADICTORY EVIDENCE.—*Singleton v. Roebuck,* 178—201; *Medlin v. Board of Education,* 167—239; *Cooper v. R. R.,* 163—150; *Crisco v. Yow,* 153—434; *Tise v. Thomasville,* 151—282; *Hill v. Bean,* 150—436; *Liles v. Lumber Co.,* 142—39; *Westfeldt v. Adams,* 135—591.

22. Printing Transcripts. (But see Rule 25.)

Twenty-five copies of the transcript in every case docketed, except in pauper appeals, shall be printed and filed immediately after the case has been docketed, unless printed before the case has been docketed, in which event the printed copies shall be filed when the case is docketed. It shall not be necessary to print the summons and other papers showing service

of process, if a statement signed by counsel is printed giving the names of all the parties and stating that summons has been duly served. Nor shall it be necessary to print formal parts of the record showing the organization of the court, the constitution of the jury, etc.

In pauper appeals the counsel for appellant may file nine legible typewritten copies of his brief, in lieu of printed copies, if he so elects, and such briefs must give a succinct statement of the facts applicable to the exceptions and the authorities relied on, and in pauper appeals the appellant may also file, in lieu of printed copies, if he so elects, nine legible typewritten copies of the transcript, in addition to the original transcript. Should the appellant gain the appeal, the cost of preparing the typewritten briefs or transcripts shall be taxed against the appellee, provided statement of such cost is given the clerk of this Court before the case is decided. The arrangement of the matter in the printed transcript shall follow the order prescribed by Rule 19.

NUMBER OF COPIES MANDATORY IN PAUPER APPEALS.—*Pruitt v. Wood,* 199—788; *Trust Co. v. Miller,* 191—787; *Fisher v. Toxaway Co.,* 171—547; *Estes v. Rash,* 170—341.

23. How Printed.

The transcript on appeal shall be printed under the direction of the clerk of this Court, and in the same type and style, and pages of same size as the reports of this Court, unless it is printed before the appeal is docketed in the required style and manner. If it is to be printed here the appellant or the party sending up the appeal shall send therewith to the clerk of this Court a cash deposit, sufficient to cover the cost of printing, which shall include 10 cents per page for the clerk of this Court, to recompense him for his services in preparing the transcript in proper shape for the printer.

When it appears that the clerk has waived the requirement of a cash deposit by appellant to cover estimated cost of printing, and the cost of printing has not been paid when the case is called for argument, the Court will in its discretion, on motion of counsel for appellee or a statement made by the clerk, dismiss the appeal.

NECESSITY OF RULE.—*Lumber Co. v. Privette,* 179—1; *Howard v. Tel. Co.,* 170—495; *Barnes v. Crawford,* 119—127.

24. Appeal Dismissed if Transcript Not Printed or Mimeographed.

If the transcript on appeal (except in pauper appeals) shall not be printed or mimeographed as required by the rules, by reason of the failure of the appellant to send up the transcript or deposit the cost therefor in time for it to be printed, when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dis-

missed; but the Court may, on motion of appellant, after five days notice, at the same term, for good cause shown, reinstate the appeal, to be heard at the next term. When a cause is called and the record is not fully printed, if the appellee does not move to dismiss, the cause will be continued. The Court will hear no cause in which the rules as to printing are not complied with, other than pauper appeals.

RULE MANDATORY.—*Pruitt v. Wood,* 199—788; *S. v. Charles,* 161—286; *Truelove v. Norris,* 152—755; *Stroud v. Tel. Co.,* 133—253; *Dunn v. Underwood,* 116—525.

25. Mimeographed Records and Briefs.

Counsel may file in lieu of printed records and briefs 25 mimeographed copies thereof, to be prepared under the immediate supervision and direction of the clerk of this Court, the cost of such copies not to exceed $1.10 per page of an average of 40 lines and 400 words to the page: *Provided, however,* that it shall be permissible and optional with counsel to file printed transcripts and briefs when it is possible to print such documents without unnecessary delay and inconvenience to the Court and appellee's counsel, and within time for an appeal to be heard in its regular order under Rule 5.

The clerk of this Court is required to purchase the stencil sheets, arrange all matter to be mimeographed for the operator, to supervise the work, to carefully read the proof, and to index the mimeographed transcripts and mail copies promptly to counsel. A cash deposit covering estimated cost of this work is required as in Rule 23 under the same penalty as therein prescribed for failure to pay the account due for such work.

26. Cost of Printing and Mimeographing Transcripts and Briefs to be Recovered.

The actual cost of printing the transcript of appeal and of the brief shall be allowed the successful litigant, not to exceed $1.50 per page, and not exceeding sixty pages for a transcript and twenty pages for a brief, unless otherwise specially ordered by the Court, and he shall be allowed 10 cents additional for each such page paid to the clerk of this Court for making copy for the printer, unless the transcript was printed before the case was docketed: *Provided* statement of such cost is given the clerk before the case is decided. In pauper appeals, appellant is not allowed to receive more for preparing typewritten transcript and brief than he would have recovered had he had them mimeographed.

Judge and counsel should not encumber the "case on appeal" with evidence or with matters not pertinent to the exceptions taken. When the case is settled, either by the judge or the parties, if either party deems that unnecessary matter is incorporated, he shall have his excep-

tion noted, designating the parts deemed unnecessary, and if, upon hearing the appeal, the Court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of printing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by Rule 22, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motions for taxation of costs for copying and printing unnecessary parts sent up in the manuscript shall be decided without argument.

A successful litigant shall recover the actual cost of mimeographing a transcript or brief, not to exceed sixty pages of a transcript and twenty pages of a brief, unless otherwise ordered as herein provided in this rule.

See C. S., 1256.

EXCESSIVE COSTS.—*R. R. v. Privette,* 179—1; *Waldo v. Wilson,* 177—461; *Brown v. Harding,* 172—835; *Hardy v. Ins. Co.,* 167—569; *Overman v. Lanier,* 157—544; *Brazille v. Barytes Co.,* 157—454; *Yow v. Hamilton,* 136—357; *Roberts v. Lewald,* 108—405.

27. Briefs.

Twenty-five printed or mimeographed copies of briefs of both parties shall be filed in all cases (except in pauper appeals, as provided in Rule 22). Such briefs may be sent up by counsel ready printed, or they may be printed or mimeographed under the supervision of the clerk of this Court if a proper deposit for cost is made, as specified in Rule 23. They must be of the size and style prescribed by such rule. The briefs are expected to cover all the points presented in the oral argument, though additional authorities may be cited, if discovered after brief is filed, by furnishing list to opposing counsel and handing memorandum of same to the Marshal to be placed by him with the papers in the case, but counsel will not be permitted to consume time on the argument in the citation of additional authorities.

MUST BE PRINTED OR MIMEOGRAPHED.—*Bradshaw v. Stansberry,* 164—356.

FAILURE TO FILE.—*Commissioners v. Dickson,* 190—330; *S. v. Dawkins,* 190—443.

27½. Statement of the Questions Involved.

The first page of appellant's brief, other than formal matters appearing thereon, shall be used exclusively for a succinct statement of the question or questions involved on the appeal. Such statement should not ordinarily exceed fifteen lines, and should never exceed one page.

This will then be followed on the next page by a recital of the facts and the argument as required by the other rules. In case of disagreement as to the exact question or questions presented for determination, the appellee may submit a counter-statement, using the first page of appellee's brief for this purpose. But no counter-statement need be made unless appellee thinks appellant's statement is inaccurate, or that it does not present the points for decision in a proper light.

The statement of the questions involved or presented by the appeal, is designed to enable the Court, as well as counsel, to obtain an immediate view and grasp of the nature of the controversy; and a failure to comply with this rule may result in a dismissal of the appeal.

FAILURE TO COMPLY.—*Lumber Co. v. Latham,* 199—820; *Pruitt v. Wood,* 199—788.

28. Appellant's Brief.

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except as to an exception that there was no evidence, it shall be sufficient to refer to pages of printed transcript containing the evidence. Such brief shall contain, properly numbered, the several grounds of exception and assignment of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter, and section. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs when filed shall be noted by the clerk on the docket, and a copy thereof furnished by him to opposite counsel on application.

Appellant shall, upon delivering a copy of his manuscript brief to the printer to be printed or to the clerk of this Court to be printed or mimeographed, immediately mail or deliver to appellee's counsel a carbon typewritten copy thereof. If the printed or mimeographed copies of appellant's brief have not been filed with the clerk of this Court, and no typewritten copy has been delivered to appellee's counsel by 12 o'clock noon on the second Saturday preceding the call of the district to which the case belongs, the appeal will be dismissed on motion of appellee, when the call of that district is begun, unless for good cause shown the Court shall give further time to print the brief.

FAILURE TO FILE IN TIME.—*In re Bailey,* 180—30; *Phillips v. Junior Order,* 175—133; *Rosamond v. McPherson,* 156—593.

EXCEPTIONS NOT BROUGHT FORWARD.—*S. v. Lea,* 203—13; *In re Fuller,* 189—509; *S. v. Godette,* 188—497; *In re Westfeldt,*

188—702; *Byrd v. Southerland,* 186—384; *S. v. Bryson,* 173—803; *Campbell v. Sigmon,* 170—348; *Watkins v. Lawson,* 166—216; *S. v. Smith,* 164—475.

BRIEF LIMITED TO EXCEPTIVE ASSIGNMENTS OF ERROR.—*Coon v. R. R.,* 171—759; *Rawls v. Lupton,* 193—428.

EXCEPTIONS NOT DISCUSSED DEEMED ABANDONED.—*In re Beard,* 202—661; *Gray v. Cartwright,* 174—49.

PRACTICE IN REGARD TO EXCEPTIONS SUMMARIZED.—*Taylor v. Plummer,* 105—56.

PAUPER APPEALS.—*Covington v. Hosiery Mills,* 195—478; *Estes v. Rash,* 170—341.

"PASS BRIEFS" DISAPPROVED.—*Jones v. R. R.,* 164—392.

29. Appellee's Brief.

The appellee shall file 25 printed or mimeographed briefs with the clerk of this Court by noon of Saturday preceding the call of the district to which the case belongs and the same shall be noted by the clerk on his docket and a copy furnished by the clerk, on application, to counsel for appellant. It is not required that the appellee's brief shall contain a statement of the case. On failure of the appellee to file his brief by the time required, the cause will be heard and determined without argument from appellee unless for good cause shown the Court shall give appellee further time to file his brief.

APPELLEE'S BRIEF DISMISSED.—*Phillips v. Junior Order,* 175—133.

30. Arguments.

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) Counsel for appellant may be heard ten minutes for statement of case and thirty minutes in argument.

(3) Counsel for appellee may be heard for thirty minutes.

(4) The time for argument may be extended by the Court in a case requiring such extension, but application for extension must be made before the argument begins. The Court, however, may direct the argument of such points as it may see fit outside of the time limited.

(5) Any number of counsel may be heard on either side within the limit of the time above specified; but if several counsel shall be heard, each must confine himself to a part or parts of the subject matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the Court, so as to avoid tedious and useless repetition.

31. Reargruments.

The Court will, of its own motion, direct a reargument before deciding any case, if in its judgment it is desirable.

MAY ORDER REARGUMENT.—*Fleming v. R. R.*, 132—714; *Lenoir v. Mining Co.*, 104—490.

32. Agreements of Counsel.

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this Court.

VERBAL AGREEMENTS INEFFECTUAL IF DENIED.—*Rogers v. Asheville*, 182—596; *McNeill v. R. R.*, 173—729; *S. v. Black*, 162—637; *Mirror Co. v. Casualty Co.*, 157—29; *Graham v. Edwards*, 114—229.

33. Appearances.

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the Court.

34. Certiorari.

(1) *When Applied For.* Generally, the writ of *certiorari*, as a substitute for an appeal, must be applied for at the term of this Court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this Court next after the judgment complained of was entered in the Superior Court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

(2) *How Applied For.* The writs of *certiorari* and *supersedeas* shall be granted only upon petition, specifying the grounds of application therefor, except when a diminution of the record shall be suggested and it appears upon the face of the record that it is manifestly defective, in which case the writ of *certiorari* may be allowed, upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit, and such other evidence as may be pertinent.

(3) *Notice of.* No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten

days notice, in writing, of the same; but the Court may, for just cause shown, shorten the time for such notice.

See C. S., 630, and annotations thereunder.

WHEN APPLICATIONS SHOULD BE MADE.—*Pruitt v. Wood*, 199—788; *S. v. Harris*, 199—377; *S. v. Crowder*, 195—335; *Pentuff v. Park*, 195—609; *Baker v. Hare*, 192—788; *S. v. Ledbetter*, 191—777; *Finch v. Commissioners*, 190—154; *Hardy v. Heath*, 188—271; *S. v. Farmer*, 188—243; *S. v. Dalton*, 185—606; *S. v. Butner*, 185—731; *Cox v. Lumber Co.*, 177—227; *McNeill v. R. R.*, 173—729; *Todd v. Mackie*, 160—352.

WITHIN COURT'S DISCRETION.—*Pruitt v. Wood*, 199—788; *Womble v. Gin Co.*, 194—577; *Waller v. Dudley*, 193—354; *S. v. Surety Co.*, 192—52; *Trust Co. v. Parks*, 191—263; *S. v. Butner*, 185—731; *Mimms v. R. R.*, 183—436; *S. v. Johnson*, 183—731.

MUST DOCKET TRANSCRIPT.—*S. v. Freeman*, 114—872; *Brock v. Ellis*, 193—540; *Baker v. Hare*, 192—789; *Hardy v. Heath*, 188—271; *S. v. Farmer*, 188—243; *Motor Co. v. Reep*, 186—509; *S. v. Dalton*, 185—606; *S. v. Butner*, 185—731; *S. v. Johnson*, 183—730; *Lindley v. Knights of Honor*, 172—818; *Murphy v. Electric Co.*, 174—782; *Trans. Co. v. Lumber Co.*, 168—60; *Caudle v. Morris*, 158—594; *Critz v. Sparger*, 121—283.

APPLICANT MUST NEGATIVE LACHES AND SHOW MERIT.—*S. v. Moore*, 210—686; *S. v. Angel*, 194—715; *S. v. Farmer*, 188—243.

35. Additional Issues.

If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issue shall be made up under the direction of the Court and certified to the Superior Court for trial, and the case will be retained for that purpose.

36. Motions.

All motions made to the Court must be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motions, not leading to debate nor followed by voluminous evidence, may be made at the opening of the session of the Court.

ONLY WRITTEN MOTIONS CONSIDERED.—*McCoy v. Lassiter*, 94—131.

37. Abatement and Revivor.

Whenever, pending an appeal to this Court, either party shall die, the proper representative in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other causes; and if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the Court: *Provided,* such order shall be served upon the opposing party.

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

38. Certification of Decisions.

The clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail, to the clerks of the Superior Courts, certificates of the decisions of the Supreme Court which shall have been on file ten days, in cases sent from said court. Con. Stats., sec. 1417. But the Court in its discretion may order an opinion certified down at an earlier day. Upon final adjournment of the Court, the clerk shall at once certify to the Superior Courts all of the decisions not theretofore certified.

See C. S., 1413 and 1417.

39. Judgment and Minute Dockets.

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom any judgment for costs or judgment interlocutory or upon the merits is entered. On this docket the clerk of the Court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money, stating the names of the parties, the term at which such judgment was entered, its number on the docket of the Court; and when it shall appear from the return on the execution, or from an order for entry of satisfaction by this Court, that the judgment has been satisfied, in whole or in part, the clerk, at the request of any one interested in such entry, and

on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

The clerk shall keep a Permanent Minute-Book, containing a brief summary of the proceedings of this Court in each appeal disposed of.

40. Clerk and Commissioners.

The clerk and every commissioner of this Court who, by virtue or under color of any order, judgment, or decree of the Supreme Court in any action or matter pending therein, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the term of the Court at which the order or orders under which the clerk of such commissioner professes to act was made, the amount and character of the investment, and the security for same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

The reports required by the preceding paragraph shall be examined by the Court or some member thereof, and their or his approval endorsed shall be recorded in a well bound book, kept for the purpose, in the office of the clerk of the Supreme Court, entitled "Record of Funds," and the cost of recording the same shall be allowed by the Court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

41. Librarian.

(1) *Reports by Him.* The Librarian shall keep a correct catalogue of all books, periodicals, and pamphlets in the Library of the Supreme Court, and report to the Court on the first day of the Spring Term of each year what books have been added to the Library during the year next preceding his report, by purchase or otherwise, and also what books have been lost or disposed of, and in what manner.

(2) *Books Taken Out.* No book belonging to the Supreme Court Library shall be taken therefrom, except in the Supreme Court chamber, unless by the Justices of the Court, the Governor, the Attorney-General, or the head of some department of the executive branch of the State Government, without the special permission of the Marshal of the Court, and then only upon the application in writing of a judge of a Superior Court holding court or hearing some matter in the city of Raleigh, the

President of the Senate, the Speaker of the House of Representatives, or the chairman of the several committees of the General Assembly; and in such cases the Marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned.

42. Court's Opinions.

After the Court has decided a cause, the judge assigned to write it shall hand the opinion, when written, to the clerk, who shall cause seven typewritten copies to be at once made and a copy sent in a sealed envelope to each member of the Court, to the end that the same may be carefully examined, and the bearing of the authority cited may be considered prior to the day when the opinion shall be finally offered for adoption by the Court and ordered to be filed.

43. Executions.

(1) *Teste of Executions.* When an appeal shall be taken after the commencement of a term of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

(2) *Issuing and Return of.* Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this Court next ensuing its teste. In the absence of such request, the clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the Superior Court of said county held next after the date of its issue, and thereafter successive executions will only be issued from said Superior Court, and when satisfied, the fact shall be certified to this Court, to the end that an entry to this effect be made here.

Executions for the costs of this Court, adjudged against the losing party to appeals, may be issued after the determination of the appeal, returnable to a subsequent day of the term; or they may be issued after the end of the term, returnable, on a day named, at the next succeeding term of this Court.

The officer to whom said executions are directed shall be amenable to the penalties prescribed by law for failure to make due and proper return thereof.

See C. S., 663 *et seq.*

44. Petition to Rehear.

(1) *When Filed.* Petitions to rehear must be filed within forty days after the filing of the opinion in the case. No communication with the Court, or any Justice thereof, in regard to any such petition, will be permitted under any circumstances. No oral argument or other presentation of the cause to the Court, or any Justice thereof, by either party, will be allowed, unless on special request the Court shall so order.

See C. S., 1419, and annotations thereunder.

RULE MANDATORY.—*Cooper v. Commissioners,* 184—615.

FILING AND DOCKETING.—*McGeorge v. Nicola,* 173—733; *Byrd v. Gilliam,* 123—63.

NOT ALLOWED AFTER TIME FOR FILING HAS EXPIRED.—*Cooper v. Commissioners,* 184—615.

NOT ALLOWED IN CRIMINAL CASES.—*S. v. Council,* 129—511.

(2) *What to Contain.* The petition must assign the alleged error of law complained of, or the matter overlooked, or the newly discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court, who have no interest in the subject matter and have not been of counsel for either party to the suit, and each of whom shall have been at least five years a member of the bar of this Court, that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion, and they shall summarize succinctly in such certificate the points in which they deem the opinion erroneous.

FAILURE TO FILE CERTIFICATES.—*Teeter v. Express Co.,* 172—620.

(3) *Two Copies to be Filed, How Endorsed.* The petitioner shall endorse upon the petition, of which he shall file two copies, the names of the two Justices, neither of whom dissented from the opinion, to whom the petition shall be referred by the clerk, and it shall not be docketed for rehearing unless both of said Justices endorse thereon that it is a proper case to be reheard: *Provided, however,* that when there have been three dissenting Justices, it shall be sufficient for the petitioner to file only one copy of the petition and designate only one Justice, and his approval in such case shall be sufficient to order the petition docketed.

The clerk shall, upon the receipt of a petition to rehear, immediately deliver a copy to each of the Justices to whom it is to be referred, unless

the petition is received during a vacation of the Court, in which event it shall be delivered to the Justice designated by the petitioner on the first day of the next succeeding term of Court.

(4) *Justices to Act in Thirty Days.* The clerk shall enter upon the rehearing docket and upon the petition the date when the petition is filed in the clerk's office, the names of the Justices to whom the petitioner has requested that the petition be referred, and also the date when the petition is delivered to each of the Justices. The Justices will act upon the petition within thirty days after it is delivered to them, and the clerk is directed to report in writing to the Court in conference all petitions to rehear not acted on within the time required.

(5) *New Briefs to be Filed.* There shall be no oral argument before the Justices or Justice thus designated, before it is acted on by them, and if they order the petition docketed, there shall be no oral argument thereon before the Court (unless the Court of its own motion shall direct an oral argument), but it shall be submitted on the record at the former hearing the printed petition to rehear, and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed, and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs, directed to the errors assigned in the petition, and shall be printed. If not printed and filed in the prescribed time by the petitioner, the petition will be dismissed, and for default in either particular by the respondent the cause will be disposed of without such brief.

(6) *When Petition Docketed for Rehearing.* The petition may be ordered docketed for a rehearing as to all points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the Justices who grant the application. When a petition to rehear is ordered to be docketed, notice shall at once be given by the clerk to counsel on both sides.

(7) *Stay of Execution.* When a petition to rehear is filed with the clerk of this Court, the Justice or Justices designated by the petitioner to pass upon it may, upon application and in his or their discretion, stay or restrain execution of the judgment or order until the certificate for a rehearing is either refused or, if allowed, until this Court has finally disposed of the case on the rehearing. Unless the party applying for the rehearing has already stayed execution in the court below, when the appeal was taken, by giving the required security, he shall, at the time of applying to the Justice or Justices for a stay, tender sufficient secur-

ity for that purpose, which shall be approved by the Justice or Justices. Notice of the application for a stay must be given to the other party, if deemed proper by the Justice or Justices, for such time before the hearing of the application and in such manner as may be ordered. If a petition for a hearing is denied, or if granted, and the petition is afterwards dismissed, the stay shall no longer continue in force, and execution may issue at once, or the judgment or order be otherwise enforced, unless, in case the petition is dismissed, the Court shall otherwise direct. When a stay is granted, the order shall run in the name of this Court and be signed and issued by the clerk, under its seal, with proper recitals to show the authority under which it was issued.

See C. S., 1419, and annotations thereunder.

WHEN REHEARING ALLOWED.—*Battle v. Mercer,* 188—116; *S. v. Martin,* 188—119; *Greene v. Lyles,* 187—598; *Weston v. Lumber Co.,* 168—98; *Weisel v. Cobb,* 122—67; *Mullen v. Canal Co.,* 115—16; *Haywood v. Davis,* 81—8.

NOT ALLOWED IN CRIMINAL CASES.—*S. v. Council,* 129—511; *S. v. Jones,* 69—16.

REHEARING MATTER OF DISCRETION.—*Moore v. Harkins,* 179—525.

REHEARING BY MEANS OF SECOND APPEAL NOT ALLOWED.—*Strunks v. R. R.,* 188—567; *Ray v. Veneer Co.,* 188—414; *R. R. v. Story,* 187—184; *LaRoque v. Kennedy,* 161—459; *Hospital v. R. R.,* 157—460.

NEW TRIAL FOR NEWLY DISCOVERED EVIDENCE IN CIVIL CASES.—*Moore v. Todwell,* 194—186; *Smith v. Moore,* 150—158; *Black v. Black,* 111—301.

COSTS TAXED AGAINST MOVANT.—*Herndon v. R. R.,* 121—498.

REQUIREMENTS STATED.—*S. v. Casey,* 201—620; *Johnson v. R. R.,* 163—431.

MOTION IN SUPERIOR COURT AFTER AFFIRMANCE ON APPEAL.—*Allen v. Gooding,* 174—271.

NEWLY DISCOVERED EVIDENCE NOT CONSIDERED IN CRIMINAL CASES.—*S. v. Griffin,* 190—133; *S. v. Lilliston,* 141—857.

45. Sittings of the Court.

The Court will sit daily, during the terms, Sundays and Mondays excepted, from 10 a.m. to 2 p.m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it.

46. Citation of Reports.

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

1 and 2 Martin, Taylor & Conf.	as	1	N. C.	9 Iredell Law	as	31	N. C
1 Haywood	"	2	"	10 " "	"	32	"
2 "	"	3	"	11 " "	"	33	"
1 and 2 Car. Law Repository & N.C. Term	"	4	"	12 " "	"	34	"
				13 " "	"	35	"
1 Murphey	"	5	"	1 " Eq.	"	36	"
2 "	"	6	"	2 " "	"	37	"
3 "	"	7	"	3 " "	"	38	"
1 Hawks	"	8	"	4 " "	"	39	"
2 "	"	9	"	5 " "	"	40	"
3 "	"	10	"	6 " "	"	41	"
4 "	"	11	"	7 " "	"	42	"
1 Devereux Law	"	12	"	8 " "	"	43	"
2 " "	"	13	"	Busbee Law	"	44	"
3 " "	"	14	"	" Eq.	"	45	"
4 " "	"	15	"	1 Jones Law	"	46	"
1 " Eq.	"	16	"	2 " "	"	47	"
2 " "	"	17	"	3 " "	"	48	"
1 Dev. & Bat. Law	"	18	"	4 " "	"	49	"
2 " "	"	19	"	5 " "	"	50	"
3 & 4 " "	"	20	"	6 " "	"	51	"
1 Dev. & Bat. Eq.	"	21	"	7 " "	"	52	"
2 " "	"	22	"	8 " "	"	53	"
1 Iredell Law	"	23	"	1 " Eq.	"	54	"
2 " "	"	24	"	2 " "	"	55	"
3 " "	"	25	"	3 " "	"	56	"
4 " "	"	26	"	4 " "	"	57	"
5 " "	"	27	"	5 " "	"	58	"
6 " "	"	28	"	6 " "	"	59	"
7 " "	"	29	"	1 and 2 Winston	"	60	"
8 " "	"	30	"	Phillips Law	"	61	"
				" Equity	"	62	"

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

47. Court Reconvened.

The Court may be reconvened at any time after final adjournment by order of the Chief Justice, or, in the event of his inability to act, by one of the Associate Justices in order of seniority.

RULES OF PRACTICE

IN THE

NORTH CAROLINA SUPERIOR COURTS

REVISED AND ADOPTED BY THE JUSTICES OF THE SUPREME COURT

RULES

1. Entries on Records.

No entry shall be made on the records of the Superior Courts (the summons docket excepted) by any other person than the clerk, his regular deputy, or some person so directed by the presiding judge or the judge himself.

2. Surety on Prosecution Bond and Bail.

No person who is bail in any action or proceeding, either civil or criminal, or who is surety for the prosecution of any suit, or upon appeal from a justice of the peace, or is surety in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several Superior Courts to state, on the docket for the court, the names of the bail, if any, and surety for the prosecution in each case, or upon appeal from a justice of the peace. All prosecution bonds for any suit must be justified before the clerk of the Superior Court in a sum double the amount of the bond, and the justification must show that the surety is a resident of North Carolina, and must also show the county wherein the surety resides.

3. Opening and Conclusion.

In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

4. Examination of Witnesses.

When several are employed on the same side, the examination, or cross-examination, of each witness shall be conducted by one counsel, but the counsel may change with each successive witness, or, with leave of the court, in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel

so offering shall state for what purpose the witness, or the evidence to be elicited, is offered; whereupon the counsel objecting shall state his objection and be heard in support thereof, and the counsel so offering shall be heard in support of the competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further, unless by special leave of the court.

5. Motion for Continuance.

When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit, the nature of such testimony and what he expects to prove by it, and the motion shall be decided without debate, unless permitted by the court.

6. Decision of Right to Conclude Not Appealable.

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument the court shall decide who is so entitled, and, except in the cases mentioned in Rule 3, its decision shall be final and not reviewable.

In re Will of Brown, 194—583; *In re Peterson*, 136—13; *Cheek v. Watson*, 90—302.

7. Issues.

Issues shall be made up as provided and directed in the Con. Stats., sec. 584.

8. Judgments.

Judgments shall be docketed as provided and directed in Con. Stats., secs. 613 and 614.

9. Transcript of Judgment.

Clerks of the Superior Courts shall not make out transcripts of the original judgment docket to be docketed in another county, until after the expiration of the term of the court at which such judgments were rendered.

10. Docketing Magistrate's Judgments.

Judgments rendered by a justice of the peace upon summons issued and returnable on the same day as the cases are successively reached and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the Superior Court shall be furnished to applicants at the same time after such rendition of judgment, and if delivered to the clerk of such court on the same day, shall

create liens on real estate, and have no priority or precedence the one over the other, if all are, or shall be, entered within ten days after such delivery to said clerk.

11. Transcript to Supreme Court.

In every case of appeal to the Supreme Court, or in which a case is taken to the Supreme Court by means of the writ of *certiorari* as a substitute for an appeal, it shall be the duty of the clerk of the Superior Court, in preparing the transcript of the record for the Supreme Court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be written on the margin of each a brief statement of the subject matter, opposite to the same. On the first page of the transcript of the record there shall be an index in the following or some equivalent form:

	PAGE
Summons—date	1
Complaint—first cause of action	2
Complaint—second cause of action	3
Affidavit of attachment	4

and so on to the end.

12. Transcript on Appeal—When Sent Up.

Transcripts on appeal to the Supreme Court shall be forwarded to that Court in twenty days after the case agreed, or case settled by the judge, is filed in office of clerk of the Superior Court. Con. Stats., sec. 645.

13. Reports of Clerks and Commissioners.

Every clerk of the Superior Court, and every commissioner appointed by such court, who, by virtue or under color of any order, judgment, or decree of the court in any action or proceeding pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action, and the term of the court at which the order or orders under which the officer professes to act were made, the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount

or character of the investment since the last report, and every payment made to any person entitled thereto.

The report required by the next preceding paragraph shall be made to the judge of the Superior Court holding the first term of the court in each and every year, who shall examine it, or cause it to be examined, and, if found correct, and so certified by him, it shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

14. Recordari.

The Superior Court shall grant the writ of *recordari* only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of *supersedeas,* if prayed for as required by the Revisal, sec. 584. In such case the writ shall be made returnable to the term of the Superior Court of the county in which the judgment or proceeding complained of was granted or had, and ten days notice in writing of the filing of the petition shall be given to the adverse party before the term of the court to which the writ shall be made returnable. The defendant in the petition, at the term of the Superior Court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified. The court shall hear the application at the return term thereof (unless for good cause shown the hearing shall be continued) upon the petition, answer, affidavits, and such evidence as the court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases the court may grant the writ of *certiorari* in like manner, except that in case of the suggestion of a diminution of the record, if it shall manifestly appear that the record is imperfect, the court may grant the writ upon motion in the cause.

15. Judgment—When to Require Bonds to Be Filed.

In no case shall the court make or sign any order, decree, or judgment directing the payment of any money or securities for money belonging to any infant or to any person until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payments shall be directed only when such bonds as are required by law shall have been given and accepted by competent authority.

16. Next Friend—How Appointed.

In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then upon the like application of some reputable citizen; and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

17. Guardians Ad Litem—How Appointed.

All motions for a guardian *ad litem* shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case.

18. Cases Put at Foot of Docket.

All civil actions that have been at issue for two years, and that may be continued by consent at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When a civil action shall be continued on motion of one of the parties, the court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent.

19. When Opinion Is Certified.

When the opinion of the Supreme Court in any cause which had been appealed to that Court has been certified to the Superior Court, such cause shall stand on the docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed. Con. Stats., sec. 4656.

20. Calendar.

When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court or by consent of the court, unless cause be shown to the contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

21. Cases Set for a Day Certain.

Neither civil nor criminal actions will be set for trial on a day certain, or not to be called for trial before a day certain, unless by order of the court; and if the other business of the term shall have been disposed of before the day for which a civil action is set, the court will not be kept

open for the trial of such action, except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the court.

22. Calendar Under Control of Court.

The court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

23. Nonjury Cases.

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders, will be placed on the motion docket, and the judge will exercise the right to call the motion docket at any time after the calendar shall be taken up.

24. Appeals from Justices of the Peace.

Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

25. On Consent Continuance—Judgment for Costs.

When civil action shall be continued by consent of parties, the court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. Time to File Pleadings—How Computed.

When time to file pleadings is allowed, it shall be computed from the adjournment of the court.

27. Counsel Not Sent for.

Except for some unusual reason, connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

28. Criminal Dockets.

Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state and number the criminal business of the court in the following order:

First. All criminal causes at issue.

Second. All warrants upon which parties have been held to answer at that term.

Third. All presentments made at preceding terms, undisposed of.

Fourth. All cases wherein judgments *nisi* have been entered at the preceding term against defendants and their sureties, and against defaulting of jurors or witnesses in behalf of the State.

29. Civil and Criminal Dockets—What to Contain.

Clerks will be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First. The names of the parties.

Second. The nature of the action.

Third. A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein.

Fourth. A blank space for the entries of the term.

30. Books.

The clerks of the Superior Courts shall be chargeable with the care and preservation of the volumes of the Reports, and shall report at each term to the presiding judge whether any and what volumes have been lost or damaged since the last preceding term.

ANNOUNCEMENT OF DEATH OF ASSOCIATE JUSTICE GEORGE W. CONNOR.

Associate Justice George W. Connor died at his residence in Raleigh on Saturday, 23 April, 1938, at 9:00 a.m. That morning Chief Justice Walter P. Stacy, Justices Heriot Clarkson, Michael Schenck, W. A. Devin, M. V. Barnhill and J. Wallace Winborne, associates of Justice Connor on the Supreme Court, made the following expression:

"In the death of Associate Justice George W. Connor a great loss has come to the judiciary. The personal feeling of each member of the Court is one of profound sorrow and regret. We shall miss the warmth of his friendship and the wisdom of his counsel. The law of the State has been enriched by his labors, and it will feel the effects of his going. In the hearts of those who knew him best, his immortality will abide. Truly, a great public servant has fallen. We desire to express our sympathy for his bereaved family and the people of North Carolina whom he served with conscientious devotion and untiring zeal."

On Tuesday, 26 April, 1938, the Court, meeting in conference at 10:00 a.m., adopted the following resolution in memory of Justice George W. Connor:

"Since the last meeting of the Court, the death of Associate Justice George W. Connor has brought to each of his associates a keen sense of personal sorrow. We proceed today with profound appreciation of the immeasurable loss that has come to the State and its people. His absence is a reminder that in the midst of life we are in death.

" 'Death is the veil which
Those who live call life;
They sleep, and it is lifted.'

"In recognition of his notable career, and as a mark of respect to his memory, it will be recorded that for fourteen years he bore the burden of intense judicial labor as a member of the Supreme Court, and his opinions, always forceful and to the point, are to be found in 26 volumes of our Reports, beginning with the 188th and ending with the 213th. The law of the State has been enriched by his labors, as both bench and bar will readily attest. He devoted himself wholeheartedly to the task of writing just judgments into the book of the law of a great people. His was a philosophy of constructive thinking ever in pursuit of the ideal. This gave him a well-poised mind. All of his powers were spent in hammering out a compact and solid piece of work, which he made first-rate and left it unadvertised. It will stand as his monument.

"Our Attorney-General in speaking of him said: 'He held all that was best in the past, brightest in the present and most hopeful for the future.' "

MEMORIAL ADDRESS

BY ROBERT WATSON WINSTON ON PRESENTATION
OF A PORTRAIT OF THE LATE

FRANK SHEPHERD SPRUILL

TO THE

SUPREME COURT OF NORTH CAROLINA

29 MARCH, 1938

May it Please Your Honors, Ladies and Gentlemen:

Scarcely had the seceding southern states entered upon their brief career before Roanoke Island fell and Union gunboats were threading their way through our defenseless waters. The Roanoke River became an avenue of flame. So great was the terror along its banks that women and children fled to the hill country, many families finding homes in the county of Halifax. There, upon his father's Halifax plantation on the waters of the upper Roanoke, was born December 9, 1862, to William E. Spruill, a Confederate soldier, and Harriet, his wife, a son whose portrait we now unveil and shall presently present to a court he loved so well.

The pattern of Frank Shepherd Spruill's life conforms to that of the average youthful enthusiast. At first we find him bold and confident. With his coöperation the liberal spirit of the coming century should blossom out. The poet's dream would come true: the parliament of men, the federation of the world, this and nothing less was the vision. But the maturer man arrived at a far different conclusion. He began to understand that this terrestrial ball, which men call the Earth, is so unmanageable, so incomprehensible, that a heavenly paradise is not likely to develop the overnight. Not only so but he realized that toil and patience are the only keys to genuine success. The old way is the best way, here a little, there a little, first the blade then the ear, and after that the full corn in the ear.

In a life of Joseph Chamberlain, which I recently read, it is stated that the first milestone of "Radical Joe" ended so abruptly and the second began so definitely that the precise year is discoverable. "At forty-nine," as his biographer relates, "Chamberlain stood on the threshold of a complete change. His outlook upon our national life, which,

although always intense, had up to this point been narrow and short, broadened and lengthened; and he perceived that the remorseless unfolding of events had proved contrary to the expectations both of his youth and of his prime. The rest of his life was to be spent fighting against the forces he himself so largely set in motion." So was it with Frank Spruill. His forty-fifth year marks the ending of the first and beginning of the second period of his career. After his forty-fifth birthday the liberal changed into a conservative, not a radical conservative at all, not the reactionary type of the Earl of Rosebery, for example, who felt about democracy as if he were holding a wolf by the ears.

