NORTH CAROLINA REPORTS

VOLUME 214

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NORTH CAROLINA REPORTS
VOL. 214

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1938
FALL TERM, 1938

REPORTED BY
ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1939

CITATION OF REPORTS

Rule 46 of the Supreme Court is as follows:

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

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

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

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

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

FALL TERM, 1938.

CHIEF JUSTICE:

WALTER P. STACY.

ASSOCIATE JUSTICES:

HERIOT CLARKSON,
MICHAEL SCHENCK,
WILLIAM A. DEVIN,
M. V. BARNHILL,
J. WALLACE WINBORNE,
A. A. F. SEAWELL.

ATTORNEY-GENERAL:

HARRY MCMULLAN.

ASSISTANT ATTORNEYS-GENERAL:

T. W. BRUTON,
ROBERT H. WETTACH,
L. O. GREGORY.

SUPREME COURT REPORTER:

ROBERT C. STRONG.*

CLERK OF THE SUPREME COURT:

EDWARD MURRAY.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

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*Died March 2, 1939. Succeeded by John M. Strong.

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[1]	Sixth	Clinton.
W. C. Harris	Seventh	Raleigh.
E. H. Cranmer[2]	Eighth	Southport.
N. A. Sinclair[3]	Ninth	Fayetteville.
Marshall T. Spears[4]	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	Greensboro.
F. Donald Phillips	Thirteenth	Rockingham.
W. F. Harding[5]	Fourteenth	Charlotte.
Frank M. Armstrong	Fifteenth	Troy.
Wilson Warlick	Sixteenth	Newton.
J. A. Rousseau	Seventeenth	North Wilkesboro.
J. Will Pless, Jr.	Eighteenth	Marion.
A. Hall Johnston[6]	Nineteenth	Asheville.
Felix E. Alley, Sr.	Twentieth	Waynesville.
E. C. Bivens[7]	Twenty-first	Mount Airy.

SPECIAL JUDGES

Frank S. Hill[8]	Murphy.
Sam J. Ervin, Jr.	Morganton.
Hubert E. Olive	Lexington.

EMERGENCY JUDGES

F. A. Daniels[9]	Goldsboro.
T. B. Finley	North Wilkesboro.
P. A. McElroy	Marshall.
Walter L. Small	Elizabeth City.
N. A. Sinclair	Fayetteville.
Henry A. Grady	New Bern.
W. F. Harding	Charlotte.
E. H. Cranmer	Southport.

[1]Succeeded by Henry L. Stevens, Warsaw, 1 January, 1939.
[2]Succeeded by John J. Burney, Wilmington, 1 January, 1939.
[3]Succeeded by Q. K. Nimocks, Jr., Fayetteville.
[4]Succeeded by Leo Carr, Burlington, 1 January, 1939.
[5]Succeeded by William H. Bobbitt, Charlotte, 1 January, 1939.
[6]Succeeded by Zeb V. Nettles, Asheville, 1 January, 1939.
[7]Succeeded by Allen H. Gwyn, Reidsville, 1 January, 1939.
[8]Deceased. Succeeded by A. Hall Johnston, Skyland, 1 May, 1939.
[9]Deceased.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
HERBERT R. LEARY[1]	First	Edenton.
DONNELL GILLIAM	Second	Tarboro.
ERNEST R. TYLER	Third	Roxobel.
CLAUDE C. CANADAY	Fourth	Benson.
D. M. CLARK	Fifth	Greenville.
JAMES A. POWERS[2]	Sixth	Kinston.
WILLIAM Y. BICKETT	Seventh	Raleigh.
JOHN J. BURNEY[3]	Eighth	Wilmington.
T. A. MCNEILL[4]	Ninth	Lumberton.
LEO CARR[5]	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[6]	Seventeenth	N. Wilkesboro.
C. O. RIDINGS	Eighteenth	Forest City.
Z. V. NETTLES[7]	Nineteenth	Asheville.
JOHN M. QUEEN	Twentieth	Waynesville.
ALLEN H. GWYN[8]	Twenty-first	Reidsville.

[1]Succeeded by Chester R. Morris, Currituck, 1 January, 1939.
[2]Succeeded by J. Abner Barker, Roseboro, 1 January, 1939.
[3]Succeeded by *David Sinclair, Wilmington.*
[4]Succeeded by F. Ertel Carlyle, Lumberton, 1 January, 1939.
[5]Succeeded by William H. Murdock, Durham, 1 January, 1939.
[6]Succeeded by Avalon E. Hall, Yadkinville, 1 January, 1939.
[7]Succeeded by Robert M. Wells, Asheville, 1 January, 1939.
[8]Succeeded by R. J. Scott, Danbury, 1 January, 1939.

LICENSED ATTORNEYS

FALL TERM, 1938.

List of applicants granted law license by the North Carolina Board of Law Examiners at Raleigh, N. C., 5 August, 1938:

BASS, CLAUDE ASHLEY	Crew, Va.
BISHOP, JESSE OSCAR, JR.	Rocky Mount.
BOWMAN, JAMES C., JR.	Wadesboro.
BILISOLY, JOSEPH BOURKE	Raleigh.
BRADY, RAY BROWN	Benson.
BROOKS, ROBERT WILLIAM	Garner.
CANN, RICHARD MCDONALD	Greensboro.
CHAPMAN, GEORGE MEMORY	Greensboro.
COFFIELD, HENRY IRWIN, JR.	High Point.
CRAIGHILL, JAMES BROWN	Rocky Mount.
DANIEL, WILLIAM MATTHEWS	Wilson.
DAWES, WILLIAM REDIN	Rocky Mount.
DUNSTAN, FORREST VAUGHAN	Elizabeth City.
DURHAM, LYNN DOVER	Burlington.
EDWARDS, DANIEL KRAMER	Durham.
EDWARDS, WILLIAM DE VAULT	Rutherfordton.
FINCH, HARRY CLINTON	Wilson.
GARDNER, RALPH WEBB	Shelby.
GOODE, NEOMIAH EUGENE	Enka.
GREGORY, CLAIBORNE BARKSDALE	Durham.
HAMRICK, L. T., JR.	Asheville.
HARRIS, WILLIAM SHEARON	Raleigh.
HENDERSON, FREDERICK GUSTAVE, JR.	Monroe.
HODGE, CATHERINE CAMPBELL	Wilmington.
HOLLAND, JOHN MACK, JR.	Gastonia.
JAMES, JOHN, JR.	Charlotte.
JOSEY, ROBERT CAREY, III	Scotland Neck.
LANCASTER, NORMAN GRAY	Castalia.
LAROQUE, GEORGE PAUL	Kinston.
MASON, JAMES WALTER, JR.	Laurinburg.
MCCONNELL, ELISHA RIGGS	Davidson.
MCKIMMON, CORNELIA NORRIS	Raleigh.
NEWSOM, JAMES LONG	Durham.
PAMPLIN, JACK COLE	Reidsville.
PASCHAL, JOEL FRANCIS	Wake Forest.
POE, CHARLES AYCOCK	Raleigh.
REID, WILLIAM LEWIS, JR.	Winston-Salem.
ROBINSON, JESSE WELLS	Asheville.
SANFORD, RUFUS BROWN, JR.	Mocksville.
SCHILLER, JOHN TAYLOR	Wilmington.
SHERMER, GILBERT LEE	Wilmington.
SLEAR, JOHN KLUMP	Charlotte.
STEIN, HARRY BINDER	Fayetteville.
STUART, CARMON JACKSON	Jefferson.
SYKES, EDWARD RICHARD, JR.	Wendell.
SWAILS, JAMES BENJAMIN	Wilmington.

TEAL, FRED THOMAS.....Hoffman.
THOMAS, ROBERT FARMER.....Forest City.
TROTT, GRAHAM FOARD.....Chapel Hill.
WEST, MILLARD C.....Winston-Salem.
WHISNANT, DICKSON.....Lenoir.
YOUNG, CHARLES HOLT.....Raleigh.
ZACHARY, WALTER LEE.....Yadkinville.

COMITY LICENSEES.

BROWN, T. C.....Raleigh from Maryland.
CAMPBELL, L. L.....Asheville from Ohio.
HEYWARD, WILLIAM.....Asheville from South Carolina.
MAXWELL, RICHARD M.....Pinehurst from Michigan.
MCDERMOTT, MALCOLM.....Durham from Tennessee.
SAVAGE, ROBERT LEE, JR.....Raleigh from Virginia.

I, H. M. London, Secretary of the North Carolina Board of Law Examiners, do hereby certify that the foregoing is a true and correct copy of the list of attorneys granted license by the said Board, August 5, 1938.

Witness my hand and seal, this the 19th day of October, 1938.

(Seal.) H. M. LONDON, *Secretary.*

SUPERIOR COURTS, FALL 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

Fall Term, 1938—Judge Thompson.