As we have seen, Frank Spruill was born in the throes of war. About his cradle the sound of guns reverberated. At the hour of his birth, over the border at Chancellorsville, in a tangled wilderness of the Rappahannock, the strategy of Lee and the tactics of Jackson were astounding the world. The child was therefore a war baby. But, in a search for the roots of his character, another circumstance should be taken into account. He was reared in the country, far, far removed from the big city with its enervating influences and its benumbing conventionalities. His lot was also cast in a community noted for aggressive leadership. At an assemblage of historians, in which I recently took part, the question was raised as to which two North Carolina counties in the past should be considered the leaders. Orange and Halifax were the favorites. Not on account of their wealth, not on account of their industries, but because of the number and vigor of their local leaders.

Amid such surroundings of war and rusticity, it might well be expected that young Spruill's life would have been warped, that he would be hindered by sectionalism. That this result did not follow is due, in part at least, to heredity. If his early surroundings were exiguous and tended to pull the youngster backward, a well poised and a stable ancestry propelled him forward. Now when one begins to discuss the subject of heredity and environment, and to appraise them, I am well aware that he is treading on slippery ground. The subject squints both ways, some psychologists acclaiming the former, and others, the latter. And yet, as we read, the better opinion is that the strictest apostle of heredity must suspect that environment and heredity are aspects of the same thing. No matter, for example, how begotten or how born Charles Dickens might have been, the Victorian poverty must have controlled his pen just as feudalism directed the pen of the immortal Scott.

At all events the quality of young Spruill's life is traceable to the blood that coursed through his veins. For generations his father's people—a sturdy, prolific, English stock whose foundation stone was

God and whose faith was rooted in Holy Writ—created hearthstones so wholesome and so characteristic of North Carolina that they made our good State loved at home and honored abroad.

> And certes in fair virtue's heavenly road
> The cottage leaves the palace far behind.
> What is a lordling's pomp? A cumbrous load,
> Disguising oft the wretch of human kind
> Studied in arts of hell, in wickedness refined!

Mr. Spruill's mother was an Arrington, a Nash County Arrington, with all that the name implies of serenity, kindliness, and open-handed hospitality. Indeed one cannot think of Nash County without a smacking of the lips. He has wonderful visions. His thoughts turn to old Nick Arrington and his famous Nash County apple brandy, to horse-racing, to cock-fighting, to deer stalking, to fox hunting, to anything and everything, in fact, save and excepting seriousness! One of the Arrington stock was our Governor, and three were judges. Four of them have been members of Congress. Archibald Hunter Arrington and Archibald Hunter Arrington Williams, each a Congressman and a popular favorite, were generous to a fault, hospitable to a degree, in warp and woof, typical Tar Heels! In his day old man Baldy Arrington had been a noted politician, from January 1st to December 31st always mending his fences and keeping his ear close to the ground. On election day he would leave his Nash County home and go up to Brassfields Township in Granville County, where by his winning personality he would convert a Whig majority into a Democratic victory.

Such was the home, such the surroundings, and such the ancestry of our young friend. And a handsome, ruddy-cheeked, blue-eyed youth he was, broad-shouldered, six feet in his stockings, a fine horseman, a lover of nature in all her varying moods. To him indeed all the earth was gay, and land and sea gave themselves up to jollity. At the age of eighteen we find the lad a student of the famous, classical Bingham School at Mebane, where he excelled in belles-lettres and won a much coveted medal for the best English essay. In due time he entered the University of North Carolina. At these two institutions he laid deep and broad the foundation of a liberal education. Likewise he acquired a taste for moving, classical oratory—a trait which distinguished him throughout life.

While at college the young student developed a genius for genuine friendships. Not the promiscuous friendship of the flippant French woman, with her dear three hundred friends. But a friendship of choice spirits. Sterling Ruffin, Edwin Alderman, Frank Dancy, Wil-

liam J. Adams, Frank Daniels, Gordon Battle, these and a few other generous youngsters he grappled to his soul with hoops of steel—one of them, Dr. Sterling Ruffin, becoming closer and dearer till the very end.

While young Spruill agreed with my Lord Bacon that whatsoever delighteth in solitude is either a wild beast or a god and whosoever, in the frame of his nature and affections, is unfit for friendship, he taketh it of the beast and not from humanity, he nevertheless gave heed to the caution of King Henry to Prince Hal. He resolved not to be common nor hackneyed in the eyes of men. He would be chary of his presence, he would sit well back in the rear of his affections.

From these apparent niceties it must not be concluded that our young student was a recluse or in any sense a parlor knight. The fact was far otherwise. True, he was somewhat exclusive in his associates, wore the best-fitting clothes and attained numerous college honors, becoming an editor of the University Magazine, and an active member of the Alpha Tau Omega Fraternity, but he was far removed from snobbery. Essentially he was a thoroughly carefree youngster, a splendid specimen of the gay debonnaire eighties. With the best of the boys he sowed his wild oats. Occasionally he would make excursions afoot, three miles up the creek to Graham Sykes' moonshine distillery. He loafed in Tom Dunstan's famous barber shop, and delighted in the homely wit and abounding nonsense of "Professor" Dunstan, Jordan Weaver, Wilson Caldwell, and Bill McDade, our faithful friends and college servants.

After graduating from Dr. Manning's popular law school, he came down to this court and was orally examined by the three learned judges then presiding, Smith, Chief Justice, Ashe, and Ruffin, the younger, associates. It is an interesting fact that two of his classmates afterwards became judges—Owen H. Guion a judge of our North Carolina courts, and R. B. Albertson a judge in the state of Washington.

The young man's career had now begun, and under favorable auspices. After a short association with William Hamilton Young, of Henderson, a black-letter lawyer, worthy to rank in knowledge of the intricacies of the profession with George N. Folk and Foster Sondley of the west, or with George Davis and M. V. Lanier of the east, he removed to Louisburg and became the partner of Captain J. J. Davis. Honest Joe Davis! How well the pseudonym fits! Legislator, Congressman, judge of this exalted court, beloved citizen, royal gentleman! But greater than these, a captain under Pettigrew—one of the few, the immortal few, who scaled the serried heights of Gettysburg, passed beyond the Bloody Angle, amidst shot and shell planted the Stars and Bars farthest north, and immortalized that spot now marked in enduring bronze and visited every year by the millions who honor the Brave.

The copartnership of Davis and Spruill was based on mutual confidence and real affection and continued until the senior became a member of this court. Soon thereafter the Captain's place in the firm was filled by William H. Ruffin, who well sustained the great name he bore.

At this point in our young lawyer's career let us pause a moment and endeavor to ascertain what he was driving at. The survey may prove interesting. Indeed, since it is source material and typical of the southern youth, it may aid some future historian. What then was his aim in life, what his central point? Undoubtedly his motif was ambition—the ambition to become a great lawyer, and the further ambition to be a reformer and serve the people. When the Farmers' Movement took shape he sympathized and coöperated with it. He recognized the needs of agriculture as well as industry. In order to further the cause which he espoused and to raise the necessary funds he took an unusual step. He placed a mortgage upon the very house which sheltered him! Thus equipped, with borrowed money and a brave heart, he began to step out!

In a short time he represented Franklin County in the Legislature, was a delegate to the National Democratic Convention, and was chosen a trustee of the University. In the early 1890's he became an elector and canvassed his congressional district for Cleveland and Stevenson. When Charles B. Aycock was appointed United States District Attorney Mr. Spruill qualified as his assistant. The agrarian movement, now well under way, claimed Franklin County as its stronghold and Louisburg, the county seat, as the home of its crusader, its voice, its hope, its spiritualizing factor. Rev. Baylus Cade, a preacher of the fiery gospel of the absolute equality of every son of Adam, has not been surpassed, in our annals, as prophet and popular orator! In a short time Cade and Spruill began to coöperate. They greatly admired each other. So far had the farmers' movement developed that in 1888 Elias Carr, a practical Edgecombe County planter, emerged from his plantation and was elected Governor, to the dismay of the old-line politicians. Governor Carr and Spruill were neighbors and their families had been intimate for years.

Since Carr was not a stumper, he had requested young Spruill to make his canvass for him. This he did, and the Carr ticket was elected by an overwhelming majority, Spruill becoming an important factor in the new administration. Offices of various kinds the Governor showered upon him: Superintendent of the State's Prison, director of the North Carolina Railroad, and others. In fact, honors came the young man's way so thick and so fast that the matter became the talk of the streets. When a convention of the Episcopal Church was sitting to elect a suc-

cessor to Bishop Lyman, the irrepressible Bill Day, himself a Halifax product, chuckled and offered to bet his Sunday hat that Governor Carr would give Spruill the job!

This period is recognizable as the William Jennings Bryan era of political excitement. Undoubtedly it was also the forerunner and the matrix of the New Deal. A day when free silver and 16 to 1 became the cry. When, as the silver-tongued orator proclaimed, mankind should not be crucified on a cross of gold! When Mark Hanna, the Goldbug Republican leader, was tattooed with dollar marks from head to foot. In our good State, unless one stood for free silver, he was anathema.

The story is told of Fabius H. Busbee, the versatile, old-line Democrat, that he accosted Bos Beckwith, one of the free silver pillars, and made known that he would like to go as a delegate to the Free Silver National Democratic Convention, soon to convene.

"But, Mr. Busbee," Bos protested, "are you in favor of 16 to 1?"

"Of course I am, Bos," retorted Busbee. "But I am not a damn fool about it!"

"Oh, well then, Mr. Busbee, you are not qualified!"

Now Spruill was qualified, and so were others of us. We were in the throes of five-cent cotton and seven-cent tobacco, and we met Bos Beckwith's severest test.

On a hundred stumps Frank Spruill's voice had been heard heralding an advancing democracy. On one occasion he made a telling reply to Jeter C. Pritchard, the wheelhorse of Republicanism. Times had changed, Spruill concluded, and government should change with them. In truth he stood closer to the people than Governor Carr himself. He disagreed with the Governor and concurred with that radical reformer, Walter Clark, in the matter of leasing the North Carolina Railroad to the Richmond and Danville. Spruill stoutly opposed this lease and contended that the property should be held by the State and become a necessary feeder, linking west and east in closer bonds.

Thus rapidly moved the life of our impetuous young barrister when an event happened which somewhat changed his plans. The liberal movement collapsed—it was swallowed up: hoof and hide devoured by its opponent! Populism, free silver, the sub-treasury scheme, all, all threw up the sponge. Surrendered! The Free Silverites and the Goldbugs went to bed together! Pritchard, brave, unyielding advocate of the gold standard, a standpat McKinley Republican, was given one seat in the United States Senate and the other seat was accorded Marion Butler, apostle of free silver and Populism. W. A. Guthrie, a brilliant Populist, was turned down for Daniel Russell, who was elected as an out-and-out

Republican. The unholy alliance, as it was called, swept the deck, but its success proved the death of liberalism. Coalition had won an election, but it had lost its own soul. And with the going of liberalism went also Mr. Spruill's sporadic political activities. Definitely he concluded that reforms do not come by a sacrifice of principle nor with the speed of a cyclone.

The amount of energy he had wasted in arriving at his true degree before he began to be himself can hardly be measured. And yet the first half of his life was not wholly useless. He had learned to know his fellowman. He had also got a line on himself. Moreover he had become a good lawyer, diligent, painstaking, and thorough. From the very start he had kept a legal notebook—a compendium of great value. From this *vade mecum* no recent statute was left out, and no recent decision of this court. As a general rule our profession relies for authorities on the printed page, the digests, and the encyclopedias. Spruill was more diligent. He had the books, but he also prepared a digest of his own. Another practice of his is remarkable. It deserves the highest praise. He briefed the facts as well as the law of his cases. His brief book is a model of thoroughness and capability. Despite a flare for politics he had, for full twenty years, ridden the circuit with the judge, attending the courts of Franklin, Nash, Vance, and Granville, and crossing swords with the able lawyers of those counties. He was a prime favorite of Captain C. M. Cooke, who afterwards adorned and amused the bench!

A little incident, which I witnessed, may illustrate the range and thoroughness of Mr. Spruill's legal application. Down in Halifax the case of *Trust Company v. Whitehead and others* (to be found in our 165th Reports) was on trial before Judge Peebles. The plaintiff bank claimed to be the owner of the note sued on, it being an instrument not due when acquired, though one payment of interest was then overdue. The defense was lack of consideration and fraud. The judge, though anxious to allow the plea, was constrained to hold that the bank was an innocent purchaser. Judgment for the bank was therefore entered, and court adjourned for the midday meal. At the recess Spruill, who was not in the case, met Judge Peebles and said, "Judge, did not the failure to pay interest dishonor the note and enable the defendant to show fraud?" The judge, now greatly interested, asked for some authority, and was cited to a decision of an obscure New York court. Judge Peebles adopted Mr. Spruill's law and set the verdict aside. On appeal to this court a like result followed and the defendants won their case.

In his forty-fifth year Mr. Spruill moved to Rocky Mount and formed a partnership with Ben H. Bunn, a former Congressman from the

Fourth District. Rocky Mount, an ambitious little city, is located in both Nash and Edgecombe counties, and is the market town for an excellent farming country. Its people are hospitable and progressive. Close-in to aristocratic Tarboro and to politically-minded Goldsboro and to bustling Wilson, where Tobe Connor, Mr. Spruill's never-failing comrade, resided, Rocky Mount is itself an ideal home city. Into the inner circle of their new surroundings, the Spruills fitted without a jar. In a short time they constructed a commodious home, with flowers and shrubs, annuals and perennials all around and with a wonderful vegetable garden in the rear.

This homestead was very dear to Mr. Spruill. It became the apple of his eye. Presided over by a devoted wife, Alice Capehart, only daughter of Patrick H. Winston and Martha E. Byrd, of Bertie, blessed with a loyal son and two interesting daughters, the new home was everything that affection could desire. Social functions weighed but little in the scales with this home, which Mr. Spruill never quitted without a sigh and never approached without joy. Often in the afternoons the busy lawyer would leave the office to his son and well-equipped partner, Captain F. S. Spruill, Jr., and would throw the saddle upon his well-trained single-stepper and canter through the surrounding country, up and down the Tar, over the hills and through the pines. His day's work had a remarkable beginning. For a period covering nearly thirty happy seasons, each morning at six he would rise and slip on his overalls. Then with hoe and rake and hand-plow, Cincinnatus-like, he would cultivate his garden, making of it a thing of beauty—each row straight as the garden line could make it and rich with lady peas and beans and radishes and sweet corn and kale, the cold frames verdant with lettuce and potato slips and cabbage plants. In an hour or two he would lay aside his garden tools, take a full-length bath, eat a simple breakfast, and stroll down to his office, taking along a basket of the reddest tomatoes or the biggest Sharpless strawberries to be exhibited as a specimen of masterful horticulture!

Mr. Spruill's legal work was pleasant, and so absorbing that he wasted no time at cards or golf or social functions. For nearly thirty years he was division counsel of The Atlantic Coast Line Railroad, serving them with fidelity and satisfaction. Likewise he was general counsel for the extensive North Carolina Pine Association and for other important industries. In a word he did a grade of commercial practice, various, extensive, and of the highest quality. Moreover, as an adviser and consulting attorney, his judgment, his tact, and his learning were greatly appreciated. In the important suit of *Wells Whitehead Tobacco Company v. The American Tobacco Company,* involving an immense

sum under the Sherman Anti-Trust Act, he was one of the mainstays of an array of able attorneys representing the plaintiff. This case was heard at a special term of the United States Court held in Raleigh, and occupied more than a month in its trial.

In short, Mr. Spruill's emoluments were commensurate with the extent of his practice. When Attorney-General William Wirt, lawyer and scholar, would receive a *good* fee, it was his custom to write in his receipt book *Laus magna Deo.* Sometimes when the fees were *very large,* and ran into five figures, Wirt would write *Laus maxima Deo!* Mr. Spruill could join in with Wirt and at the end of nearly every year write *Laus maxima Deo.*

His style in speaking was ornate and classical. He strove for the highest standards. One or two sentences may illustrate. On the death of his friend Bishop Cheshire, whom he had known and loved for half a century, he beautifully said: "His convictions were so deeply rooted in his nature that they expressed themselves in his hourly walk and conduct. He never compromised with them, and in differing from others he was ever the urbane and courteous gentleman, but he was the positive exponent of his considered thought."

Perhaps it was this quality—consideration for others—that drew the priest and the lawyer together. Certainly it was this trait of magnanimity and courtesy which endeared him to the bench and bar alike and enabled him, even in the face of the highest legal tempests, to keep his rudder true. In Halifax County, as an instance, those influential lawyers, the Kitchins, the Dunns, Ed Travis, and Walter Daniel, would sometimes combine and cause juries to render the most "ongodly" verdicts. But even under this bludgeoning Mr. Spruill stood up like a man, never a whiner, never sour, never losing heart. Time and patience and an educated citizenry, together with remedial statutes, as he concluded, would cure the evil of excessive verdicts. But above all and in the final analysis Mr. Spruill pinned his faith to the integrity and the ability of this our highest court of appeals.

As I have been developing the character of this product of our good State, the thought must have occurred to some that he was remiss in abandoning the cause of liberalism; a criticism quite just had Mr. Spruill become self-centered or cut loose from his fellowman. This he did not do. On the contrary he became more truly liberal. His approach to liberalism changed but not the pursuit, and with the change came a newer, a deeper, a broader concept of service to humanity. When a young reformer he had relied upon the law—that is, upon the fleshly arm. When he grew more mature he understood that he had made a mistake. The Kingdom of Heaven is not taken by violence—

the Kingdom of Heaven is within us. The old, old way is the only way: Here a little, there a little.

Instead of a violent approach, therefore, he determined to employ more winning methods. He would build up, he would not tear down. He would awaken the conscience of his fellowman. He would reënact the Golden Rule.

Now, in approaching the second stage of Mr. Spruill's life, I can but regret my inability adequately to depict it or to make known how admirably it worked out. Suffice it to say that God became his central point—a universal God, the God and Father of all mankind. The Christian faith, as he concluded, was as good as can be expected, and certainly it is absolutely necessary to a well ordered social life. Upon this rock he planted himself and won the victory. He had wrestled desperately in the dawn with the angel of the withheld secret. He became as a lighted candle in a night of doubt.

For many years he was a vestryman of the Episcopal Church, whose ritual of beauty, dignity and, as he loved to call it, historicity, stimulated his æsthetical nature. He was likewise trustee and attorney for the local hospital and greatly interested in its work. The town library was very dear to him. He contributed to all community activities. A delegate and a regular attendant at all church conventions, he was a tower of strength to his minister and his bishop. For more than a quarter of a century he was the beloved teacher of a men's Bible class, which met every Sunday morning just before the church hour.

Such were a few of his social activities, the fruits of which were a patience, a tolerance, and a spirit so deep and so broad that it embraced all creeds, all colors and all conditions of mankind, notably the Hebrew people. It was a source of amazement to him that a race without a country, and throughout the ages, should have resisted absorption by other nations and retained their racial characteristics. He frequently dwelt upon the fact that so many things that make for the beauty and the pleasure of the human family were sponsored by the Jews—art, music, religion, philosophy, the theatre, and even the movies.

Referring to Mr. Spruill's Bible class and its far-reaching influence, one of its constant attendants recently wrote that the meetings were first held in the municipal courtroom and were presided over by a Methodist, being the Chief of Police. Such subjects were discussed as the life and the trial of Jesus, the life of St. Paul, the Book of Job, the story of the major prophets and of the lesser characters of the Old Testament. This letter concludes with the deepest appreciation and the statement that the lectures unfolded so much of the richness and beauty of the Bible literature, in addition to its spiritual significance, that parts

of the Scriptures, incredible to most minds, were converted into sources of comfort and help.

Among Mr. Spruill's papers were found many hundreds of these lectures and addresses, in the preparation of which he had been just as painstaking, thorough, and methodical as if writing a brief in an important case. Each paper is in longhand and covers many pages, including copious notes and references, and profound comments and deductions. In a characteristic Christmas talk, which he called the Three Wise Men, he made a striking observation. As he saw it, the language about seeing the star in the East was figurative. A visible star was not the real cause of the journey. The Three Wise Men were illumined by an inner light—that is, by an inner vision. When they could not see the star, the star had not faded from the sky at all. The three men had temporarily lost their inward glow. As a result they did not go to Bethlehem to inquire, nor to the temple. They went to the palace of the wicked Herod.

Unlike Saul, who went forth to tend his father's asses and founded a kingdom, the Three Wise Men went forth to find the Saviour and wandered off into the palace of the monster Herod. Not until the inner light returned did they discover the Babe in the Manger.

As with the Three Wise Men, so with Frank Spruill. After the heyday of his youth had spent itself, the inner light appeared and became his guide. Even as Elijah, he stood at last upon the mount before the Lord, and the Lord passed by and a great and strong wind rent the mountain, but the Lord was not in the wind, and after the wind an earthquake, but the Lord was not in the earthquake, and after the earthquake a fire, but the Lord was not in the fire, and after the fire a still, small voice.

Surely the serene face and the noble lineaments of such a man is worthy of perpetuation. His portrait should be hung upon these walls, these peaceful walls, unruffled by strife or turmoil, amidst a noble brotherhood who have gone before to encourage and to bless. At the request of his wife, his children, and his children's children, I now present to your Honors this portrait of Frank Shepherd Spruill, and request its acceptance in the spirit of its presentation.

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING THE PORTRAIT OF FRANK SHEPHERD SPRUILL, IN THE SUPREME COURT ROOM, MARCH 29, 1938

"To every man upon this earth
Death cometh soon or late."

The Grim Reaper is no respecter of persons. He calls with equal tread at the cottage gate and the palace door. The high and the low, the young and the old, he visits them all. He presses their eyelids down with dreamless slumber and they sleep with the hush of the generations.

"Like to the bubble in the brook,
Or in a glass much like a look,
Or like the shuttle in weaver's hand,
Or the writing on the sand,
Or like a thought, or like a dream,
Or like the gliding of the stream—
Even such is man, who lives by breath,
Is here, now there, in life and death.
The bubble's out, the look forgot,
The shuttle's flung, the writing's blot,
The thought is past, the dream is gone,
The water's glide, man's life is done."

Such is the flight of time. 'Tis the way of life.

"Time flies, you say! Ah, no!
Alas! Time stays! We go."

Our friend who returns to us in remembrance today, and who made the world a little better for having lived in it, deserves a permanent place in the annals of his day and generation. As has been so well said in the splendid appraisal of his life and character by his friend and ours, he was fortunate in the stock from which he sprang; also the temper of the times and the society of his young manhood stimulated him to effort, evoked him to nobleness, and spurred him to strength. During the early years of his career the South emerged from the carnage of battle, and, under the leadership of the heroes of the Confederacy, finally triumphed over the night of reconstruction and found a way,

after its wounds had healed, but with heart still bleeding, to rehabilitate itself honorably and without the surrender of cherished ideals or principles. It was a task which required the exercise of superb wisdom and rare statesmanship. Human endurance has always been equal to human misfortune, and great causes have never lacked for leaders. Like all bruised and battered peoples, they turned instinctively to the younger generation for the realization of their hopes and for the fruition of their dreams. There was a fine spirit of determination in the atmosphere of the time, a broad conception of civic duty, and a clear call to youth to put its hand to the plow and spend itself, if need be, in high endeavor for the upbuilding of the common good. Frank Shepherd Spruill heard and heeded this call with great credit to himself and in a manner eminently satisfactory to his contemporaries. He was freely accorded a place of first rank among his fellows, as lawyer, statesman, citizen. We honor ourselves by honoring him. Nothing can be added to the just and faithful tribute of his biographer, who has spoken today.

At a time when the world is again enveloped in an agony of uncertainty; when men are bewildered by the sheer complexity of the civilization which they have evolved; when the center of gravity appears to have shifted from spiritual values to externals; when people are "shell-shocked" by economic collapse and baffled, if not intimidated, by life itself; when society as a whole seems to have lost, in large measure, its grasp upon reality, it is fitting that we pause in the midst of such confusion and pay homage to the memory of one who placed first things first, who added to the peace and tranquillity of the community, and who taught by precept and example that the better way of living comes only from holding fast to that which is good.

The Court is pleased to receive this handsome portrait. The Marshal will see that it is hung in its appropriate place, and these proceedings will be published in the forthcoming volume of the Reports.

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§ 7. Priority of Institution of Actions.

Order extending time for filing complaint for more than 20 days is not void, and action is pending from time of service of summons and such order. *O'Briant v. Bennett*, 400.

ACTIONS.

§ 4. Civil Action Based Upon Plaintiff's Own Wrongful Act.

A party may not maintain an action founded upon or growing out of his own wrongful or unlawful act. *Brown v. Brown*, 347.

Husband may not maintain action for divorce on ground of separation when separation is result of husband's wrongful abandonment of wife. *Ibid.*

§ 10. Pendency and Termination of Actions. (See, also, Abatement and Revival § 7.)

An action is not ended by the rendition of a judgment, but is still pending for the purposes of issuing and recalling execution, determining proper credits, or the amount due thereon, and for other motions affecting the existence of the judgment not involving fraud. *Finance Co. v. Trust Co.*, 369.

ADVERSE POSSESSION.

§ 3. Actual, Hostile, and Exclusive Possession.

When title to the mineral rights has been severed from title to the surface of the earth, the owner of the surface can acquire no title to the minerals by exclusive and continuous possession of the surface, and the owner of the minerals does not lose his title or possession by any length of nonuser, and may be disseized only by the actual taking of the minerals out of his possession. *Vance v. Pritchard*, 552.

§ 9. Color of Title.

A deed is color of title only in accordance with the estate it purports to convey, and a deed conveying a one-half interest is color of title only as to the one-half interest. *Dorman v. Goodman*, 406.

APPEAL AND ERROR.

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§ 2. Judgments Appealable: Premature Appeals.

When the Supreme Court has granted a motion for a new trial for newly discovered evidence in a cause originally heard by a referee, an appeal from judgment of the Superior Court annulling the former judgment and restoring the cause to the docket for trial, is premature and will be dismissed. *Franklin v. School*, 263.

The refusal of the trial judge to require a prosecution bond in an action to abate a public nuisance is not appealable. C. S., 493. *Carpenter v. Boyles*, 432.

§ 6a. Time of Taking Objections and Exceptions.

An exception, entered after trial and verdict, to the refusal of the court to submit the issue tendered will not be considered when no exception was taken at the time and no exception taken to the issue submitted. *Carpenter v. Boyles*, 432.

§ 6b. Form and Sufficiency of Exceptions in General.

When there is no exception to the court's finding that the parties consented to a consolidation of the actions for trial, an exception to the order of the court consolidating the actions will not be sustained. *Cole v. Bryant*, 672.

§ 6e. Objections and Exceptions to Evidence.

An objection to a question asked a witness cannot be sustained when no exception to the answer of the witness is taken and no motion to strike out the answer is made. *Carpenter v. Boyles*, 432.

Appellant excepted to a preceding question but did not except to the question eliciting the testimony complained of, or to the testimony. *Held:* The competency of the testimony is not presented for decision, since only exceptive assignments of error will be considered. Rule of Practice in the Supreme Court, No. 19 (3). *Mfg. Co. v. Mutual Exchange*, 658.

§ 6f. Objections and Exceptions to Charge. (In criminal cases see Criminal Law § 53g.)

Objections to the statement of the contentions of a party must be made in apt time in order for assignments of error based thereon to be availing on appeal. *Rooks v. Bruce*, 58.

When there is no exception to the charge, it will be presumed that the principles of law applicable to the different views of the evidence were correctly and fairly presented. *Perry v. Davis*, 526.

§ 9. Appeal Entries.

In this action in ejectment plaintiff claimed under deed from the purchaser at a sale under decree of foreclosure of a deed of trust on the lands. Defendant denied the validity of the confirmation of the sale. The court during the progress of the trial entered an order of confirmation of the sale. *Held:* Even though the order of confirmation was entered during the progress of the trial in ejectment, it was in fact entered in the foreclosure action, and the question of the validity of the order of confirmation may be presented only by appeal in that action, and may not be considered on appeal from the judgment in the action in ejectment. *Bank v. Stone*, 598.

APPEAL AND ERROR—*Continued.*

§ 21. Matters Not Appearing of Record.

Where the charge of the court is not in the record, it will be presumed that the questions of fact were properly submitted to the jury. *Silver v. Skidmore*, 231.

When record does not affirmatively show that court decided discretionary matter as matter of law or from want of power, it will be presumed that matter was properly decided in exercise of discretionary power. *Hogsed v. Pearlman*, 240.

The record imports verity, and when the record does not disclose an agreement of the parties that an order might be entered outside the county and district, appellant's contention that no such agreement was made, must prevail. *Jeffreys v. Jeffreys*, 531.

§ 22. Conclusiveness and Effect of Record.

The record imports verity. *Jeffreys v. Jeffreys*, 531.

§ 23c. Form and Requisites of Assignments of Error to Charge.

An assignment of error for that the charge failed to state in a plain and correct manner the evidence and to explain the law arising thereon as required by C. S., 654, without pointing out its deficiencies, is too general. *Rooks v. Bruce*, 58.

§ 37b. Review of Discretionary Matters.

The denial of a motion to amend, being a matter within the sound discretion of the trial court, is not reviewable on appeal except in case of manifest abuse of discretion. *Hogsed v. Pearlman*, 240.

It will be presumed on appeal that the court's ruling upon a matter resting in his discretion was properly based upon his discretionary power when the record does not affirmatively show that appellant's motion was denied as a matter of law or from want of power. *Ibid.*

Objection on the ground that the verdict awarded excessive damages rests in the sound discretion of the trial court, and a verdict will not be disturbed on appeal in the absence of abuse of discretion or some error of law or legal inference in connection therewith. *Johnston v. Johnston*, 255.

While a motion for a new trial for newly discovered evidence is addressed to the discretion of the trial court, when the affidavits supporting the motion are insufficient to invoke the discretionary power of the court, its ruling thereon is reviewable, and the granting of the motion will be held for error. *Bullock v. Williams*, 320.

An order of the trial court permitting plaintiff to file complaint after the time limited, C. S., 536, entered in the court's discretion, is ordinarily not reviewable. *O'Briant v. Bennett*, 400.

Ordinarily, an order making additional parties is not prejudicial, and therefore such orders are usually discretionary and not reviewable. *Morgan v. Turnage Co.*, 425.

Court's finding that witness had sufficient mentality to testify is not reviewable. *Carpenter v. Boyles*, 432.

A motion to set aside a verdict as being against the weight of the evidence is addressed to the discretion of the trial court and is not reviewable, and an exception on the ground that the refusal of the motion was error as a matter of law is untenable. *Evans v. Ins. Co.*, 539.

A motion for continuance is addressed to the sound discretion of the trial court, and the denial of the motion is not reviewable in the absence of abuse of discretion. *Cole v. Bryant*, 672.

APPEAL AND ERROR—*Continued.*

§ 37c. Matters Reviewable in Injunctive Proceedings.

Although the Supreme Court can review the evidence on appeal in injunctive proceedings, where there are no exceptions to the findings of fact by the lower court, and the record shows that the statement of case on appeal as served by appellees stated that it did "not contain all the evidence relating to the findings of fact to which there are no exceptions" the findings of fact will be held conclusive. Art. IV, sec. 13. *Williamson v. High Point*, 96.

§ 37d. Conclusiveness of Verdict of Jury.

The verdict of the jury on conflicting evidence is conclusive in the absence of prejudicial error upon the trial. *Rooks v. Bruce*, 58; *Owens v. Hill*, 202.

§ 37e. Conclusiveness of Findings of Fact.

The findings of fact of the trial court in affirming the report of the referee are conclusive on appeal when supported by evidence. *Wake Forest v. Gulley*, 494.

The court's finding that petitioner's continued refusal to pay alimony was willful supports the court's judgment refusing to grant the petition for release for financial inability to pay, and the finding is conclusive on appeal when supported by evidence. *Dyer v. Dyer*, 634.

§ 38. Presumptions and Burden of Showing Error.

The burden is on appellant to show error. *Merrell v. Bridges*, 123.

The burden is on appellant to show prejudicial error, as the presumption is against him. *Madison County v. Catholic Society*, 204.

It will be presumed that court passed upon matter resting in discretion in exercise of discretion when record does not affirmatively show that matter was decided as matter of law or from want of power. *Hogsed v. Pearlman*, 241.

When the judgment of the lower court is affirmed on appeal because the Supreme Court is evenly divided in opinion, the judgment of the lower court becomes the law of the case and is determinative of the rights of the parties upon a second action instituted by the same plaintiff on the same contract against the successor of the defendant company. *Seay v. Ins. Co.*, 660.

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the Superior Court will be affirmed without becoming a precedent. *Collins v. Mfg. Co.*, 800; *Wells v. Ins. Co.*, 801; *Mills v. Jones*, 802; *Frady v. Power Corp.*, 803.

§ 39b. Error Cured by Verdict or Harmless Because Appellant Is Not Entitled to Relief on Any Aspect.

Exceptions to rulings upon the evidence relating to damages become immaterial when the answer to the first issue establishes that plaintiff was not injured by wrongful act of defendant. *Rooks v. Bruce*, 58.

The failure of the jury to answer the issue of indebtedness does not entitle plaintiff to a new trial when the evidence is sufficient to justify an instruction that the issue be answered "Nothing," the verdict, though incomplete, not being prejudicial in such instance. *McArthur v. Byrd*, 321.

An erroneous instruction on one issue cannot be cured by the answers to other issues submitted when the issue to which the error related is the one determinative of the rights of the parties. *Whitaker v. Ins. Co.*, 376.

§ 39d. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The court's rulings upon the evidence cannot be held prejudicial upon appellant's exceptions when rulings in accord with appellant's contentions could not change the result of the trial. *Realty Co. v. Demetrelis*, 52.

APPEAL AND ERROR—*Continued.*

Exclusion of evidence *held* not prejudicial in view of other like evidence introduced upon the trial. *Anderson v. Amusement Co.*, 130.

The admission of testimony cannot be held prejudicial when it appears that the adverse party, in his testimony at a former trial introduced in evidence, admitted in substance the facts testified to by the witness. *Allen v. Allen*, 164.

Error in the admission of evidence may be rendered harmless by the admission of an overwhelming mass of other competent evidence tending to prove the same fact. *Carpenter v. Boyles*, 432.

When the trial judge instructs the jury that certain evidence introduced is withdrawn, and that they should not consider it in their deliberations, the admission of such evidence will not be held for error. *Munden v. Ins. Co.*, 504.

An exception to the admission of certain evidence will not be sustained when the evidence is rendered meaningless and its admission harmless by the withdrawal of other evidence upon which it was predicated and which alone gave it meaning. *Munden v. Ins. Co.*, 504.

§ 39e. Harmless and Prejudicial Error in Instructions.

The inadvertent use of the word "no" instead of "yes" will not be held for reversible error when the error does not mislead the jury or prejudice the rights of the parties. *Merrell v. Bridges*, 123.

Error in charge on measure of damages *held* not cured by later correct instruction followed by another erroneous charge. *Blaine v. Lyle*, 529.

An instruction will be construed as a whole, and portions of the charge, even if slightly objectionable when standing alone, will not entitle appellant to a new trial if the charge as a whole is not prejudicial. *Acceptance Corp. v. Edwards*, 736.

§ 39h. Prejudicial and Harmless Error in Selection of Jury.

The fact that the panel was not drawn by a legal agency does not entitle appellants to a new trial in the absence of a showing of prejudice. *Reed v. Madison County*, 145.

§ 40a. Review of Judgments on Findings of Fact or Verdict.

Where the Superior Court strikes out a finding of a referee and makes an additional finding in lieu thereof, which additional finding is not supported by any competent evidence, there is no proper basis for the judgment, and the cause must be remanded for a proper determination of the pertinent exceptions to the referee's report. *Threadgill v. Faust*, 226.

An assignment of error to the signing of the judgment cannot be sustained when the judgment is supported by the verdict. *Evans v. Ins. Co.*, 539.

It will be presumed on appeal, nothing else appearing, that the court found facts supporting its judgment. *Jones v. Warren*, 730.

§ 40e. Review of Judgments on Motions to Nonsuit.

Upon appeal from the overruling of a motion to nonsuit, the evidence must be reviewed to ascertain whether there is any competent evidence to support plaintiff's cause of action, considering the evidence in the light most favorable to plaintiff. *Perry v. Davis*, 526.

§ 40f. Review of Judgments on Demurrers.

Upon appeal from judgment sustaining a demurrer, the Supreme Court will examine the allegations of the complaint to ascertain if they are sufficient, under the rule of liberal construction, to state a cause of action. *Griggs v. Griggs*, 624.

Upon appeal from judgment sustaining a demurrer, the Supreme Court is required to decide solely whether the complaint is sufficient to allege a cause

APPEAL AND ERROR—*Continued.*

of action on any aspect, and it will not consider the merits of the controversy. *Stroud v. Transportation Co.*, 642.

§ 40g. Review of Constitutional Questions.

When an appeal may be decided on either one of two grounds, one involving a constitutional question and the other a question of less moment, the constitutional question will be pretermitted. *Reed v. Madison County*, 145.

§ 41. Questions Necessary to Determination of Appeal.

Where it is determined on appeal that plaintiff taxpayer is entitled to an injunction restraining the issuance of bonds for the construction of an electric power plant by defendant city, the right of an intervening power company to the same relief on its contention that its valuable franchise rights would be destroyed, need not be considered. *Williamson v. High Point*, 96.

When a new trial is awarded on one exception, other exceptive assignments of error need not be considered. *Tomberlin v. Bachtel*, 250; *Vance v. Pritchard*, 552; *Kennedy v. Trust Co.*, 620.

§ 43. Rehearings.

Plaintiff, with knowledge of the facts, asserted a lien as a subcontractor under C. S., 2437. Upon ascertaining that the amount due the contractor was insufficient to pay its claim in full, plaintiff asserted a lien as a material furnisher under C. S., 2433, and in its action founded upon C. S., 2433, judgment of nonsuit was entered because of plaintiff's original election to proceed under C. S., 2437. The judgment as of nonsuit was affirmed on appeal. *Held:* Plaintiff's petition to rehear and for a modification of the judgment to take advantage of the provisions of C. S., 2437, is precluded by its second election to maintain the action under the provisions of C. S., 2433. *Lumber Co. v. Perry*, 533.

§ 47a. Motions in Supreme Court for New Trial for Newly Discovered Evidence.

A new trial for newly discovered evidence will not be allowed in the Supreme Court when the evidence relied on is immaterial in determining the ultimate rights of the parties. *Owens v. Hill*, 202.

§ 48. Remand. (Of proceedings for compensation see Master and Servant § 55g.)

Cause remanded for findings necessary for determination of whether disobedience of court order was willful. *Vaughan v. Vaughan*, 189.

Upon this appeal the cause was remanded for want of evidence supporting the court's finding in regard to proper parties to defendant's counterclaim, and it is also ordered that additional evidence be taken on the question of damages upon the counterclaim in view of plaintiff's motion for a new trial for newly discovered evidence on this question, and the fact that the trial court was of the opinion that error was committed in calculating the damages, which he attempted to correct at a subsequent term over objection. *Threadgill v. Faust*, 226.

§ 49. Force and Effect of Decisions of Supreme Court.

When the Supreme Court grants a new trial for newly discovered evidence, the final judgment and the verdict or findings upon which it rests are *ex necessitate* set aside. *Franklin v. School*, 263.

§ 50. Jurisdiction and Proceedings in Lower Court After Remand or New Trial.

When original order does not agree upon referee, trial court need not refer to same referee after Supreme Court grants a new trial for newly discovered evidence. *Franklin v. School*, 263.

APPEAL AND ERROR—*Continued.*

A decision of the Supreme Court adjudicating solely the invalidity of certain deeds of gift for want of registration within two years of their execution, and remanding the cause for a new trial, does not adjudicate the question of estoppel raised by the pleadings, and a motion for judgment on the pleadings and the certificate of the Supreme Court on the question of estoppel is properly denied. *Allen v. Allen*, 264.

When the effect of the decision on a former appeal is that the evidence of a parol contemporaneous agreement alleged by defendants was competent and sufficient to be submitted to the jury, the decision becomes the law of the case, and it is error for the lower court upon the subsequent hearing upon substantially the same evidence to hold the evidence incompetent and insufficient to be submitted to the jury. *Stanback v. Haywood*, 535.

When Supreme Court is evenly divided in opinion the judgment of lower court becomes law of the case and is controlling. *Seay v. Ins. Co.*, 660.

ARREST AND BAIL.

§ 4. Manner and Method of Detention.

Where defendant is informed immediately after his arrest that he is charged with the murder of a named person, and defendant makes no request to be allowed to communicate with friends or counsel, the arrest and detention of defendant without permitting friends or counsel to communicate with him does not constitute a violation of ch. 257, Public Laws of 1937. *S. v. Exum*, 16.

§ 5. Right to Bail.

When defendant is arrested pending investigation on a capital charge, the officer making the arrest is not required to have bail fixed. Ch. 257, Public Laws of 1937. *S. v. Exum*, 16.

ASSAULT AND BATTERY.

(Forcible trespass see Forcible Trespass.)

§ 1b. Right of Action of Injured Bystander.

A bystander, injured in an affray, may maintain an action against the participants in the affray, and his failure to leave the scene, a public place, *held* contributory negligence. *Sitton v. Twiggs*, 261.

§ 5. Sufficiency of Evidence in Civil Actions for Assault.

Nonsuit *held* correctly allowed as to one defendant upon plaintiff's testimony that the defendant did not curse, abuse, or frighten plaintiff, but merely took hold of his codefendant. *Rooks v. Bruce*, 58.

§ 9. Presumptions and Burden of Proof in Criminal Prosecutions.

Presumption from use of deadly weapon does not apply to assault cases, but only to prosecutions for homicide. *S. v. Carver*, 150.

§ 12. Instructions in Criminal Prosecutions.

Failure to submit question of guilt of less degrees of assault *held* error. *S. v. Burnett*, 153.

ASSIGNMENTS.

§ 6. Rights and Liabilities of Acceptor.

Evidence *held* not to show as matter of law that assignor was owner of funds paid to third person by acceptor. *Bank v. Gahagan*, 511.

ATTORNEY AND CLIENT.

§ 9. Right to, and Amount of Compensation.

The amount allowed by the jury's verdict in an action by an attorney to recover upon *quantum meruit* for services rendered is conclusive in the absence

ATTORNEY AND CLIENT—*Continued.*

of a showing of prejudicial error on the trial. *Madison County v. Catholic Society*, 204.

§ 12. Disbarment Procedure and Proceedings.

Courts have inherent power to disbar attorneys found to be unfit and unworthy to practice law. *S. v. Spivey*, 45.

§ 14. Judgment and Orders in Disbarment Proceedings.

Court has inherent power to order copy of disbarment order to be certified to State granting license by comity. *S. v. Spivey*, 45.

An order disbarring an attorney upon his conviction of a felony is not additional punishment, but is entered as a protection to the public. *Ibid.*

AUTOMOBILES.

II. Sale, Title, and Warranties
7. Warranties and Liabilities of Dealer
III. Operation and Law of the Road
8. Sudden Emergency
12. Speed
a. Speed in General
e. Through Streets and Boulevards
14. Parkings and Parking Lights
15. Condition of, and Defects in Vehicles
18. Actions to Recover for Negligent Operation
a. Negligence and Proximate Cause
c. Contributory Negligence
d. Concurring and Intervening Negligence
g. Sufficiency of Evidence and Nonsuit
h. Instructions
IV. Guests and Passengers
21. Parties Liable for Injuries to Guest
V. Liability of Owner for Driver's Negligence
24. Agents and Employees
b. Scope of Employment and Furtherance of Master's Business
VII. Criminal Responsibility of Driver
29. Drunken Driving

§ 7. Warranties and Liabilities of Dealer.

Complaint *held* to state cause of action in favor of guest in car against dealer for alleged defective brakes. *Jones v. Chevrolet Co.*, 775.

§ 8. Sudden Emergency.

Held: Whether the driver of the truck was confronted with a sudden emergency and the accident was unavoidable, or whether the driver of the truck was negligent in driving at an excessive speed and in failing to apply his brakes, and whether either or both of these acts or omissions, if established, was a proximate cause of the injury, is for the determination of the jury upon proper instructions. *Woods v. Freeman*, 314.

§ 12a. Speed in General.

Speed in excess of statutory restriction is *prima facie* unlawful but does not constitute negligence *per se*. *Latham v. Bottling Co.*, 158; *Woods v. Freeman*, 314.

§ 12e. Through Streets and Boulevards.

Failure to stop before entering through street intersection is not negligence *per se*. *Sebastian v. Motor Lines*, 770.

While a motorist traveling along a through street may assume that other motorists will stop before entering the intersection from a side street, he remains under duty to conform to the rule of the reasonably prudent man. *Ibid.*

§ 14. Parking and Parking Lights.

Even conceding that evidence disclosed negligence on part of defendant in parking car too near street intersection, *held*, the evidence disclosed contributory negligence on part of plaintiff in hitting car while sledding on the street. *Grimsley v. Scott*, 110.

§ 15. Condition of, and Defects in Vehicles.

Evidence *held* not to show that condition of truck or fact that it was overloaded proximately caused injury. *Owens v. Hill*, 202.

AUTOMOBILES—*Continued.*

§ 18a. Negligence, Proximate Cause and Last Clear Chance.

Plaintiff's employee's allegation and evidence tended to show that he was injured when he fell from a stationary truck as he was attempting to replace a sack of corn which had fallen off. There was no evidence that the condition of the truck or the fact that it was overloaded contributed to or proximately caused him to fall. *Held:* Plaintiff's allegation and evidence that the truck was overloaded and in disrepair are immaterial. *Owens v. Hill*, 202.

§ 18c. Contributory Negligence.

Evidence *held* to show contributory negligence of plaintiff hitting parked car while sledding. *Grimsley v. Scott*, 110.

§ 18d. Concurring and Intervening Negligence.

Held: Conceding that there was negligence in parking the truck, the evidence discloses that the active negligence of the driver of the car was the real, efficient cause of the accident, insulating defendant's negligence, and defendants' motions to nonsuit should have been granted. *Powers v. Sternberg*, 41.

Defendant railroad company's motion to nonsuit on the ground that the evidence showed that the negligence of the driver of the car in which plaintiff was riding as a guest was the sole proximate cause of the accident, *held* properly overruled. *Quinn v. R. R.*, 48.

§ 18g. Sufficiency of Evidence and Nonsuit.

Whether injury was result of unavoidable accident or of negligence of driver *held* for jury upon the evidence. *Woods v. Freeman*, 314.

§ 18h. Instructions.

Instruction that operation of truck on highway at speed in excess of 35 miles per hour constituted negligence *per se held* error. *Latham v. Bottling Co.*, 158.

A speed in excess of the statutory restrictions is *prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful, but it does not establish that the speed is unlawful as a matter of law, and is not *prima facie* proof of proximate cause, and does not make out a *prima facie* case, and an instruction that such speed constituted *prima facie* evidence of negligence, and if the jury should so find they should answer the issue of negligence in the affirmative, is erroneous. *Woods v. Freeman*, 314.

In an action to recover for injuries received in an automobile accident upon allegations of negligence, it is error for the court to instruct the jury that if defendant was negligent in the respects pointed out, they should return a verdict for plaintiff, since such instruction fails to take into consideration the element of proximate cause, but where the charge elsewhere instructs the jury that plaintiff could not recover unless defendant was responsible for negligence which proximately caused the injury, the charge may be held without error when construed contextually. *Ibid.*

Charge *held* for error in inadvertently imposing wrong statutory speed restriction. *Wood v. Freeman*, 314.

An instruction that intestate, who was driving along the through street, had a right to assume that defendant's truck would stop before entering the intersection from a side street, *is held* erroneous for failing to further instruct the jury on the issue of contributory negligence as to whether intestate acted with due care in keeping with the exigencies of the occasion upon evidence that the truck had almost passed through the intersection before intestate reached same, and that intestate, notwithstanding, attempted to pass in front of the truck. *Sebastian v. Motor Lines*, 770.

AUTOMOBILES—*Continued.*

§ 21. Parties Liable for Injuries to Guest.

Where the evidence discloses that the intervening negligence of the driver of the car in which plaintiff's intestate was riding as a guest was the sole proximate cause of the accident, plaintiff's action against persons responsible for the negligent parking of the other car involved in the collision is properly nonsuited. *Powers v. Sternberg*, 41.

Defendant railroad company's motion to nonsuit on ground that evidence showed that negligence of driver of car in which plaintiff was riding as guest was guilty of negligence constituting sole proximate cause of accident *held* properly overruled. *Quinn v. R. R.*, 48.

§ 24b. Scope of Employment and Furtherance of Master's Business.

Evidence *held* sufficient for jury on question of whether driver was acting within scope of employment. *Barrow v. Keel*, 373.

Evidence tending only to show that the driver of the truck involved in the accident was employed by defendant and that at the time the truck was loaded with merchandise belonging to defendant fails to make out a case against defendant under the doctrine of *respondeat superior*. *Tribble v. Swinson*, 550.

§ 29. Drunken Driving.

In a prosecution for drunken driving, C. S., 4506, an instruction that defendant was under the influence of intoxicating liquor if he had drunk enough to make him act or think differently than he would have acted or thought if he had not drunk any, regardless of the amount he drank, *is held* without error. *S. v. Harris*, 648.

BANKS AND BANKING.

§ 7a. Checking Deposits.

When a general deposit is made in a bank, title to the money passes from the depositor to the bank, forming a general fund for the payment of depositors, and the depositor owns a credit account with the bank under the relation of debtor and creditor. *Bank v. Weaver*, 767.

§ 9. Loans and Discounts.

The statutory right of counterclaim and set-off does not authorize a bank to apply a deposit to a debt due the bank by the depositor. *Stelling v. Trust Co.*, 324.

Held: Defendant bank made the advancements on the notes with full knowledge of the facts, and failed to inform plaintiff when the savings deposits were made that it intended to apply same to plaintiff's notes, and defendant may not assert the equitable right of set-off in plaintiff's action for the wrongful conversion of his savings account. *Ibid.*

BILLS AND NOTES.

§ 24. Pleadings.

Held: Conceding that debt declared on referred to the notes alleged in the first cause of action, second cause of action was demurrable for failure of allegation that notes were executed by defendants. *Griggs v. Griggs*, 624.

§ 22. Defenses.

Held: The pleadings raise the defenses of breach of contract for which the notes were given and failure of consideration, in whole or in part, and plaintiff is entitled to have both defenses submitted to the jury, the availability of the defenses as against the holder being dependent upon the jury's finding as to whether the defendant is a holder in due course. *Stelling v. Trust Co.*, 324.

BILLS AND NOTES—*Continued.*

§ 24b. Judgment on the Pleadings.

It is error for the court to render judgment in favor of the holder upon defendant's admission of the execution of the notes and nonpayment when the pleadings raise the defenses of breach of the contract for which the notes were given and partial failure of consideration, the availability of these defenses as against the holder being dependent upon the jury's finding as to whether he is a holder in due course. *Stelling v. Trust Co.*, 324.

BURGLARY AND UNLAWFUL BREAKINGS.

§ 5. Possession of Implements of Housebreaking.

The offense of possessing implements of housebreaking without lawful excuse, C. S., 4236, does not require the proof of any "intent" or "unlawful use." *S. v. Vick*, 235.

The courts will take judicial notice that nitroglycerin, soap, eye-dropper, dynamite caps, dynamite fuse, pistol cartridges, a double-barrel shotgun, a single-barrel shotgun, a sawed-off shotgun, a pair of bolt clippers, a sledge hammer, and a cold chisel, are, in combination, implements of housebreaking, and come within the term "other implement of housebreaking" used in the statute, C. S., 4236. *Ibid.*

§ 9. Sufficiency of Evidence.

Evidence in this case *held* sufficient to be submitted to the jury on charge of burglary in the first degree. *S. v. Feyd*, 617.

§ 10. Instructions.

Where implements are implements of housebreaking within judicial knowledge, court need not define the term. *S. v. Vick*, 235.

The court instructed the jury that defendant might be convicted of burglary in the first degree, or of burglary in the second degree, if they found that the room was unoccupied, but if they found defendant was too drunk to form felonious intent they should return a verdict of not guilty. *Held:* The instruction required the jury to find the defendant guilty of burglary in the first degree or not guilty, since there was no evidence that the room was unoccupied, and defendant is entitled to a new trial for error of the court in failing to instruct that defendant might be found guilty of breaking and entering otherwise than burglariously, C. S., 4235, or of an attempt to commit the offense. C. S., 4640. *S. v. Feyd*, 617.

CARRIERS.

§ 15. Relationship of Carrier and Passenger.

Conflicting evidence *held* properly submitted to jury upon question of whether deceased at time of injury was a passenger. *Perry v. Davis*, 526.

§ 18b. Separate Accommodations for Races.

Evidence *held* not to show willful violation of provision for segregation of races on bus. *S. v. Harris*, 758.

§ 21b. Injuries to Persons on Moving Car.

Nonsuit *held* proper in action against railroad company upon evidence showing that intestate was a trespasser upon a train and fell therefrom to his death, without evidence that his fall was caused by any wrongful and willful act of the railroad company or its employees. *Edwards v. R. R.*, 212.

§ 21d. Contributory Negligence.

Evidence *held* not to establish contributory negligence as matter of law on part of passenger struck on the railroad premises by freight car set in motion without warning in making a flying switch. *Perry v. Davis*, 526.

CHATTEL MORTGAGES AND CONDITIONAL SALES CONTRACTS.

§ 10. Liability of Mortgagor for Removing or Disposing of Mortgaged Property.

Warrant, as amended, and evidence *held* sufficient to support conviction for unlawfully disposing of chattels purchased under conditional sales contract. C. S., 4287. *S. v. Hart*, 804.

CLERKS OF COURT.

§ 7. Jurisdiction as Judge of Juvenile Court.

Juvenile courts have no jurisdiction to try boys fifteen years of age charged with a capital felony, the jurisdiction of the Superior Court over such prosecutions not having been taken away by the juvenile court act. *S. v. Smith*, 299.

CONSPIRACY.

§ 6. Sufficiency of Evidence of Criminal Conspiracy.

Evidence *held* sufficient to be submitted to the jury as to each defendant on charges of conspiracy to rob and larceny of a sum of money by trick. *S. v. Fuer*, 426.

CONSTITUTIONAL LAW.

III. Governmental Branches and Powers
4. Legislative Powers
6. Judicial Powers
a. Duty to Construe and Declare Law
b. Power and Duty to Determine Constitutionality of Statutes
IV. Police Power of the State
7. Scope of State Police Power in General
8. Regulation of Trades and Professions
10. Morals and Public Welfare
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12. Monopolies and Exclusive Emoluments
14. Right to Security in Person and Property
a. Searches and Seizures
VI. Due Process of Law: Law of the Land
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22. Remedies and Procedure for Enforcement of Contractual Obligations
XI. Constitutional Guaranties to Persons Accused of Crime
26. Necessity of Indictment or Presentment

§ 4. Legislative Powers. (Power to create municipal corporations see Municipal Corporations § 2; control over municipal corporations see Municipal Corporations § 5.)

Our State Constitution does not attempt to define the field of governmental authority, but is a limitation of powers, within which limitations the General Assembly, as representative of the people, may act, and an attempt by the Legislature to assert those powers must be liberally construed. *Wells v. Housing Authority*, 744.

The method for selecting membership of a housing authority created under ch. 456, Public Laws of 1935, does not constitute an unconstitutional delegation of authority. *Ibid.*

§ 6a. Duty to Construe and Declare Law.

The courts may not change or alter the common law by judicial decision, the power to make or alter the law, within constitutional limits, being the province of the Legislature alone. *Wells v. Ins. Co.*, 178.

§ 6b. Power and Duty to Determine Constitutionality of Statutes.

The courts will not declare a law unconstitutional unless clearly so, since the presumption is in favor of constitutionality. *Calcutt v. McGeachy*, 1.

The courts will not declare an act of the General Assembly unconstitutional where there is reasonable doubt. *Wells v. Housing Authority*, 744.

A statute will not be declared unconstitutional unless it so clearly violates a constitutional provision that no reasonable doubt can arise. *S. v. Lawrence*, 674.

CONSTITUTIONAL LAW—*Continued.*

When a statute is constitutional in part and unconstitutional in part, the constitutional provisions will be given effect when they are separable from the unconstitutional provisions. *Power Co. v. Clay County*, 698.

§ 7. Scope of State Police Power in General.

The police power is a necessary attribute of the sovereignty of the State and embraces the power to make regulations relating to the public health, safety, morals, comfort, convenience and welfare and the peace and good order of the community, the exercise of the power being largely in the discretion of the Legislature, limited only by the requirements that the regulations should not unnecessarily interfere with the rights of the citizen, and that there must be a reasonable relation between the regulation and the purpose sought to be accomplished. *Calcutt v. McGeachey*, 1.

§ 8. Regulation of Trades and Professions.

What professions and occupations should be subject to regulation in the exercise of the police power is largely in the discretion of the Legislature. *S. v. Lawrence*, 674.

Legislature, in exercise of police power, may regulate practice of photography. *Ibid.*

§ 10. Morals and Public Welfare.

Statute prohibiting slot machines which enable player to make varying scores upon which wagers may be made *held* valid. *Calcutt v. McGeachy*, 1.

C. S., 3180, *et seq.*, providing for the abatement of public nuisances is constitutional as a valid exercise of the police power of the State. *Carpenter v. Boyles*, 432.

§ 12. Monopolies and Exclusive Emoluments.

Act regulating practice of photography does not create monopoly. *S. v. Lawrence*, 674.

§ 14a. Searches and Seizures.

Affidavit for search warrant signed by chief of police meets requirements of the statute. *S. v. Cradle*, 217.

§ 16. What Constitutes Due Process.

The establishment of a cartway involves the taking of private property by eminent domain, and land therefor may not be taken without giving the owner notice and an opportunity to be heard, with right of appeal according to the due course of law. N. C. Constitution, Art. I, sec. 35. *Waldroup v. Ferguson*, 198.

C. S., 3180, *et seq.*, providing for the abatement of public nuisances by temporary order without bond, and the sale of the personalty and the closing of the property for one year upon the finding of the jury, is constitutional, and does not impinge Art. I, sec. 17, of the State Constitution, or Art. XIV, sec. 1, of the Federal Constitution. *Carpenter v. Boyles*, 432.

Act regulating practice of photography does not violate due process clause. *S. v. Lawrence*, 674.

Act providing for regulation and licensing of photographers does not set up arbitrary standards for examining applicants. *Ibid.*

§ 22. Remedies and Procedure for Enforcement of Contractual Obligations.

The obligations of a contract within the meaning of the constitutional prohibition against impairment, include all the means and assurances available for its enforcement both under its terms and under statutory provisions in force at the time of its execution, and remedies for its enforcement may be altered only so long as such alteration does not impair substantial rights thereunder. *Bank v. Bryson City*, 165.

CONSTITUTIONAL LAW—*Continued.*

Provision that refunding bonds should carry same remedies as bonds refunded may not be impaired by later act. *Ibid.*

§ 26. Necessity of Indictment or Presentment.

A person may be tried on a charge of manufacturing spirituous liquor for the second offense only upon indictment, since the offense is a felony. *S. v. Sanderson*, 381.

Male defendant's contention that indictment was void because returned by grand jury from which women were excluded *held* untenable, the alleged discrimination not being against the class to which defendant belonged and therefore not being prejudicial to him. *S. v. Sims*, 590.

General appearance waives any objection predicated upon irregularity in the warrant. *S. v. Harris*, 648.

CONTEMPT OF COURT.

§ 2a. Contempt of Court in General.

Criminal contempt is the commission of an act tending to interfere with the administration of justice, C. S., 978, while civil contempt is the remedy for the enforcement of orders in the equity jurisdiction of the court, C. S., 985, and the willful refusal to pay alimony as ordered by the court is civil contempt. *Dyer v. Dyer*, 634.

§ 2b. Willful Disobedience of Court Order.

Failure to comply with deed of separation approved by consent judgment will not support attachment for contempt. *Davis v. Davis*, 537.

§ 5. Hearings and Findings in Contempt Proceedings.

Court should find husband's financial condition on contempt hearing for failure to comply with order for support. *Vaughan v. Vaughan*, 189.

The court's finding that petitioner's continued refusal to pay alimony was willful supports the court's judgment refusing to grant the petition for release for financial inability to pay, and the finding is conclusive on appeal when supported by evidence. *Dyer v. Dyer*, 634.

§ 6. Punishment.

Punishment for civil contempt is not limited to thirty days imprisonment, C. S., 981, not being applicable to civil contempt, and a petition for release from imprisonment for willful refusal to pay alimony on the ground that the court exceeded its authority in not limiting the imprisonment to thirty days, is properly refused, but defendant need not serve indefinitely and may obtain his discharge upon a proper showing under appropriate proceedings. *Dyer v. Dyer*, 634.

CONTRACTS.

§ 7d. Gaming Contracts.

This action was instituted to recover commissions alleged to be due and advancements made in alleged buying and selling of cotton for the account of defendant's intestate, who was a dealer in sand. Defendant introduced evidence of stipulations of plaintiff brokers that on all "marginal business" the brokers might close out transactions when "margins" are near exhaustion, and that either party might "call" for "margin" in accordance with variations of the market, and a letter written by intestate to the brokers referring to a "call" for plaintiffs' "margin clerk." There was no probative evidence that the parties contemplated actual delivery of the cotton at any time. *Held:* Under the provisions of N. C. Code, 2145, defendant made out a *prima facie* case that the cause of action was founded on illegal contracts in cotton "futures," N. C. Code, 2144, placing the burden of proof on plaintiffs to estab-

CONTRACTS—*Continued.*

lish legality, N. C. Code, 4146, and there being no conflicting evidence requiring the submission of the issue to the jury, defendant's motion to nonsuit was properly granted. *Fenner v. Tucker*, 419.

Ch. 236, sec. 2, Public Laws of 1931, repealing C. S., 2145, 2146, does not apply to contracts made prior to its enactment, the repealing statute being prospective in effect and not retroactive. *Ibid.*

§ 8. General Rules of Construction.

Laws in force at the time of the execution of a contract become a part thereof. *Abernethy v. Ins. Co.*, 23; *Bank v. Bryson City*, 165.

The courts must declare a contract as written. *Law v. Cleveland*, 289.

The parties are bound in accordance with the terms, provisions and limitations set out in their agreement. *Whitaker v. Ins. Co.*, 376.

§ 11b. Conditions Precedent.

A contract is not effective so long as the parties thereto contemplate that anything should be done before contract relations should be established, and the parties may impose any condition precedent to the effectiveness of the agreement. *Federal Reserve Bank v. Mfg. Co.*, 489.

CORONERS.

§ 2. Duties and Authority.

A coroner has no authority to perform an autopsy in cases where there is no suspicion of foul play. C. S., 1020; ch. 209, Public Laws of 1933 (N. C. Code, 5003 [1]). *Gurganious v. Simpson*, 613.

COSTS.

§ 1. Prosecution Bonds.

The refusal of the trial judge to require a prosecution bond in an action to abate a public nuisance is not appealable. C. S., 493. *Carpenter v. Boyles*, 432.

COUNTIES.

§ 12. Budgets, Levy of Taxes and Appropriations. (Constitutional limitations on taxing power see Taxation, Title I.)

The county commissioners may amend their records to speak the truth to show which items of taxation are levied for special and which for general purposes, when the records fail to show separately the purposes of a levy but combine several purposes as a unit. *Power Co. v. Clay County*, 698.

§ 13. Application of Revenue.

By provision of Art. IX, sec. 5, the clear proceeds of fines collected by the clerk of a municipal court belong to the county school fund, and the clerk is not entitled to retain a percentage thereof as his fees, regardless of the provisions of public-local laws relating to his compensation. *Board of Education v. High Point*, 636.

COURTS.

§ 2a. Appeals to Superior Court from County, Municipal and Recorders' Courts.

The jurisdiction of the Superior Court on appeal from judgment of a recorder's court is derivative, and therefore, in an action on contract in the concurrent original jurisdiction of both courts, an amendment which sets up an affirmative equity over which the recorder's court has no jurisdiction, may not be allowed in the Superior Court upon appeal. *Allen v. Ins. Co.*, 586.

COURTS—*Continued.*

§ 2d. Appeals from Justices of the Peace.

When plaintiff institutes several actions in the same right in the court of the justice of the peace against the same defendant, which might have been united except for the jurisdictional limitation of the justice's court, and a common defense is set up as to each cause, the Superior Court, upon appeal of the several actions, may consolidate same for trial. *Kalte v. Lexington*, 779.

§ 6b. Clerks of Municipal Courts.

Clerk of a municipal court is not entitled to retain percentage of fines collected, since all of fines collected by him belong to county school fund. *Board of Education v. High Point*, 636.

§ 7. Jurisdiction of Recorders' Courts.

Action for reformation is for an affirmative equity beyond jurisdiction of the recorder's court. *Allen v. Ins. Co.*, 586.

§ 11. Conflict of Laws.

Laws of another State in regard to exemption of personal property from execution have no extra-territorial effect and are not controlling in regard to personal property within this State, since an exemption relates to the remedy and is subject to the law of the *forum*. *Bank v. Weaver*, 767.

CRIMINAL LAW.

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§ 2. Intent, Willfulness.

Offense of possessing implements of housebreaking does not require proof of any intent. *S. v. Vick*, 235.

CRIMINAL LAW—*Continued.*

"Willful," as used in a criminal statute, means something more than an intention to do a thing; it implies the doing of an act purposely and deliberately, without authority or careless whether one has the right to do the act or not, in violation of law. *S. v. Harris*, 758.

§ 4. Responsibility of Minors.

The presumption is that a boy fifteen years of age is capable of committing the crime of rape. *S. v. Smith*, 299.

§ 6. Sovereign Immunity.

A person asserting immunity from prosecution as an officer of the United States must establish such immunity, and in this prosecution of a Farm Agent for Indian lands for destroying a cartway bridge on such lands, *held*, the evidence fails to establish that the act was done under authority of the United States or in pursuance of defendant's duties as Farm Agent. *S. v. Adams*, 243.

§ 7. Limitations.

Where a warrant charging a misdemeanor is amended to charge a felony, defendant's plea of the statute of limitations on the misdemeanor count becomes immaterial. C. S., 4512. *S. v. Sanderson*, 381.

Whether a *nolle prosequi* without leave prevents the running of the statute of limitations against the offense charged, *quære*. *Ibid.*

§ 11. Felonies and Misdemeanors.

Common law misdemeanors punishable by imprisonment in penitentiary under C. S., 4173, are made felonies by C. S., 4171. *S. v. Spivey*, 45.

The second offense of manufacturing spirituous liquor is a felony. C. S., 3409. *S. v. Sanderson*, 381.

§ 28b. Judicial Notice.

Courts will take judicial notice of whatever is, or ought to be, generally known in the jurisdiction. *S. v. Vick*, 235.

§ 29b. Evidence of Guilt of Other Offenses.

Evidence of guilt of other crimes is competent when tending to show *scienter*, motive, and intent. *S. v. Smoak*, 79.

Objection to evidence on the ground that it tended to establish guilt of offenses separate and distinct from the crime charged is untenable when the evidence of such other offenses tends to show defendants' state of mind at the time of the commission of the crime charged. *S. v. Payne*, 719.

§ 29d. Evidence That Third Persons Attempted to "Frame" Defendant.

In prosecution for rape, testimony of defendant that another man had made threats to get him out of the way, and was seen talking to the prosecutrix before the commission of the alleged crime, introduced for the purpose of showing that such other man and the prosecutrix "framed" defendant, *is held* properly excluded, since it creates only an inference. *S. v. Howie*, 782.

§ 31a. Subjects of Expert and Opinion Evidence.

Doctors qualified as experts are competent to testify upon proper hypothetical questions based upon the symptoms during the fatal illness of deceased persons, the condition of their bodies after death, and the amount of strychnine recovered from their vital organs upon autopsies, that the deceased persons died as the result of being poisoned with strychnine. *S. v. Smoak*, 79.

To the general rule that opinion evidence is incompetent there are at least three exceptions: Opinions of experts, opinions on the question of identity, and opinions received from necessity because from the nature of the subject under investigation no better evidence can be obtained. *S. v. Harris*, 648.

CRIMINAL LAW—*Continued.*

In a prosecution for drunken driving, it is competent for a State's witness to testify that in his opinion defendant was under the influence of intoxicating beverages, the testimony being competent under the exception to the general rule that opinion evidence is competent when from the nature of the subject under investigation, no better evidence can be obtained. *Ibid.*

§ 31g. Qualification of Experts.

Witness with special training in toxicology need not be licensed physician in order to be qualified as expert. *S. v. Smoak*, 79.

The competency of a witness as an expert is primarily addressed to the discretion of the trial court, whose decision is ordinarily not reviewable. *Ibid.*

§ 31h. Examination of Experts.

Hypothetical question based upon jury's finding facts as contended for by State, supported by its evidence, *held* proper. *S. v. Smoak*, 79.

§ 32. Circumstantial Evidence in General.

Where State relies on circumstantial evidence, evidence of all circumstances forming integral part of composite picture is competent. *S. v. Smoak*, 79.

In criminal cases every circumstance that is calculated to throw any light upon the supposed crime is permissible. *S. v. Payne*, 719.

§ 33. Confessions.

Mere presence of officers does not render confession involuntary. *S. v. Exum*, 16; *S. v. Smith*, 299.

The violation of ch. 257, Public Laws of 1937, in regard to bail and the manner of detention of defendant under arrest, would not render defendant's voluntary confession incompetent. *S. v. Exum*, 16.

Testimony of an officer as to statements made by defendant after the officer had told defendant he wanted to ask him some questions, to which defendant assented, *held* competent. *S. v. Smoak*, 79.

In ruling upon the competency of testimony of alleged confessions, the trial court is required to find, and may properly find, only whether the alleged confession was voluntarily made, and it is not error for the court to refuse to find further facts. *S. v. Smith*, 299.

Defendant is entitled to testify and offer witnesses in rebuttal upon the question of the voluntariness of his alleged confessions, but the court is not required to call upon him to offer testimony, and when he fails to do so he has no cause for complaint. *Ibid.*

§ 34b. Flight as Implied Admission of Guilt.

The fact that defendant fled the scene when his car containing intoxicating liquor was stopped by officers is a competent circumstance to be considered by the jury. *S. v. Epps*, 709.

Flight is competent evidence to be considered by the jury in connection with other circumstances in passing upon the question of guilt. *S. v. Payne*, 719.

§ 34d. Attempted Suicide as Implied Admission of Guilt.

Evidence tending to show that defendant, after his arrest and while in the custody of officers, attempted suicide by drinking poison, is competent. *S. v. Exum*, 16.

§ 40. Character Evidence as Substantive Proof.

In proving defendant's good character it is competent to ask witnesses as to defendant's general reputation in the community, but it is incompetent to ask witnesses as to defendant's reputation in any restricted group in the community. *S. v. Smoak*, 79.

When defendant does not offer evidence of good character, his character is not in issue and may not be impeached by the State. *S. v. Proctor*, 221.

CRIMINAL LAW—*Continued.*

§ 41d. Impeaching Credibility of Defendant as Witness in His Own Behalf.

When defendant does not go upon the stand, N. C. Code, 1799, and does not offer evidence of good character, his character is not in issue and it may not be impeached by the State, but in absence of objection by defendant, instruction that State contended that defendant associated with codefendants who were men of bad character to defendant's knowledge, *held* not error. *S. v. Proctor*, 221.

When defendant testifies in his own behalf, the State may impeach his credibility by testimony of witnesses as to his general reputation, and by cross-examination of defendant, as to specific acts, and such cross-examination is not limited to felonies or to crimes involving moral turpitude, but may include any acts tending to impeach his character, and testimony of defendant on cross-examination that he had been arrested for beating a ride on a freight train, and had been repeatedly convicted of gambling, constitutes some evidence of bad character which the court may properly bring to the jury's attention in charging it as to the credibility to be given defendant's testimony. *S. v. Sims*, 590.

Upon cross-examination of defendant, the State may ask him whether he is under indictment for other crimes. *S. v. Howie*, 782.

§ 41e. Evidence Competent for Purpose of Corroborating Witness.

A police officer was permitted to testify as to prosecutrix' identification of defendant out of a line of suspects. Defendant objected thereto on the ground he was not present. *Held:* Whether defendant heard the accusation is a matter for the jury, and the testimony was competent for the purpose of corroborating prosecutrix. *S. v. Howie*, 782.

§ 41h. Right to Impeach Own Witness.

New trial is awarded in this case for error in permitting the State to discredit its own witness. *S. v. Freeman*, 378.

§ 43. Evidence Obtained by Unlawful Means.

An affidavit for a search warrant signed by the chief of police is sufficient compliance with ch. 339, sec. 1½, Public Laws of 1937, since if the chief of police is not the informant he is "some other person," and the statute does not require that the informant should make the affidavit, or that the person signing the affidavit should state therein who his informant is, and evidence obtained on a search warrant issued on such affidavit is competent. *S. v. Cradle*, 217.

§ 48b. Evidence Competent for Restricted Purpose.

When evidence is competent for any purpose, it would be error to exclude it. *S. v. Payne*, 719.

§ 52a. Questions of Law and of Fact in General.

The competency, admissibility, and sufficiency of the evidence is for the court, its weight, effect, and credibility is for the jury. *S. v. Smoak*, 79; *S. v. Johnson*, 389.

§ 52b. Nonsuit.

On a motion to nonsuit, all the evidence on the whole record tending to support the State's contentions is to be considered in the light most favorable to the State, and it is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 4643. *S. v. Smoak*, 79.

On a motion to nonsuit, the evidence is to be considered in its most favorable light for the prosecution. *S. v. Adams*, 243.

Evidence which tends to prove the fact of guilt or which reasonably conduces to that conclusion as a fairly logical and legitimate deduction, should

be submitted to the jury, but the court should direct a nonsuit or an acquittal upon evidence which raises a mere suspicion or conjecture of guilt. *S. v. Adams*, 243.

§ 53a. Form and Sufficiency of Instructions in General.

It is error for the court to fail to charge the jury on substantive features of the case arising on the evidence, even in the absence of special requests for instructions. *S. v. Robinson*, 273; *S. v. Bryant*, 752.

Evidence of good character of defendant on trial for murder is a subordinate and not a substantive feature of the trial, and the failure of the court to refer thereto in the charge will not ordinarily be held for error in the absence of written request for such instruction. C. S., 565. *S. v. Sims*, 590.

The failure of the court to instruct the jury that it was their duty to recollect the evidence and not be guided by the recollection of the court or anyone else, will not be sustained in the absence of a request to so charge. *S. v. Harris*, 648.

§ 53c. Instructions on Burden of Proof.

Instruction *held* for error as placing burden on defendant to raise reasonable doubt of his guilt. *S. v. Baker*, 524.

§ 53d. Instruction on Less Degrees of Crime.

Failure to charge jury it might find defendant guilty of less degrees of crime charged *held* error. *S. v. Burnett*, 153.

Evidence *held* to require submission of guilt of lesser degrees of the crime charged. *S. v. Feyd*, 617.

§ 53e. Expression of Opinion by Court on Weight or Credibility of Evidence.

An instruction that "there was evidence tending to show that he (the defendant) is a man of bad character," said while stating the contentions of the State, cannot be held for error as an expression of opinion by the court on the weight or credibility of the testimony in violation of C. S., 564. *S. v. Sims*, 590.