Beaufort—Sept. 19* (A); Sept. 26†; Oct. 10†; Nov. 7* (A); Dec. 5†.
Camden—Oct. 3.
Chowan—Sept. 12; Dec. 12.
Currituck—Sept. 5.
Dare—Oct. 24.
Gates—Nov. 21.
Hyde—Aug. 15†; Oct. 17.
Pasquotank—Sept. 19†; Oct. 10† (A) (2); Nov. 7†; Nov. 14*.
Perquimans—Oct. 31.
Tyrrell—Oct. 3 (A).

SECOND JUDICIAL DISTRICT

Fall Term, 1938—Judge Bone.

Edgecombe—Sept. 12; Oct. 17†; Nov. 14† (2).
Martin—Sept. 19 (2); Nov. 21† (A) (2); Dec. 12.
Nash—Aug. 29; Sept. 19† (A) (2); Oct. 10†; Nov. 28*; Dec. 5†.
Washington—July 11; Oct. 24†.
Wilson—Sept. 5; Oct. 3†; Oct. 31† (2).

THIRD JUDICIAL DISTRICT

Fall Term, 1938—Judge Parker.

Bertie—Aug. 29; Nov. 14 (2).
Halifax—Aug. 15 (2); Oct. 3† (A) (2); Oct. 24* (A); Nov. 28 (2).
Hertford—July 25; Oct. 17*; Oct. 24†.
Northampton—Aug. 1; Oct. 31 (2).
Vance—Oct. 3*; Oct. 10†.
Warren—Sept. 19 (2).

FOURTH JUDICIAL DISTRICT

Fall Term, 1938—Judge Williams.

Chatham—Aug. 1† (2); Oct. 24.
Harnett—Sept. 5* (A); Sept. 19†; Oct. 3† (A) (2); Nov. 14* (2).
Johnston—Aug. 15*; Sept. 26† (2); Oct. 17 (A); Nov. 7† (A) (2); Dec. 12 (2).
Lee—July 18 (2); Oct. 31† (2).
Wayne—Aug. 22; Aug. 29† (2); Oct. 10† (2); Nov. 28 (2).

FIFTH JUDICIAL DISTRICT

Fall Term, 1938—Judge Frizzelle.

Carteret—Oct. 17; Dec. 5†.
Craven—Sept. 5*; Oct. 3† (2); Nov. 21† (2).
Greene—Dec. 5 (A); Dec. 12 (2).
Jones—Sept. 19; Dec. 12 (A).
Pamlico—Nov. 7 (2).
Pitt—Aug. 22†; Aug. 29; Sept. 12†; Sept. 26†; Oct. 24†; Oct. 31; Nov. 21† (A).

SIXTH JUDICIAL DISTRICT

Fall Term, 1938—Judge Grady.

Duplin—July 25*; Aug. 29† (2); Oct. 3*; Dec. 5† (2).
Lenoir—Aug. 22; Sept. 26†; Oct. 17; Nov. 7† (2); Dec. 12 (A).
Onslow—July 18‡; Oct. 10; Nov. 21† (2).
Sampson—Aug. 8 (2); Sept. 12† (2); Oct. 24† (2).

SEVENTH JUDICIAL DISTRICT

Fall Term, 1938—Judge Harris.

Franklin—Sept. 5†; Sept. 12† (A); Oct. 17*; Nov. 14† (2).
Wake—July 11*; Aug. 29† (A) (2); Aug. 29 (2); Sept. 5† (A); Sept. 12*; Sept. 19 (2); Sept. 26 (A); Oct. 3†; Oct. 10*; Oct. 10† (A) (2); Oct. 24† (2); Oct. 31 (A); Nov. 7*; Nov. 7† (A) (3); Nov. 14 (A) (2); Nov. 28† (2); Dec. 12* (2); Dec. 12† (A) (2).

EIGHTH JUDICIAL DISTRICT

Fall Term, 1938—Judge Cranmer.

Brunswick—Sept. 5†; Oct. 3.
Columbus—Aug. 22 (2); Oct. 10*; Nov. 21† (2).
New Hanover—July 25*; Sept. 12*; Sept. 19†; Oct. 17† (2); Nov. 14*; Dec. 5† (2).
Pender—July 18; Oct. 31 (2).

NINTH JUDICIAL DISTRICT

Fall Term, 1938—Judge Sinclair.

Bladen—Aug. 8†; Sept. 19*.
Cumberland—Aug. 29*; Sept. 26† (2); Oct. 24† (2); Nov. 21* (2).
Hoke—Aug. 22; Nov. 14.
Robeson—July 11†; Aug. 15*; Sept. 5* (2); Sept. 26* (A); Oct. 10† (2); Oct. 24* (A); Nov. 7*; Dec. 5† (2); Dec. 19*.

TENTH JUDICIAL DISTRICT

Fall Term, 1938—Judge Spears.

Alamance—Aug. 1†; Aug. 15*; Sept. 5† (2); Nov. 14† (A) (2); Nov. 28*.
Durham—July 18*; Sept. 5* (A); Sept. 12† (A); Sept. 19† (2); Oct. 10*; Oct. 24† (A); Oct. 31† (2); Dec. 5*.
Granville—July 25; Oct. 24†; Nov. 14 (2).
Orange—Aug. 22; Aug. 29†; Oct. 3†; Dec. 12.
Person—Aug. 8; Oct. 17.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Fall Term, 1938—Judge Sink.

Ashe—July 25† (2); Oct. 24*.
Alleghany—Sept. 26.
Forsyth—July 11 (2); Sept. 5 (2); Sept. 19†; Sept. 26† (A); Oct. 10 (2); Oct. 24† (A) (2); Nov. 7 (2); Nov. 21† (2); Dec. 5 (2).

TWELFTH JUDICIAL DISTRICT

Fall Term, 1938—Judge Phillips.

Davidson—Aug. 22*; Sept. 12†; Sept. 19† (A); Oct. 3† (A) (2); Nov. 21 (2).
Guilford—July 11*; Aug. 1*; Aug. 8† (2); Aug. 29† (2); Sept. 19† (A) (2); Sept. 19* (2); Oct. 3† (2); Oct. 24*; Oct. 31† (2); Nov. 14*; Nov. 21† (A) (2); Dec. 19*.

THIRTEENTH JUDICIAL DISTRICT

Fall Term, 1938—Judge Bivens.

Anson—Sept. 26*; Nov. 14†.
Moore—Aug 15*; Sept. 19†; Sept. 26† (A); Dec. 12†.
Richmond—July 18†; July 25*; Sept. 5†; Oct. 3*; Nov. 7†.
Scotland—Aug. 8; Oct. 31†; Nov. 28 (2).
Stanly—July 11; Sept. 5† (A) (2); Oct. 10†; Nov. 21.
Union—Aug. 1*; Aug. 22† (2); Oct. 17† (2).

FOURTEENTH JUDICIAL DISTRICT

Fall Term, 1938—Judge Harding.

Gaston—July 25*; Aug. 1† (2); Sept. 12* (A); Sept. 19† (2); Oct. 24*; Nov. 28* (A); Dec. 5† (2).
Mecklenburg—July 4*; July 11* (A); July 11* (2); July 18* (A) (2); Aug. 1* (A) (2); Aug. 15* (2); Aug. 29*; Aug. 29† (A) (2); Sept. 5† (2); Sept. 12† (A) (2); Sept. 26† (A) (2); Oct. 3*; Oct. 10† (2); Oct. 10† (A) (2); Oct. 24† (A) (2); Oct. 31† (2); Nov. 7† (A) (2); Nov. 14*; Nov. 21† (2); Nov. 21† (A) (2); Dec. 5† (A) (2); Dec. 5* (A) (2).

FIFTEENTH JUDICIAL DISTRICT

Fall Term, 1938—Judge Armstrong.

Alexander—Aug. 29 (A) (2).
Cabarrus—Aug. 22*; Aug. 29†; Oct. 17 (2).
Iredell—Aug. 1 (2); Nov. 7 (2).
Montgomery—July 11; Sept. 26†; Oct. 3; Oct. 31†.
Randolph—July 18† (2); Sept. 5*; Dec. 5 (2).
Rowan—Sept. 12 (2); Oct. 10†; Oct. 17† (A); Nov. 21 (2).

SIXTEENTH JUDICIAL DISTRICT

Fall Term, 1938—Judge Warlick.

Burke—Aug. 8 (2); Sept. 26† (3); Dec. 12 (2).
Caldwell—Aug. 22 (2); Nov. 28 (2).
Catawba—July 4 (2); Sept. 5† (2); Nov. 14*; Nov. 21†; Dec. 5† (A).
Cleveland—July 25 (2); Sept. 12† (A) (2); Oct. 31 (2).
Lincoln—July 18; Oct. 17† (2).
Watauga—Sept. 19.

SEVENTEENTH JUDICIAL DISTRICT

Fall Term, 1938—Judge Rousseau.

Avery—July 4*; July 11† (2); Oct. 17*; Oct. 24†.
Davie—Aug. 29; Dec. 5†.
Mitchell—July 25† (2); Sept. 19 (2).
Wilkes—Aug. 8 (2); Oct. 3† (2); Oct. 31† (2).
Yadkin—Aug. 22*; Dec. 12† (2).