An instruction that there was "some evidence tending to show" a fact in issue cannot be construed as an expression of opinion by the court as to whether the fact was fully or sufficiently proven. *S. v. Harris*, 648.

Objection to the charge on the ground that the court unduly emphasized the contentions of the State, amounting to an expression of opinion on the facts, *held* untenable, since the charge construed as a whole stated only contentions legitimately arising on the evidence and inferences properly deducible therefrom. C. S., 564. *S. v. Wilcox*, 665.

§ 53g. Objections and Exceptions to Instructions.

A misstatement of the contentions of a party must be brought to the court's attention in apt time to afford opportunity for correction in order to be considered on appeal. *S. v. Proctor*, 221; *S. v. Howie*, 782.

An assignment of error to the statement of the contentions cannot be sustained in the absence of an exception entered at the time. *S. v. Jones*, 640.

A slight inaccuracy in stating the evidence will not be held for reversible error when the matter is not called to the court's attention in apt time to afford opportunity for correction. *S. v. Harris*, 648.

§ 56. Arrest of Judgment.

When it appears that defendant was tried and convicted upon a warrant charging a felony, his motion in arrest of judgment should be allowed, since a person may be tried for a felony only upon indictment. *S. v. Sanderson*, 381.

CRIMINAL LAW—*Continued.*

A motion in arrest of judgment for the reason that the warrant upon which defendant was tried was not signed by the proper officer is correctly denied when defendant makes a general appearance in court, such appearance being a waiver of any objection predicated upon any irregularity in the warrant. *S. v. Harris*, 648.

§ 61c. Sentence of Minors.

It would seem that the Legislature did not intend that a fifteen-year-old boy, convicted of a capital crime, should be sentenced to a reformatory, C. S., 7322, 5912 D, but if the statutes be construed to permit such sentence, the power of the court to impose such sentence is made permissive and not compulsory, and sentence of death upon a conviction of a fifteen-year-old boy of the crime of rape is without error. *S. v. Smith*, 299.

§ 68a. Right of State to Appeal.

The State may appeal from a judgment of not guilty rendered on a special verdict. N. C. Code, 4649. *S. v. Lawrence*, 674.

§ 77c. Matters Not Appearing of Record.

Where the charge of the court is not in the record, it will be presumed on appeal that the court correctly charged the law on every material aspect arising upon the evidence in the case. *S. v. Smoak*, 79.

§ 78b. Objections and Exceptions.

Assignments of error which are not supported by exceptions duly noted will not be considered. *S. v. Oliver*, 386; *S. v. Howie*, 782.

Exception to misstatement of contentions must be made at the time. *S. v. Jones*, 640.

Contention of error in the charge must be supported by proper exceptions. *S. v. Petree*, 785.

§ 78c. Necessity of Motions in Lower Court to Preserve Grounds of Review.

When defendant fails to move for judgment as of nonsuit, the sufficiency of the evidence is not presented for review. *S. v. Petree*, 785.

§ 78d. Assignments of Error.

Exceptions which are not set out as assignments of error are abandoned. Rule of Practice in Supreme Court, No. 19 (3). *S. v. Oliver*, 386.

§ 79. Briefs.

Contentions of counsel that defendant did not have a fair trial in the court below need not be considered when they are not supported by the record, and no authorities are cited in the brief and no reasons given in the argument in support of the contentions. *S. v. Exum*, 16.

Exceptions not set out and discussed in appellant's brief will be deemed abandoned. Rule of Practice in Supreme Court, No. 28. *S. v. Proctor*, 221; *S. v. Sims*, 590; *S. v. Howie*, 782.

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*. *S. v. Hadley*, 427; *S. v. Fowler*, 549.

§ 80. Prosecution of Appeals and Dismissal.

Where defendant fails to file briefs, the motion of the Attorney-General to dismiss the appeal will be allowed, Rule of Practice in the Supreme Court, No. 28, but in capital cases this will be done only after an inspection of the record fails to disclose error. *S. v. Hadley*, 427; *S. v. Outlaw*, 428; *S. v. Fowler*, 549.

When defendant, convicted of a capital crime, gives notice of appeal, but it appears from certificate of the clerk after expiration of the time allowed for

service of statement of case on appeal, that nothing has been done toward perfecting the appeal, the motion of the Attorney-General to docket and dismiss will be allowed, nothing appearing on the face of the record to defeat the motion. *S. v. Baldwin*, 648.

§ 81a. Matters Reviewable.

The decision of the trial judge as to the qualification of a witness as an expert is not ordinarily reviewable. *S. v. Smoak*, 79.

The jurisdiction of the Supreme Court on appeal is limited to matters of law and legal inference, and whether the youth of a defendant constitutes a mitigating circumstance justifying a relaxation of the prescribed punishment is a matter addressed to the discretionary power of the Governor. *S. v. Smith*, 299.

When the judgment is supported by the verdict, an exception to the judgment cannot be sustained. *S. v. Oliver*, 386.

§ 81b. Presumptions and Burden of Showing Error.

The burden is upon defendant upon appeal from conviction to show not only that error was committed in the trial, but that the alleged error was prejudicial. *S. v. Adams*, 243.

§ 81c. Prejudicial and Harmless Error.

Alleged error must be prejudicial in order to entitle defendants to a new trial. *S. v. Payne*, 719.

Where an expert testifies that the amount of strychnine actually recovered by him from the vital organs of deceased was more than enough to cause death, his testimony estimating, from the amount recovered, the total amount of strychnine in the body, is not prejudicial. *S. v. Smoak*, 79.

Defendant's exceptions to the admission of evidence become immaterial when similar evidence is later introduced without objection. *Ibid.*

Instruction placing burden on defendant to prove innocence is not cured by verdict of guilty of less degree of crime charged. *S. v. Carver*, 150.

Verdict of guilty of crime charged does not cure error in failing to submit question of guilt of less degrees. *S. v. Burnette*, 153; *S. v. Feyd*, 617.

An erroneous instruction on a substantive feature of the case constitutes prejudicial error even though correct instructions on the point are elsewhere given in the charge, since it must be presumed on appeal that the jury were influenced by the erroneous portion in arriving at its verdict. *S. v. Mosley*, 304; *S. v. Bryant*, 752.

Exclusion of evidence *held* not prejudicial upon the record in this case. *S. v. Taylor*, 521.

Admission of evidence objected to *held* harmless in view of admissions and verdict in this case. *S. v. Lewis*, 646.

When a defendant is charged in two counts in the bill of indictment with separate offenses of the same grade, and the jury returns a verdict of guilty as to both counts, error in the trial of one count is harmless and does not entitle defendant to a new trial when such error does not affect the verdict on the other count. *S. v. Epps*, 709.

Defendant may not complain that the court failed to instruct the jury in regard to "*prima facie* evidence" involved in the case, since such failure, if error, is in defendant's favor, the charge not being in violation of C. S., 564. *Ibid.*

§ 81d. Questions Necessary for Determination of Appeal.

When a new trial is awarded on certain exceptions, other exceptions need not be considered. *S. v. Robinson*, 273; *S. v. Freeman*, 378; *S. v. Feyd*, 617; *S. v. Bryant*, 752.

CRIMINAL LAW—*Continued.*

§ 85. Proceeding in Lower Court After Remand or New Trial.

Where, on a former appeal, a new trial is awarded for error in the admission of evidence, but it is determined that the evidence was sufficient to be submitted to the jury, a motion to nonsuit upon the second trial upon substantially the same evidence is correctly denied. *S. v. Lee*, 319.

DAMAGES.

§ 2. Direct and Remote Injury or Loss.

Plaintiff is entitled to recover only for damages directly caused by negligence alleged. *Blaine v. Lyle*, 529.

§ 14. Inadequate and Excessive Awards.

Objection on the ground that the verdict awarded excessive damages rests in the sound discretion of the trial court, and a verdict will not be disturbed on appeal in the absence of abuse of discretion or some error of law or legal inference in connection therewith. *Johnston v. Johnston*, 255.

DEAD BODIES.

§. 3. Persons Who May Sue for Mutilation.

A right of action for the mutilation of a dead body of a person divorced at the time of death rests in his children as his next of kin. *Morrow v. R. R.*, 127.

A father may maintain an action for the wrongful mutilation of the dead body of his son, including mutilation by unauthorized autopsy. *Gurganious v. Simpson*, 613.

§ 4. Elements and Essentials of Right of Action for Mutilation.

Mutilation which accompanies a killing does not give rise to a cause of action for wrongful mutilation of a dead body, such cause of action existing only for mutilation after death. *Morrow v. R. R.*, 127.

To recover for mutilation of body by train, plaintiff must show that body was struck by train intentionally or negligently. *Ibid.*

Both the coroner and physicians performing an autopsy on a dead body, under the coroner's direction, may be held liable by the father of the deceased for wrongful mutilation when the autopsy is ordered by the coroner on his own initiative solely to ascertain the cause of death without suspicion of foul play, since in such case the coroner is without authority to order the autopsy, and his direction therefor can confer no immunity upon the physicians. *Gurganious v. Simpson*, 613.

Evidence that agents of a funeral home merely failed to object to the performance of an unauthorized autopsy by physicians under direction of the coroner, is insufficient to establish a cause of action against it for wrongful mutilation. *Ibid.*

DEATH.

§ 8. Expectancy of Life and Damages.

Court may not instruct jury what the age of testate was or that his life expectancy was a stated number of years. *Sebastian v. Motor Lines*, 770.

DEBT, ACTION OF.

§ 2. Pleadings.

Mere allegation that defendant is indebted to plaintiff without stipulating facts *held* insufficient. *Griggs v. Griggs*, 624.

DECLARATORY JUDGMENT ACT.

§ 2a. Subject of Action.

Only civil rights, status and relations may be determined under the Declaratory Judgment Act, and when an action instituted thereunder involves both civil and criminal matters, the courts have jurisdiction to determine only the civil matters. C. S., 628 (a-o). *Calcutt v. McGeachy*, 1.

An executor and trustee may institute an action in the Superior Court to obtain the advice of the court as to whether inheritance taxes should be paid from the *corpus* of the estate or deducted from annuities provided for in the will, and such action may be maintained under the Declaratory Judgment Act, ch. 102, sec. 3, Public Laws of 1931. *Trust Co. v. Lambeth*, 576.

DEEDS.

§ 3. Execution, Acknowledgment, Private Examination and Probate.

The commissioners' deed in sale for partition was correctly indexed and cross indexed, and the names of the commissioners properly appeared in the body of the instrument, but the signature of one of the commissioners was erroneously transcribed as "W. R. Whitmire" instead of "W. R. Whitson." *Held:* The irregularity was a mere clerical error, calculated to mislead no one, and is not a fatal defect. *Realty Corp. v. Houston*, 628.

The order of probate of the assistant clerk, immediately following the certificate of acknowledgment of the notary public, erroneously designated the notary as of the county of probate, although the certificate of acknowledgment, which was in due form, correctly stated that the notary was of a designated county of the State of Virginia in which the acknowledgment was taken. *Held:* The irregularity was a mere clerical error, calculated to mislead no one, and is not a fatal defect. *Ibid.*

§ 5. Delivery.

The redelivery of an unregistered deed to the grantor does not *ipsa facto* reinvest title in the grantor, and an instruction that it does so is erroneous, certainly where it does not appear that the grantees surrendered possession upon its redelivery or that it was a deed of gift. *Bank v. Gahagan*, 511.

§ 7. Requisites and Sufficiency of Registration.

The indexing of deeds is an essential part of their registration. C. S., 3560, 3561, but this rule is prospective and not retroactive in effect. *Dorman v. Goodman*, 406.

The increasing complexity of business and the growing number and character of conveyances, make it necessary for the preservation of property rights, that the established rules governing the registration of instruments should not be relaxed, but that instruments should be recorded in strict compliance therewith. *Ibid.*

§ 8. Registration as Notice.

Records are notice of all matters which would be discovered from them by careful and prudent examiner. *Dorman v. Goodman*, 406.

No notice, however full and formal, will take the place of registration. *Ibid.*

§ 9. Priorities.

Deed properly indexed under name of grantee, but indexed under wrong initials of grantor *held* ineffective as against creditor of grantor. *Dorman v. Goodman*, 406.

§ 15. Reservations and Exceptions.

An "exception" as used in deeds means some part of the estate not granted at all or withdrawn from the effect of the grant, while a "reservation" means something issuing or arising out of the thing granted, but the courts will not

DEEDS—*Continued.*

give strict technical interpretation of the words, but will look to the character and effect of the provisions and effect the obvious intention of the parties. *Vance v. Pritchard*, 552.

§ 17a. Warranties of Title and Against Encumbrances.

In this action for breach of warranty of title and against encumbrances, judgment that plaintiff had no cause of action *held* for error, it appearing that plaintiff grantee had obtained title by adverse possession under color only as to a one-half interest in the land, and that the other one-half interest was subject to a judgment in favor of defendant grantor's predecessor in title. *Dorman v. Goodman*, 406.

DESCENT AND DISTRIBUTION.

§ 1. Descent in General.

Upon the death of a person intestate his personal estate vests in his administrator and his lands descend to his heirs, subject to be sold only if the personalty is insufficient to pay debts of the estate, and the lands are not an asset of the estate until sold and the proceeds received by the administrator. *Linker v. Linker*, 351; *Hinkle v. Walker*, 657.

The will directed the executor to sell the residue of the realty, and divide the proceeds of sale into three equal parts to be held for the benefit of, and paid to each of executor's three children or heirs of the children. *Held:* Pending the execution of the power of sale by the executor, or the administrator with the will annexed, the land descended to the heirs. *Jones v. Warren*, 730.

§ 3. Heirs and Distributees in General.

Where at the time of intestate's death his sole surviving next of kin are first cousins and children of deceased first cousins, the children of deceased first cousins represent their parents, and the representatives of each deceased first cousin take one share equal with the share of each living first cousin. C. S., 137 (5). *In re Estate of Mizzelle*, 367.

§ 12. Advancements and Debts Due the Estate.

An advancement is a gift *in præsenti* made by a parent on behalf of a child to advance the child in life, and thus enable him to anticipate his inheritance to the extent of the advancement. C. S., 1654 (2). *Parker v. Eason*, 115.

Advancements are restricted by statute, N. C. Code, 138, to gifts from a parent to a child, and ordinarily grandchildren may not be held accountable for gifts to themselves, but must account for gifts from their grandparent to their parent before they can inherit from their grandparent. *Ibid.*

Where parents pool their real estate for the purpose of dividing it equitably among their children, and allot each child the share they desire it to have, and, pursuant to this design, execute a deed to two of the children, who accept same with full knowledge that the land conveyed represented their shares in the realty of their parents' estates, the children so accepting the deed with full knowledge are estopped from asserting any interest in other lands of the estates of their parents, and the estoppel is operative regardless of the fact that the deeds of gift executed to other children in the division of the real property are void because not registered within two years from their execution. *Allen v. Allen*, 264.

Evidence that husband and wife pooled their real estate for equitable division among their children *held* sufficient for jury. *Ibid.*

Where lands are sold to make assets to pay debts, and a surplus remains in the hands of the administrator, the administrator is not entitled to hold the share of an heir in the fund to pay a debt, which is not an advancement,

DESCENT AND DISTRIBUTION—*Continued.*

due the estate by the heir, since the heir's right to his share in the surplus is the same as though the land had not been sold. C. S., 56. *Linker v. Linker*, 351.

§ 14. Rights and Remedies of Creditors of Heirs and Distributees.

When an heir is entitled to a share in the surplus remaining after sale of lands to make assets to pay debts, judgment creditors of the heir whose judgments were docketed prior to the death of the ancestor are entitled to pro rata payment out of the heir's share. *Linker v. Linker*, 351.

A creditor of an heir, certainly in the absence of fraud and collusion, is not entitled to prevent the executor from selling lands of the estate to make assets to pay debts. *Stimson v. Phifer*, 355.

The will in question directed the executor to sell the residue of the realty, divide the proceeds of sale into three parts, and directed that one part be given and bequeathed to testator's son. The son executed several mortgages on all the residuary lands of the estate, and more than a year after the execution of the last mortgage, several judgments were docketed against the son. *Held:* The mortgage liens attached to the son's interest therein, and upon sale, the mortgages constituted an equitable lien against the son's share in the proceeds, and the mortgages have priority over the later docketed judgments, the order of priority being determined by the date of registration of the mortgages. *Jones v. Warren*, 730.

DIVORCE.

§ 2a. Separation.

Husband unlawfully abandoning wife is not entitled to divorce on ground of two years separation under ch. 100, Public Laws 1937. *Brown v. Brown*, 347.

§ 14. Enforcing Payment of Alimony or Support.

Court should find husband's financial condition on contempt hearing for failure to comply with order for support. *Vaughan v. Vaughan*, 189.

Failure to comply with deed of separation approved by consent judgment will not support attachment for contempt. *Davis v. Davis*, 537.

The court's finding that petitioner's continued refusal to pay alimony was willful supports the court's refusal to grant petition for release for financial inability to pay. *Dyer v. Dyer*, 634.

The court's power to imprison for willful refusal to pay alimony is not limited to thirty days imprisonment. *Ibid.*

§ 17. Judgment and Decree for Support of Children.

Consent judgment for support of child *held* to require payments only for such time as child was in custody of mother. *Webster v. Webster*, 135.

EJECTMENT.

§ 6b. Sufficiency of Evidence, Nonsuit and Directed Verdict in Summary Ejectment.

When lessee claims right of possession solely upon a certain lease, and denies all other leases and tenancies, a directed verdict in lessor's favor in his action in summary ejectment is proper when the lease relied on by lessee had terminated according to its terms prior to the institution of the action. *Realty Co. v. Demetrelis*, 52.

§ 9b. Establishing Title by Showing Better Title from Common Grantor.

Plaintiff in ejectment may establish title by connecting defendant with a common source of title and showing a better title from that source, and need not prove the title of the common grantor, since neither party may deny the title of their common grantor. *Vance v. Pritchard*, 552.

EJECTMENT—*Continued.*

The rule that when plaintiff in ejectment establishes a common source of title, defendant may not deny the title of the common grantor, since he claims under it, does not apply to an estate reserved by the common grantor and thereby severed from the granted interest in the land. *Ibid.*

When defendants' deed from common grantor reserves the mineral rights, defendants are not estopped to deny grantor's title to minerals. *Ibid.*

§ 10. Defenses in Ejectment to Try Title.

Allegations in the answer that plaintiff's deed was executed pursuant to a conspiracy and fraud between plaintiff and his grantor to deprive defendant of his rights under a contract to convey previously executed by the grantor, constitutes a further defense as a denial of title, notwithstanding its designation in the answer as a "Cross Action." *Toler v. French*, 360.

The defense to an action in ejectment that plaintiff's deed is void for fraud is an equitable defense that must be pleaded, since mere denial of plaintiff's title is insufficient to put him upon notice that his title will be attacked on this ground. *Ibid.*

§ 12. Answer and Bond in Ejectment to Try Title.

In action in ejectment judgment may be rendered by default final for want of bond only on a Monday. *Clegg v. Canady*, 258.

Defendants' bond in this action for the possession of real property *held* in substantial compliance with C. S., 495, and plaintiff's objection to the form of the bond is untenable. *Ibid.*

In an action in ejectment, allegations in the answer that plaintiff's deed was executed as a result of a conspiracy between plaintiff and his grantor to prevent defendant from obtaining title under a contract to convey previously executed by the grantor, and thus to defraud defendant out of his rights under his contract, constitute an equitable defense to the action, and plaintiff's demurrer to the defense is erroneously sustained. *Toler v. French*, 360.

§ 14. Sufficiency of Evidence, Nonsuit and Directed Verdict in Ejectment to Try Title.

Introduction of decree for sale without confirmation of court having jurisdiction *held* insufficient to show title under the sale. *Bank v. Stone*, 598.

Even conceding that the evidence in an action in ejectment is sufficient to warrant a directed verdict in plaintiff's favor, the court may not take the case from the jury, find the facts and render judgment thereon, but must submit appropriate issues to the jury under such charge as it deems proper, and its failure to do so is a denial of a substantial right. *Ibid.*

§ 15. Instructions and Burden of Proof in Ejectment to Try Title.

Held: Since plaintiff failed to show a common source of title as to the mineral estate in controversy, defendants are not estopped to deny the title to the minerals in the common grantor, and the burden on the issue remains on plaintiff, since he must rely for recovery on the strength of his own title, and an instruction that the burden was on defendants to prove by the greater weight of the evidence the adverse possession relied on by them, is error. *Vance v. Pritchard*, 552.

ELECTION OF REMEDIES.

§ 3. Election Between Action Ex Contractu and in Tort.

Plaintiff alleged that defendant agreed to cut timber from plaintiff's land under an agreement that plaintiff was to receive one-half the lumber cut, that defendant cut lumber and wrongfully disposed of same. *Held:* The allegations are sufficient to support an action on implied contract, and they will be so construed when necessary to support recovery. *Patterson v. Allen*, 632.

ESTATES.

§ 2. Title to Surface and to Minerals.

Title to the surface of the earth and the minerals under the surface may be severed, and the minerals being a part of the realty, title thereto is governed by the ordinary rules governing title to real property, and when severed the title to the surface and to the minerals constitute two separate estates and the presumption that possession of the surface is possession of the subsoil containing the minerals does not exist. *Vance v. Pritchard*, 552.

ESTOPPEL.

§ 1. Creation and Operation of Estoppel by Deed. (Estoppel to deny title of common grantor see Ejectment.)

A contingent remainderman who is one of a definite class named as ulterior takers after the termination of a life estate, may not convey his interest in fee by deed executed prior to the happening of the contingency, but upon the death of the life tenant, his interest vests, and his title inures to the benefit of his grantee by estoppel. *Woody v. Cates*, 792.

A deed of trust purporting to convey all interest of the trustor in the land, and empowering the trustees to convey the fee upon foreclosure, although containing no covenants of title, will estop the trustor, upon conveyance of the property by the trustees under foreclosure, from denying title. *Ibid.*

When a contingent remainderman survives the life tenant, upon which contingency his title is made to depend, his heirs take through him and not by purchase under the will, and his heirs are estopped by his deed, executed prior to the happening of the contingency, purporting to convey his entire interest. *Ibid.*

§ 6g. Acceptance of Benefits.

Acceptance of deed with knowledge that land represented grantee's share in estates of his parents *held* to estop grantee from asserting interest in other lands of the parents' estates. *Allen v. Allen*, 264.

Evidence that grantees accepted deeds with full knowledge that land conveyed represented their share in their parents' estates *held* sufficient to be submitted to the jury. *Ibid.*

§ 6i. Mutuality.

Contention that estoppel was ineffective for want of mutuality *held* untenable under facts of this case. *Allen v. Allen*, 264.

§ 6j. Parties Who May Plead.

Children, as heirs at law, *held* entitled to plead estoppel relating to reality in favor of estate. *Allen v. Allen*, 264.

EVIDENCE.

§ 6. Burden of Proof in General.

The burden of proof constitutes a substantial right. *Fenner v. Tucker*, 419.

§ 15. Credibility of Witnesses in General.

Contention that jury should take into consideration evidence of good character of witness in passing on credibility *held* proper. *Acceptance Corp. v. Edwards*, 736.

§ 16. Credibility of Testimony of Parties Interested in the Event.

Instruction in regard to weight to be given testimony by parties interested in the verdict *held* without error. *Acceptance Corp. v. Edwards*, 736.

§ 17. Rule That Party May Not Impeach His Own Witness.

A party may not impeach or discredit his own witness. *S. v. Freeman*, 378.

EVIDENCE—*Continued.*

§ 19. Evidence Competent to Impeach or Discredit Witness.

The plea of the bar of the statute of limitations is neither criminal nor immoral and such plea cannot be used to impeach defendant. *Patterson v. Allen*, 632.

§ 22. Cross-Examination of Witnesses.

Although the plea of the statute of limitations may not be used to impeach defendant, questioning defendant as to the *bona fides* of his plea *is held* not beyond the latitude allowed in cross-examination, and not to constitute reversible error. *Patterson v. Allen*, 632.

§ 29. Evidence at Former Trial or Proceedings.

When the full transcript of the testimony of a witness at a former hearing is properly identified and offered in evidence, the witness having died prior to the rehearing, the adverse party may not complain that all his testimony was not read to the jury when it appears that all of his direct examination and part of his cross-examination was read to the jury, without request that the entire cross-examination be read or objection to the failure to read it, and that appellants had the right to read the part omitted to the jury at any time. *Allen v. Allen*, 264.

When the transcript of plaintiff's testimony at a former trial is properly identified, its admission in evidence is without error, the plaintiff having the right to contradict or explain any statement theretofore made by him, and the rule governing the admission of depositions not being applicable to testimony at a former hearing given by a party to the action. *Ibid.*

§ 32. Transaction or Communications With Decedent or Lunatic.

Testimony of conversations with a party to the action in which the witness related to the party statements made by a decedent is not in contravention of C. S., 1795. *Allen v. Allen*, 264.

A "person interested in the event" within the contemplation of C. S., 1795, is one having a direct legal or pecuniary interest in the subject matter of the litigation. *Ibid.*

Since a husband has no vested interest in the real estate of his wife, it would seem that he is not a "person interested in the event" within the contemplation of C. S., 1795, in an action involving his wife's title to realty. *Ibid.*

A partner in intestate's firm may not testify as to transactions or communications with intestate in an action by brokers against the estate on a claim for commissions and advancements. C. S., 1795. *Fenner v. Tucker*, 419.

§ 36. Accounts, Ledgers, and Private Writings.

When a witness denies any independent recollection of the matters upon which he is called to testify, the exclusion of his testimony is without error, nor may such witness read to the jury tally sheets identified by him when they are not evidence in themselves. *Patterson v. Allen*, 632.

§ 43d. Declarations as to Health or Bodily Feeling.

Where the physical condition of insured after he had played in a football game is the subject of inquiry, testimony of his declarations at the time to the effect that he felt bad, is competent. *Munden v. Ins. Co.*, 504.

§ 45. Opinion Evidence in General.

In this action against an estate by brokers to recover commissions and advancements, defendant administratrix contended that the cause of action was founded upon illegal cotton "futures" contracts. There was no direct competent evidence as to intestate's intent in regard to whether actual delivery of the cotton was contemplated. *Held:* The exclusion of testimony of plaintiff brokers' clerk as to the intent of the parties in regard to actual delivery was

EVIDENCE—*Continued.*

properly excluded, it appearing that the testimony was merely the conclusions and opinions of the witness. *Fenner v. Tucker*, 419.

§ 52. Examination of Experts.

When there is sufficient evidence to support the hypothesis, the fact that there is conflict in the evidence relating thereto does not render the hypothetical question incompetent, and the answer is competent if it is sufficiently definite in regard to the fact in dispute. *Munden v. Ins. Co.*, 504.

§ 55. Prima Facie Proof.

A *prima facie* case does not require an affirmative finding for plaintiff, or change the burden of proof, its effect being merely to take the case to the jury for its determination of the issue, and subject defendant to the risk of an adverse verdict in the absence of evidence in rebuttal. *Woods v. Freeman*, 314.

EXECUTION.

§ 3. Exemptions of Proceeds of Compensation Awards.

Conceding that money received by a judgment debtor through the North Carolina Industrial Commission from the Insurance Fund of the State of New York as compensation for permanent disability for injury received while the debtor was employed in the State of New York is exempt from execution in supplemental proceedings in this State, when the debtor makes a general deposit of money so received, the credit account with the bank is subject to execution. *Bank v. Weaver*, 767.

§ 11. Procedure to Stay, Quash or Recall Execution.

The proper remedy to recall or set aside an execution or a sale made thereunder and to prevent further proceedings is by motion in the cause and not by independent action. *Finance Co. v. Trust Co.*, 369.

Court may consider summons and complaint in action to restrain execution sale as a motion in the original cause. *Ibid.*

Injunction will not lie to enjoin execution sale on a judgment, since there is an adequate remedy at law by motion in the cause to stay or recall the execution. *Ibid.*

§ 21. Application of Proceeds of Sale.

When a judgment creditor purchases the land of the judgment debtor at the execution sale for a sum in excess of the judgment, the judgment debtor may require the surplus over the judgment applied to other liens against the land when there are no other junior liens against the land. *Finance Co. v. Trust Co.*, 369.

§ 24. Procedure in Supplemental Proceedings.

Affidavit *held* sufficient to support order for examination of judgment debtor concerning choses in action subject to execution. *Bank v. Hinton*, 162.

EXECUTORS AND ADMINISTRATORS.

I. Appointment and Qualification
2c. Appointment of Successor Administrators
4. Removal and Revocation of Letters
II. Assets of the Estate
5. Assets of Estate and Title Thereto
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IV. Sales to Make Assets to Pay Debts
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V. Allowance and Payment of Claims
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15i. Mortgage Debts of the Estate
16. Priorities
20. Judgments, Lien, and Execution
VI. Distribution of Estate
21. Distribution to Devisees, Legatees, and Heirs in General
24. Distribution under Family Agreements
VII. Accounting and Settlement
26. Final Accounting and Settlement
VIII. Liabilities of Executors and Administrators
32. Actions for Waste or Devistavit

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 2c. Appointment of Successor Administrators.

The appointment of successor administrators does not interrupt the course of administration or constitute two administrations, or affect the rights of the parties upon a petition to sell lands to make assets. *Trust Co. v. McDearman*, 141.

§ 4. Removal and Revocation of Letters.

In special proceeding to remove administratrix, her rights as distributee may not be determined. *In re Estate of Banks*, 382.

§ 5. Assets of Estate and Title Thereto.

Upon the death of a person intestate his personal estate vests in his administrator and his lands descend to his heirs, subject to be sold only if the personalty is insufficient to pay debts of the estate, and the lands are not an asset of the estate until sold and the proceeds received by the administrator. *Linker v. Linker*, 351.

Upon the death of the owner of land title thereto vests either in his devisees or his heirs at law, but not in his executor. *Hinkle v. Walker*, 657.

An adjudication that persons dead at the time of the institution of the action were the owners of the fee in the land in controversy is error. *Ibid.*

Land descends to heirs pending execution of power of sale by executor. *Jones v. Warren*, 730.

§ 9. Powers and Duties of Administrator With Will Annexed.

An administrator with the will annexed has all the rights and powers, and is subject to the same duties, as if he had been named executor in the will. *Jones v. Warren*, 730.

§ 12b. Private Sale of Assets Without Court Order.

An administratrix may sell notes and choses in action of the estate at private sale without authorization from the court, and the purchaser obtains good title if the sale is made in good faith and for value, and C. S., 69, does not abrogate this common law rule, since the statute merely makes the obtaining of a court order permissive but not mandatory. *Felton v. Felton*, 194.

When the purchasers of choses in action at private sale from an administratrix allege that the sale was made in good faith for value, the pleadings raise an issue of fact for the jury, and the granting of plaintiff distributees' motion for judgment on the pleadings in their action against the administratrix for *devastavit* and to set aside the sale, is error. *Ibid.*

Will *held* to confer power on executrix to sell realty without court order. *Toms v. Brown*, 295.

§ 13a. Nature and Grounds of Remedy to Sell Realty to Make Assets.

Reversion after dower is not subject to sale to make assets when homestead is allotted in same property. *Trust Co. v. McDearman*, 141.

As long as an estate remains unsettled, the real property undisposed of is subject to sale to make assets by petition properly filed by the administrator. C. S., 74. *Ibid.*

Under facts of this case, administrator was not guilty of laches in moving for sale of assets. *Ibid.*

The appointment of successor administrators does not interrupt the course of administration or constitute two administrations, or affect the rights of the parties upon a petition to sell lands to make assets. *Ibid.*

An administrator may sell lands of the estate only if the personalty is insufficient to pay debts of the estate, C. S., 74. *Linker v. Linker*, 351.

A creditor of an heir, certainly in the absence of evidence of fraud and collusion, is not entitled to prevent the executor from selling lands of the estate to make assets to pay debts. *Stimson v. Phifer*, 355.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 18d. Proceeds of Sale.

Where land is sold to make assets to pay debts of the estate, so much of the proceeds of sale as is necessary to pay debts of the estate, is to be treated as personal assets, C. S., 55, but the surplus goes to the heirs as realty in the same manner as if the sale had not been had. C. S., 56. *Linker v. Linker*, 351.

Where lands are sold to make assets to pay debts, and a surplus remains in the hands of the administrator, the administrator is not entitled to hold the share of an heir in the fund to pay a debt, which is not an advancement, due the estate by the heir, since the heir's right to his share in the surplus is the same as though the land had not been sold. C. S., 56. *Ibid.*

§ 15f. Claims of Creditors of Heirs and Distributees.

When an heir is entitled to a share in the surplus remaining after sale of lands to make assets to pay debts, judgment creditors of the heir whose judgments were docketed prior to the death of the ancestor are entitled to pro rata payment out of the heir's share. *Linker v. Linker*, 351.

Mortgages executed by heir pending execution of power of sale by executor *held* equitable liens against heir's share of proceeds of sale. *Jones v. Warren*, 730.

§ 15i. Mortgage Debts of the Estate.

Under terms of this will mortgage debt was proper charge against estate to be paid from other assets. *Toms v. Brown*, 295.

§ 16. Priorities.

After the death of insolvent intestate, certain land of the estate was sold for taxes assessed prior to the death of intestate, and the county became the purchaser for want of other bidder, C. S., 8015, and received certificate of sale, C. S., 8024. *Held:* The county acquired a first lien on the land, C. S., 7980, 7987, 8036, prior to the claims of the administrator, widow, heirs at law, and judgment creditor of intestate, which lien the county may foreclose by civil action in the nature of an action to foreclose a mortgage, C. S., 8037, and the provisions of C. S., 93, that taxes should be paid by the personal representative in the third class of priority has no application to the statutory action to foreclose the tax sale certificate. *Guilford County v. Estates Administration*, 763.

§ 20. Judgments, Liens and Execution.

The right of the personal representative to sell lands of the estate subject to such liens, statutory and otherwise, as exist at the time, in order to make assets to pay debts when the personalty is insufficient, does not prevent the holder of a tax sale certificate against lands of the estate for taxes assessed prior to the death of insolvent intestate from foreclosing same in a civil action, in the nature of an action to foreclose a mortgage, during the pendency of the administration. *Guilford County v. Estates Administration*, 763.

§ 21. Distribution to Devisees, Legatees and Heirs at Law in General.

(Persons entitled to inherit see Descent and Distribution.)

When there is a dispute as to who is entitled to personalty of the estate under the canons of descent, it is proper for the personal representative to institute suit to obtain the advice of the court. *In re Estate of Mizzelle*, 367.

Held: The evidence discloses that the amount was paid the widow as a beneficiary under the will, and her contention that the transaction was a personal transaction between herself and daughter in which the court had no interest, is untenable. *Latta v. Trustees*, 462.

In the distribution of a trust estate under a family agreement, containing a provision for the retention of a certain sum by the trustee to pay annuities

EXECUTORS AND ADMINISTRATORS—*Continued.*

to minors as directed in the will, the court has plenary jurisdiction to direct that no further sums be paid the beneficiaries under agreement for the distribution of the estate until funds fully sufficient to protect the interests of minor beneficiaries are received by the trustee from the estate placed in the trust estate for the minors, the order being in the jurisdiction of the court over the administration of a trust estate and in its power to protect the interests of minors. *Ibid.*

An executor and trustee may institute an action in the Superior Court to obtain the advice of the court as to whether inheritance taxes should be paid from the *corpus* of the estate or deducted from annuities provided for in the will, and such action may be maintained under the Declaratory Judgment Act, ch. 102, sec. 3, Public Laws of 1931. *Trust Co. v. Lambeth*, 576.

§ 24. Distribution Under Family Agreements.

An agreement of certain devisees for the distribution of their shares in a trust estate merely affects the method of the distribution of the *corpus* of the estate, and the estate remains a trust estate to be administered by the executor and trustee subject to control and power of modification by the court. *Latta v. Trustees*, 462.

The agreement of certain devisees for the distribution of their shares in the trust estate *is held* to show the intent of the parties that the funds were to be distributed in installments ratably in proportion to the interest of each devisee under the agreement. *Ibid.*

In distribution of estate under family agreement court should order executor to retain funds amply sufficient to guarantee payment of annuities to infants. *Ibid.*

Beneficiaries not made parties to an agreement for the distribution of the estate are not affected thereby and their rights must be determined solely by the provisions of the will. *Latta v. McCorkle*, 508.

§ 26. Final Accounting and Settlement.

Under facts of this case, administrator was not guilty of unreasonable delay in settling estate. *Trust Co. v. McDearman*, 141.

An estate is not fully settled until all debts are paid or all assets exhausted. *Ibid; Felton v. Felton*, 194.

§ 32. Action for Waste or Devastavit.

While the executrix is alive and the administration is not completed by payment of all debts or the exhaustion of all assets, and the distribution of the estate, the distributees may maintain an action for alleged waste or *devastavit* committed by the administratrix. *Felton v. Felton*, 194.

FALSE IMPRISONMENT.

§ 1. Nature and Essentials of Right of Action.

Involuntary restraint and its unlawfulness are the two essential elements of false imprisonment, and such restraint may be caused by threats as well as by actual force, but such threats must be sufficient to induce a reasonable apprehension of force. *Hoffman v. Hospital*, 669.

§ 2. Actions.

Evidence that the manager of a hospital told plaintiff, a patient in the hospital, she could not leave until she had paid her bill, that she remained there a short period of time, believing she could not go, but then left, nevertheless, in the hospital's wheel chair without any force or show of force being offered to prevent her going, *is held* insufficient to show an express or implied threat of force, and defendant hospital's motion to nonsuit was properly granted. *Hoffman v. Hospital*, 669.

FALSE PRETENSES.

§ 2. Prosecution and Punishment.

Evidence *held* sufficient to be submitted to the jury as to each defendant on charges of conspiracy to rob and larceny of a sum of money by trick. *S. v. Fuer*, 426.

FIXTURES.

§ 2. Manner of Annexation as Determining Whether Chattels Are Affixed.

In determining whether chattels are affixed to the realty, the determining factor is whether the chattels are annexed to the realty so that they have a permanent and fixed position, the manner of annexation not being controlling, even the weight of the chattel alone being sufficient, and the intent with which the annexation is made is relevant to the question. *Brown v. Land Bank*, 594.

§ 4. Right to Remove.

Unfixed chattels do not become part of realty, and ordinarily mortgagor is entitled to remove same after foreclosure. *Brown v. Land Bank*, 594.

FOOD.

§ 4. Nature and Grounds of Liability of Manufacturer.

A person preparing food, medicines, drugs, or beverages in packages or bottles is charged with the duty of exercising due care in their preparation, and under certain circumstances may be held liable in damages to the ultimate consumer. *Smith v. Bottling Co.*, 544.

§ 15. Competency of Evidence and Proof of Negligence.

While the doctrine of *res ipsa loquitur* is not available to establish negligence on the part of a person preparing food, drugs, or beverages, such negligence need not be established by direct proof, but may be established by substantially similar incidents in reasonable proximity in time. *Smith v. Bottling Co.*, 544.

§ 16. Sufficiency of Evidence.

Evidence that plaintiff was injured by foreign and deleterious substances which he drank from a bottled drink prepared by defendant, without other evidence of negligence, is insufficient to be submitted to the jury. *McCarn v. Bottling Co.*, 543.

Evidence of injury resulting from drinking foreign and deleterious substances from a bottled drink prepared by defendant, with evidence that other drinks bottled by defendant at about the same time contained like foreign and deleterious substances, is sufficient to take the case to the jury. *Smith v. Bottling Co.*, 544.

FRAUD.

(Avoidance of policy for, see Insurance.)

§ 2. Misrepresentation.

A *suppressio veri* by one whose duty it is to speak is equivalent to a *suggestio falsi*. *Butler v. Ins. Co.*, 384.

§ 7. Waiver and Abandonment of Right of Action.

In action for damages for fraudulent misrepresentations inducing execution of lease of mining properties, finding, supported by evidence, that true condition of mine was not discovered until some five months after execution of lease, when lessee ceased to operate the mine, *held* to support conclusion of law that lessee was not precluded by conduct from setting up counterclaim for fraud in lessor's action for rents. *Threadgill v. Faust*, 226.

FRAUD—*Continued.*

§ 9. Pleading.

The facts constituting alleged fraud must be set up with such particularity as to show all the elements of actionable fraud, including fraudulent intent. *Griggs v. Griggs*, 624.

§ 11. Sufficiency of Evidence.

Evidence *held* for jury on issue of fraudulent misrepresentation and damages in sale of land by vendor. *Silver v. Skidmore*, 231.

Evidence *held* insufficient to establish fraud in the procurement of the execution of notes for the balance of the purchase price of a lot in a real estate subdivision. *Stelling v. Trust Co.*, 324.

§ 12. Instructions.

Held: The measure of damages plaintiff is entitled to recover upon a favorable verdict upon the issue of fraud is the difference in the actual value of the mortgage and note and their value if they had been as represented, and a charge of the trial court giving the jury no other guide as to the measure of damages except an instruction that they might consider the amount of the purchase price paid by plaintiff, is error entitling defendants to a new trial. *Kennedy v. Trust Co.*, 620.

FRAUDS, STATUTE OF.

§ 9. Contracts Affecting Realty in General.

Statute does not apply to executed contracts under which standing timber has been cut and converted into personalty. *McArthur v. Byrd*, 321.

While an equitable interest in land may not be conveyed by parol, an equitable interest may be abandoned, released, or waived in favor of the holder of the legal title by conduct positive, unequivocal, and inconsistent with an intention to assert such equitable claim, but such waiver or abandonment, being an equitable defense, must be pleaded. *Hare v. Weil*, 484.

§ 12. Parol Trusts.

Parol agreement to purchase at sale for benefit of debtor creates valid parol trust. *Hare v. Weil*, 484.

GAMING.

§ 2. Slot Machines.

Statute prohibiting slot machines which enable player to make varying scores upon which wagers may be made *held* valid. *Calcutt v. McGeachy*, 1.

Slot machine is illegal under Laws of 1935 if the result of its operation is affected by the element of chance. *Tomberlin v. Bachtel*, 250.

§ 3. "Futures" Contract. (Rights of parties to contract see Contracts § 7d.)

The intent of the parties that the merchandise contracted for should not be actually delivered is the cardinal element of a "futures" contract made illegal by N. C. Code, 2144, and the courts will disregard the form and ascertain whether the intent of the parties was to speculate in the rise and fall of the price of the commodity. *Fenner v. Tucker*, 419.

§ 4. Lotteries.

The possession of lottery tickets sufficient to raise *prima facie* evidence of the violation of C. S., 4428, need not be actual physical possession, and they need not be found on defendant's person, it being sufficient if they are found in his place of business under his control. *S. v. Jones*, 640.

Evidence that numerous lottery tickets and lottery ticket books were found in the store operated by defendant is sufficient to be submitted to the jury in

GAMING—*Continued.*

a prosecution under C. S., 4428, and defendant's contention that there was no evidence that he was in charge of the store is untenable when the record discloses that several witnesses referred to the *locus in quo* as defendant's place of business. *S. v. Jones*, 640.

GUARDIAN AND WARD.

§ 23. Bonds and Sureties Liable.

Sureties on successive bonds given by a guardian are jointly and severally liable for default of the guardian, and judgment may be taken against one before the cause is at issue against the other, plaintiff relator having no interest in the right of the sureties to contribution between themselves. *Humphrey v. Surety Co.*, 651.

The fact that a successive guardianship bond is marked by someone "substitute bond" does not affect the rule of the joint and several liability of the sureties in the successive bonds to plaintiff relator upon default of the principal. *Ibid.*

§ 24. Actions on Bonds.

In an action against the surety in a guardianship bond, instituted after failure of the principal to pay the amount found due upon accounting, plaintiff relator need not allege the conditions of the bond nor attach copy of the bond to the complaint, since the bond is of record and if its terms do not provide liability upon the breach alleged, our statutory provisions, which become a part thereof, do provide for such liability. *Humphrey v. Surety Co.*, 651.

Allegations that the principal in a guardianship bond had failed to pay to the successor guardian the amount found to be due upon accounting for which judgment against the principal had been rendered in judicial proceedings in which defendant surety had full opportunity to appear and defend, sufficiently states a cause of action against the surety, the account filed by the principal in the bond being only *prima facie* correct and not binding upon the ward or the successor guardian. *Ibid.*

HIGHWAYS.

§ 1b. Power to Enter Upon Lands in Performance of Work on Project.

An employee of a contractor for the State Highway Commission who enters upon land in the performance of work upon a highway project is a licensee, since he occupies the same relation to the owner of the land as his employer, who is given the right to enter upon the land for this purpose by virtue of the State Highway statute. *Dunn v. Bomberger*, 172.

§ 10. Establishment of County Roads.

Evidence *held* sufficient for jury on issue of establishment of road under ch. 80, Public Laws 1909. *Merrell v. Bridges*, 123.

§ 13. Nature and Right to Establishment of Neighborhood Public Roads.

Cartways are *quasi*-public roads, laid out and designed principally for the benefit of individuals, and paid for by them, although also intended to some extent for public use, and cartways may be established solely to give petitioning individuals access to a public highway. *Waldroup v. Ferguson*, 198.

§ 14. Procedure and Establishment of Neighborhood Public Roads.

The establishment of a cartway involves the taking of private property by eminent domain, and land therefor may not be taken without giving the owner notice and an opportunity to be heard, with right of appeal according to the due course of law. N. C. Constitution, Art. I, sec. 35. *Waldroup v. Ferguson*, 199.

HIGHWAYS—*Continued.*

Where private act does not provide constitutional procedure for certain remedy, later general statute providing such remedy is in force in the locality. *Ibid.*

Evidence *held* to sufficiently establish cartway for purpose of prosecution for destroying cartway bridge. *S. v. Adams*, 243.

The Secretary of the Interior is not a necessary party in a proceeding to establish a cartway over lands belonging to Indians in severalty or to an Indian band. *Ibid.*

Petition for establishment of neighborhood public road need not allege right of easement in petitioners. *Pearce v. Privette*, 501.

§ 16. Criminal Responsibility for Obstructing Highway.

Evidence *held* to sufficiently establish cartway for purpose of prosecution for destroying cartway bridge. *S. v. Adams*, 243.

The fact that the validity of a proceeding establishing a cartway over Indian lands might be questioned by the United States in a direct proceeding is no defense to a prosecution for destroying a bridge of the cartway, since the proceeding to establish the cartway may not be collaterally attacked. *Ibid.*

HOMICIDE.

(Assault with intent to kill see Assault.)

II. Murder in the First Degree
3. Definition of First Degree Murder
V. Justifiable or Excusable Homicide
10. Scope of Defense in General
11. Self-Defense
12. Defense of Others
VII. Evidence
16. Presumptions and Burden of Proof
17. Relevancy and Competency of Evidence in General
18. Dying Declarations
20. Evidence of Motive and Malice
21. Evidence of Premeditation and Deliberation
VIII. Trial
25. Sufficiency of Evidence and Nonsuit
27. Instructions
b. On Presumptions and Burden of Proof
f. On Question of Excusable or Justifiable Homicide
h. Form and Sufficiency of Issues and Instructions on Less Degrees of the Crime Charged
30. Appeal and Review

§ 3. Definition of First Degree Murder.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation, C. S., 4200. *S. v. Payne*, 719.

§ 10. Justifiable and Excusable Homicide in General.

When he has reasonable grounds to believe that a felonious assault is about to be committed, a private citizen has the right and duty to interfere to prevent the supposed crime. *S. v. Robinson*, 273.

The evidence tended to show that defendant shot and killed the male companion of his estranged wife while they were seated in a cafe. *Held:* An instruction that if defendant killed deceased with malice and premeditation and deliberation, and did it on account of his wife, the crime would be murder in the first degree, is without error. *S. v. Petree*, 786.

§ 11. Self-Defense.

Right to kill in self-defense rests upon necessity, real or apparent. *S. v. Robinson*, 273; *S. v. Mosley*, 304.

If one uses language calculated and intended to bring on a fight, considering the language in regard to the circumstances and the relation between the parties, he is at fault in bringing on the affray, and his plea of self-defense cannot absolve him of all criminal responsibility, but an instruction that defendant would be at fault if he used language calculated to bring on a controversy and it does so, without instructing the jury that defendant must have intended this result, is erroneous. *S. v. Robinson*, 273.

HOMICIDE—*Continued.*

Person at fault may restore right of self-defense by quitting fight in good faith and giving adversary notice. *Ibid.*

When a person is without fault in bringing on an affray, and a murderous assault is made upon him, he is not required to retreat, but may stand his ground and kill his adversary if necessary in his self-defense. *S. v. Mosley*, 304.

If excessive force or unnecessary violence is used in self-defense, defendant is guilty of manslaughter at least. *Ibid.*

Mere language is not sufficient to support the plea of self-defense, but it is required that defendant be put in fear of death or great bodily harm by an actual or threatened assault. *Ibid.*

Fear either of death or great bodily harm will justify killing in self-defense. *Ibid.*

The evidence disclosed that defendants were fugitives from justice and shot and killed an officer attempting to arrest them, and defendants refused to stop their car although commanded to do so and although pursued by the officer in a police car with the siren open, and that defendants knew deceased was an officer and was attempting to arrest them. *Held:* Deceased was acting in the line of his duty in attempting to arrest defendants, and defendants' resisting arrest was unlawful, C. S., 2621 (62) (a), (151) (e) (g), and the plea of self-defense is not available to defendants. *S. v. Payne*, 719.

§ 12. Defense of Others.

Stepson may kill in lawful defense of stepfather. *S. v. Robinson*, 273.

§ 16. Presumptions and Burden of Proof.

When the intentional killing of a human being with a deadly weapon is admitted or established, the law implies malice, constituting the offense 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. Robinson*, 273; *S. v. Mosley*, 304.

The intentional killing of a human being with a deadly weapon implies malice, and, if nothing else appears, constitutes murder in the second degree. *S. v. Payne*, 719.

§ 17. Relevancy and Competency of Evidence in General.

Every circumstance that is calculated to throw any light upon the supposed crime is permissible. *S. v. Payne*, 719.

The State contended that defendant took out insurance on the life of his daughter and thereafter poisoned her with strychnine, that defendant had previously poisoned his first and second wives, successively, and collected the insurance on their lives, and had attempted to poison another woman upon whose life he had taken out insurance. *Held:* Testimony tending to show that defendant's victims, as contended by the State, had died of strychnine poisoning, that defendant's daughter died of the same poison, that the premiums on the policies on her life were paid further in advance than other policies held by defendant, is competent as tending to show links in the chain of circumstantial evidence. *S. v. Smoak*, 79.

Evidence of articles taken from defendants' car after the homicide, including pistols, guns, shells, bullets, tools, etc., is competent to show a design and plan, and the fact that the articles were found several months after the date of the crime does not render the evidence incompetent, the remoteness in time affecting only its probative force. *S. v. Payne*, 719.

§ 18. Dying Declarations.

Evidence *held* to establish proper predicate for admission of testimony of dying declarations. *S. v. Lewis*, 646.

HOMICIDE—*Continued.*

§ 20. Evidence of Motive and Malice.

Evidence tending to show that defendant had taken out insurance on his first two wives and had poisoned them, successively, and that another person upon whom he had taken out insurance had suffered a serious, but not fatal, attack of poisoning, *held* competent to show motive and malice in prosecution of defendant for murder of daughter whose life he had insured. *S. v. Smoak*, 79.

Evidence of animosity between defendant and deceased *held* competent as tending to show motive. *Ibid.*

Evidence of repeated escapes from arrest and flight, with other evidence establishing that defendants were fugitives from justice and had expressed their intention to resist arrest to the death, *held* competent upon the question of motive and malice in prosecution for first degree murder in killing officer attempting to arrest them. *S. v. Payne*, 719.

Evidence of threats against class to which deceased belonged *held* competent to show malice. *Ibid.*

§ 21. Evidence of Premeditation and Deliberation.

The dealing of lethal blows after the deceased had been felled and rendered helpless is evidence from which the jury may infer deliberation and premeditation. *S. v. Taylor*, 521.

Flight is not evidence of, and may not be admitted to prove premeditation and deliberation. *S. v. Payne*, 719.

Evidence of threats made by defendants in a prosecution for homicide is competent to show premeditation and deliberation and previous express malice, and while such threats must be directed toward deceased with sufficient definiteness to connect them with the crime charged, when defendants are fugitives from justice, evidence of malice against all officers and threats to kill any officer attempting to arrest them and to die rather than be taken into custody, is competent in a prosecution of defendants for murder of an officer attempting to arrest them. *Ibid.*

The fact that the first alleged threat was made by defendants some three or four years prior to the homicide does not render evidence of such threat incompetent when it appears that the threat was repeated up to the very time of the homicide, since the remoteness of the threat goes to its weight and not its competency. *Ibid.*

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence in this case *held* sufficient to support the contentions of the State that defendant shot and killed deceased in the perpetration of a robbery, and therefore was guilty of murder in the first degree. C. S., 4200. *S. v. Exum*, 16.

Evidence that defendant killed his daughter by means of poison *held* sufficient for jury on charge of first degree murder. *S. v. Smoak*, 79.

Evidence *held* sufficient for jury on question of defendant's guilt of first degree murder. *S. v. Taylor*, 521; *S. v. Payne*, 719; *S. v. Petree*, 785.

§ 27b. Instructions on Presumptions and Burden of Proof.

When the court fully charges the law on the burden of proof it is not required that the court repeat "beyond a reasonable doubt" in the portion of the charge relating to the consideration to be given evidence of motive. *S. v. Petree*, 785.

§ 27f. Instructions on Question of Excusable or Justifiable Homicide.

An instruction that defendant would be at fault if he used language calculated to bring on a controversy and it does so, without instructing the jury that defendant must have intended this result, is erroneous. *S. v. Robinson*, 273.

In this case the court instructed the jury that if defendants were at fault in bringing on the fight they could not plead perfect self-defense. *Held:* Under the evidence, it was error for the court to fail to charge the jury further that even if defendants were at fault, if they quit the fight in good faith and gave their adversary notice of such action, defendants' rights to self-defense would be restored. *Ibid.*

A stepson has the right to kill in the defense of his stepfather, such right being coextensive with the right of self-defense, and under the evidence in this case it was error for the court to fail to instruct the jury in regard to this right, whether the stepson aided his stepfather in his lawful defense or in an unlawful assault being for the determination of the jury. *Ibid.*

When he has reasonable grounds to believe that a felonious assault is about to be committed, a private citizen has the right and duty to interfere to prevent the supposed crime, and under the evidence in this case it was error for the court not to have instructed the jury upon this matter under the contention and evidence of one of defendants. *Ibid.*

In this prosecution for homicide, the court instructed the jury that defendant would be justified in killing his adversary if defendant believed, and had reasonable grounds to believe, that the act was necessary to save himself from death. *Held:* The instruction must be held for error as failing to include, as a basis of the plea of self-defense, reasonable apprehension of great bodily harm, even though the court elsewhere correctly charged the jury on the question, since it cannot be ascertained which instruction the jury followed in arriving at its verdict. *S. v. Mosley*, 304.

Instruction on question of self-defense *held* erroneous in failing to explain law of self-defense in case of nonfelonious assault arising upon the evidence. *S. v. Bryant*, 752.

The court charged that a person may use such force as reasonably appears necessary to repel an attack and save himself from death or great bodily harm. *Held:* The instruction is susceptible to the interpretation that the amount of force and the reasonableness of the necessity should be determined upon the facts and circumstances as they appeared at the time of trial, and is erroneous in failing to instruct the jury that the amount of force and the necessity to act should be determined by the jury upon the facts and circumstances as they appeared to the defendant at the time of the assault. *Ibid.*

An exception to the court's instruction that if the jury found from the evidence that defendant killed in his proper self-defense, as theretofore defined by the court, then its verdict would be not guilty, *held* untenable. *S. v. Petree*, 785.

§ 27h. Form and Sufficiency of Issues and Instructions on Less Degrees of the Crime Charged.

Evidence *held* to warrant refusal of instruction that in no event could defendant be guilty of murder in the first degree. *S. v. Taylor*, 521.

Instruction on question of conviction of lesser degrees of the crime charged *held* without error. *S. v. Petree*, 785.

§ 30. Appeal and Review.

Held: The exclusion of defendant's evidence to the effect that the reputation of the home of deceased was "bad for drinking and frolicking parties" could not have affected the result, and an exception to its exclusion is not sustained. *S. v. Taylor*, 521.

An exception to an instruction that a killing with a deadly weapon raises a presumption of murder in the second degree will not be sustained when all the evidence shows an intentional killing and defendant pleads self-defense based upon an intentional killing. *Ibid.*

HOMICIDE—*Continued.*

Where defendant admits the fatal shooting, and the jury returns a verdict of guilty of manslaughter, the admission of testimony of declarations by deceased to the effect that defendant shot him without excuse, while he was unarmed, would seem harmless. *S. v. Lewis*, 646.

When there is no motion to nonsuit in a prosecution for homicide, the sufficiency of the evidence of premeditation and deliberation to warrant the submission of the question of guilt of murder in the first degree is not presented for review. *S. v. Petree*, 785.

The contention of error in the court's charge on the questions of premeditation and deliberation and on the plea of self-defense must be presented for review by proper exceptions to the charge. *Ibid.*

HUSBAND AND WIFE.

§ 4b. Contracts Between Husband and Wife.

A wife's agreement with her husband to repay him for sums expended by him in the repair and improvement of her real estate is void unless in writing and acknowledged in the manner prescribed by C. S., 2515. *Jackson v. Hewlett*, 805.

§ 32. Nature and Essentials of Right of Action for Alienation.

The relation of parent and child justifies the parent in giving the child counsel and advice in regard to the child's marital relations so long as the parent acts in good faith, but the injured spouse may maintain an action for alienation when the parent acts with malice in breaking up the marital relation. *Johnston v. Johnston*, 255.

§ 34. Competency and Sufficiency of Evidence of Alienation.

In this action by a married woman against her mother-in-law for alienation of the affections of plaintiff's husband, the evidence *is held* sufficient to be submitted to the jury. *Johnston v. Johnston*, 255.

§ 36. Damages and Judgment in Actions for Alienation.

Loss of support or assistance is a proper element of damage in an action for alienation, but plaintiff must introduce some evidence of the value of support of which she was deprived in order for it to be included in the award, and the instruction on this issue in this case *is held* not objectionable on the ground that it failed to limit recovery to the present cash value of future assistance, there being no reference in the charge to any future loss of assistance. *Johnston v. Johnston*, 255.

INDIANS.

§ 4. Criminal Offenses Committed Within Indian Reservation.

The criminal laws of the State are applicable to offenses committed within an Indian Reservation within the borders of the State. *S. v. Adams*, 243.

INDICTMENT.

(Necessity of indictment see Constitutional Law § 26.)

§ 2. Duly Constituted Grand Jury.

The male defendant moved to quash the bill of indictment on the ground that it was returned by a grand jury composed entirely of men and that women had been unlawfully excluded therefrom. *Held:* There had been no discrimination against the class or sex to which defendant belongs, and he could not have been prejudiced by the alleged discrimination, and therefore he may not raise the question of the qualification of women to serve as jurors

INDICTMENT—*Continued.*

or maintain that the proceeding constituted a violation of the equal protection guaranteed by the Fourteenth Amendment of the Federal Constitution and by sec. 17, Art. I, of the State Constitution. *S. v. Sims*, 590.

§ 9. Charge of Crime.

Provisos which constitute exceptions withdrawing an act from the condemnation of the statute constitute defenses and need not be negatived in the indictment, while provisos which add a qualification without which the act is not condemned by the statute relate to essential elements of the offense which must be set out in the indictment. *S. v. Epps*, 709.

§ 11. Definiteness and Sufficiency in General.

In a prosecution for willful failure and refusal to support an illegitimate child, sec. 1, ch. 228, Public Laws of 1933, an exception on the ground that the indictment failed to charge the specific date in the month in which the offense was alleged to have been committed cannot be sustained. C. S., 4625. *S. v. Oliver*, 386.

§ 13. Motions to Quash.

Denial of male defendant's motion to quash for that women were excluded from jury *held* not prejudicial. *S. v. Sims*, 590.

INFANTS.

§ 1. Control and Protection of Courts.

In a sense the courts are the supreme guardians of all infants, and in all suits or legal proceedings the powers of a court of chancery may be invoked to protect both their personal and property rights, and, when necessary, the courts will act *ex mero motu* to afford them protection. *Latta v. Trustees*, 462.

§ 4. Affirmance and Disaffirmance of Contracts.

Conflicting evidence as to age *held* for jury upon plea of defense of infancy and counterclaim seeking disaffirmance of contract. *Acceptance Corp. v. Edwards*, 736.

INJUNCTIONS.

§ 2. Inadequacy of Legal Remedy and Irreparable Injury.

Injunction will not lie to enjoin execution sale on a judgment, since there is an adequate remedy at law by motion in the cause to stay or recall the execution. *Finance Co. v. Trust Co.*, 369.

§ 5. Enjoining Prosecution of Actions.

Insurer may not enjoin third person from prosecuting suit while it litigates its contractual obligation to defend same. *Casualty Co. v. DeLozier*, 334.

§ 10. Bonds and Procedure.

In an action to abate a public nuisance plaintiff relator is not required to give an undertaking, C. S., 3181, the provisions of C. S., 854, not being applicable. *Carpenter v. Boyles*, 432.

§ 11. Continuance, Modification and Dissolution.

Ordinarily, when the facts are in dispute in an action for damages and to restrain future cutting of standing timber upon assertion of irreparable injury, the temporary order should be continued to the hearing, C. S., 845, or the defendant be required to give bond, C. S., 846. *Lawhon v. McArthur*, 260.

When the facts are in dispute in an action to restrain the cutting of standing timber, it is error for the trial court upon the hearing of the order to show cause to dismiss the action and deprive plaintiff of a jury trial. *Ibid.*

INSURANCE.

III. Insurance Agents and Brokers
9. Authority and Liability of Brokers and Agents
IV. The Contract in General
13. Construction and Operation in General
V. Fire Insurance
17. Insurable Interest
22. Avoidance or Forfeiture of Policy
b. For Nonpayment of Premiums or Assessments
e. For Breach of Condition or Warranty against Additional Insurance
24. Extent of Loss and Liability of Insurers
c. Companies Liable
d. Persons Entitled to Payment
25. Actions on Policies
c. Evidence and Burden of Proof
VI. Life Insurance
31. Avoidance or Forfeiture of Policy for Misrepresentation of Fraud
a. Policies Issued Without Medical Examination
34. Disability Clauses
g. Payment and Discharge of Disability Benefits
36. Payment and Discharge of Policy
d. Assignment
VII. Double Indemnity, Accident, and Health Insurance
39. Provisions Relating to Intentionally Inflicted Injuries
41. Actions on Double Indemnity Clauses and Accident Policies
VIII. Liability Policies
47. Distinction between Liability and Indemnity Contracts
49. Defense of Action by Insurer
51. Payment and Subrogation in General
51b. Payment upon Insolvency of Insurer

§ 9. Authority and Liability of Brokers and Agents. (Broker's right of subrogation against insurer see hereunder § 51.)

An insurance broker undertook to obtain liability insurance coverage for its client, represented that the insurance coverage had been obtained and demanded payment of premium, and the client, in reliance on the representation, made no further negotiation with respect to insurance coverage, and paid the premium, which the broker forwarded to the insurer. *Held:* By its conduct and representations, the broker is estopped from denying that its client was protected by the insurance ordered. *Boney v. Ins. Co.*, 563.

§ 13. Construction and Operation of Insurance Contracts in General.

Policies of insurance, having been prepared by insurer, will be liberally interpreted in favor of insured. *Abernethy v. Ins. Co.*, 23.

Laws in force at the time of the execution of a contract become a part thereof. *Ibid.*

The parties are bound in accordance with the terms, provisions and limitations set out in their agreement. *Whitaker v. Ins. Co.*, 376.

§ 17. Insurable Interest.

The devisee of the fee to property subject to a charge in a certain sum in favor of other beneficiaries under the will, has a separately insurable interest in the property, which he may protect for his sole benefit. *Bryan v. Ins. Co.*, 391.

The executor of a solvent estate has no interest in real property devised by will, and may not recover upon a fire insurance policy taken out by him on the property, since the estate suffers no loss from the destruction of the building by fire. *Ibid.*

§ 22b. For Nonpayment of Premiums or Assessments.

Where a mutual fire insurance company relies on the failure of insured to pay an assessment levied against policyholders in order to defeat recovery on the policy, it must show that the assessment was legally made in conformity with the provisions of C. S., 6353, and where it fails to so show and plaintiff insurer testifies that she did not get notice of the assessment or of the cancellation of the policy, peremptory instructions against insurer on the affirmative defense are without error. *Abernethy v. Ins. Co.*, 23.

§ 22e. For Breach of Condition or Warranty Against Additional Insurance.

Findings that insured did not make agreement to take out additional insurance *held* conclusive. *Bryan v. Ins. Co.*, 391.

INSURANCE—*Continued.*

Other insurance issued to person having separably insurable interest does not violate provision against additional insurance. *Ibid.*

§ 24c. Companies Liable.

In determining the proportionate liability of several insurers issuing their respective policies on the same property, the amount of insurance issued by one of them should be disregarded when its policy is void because issued to a person having no insurable interest. *Bryan v. Ins. Co.*, 391.

The face amount of the policy of one insurer is the correct basis for determining the proportionate liability of another insurer issuing a policy on the same property, even though the parties to such other policy agree to a compromise settlement for less than its face amount. *Ibid.*

§ 24d. Persons Entitled to Payment.

Where the devisee of the fee, subject to a charge in favor of other beneficiaries under the will, takes out a fire insurance policy for his sole benefit, the other beneficiaries are not entitled to an accounting from him for the proceeds of the policy upon the destruction of the premises by fire. *Bryan v. Ins. Co.*, 391.

§ 25c. Evidence and Burden of Proof.

Where plaintiff introduces the fire policy sued on, and evidence of the destruction of the premises insured by fire, the burden is on defendant insurer to establish affirmative defenses relied on to defeat recovery. *Abernethy v. Ins. Co.*, 23.

§ 31a. Policies Issued Without Medical Examination.

Evidence *held* to disclose fraud in procuring delivery of policy issued without medical examination. *Butler v. Ins. Co.*, 384.

§ 34g. Payment and Discharge of Disability Benefits.

The policy in suit provided for disability benefits payable annually during disability on the anniversary date of the policy. Insured received several annual disability payments, and died less than two months before another disability payment was due. *Held:* Under the terms of the policy insured's death terminated the disability and matured the policy prior to the date of the next annual payment, and insured's personal representative is not entitled to recover payment on the disability clause for the proportionate part of the year prior to insured's death. *Wells v. Ins. Co.*, 178.

Where disability benefits are payable annually and insured dies less than two months before an annual payment becomes due, insured's personal representative is not entitled to recover disability benefits for the proportionate part of the year during which insured lived, since the annuity does not come within the exceptions to the common law rule that annuities are not apportionable, or within statutory modifications of the common law. *Ibid.*

C. S., 2346, providing that annuities shall be apportionable in certain instances, has no application to disability benefits payable annually under the terms of an insurance policy, since there is no provision for successive owners, but the right to payment terminates upon the death of insured. *Ibid.*

§ 36d. Person Entitled to Payment Upon Assignment.

A corporation was made the beneficiary of a policy on the life of one of its officers. The corporation became insolvent, and intervener alleged an agreement by the receiver to assign the policy to the insured officer upon his payment of the cash value, upon the approval of the court. Insured died prior to approval of the agreement by the court. *Held:* Even conceding that the terms for the transfer of the policy were sufficiently definite to constitute a contract,

INSURANCE—*Continued.*

the approval of the court was made a condition precedent, and such approval not having been given, there was no valid and subsisting contract to transfer the policy, and intervener is not entitled to recover the proceeds of the policy from the receiver. *Federal Reserve Bank v. Mfg. Co.*, 490.

§ 39. Provisions Relating to Intentionally Inflicted Injuries.

The policy in suit provided for payment of double indemnity in the event insured died of injuries inflicted through external, violent and accidental means, provided such injuries were not self-inflicted, or intentionally inflicted by another. *Held:* An instruction that if insured died of a gunshot wound "intentionally inflicted by" another, the law would regard this as by accidental means, and upon such finding plaintiff would be entitled to double indemnity, is error. *Whitaker v. Ins. Co.*, 376.

§ 41. Actions on Double Indemnity Clauses and Accident Policies.

Erroneous instruction as to liability on double indemnity provision *held* not cured by verdict. *Whitaker v. Ins. Co.*, 376.

Insured died a few hours after playing in a football game. Plaintiff beneficiary contended that the embolus causing death resulted from a blow received while he was playing in the game, and that therefore insured's death resulted from bodily injuries sustained solely through external, violent and accidental means within the terms of a double indemnity clause in the policy. *Held:* The physical condition of insured immediately after the game was a proper subject of inquiry, and testimony of declarations by insured at that time as to his bodily feeling was properly admitted. *Munden v. Ins. Co.*, 504.

§ 47. Distinction Between Liability and Indemnity Contracts.

Whether policy is a liability or an indemnity contract depends upon intent of parties as expressed in the instrument. *Boney v. Ins. Co.*, 470.

Policy in suit *held* to insure against liability and insured was entitled to recover upon rendition of judgment in favor of third person. *Ibid.*

§ 49. Defense of Action by Insurer.

Insurer is bound to defend action when the allegations bring it within class of actions insurer agrees to defend. *Casualty Co. v. DeLozier*, 334.

Insurer may not enjoin third person from prosecuting suit while it litigates its contractual obligation to defend same. *Ibid.*

§ 51a. Payment and Subrogation in General.

Insurance broker paying claims under liability policy in good faith *held* entitled to subrogation. *Boney v. Ins. Co.*, 563.

Broker *held* entitled to maintain action against insurer upon assignment by insured. *Ibid.*

§ 51b. Payment Upon Insolvency of Insurer.

Where judgment against insured is rendered on a risk covered by a liability contract, claim against the receiver of the insolvent insurer should be allowed on its admitted policy upon proof of the judgment, and where insured has also become insolvent the disposition of payments on the claim by insured's receiver is for the determination of the court. *Boney v. Ins. Co.*, 470.

INTOXICATING LIQUOR.

§ 2. Construction and Operation of Control Acts and Repeal of Prior Acts.

Under the second section of the 21st Amendment to the Federal Constitution, any state can prohibit the transportation or importation of intoxicating liquors into its territory. *S. v. Epps*, 709.

INTOXICATING LIQUOR—*Continued.*

The "A. B. C. Act," ch. 49, Public Laws of 1937, does not repeal the Turlington Act, N. C. Code, 3411, since the two acts are not in conflict, and the later act repeals only prior laws inconsistent therewith, and therefore only provisions of the Turlington Act in conflict with the later act are repealed. *Ibid.*

§ 4b. Constructive Possession.

An instruction to the effect that defendant would be guilty of illegal possession and transportation, whether he was driving or not, if he were present in his car, aiding and abetting his companion, and had in his constructive possession and under his control the intoxicating liquor, is without error since actual physical possession is not necessary for conviction. *S. v. Epps*, 709.

§ 4c. Effect of Control Act as to Legality of Possession.

"A. B. C. Act" does not repeal provisions of Turlington Act as to possession by individual for purpose of sale. *S. v. Epps*, 709.

§ 5c. Second Offense of Manufacturing Intoxicating Liquor.

The second offense of manufacturing spirituous liquor is a felony. C. S., 3409. *S. v. Sanderson*, 381.

§ 7b. Effect of Control Act in Regard to Transportation.

The transportation of intoxicating liquor for the purpose of sale other than to an Alcoholic Beverage Control Board, and the transportation of intoxicating liquor having the cap or seal on the containers opened or broken, are not permitted by ch. 49, Public Laws of 1937, and therefore the provisions of the Turlington Act in regard to transportation in such cases are still in effect. *S. v. Epps*, 709.

§ 9a. Warrant and Indictment.

A person may be tried on a charge of manufacturing spirituous liquor for the second offense only upon indictment, since the offense is a felony. *S. v. Sanderson*, 381.

An indictment charging defendant with unlawful possession of intoxicating liquor for the purpose of sale, contrary to the form of the statute in such cases made and provided is sufficient, the provisions of N. C. Code, 3379, not having been repealed by ch. 49, Public Laws of 1937. *S. v. Epps*, 709.

An indictment for illegal possession and transportation of intoxicating liquor need not negative the conditions under which intoxicating liquor may be possessed for the purpose of sale and may be transported, since the exceptions are matters of defense. *Ibid.*

§ 9b. Competency and Relevancy of Evidence.

The presence of empty whiskey bottles around a defendant's store and filling station constitutes some evidence that whiskey had been consumed on the premises and tends to assist in establishing that defendant possessed whiskey for the purpose of sale. *S. v. Libby*, 662.

§ 9c. Sufficiency of Evidence.

Evidence that over a gallon of whiskey in pint bottles with unbroken seals was found on defendant's premises, that defendant admitting owning the whiskey, and that empty bottles were found around premises, *is held* sufficient to be submitted to the jury on a charge of illegal possession of intoxicating liquor for the purpose of sale. Ch. 49, Public Laws of 1937, N. C. Code, 3379, 3411 (j). *S. v. Libby*, 662.

Evidence *held* sufficient for jury on charges of illegal possession for sale and transporting intoxicating liquor. *S. v. Epps*, 709.

§ 9e. Instructions.

Instruction need not charge as to legal transportation when there is no evidence that transportation was legal. *S. v. Epps*, 709.

JUDGMENTS.

I. Judgments by Consent
1. Nature, Construction, and Essentials of Consent Judgments
4. Attack and Setting Aside Consent Judgments
II. Judgments by Default (Setting aside see hereunder s 23)
11. Rendition of Judgments by Default
VI. Judgment on Trial of Issues or Hearings on Motions
18. Time and Place of Rendition
VII. Docketing and Lien
19d. Priorities against Later Acquired Real Estate
VIII. Validity, Attack, and Setting Aside
22. Procedure: Direct and Collateral Attack
23. For Surprise, Inadvertence, and Excusable Neglect
26. Want of Jurisdiction
X. Operation of Judgments as Bar to Subsequent Action
32a. Parties and their Privies
33a. Bar of Consent Judgments
34. Judgments of Federal Courts and of other States
35. Plea of Bar, Hearings, and Determination

§ 1. Nature, Construction and Essentials of Consent Judgments.

A judgment by consent is in effect the contract of the parties entered upon the records with the sanction and permission of the court, and it must be construed in the same manner as a written contract between the parties. *Carpenter v. Carpenter*, 36.

A consent judgment is the contract of the parties entered upon the records with the sanction of the court, and the judgment must be construed in the same manner as a contract to ascertain the intent of the parties. *Webster v. Webster*, 135.

A consent judgment is as valid and binding as a judgment rendered upon the trial of a cause. *Law v. Cleveland*, 289.

§ 4. Attack and Setting Aside Consent Judgments.

The procedure in attacking a consent judgment on the ground that a party thereto was a minor or *non compos mentis* and incapable of consenting, is by motion in the cause. *Gibson v. Gordon*, 666.