EIGHTEENTH JUDICIAL DISTRICT

Fall Term, 1938—Judge Pless.

Henderson—Oct. 10 (2); Nov. 21† (2).
McDowell—July 11† (2); Sept. 5 (2).
Polk—Aug. 22 (2).
Rutherford—Sept. 26† (2); Nov. 7 (2).
Transylvania—July 25 (2); Dec. 5 (2).
Yancey—Aug. 8 (2); Oct. 24† (2).

NINETEENTH JUDICIAL DISTRICT

Fall Term, 1938—Judge Johnston.

Buncombe—July 11† (2); July 25; Aug. 1† (2); Aug. 15; Aug. 29; Sept. 5† (2); Sept. 19; Oct. 3† (2); Oct. 17; Oct. 31; Nov. 7† (2); Nov. 21; Dec. 5† (2); Dec. 19.
Madison—Aug. 22; Sept. 26; Oct. 24; Nov. 28.

TWENTIETH JUDICIAL DISTRICT

Fall Term, 1938—Judge Alley.

Cherokee—Aug. 8 (2); Nov. 14 (2).
Clay—Oct. 31 (A).
Graham—Sept. 5 (2).
Haywood—July 11 (2); Sept. 19† (2); Nov. 21 (2).
Jackson—Oct. 10 (2).
Macon—Aug. 22 (2); Dec. 5 (2).
Swain—July 25 (2); Oct. 24 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Fall Term, 1938—Judge Clement.

Caswell—July 4; Nov. 14 (2).
Rockingham—Aug. 8 (2); Sept. 5 (2); Oct. 24; Oct. 31 (2); Nov. 28† (2); Dec. 12*.
Stokes—Aug. 22; Oct. 10*; Oct. 17†.
Surry—July 11† (2); Sept. 19*; Sept. 26† (2); Dec. 19*.

*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; ELIZABETH HENNESSEE, Deputy Clerk.

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.

CASES REPORTED

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1938

HOME REAL ESTATE, LOAN AND INSURANCE COMPANY, AGENTS FOR WM. JAEGER, v. MR. AND MRS. LOCKER OR JOSEPH LAKEY AND A. B. CUMMINGS (SURETY).

(Filed 15 June, 1938.)

1. Landlord and Tenant § 25: Parties § 1—

A rental agent may not maintain a suit in ejection or for the collection of rents, the owner being the real party in interest, C. S., 446, and this rule is not changed by C. S., 2367.

2. Limitation of Actions § 11—Joinder of new party plaintiff constitutes new action as to such party, and his action does not relate back.

Suit was instituted by a rental agent in a justice's court to recover rent in arrears when defendant tenant vacated the premises. Upon appeal to the Superior Court, the owner was joined as additional party plaintiff, C. S., 547. *Held:* The owner was the real party in interest, C. S., 446, and as to him the amendment constituted a new cause of action against defendant, and his action does not relate back to the date of the institution of the original action, and the joinder being made more than three years after the due date of the rent, defendants' plea of the statute of limitations is good, and their motion to nonsuit should have been allowed.

APPEAL by defendants from *Hill, J.*, at January-February Term, 1938, of FORSYTH. Reversed.

The plaintiff William Jaeger is the owner of an apartment building in Winston-Salem, and the plaintiff Home Real Estate, Loan and Insurance Company is the rental agent in charge of said building for the purpose of leasing same and collecting rent therefor. Said agent leased

an apartment in said building to Mrs. J. Locker 15 March, 1931. Said lease was signed by and in the name of William Jaeger. On 20 August, 1931, Mrs. Locker vacated the premises and was at that time in arrears in rent in amount of $50.00. The rental agent instituted an action before a magistrate for the recovery of the rent 21 August, 1931, and in connection therewith sued out a writ of attachment under which the furniture moved from said premises by the defendants was attached. The magistrate rendered judgment in favor of the plaintiff and the defendants appealed to the Superior Court.

The cause came on for hearing in the court below 2 February, 1938. When the case was called for trial motion was made that William Jaeger be made a party plaintiff. This motion was allowed and a formal order was signed making the said William Jaeger a party plaintiff 5 February, 1938. Upon the making of William Jaeger a party plaintiff the defendants set up and pleaded the three-year statute of limitation in bar of plaintiff's right to recover.

Issues were submitted to the jury on plaintiffs' cause of action and the court charged the jury on the third issue directed to the defendants' plea of the statute of limitations as follows: "The court instructs you that in the light of all the evidence in this case, if you believe it and find the facts to be as the evidence tends to show, and reach the third issue, it would be your duty to answer that issue 'No.'"

The issues were answered in favor of the plaintiffs. The defendants excepted to the judgment thereon and appealed.

No counsel for plaintiffs.

A. B. Cummings for defendants, appellants.

BARNHILL, J. Actions must be instituted in the name of the real party in interest. C. S., 446. *Rogers v. Gooch,* 87 N. C., 442; *Rental Co. v. Justice,* 211 N. C., 54; *Ballinger v. Cureton,* 104 N. C., 474.

The provisions of C. S., 2367, do not modify this rule in relation to suits in ejectment or for the collection of rents. *Rental Co. v. Justice, supra; Martin v. Mask,* 158 N. C., 436.

The court has the power to make additional parties plaintiff or defendant. C. S., 547. However, when the court makes a new party plaintiff it constitutes a new action against the defendant as to the new party and the action as to him does not relate back to the date of the institution of the original cause so as to deprive the defendants of the right to plead the statute of limitations in bar of recovery in such action. *Goodwin v. Fertilizer Works,* 123 N. C., 162; *Reynolds v. R. R.,* 136 N. C., 345; *Sams v. Price,* 121 N. C., 392; *Fishell v. Evans,* 193 N. C., 660.

The cause was instituted 21 August, 1931, and the real party in interest was made a party plaintiff on 2 February, 1938, more than six years after the rents for which this suit was instituted became due. As the rental agent was not authorized to maintain this action and the real party in interest was made a party plaintiff more than three years after the maturity date of the amount which is the subject matter of the suit, it follows that the plea of the statute of limitations by the defendants is good. The charge of the court on the third issue was erroneous. The defendants' motion to nonsuit should have been allowed.

Judgment should be entered dismissing the action at the cost of the plaintiffs.

Reversed.

C. P. THOMPSON v. CLARENCE W. ANGEL AND WIFE, FRANCES P. ANGEL.

(Filed 15 June, 1938.)

Trial § 6—Remark of court that law invoked by defendants was a bad law held prejudicial error entitling defendants to a new trial.

A remark of the court during the conduct of the trial and in the hearing of the jury, to the effect that the very law upon which defendants predicated their defense was a bad law, is prejudicial error which may not be cured by a later statement that the court's personal disagreement with the law did not render it any the less effective as the law of the land to be respected and obeyed by the court and the jury, and a new trial is awarded on defendants' appeal.

APPEAL by defendants from *Sink, J.*, at September Term, 1937, of GUILFORD. New trial.

Frazier & Frazier for plaintiff, appellee.
Spencer B. Adams and Moseley & Holt for defendants, appellants.

SCHENCK, J. This is an action to recover a deficiency judgment after sale of real property by a trustee in a deed of trust at which sale the plaintiff, the holder of the obligation secured by said deed of trust, became the purchaser, and wherein the defendants, trustors and makers of the obligation, whose property was purchased at said foreclosure sale and against whom the deficiency judgment is sought, alleged and offered evidence tending to show as a matter of defense and set-off that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale, and that the amount bid at said sale was substantially less than the true value of the property sold. Sec. 3, ch. 275, Public Laws 1933 (N. C. Code of 1935 [Michie], sec. 2593d).

When the defendants offered their evidence tending to show the value of the real estate sold under foreclosure at the time of the foreclosure there was some discussion as to its competency, but the court finally ruled that the evidence was competent, and "In doing so, the court said, in the presence and hearing of the jury and during the progress of the trial, 'I looked for it myself. I still think it is bad law but it is the law of the land.' To which said remark in the presence and hearing of the jury and during the progress of the trial, to wit, that it was bad law, the defendants and each of them in apt time duly excepted, stating in making said exception that it had been decided by the Supreme Court of North Carolina and the Supreme Court of the United States that it was good law. Exception No. 7.

"Whereupon, the court stated to the jury: 'Gentlemen of the jury, the defendants through their attorneys of record except to the remark of the court that the court thought that the law we have been discussing was bad law. That is quite proper. This court reasserts that it thinks it is bad law, and I instruct you, or rather it instructs you, as it has heretofore, that it is immaterial what this court thinks about it, and it is immaterial what you think about it. It is the law of the land and should be respected and will be respected by this court, and shall be by you. There are many things in the law that one may disagree with personally. This happens to be one that this court disagrees with; but we took a recess yesterday afternoon to find out what the law was, and, in order that this court might tell you, gentlemen of the jury, what the law is. It turned out to be something personally that the court disagrees with. That does not make (it) any the less effective as the law of the land to be respected and obeyed by you and by this court.' To the instruction subsequently given and the statements in their entirety, the defendants again except. Exception No. 8."