When a consent judgment of a minor or a person *non compos mentis* recites that the court investigated the facts and found that the settlement was just and reasonable, the finding is conclusive. *Ibid.*

§ 11. Rendition of Judgments by Default.

When defendant in an action for the possession of real property fails to file the required bond the clerk is authorized to enter judgment by default final, C. S., 595 (4), on any Monday, but he is without jurisdiction to enter such judgment except on Monday, C. S., 597 (b), and such judgment entered on a Wednesday is properly set aside upon appeal to the presiding judge at term. *Clegg v. Canady*, 258.

Negotiations, as distinguished from agreement of counsel, cannot be held to extend the time to a day other than a Monday for hearing a motion and entering judgment by default final for want of the required bond in an action in ejectment, and the findings of the court in this case *are held* to disclose that no definite agreement of counsel had been made. *Ibid.*

§ 18. Time and Place of Rendition of Judgments on Issues or Motions.

Court may not make order substantially affecting rights of parties out of the county and district, except by consent. *Jeffreys v. Jeffreys*, 531.

Where it does not appear that parties agreed thereto, order entered outside of county and district will be vacated. *Ibid.*

§ 19d. Priorities Against Later Acquired Real Estate.

When an heir acquires land or property to be treated as realty subsequent to the docketing of the several judgments against him, the judgment creditors are not entitled to priority in accordance with the date of the docketing of their respective judgments, but are entitled only to application of the property to the judgments pro rata. C. S., 614. *Linker v. Linker*, 351.

JUDGMENTS—*Continued.*

§ 22. Procedure: Direct and Collateral Attack.

Only void judgments are subject to collateral attack. *S. v. Adams*, 243.

Procedure to attack consent judgment on ground that plaintiff was a minor or *non compos mentis* is by motion in the cause. *Gibson v. Gordon*, 666.

§ 23. For Surprise, Inadvertence, and Excusable Neglect.

Defendants duly served with summons are not entitled to set aside a judgment by default final for surprise or excusable neglect because they had no notice that the case was calendared for trial and no notice of the trial. *Fertilizer Co. v. Whorton*, 211.

In setting aside a judgment under C. S., 600, the court is required to find the facts not only in regard to the excusable neglect relied on, but also the facts in regard to meritorious defense, and a finding of a "meritorious defense" without finding the facts showing a meritorious defense, is insufficient. *Parnell v. Ivey*, 644.

§ 26. Want of Jurisdiction.

A *prima facie* presumption or rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in the matter. *S. v. Adams*, 243.

§ 32a. Parties and Their Privies.

Judgment in action by minor, brought by father as next friend, *held* not to bar action by father to recover for loss of services. *Rabil v. Farris*, 414.

§ 33a. Bar of Consent Judgments.

When a consent judgment of a minor or a person *non compos mentis* recites that the court investigated the facts and found that the settlement was just and reasonable, the finding is conclusive and the judgment is a bar to a subsequent action on the same cause of action. *Gibson v. Gordon*, 666.

§ 34. Judgments of Federal Courts and of Other States.

Under the full faith and credit clause, U. S. Constitution, Art. IV, sec. 1, a consent judgment of another State will bar the parties from maintaining an action in our courts if such judgment would bar the action in the jurisdiction which rendered the judgment, unless the judgment is set aside for fraud or mutual mistake. *Law v. Cleveland*, 290.

Judgment of South Carolina court in action involving same parties and subject matter *held* to bar action in this State. *Ibid.*

§ 35. Plea of Bar, Hearings and Determination.

An estoppel by prior judgment between the parties on the same cause of action is properly pleaded in the answer. *Gibson v. Gordon*, 666.

Upon a plea of estoppel by prior judgment between the parties, the record itself in the former action, being in existence, is the only evidence admissible to prove its contents. *Ibid.*

JURY.

§ 5. Right to Trial by Jury.

When the facts are in dispute in an action to restrain the cutting of standing timber, it is error for the trial court upon the hearing of the order to show cause to dismiss the action and deprive plaintiff of a jury trial. *Lawhon v. McArthur*, 260.

Court must submit issues to jury even when evidence is sufficient to warrant directed verdict. *Bank v. Stone*, 598.

§ 8. Jury Panels.

Challenge to the array for that jury commission drawing the panel was created by ch. 177, Public-Local Laws 1931, and was not legal agency for drawing the panel, should have been sustained. *Reed v. Madison County*, 145.

JUSTICES OF THE PEACE.

(Appeals from Justice's Court see Courts § 2d.)

§ 4. Pleadings.

Pleadings must be written and verified in action against city in justice's court. *Kalte v. Lexington*, 779.

LABORERS' AND MATERIALMEN'S LIENS.

§ 10. Procedure and Enforcement of Lien.

When plaintiff is estopped by its election in asserting a lien under C. S., 2437, from asserting a lien under C. S., 2433, and its action brought solely under C. S., 2433, is dismissed as of nonsuit because of such election, plaintiff's remedy is by instituting another action to recover for materials furnished the contractor and used in the construction of the building under C. S., 2437. *Lumber Co. v. Perry*, 533.

LANDLORD AND TENANT.

§ 8. Possession and Use of Premises.

Lessee is not contractually bound to occupy and use demised premises in absence of express agreement in lease contract. *Jenkins v. Rose's Stores*, 606.

§ 15c. Renewals and Extensions.

Notice of intention to renew must be given as required by lease, as time is of the essence. *Realty Co. v. Demetrelis*, 52.

Acceptance of sums after expiration of lease *held* not to waive notice required under renewal agreement. *Ibid.*

§ 19. Notice of Intent to Terminate.

When lease terminates by its own terms on specified date, landlord is not required to give notice. *Realty Co. v. Demetrelis*, 52.

§ 22. Determination of Amount of Rent.

Lease provided for minimum rent plus percentage of gross sales in excess of stipulated amount. Lessee operated its store in the premises, and then moved its store, and tendered lessors the minimum rent for the year the premises were unoccupied. Lessors contended they were also entitled to percentage of gross sales made in new location. *Held:* In absence of express agreement lessee was not bound to occupy the premises, and lessors are entitled only to minimum rent tendered. *Jenkins v. Rose's Stores*, 606.

§ 26. Actions and Counterclaims for Misrepresentation of Condition of Premises.

In an action for rent, tenant may set up counterclaim for fraud inducing execution of lease contract. *Threadgill v. Faust*, 226.

LARCENY.

§ 5. Presumptions and Burden of Proof.

An instruction that the recent possession of stolen property raises the presumption that the possessor is guilty of larceny of the property, placing the burden on him to offer an explanation sufficient to raise a reasonable doubt of his guilt in the minds of the jurors, *is held* erroneous as placing the burden on defendant to raise a reasonable doubt of his guilt in the minds of the jurors if they should find he had recent possession of stolen property. *S. v. Baker*, 524.

Recent possession of stolen property raises presumption to be considered merely as evidential fact along with other evidence. *Ibid.*

LIMITATION OF ACTIONS.

§ 5. Notice and Demand.

An action instituted against the surety in a guardianship bond is not barred when instituted within three years from the principal's failure to pay over upon demand the amount found to be due upon accounting. *Humphrey v. Surety Co.*, 651.

§ 10. Death and Administration.

No statute of limitations bars administrator's right and duty to sell lands to make assets to pay debts. *Trust Co. v. McDearman*, 141.

§ 11. Institution of Action.

Amendment making true owner defendant is not continuation of original suit to foreclose tax certificate. *Wendell v. Scarboro*, 540.

§ 12a. Part Payment in General.

While part payment will not repeal the bar of the statute on a cause of action *in tort*, the complaint *is held* sufficient to allege an action *ex contractu* under the rule that a person whose property has been wrongfully converted may waive the tort and sue on contract, and the court's charge on the effect of part payment on the cause *ex contractu is held* without error. *Patterson v. Allen*, 632.

LIS PENDENS.

§ 3. Sufficiency of Notice.

When an action involving title to realty is instituted in the county in which the land lies, the action itself is notice, and no notice under C. S., 500, is required, but mere description of the land in the complaint is insufficient, it being necessary that its allegations show that title to the land is involved. *Jarrett v. Holland*, 428.

Action for recovery of purchase money *held* not to involve title so as to constitute notice of *lis pendens*. *Ibid.*

5. Operation and Effect.

A party purchasing property, the title to which is involved in a pending suit, of which he has actual or presumptive notice, is bound by the judgment as much as the party to the action from whom he bought. *Jarrett v. Holland*, 428.

MASTER AND SERVANT.

I. The Relation
4a. Employees and Independent Contractors
III. Employer's Liability for Injuries to Employee
12. Employer's Liability for Injury to Independent Contractor
IV. Liability for Injury to Third Persons
21a. "Employees" within Meaning of the Rule
21b. Course of Employment: Scope of Authority
23. Negligence or Wrongful Act of Servant
VII. Workmen's Compensation Act
37. Nature and Construction of Compensation Act in General
39a. Employees within Meaning of the Act in General
39b. Independent Contractors
39c. Residence of Employee
40. Injuries Compensable
a. Injuries Compensable in General
e. Whether Accident Arises "Out of the Employment"
f. Whether Accident Arises "In the Course of the Employment"
h. Intoxication of Employee
41b. Costs and Attorneys' Fees
47. Notice and Filing of Claim
49. Exclusive of Remedy
53a. Form and Rendition of Award
55d. Matters Reviewable upon Appeal
55g. Determination and Disposition of Appeal

§ 4a. Employees and Independent Contractors.

The relationship of owner and independent contractor is not changed by the fact that the contractor agrees to do additional work of the same nature not covered by the original contract, which additional work is under the contractor's control, including the furnishing of labor and material, the owner being interested solely in the result. *Odum v. Oil Co.*, 478.

MASTER AND SERVANT—*Continued.*

§ 12. Employer's Liability for Injury to Independent Contractor.
Independent contractor may hold owner of structure liable when contractor is hurt as a result of a defect in scaffolding built by owner and used in performance of work by the contractor with the owner's permission. *Odum v. Oil Co.*, 478.

§ 21a. "Employees" Within Meaning of the Rule.
Defendant company rented a tractor and driver for work on an E. R. A. project, the truck and driver being under the direction and control of the E. R. A. superintendent. Plaintiff, an employee of the Emergency Relief Administration, instituted this action to recover for injuries inflicted by said truck and driver. *Held:* Judgment of nonsuit was properly entered on authority of *Liverman v. Cline*, 212 N. C., 43. *Wadford v. Gregory Chandler Co.*, 802.

§ 21b. Course of Employment: Scope of Authority. (Master's liability for employee's negligent driving see Automobiles § 24.)
Nonsuit *held* properly granted upon evidence tending to show that plaintiff was negligently injured by defendant's employee while he was on his way home from work after the defendant employer's place of business had closed, since plaintiff is under duty to show that the relation of master and servant existed at the time of, and in respect to, the very transaction out of which the injury arose in order for the doctrine of *respondeat superior* to apply. *Bright v. Tel. Co.*, 208.

A master is liable for injuries caused by the negligence of the servant while acting in the course of his employment and in furtherance of the master's business. *Barrow v. Keel*, 373.

§ 23. Negligence or Wrongful Act of Servant.
Since the doctrine of *respondeat superior* is based upon responsibility for the negligent act of the servant, when judgment as of nonsuit is granted on the issue of the servant's negligence, without appeal, the judgment is conclusive against plaintiffs as to the employer also. *Morrow v. R. R.*, 127.

§ 37. Nature and Construction of Compensation Act in General.
The Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees, and its benefits should not be denied by a technical, narrow and strict construction. *Barbour v. State Hospital*, 515.

§ 39a. Employees Within Meaning of the Act in General.
State employee engaged in farming operations is covered by the Workmen's Compensation Act. *Barbour v. State Hospital*, 515.

§ 39b. Independent Contractors.
Intestate was killed in a cave-in of a ditch in a city street in which he was working under the Emergency Relief Administration, which was performing the work as an independent contractor. Whether the Industrial Commission might hold the city liable under the provisions of the Compensation Act under the doctrine that a person may not escape liability for injuries to employees of independent contractors when the work is intrinsically dangerous, *quære*. *Barnhardt v. Concord*, 364.

§ 39c. Residence of Employee.
Evidence *held* to support finding that employee was resident of the State at time of the accident. *Brooks v. Rim & Wheel Co.*, 518.

§ 40a. Injuries Compensable in General.
The Compensation Act provides, unless the context otherwise requires, that a death of an employee in order to be compensable must result from an injury

by accident arising out of and in the course of the employment. C. S., 8081 (i), subsecs. j and f. *Plemmons v. White's Service, Inc.*, 148.

Whether an injury results from an accident arising out of and in the course of the employment is a mixed question of law and fact. *Singleton v. Laundry Co.*, 32; *Plemmons v. White's Service, Inc.*, 148; *Lockey v. Cohen, Goldman & Co.*, 356.

The Workmen's Compensation Act does not contemplate compensation for every injury an employee may receive during the course of his employment, but only those from accident arising out of and in the course of the employment. *Lockey v. Cohen, Goldman & Co.*, 356.

§ 40e. Whether Accident Arises "Out of the Employment."

The words "out of" refer to the origin or cause of the accident. *Plemmons v. White's Service, Inc.*, 148; *Lockey v. Cohen, Goldman & Co.*, 356.

Whether an accident arises "out of the employment" is a mixed question of law and fact to be determined in the light of the facts and circumstances of each case, but the term requires that there be some causal connection between injury and the employment or that the risk be incidental to the employment. *Plemmons v. White's Service, Inc.*, 148.

Intestate died of hydrophobia resulting from a dog bite received by him while engaged in his duties as attendant in a filling station. *Held:* Claimant is not entitled to compensation for the employee's death, since there was no causal connection between the employment and the bite of a dog running at large, and the accident was not from a risk incidental to the employment. *Plemmons v. White's Service, Inc.*, 148.

An accident arises out of the employment if there is a causal connection between the employment and the accident, and the risk is incidental to the employment and not common to all others in the neighborhood. *Lockey v. Cohen, Goldman & Co.*, 356.

Evidence that employee slipped on fruit peeling on sidewalk as he was going to plant in response to call of nightwatchman *held* to support finding that accident did not arise out of employment. *Lockey v. Cohen, Goldman & Co.*, 356.

Evidence that a stairway was provided for the use of employees, that employees were forbidden to use an empty crate conveyor in going to and from the basement to the first floor, and that an employee, notwithstanding repeated warnings, used the crate conveyor in spite of its obvious danger, resulting in his fatal injury, *is held* to support the finding of the Industrial Commission that the accident causing death did not arise out of the employment. *Teague v. Atlantic Co.*, 546.

§ 40f. Whether Accident Arises "In the Course of the Employment."

The words "in the course of" refer to the time, place, and circumstances under which an accident occurs. *Plemmons v. White's Service, Inc.*, 148; *Lockey v. Cohen, Goldman & Co.*, 356.

Evidence *held* sufficient to sustain finding that injury arose in the course of claimant's employment. *Pickard v. Plaid Mills*, 28.

§ 40h. Intoxication of Injured Employee.

Evidence *held* sufficient to support finding of Industrial Commission that the accident causing injury was not the result of the employee's intoxication, although defendants introduced evidence in conflict therewith. N. C. Code, 8081 (t). *Brooks v. Rim & Wheel Co.*, 518.

MASTER AND SERVANT—*Continued.*

§ 41b. Costs and Attorneys' Fees.

The allowance of attorneys' fee to claimant's attorneys in this proceeding *held* authorized by N. C. Code, 8081 (rrr), and defendants' assignment of error thereto is untenable. *Brooks v. Rim & Wheel Co.*, 518.

§ 47. Notice and Filing of Claim.

Employee must give notice of injury or show to satisfaction of Commission reasonable excuse for failure to do so. *Singleton v. Laundry Co.*, 32.

§ 49. Exclusion of Remedy at Common Law by Remedy Under Compensation Act.

Employee bound by Compensation Act may not maintain action at common law for disease not compensable under the act. *Murphy v. Enka Corp.*, 218.

This action was instituted by the administrator of an E. E. A. worker who was killed when a ditch along a street in which he was working caved in, the complaint alleging negligence on the part of the city. In a hearing before the Industrial Commission claim for compensation was denied on the ground that intestate was not an employee of the city. *Held:* Defendant city's demurrer on the ground that the Industrial Commission had exclusive jurisdiction was properly sustained. N. C. Code, 8081 (o). *Barnhardt v. Concord*, 364.

Where the Industrial Commission refuses compensation on the ground that claimant was an independent contractor and not an employee, the Superior Court has jurisdiction of an action by the independent contractor to recover for the injury upon allegations of negligence. *Odum v. Oil Co.*, 478.

§ 53a. Form and Rendition of Award.

The Industrial Commission is required by C. S., 8081 (nnn), to file with the award, which is its judgment, a statement of the findings of fact and conclusions of law upon which the award is based, and although specific and definite findings of fact may not be necessary in all cases, the Commission should make such specific and definite findings upon the evidence reported as will enable the courts on appeal to determine whether general findings or conclusions should stand. *Singleton v. Laundry Co.*, 32.

§ 55d. Matters Reviewable.

Whether an accident arises out of and in the course of the employment is a mixed question of law and fact, and the finding of the Industrial Commission upon this point is conclusive if supported by competent evidence, even though the evidence may also warrant an inference to the contrary. *Lockey v. Cohen, Goldman & Co.*, 356.

The finding of the Industrial Commission upon conflicting evidence supporting both the contention of claimant and of defendants, that the accident was not the result of his intoxication, is conclusive on the courts on appeal. *Brooks v. Rim & Wheel Co.*, 518.

Findings of fact of the Industrial Commission are conclusive on appeal when they are supported by competent evidence. *Teague v. Atlantic Co.*, 546.

§ 55g. Determination and Disposition of Appeal.

Proceedings remanded to Superior Court for order recommitting cause to Industrial Commission for definite findings of fact supporting its general findings. *Singleton v. Laundry Co.*, 32.

MORTGAGES AND DEEDS OF TRUST.

I. Nature of Conveyance of Land as Security for Debt
2. Equitable Mortgages
III. Construction and Operation
12. Registration, Lien, and Priorities
15. After Acquired Property
VIII. Foreclosure
30d. Restraining Foreclosure on Ground of Usury
31. Foreclosure by Action
b. Parties
e. Sale Under Decree

MORTGAGES AND DEEDS OF TRUST—*Continued.*

f. Bidders at Sale under Decree
g. Confirmation
32. Foreclosure under Power Contained in the Instrument
a. Execution of Power of Sale in General
35. Parties Who May Purchase
a. Mortgagee or Cestui Que Trust
39. Attack of Foreclosure
c. Waiver of Right to Attack and Estoppel
d. Election between Action for Damages and Suit to Set Aside
40. Agreement to Bid in at Sale for Mortgagor or Trustor
IX. *Operation and Effect of Foreclosure*
45. Right to Chattels and Fixtures

§ 2. Equitable Mortgages.

Plaintiffs mortgagors instituted an action against the mortgagee and the purchasers at the foreclosure sale, attacking the validity of the mortgage. A consent judgment was entered in the action declaring that the mortgage was valid, and that the purchaser at the sale acquired a fee simple title "fully freed, released and discharged from any or all right, title or interest" of plaintiffs, but providing that should plaintiffs pay a stipulated sum to the purchasers within a specified time, the purchasers should execute deed to plaintiffs. *Held:* The terms of the consent judgment did not establish the relation of mortgagors and mortgagees between plaintiffs and the purchasers at the foreclosure sale, but gave plaintiffs merely an option to purchase the property within a given time, and upon their failure to tender the amount agreed within the time stipulated, plaintiffs lose any rights thereunder. *Carpenter v. Carpenter*, 36.

There is no lien for purchase money in North Carolina. *Jarrett v. Holland*, 428.

§ 12. Registration, Lien and Priorities.

Mortgagee has prior lien to that of judgment against mortgagor for purchase price in absence of notice of *lis pendens*. *Jarrett v. Holland*, 428.

§ 15. After Acquired Property.

Fixtures annexed by the mortgagor after execution of the mortgage become a part of the security and are subject to the mortgage, but unfixed chattels do not become a part of the realty, and ordinarily the mortgagor is entitled to remove them upon foreclosure. *Brown v. Land Bank*, 594.

§ 30d. Restraining Foreclosure on Grounds of Usury.

A mortgagor may not enjoin foreclosure on the ground of usury unless he tenders the amount of the debt with legal interest, the mortgagor not being entitled to invoke the forfeiture or penalty for usury in such action, since it is required that "he who seeks equity must do equity." *Buchanan v. Mortgage Co.*, 247.

A temporary order restraining foreclosure should not be continued to the hearing upon a tender only of the amount of the debt after deducting the penalty for usury, since in such case the penalty for usury may not be invoked. *Ibid.*

A tender of the amount of the debt after deducting the penalty for alleged usury plus a "tender" in the complaint of any amount which may be found due upon a proper accounting, is insufficient to support an order continuing the temporary restraining order, the "tender" in the complaint amounting to nothing more than an assertion of willingness and ability to pay, which is insufficient to constitute a legal tender. *Ibid.*

§ 31b. Parties in Foreclosure Suits.

In an action to foreclose a mortgage, the joinder of the executors of the holders of the record title, who were dead at the time of the institution of the action, without the joinder of their devisees or heirs at law, fails to state a cause of action either against the executors or against those through whom record title was derived, and defendant appellants' demurrer *ore tenus* in the Supreme Court is allowed. *Hinkle v. Walker*, 657.

MORTGAGES AND DEEDS OF TRUST—*Continued.*

§ 31e. Sale Under Decree.

An action to foreclose is essentially equitable in its nature, and a sale under decree is in effect sale by the court, and the commissioner, who acts as agent of the court, must report all his acts to the presiding judge, who alone has power to enter any order or decree and who is required to exercise a sound discretion for the protection of the rights of all the parties, and who directs and controls the sale made under its order by the commissioner appointed by it. *Bank v. Stone*, 598.

§ 31f. Bidders at Sale Under Decree.

Bidder at sale under decree is but proposed purchaser and has no rights in the land until confirmation. *Bank v. Stone*, 598.

§ 31g. Confirmation.

The power to confirm a sale under a decree for foreclosure may not be delegated to the commissioner or to the clerk, but confirmation is the act of consent and approval of the court, which it may give or withhold in its discretion within the limitations prescribed by law, but the court may confirm a sale *nunc pro tunc*, in which case the order relates back to the date of sale. *Bank v. Stone*, 598.

§ 32a. Execution of Power of Sale in General.

Where the instrument does not designate the place at which foreclosure sale should be held, the mortgagee is vested with sound discretion to select the place of sale, and where it selects the courthouse door in the county in which the land lies, there is no abuse of discretion. *Council v. Land Bank*, 329.

§ 35a. Purchase of Property by Mortgagee or Cestui Que Trust.

Where an officer of the corporate mortgagee purchases the property at foreclosure sale, the presumption is that he acts for the corporation and that it is the purchaser, but such sale is not void, but voidable, and ordinarily can be avoided only by the mortgagor or his heirs and assigns. *Council v. Land Bank*, 329.

When the mortgagee purchases at the foreclosure sale, either directly or by agent, the sale is not void, but voidable, and ordinarily may be avoided only by the mortgagor or his heirs and assigns. *Smith v. Land Bank*, 343.

A *cestui que trust* has the right to buy in the property at the foreclosure sale in the absence of fraud or collusion. *Hare v. Weil*, 484.

§ 39c. Waiver of Right to Attack and Estoppel.

Mortgagors *held* to have waived their right to attack foreclosure by conduct ratifying the sale. *Council v. Land Bank*, 329.

Lease and conduct of mortgagors after foreclosure *held* to estop them from asserting that purchaser at the sale agreed to bid in the property for their benefit. *Hare v. Weil*, 484.

§ 39d. Election Between Action for Damages and Suit to Set Aside.

Mortgagor must elect between suit to set aside sale and action for damages for wrongful foreclosure. *Smith v. Land Bank*, 343.

§ 40. Agreements to Bid in at Sale for Benefit of Mortgagor or Trustor.

Where a person agrees to purchase at a foreclosure or judicial sale under a parol agreement to hold title for the benefit of the debtor and to reconvey the legal title upon repayment of the amount advanced, a valid, enforceable parol trust is created in favor of the debtor, provided the agreement is made at or before the legal estate passes, and such agreement need not be supported by consideration but may be enforced by a mere volunteer. *Hare v. Weil*, 484.

Evidence *held* to establish estoppel against mortgagor to assert that purchaser at sale bought for his benefit. *Ibid.*

MORTGAGES AND DEEDS OF TRUST—*Continued.*

§ 45. Right to Chattels and Fixtures.

Evidence that chattels had not been affixed to realty *held* for jury in mortgagor's action to recover same after foreclosure. *Brown v. Land Bank*, 594.

MUNICIPAL CORPORATIONS.

(Limitation on taxing power see Taxation, Title I.)

I. Creation, Alteration, and Existence
1. Definition of "Municipal Corporation"
2. Creation and Validity
II. Powers and Functions
5. Powers in General: Legislative Control and Supervision
8. Private Powers
IV. Torts of Municipal Corporations
14. Defects or Obstructions in Streets and Sidewalks
VI. Conveyance and Purchase of Property
24. Power to Convey
VIII. Public Improvements
30. Power to Make Improvements and Levy Assessments
33. Objections and Waiver or Irregularities
34. Nature of Lien, Priorities, and Enforcement
X. Fiscal Management
43. Budgets, Appropriations, and Levies
XI. Claims and Actions Against Municipalities
48. Pleadings and Verification

§ 1. Definition.

The term "municipal corporation" should not be construed narrowly to include only cities, towns, counties and school districts, as the Constitution contemplates a broader construction of the term, Art. VII, Art. VIII, sec. 1, and in its broader sense the term includes all public corporations exercising governmental functions within the constitutional limitations. *Wells v. Housing Authority*, 744.

§ 2. Creation and Validity.

What is a "public purpose" for which the General Assembly may create a municipal corporation is a question for the courts to determine upon the basis of the end sought to be reached and the means used, rather than statutory declarations. *Wells v. Housing Authority*, 744.

The necessity of bringing the government closer to the people in congested areas progressively demands, in order to meet new conditions, further refinement and subdivision in the instrumentalities of government. *Ibid.*

The failure to own the instrumentalities by which its purpose is to be served does not detract from the public or municipal character of the agency employed. *Ibid.*

"Slum clearance" to rehabilitate crowded and congested areas in cities and towns where conditions conducive to disease and public disorder exist, is a public purpose, for which the Legislature may create municipal corporations, and housing authorities established under ch. 456, Public Laws of 1935, or for such governmental purpose. *Ibid.*

Housing authority created under ch. 456, Public Laws of 1935, is a municipal corporation. *Ibid.*

§ 5. Powers in General: Legislative Control and Supervision.

A municipal corporation is an agency of the State for the administration of local government, and has only the express and implied powers conferred by the Legislature or which are essential to the declared objects and purposes of the corporation. *Williamson v. High Point*, 96.

The power of municipalities to levy taxes, within constitutional bounds, may be expanded or contracted by the Legislature at will, provided that in limiting or reducing the power to levy taxes the obligations of existing contracts of the municipalities are not impaired. *Bank v. Bryson City*, 165.

§ 8. Private Powers.

Public utilities are operated by a municipality in its *quasi*-private and not in its political or governmental capacity, but a municipality is without power to extend its electric lines beyond the corporate limits for the purpose of sell-

MUNICIPAL CORPORATIONS—*Continued.*

ing electricity to nonresidents in the absence of legislative authority. *Williamson v. High Point*, 96.

Ordinarily, power to construct electric lines outside city limits is limited by proprietary power to operate utility for its citizens. *Ibid.*

Revenue Bond Act of 1935 authorizes municipalities to construct and operate utilities for the use and benefit of the citizens thereof. *Ibid.*

City *held* without authority to construct or acquire proposed municipal electric power plant. *Ibid.*

§ 14. Defects or Obstructions in Streets and Sidewalks.

In this action at common law to recover for the death of plaintiff's intestate who was killed in the cave-in of a ditch in which he was working, the complaint alleged that intestate was working under the Emergency Relief Administration, which was an independent contractor, and that the cave-in of the ditch was caused by negligent failure to keep the sides of the ditch shored up, and by defendant city's negligence in permitting traffic along the street beside the ditch and in failing to keep its streets in reasonably safe condition. *Held:* Defendant city's demurrer was properly sustained, since the complaint alleges that intestate was an employee of E. R. A., and that this agency was an independent contractor. *Barnhardt v. Concord*, 364.

A municipality is not an insurer of the safety of its streets, but is under duty to exercise due care to see that they are reasonably safe for travel, and is liable for injuries from dangers which can or ought to be anticipated in the exercise of such duty. *Ferguson v. Asheville*, 569; *Houston v. Monroe*, 788.

The absence of lights or defective lights at a particular place along a street is not in itself negligence on the part of a municipality, but may bear upon the principal question of whether the street at such place is reasonably safe for travel, and the presence of shade trees which diffuse the light is not negligence. *Ferguson v. Asheville*, 569.

A municipality is not relieved of liability for an obstruction in a street solely by the fact that it was placed there by a third person, but after notice of the obstruction it is under duty to exercise ordinary care to make the street reasonably safe. *Ibid.*

Evidence *held* sufficient for jury on question of municipality's negligence in permitting obstruction to remain in street. *Ibid.*

In the absence of knowledge to the contrary, a traveler has the right to act on the assumption that a street is in reasonably safe condition for travel, but he must nevertheless exercise due care for his own safety, and is guilty of contributory negligence if he hits an obstruction which he should have seen and avoided in the exercise of due care. *Ibid.*

Evidence of whether driver should have seen obstruction *held* conflicting and nonsuit should have been denied. *Ibid.*

Evidence *held* insufficient to establish liability on part of city for pedestrian's fall on walkway across street. *Houston v. Monroe*, 788.

§ 24. Power to Convey Land.

The power of a city or town to convey land is governed by statute, and by express terms of sec. 3, ch. 408, Public Laws of 1935, a municipal corporation is given authority to convey land to a housing authority within its territory with or without monetary consideration in consideration of the benefit to be received by the city or town from the activities of the municipal housing authority. *Wells v. Housing Authority*, 744.

§ 30. Power to Make Improvements and Levy Assessments.

A charter provision that property assessed for permanent improvements should not be again assessed therefor within ten years is a limitation of power which may be waived by property owners. *Ins. Co. v. Charlotte*, 497.

MUNICIPAL CORPORATIONS—*Continued.*

§ 33. Objections and Waiver of Irregularities.

Owner signing petition and paying installments without objection waives right to correction of assessments. *Wake Forest v. Gulley*, 494.

Property owner *held* to have ratified lien and was estopped to contest its validity. *Ins. Co. v. Charlotte*, 497.

§ 34. Nature of Lien, Priorities and Enforcement.

Where judgment is rendered in favor of a municipality in its suit to enforce liens for public improvements, the court in its discretion, in the exercise of its equitable jurisdiction, should give the property owner a reasonable time to pay the assessments and prevent a sale of his property. *Wake Forest v. Gulley*, 494.

Where the owner of property is estopped to contest the existence and validity of a lien against the property for street improvements, a successor in title by foreclosure of a mortgage executed after the assessment was made and put on record, takes title subject to the lien. *Ins. Co. v. Charlotte*, 497.

§ 43. Budgets, Appropriations and Levies.

Municipal Fiscal Control Act prohibits city making appropriation and levying tax for common contingent fund. *Sing v. Charlotte*, 60.

Municipality may not appropriate money from contingent fund for purpose of operating, maintaining, and improving airport. *Ibid.*

§ 48. Pleadings and Verification.

While ordinarily a pleading may be verified or not, and in an action instituted in the court of a justice of the peace the pleadings may be written or verbal, when an action against a city on a money demand is instituted in a justice's court the pleading must be written and verified, since C. S., 1330, requires that in an action against a city on a money demand the complaint must be verified, and defendant city's motion to nonsuit should be allowed when the action is instituted by summons without written pleadings. *Kalte v. Lexington*, 779.

NEGLIGENCE.

I. Acts and Omissions Constituting Negligence
1. In General
4. Condition and Use of Lands and Building
a. In General
b. Licensees
d. Invitees
II. Proximate Cause
7. Intervening Negligence
9. Anticipation of Injury
III. Contributory Negligence
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IV. Actions
16. Pleadings
18. Competency and Relevancy of Evidence
19. Sufficiency of Evidence and Nonsuit
a. On Issue of Negligence
b. On Issue of Contributory Negligence
c. On Ground of Intervening Negligence

§ 1. Acts and Omissions Constituting Negligence in General.

Use of firearms in affray at public place where multitude of people were assembled, to injury of bystander, *held* negligence. *Sitton v. Twiggs*, 261.

The standard of care required remains that of the reasonably prudent man, the degree of care required under all circumstances being that which he would exercise under the exigencies of the occasion. *Meacham v. R. R.*, 609.

§ 4a. Condition and Use of Lands and Buildings in General.

The owner of land has the right to construct an underground drain-pipe thereon for the discharge of waste water, and where the saturated condition of the soil resulting therefrom is not dangerous except upon subsequent excavation, no liability attaches to the owner merely by reason of the existence of the condition. *Dunn v. Bomberger*, 172.

In order to establish liability on the part of the owner of land for injuries resulting from alleged defects or dangerous conditions, plaintiff must establish

NEGLIGENCE—*Continued.*

that the owner foresaw, or should have foreseen in the exercise of due care, that injury might result from the alleged defect. *Ibid.*

Held: Under evidence in this case, owner could not be charged with duty of foreseeing that injury might result from condition of land. *Ibid.*

Plaintiff alleged and offered evidence tending to show that after the destruction of defendant's building by fire, defendant in reconstructing same, was guilty of negligence in digging the foundations two feet below the base of the party wall at a time when the soil was soggy from rain and long exposure, causing the collapse of the wall. *Held:* The allegations and evidence are for the jury on the issue of negligence. *Smith v. Phillips*, 339.

§ 4b. Licensees.

An employee of a contractor for the State Highway Commission who enters upon land in the performance of work upon a highway project is a licensee, since he occupies the same relation to the owner of the land as his employer, who is given the right to enter upon the land for this purpose by virtue of the State Highway statute. *Dunn v. Bomberger*, 172.

The owner of land owes the duty to a licensee to refrain from willful or wanton negligence and from doing any act which increases the hazard to the licensee while he is on the premises, but he is not required to warn the licensee of defects, obstacles or pitfalls, and is not liable for injuries resulting therefrom in the absence of active, affirmative negligence resulting in increasing the hazard therefrom while the licensee is on the premises. *Ibid.*

Facts alleged *held* insufficient to show liability on part of owner for injury to licensee. *Ibid.*

§ 4d. Invitees.

A patron purchasing a ticket and entering a theatre is an invitee. *Anderson v. Amusement Co.*, 130.

While the owner of the premises is not an insurer of the safety of invitees, he owes them the duty to use due care to avoid injury to them while on the premises. *Ibid.*

The proprietor of a store, while not an insurer of the safety of his customers, owes them the duty to exercise ordinary care to keep the premises in reasonably safe condition and to give warning of hidden dangers ascertainable by him by reasonable inspection and supervision. *Pridgen v. Kress & Co.*, 541.

Evidence that a customer in a store was shoved or pushed off balance by the movement of a crowd around a demonstrator of merchandise in the store, resulting in her falling down the steps leading to the basement of the store, without evidence or contention of any unsafe condition in the stairway or lighting, *is held* insufficient to resist defendant's motion to nonsuit, the evidence disclosing that the accident was due not to any negligence on the part of the proprietor but to the movement of the crowd which was not reasonably forseeable by defendant. *Ibid.*

Evidence *held* not to show contributory negligence as matter of law on part of invitee injured in fall. *Mulford v. Hotel Co.*, 603.

§ 7. Intervening Negligence.

Intervening negligence of driver *held* to preclude recovery for death of guest on contention that defendants were negligent in parking truck on highway. *Powers v. Sternberg*, 41.

Plaintiff was riding as a guest in an automobile and was injured in a collision between the car and a train at a grade crossing. The negligence of the driver of the car was admitted. The court instructed the jury that the negligence of the driver would constitute the sole proximate cause of the injury, exculpating the railroad company, if it were palpable and gross. *Held:* The

NEGLIGENCE—*Continued.*

instruction constitutes error entitling the railroad company to a new trial, since the negligence of the driver need not be palpable and gross in order to insulate the negligence of the railroad company, but would be sufficient for this purpose if it were the sole proximate cause of the injury. *Quinn v. R. R.*, 48.

§ 9. Anticipation of Injury.

In order for plaintiff to recover for alleged negligence he must show that defendant foresaw, or should have foreseen in the exercise of due care, that injury might result from the alleged negligent act. *Dunn v. Bomberger*, 172.

§ 11. Contributory Negligence of Persons Injured in General.

Plaintiff was injured by a stray bullet in an affray between defendants at a public place. Appealing defendant moved for judgment as of nonsuit on the theory that plaintiff's own evidence showed that he had an opportunity to leave the scene and failed to avail himself of the opportunity. *Held:* The evidence does not disclose contributory negligence as a matter of law. *Sitton v. Twiggs*, 261.

There is no essential difference between negligence and contributory negligence; contributory negligence being merely the negligence of the plaintiff, who becomes defendant, *pro hac vice*, upon the issue of contributory negligence. *Sebastian v. Motor Lines*, 770.

§ 16. Pleadings.

Complaint *held* to allege actionable negligence, the relationship between the parties being determinable upon the trial. *Stroud v. Transportation Co.*, 642.

§ 18. Competency and Relevancy of Evidence.