Exceptions 7 and 8 are made the bases for exceptive assignments of error, which we think, and so hold, should be sustained.

As was said in *Perry v. Perry,* 144 N. C., 328, quoting Mr. Thompson in his work on Trials, sec. 218, "Any remarks of the presiding judge, made in the presence of the jury, which have a tendency to prejudice their minds against the unsuccessful party will afford grounds for a reversal of the judgment."

Adams, J., in *S. v. Bryant,* 189 N. C., 112, writes: "'No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon.' C. S., 564. In terms, this statute refers to the charge, but it has always been construed as including the expression of any opinion, or even an intimation by the judge, at any time during the trial, which is calculated to prejudice either of the

parties. *Morris v. Kramer,* 182 N. C., 87, 91. And when once expressed, such opinion or intimation cannot be recalled. In the case last cited, the Court said: 'When the damage is once done, it cannot be repaired, because, as we know, the baneful impression on the minds of the jury remains there still.' "

The remark of the trial judge to the effect that he thought the very law upon which the defendants predicated their defense was a bad law we apprehend had a tendency to prejudice the minds of the jury against such law and thereby against the defendants who were invoking it, and "the baneful impression" created upon the minds of the jury remained notwithstanding the instruction of the judge that his personal disagreement with the law "does not make (it) any the less effective as the law of the land to be respected and obeyed by you and by this court."

For the errors assigned there must be a

New trial.

STATE v. TOMMIE BRADSHAW, ALIAS THOMAS BRADSHAW.

(Filed 15 June, 1938.)

Bastards § 7—Proceedings under ch. 228, Public Laws of 1933, must be instituted within three years next after birth of child.

A proceeding upon indictment charging defendant with willful neglect and refusal to support his illegitimate child, instituted more than three years after the birth of the child, is properly dismissed, ch. 228, Public Laws of 1933, sec. 3, and this result is not affected by the fact that defendant had admitted paternity of the child in a prior proceeding under C. S., 265-279, the limitation provided in sec. 3 of the Act of 1933 not being confined to proceedings to establish the paternity of the child.

APPEAL by State from *Williams, J.,* at February Term, 1938, of ALAMANCE.

Proceeding upon indictment charging the defendant with willful neglect and refusal to support illegitimate child begotten by him of Lola May Price.

The essential facts set out in the special verdict, from which the State appeals, follow:

1. The child in question was "born during the month of September, 1933."

2. On 21 August, 1933, a warrant was sworn out by Lola May, mother of the child, charging the defendant with the offense of bastardy under C. S., 265-279. In this case, the defendant admitted the charge and was ordered to pay the mother of the child the full sum of $200, which he did.

3. Thereafter, on 5 March, 1934, the county superintendent of public welfare swore out a warrant against the defendant charging him with the willful neglect and refusal to support his illegitimate child in violation of ch. 228, Public Laws 1933. The defendant's plea of former jeopardy was sustained in the trial court. Notice of appeal was entered, but the appeal was not perfected.

4. On 5 June, 1937, Lola May Price (then married), mother of the child, obtained a warrant in the present proceeding. A true bill was returned at the November Term, 1937, and special verdict rendered at the February Term, 1938, upon which the defendant was adjudged not guilty.

The State appeals, assigning error.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Willis for the State, appellant.

J. Elmer Long and Clarence Ross for defendant, appellee.

STACY, C. J. It was held in *S. v. Mansfield,* 207 N. C., 233, 176 S. E., 761, that a judgment under the prior bastardy statutes after their repeal by ch. 228, Public Laws 1933, and with which the defendant had failed to comply, would not defeat a proceeding under the latter act.

It was also held in *S. v. Johnson,* 212 N. C., 566, that the offense created by ch. 228, Public Laws of 1933, is a continuing one, and that a prior proceeding would not defeat a subsequent one for a later violation.

In the instant case, the plea is interposed that the proceeding is barred by section 3 of the act which provides: "Proceedings under this act may be instituted at any time within three years next after the birth of the child, and not thereafter."

It is not perceived wherein this section can be limited to proceedings to establish paternity as the State contends. Its language is clear, positive and unbending. It seems to have been taken from C. S., 274, of the old law, which was held to supersede the general statute of limitations on the subject. *S. v. Perry,* 122 N. C., 1043, 30 S. E., 139; *S. v. Hedgepeth, ibid.,* 1039, 30 S. E., 140.

Section one of the act in question provides that any parent who willfully neglects or refuses to support and maintain his or her illegitimate child "shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided." A child is defined as any person less than fourteen years of age, whom either parent might be required to support and maintain if such child were the legitimate child of such parent. Ch. 432, Public Laws 1937.

What are the penalties thereinafter provided? These are set out in section 7 of the act. *S. v. Mansfield, supra.*

It is provided in section 6 that the court shall first try the issues of paternity and willful neglect or refusal to support. If these be deter-

mined in the affirmative, "the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the particular child," and "shall require the defendant to pay it either as a lump sum or in periodic payments as the circumstances of the case may appear to the court to require."

It is evidently contemplated by the statute that proceedings may be instituted at any time within three years next after the birth of the child, and not thereafter; that issues of paternity and nonsupport shall first be determined; that a specific sum shall then be fixed for maintenance, and that the case shall be left open for such modification or increase as the circumstances, thereafter appearing, may warrant.

It is further provided in section 7 that "for the purpose of enforcing payment of the sum fixed," the court may issue orders of a civil or criminal nature, or both, as specified therein, including imprisonment "for a term not to exceed six months," and modify the same from time to time as the circumstances of the case may require.

Whether the procedural provisions of the statute have been given due consideration in some of our former decisions, we need not now decide.

The proceeding was properly dismissed upon the special verdict.

No error.

NUMA E. KNIGHT v. FORD BODY COMPANY ET AL.

(Filed 15 June, 1938.)

1. Master and Servant § 42—Industrial Commission may review award for changed condition upon petition filed within year from last payment.

Claimant was awarded compensation, and payments thereunder were made from time to time. Thereafter the Industrial Commission, upon application of the interested parties, ordered payment of a lump-sum award, which was made. Within a year from the last payment, claimant filed petition for review of award for changed condition. *Held:* The petition for review for changed condition was filed within the time allowed, ch. 120, Public Laws of 1929, as amended by ch. 274, Public Laws of 1931, N. C. Code, 8081 (bbb), and the award by the Commission of additional compensation for total disability upon its finding, supported by evidence, that claimant had experienced a change in his condition since the last award, will be upheld by the courts.

2. Master and Servant § 55d—

When there is ample evidence to support a finding of a change in claimant's condition as contemplated by N. C. Code, 8081 (bbb), and evidence which would support a contrary finding, the finding of the Industrial Commission from the conflicting evidence is conclusive.

KNIGHT *v.* BODY CO.

APPEAL by defendants from *Hill, Special Judge,* at February Term, 1938, of GUILFORD.

Proceeding under Workmen's Compensation Act to review award on ground of change in condition.

On 3 October, 1934, while in the employ of Ford Body Company, the plaintiff received an injury to his left hand; blood poison set in; and as a consequence he lost the use of his arm from the elbow down.

Compensation was agreed upon and approved by the North Carolina Industrial Commission on 13 November, 1934. Payments were accordingly made from time to time, and thereafter, on 6 January, 1936, the Industrial Commission received from the interested parties an application for a lump-sum award, which was approved 20 February, 1936, and payment made four days later.

On 5 January, 1937, the plaintiff filed his petition for a review of the award on the ground of a change in his condition, alleging that the poison which set in from the accident of 3 October, 1934, had never been completely removed from his system, and that other portions of his body had lately become involved.

The hearing Commissioner made findings which were later adopted and approved by the Full Commission. The pertinent ones follow:

"1. Under an agreement that can be found in the record compensation has been paid in this case to 16 February, 1936.

"2. The defendants are contending that disability as a result of the accident terminated on or about that date. Plaintiff is contending that he has had a change of condition and that he has been totally disabled since 1 January, 1937. He contends that he is suffering as a result of his accident from a disease known as Buerger's Disease.

"The record contains the testimony of several experts, including Dr. Bullitt, pathologist at the University of North Carolina.

"3. From all the evidence in the record the Commissioner finds as a fact that the plaintiff at the present time is totally disabled and that he has been totally disabled since January of 1937; that he has had a change of condition; that his condition at this time has been caused by the injury by accident suffered while employed, and the Commissioner orders that compensation payments be resumed as of 1 January, 1937."

From the award of the Full Commission, the defendants appealed to the Superior Court, where the award was affirmed, and from this ruling the defendants appeal, assigning errors.

E. D. Kuykendall, Jr., and E. D. Broadhurst for plaintiff, appellee.

Ruark & Ruark and Henderson & Henderson for defendants, appellants.

STACY, C. J. The last payment of compensation under the previous award was made in February, 1936, and the petition for review on

ground of change in condition was filed 5 January, 1937. This is within the year as contemplated by section 46 of the Workmen's Compensation Act, ch. 120, Public Laws 1929, as amended by ch. 274, Public Laws 1931, which provides that "no such review shall be made after twelve months from the date of the last payment of compensation pursuant to an award under this article." N. C. Code of 1935 (Michie), 8081 (bbb); *Lee v. Rose's Stores,* 205 N. C., 310, 171 S. E., 87.

The finding is that plaintiff has experienced a change in his condition since the last award, growing out of the injury of 3 October, 1934, and that he has been totally disabled since January, 1937. It is a reasonable inference, if not a direct finding of the hearing Commissioner, approved by the Full Commission, that plaintiff's total disability occurred 1 January, 1937, as compensation payments were ordered to be resumed as of that date.

There is ample evidence to support the finding of a change in plaintiff's condition as contemplated by the act. *Smith v. Swift & Co.,* 212 N. C., 608; *Butts v. Montague Bros.,* 208 N. C., 186, 179 S. E., 799. There is also evidence which would have supported a contrary finding. *Allen v. Mottley Const. Co.,* 170 S. E. (Va.), 412. With this conflict, however, we are not concerned. It is fully established by numerous decisions that the findings of fact made by the Industrial Commission, if supported by competent evidence, are conclusive on appeal, and they are not subject to review by the courts. *Carlton v. Bernhardt-Seagle Co.,* 210 N. C., 655, 188 S. E., 77; *Swink v. Asbestos Co., ibid.,* 303, 186 S. E., 258; *Bryson v. Lumber Co.,* 204 N. C., 664, 169 S. E., 276.

It results, therefore, that the judgment must be upheld.

Affirmed.

STATE v. JACKSON HARVEY.

(Filed 15 June, 1938.)

1. Rape § 8—

Evidence in this prosecution *held* sufficient to be submitted to the jury on the charge of rape.

2. Criminal Law § 50—Court may question witnesses to clarify testimony, but must not express opinion on the facts by manner or word.

The court must not express an opinion on the facts, directly or indirectly, by word or manner, either in the conduct and course of the trial or in the charge, C. S., 564, but exceptions to questions propounded by the court to witnesses in order to obtain a proper understanding and clarification of their testimony, or to bring out some fact overlooked, will not be sustained when it appears that the questions were not unfair and care was used not to influence the jury.

3. Criminal Law § 53g—

When the court's statement of the contentions of the State is supported by the testimony, defendant's exception thereto on the ground that the language used unduly emphasized the State's evidence will not be sustained when the matter was not called to the court's attention in apt time.

4. Criminal Law § 77c—Regularity will be presumed with record does not affirmatively show to the contrary.

When the record does not affirmatively show either the absence or presence of defendant's arraignment and plea, the presumption is in favor of regularity, and defendant's objection thereto will not be sustained, certainly when case on appeal contains an affirmative statement by the judge that defendant's plea, in the time-honored form upon arraignment, was duly entered before the trial was begun.

5. Criminal Law § 53b—

Exception to the court's ruling, during argument of counsel, that certain witnesses had testified not only in corroboration but also to other facts, *held* without merit, since the record supports the ruling of the court.

APPEAL by defendant from *Phillips, J.*, at December Term, 1937, of FORSYTH. No error.

The defendant was convicted of the capital felony of rape and appeals from judgment imposing sentence of death.

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

Jno. D. Slawter and Richmond Rucker for defendant.

DEVIN, J. The evidence offered at the trial was sufficient to establish all the elements of the crime charged in the bill of indictment, and defendant's motion for judgment as of nonsuit was properly denied.

In the case on appeal defendant assigns as error that the presiding judge during the trial propounded numerous questions, some of them leading, to the prosecuting witness and to another State's witness, and that this examination of the witnesses by the court, after they had been examined and cross-examined by counsel, had the effect of intimating to the jury an opinion on the part of the judge that certain facts material to the case had been sufficiently proven, and the defendant contends that he was prejudiced thereby in the eyes of the jury. However, upon examination of the entire record of the evidence, it is apparent that the questions complained of were asked for the purpose of ascertaining definitely the meaning of the witnesses' testimony in certain particulars, and were not unfair to the defendant and hence afford no just ground upon which to predicate prejudice.

The court recently has had occasion to consider the matter of the effect of questions propounded to a witness by a presiding judge, and attention was called to the fact that the inhibition of the statute against

the expression of an opinion on the facts extends to the intimation of an opinion by interrogation as well as by statement or action. *S. v. Bean,* 211 N. C., 59; *S. v. Winckler,* 210 N. C., 556, 187 S. E., 792; *S. v. Oakley,* 210 N. C., 206, 186 S. E., 244; *S. v. Hart,* 186 N. C., 582, 120 S. E., 345; *S. v. Bryant,* 189 N. C., 112, 126 S. E., 107. The statute, forbidding judges in charging the jury from giving an opinion whether a fact has been fully or sufficiently proven, was enacted in 1796, and has remained unchanged to this day. It is now codified as section 564 of the Consolidated Statutes. This statute has reflected the settled policy of the State from the beginning in regard to the conduct of trials, and expresses the jealous care of the people at all times for the impartiality and independence of jury trials and against encroachments upon the exclusive function of the jury to determine issuable facts, uninfluenced even by the presiding judge. This Court has applied this rule to many varying instances of judicial language, whether in the charge to the jury or in comments to or concerning witnesses in the presence and hearing of the jury, beginning with *Reel v. Reel,* 9 N. C., 63, and extending to the latest volume of our reports. *Thompson v. Angel, ante,* 3.

While there are times, in the course of the trial, when the presiding judge, in order to obtain a proper understanding and clarification of what the witness has said or meant to say, or to bring out some fact overlooked, may and should propound competent questions, care should be exercised to prevent by manner or word what may be understood by the jury as the indirect expression of an opinion on the facts.

The defendant also assigns error in a portion of the charge of the court, wherein certain of the State's contentions were stated, and complains that the language used gave undue emphasis to the State's evidence, but the record does not disclose that the court's attention was called to this at the time, and from an examination of the charge it would seem that the statements to which exception was noted were based upon the testimony offered, and that in this respect the defendant has no substantial ground of complaint.

In his brief defendant further assails the judgment on the ground that the record does not affirmatively show defendant's arraignment and plea. However, the record proper does not show, as a matter of fact, the absence of arraignment and plea, and in the judge's preliminary statement to the jury, in his charge, it is made to appear that "the defendant has entered a plea of not guilty to this bill of indictment (which the judge had just read to the jury), and for his trial has placed himself upon God and his country." The record being apparently silent, regularity would ordinarily be presumed, but in addition the case on appeal brought up by the defendant contains the affirmative statement by the judge that the defendant's plea, in the time-honored form upon arraignment, was duly entered before the trial was begun.

The exception noted to the ruling of the court, during the argument to the jury, that certain witnesses had testified not only in corroboration but also to other facts, is without merit. The record of the testimony of the witnesses supports the ruling of the court.

There was competent evidence of the commission by the defendant of the crime charged, sufficient to warrant the submission of the case to the jury. There was no error in the trial. The verdict of the triers of the facts must be upheld, and the judgment affirmed.

No error.

SAFE BUS v. A. J. MAXWELL, COMMISSIONER OF REVENUE.

(Filed 15 June, 1938.)

Taxation § 27—

Sec. 203 of the Revenue Act of 1933, N. C. Code, 7880 (111), imposing a franchise tax of six per cent of the total gross earnings on business therein enumerated, does not apply to the operation of buses for hire within a city, even though operated on definite routes, unless used in connection with or in substitution for a street railway.

APPEAL by plaintiff from *Phillips, J.,* at February Term, 1938, of FORSYTH. Reversed.

Action to recover certain franchise taxes paid under protest.

Efird & Liipfert, Price & Jones, and John J. Ingle for plaintiff.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Willis for defendant.

DEVIN, J. The plaintiff corporation operates on the streets of Winston-Salem forty-one automobile buses for the transportation of Negro passengers for compensation, over fixed routes, according to city ordinance.

For the years 1933 to 1936, inclusive, the plaintiff paid, and the defendant accepted, license tax under ch. 375, Public Laws 1933 (codified in Michie's Code as sec. 2621 [29]), which imposed tax on the following basis: " 'For hire' passenger vehicles shall be taxed at a rate of $1.90 per hundred pounds of weight."