In this action by a theatre patron to recover for injuries resulting from a fall in the foyer of the building, the exclusion of testimony of a witness that a large number of patrons were in the theatre on the same day and that none had fallen, tendered as negative evidence that excessive oil or wax had not been left at a spot on the floor where plaintiff fell, *is held* not prejudicial error in view of the admission of other evidence by defendant of the number of persons in the theatre that day, some of whom passed over the place where plaintiff fell, and the other evidence properly admitted on the trial. *Anderson v. Amusement Co.*, 130.

§ 19a. Sufficiency of Evidence and Nonsuit on Issue of Negligence.

Evidence *held* sufficient for jury in this action to recover for injuries resulting from fall in theatre. *Anderson v. Amusement Co.*, 130.

Evidence tending to show the use of firearms in a public place where a multitude of people were assembled, to the injury of plaintiff, a bystander, *held* sufficient evidence of actionable negligence to take the case to the jury. *Sitton v. Twiggs*, 261.

While a motion to nonsuit on the issue of negligence or contributory negligence often presents difficult questions, when it appears from all the evidence that plaintiff ought not to recover, it is the duty of the court to take the case from the jury. *Houston v. Monroe*, 788.

§ 19b. Nonsuit on Ground of Contributory Negligence.

Plaintiff was injured by a stray bullet in an affray between defendants at a public place. Appealing defendant moved for judgment as of nonsuit on the theory that plaintiff's own evidence showed that he had an opportunity to leave the scene and failed to avail himself of the opportunity. *Held:* The evidence does not disclose contributory negligence as a matter of law. *Sitton v. Twiggs*, 261.

NEGLIGENCE—*Continued.*

Since defendant has the burden of establishing contributory negligence, his motion to nonsuit upon the issue should be denied when the relevant facts are in dispute or opposing inferences are permissible from plaintiff's proof. *Ferguson v. Asheville*, 569.

Since the granting of a motion to nonsuit on the ground of contributory negligence involves a determination by the court not only that plaintiff was guilty of negligence but also that such negligence was a proximate cause of the injury, such motion should be denied except in exceptional cases strictly within the rule that the motion may be granted only when one inference may be reasonably drawn from the evidence. *Mulford v. Hotel Co.*, 603.

While a motion to nonsuit on the issue of negligence or contributory negligence often presents difficult questions, when it appears from all the evidence that plaintiff ought not to recover, it is the duty of the court to take the case from the jury. *Houston v. Monroe*, 788.

§ 19d. Nonsuit on Ground of Intervening Negligence of Codefendant or of Third Person.

Nonsuit on ground of intervening negligence of third person *held* properly allowed. *Powers v. Sternberg*, 41.

Nonsuit on ground of intervening negligence *held* properly overruled. *Quinn v. R. R.*, 48.

NUISANCE.

§ 9. Proceedings to Abate Public Nuisance.

By provision of C. S., 3182, evidence of the general reputation of the place in question is competent in an action to abate a public nuisance. *Carpenter v. Boyles*, 432.

In an action to abate a public nuisance plaintiff relator is not required to give an undertaking, C. S., 3181, the provisions of C. S., 854, not being applicable. *Ibid.*

C. S., 3180, *et seq.*, providing for the abatement of public nuisances by temporary order without bond, and the sale of the personalty and the closing of the property for one year upon the finding of the jury, is constitutional, and does not impinge Art. I, sec. 17, of the State Constitution, or Art. XIV, sec. 1, of the Federal Constitution. *Ibid.*

Where, in an action to abate a public nuisance, testimony of several witnesses as to the general reputation of the place in question is properly admitted, C. S., 3182, testimony of the solicitor of the recorder's court that numerous complaints about the place had been made to him in his official capacity is properly admitted for the purpose of corroborating the other witnesses, and objection thereto on the ground that it was hearsay is untenable. *Ibid.*

The definition of a public nuisance as given in the charge *held* not to contain prejudicial error when construed contextually as a whole. *Ibid.*

Whether the court should allow defendant in an action under C. S., 3180, *et seq.*, to give bond to cancel the temporary order of abatement so far as same relates to the property, is in the sound discretion of the trial court, C. S., 3186. *Ibid.*

Evidence that place in question constituted public nuisance *held* plenary to be submitted to the jury. *Ibid.*

PARTIES.

§ 1. Necessary Parties Plaintiff.

All partners must join in suit on cause of action accruing to partnership. *Threadgill v. Faust*, 226.

PARTIES—*Continued.*

§ 5. Joinder of Additional Parties Defendant.

The trial court has the power to order the joinder of additional parties defendant when the order does not change the cause of action. *Morgan v. Turnage Co.*, 425.

§ 10. Time of Making Objection and Waiver of Defect of Parties.

Defect of parties *held* not waived by failure to object, since defect did not appear until taking of evidence. *Threadgill v. Faust*, 226.

PARTNERSHIP.

§ 9. Actions on Claims of Partnership.

Partner may not sue for his sole benefit on cause of action accruing to the partnership. *Threadgill v. Faust*, 226.

PARTY WALLS.

§ 2. Mutual Rights and Liabilities.

Case *held* properly submitted to the jury on plaintiffs' contention that negligence of defendant caused collapse of party wall. *Smith v. Phillips*, 339.

PAYMENT.

§ 8. Application of Payment in Absence of Direction of Application by Parties.

When neither debtor nor creditor directs application of payment, law will make application to unsecured debt. *Power Co. v. Clay County*, 698.

PHYSICIANS AND SURGEONS.

§ 15e. Sufficiency of Evidence in Malpractice Cases.

Nonsuit *held* properly granted in this action against physician for alleged malpractice in failing to properly set the bones in plaintiff's broken leg. *Mitchem v. James*, 673.

§ 15f. Damages in Malpractice Cases.

Plaintiff is entitled to recover only for damages directly caused by negligence alleged. *Blaine v. Lyle*, 529.

PLEADINGS.

§ 1. Filing and Service of Complaint.

Trial court has discretionary power to permit plaintiff to file complaint after expiration of statutory time. *O'Briant v. Bennett*, 400.

§ 2. Joinder of Actions.

Action to set aside foreclosure sale is improperly joined with action for damages for wrongful foreclosure. *Smith v. Land Bank*, 343.

§ 6. Defenses in General.

Equitable defenses must be pleaded. *Toler v. French*, 360; *Hare v. Weil*, 484.

§ 16. Demurrer for Misjoinder of Parties and Causes.

When there is a misjoinder of both parties and causes of action, the action is properly dismissed upon demurrer interposed upon this ground. *Smith v. Land Bank*, 343.

An action against the mortgagee and his transferees to set aside a foreclosure sale on the ground that the sale was voidable for that the mortgagee bid in the property, is improperly joined with an action against the mortgagee,

PLEADINGS—*Continued.*

in the event the transferees should be found to be innocent purchasers for value, for damages for wrongful foreclosure, since all the parties are necessary only in th first cause of action and in the second action only the mortgagee is affected. C. S., 507. *Ibid.*

§ 19. Time of Filing Demurrer and Waiver of Right to Demur.

Objection to an answer on the ground of the insufficiency of a further defense therein alleged may be taken by former demurrer or by demurrer *ore tenus*. *Toler v. French*, 360.

The right to demur on grounds other than the failure of the complaint to state a cause of action and want of jurisdiction is waived by failure to demur in apt time, and as to grounds which may be waived it is not error for the trial court to refuse to permit defendant to withdraw his answer and file demurrer. C. S., 518. *Carpenter v. Boyles*, 432.

Defendant may demur *ore tenus* for failure of the complaint to state a cause of action and for want of jurisdiction at any time, even in the Supreme Court on appeal. C. S., 518. *Ibid.*

§ 20. Office and Effect of Demurrer.

The office of a demurrer is to test the sufficiency of a pleadings, admitting, for the purpose, the truth of the allegations of fact and relevant inferences of fact. *Toler v. French*, 360; *Pearce v. Privette*, 501.

Upon demurrer, a pleading will be liberally construed, and the demurrer should be overruled unless the pleading is fatally defective. C. S., 535. *Toler v. French*, 360.

A pleading should be liberally construed upon a demurrer, and every reasonable intendment and presumption made in its favor, and the demurrer should be overruled unless the pleading is wholly insufficient. C. S., 535. *Pearce v. Privette*, 501.

A demurrer cannot be sustained if plaintiff is entitled to recover on any aspect of the case presented in the complaint. *Stroud v. Transportation Co.*, 642.

Upon demurrer, the allegations of the complaint are to be taken as true, and are to be construed liberally in favor of the pleader. *Jones v. Chevrolet Co.*, 775.

§ 22. Amendment by Trial Court.

Motion to amend pleadings by substituting name of corporation for name of individual defendant *held* properly denied. *Hogsed v. Pearlman*, 240.

Amendment alleging affirmative equity beyond recorder's jurisdiction may not be allowed in Superior Court on appeal. *Allen v. Ins. Co.*, 586.

§ 28. Motions for Judgment on the Pleadings. (In action on note see Bills and Notes § 24b.)

Pleadings *held* to raise issue of fact for jury and granting of judgment on the pleadings was error. *Felton v. Felton*, 194.

PRINCIPAL AND AGENT.

§ 7. Evidence and Proof of Agency.

Defendants' evidence that the person selling standing timber on plaintiff's land was plaintiff's general agent in the supervision of the farm with power to sell crossties, timber and crops therefrom *held* sufficient to be submitted to the jury. *McArthur v. Byrd*, 321.

Where tenants in common place one of their number in charge of the farm, and sign a mortgage thereon, and the tenant in charge impliedly represents in his dealings with the mortgagee after foreclosure that he was acting for

PRINCIPAL AND AGENT—*Continued.*

himself and cotenants, his cotenants are bound by an estoppel arising from his negotiations. *Council v. Land Bank*, 329.

§ 10. Wrongful Acts of Agent.

Evidence that defendant copartners authorized and ratified the act of their clerk in swearing out a warrant for plaintiff for the purpose of coercing him to pay a civil debt owed by plaintiff to the firm, *held* sufficient to be submitted to the jury. *Smith v. Somers*, 209.

PRINCIPAL AND SURETY.

§ 18. Competency of Judgments Against Principal in Establishing Liability of Surety.

A surety who has notice of proceedings for accounting as against the principal and an opportunity to appear and defend, but elects not to do so, but has the proceeding dismissed as to it, it is bound by the account stated and the judgment rendered against the principal. *Humphrey v. Surety Co.*, 651.

PROCESS.

§ 3. Defective Process and Amendment.

Motion to amend by substituting name of corporation for name of individual defendant *held* properly denied. *Hogsed v. Pearlman*, 240.

Order for publication without issuance of attachment *held* cured by later order for publication and warrant of attachment. *Suskin v. Trust Co.*, 388.

§ 5. Service by Publication.

Proceeding for modification of trust agreement is *in rem*, and nonresident beneficiary was properly served by publication. *Cutter v. Trust Co.*, 686.

§ 6. Service by Publication and Attachment.

Order for service of process by publication must be issued with warrant of attachment. *Suskin v. Trust Co.*, 388.

§ 15. Actions for Abuse of Process.

Evidence that defendant copartners authorized and ratified the act of their clerk in swearing out a warrant for plaintiff for the purpose of coercing him to pay a civil debt owed by plaintiff to the firm, *held* sufficient to be submitted to the jury *Smith v. Somers*, 209.

PUBLIC OFFICERS.

§ 4b. Provision Prohibiting Holding of More Than One Public Office.

A statute which creates no new office and appoints no additional officer, but merely attaches new duties to offices already existing, to be performed by the incumbents therein, does not violate Art. XIV, sec. 7. *Brigman v. Baley*, 119.

Act is question *held* to require one person to hold two public offices, and statute is unconstitutional as violating Art. XIV, sec. 7. *Ibid.*

§ 4c. Effect of Accepting Second Public Office.

A statute providing that the incumbent of one public office should also fill another public office is unconstitutional as violating Art. XIV, sec. 7, and cannot be upheld as merely affording the choice between the offices so that the acceptance of the second office would *ipso facto* vacate the first, since incumbency in the first is essential to incumbency in the second. *Brigman v. Baley*, 119.

§ 8. Protection from Civil Liability on Grounds of Official Capacity.

(Protection from criminal responsibility see Criminal Law § 6.)

As a general rule, a public officer is not protected from liability on account of his office when the act complained of is outside the scope of his duties, and

PUBLIC OFFICERS—*Continued.*

a public officer is charged with observing the legal limitations upon his authority, especially where rights of third persons are involved. *Gurganious v. Simpson*, 613.

§ 11. Actions to Recover Emoluments.

Where it is determined that the special statute under which relator was appointed to an office is unconstitutional and void, his suit to recover the emoluments of office from the person appointed under a valid general statute which he contends was repealed by the special statute, necessarily fails. *Brigman v. Baley*, 119.

In an action to recover emoluments of public office to which plaintiff contends he was legally elected, a directed verdict in plaintiff's favor is error when defendants plead the statute of limitations and controvert the evidence relative to the amount of time and mileage claimed by plaintiff. *Reed v. Madison County*, 145.

In an action to recover the emoluments of a public office, no recovery may be had upon *quantum meruit*, since a public officer is entitled only to compensation specified by statute, ordinance, or contract. *Ibid.*

RAILROADS.

§ 9. Accidents at Crossings.

Defendant railroad company's motion to nonsuit on the ground that the evidence showed that the negligence of the driver of the car in which plaintiff was riding as a guest was the sole proximate cause of the accident, *held* properly overruled. *Quinn v. R. R.*, 48.

Intestate was thrown upon the "cow-catcher" of defendant's engine after it had struck intestate's car. Plaintiff sought recovery upon the contention that defendant was negligent in failing to stop the train before intestate had been hurled therefrom to his death, and that the facts established that defendant had the last clear chance to avoid the serious injury and death of intestate. Judgment as of nonsuit is affirmed on appeal upon authority of *Batchelor v. R. R.*, 198 N. C., 84. *Taylor v. R. R.*, 671.

A traveler has the right to expect a train to give timely warning of its approach to a grade crossing, but absence of such warning does not warrant him in assuming that no train approaches, nor relieve him of the duty to keep a proper lookout. *Quinn v. R. R.*, 48.

When visibility is low because of fog or mist, the increased hazard requires commensurate increase in care at railroad grade crossings, both on the part of travelers and the railroad company; heightened attention on the part of travelers, and increased need of timely warning which travelers have a right to expect on the part of the railroad company. *Meacham v. R. R.*, 609.

Fact that view of crossing is partially obstructed does not relieve driver of duty to keep proper lookout. *Quinn v. R. R.*, 48.

Evidence *held* to show contributory negligence as matter of law on part of pedestrian struck at grade crossing. *Coley v. R. R.*, 213.

Evidence *held* to disclose contributory negligence barring recovery for truck demolished in crossing accident. *Lamm v. R. R.*, 216.

Evidence that engine was not seen by driver because of mist and fog *held* to prevent nonsuit. *Meacham v. R. R.*, 609.

Held: Under evidence court should have charged, as requested, that driver was contributorily negligent unless vision was obstructed by fog. *Ibid.*

§ 10. Injuries to Persons on or Near Track.

It is not the duty of an engineer to stop his train whenever he sees any object on the tracks. *Morrow v. R. R.*, 127.

RAILROADS—*Continued.*

Nonsuit *held* proper in action against railroad company upon evidence showing that intestate was a trespasser upon a train and fell therefrom to his death, without evidence that his fall was caused by any wrongful and willful act of the railroad company or its employees. *Edwards v. R. R.*, 212.

RAPE.

§ 2. Presumption as to Capacity of Minors to Commit the Crime.

The presumption is that a boy fifteen years of age is capable of committing the crime of rape. *S. v. Smith*, 299.

Incapacity to commit the offense is a positve defense to be pleaded and proven by defendant. *S. v. Howie*, 782.

§ 7. Competency and Relevancy of Evidence.

In this prosecution for rape, testimony of prosecutrix that she told her mother about the attack *held* properly admitted for the purpose of corroborating the witness. *S. v. Howie*, 782.

§ 8. Sufficiency of Evidence and Nonsuit.

Evidence that the crime of rape was committed upon the person of the prosecutrix and that defendant was the perpetrator of the crime *held* sufficient to be submitted to the jury. *S. v. Smith*, 299; *S. v. Howie*, 782.

Testimony of prosecutrix *held* sufficient to take the case to the jury on the charge of rape, although there were possible inferences from the testimony tending to contradict her, the weight and credibility of her testimony being in the exclusive province of the jury. *S. v. Johnson*, 389.

§ 9. Instructions.

Indictment and evidence *held* to warrant submission of both carnal knowledge of prosecutrix, she being under 12 years of age, and with force against her will. *S. v. Johnson*, 389.

§ 10. Judgment and Sentence.

Exception to the judgment of the court upon the verdict of guilty of rape for failure of the judgment to show upon its face that defendant is a male person of the age of responsibility is untenable when no contention of incapacity is made on the trial, incapacity being a matter of defense. *S. v. Howie*, 782.

RECEIVERS.

§ 11. Sales and Conveyances.

Even conceding that a receiver may sell a capital asset of the insolvent without the approval of the court, the receiver may make the approval of the court a valid condition precedent to the effectiveness of a contract to sell a capital asset. *Federal Reserve Bank v. Mfg. Co.*, 489.

REFERENCE.

§ 9. Duties and Powers of Court in General.

Upon review of exceptions to the report of a referee the Superior Court has the power to set aside findings of fact and make additional findings, C. S., 578, but such power is limited by the requirement that such additional findings must be supported by some competent evidence. *Threadgill v. Faust*, 226.

§ 10. Setting Aside Report and Rereference.

When the order of reference merely waives the right to a jury trial and does not agree upon a referee, it is not error for the trial court upon certification of the opinion of the Supreme Court granting a new trial for newly discovered evidence, to refuse to sign defendant's order that the cause be referred to the same referee who first heard the matter. *Franklin v. School*, 263.

REFERENCE—*Continued.*

§ 13. Exceptions and Right to Jury Trial Thereon.

Where the referee makes certain findings, supported by evidence, to which no exceptions are taken and which are approved by the trial court, such findings are conclusive, and the verdict of the jury upon an issue inadvertently submitted in regard to the same matters must be disregarded. *Bryan v. Ins. Co.*, 391.

REFORMATION OF INSTRUMENTS.

§ 7. Pleadings.

In an action for reformation of a deed for fraud, the facts constituting the alleged fraud must be set up with such particularity as to show all the elements of actionable fraud, including fraudulent intent. *Griggs v. Griggs*, 624.

Held: In plaintiffs action for reformation for mistake induced by fraud, defendants' demurrer was properly sustained, the complaint failing to allege the essential element of fraudulent intent, or any trick or device to prevent plaintiffs from reading the instrument, or mistake on the part of either. *Ibid.*

SALES.

§ 18. Waiver of Breach of Warranty.

Testimony by the president of the purchasing company that the company had paid the purchase price after discovery of every defect complained of, precludes recovery for breach of warranty and for failure to furnish necessary parts when needed. *Hosiery Co. v. Hemphill Co.*, 164.

§ 20. Actions and Counterclaims for Purchase Price.

A directed verdict for the seller on its counterclaim for the purchase price of needles in the purchaser's action for breach of warranty, is error when the purchaser's testimony contains no admission of liability for the purchase price of the needles, the burden of proof on the issue being on the seller. *Hosiery Co. v. Hemphill Co.*, 164.

§ 24. Recovery of Purchase Price.

In an action to cancel or rescind a contract of sale for fraud, upon return or tender of the property received, the buyer is entitled to recover the price paid. *Kennedy v. Trust Co.*, 620.

SCHOOLS.

(Limitation on taxing power see Taxation, Title I.)

§ 14. Selection of School Sites.

Courts may not control selection of school site by school board in absence of abuse or discretion by the board. *Mosser v. Smathers*, 183.

§ 33. Non-tax Revenue.

By provision of Art. IX, sec. 5, the clear proceeds of fines collected by the clerk of a municipal court belong to the county school fund, and the clerk is not entitled to retain a percentage thereof as his fees, regardless of the provisions of public-local laws relating to his compensation. *Board of Education v. High Point*, 636.

SET-OFF AND COUNTERCLAIM.

§ 1. Equitable Set-Off.

The equitable right of set-off and counterclaim may not be invoked by a party unless his conduct has been equitable, fair and aboveboard, since "he who comes into equity must come with clean hand," and misconduct which will bar the assertion of the right need not necessarily be fraudulent. *Stelling v. Trust Co.*, 324.

SET-OFF AND COUNTERCLAIM—*Continued.*

Conduct of defendant *held* to preclude it from asserting equitable right of set-off. *Ibid.*

§ 2. Statutory Set-Off.

The statutory right of counterclaim and set-off does not authorize a bank to apply a deposit to a debt due the bank by the depositor. *Stelling v. Trust Co.*, 324.

The fact that a party is precluded from asserting the equitable remedy of set-off does not affect his statutory right of set-off. *Ibid.*

STATUTES.

§ 5. General Rules of Construction. (Construction in regard to constitutionality see Constitutional Law § 6b.)

Conflicting provisions of a statute, like conflicting provisions of two acts dealing with the same subject matter, will be reconciled if this can be done by a fair and reasonable intendment. *Thomasson v. Patterson*, 138.

Ordinarily, when a statute employs the word "may" its provisions will be construed as permissive and not mandatory. *Felton v. Felton*, 194.

While all questions of public policy are for the determination of the Legislature, a statute will not be construed to alter established principles of public policy founded on good morals, unless such intent is clearly and unequivocally expressed in the statute. *Brown v. Brown*, 347.

Where a statute is repealed by a later act which reënacts all or some of its provisions, it will be presumed that the provisions reënacted were written with regard to the decisions interpreting the same language in the former act, and such decisions control in interpreting the same language in the later act. *Ibid.*

§ 7. Effective Date of Statutes.

Ordinarily, a statute will be given prospective effect only, and will *not* be construed to have retroactive effect unless such intent is clearly expressed or arises by necessary implication from its terms. *Fenner v. Tucker*, 419.

§ 8. Construction of Criminal Statutes.

Criminal statutes are to be strictly construed. *S. v. Harris*, 758.

§ 10. Repeals by Implication and Construction.

Repeals by implication are not favored, and a later act will not repeal a former act unless the two are irreconcilable and repeal by implication is necessary, and a general repealing clause in the later act repealing prior acts in conflict therewith, strengthens the application of this rule. *S. v. Epps*, 709.

§ 12. Local and General Statutes.

Where private act does not provide constitutional procedure for certain remedy, later general statute providing such remedy is in force in the locality. *Waldroup v. Ferguson*, 198.

§ 13. Repeal and Re-enactment.

When a statute is repealed by a later statute which reënacts all or some of its provisions, the portions of the original statute which are reënacted continue in force without interruption. *Brown v. Brown*, 346.

SUBROGATION.

§ 1. Nature and Ground of Remedy.

The doctrine of subrogation is not available to a mere volunteer, but the term "volunteer" being a limitation upon the equitable remedy, should be narrowly and strictly interpreted, and payment by one under compulsion, or

SUBROGATION—*Continued.*

under a moral obligation, or under a *bona fide* belief that he is legally liable, is not a voluntary payment. *Boney v. Ins. Co.*, 563.

Insurance broker paying claims under liability policy in good faith *held* entitled to subrogation. *Ibid.*

TAXATION.

I. Validity, Constitutional Restructions, and Requirements
3a. Limitation on Tax Rate
3b. Limitation on Increase of Debt
4. Necessary Expenses and Necessity of Vote
9. Taxing Units Liable on Bonds
IV. Property Exempt from Taxation
19. Property of State and Political Subdivisions
V. Levy and Assessment
28. Levy and Assessment of Inheritance and Transfer Taxes
VI. Liens and Persons Liable
32c. Liability of Estate and Heirs for Inheritance Taxes
33. Priorities
VIII. Actions to Determine Validity of Levy of Taxes or Issuance of Bonds
38. Remedies of Tax Payer
a. Enjoining Issuance of Bonds
c. Recovery of Taxes Paid under Protest
IX. Sale of Property for Taxes
40. Sale of Realty
a. Sales and Tax Sale Certificates
b. Foreclosure of Certificates
c. Limitations on Sale of Realty for Taxes

§ 3a. Limitation on Tax Rate.

A municipality may levy taxes for necessary expenses in excess of the constitutional limitation by special legislative authority without a vote of the people. Constitution of North Carolina, Art. V, sec. 6. *Sing v. Charlotte*, 60.

Legislature may not limit municipal tax rate so as to prevent prompt discharge of municipality's obligation. *Bank v. Bryson City*, 165.

Legislative limitation on tax rate *held* inoperative as to municipal refunding bonds proposed to be issued in this case. *Ibid.*

What is a "special purpose" within the meaning of Art. V, sec. 6, of the State Constitution is a matter for judicial rather than legislative determination, since such purpose for which an unlimited tax may be levied with the special approval of the General Assembly must also be a "necessary expense" of the county within the meaning of Art. VII, sec. 7, which involves both questions of law and fact. *Power Co. v. Clay County*, 698.

While ordinarily when a statute is constitutional in part and unconstitutional in part, only the unconstitutional provisions will be disregarded, when an item for the levy of taxes includes both general and special expenses, the entire item in excess of the constitutional limitation, Art. V, sec. 6, must fail, or if an item combines both a special and an unnecessary expense, the item must fail in its entirety. *Ibid.*

Items of expense which are of a constantly recurring nature in the ordinary functioning of the county are not for special purposes for which an unlimited tax may be levied with the special approval of the Legislature, and therefore the expenses of the county commissioners, and expenses in running the courthouse and care of its grounds are for general purposes, while the purchase or building of a courthouse may be a special purpose. *Ibid.*

Defendant county levied taxes up to the 15-cent limitation for general county purposes and in addition thereto levied taxes for the purpose of "commissioners' pay, expense and board, courthouse and grounds, and county attorney's fees." *Held:* No special approval of the Legislature being shown for county attorney's fees, the entire item must fail, and furthermore, the other purposes included in the item are for general county expenses and not for a special purpose within the meaning of Art. V, sec. 6. *Ibid.*

Defendant county levied taxes up to the 15-cent limitation for general county purposes, and in addition thereto levied a tax for "upkeep of county buildings, courthouse, county home, poor and paupers, and incidental purposes." *Held:* The court may not determine whether the "incidental expenses" are for a necessary or unnecessary purpose, or for a general or special pur-

TAXATION—*Continued.*

pose, or how much of the tax is for "incidental expenses," and therefore the entire item is void as not being for a special purpose with special approval of the Legislature within the meaning of Art. V, sec. 6. *Power Co. v. Clay County*, 698.

The encouragement of agriculture is a fundamental objective of the State government, Art. III, sec. 17; Art. IX, sec. 14, and a levy of a tax by a county to pay the county farm agent's salary is for a special purpose having the special approval of the Legislature, C. S., 4666, 4689 (a), 1297 (40), within the meaning of Art. V, sec. 6, for which a tax in excess of the 15-cent limitation may be imposed. *Ibid.*

A county tax levy to pay the county accountant's salary is for a special purpose having the special approval of the Legislature (County Fiscal Control Act, Public Laws of 1927, ch. 146), within the meaning of Art. V, sec. 6, of the State Constitution. *Ibid.*

Ordinarily, the expenses of listing taxes, holding elections, holding courts, caring for and feeding jail prisoners are general and are not special expenses of the county, and under the facts of this case such purposes *are held* general expenses, and the tax rate therefor may not exceed the 15-cent limitation imposed by Art. V, sec. 6. *Ibid.*

§ 3b. Limitation on Increase of Debt.

The language of Art. V, sec. 4, of the State Constitution, as amended, is unambiguous, and by its plain terms the power of the State, or any county or municipality to contract debts in any biennium or fiscal year, respectively, without submitting the matter to a vote of the people, except for those purposes specifically enumerated in the amendment, is definitely prescribed to two-thirds of the amount by which its outstanding indebtedness was decreased during the prior biennium or fiscal year. *Hallyburton v. Board of Education*, 9.

Limitation prescribed by Art. V, sec. 4, is in addition to limitations prescribed by Art. VII, sec. 7, and Art. V, sec. 6. *Ibid.*

Method of determining amount of debt contracted in fiscal year within meaning of Art. V, sec. 4. *Ibid.*

County may not borrow money for necessary expenses without vote when its outstanding debt was not reduced during prior fiscal year. *Ibid.*

Art. VII, sec. 7, and the amended Art. V, sec. 4, will be considered *in pari materia*, and the word "debt" in Art. V, sec. 4, will be given the same construction as has been given the word in construing Art. VII, sec. 7, since the Legislature in framing the amendment must have had in mind the construction which has been given the word as used in Art. VII, sec. 7. *Williamson v. High Point*, 96.

Contract of city to pay for property bought for public purposes solely from revenue from the property does not create "debt." *Ibid.*

All bonds issued by city, whether with or without vote, must be included in determining amount of bonds issued during year. *Gill v. Charlotte*, 160.

§ 4. Necessary Expenses.

What are necessary municipal expenses for which a tax may be levied without a vote is a question for the courts. *Sing v. Charlotte*, 60.

What class of expenses constitute "necessary expenses" of a county within the meaning of Art. VII, sec. 7, is a judicial question for the determination of the courts, and whether they are needed in a particular county is for the determination of the governing authorities of the county. *Power Co. v. Clay County*, 698.

The courts determine what class of expenses are necessary expenses of a municipality, and the governing body of the municipality determines when such expenses are necessary for that particular locality. *Sing v. Charlotte*, 60.

TAXATION—*Continued.*

Whether a given expense is a necessary expense of a municipality is to be determined by the courts by ascertaining whether the purpose of the expense partakes of a governmental nature or purports to be an exercise by the municipality of a portion of the State's delegated sovereignty. *Ibid.*

An airport is not a necessary expense of a municipality. *Ibid.*

A municipality may levy taxes for necessary expenses up to the constitutional limitation without a vote of the people and without legislative authority. *Ibid.*

A municipality may not levy a tax for other than necessary expenses, either within or in excess of the constitutional limitation, without a vote of the people under special legislative authority. *Ibid.*

Since an airport is not a necessary municipal expense, a city may not levy a tax for the purpose of operating, maintaining, and improving a municipal airport without submitting the question to a vote. *Ibid.*

Municipality may not levy tax directly or indirectly for purposes of improving municipal airport without a vote. *Ibid.*

Bonds for municipal power plant are for public purpose and necessary expense. *Williamson v. High Point*, 96.

§ 9. Taxing Units Liable on Bonds.

A city or town is not liable on the bonds of a housing authority within its territory, it being expressly provided that neither the State, nor the city or town shall be liable, sec. 14 (b), ch. 456, Public Laws of 1935, and the authority not being an agency of the city or town so as to contravene this express statutory provision. *Wells v. Housing Authority*, 744.

§ 19. Exemption from Taxation of Property of State and Political Subdivisions.

Since a housing authority created under ch. 408, Public Laws of 1935, is a municipal corporation created for a public governmental purpose, its property is exempt from State, county and municipal taxation. *Wells v. Housing Authority*, 744.

§ 28. Levy and Assessment of Inheritance and Transfer Taxes.

Federal taxes not deductible under provisions of State statute may be computed according to later Federal amendment changing rates. *Harwood v. Maxwell, Comr. of Revenue*, 55.

§ 32c. Liability of Estate and Heirs for Inheritance Taxes.

Under facts of this case, inheritance taxes *held* properly charged against *corpus* rather than against annuities to beneficiaries. *Trust Co. v. Lambeth*, 576.

§ 33. Priorities.

The lien upon real estate for taxes has priority over all other liens, and continues until paid with interest, penalties and costs. *Guilford County v. Estates Administration*, 763.

After the death of insolvent intestate, certain land of the estate was sold for taxes assessed prior to the death of intestate, and the county became the purchaser for want of other bidder, C. S., 8015, and received certificate of sale, C. S., 8024. *Held:* The county acquired a first lien on the land, C. S., 7980, 7987, 8036, prior to the claims of the administrator, widow, heirs at law, and judgment creditor of intestate, which lien the county may foreclose by civil action in the nature of an action to foreclose a mortgage, C. S., 8037, and the provisions of C. S., 93, that taxes should be paid by the personal representative in the third class of priority has no application to the statutory action to foreclose the tax sale certificate. *Ibid.*

TAXATION—*Continued.*

§ 38a. Enjoining Issuance of Bonds.

Taxpayers of a municipality may maintain an action to enjoin the municipality from issuing its bonds. *Williamson v. High Point*, 96.

§ 38c. Recovery of Taxes Paid Under Protest.

Plaintiff made anticipatory payment of taxes under C. S., 7971 (92), (8), in order to take advantage of the discount. After levy of taxes by the county, plaintiff paid the balance of taxes levied against its property and gave written notice that all the taxes were paid under protest. In an action under C. S., 7880 (194), to recover the taxes paid, *held*, the anticipatory payment was not made under protest, there being no written protest at the time of that payment, C. S., 7979, a strict compliance with the statute being necessary in an action to recover taxes paid. *Power Co. v. Clay County*, 698.

When a taxpayer makes anticipatory payment not under protest, and thereafter pays under protest the balance of the taxes levied against his property, in his action under C. S., 7880 (194), to recover the taxes the entire amount paid under protest may be recovered when unlawful levies equal such amount, and the recovery will not be limited to the proportionate part which the unlawful levies bear to the entire tax levy, since it will not be presumed that the county intended to make an unlawful levy or that the taxpayer intended to pay tax illegally levied. *Ibid.*

§ 40a. Sales and Tax Sale Certificates.

The purchaser of a tax sale certificate is subrogated to the lien for taxes, and may foreclose same by civil action in the nature of an action to foreclose a mortgage. C. S., 8037. *Guilford County v. Estates Administration*, 763.

§ 40b. Foreclosure of Certificates.

Tax sale certificate may be foreclosed pending administration. *Guilford County v. Estates Administration*, 763.

§ 40c. Limitations on Sale of Realty for Taxes.

Amendment making true owner defendant is not continuation of original suit to foreclose tax certificate. *Wendell v. Scarboro*, 540.

TENDER.

§ 1. Requisites and Sufficiency of Tender.

A "tender" in the complaint of any amount found to be due upon a proper accounting is insufficient to constitute a legal tender. *Buchanan v. Mortgage Co.*, 247.

§ 2. Acceptance, Rejection and Withdrawal.

Failure to accept tender under C. S., 896, works its withdrawal. *Lumber Co. v. Perry*, 533.

TRESPASS.

§ 9. Actions for Forcible Trespass.

Nonsuit on cause of action for trespass *held* proper upon failure of allegation and evidence of trespass other than for an assault, the motion to nonsuit on the cause of action for assault being denied. *Rooks v. Bruce*, 58.

TRIAL.

I. Time of Trial, Notice, and Preliminary Proceedings
1. Time of Trial, Notice, and Calendars
4. Continuance
II. Order, Conduct, and Course of Trial
7. Argument and Conduct of Counsel
11. Consolidation of Actions for Trial
III. Reception of Evidence
16. Withdrawal of Evidence
IV. Province of Court and Jury
18. In General
V. Nonsuit
22a. Office and Effect of Motion to Nonsuit

TRIAL—*Continued.*

22b. Consideration of Evidence on Motion to Nonsuit
23. Contradictions and Discrepancies in Evidence
24. Sufficiency of Evidence
VI. Directed Verdict and Peremptory Instructions
27. In Favor of Plaintiff or Party Having Burden of Proof
VII. Instructions
29a. Form, Requisites, and Sufficiency in General
29b. Statement of Evidence and Explanation of Law Arising thereon
31. Expression of Opinion by Court
32. Requests for Instructions
33. Statement of Contentions and Objections thereto
36. Consideration of Instructions
VIII. Issues and Verdict
39. Tender of Issues
IX. Return of Verdict
43. Correction of Verdict
X. Motions after Verdict
47. Motions for New Trial for Newly Discovered Evidence
49. Motions to Set Aside Verdict as Being against Weight of Evidence

§ 1. Time of Trial, Notice and Calendars.

The time set for trial of a case is in the sound discretion of the trial court. *Carpenter v. Boyles*, 432.

§ 4. Continuance.

A motion for a continuance is addressed to the sound discretion of the trial court. *Cole v. Bryant*, 672.

§ 7. Argument and Conduct of Counsel.

The court has discretionary power to allow counsel for defendant to speak privately to defendant while he is a witness on the stand. *Rooks v. Bruce*, 58.

§ 11. Consolidation of Actions for Trial.

Where there is no exception to the court's finding that the parties agreed to consolidation, exception to the order of consolidation is untenable. *Cole v. Bryant*, 672.

§ 16. Withdrawal of Evidence.

When the trial judge instructs the jury that certain evidence introduced is withdrawn, and that they should not consider it in their deliberations, the admission of such evidence will not be held for error. *Munden v. Ins. Co.*, 504.

§ 18. Province of Court and Jury in General.

Court must submit issues to jury even when evidence is sufficient to warrant directed verdict in plaintiff's favor. *Bank v. Stone*, 598.

When facts are in dispute it is error for court upon hearing of order to show cause to dismiss action and deprive plaintiff of jury trial. *Lawhon v. McArthur*, 260.

§ 22a. Office and Effect of Motion to Nonsuit.

Since the office of a motion to nonsuit is to test the sufficiency of the evidence, judgment overruling defendant's demurrer for failure of the complaint to state a cause of action does not preclude defendant from raising the same question by a motion to dismiss or for judgment as of nonsuit. *Law v. Cleveland*, 289.

§ 22b. Consideration of Evidence on Motion to Nonsuit.

Upon motion to nonsuit, the evidence must be viewed in the most favorable light for plaintiff. *Anderson v. Amusement Co.*, 130; *Woods v. Freeman*, 314; *Barrow v. Keel*, 373.

While ordinarily defendant's evidence will not be considered in passing upon his motion to nonsuit, where defendant's evidence is not in conflict with plaintiff's evidence, it may be considered in so far as it tends to explain and clarify plaintiff's evidence. *Hare v. Weil*, 484.