The defendant Commissioner of Revenue has now assessed franchise taxes against the plaintiff for these years under sec. 203 of the Revenue Act of 1933 (codified in Michie's Code as section 7880 [111]). The pertinent portion of this section is as follows: "Sec. 203. Franchise or Privilege Tax, Electric Light, Power, Street Railway, Gas, Water, Sewerage, and Other Similar Public Service Companies Not Otherwise

Taxed. (1) Every person, firm or corporation, domestic or foreign, other than municipal corporations, engaged in the business of furnishing electricity, electric lights, current, power or gas, owning and/or operating a water or public sewerage system, or owning and/or operating a street railway, including automobile buses, for the transportation of freight or passengers for hire shall annually . . . make and deliver to the Commissioner of Revenue . . . a report and statement . . . containing the following information: (a) Such person, firm, or corporation shall pay an annual franchise or privilege tax of six per cent of the total gross earnings. . . ."

The plaintiff paid the franchise tax under protest and now seeks to recover back the amount paid therefor, contending that section 203 of the Revenue Act is inapplicable to the character and method of its operations.

The determination of the question here presented involves a construction of section 203 of the Revenue Act of 1933 (chapter 445). Section 203 appears in the Revenue Act of 1935 (chapter 371) in identical language. If this section applies to plaintiff's operations, plaintiff is not entitled to recover the amount assessed and paid. If the section is not applicable, then plaintiff has been required to pay taxes not lawfully assessed, and this action is well founded.

It is apparent that section 203 is primarily intended to fix the basis of taxation and to impose the rate to be paid by public utilities. It in terms applies to those engaged in the business of furnishing electricity, electric current, or gas, or operating a water system, or owning and operating, or merely operating, a street railway, including automobile buses, for the transportation of freight or passengers for hire, and requires reports of annual earnings and the payment of six per cent on total gross earnings. An examination of the Revenue Acts for several years prior to 1933 shows that section 203 had been biennially reënacted in substantially the same form until the Act of 1933 inserted the phase "including automobile buses" after the words "street railway," doubtless because automobile buses were then being largely substituted for street cars on rails, and it was intended that the tax on electric companies operating street railways should also be imposed when those companies operating automobile buses in connection therewith or in substitution therefor.

The contention of the Attorney-General that the addition to section 203 of the words "including automobile buses" has the effect of imposing the franchise tax of six per cent on gross earnings upon one operating automobile buses, whether connected with a street railway or not, finds some support from an analysis of the language used. However, upon consideration of both taxing statutes involved in this action, we reach the conclusion that section 203 of the 1933 Revenue Act was not intended

to apply to "for hire" passenger vehicles, even though operated on definite routes, unless used in connection with or in substitution for a street railway. The phrase "including automobile buses" appears to have been inserted parenthetically to modify the term "street railway" and as incident or pertinent thereto.

It may be noted that in the Revenue Act of 1937, section 203 has been amended so that this question will not likely arise again.

The ruling of the court below upon the facts agreed, that the plaintiff was not entitled to recover the franchise taxes paid under protest, must be held for error, and the judgment

Reversed.

W. P. BENNER AND WIFE, BETTIE F. BENNER v. J. S. PHIPPS AND C. J. McDONALD, SHERIFF OF MOORE COUNTY.

(Filed 15 June, 1938.)

1. Evidence § 6—

Ordinarily, the burden of proof is on the party asserting the affirmative of the issue.

2. Bankruptcy § 9—Bankrupt has burden of proving that creditor's claim was included in schedule or that he had actual knowledge of proceedings.

This action was instituted by debtor who had been discharged in bankruptcy to perpetually enjoin the issuance of execution on a judgment upon his allegations that his schedule in bankruptcy had been amended to include the judgment in time for the creditor to prove his claim and notice thereof issued to the creditor, and that the creditor had actual knowledge of the bankruptcy proceedings in time to have proved his claim. *Held:* The burden of proof on the issue of the amendment of the schedule and on the issue of the creditor's actual knowledge was properly placed on the debtor, since he alleged the affirmative on both issues. Ch. 3, sec. 17 (a), subsec. 3, Act of Congress of 1898 (30 Stat. L., 550).

APPEAL by the plaintiffs from *Phillips, J.*, at February Term, 1938, of MOORE. No error.

H. F. Seawell, Sr., for plaintiffs, appellants.

M. G. Boyette and Sapp & Sapp for defendants, appellees.

SCHENCK, J. This is an action to perpetually enjoin the defendants from procuring execution to levy on the property of the plaintiffs by virtue of a judgment obtained by the defendant Phipps against the plaintiffs. It is alleged by the plaintiffs, and all of the evidence tends to prove, that the defendant Phipps obtained judgment in Guilford

County against the plaintiffs for $496.95 in April, 1929, and that said judgment was docketed in Moore County in May, 1929; that the plaintiffs filed voluntary petitions in bankruptcy in October, 1929, and in April, 1930, were discharged in bankruptcy. Plaintiffs allege that the judgment of the defendant Phipps was inadvertently omitted from the original schedule of creditors filed in the bankrupt court by the plaintiffs, but that subsequently the schedule was amended so as to include said judgment and notice thereof was duly given to the defendant Phipps, and that defendant Phipps had actual knowledge of the proceedings in bankruptcy in time to file his claim. The defendant Phipps denies that the schedule of creditors was ever amended so as to include his judgment against the plaintiffs and that notice thereof was given to him, and also denies that he had actual knowledge of the proceeding in bankruptcy in time to file his claim.

The issues submitted and answers made thereto were as follows:

"1. Were the plaintiffs discharged in bankruptcy after defendant's provable claim was due and owing by the plaintiffs to the defendants, as alleged? Answer: 'Yes.'

"2. Was the schedule in said bankruptcy proceedings so amended as to include the claim of the defendant J. S. Phipps in time for him to have proved his claim and notice thereof issued to the defendant J. S. Phipps, as alleged? Answer: 'No.'

"3. Did the defendant J. S. Phipps have actual knowledge of the bankruptcy proceeding involved in time to have proved his claim, as alleged? Answer: 'No.'"

The first issue was answered by consent.

The plaintiffs, appellants, assail by exceptive assignments of error the charge of the court for the reason that it placed upon them the burden of proof on the second and third issues. We are of the opinion, and so hold, that these assignments of error cannot be sustained.

Chapter 3, section 17a, subsection (3), of the Act of Congress of 1898 (30 Stat. L. 550), is as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as 1. (not here material). 2. (not here material). 3. Have not been duly scheduled in time for proof and allowance with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy, or 4. (not here material)."

As to the second issue: The plaintiffs admit that the defendant Phipps' judgment was omitted from their original schedule but allege that said original schedule was so amended as to include said judgment, and that notice was duly given to said Phipps. This allegation was denied by the defendants.

"It is a fundamental rule of evidence that the burden is on the party who asserts the affirmative of the issue. *Walker v. Carpenter,* 144

N. C., 674; *Poindexter v. Call,* 182 N. C., 366. The burden of the issue, that is, the burden of proof in the sense of establishing the issue as distinguished from the act of going forward and producing evidence, does not shift from one party to the other. *Cotton Oil Co. v. R. R.,* 183 N. C., 95; *Speas v. Bank,* 188 N. C., 524; *Hunt v. Eure,* 189 N. C., 482. This is not a case in which the subject matter of a negative averment is peculiarly within the knowledge of the opposing party. *Hosiery Co. v. Express Co.,* 184 N. C., 478." *Stein v. Levins,* 205 N. C., 302, 306.

As to the third issue: This issue presents the question as to whether the plaintiffs have brought the defendant Phipps within the last provision in the third exception of the general law by establishing that he had actual knowledge of the proceedings in bankruptcy in time to have proved his claim. Again the allegation is made by the plaintiffs and the rule that the burden of proof is upon him who asserts the affirmative of the issue is applicable.

In *Hill v. Smith,* 260 U. S., 592 (67 L. Ed., 419), in reference to the section of the Federal statute above quoted, it is said: "We agree with the court below that justice and the purpose of the section justify the technical rule that if the debtor would avoid the effect of his omission of a creditor's name from his schedules, he must prove the facts upon which he relies."

We have examined the other exceptions to the charge and to the admission and exclusion of evidence and find no reversible error.

The judgment below declaring the judgment of the defendant Phipps against the plaintiffs to be "in full force and effect to the same extent as if W. P. Benner and Bettie F. Benner, his wife, had not heretofore been adjudicated bankrupt," and dissolving and vacating the restraining order theretofore issued, must be affirmed, since on the record we find

No error.

BERTHA WOODS, E. D. STUBBS AND PEARL GAITHER, ADMINISTRATRIX OF VERSAL JOHNSON, DECEASED, v. MADIE B. HALL, LEROY HALL, ELEANOR HALL, EDNA F. HALL, WILLIE HALL KENNEDY AND HUSBAND, HAROLD KENNEDY, AND MADIE B. HALL, EXECUTRIX OF H. H. HALL, DECEASED.

(Filed 15 June, 1938.)

Negligence § 4f—Evidence held insufficient to show statutory duty on defendant owners to provide two exits from sleeping quarters.

These actions to recover for personal injuries and for wrongful death resulting from a fire in defendants' building, the third floor of which was rented for sleeping quarters, were founded on sec. 4, ch. 149, Public Laws of 1923 (C. S., 6081), upon allegations that defendants failed to have two

exits from the sleeping quarters in case of fire. All the evidence tended to show that the building was constructed prior to 1913, and there was no evidence that the Insurance Commissioner ever deemed practical that the building should be provided with any additional ways of egress in order that the dangers existing should be terminated. *Held:* Defendants' motion to nonsuit was properly allowed, since plaintiffs fail to bring themselves within subsecs. 1 or 2 of sec. 4 of the statute relied upon.

APPEAL by the plaintiffs from *Bivens, J.,* at October Term, 1937, of FORSYTH. Affirmed.

Elledge & Wells and Williams & Bright for plaintiffs, appellants.
Parrish & Deal and Price & Jones for defendants, appellees.

SCHENCK, J. These are three cases consolidated for the purpose of trial, to recover for personal injuries and wrongful death alleged to have been caused by the negligence of the defendants in failing to furnish proper means of escape from fire in a building owned by the defendants and occupied for living and sleeping purposes by the plaintiffs and the plaintiff's intestate.

The plaintiffs, in referring to C. S., 6081, being section 4, chapter 149, Public Laws 1923, say in their brief: "It is upon the violation of these two sections that the plaintiffs predicate their cause of action." Said section 4 reads as follows:

"Sec. 4. Section six thousand and eighty-one of the Consolidated Statutes is hereby repealed, and the following, to be known as six thousand and eighty-one, is to be substituted therefor:

"Sec. 1. That all hotels, lodging houses, school dormitories, hospitals, sanatoriums, apartment houses, flats, tenement houses and all buildings other than private dwellings not over three stories in height, in which rooms are to be rented or leased or let or offered for rent, let or leased for living or sleeping purposes, *hereafter constructed* in this State shall be constructed so that the occupants of all rooms above the first floor shall have unobstructed access to two separate and distinct ways of egress extending from the uppermost floor to the ground, such ways of egress to be so arranged in reference to rooms that in case of fire on one stairway the other stairway can be reached by the occupant without his or her having to pass the stairway involved. Entrance to all such ways of egress aforementioned in this section shall be from corridors or hallways of not less than three feet in width, and in no case shall entrance to such ways of egress be through a room or closet, and where such building is in the opinion of the Insurance Commissioner of sufficient size to require more than two ways of egress the 'National Fire Protection Association' Standard governing corridors and stair areas shall be adhered to.

"Sec. 2. Every hotel, lodging house, school dormitory, hospital, sanatorium, apartment house, flat, tenement or other building, other than a private dwelling not over three stories in height, in which rooms are rented, leased, let or offered for rent, lease or let, shall forthwith, at the owner's expense, be provided with additional ways of egress as to the Insurance Commissioner shall deem practicable in order that the object of this law may be accomplished and that existing dangers not be perpetuated."

Sec. 1 of section 4, chapter 149, Public Laws 1923 (at present C. S., 6081), has no application to the building owned by the defendants and occupied by the plaintiffs and plaintiff's intestate for living and sleeping purposes, and alleged to have been burned on 19 November, 1936, since it applies only to buildings "hereafter constructed in this State," and all of the evidence is to the effect that said building was constructed in 1913.

The plaintiffs likewise fail to bring themselves within the provisions of sec. 2 of section 4 of chapter 149, Public Laws of 1923 (present C. S., 6081), since there is no evidence that the Insurance Commissioner ever deemed practicable that the building mentioned in the complaint should be provided with any additional ways of egress in order that the object of the law might be accomplished and existing dangers not perpetuated.

Since the plaintiffs bottom their cases upon a violation by the defendants of sec. 4, chapter 149, Public Laws 1923, and since there is no evidence to establish any violation of said statute, the judgment of nonsuit must be

Affirmed.

MRS. LAWRENCE GOWENS, WIDOW OF LAWRENCE GOWENS, DECEASED; MARY RUTH GOWENS, THEO GOWENS, ALFRED GOWENS, JUANITA GOWENS AND CAROL GOWENS, CHILDREN, v. ALAMANCE COUNTY, H. J. STOCKARD, SHERIFF OF ALAMANCE COUNTY, AND HARTFORD ACCIDENT & INDEMNITY COMPANY.

(Filed 15 June, 1938.)

Master and Servant § 55g—Cause remanded for definite finding of fact as to whether accident arose out of deceased's employment as jailer.

The Industrial Commission found that deceased suffered an injury by accident arising out of and in the course of his employment as deputy sheriff, or jailer, or as deputy sheriff-jailer. Upon appeal to the Supreme Court, the cause is remanded for a definite finding by the Commission sufficient to support an award.

NUTT CORP. *v.* R. R.

APPEAL by defendants from *Cowper, J.,* at 31 January, 1938, Civil Term, of ALAMANCE.

Proceeding under North Carolina Workmen's Compensation Act to determine liability of defendants to claimant.

From judgment awarding compensation, defendants appealed to Supreme Court, and assign error.

Long, Long & Barrett for plaintiffs, appellees.
Geo. D. Taylor and R. M. Robinson for defendants, appellants.

WINBORNE, J. The record on appeal discloses these facts: Lawrence Gowens died in July, 1936, as the result of a gunshot wound inflicted by a person whom he was trying to arrest. At the time of his injury and death Gowens was employed by Alamance County in the capacity of jailer, with duties pertaining to such position. He was also deputy sheriff, under the defendant sheriff of Alamance County, with duties generally performed by deputies sheriffs. The defendants, Alamance County and sheriff of Alamance County, each carried a policy of compensation insurance with defendant Hartford Accident & Indemnity Company to cover compensation liability.

The findings of fact, conclusion of law and award of the Commissioner who heard the case were adopted by the Full Commission and affirmed on appeal to the Superior Court. Among others, the Commissioner makes this finding: "We are of the opinion, under all the evidence, that the deceased, either as a deputy sheriff or as jailer, or in the dual capacity of deputy sheriff jailer, suffered an injury by accident arising out of and in the course of his employment resulting in his death." Upon the facts of this case, this finding is insufficient to support an award. The finding must be specific. For proper determination of this controversy it is necessary that there be a finding of fact on this question: Did Lawrence Gowens suffer injury by accident arising out of and in the course of his employment as jailer? The cause will be remanded to the end that such finding of fact may be made and further proceeding had upon that basis.

Remanded.

THE JOHN P. NUTT CORPORATION v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 15 June, 1938.)

1. Venue § 1d—

The residence of a domesticated corporation for the purpose of determining proper venue is the county in which its principal place of business is located. C. S., 466.

2. Same—

Plaintiff, a domesticated corporation, instituted action against several railroad companies in a county other than its residence. There was no finding nor request to find that the cause of action arose outside the county of plaintiff's residence. *Held:* Defendants' motion to remove to the county of plaintiff's residence should have been allowed.

APPEAL by defendants from *Harding, J.*, at March Term, 1938, of FORSYTH.

Civil action to recover damages for conspiracy to injure plaintiff's business.

Plaintiff is a Florida corporation, domesticated in this State, and has designated the city of Wilmington, New Hanover County, as the place of its principal office in North Carolina. It is a contract carrier of freight by motor vehicle.

The defendants are railroads engaged in the transportation business in North Carolina. Some are domestic and others are foreign corporations.

The alleged conspiracy relates to the competitive business of transporting gasoline and other petroleum products from the port of Wilmington to various points in North Carolina, including Winston-Salem and Kernersville in Forsyth County.

The action was instituted in Forsyth County, and, in apt time, the defendants lodged a motion for change of venue to New Hanover County as a matter of right. Motion denied and defendants appeal.

Parrish & Deal for plaintiff, appellee.

Frank P. Hobgood for defendant Atlantic & Yadkin Railroad Co.

Robert H. Dye for defendant Aberdeen & Rockfish Railroad Co.

Richard P. Gwathney and Murray Allen for defendant Atlantic Coast Line Railroad Co.

Craige & Craige and Murray Allen for defendant Winston-Salem Southbound Railway Co.

W. S. O'B. Robinson, Manly, Hendren & Womble for defendant Piedmont & Northern Railway Co.

Manly, Hendren & Womble and W. T. Joyner for defendants Yadkin Railroad Company, High Point, Randleman, Asheboro and Southern Railroad Company and Southern Railway Company.

STACY, C. J. For the purpose of suing and being sued in the courts of this State, the plaintiff, by submitting to domestication, has acquired the right of a domestic corporation, with its principal place of business in Wilmington. *Smith-Douglass Co. v. Honeycutt,* 204 N. C., 219, 167 S. E., 810. Therefore, in determining the proper venue, the plaintiff is

to be regarded as a resident of New Hanover County. C. S., 466. We are not now concerned with the right of removal to the Federal Court for trial. *Smith-Douglass Co. v. Honeycutt, supra.*

There is neither finding, nor request to find, that the cause of action arose outside the county of plaintiff's residence. *Motor Service Corp. v. R. R.,* 210 N. C., 36, 185 S. E., 479. Nor is it specifically alleged that the cause of action arose elsewhere. The defendants are railroads. Thus it would seem, upon the instant record, "the action must be tried" (C. S., 468) in New Hanover County, or some adjoining county, unless the place of trial is changed as provided by statute. *Forney v. R. R.,* 159 N. C., 157, 74 S. E., 884; *R. R. v. Thrower,* 213 N. C., 637.