§ 23. Contradictions and Discrepancies in Evidence.

Contradictions and discrepancies in plaintiff's evidence do not warrant the granting of defendant's motion to nonsuit, and the motion should be denied if plaintiff's evidence, in any aspect, is sufficient to support the cause alleged. *Ferguson v. Asheville*, 569.

§ 24. Sufficiency of Evidence.

If there is any competent evidence tending to prove the fact in issue, the evidence must be submitted to the jury. *Anderson v. Amusement Co.*, 130; *Barrow v. Keel*, 373.

A *prima facie* case does not require an affirmative finding for plaintiff, or change the burden of proof, its effect being merely to take the case to the jury for its determination of the issue, and subject defendant to the risk of an adverse verdict in the absence of evidence in rebuttal. *Woods v. Freeman*, 314.

§ 27. In Favor of Plaintiff or Party Having Burden of Proof.

Peremptory instructions in favor of plaintiff insured upon failure of proof by insurer on affirmative defense upon which it had burden of proof, *held* not error. *Abernethy v. Ins. Co.*, 23.

Ordinarily, a verdict may not be directed in favor of the party upon whom rests the burden of proof. *Reed v. Madison County*, 145; *Hosiery Co. v. Hemphill Co.*, 164.

§ 29a. Form, Requisites and Sufficiency of Instructions in General.

Form of instruction as to answering of issues *held* sufficiently full in view of amount of evidence and complexity of case. *Guyes v. Council*, 654.

§ 29b. Statement of Evidence and Explanation of Law Arising Thereon.

A charge that plaintiff contended that defendant and his witnesses were interested in the outcome of the action, that the quality of their testimony was such that the jury ought not to believe it, and that the jury ought to take the fact of their interest into consideration in weighing their testimony, but that the jury should remember the court's instruction as to the weight to be given the testimony of interested witnesses, will not be held for error when the court's prior instruction on the point is without error, the word "quality" in the statement of the contention being used not in the sense of natural superiority but as to the weight to be given to interested witnesses. *Acceptance Corp. v. Edwards*, 736.

§ 31. Expression of Opinion by Court.

An instruction that the record evidence established the claim of plaintiff is not held for error as an expression of opinion by the court on the weight of the evidence, since the context of the instructions is fairly susceptible to the interpretation that the court was stating what the record evidence showed in reviewing the evidence as required by C. S., 564. *Merrill v. Bridgers*, 123.

In an action for wrongful death, an instruction that, according to the mortuary table, testate's age being a stated number of years, his life expectancy was a certain number of years, is error as being an expression of opinion by the court as to the sufficiency of the proof of the fact of age and the life expectancy, contrary to C. S., 564. *Sebastian v. Motor Lines*, 770.

§ 32. Requests for Instructions.

A party desiring more specific instructions on subordinate features of the charge must aptly tender request therefor. *Madison County v. Catholic Society*, 204.

When a requested instruction is modified, and, as given, is without error, and another requested instruction is given in substance, an exception to the court's failure to give the requested instructions as written, will not be sustained. *Acceptance Corp. v. Edwards*, 736.

§ 33. Statement of Contentions and Objections Thereto.

Objections to the statement of the contentions of a party must be made in apt time in order for assignments of error based thereon to be availing on appeal. *Rooks v. Bruce*, 58; *Acceptance Corp. v. Edwards*, 736.

TRIAL—*Continued.*

When plaintiff offers evidence of the good character of its witness, a contention that the jury should take such evidence into consideration in passing upon the weight of the witness' testimony, is proper, and objection that the court did not instruct the jury in like manner with reference to the evidence of the good character of defendant's witnesses is untenable, the record disclosing that the court fully gave like contentions of defendant. *Acceptance Corp. v. Edwards*, 736.

§ 36. Construction of Instructions. (Harmless and prejudicial error in instructions see Appeal and Error § 39e.)

A charge will be construed contextually as a whole. *Carpenter v. Boyles*, 432; *Acceptance Corp. v. Edwards*, 736.

§ 39. Tender of Issues.

Where the issues submitted fully and adequately presented the cause to the jury, the refusal to submit issues tendered will not be held for error. *Allen v. Allen*, 264.

§ 43. Correction of Verdict.

The jury returned an affirmative answer to the issue at trial, and the case being the last for the term, the court discharged the jury. Fifteen minutes later, the court, upon being informed that the jury through an affirmative answer decided the case in favor of one of defendants, permitted the jury to retire and change the answer to the issue from "Yes" to "No." *Held:* The action of the trial court amounted to setting aside the verdict first rendered, and it appearing that the mistake of the jury was as to the legal effect of the first rendered verdict, and not an error of fact, the second verdict is without legal sanctions, and a *venire de novo* is ordered. The distinction between permitting the jury to correct an error before its discharge, and permitting it to change its verdict after its discharge is pointed out. *Livingston v. Livingston*, 797.

§ 47. Motions for New Trial for Newly Discovered Evidence. (In Supreme Court see Appeal and Error § 47a.)

Affidavits supporting a motion for a new trial for newly discovered evidence are insufficient to invoke the discretionary power of the court to hear the motion when they disclose that the evidence relied upon is merely cumulative and contradictory. *Bullock v. Williams*, 320.

§ 49. Motions to Set Aside Verdict as Being Against Weight of Evidence.

A motion to set aside the verdict or for a new trial on the ground that the verdict is contrary to the evidence is addressed to the discretion of the trial court. *Evans v. Ins. Co.*, 539.

TROVER AND CONVERSION.

§ 1. Nature and Essentials of Cause of Action.

Action for conversion fails when defendant shows that plaintiff's duly authorized agent sold defendant the personalty in question. *McArthur v. Byrd*, 321.

TRUSTS.

§ 1b. Parol Trusts.

Parol agreement to purchase at sale for benefit of debtor creates valid parol trust. *Hare v. Weil*, 484.

§ 4. Incapacity of Trustee and Appointment of Successor.

Substitute trustee may be appointed in accordance with terms of instrument without special proceeding or approval of the court. *Cutter v. Trust Co.*, 686.

TRUSTS—*Continued.*

§ 5. Control, Management, and Preservation of Trust Estate.

Trustee *held* properly directed to pay taxes and preserve property pending termination of trust. *Latta v. McCorkle*, 508.

Instrument *held* to authorize substitute trustee to borrow on insurance policies to pay premiums. *Cutter v. Trust Co.*, 686.

Court of equity has jurisdiction to modify terms of trust agreement when necessary to preserve trust estate. *Ibid.*

§ 9b. Waiver and Abandonment of Trust Estate.

While an equitable interest in land may not be conveyed by parol, an equitable interest may be abandoned, released, or waived in favor of the holder of the legal title by conduct positive, unequivocal, and inconsistent with an intention to assert such equitable claim, but such waiver or abandonment, being an equitable defense, must be pleaded. *Hare v. Weil*, 484.

Evidence *held* to establish estoppel against mortgagor to assert that purchaser at sale bought for his benefit. *Ibid.*

VENDOR AND PURCHASER.

§ 7. Construction of Contract as to Installments and Payment of Purchase Price.

Options to sell land, being unilateral in their inception, are to be strictly construed in favor of the vendor, and it will be generally held that time is of the essence, and that payment or tender of the amount agreed within the time specified is necessary to convert the right to buy into a contract for sale. *Carpenter v. Carpenter*, 36.

§ 21. Actions for Purchase Money.

There is no lien for purchase money in North Carolina, and while the judgment debtor cannot claim homestead as against a judgment for purchase money (N. C. Constitution, Art. X, sec. 2), the lien of a mortgage executed to a third person has priority over the judgment lien, when the mortgage is executed prior to the rendition of the judgment and prior to an amendment putting the title to the property in issue. *Jarrett v. Holland*, 428.

§ 29. Liens and Encumbrances.

The purchase of property takes same subject to all liens valid and enforceable against his vendor. *Ins. Co. v. Charlotte*, 497.

VENUE.

§ 1b. Actions Against Principals and Sureties on Guardianship and Administration Bonds.

An action against an executor or administrator in his official capacity must be instituted in the county in which he qualified unless the action is on an official bond executed by the deceased. *Thomasson v. Patterson*, 138.

Action on guardianship bond is properly brought in county where bond was given and sureties reside, although brought against executrix of principal who qualified in another county. *Ibid.*

Where statute makes place where bond was given and sureties or principal reside controlling, insolvency of parties is immaterial. *Ibid.*

§ 4a. Motions for Change of Venue as Matter of Right.

When neither party resides in the county in which the action is instituted, defendant's motion to remove to the county of his residence must be allowed as a matter of right, C. S., 469, 470 (1), and the court must dispose of such motion before proceeding further in the case, and it is error for the court to

VENUE—*Continued.*

retain the cause for trial upon plaintiff's motion founded upon the convenience of witnesses and the promotion of the ends of justice. C. S., 470 (2), although after proper removal the court may hear plaintiff's motion. *R. R. v. Thrower*, 637.

WILLS.

I. Nature and Requisites of Testamentary Disposition of Property in General
1. Definition of "Will"
3. Testamentary Intent
9. Holographic Wills
VI. Revocation of Wills
13. Revocation by Testator
14. Revocation by Subsequent Marriage
IX. Construction and Operation
33a. Estates and Interests Created in General
33b. Rule in Shelley's Case
33c. Vested and Contingent Interests
33d. Estates in Trust or in Fee or for Life with Remainder Over
33e. Annuities
33f. Devisees with Power of Disposition
33g. Destruction or Termination of Particular Estate and Vesting of Remainder
34. Designation of Devisees and Legatees and their Respective Shares
46. Conveyance of Property by Devisees

§ 1. Definition of "Will."

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. *Rountree v. Rountree*, 252.

§ 3. Testamentary Intent.

Paper writing in this case *held* to disclose the *animus testandi* which fixes the character of the instrument as a will. *Rountree v. Rountree*, 252.

§ 9. Holographic Wills.

A paper writing in the handwriting of deceased, found among his valuable papers after his death, and bearing upon its face the *animus testandi*, will be declared his will as a matter of law. *Rountree v. Rountree*, 252.

§ 13. Revocation by Testator.

The revocation of a will by implication in a codicil is not favored, and when a codicil is attached to a will and does not import revocation, but explains, alters and adds to the will, the will and codicil will be construed together to ascertain the intent of the testator. *Toms v. Brown*, 295.

A will may be revoked by any of the acts enumerated in C. S., 4133, performed by testator or by some other person in his presence and by his direction and consent, indicating an intention to revoke same, or by proper execution of a subsequent will or other writing, or by the subsequent marriage of the testator, C. S., 4134, but a will may not be revoked by verbal declarations and it is expressly provided by statute that a will may not be revoked by any presumption of an intention to revoke on the ground of an alteration in circumstances, C. S., 4135. *In re Will of Watson*, 309.

§ 14. Revocation by Subsequent Marriage.

Tripartite will *held* not revoked by subsequent revocation by marriage of wills of other parties to the agreement. *In re Will of Watson*, 309.

§ 33a. Estates and Interests Created in General.

A general devise will be construed to be in fee unless a contrary intent plainly appears. *Brinn v. Brinn*, 282.

An unrestricted devise of real estate passes the fee, but a general devise of realty does not pass the fee when it clearly appears from the language of the will that the testator intended to convey an estate of less dignity. C. S., 4162. *Strickland v. Johnson*, 581.

§ 33b. Rule in Shelley's Case.

The will in question devised certain lands to testator's son for life "and then to be divided equally among his male heirs, they to share and share alike." *Held:* Even if it be conceded that the words "male heirs" should be construed "heirs" under the provisions of C. S., 1734, the addition of the words

"share and share alike" prevents the application of the rule in *Shelley's case*, and upon the death of the son, his sole male heir takes the fee in the property by purchase under the will. *Cheshire v. Drewry*, 450.

§ 33c. Vested and Contingent Interests.

The law favors the early vesting of estates. *Cheshire v. Drewry*, 450.

A devise to C. for life and no longer, and at her death "to her children then living and to the issue of such children as may be dead, *per stirpes*," conveys a contingent remainder to C.'s children, dependent upon their being alive at her death. *Woody v. Cates*, 792.

§ 33d. Estates in Trust or in Fee or for Life with Limitation Over.

A devise of land to testator's wife in fee simple with full power of disposition, and a bequest of personalty "to use or sell as she may choose" with provision in each item that any surplus left at her death should go to testator's heirs, *is held* to vest the absolute fee simple in the realty and the absolute estate in the personalty in the wife, the provision directing or expressing a desire for the disposition of the property after the first taker's death being void as repugnant to the absolute estate previously conveyed. *Peyton v. Smith*, 155.

Words of request, desire, etc., addressed to devisee will not create trust unless it clearly appears testator so intended. *Brinn v. Brinn*, 282.

Words of recommendation or request, when used in direct reference to estate, are *prima facie* testamentary and imperative. *Ibid.*

Request for disposition of estate, addressed to sole legatee and devisee, *held* to create trust under language of this will. *Ibid.*

The will in question set up a residue trust in favor of testator's wife and son, with provision that the trusts should continue until both of the trusts were terminated. The trust in favor of the widow was terminated by her dissent from the will. The trust in favor of the son provided that the property should not vest in fee "or pass any title to him or his heirs until he attains the age of 35 years or dies before that time, leaving issue surviving him." The son died before attaining the age of 35, leaving issue him surviving. *Held:* The trust estate terminated upon the death of the son and the property vested in his children at that time, and the contention that the trust should continue until the son would have attained the age of 35 had he lived, is untenable, there being no expressed intention of the testator that the trust should continue after the death of his son. *Cheshire v. Drewry*, 450.

It appeared that testator was twice married, and left his second wife, children by his first wife and one child by his second wife him surviving. The will by general devise left his realty to his second wife, "in lieu of her dower," then his personalty to his daughter by his second wife, and then provided that upon the death of his second wife "that all of her property be sold and the proceeds to be divided between" the children by his first wife, naming them. *Held:* Taking the setting of the parties and construing the will as a whole, it plainly appears that testator did not intend to devise the fee in the realty to his second wife, and she is entitled only to a life estate in the realty with remainder over to his children by his first wife. C. S., 4162. *Strickland v. Johnson*, 581.

§ 33e. Annuities.

Annuities to beneficiaries not parties to agreement for distribution of trust estate, constitute a charge on whole estate. *Latta v. Trustees*, 462.

§ 33f. Devises with Power of Disposition.

Will and codicil *held* to convey land to devisee generally with power of disposition, carrying the fee simple. *Hoskins v. May*, 795.

WILLS—*Continued.*

§ 33g. Destruction or Termination of Particular Estate and Vesting of Remainder.

Upon the destruction of the preceding estate before it regularly expires, as where a widow to whom is devised a life estate dissents from the will, the ultimate takers come into the present enjoyment of the property as though the life tenant had died. *Cheshire v. Drewry*, 450.

Where widow, having life estate, dissents from will, remainderman is entitled to immediate enjoyment subject to dower. *Ibid.*

§ 34. Designation of Devisees and Legatees and Their Respective Shares. (Distribution to devisees and legatees see Executors and Administrators § 21.)

Will *held* to require accounting for advancements in same manner as though testator died intestate. *Parker v. Eason*, 115.

The will in question, construed as a whole, *is held* to devise one-third of the residuary estate in trust for testator's grandson until he reaches the age of 35, to be delivered to him if he should be living at that age. *Cheshire v. Drewry*, 450.

Held: An order directing the trustees to pay taxes on the house and lot and to keep same in repair, even though the comparatively small amount necessary therefor would be at the expense of the beneficiaries under the residuary trust, is proper, such construction of the will being necessary to effectuate the primary purpose of testator to provide a home for life for his aged and crippled employee. C. S., 7985. *Latta v. McCorkle*, 508.

§ 46. Conveyance of Property by Devisees. (Rights and remedies of creditors of devisees see Descent and Distribution § 14; sale of land to make assets see Executors and Administrators § 13.)

Although contingent remainderman, who is one of a definite class named as ulterior takes after the termination of a life estate, may not convey his interest in fee by deed executed prior to the happening of the contingency, but upon the death of his life tenant, his interest vests, and his title inures to the benefit of his grantee by estoppel. *Woody v. Cates*, 792.

WITNESSES.

§ 5. Mentality.

Whether a witness has sufficient mentality to testify is addressed to the sound discretion of the trial court, and the court's finding after examining a proposed witness that he had sufficient mental capacity to testify to the facts, although he had been adjudged insane at the time of the occurrence of the matters in question, is not reviewable. *Carpenter v. Boyles*, 432.

CONSOLIDATED STATUTES AND MICHIE'S CODE CONSTRUED.

SEC.

8 (2), 147. In special proceeding to remove administratrix, her right to distributive share of estate may not be determined. *In re Estate of Banks*, 382.

55, 56. Proceeds of sale to make assets to pay debts of estate is personalty so far as necessary to pay debts, but surplus goes to heirs as realty in same manner as if sale had not been had. *Linker v. Linker*, 351.

69. Personal representative may sell choses in action at private sale in good faith, since statute makes obtaining of court order permissive but not mandatory. *Felton v. Felton*, 194.

74. Administrator may sell lands of the estate to make assets only if the personalty is insufficient. *Linker v. Linker*, 351. As long as estate remains unsettled the real property undisposed of is subject to sale to make assets. *Trust Co. v. McDearman*, 141.

93. Statute does not prevent county purchasing certificate of sale for taxes assessed prior to death from foreclosing same as first lien even pending administration. *Guilford County v. Estates Administration*, 763.

137 (5). Where distributees of estate are not of equal degree of kinship, estate should be distributed *per stirpes*. *In re Estate of Mizzelle*, 367.

138. Ordinarily, grandchildren may not be held accountable for gifts from grandparent, but must account for gifts from grandparent to parent before they can inherit from grandparent. *Parker v. Eason*, 115.

353. Upon demurrer, a pleading will be liberally construed, and the demurrer overruled unless the pleading is fatally defective. *Toler v. French*, 360; *Pearce v. Privette*, 501.

446. Partner may not sue for his sole benefit on cause of action accruing to the partnership. *Threadgill v. Faust*, 226.

465. Action on guardianship bond is properly brought in county where bond was given and sureties resided, although brought against executrix of principal who qualified in another county. *Thomasson v. Patterson*, 138.

469, 470 (1). Court must determine motion to remove as a matter of right before it may proceed further in the cause. *R. R. v. Thrower*, 637.

475, 488, 505. Order extending time for filing complaint for more than 20 days is not void, and action is pending from time of service of summons and such order. *O'Briant v. Bennett*, 400.

491. Proceeding for modification of trust agreement is *in rem*, and nonresident beneficiary is properly served by publication. *Cutter v. Trust Co.*, 686.

493. Refusal of trial court to require prosecution bond in action to abate public nuisance is not appealable. *Carpenter v. Boyles*, 432.

495. Defendant's bond in ejectment is sufficient if in substantial compliance with statute. *Clegg v. Canady*, 258.

500. When action involving title to realty is instituted in county in which land lies, the action itself is notice and no notice under the statute is required, but action to recover balance of purchase money due for land is not action involving title to realty. *Jarrett v. Holland*, 428.

507. Action to set aside foreclosure sale is improperly joined with action for damages for wrongful foreclosure. *Smith v. Land Bank*, 343.

CONSOLIDATED STATUTES—*Continued.*

SEC.

518. Ground of demurrer other than for failure of the complaint to state a cause of action or for want of jurisdiction may be waived by failure to demur in apt time, but as to these two grounds demurrer may be interposed at any time, even in the Supreme Court on appeal. *Carpenter v. Boyles*, 432.

536. Trial court has discretionary power to permit plaintiff to file complaint after expiration of statutory time. *O'Briant v. Bennett*, 400.

547. Motion to amend by substituting name of corporation for name of individual defendant *held* properly denied. *Hogsed v. Pearlman*, 240.

564. Charge construed as a whole *held* not objectionable as expressing opinion on evidence in stating contentions of the State. *S. v. Wilcox*, 665. Instruction that record evidence established plaintiff's claim *held* not error as expression of opinion by court, since context of instructions disclosed that court was stating what record evidence showed in reviewing the evidence as required by the statute. *Merrell v. Bridges*, 123. Instruction that there "was evidence tending to show" certain fact, said while stating contentions of parties, *held* not error as expression of opinion by the court. *S. v. Sims*, 590. Charge *held* not violative of the statute, and defendant may not complain at failure to define term "*prima facie* evidence," the error, if any, being in his favor. *S. v. Epps*, 709. In prosecution under C. S., 4236, when evidence establishes defendant had in his possession implements of housebreaking within judicial knowledge of court, court need not define the term. *S. v. Vick*, 235. Court may not instruct jury what the age of testate was or that his life expectancy was a stated number of years. *Sebastian v. Motor Lines*, 770.

565. Evidence of good character of defendant on trial for murder is subordinate feature, and failure of court to refer thereto will not be *held* for error in absence of request for instructions. *S. v. Sims*, 590.

578. Court's power to make additional findings upon review of referee's report is limited by requirement that additional findings must be supported by evidence. *Threadgill v. Faust*, 226.

595 (4), 597 (b). In action in ejectment judgment may be rendered by default final for want of bond only on a Monday. *Clegg v. Canady*, 258.

600. In order to set aside judgment under this section court must find facts constituting a meritorious defense, and mere finding of a "meritorious defense" is insufficient. *Parnell v. Ivey*, 644.

614. Judgment creditors are entitled to share pro rata in property acquired by debtor subsequent to docketing of judgments. *Linker v. Linker*, 352.

628 (a-o). Criminal matters may not be determined in proceedings under Declaratory Judgment Act. *Calcutt v. McGeachy*, 1.

654. Exception to charge on ground that it failed to comply with mandate of this section, without specifically pointing out deficiencies, is too general to be considered. *Rooks v. Bruce*, 58.

712. Affidavit *held* sufficient to support order for examination of judgment debtor concerning choses in action subject to execution. *Bank v. Hinton*, 162.

CONSOLIDATED STATUTES—*Continued.*

SEC.

845, 846. In action to restrain cutting of standing timber when the facts are in dispute, ordinarily temporary order should be continued or defendant be required to give bond. *Lawhon v. McArthur*, 260.

854. Is not applicable to action to abate a public nuisance under C. S., 3180. *Carpenter v. Boyles*, 432.

896. Failure to accept tender of judgment works its withdrawal. *Lumber Co. v. Perry*, 533.

970. Common law which has not been provided for in whole or in part, or abrogated or repealed by statute and which is not obsolete, is in force in this State. *Wells v. Ins. Co.*, 178.

978, 985. Criminal contempt is the commission of an act tending to interfere with administration of justice; civil contempt is remedy for enforcement of orders in the equity jurisdiction of the court. *Dyer v. Dyer*, 634.

978 (4). Court should find husband's financial condition on contempt hearing for failure to comply with order for support. *Vaughan v. Vaughan*, 189. Willful refusal to pay alimony as ordered by the court is civil contempt. *Dyer v. Dyer*, 634.

981. Power to punish for civil contempt is not limited to thirty days imprisonment. *Dyer v. Dyer*, 634.

1020, 5003 (1). Coroner has no authority to perform autopsy in cases where there is no suspicion of foul play. *Gurganious v. Simpson*, 613.

1330. Pleadings must be written and verified in action against city in justice's court. *Kalte v. Lexington*, 779.

1334 (53) to (57). City may not transfer one fund to another except from general municipal expense fund. *Sing v. Charlotte*, 60.

1654 (2). Advancement is gift *in præsenti* from parent to child and ordinarily statute does not apply to gifts from grandparent to grandchild. *Parker v. Eason*, 115.

1659 A. Husband unlawfully abandoning wife is not entitled to divorce on ground of two years separation under ch. 100, Public Laws of 1937. *Brown v. Brown*, 347.

1734. Devise to A. for life and then "to be divided equally among his male heirs, they to share and share alike." *Held:* Even conceding that "male heirs" should be construed "heirs" by provision of the statute, the rule in *Shelley's case* does not apply because of the addition of the words "share and share alike." *Cheshire v. Drewry*, 450.

1795. Partner in intestate's firm may not testify as to transactions or communications with intestate in action against estate. *Fenner v. Tucker*, 419. Testimony of conversations with a party to the action in which witness related to the party statements made by a decedent is not in contravention of the statute. *Allen v. Allen*, 264. "Person interested in the event" is one having direct pecuniary interest, and husband is not interested party in wife's action. *Ibid.*

1799. When defendant does not go upon stand and does not offer evidence of good character, his character is not in issue and it may not be impeached by the State, but instruction on State's contention that defendant associated with codefendants *held* not error in absence of objection. *S. v. Proctor*, 221.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2144, 2145, 2146. Defendant's evidence *held* to establish that contract sued on related to cotton futures and that contract was void. *Fenner v. Tucker*, 419. Ch. 236, sec. 2, Public Laws of 1931, repealing the above statutes, does not apply to contracts made prior to its enactment. *Ibid.*

2346. Has no application to disability benefits payable annually under terms of insurance policy. *Wells v. Ins. Co.*, 178.

2433, 2437. Where action under C. S., 2433, is dismissed, material furnisher may proceed under C. S., 2437. *Lumber Co. v. Perry*, 533.

2492 (50b). Refunding bonds are entitled to be secured by all rights and powers of taxation which formed part of obligation of original bonds, and later legislative limitation on tax rate is inoperative as to refunding bonds. *Bank v. Bryson City*, 165.

2515. Contract between husband and wife relating to her real property is void if not in writing and acknowledged as required by the statute. *Jackson v. Hewlett*, 805.

2621 (46a). Operation of truck on highway at speed in excess of 35 miles per hour is only *prima facie* evidence of negligence and not negligence *per se*. *Latham v. Bottling Co.*, 158.

2621 (62), (151) (e), (g). Defendants operating stolen car and refusing to stop in response to siren, *held* illegally resisting arrest. *S. v. Payne*, 719.

2621 (305). Failure to stop before entering through street intersection is not negligence *per se*, but only evidence to be considered with other evidence in the case. *Sebastian v. Motor Lines*, 770.

2712, 2713, 2714. Owner signing petition and paying installments without objection waives right to correction of assessments. *Wake Forest v. Gulley*, 494.

2791, 2792, 2807, 2808. Private Laws of 1931, as amended by ch. 149, Private Laws of 1935. Ordinarily, power of municipality to construct and operate power plant outside of city limits is limited by proprietary power to operate utility primarily for benefit of its citizens only, and such power is further limited by the provisions of the Revenue Bond Act of 1935, since sec. 2969 (13), expressly repeals inconsistent provisions of prior acts. *Williamson v. High Point*, 96.

2969. Municipal Fiscal Control Act prohibits city making appropriation and levying tax for common contingent fund. *Sing v. Charlotte*, 60.

2969 (3), (13). Revenue Bond Act of 1935 authorizes municipalities to construct and operate utilities primarily for benefit of its own citizens only. *Williamson v. High Point*, 96.

3180. Provision for abatement of public nuisances is valid as exercise of police power. *Carpenter v. Boyles*, 432.

3182. In action to abate public nuisance, evidence of general reputation of the place in question is competent. *Carpenter v. Boyles*, 432.

3186. In action to abate a public nuisance, whether court should allow defendant to give bond to cancel temporary order of abatement is a matter resting in its sound discretion. *Carpenter v. Boyles*, 432.

3379. Is not repealed by ch. 49, Public Laws of 1937. *S. v. Epps*, 709.

CONSOLIDATED STATUTES—*Continued.*

SEC.

3379, 3411 (j), Ch. 49, Public Laws of 1937. Evidence of illegal possession of intoxicating liquor for purpose of sale *held* sufficient for jury. *S. v. Libby*, 662.

3409. Second offense of manufacturing spirituous liquor is a felony. *S. v. Sanderson*, 381.

3411. Turlington Act is not repealed by ch. 49, Public Laws of 1937. *S. v. Epps*, 709.

3536, 3537, 3539 (a). Evidence *held* not to show willful violation of provision for segregation of races on bus. *S. v. Harris*, 758.

3560, 3561. The indexing of deeds is an essential part of their registration. *Dorman v. Goodman*, 406. Deed properly indexed under name of grantee, but indexed under wrong initials of grantor, *held* ineffective as against creditor of grantor. *Ibid.*

3835-3838. Ch. 40, Public-Local Laws of 1913, relating to cartways in Madison County, *held* void, and therefore the general act *is held* in force in the county. *Waldroup v. Ferguson*, 198.

3836. Petition for establishment of neighborhood public road need not allege right of easement in petitioners. *Pearce v. Privette*, 501.

4134, 4135. Tripartite will *held* not revoked by subsequent revocation by marriage of other parties to the agreement. *In re Will of Watson*, 309.

4162. General devise of realty carries the fee unless testator's intent to convey estate of less dignity clearly appears, and under will in this case devise *held* to create life estate only in first taker, with remainder over to testator's children. *Strickland v. Johnson*, 581. Words of request, desire, etc., addressed to devisee will not create trust unless it clearly appears that testator so intended. *Brinn v. Brinn*, 282.

4170. Administrator with the will annexed has all the rights, powers and duties as if he had been named executor in the will. *Jones v. Warren*, 730.

4171, 4173. Common law misdemeanors punishable by imprisonment in penitentiary under C. S., 4173, are made felonies by C. S., 4171. *S. v. Spivey*, 45.

4200. Murder in first degree is intentional killing of human being with malice and with premeditation and deliberation. *S. v. Payne*, 719. Evidence of defendant's guilt of murder in perpetration of robbery *held* to require submission to jury on charge of first degree murder. *S. v. Exum*, 16.

4204. Indictment and evidence *held* to warrant submission of both carnal knowledge of prosecutrix, she being under 12 years of age, and with force against her will. *S. v. Johnson*, 389.

4214. Presumption from use of deadly weapon does not apply to assault cases, but only to prosecutions for homicide. *S. v. Carver*, 150.

4236. Offense of possessing implements of housebreaking without lawful excuse does not require proof of any intent or "unlawful use," and court will take judicial knowledge that certain articles, taken in combination, are "other implements of housebreaking" within contemplation of statute. *S. v. Vick*, 235.

4287. Evidence *held* sufficient for jury on charge of wrongfully disposing of mortgaged chattels. *S. v. Hart*, 804.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4428. Possession of lottery tickets raises *prima facie* case of violation of statute, and evidence in this case *held* sufficient for jury. *S. v. Jones*, 640.

4506. In prosecution for drunken driving, instruction that defendant was intoxicated if he had drunk enough to make him act or think differently is without error. *S. v. Harris*, 648.

4625. In prosecution for willful failure to support illegitimate child, failure of indictment to charge specific date of the month the offense was committed is not fatal. *S. v. Oliver*, 386.

4640. Evidence *held* to require submission of question of guilt of less degrees of the crime charged. *S. v. Feyd*, 617; *S. v. Burnett*, 153.

4643. On motion to nonsuit, all evidence must be considered in light most favorable to State. *S. v. Smoak*, 79.

4649. State may appeal from judgment of not guilty rendered on a special verdict. *S. v. Lawrence*, 674.

6243 (4) (5) (7) (8) (9). Housing authority created under the statute is a municipal corporation and is for a public purpose for which the General Assembly may create a municipal corporation, and the method for the selection of its membership is not an unconstitutional delegation of authority. *Wells v. Housing Authority*, 744.

6353. Mutual company must show levy of additional assessments in conformity with statutory provisions in order to enforce forfeiture for nonpayment. *Abernethy v. Ins. Co.*, 23.

6437. Other insurance issued to person having separable insurable interest does not violate provision against additional insurance. *Bryan v. Ins. Co.*, 391.

6460. Evidence *held* to disclose fraud in procuring delivery of policy issued without medical examination. *Butler v. Ins. Co.*, 384.

7007 (1) to (29). Act regulating practice of photography is constitutional and valid. *S. v. Lawrence*, 674.

7322, 5912 D. Court is not required to sentence fifteen-year-old boy, convicted of capital crime, to reformatory. *S. v. Smith*, 299.

7971 (92). Protest in strict compliance with statute is necessary in order for taxpayer to maintain action under this section, and anticipatory payment is not under protest, but balance paid under protest after establishment of tax rate will be taken as in payment of illegal levies. *Power Co. v. Clay County*, 698.

7985. Trustee *held* properly directed to pay taxes and preserve property pending termination of the trust. *Latta v. McCorkle*, 508.

7987. Lien for taxes is prior to all other liens. *Guilford County v. Estates Administration*, 763.

8036, 8037. Lien for taxes is continued in favor of holder of certificate of sale by subrogation. *Guilford County v. Estates Administration*, 763.

8037. Amendment making true owner defendant is not continuation of original suit to foreclose tax certificate. *Wendell v. Scarboro*, 540. County purchasing certificate of sale for taxes assessed prior to death of insolvent acquires first lien, which it may foreclose by civil action pending administration. *Guilford County v. Estates Administration*, 763.

CONSOLIDATED STATUTES—*Continued.*

SEC.

8081 (i), subsecs. j and f. Death of employee must result from injury by accident arising out of and in the course of the employment in order to be compensable. *Plemmons v. White's Service, Inc.*, 148. Death from hydrophobia *held* not result of accident arising out of employment. *Ibid.*

8081 (i), (u). State employee engaged in farming operations on State farm is covered by Compensation Act. *Barbour v. State Hospital*, 515.

8081 (r), (k), (1), (2). Employee bound by Compensation Act may not maintain action at common law for disease not compensable under the act. *Murphy v. American Enka Corp.*, 218.

8081 (t). Evidence *held* sufficient to support Commission's finding that accident was not result of employee's intoxication. *Brooks v. Rim & Wheel Co.*, 518.

8081 (rr). Evidence *held* to support finding that employee was resident of the State at time of the accident. *Brooks v. Rim & Wheel Co.*, 518.

8081 (nnn). Industrial Commission should make such specific and definite findings as will enable the courts on appeal to determine whether general findings and conclusions should stand. *Singleton v. Laundry Co.*, 32.

8081 (rrr). Allowance of attorneys' fees for claimant *held* proper. *Brooks v. Rim & Wheel Co.*, 518.

CONSTITUTION, SECTIONS OF, CONSTRUED.

ART.

I, sec. 17. Provision of C. S., 3180, for abatement of a public nuisance by temporary order without bond, and sale of the personalty and the closing of the property for one year upon the verdict of the jury does not impinge this section. *Carpenter v. Boyles*, 432. Denial of male defendant's motion to quash for that women were excluded from jury *held* not prejudicial. *S. v. Sims*, 590. Act regulating practice of photography does not violate due process clause. *S. v. Lawrence*, 674.

I, sec. 31. Act regulating practice of photography does not create monopoly. *S. v. Lawrence*, 674.

I, sec. 35. Establishment of cartway involves taking of private property by eminent domain, and statute prescribing procedure for establishment of cartway which does not give owner notice and an opportunity to be heard is void. *Waldroup v. Ferguson*, 198.

IV, sec. 1. Under full faith and credit clause, judgment of another state will bar action in this State if such judgment would bar the action in the jurisdiction which rendered it. *Law v. Cleveland*, 289.

IV, sec. 13. Although Supreme Court may review evidence on appeal in injunctive proceedings, when there are no exceptions to the findings of fact the findings are conclusive. *Williamson v. High Point*, 96.

V, sec. 4. Limitation prescribed by this article imposes definite check on increase of debt except with approval of voters, and the limitation is in addition to the limitation prescribed by Art. VII, sec. 7, and Art. V, sec. 6. *Hallyburton v. Board of Education*, 9. County may not borrow money for necessary expenses without vote when its outstanding debt was not reduced during prior fiscal year. *Ibid.* Word "debt"

CONSTITUTION, SECTIONS OF, CONSTRUED—*Continued.*

ART.

as used in this section will be given same construction as that given the word as used in Art. VII, sec. 7. *Williamson v. High Point*, 96. Contract of city to pay for property bought for public purpose solely from revenue from the property does not create "debt." *Ibid.* All bonds issued by city, whether with or without vote, must be included in determining amount of bonds issued during year. *Gill v. Charlotte*, 160.

V, sec. 6. Municipality may levy taxes for necessary expenses in excess of constitutional limitation by special legislative authority without a vote of the people. *Sing v. Charlotte*, 60. What are "special purposes" within meaning of this section is question for courts. *Power Co. v. Clay County*, 698. Courts cannot separate purposes for which tax is levied when item for which tax is levied combines several purposes. *Ibid.* Item including county attorney's fees must fail, since no special approval of Legislature therefor is given. *Ibid.* Item including "incidental expenses" must fail, since it may not be adjudicated that such expense is for necessary and special purpose. *Ibid.* Farm agent's salary is for special purpose having special approval of Legislature. *Ibid.* County accountant's salary is for special purpose having special approval of Legislature. *Ibid.* Expenses of listing taxes, holding elections and courts, caring for jail prisoners are general purposes and not special purposes. *Ibid.*

VII, VIII, sec. 1. Term "municipal corporation" should be liberally construed, and housing authority created under ch. 456, Public Laws of 1935, is a municipal corporation. *Wells v. Housing Authority*, 744.

VII, sec. 7. What are "necessary expenses" of county is question for courts. *Power Co. v. Clay County*, 698. Airport is not necessary expense of city, and it may not issue bonds for the purpose of operating, maintaining and improving its airport without a vote. *Sing v. Charlotte*, 60. Bonds for municipal power plant are for necessary expense. *Williamson v. High Point*, 96.

IX, sec. 5. Clear proceeds of fines collected by clerk of a municipal court belong to county school fund, and clerk is not entitled to retain part thereof as fees regardless of public-local laws. *Board of Education v. High Point*, 636.

XIV, sec. 7. Ch. 177, Public-Local Laws of 1931, *held* to require one person to hold two public offices, and statute is unconstitutional. *Brigman v. Baley*, 119.