Reversed.

CLARENCE MASON v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 15 June, 1938.)

1. Removal of Causes § 6—

When a cause is a proper one for removal, and adequate petition and bond are duly filed, no further orders substantially affecting the rights of the parties may be entered except the order of removal.

2. Appeal and Error §§ 19, 31f—Petition is necessary part of record proper upon appeal involving nonresident's right to removal.

The corporate defendant duly filed petition and bond for removal and the individual defendant filed demurrer. On appeal to the judge, plaintiff was allowed to amend, and order was entered staying hearings on the motion to remove and the demurrer, and the corporate defendant appealed from this order. *Held:* The matter is determinable upon the petition, since in proper cases for removal, no order substantially affecting the rights of the parties may be entered after the filing of a proper petition and bond, and the petition not being in the record, the appeal must be dismissed for failure to bring up necessary parts of the record proper; and *held further,* no ruling having been made on the question of removal, the appeal would seem to be premature.

APPEAL by defendant Southern Railway Company from *Hamilton, Special Judge,* at January Term, 1938, of DURHAM.

Civil action to recover damages for an alleged negligent injury, instituted by plaintiff, a citizen and resident of Durham County, N. C., against the corporate defendant, "duly organized and chartered under the laws of another state," and the individual defendant, a citizen and resident of North Carolina.

The record states that, in apt time, the corporate defendant "filed a motion to remove the cause to the United States Court upon the grounds

of fraudulent joinder and separable controversy." The individual defendant duly filed demurrer to the complaint. The motion of the corporate defendant to remove was denied by the clerk, and on appeal to the judge, the plaintiff was allowed to amend his complaint for the purpose of setting forth new matter, correcting typographical errors, and clarifying the original complaint. In the meantime, hearings upon the motion to remove, and the demurrer of the individual defendant, were stayed.

From this order, the corporate defendant appeals, assigning errors.

Oscar G. Barker and Emma Lee Smith for plaintiff, appellee.

Hedrick & Hall and W. T. Joyner for defendant Railway Company, appellant.

STACY, C. J. When the cause is a proper one for removal and adequate petition and bond are duly filed, it is error for the clerk or the judge of the State court to enter any order therein substantially affecting the rights of the parties, save the order of removal. *Huntley v. Express Co.*, 191 N. C., 696, 132 S. E., 786; *Powell v. Watkins*, 172 N. C., 244, 90 S. E., 207; *Winslow v. Collins*, 110 N. C., 119, 14 S. E., 512.

Whether the petition in the instant case is sufficient to oust the jurisdiction of the Superior Court, and thus render the order appealed from nugatory, cannot be determined on the record, because the petition has been omitted from the transcript of the case on appeal. *Morganton v. Hutton*, 187 N. C., 736, 122 S. E., 842.

It is provided by Rule 19, section 1, of the Rules of Practice 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." Here, the matter was determined, or should have been determined, upon the defendant's petition, hence the petition ought to appear in the transcript of the case on appeal. *Abernethy v. Trust Co.*, 211 N. C., 450, 190 S. E., 735; *Bank v. McCullers, ibid.*, 327, 190 S. E., 217; *Riggan v. Harrison*, 203 N. C., 191, 165 S. E., 358. It is the uniform practice to dismiss an appeal for failure to send up necessary parts of the record proper. *Pruitt v. Wood*, 199 N. C., 788, 156 S. E., 126; *Waters v. Waters, ibid.*, 667, 155 S. E., 564.

Moreover, it would seem that the appeal is premature, as the judge of the Superior Court has not yet ruled on the question of removal.

Appeal dismissed.

HARRY ROTH v. GREENSBORO NEWS COMPANY.

(Filed 15 June, 1938.)

Libel and Slander § 6—Letter written by plaintiff and received by defendant, containing demand for retraction of specified libel, is sufficient notice.

A letter written by plaintiff and received by defendant, in which demand is made for a retraction and apology for a clearly specified article, in which the alleged false and defamatory statements are plainly indicated, is a sufficient notice in writing as required by C. S., 2429, the provisions of C. S., 914, relating to notice in judicial proceedings after suit has been instituted, not being applicable.

APPEAL by the defendant from judgment overruling demurrer entered by *Bivens, J.*, at February Term, 1938, of GUILFORD. Affirmed.

Stern & Stern for plaintiff, appellee.
Hobgood & Ward and Douglas & Douglas for defendant, appellant.

SCHENCK, J. This is an action to recover both actual and punitive damages for libel, instituted under the provisions of chapter 48 of the Consolidated Statutes. The defendant demurs to the complaint on the ground that it fails to allege facts sufficient to constitute a cause of action "in that it is not therein alleged that at least five days before the institution of this action for the publication in a newspaper owned and published by the defendant of an alleged libel plaintiff served notice, in writing, on defendant specifying the article and the statements therein which he alleges to be false and defamatory."

The complaint alleges that on 11 September, 1937, the plaintiff "wrote a letter to the defendant and made demand that a full and fair correction, apology and retraction . . . be made" of the libelous article published on 1 September, 1937, and "that more than twenty days have elapsed since the defendant received said letter," and that defendant has failed and refused to publish any apology, correction or retraction. The letter alleged to have been written by plaintiff and received by the defendant is set forth in the complaint and fully specifies the article and statements therein which the plaintiff alleges to be false and defamatory.

It is the contention of the defendant that the allegation of the plaintiff's having written a letter, and its having been received by the defendant, is not an allegation of the plaintiff's having served notice in writing on the defendant as required by C. S., 2429, which reads: "Before any action, either civil or criminal, is brought for the publication, in a newspaper or periodical, of a libel, the plaintiff or prosecutor shall at

least five days before instituting such action serve notice in writing on the defendant, specifying the article and the statements therein which he alleges to be false and defamatory"; that the notice is governed by C. S., 914, which provides that "All notices must be in writing, and notices and other papers may be served on the party or his attorney personally, where not otherwise provided in this chapter"; and that since there is no provision "otherwise" for the service of the notice required by C. S., 2429, it must be personally served, and the writing and receipt of a letter is not a compliance with the statute.

With the contention of the defendant we cannot concur. C. S., 914, upon which defendant relies, forms a part of the chapter entitled "Civil Procedure," and it pertains only to notices in judicial proceedings after suit has been instituted. C. S., 2429, and C. S., 914, are separate and distinct statutes and have no relation one to the other. The provision for service of notice in the former refers to an act to be performed as a condition precedent to the institution of the action, whereas the provision as to service of notices in the latter refers to acts to be performed after an action is instituted.

In referring to C. S., 2429, it is said: "The giving of such notice is required only for the purpose of furnishing the defendant opportunity to publish a retraction. . . ." *Osborn v. Leach,* 135 N. C., 628. A letter written by plaintiff and received by defendant, in which a demand is made for a retraction and apology for a clearly specified article, in which the alleged false and defamatory statements are plainly indicated, fully accomplished the purpose of furnishing the defendant the opportunity which the statute provides it should have.

The judgment of the Superior Court is

Affirmed.

RUFUS L. PATTERSON ET AL., TRUSTEES UNDER THE WILL OF LUCY L. MOREHEAD, AND HUNLEY ABBOTT AND BEALE J. FAUCETTE, INTERVENERS, v. THE DURHAM HOSIERY MILLS AND A. H. CARR ET AL., DIRECTORS OF THE DURHAM HOSIERY MILLS.

(Filed 15 June, 1938.)

Appeal and Error § 38—

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by the defendants from *Spears, J.,* at April Term, 1938, of DURHAM. Affirmed.

A. W. Kennon for plaintiffs, appellees.

R. O. Everett for interveners, appellees.

William W. Sledge and Fuller, Reade & Fuller for defendants, appellants.

PER CURIAM. This is an action to restrain the defendants from further declaring and/or paying dividends on any stock of the defendant corporation until the accrued dividends on the 6% preferred stock of the plaintiffs, and on the stock of other nonassenting shareholders, are paid and/or discharged. His Honor, Judge Spears, entered judgment continuing the temporary restraining order theretofore issued by his Honor, Judge Williams, until the final determination of the action, from which judgment the defendants appealed, assigning error.

Devin, J., not sitting, and the remaining six members of the Court being equally divided in opinion as to whether there are on the record any disputed facts which should be determined before final judgment, the judgment of the Superior Court is affirmed, and stands as the decision in this case without becoming a precedent. *Braswell v. Town of Wilson,* 212 N. C., 833, and cases there cited. This leaves undecided the questions of law sought to be presented, as they do not presently arise.

Affirmed.

A. H. POWELL, R. R. HERRING, E. N. CLEMENT, E. A. HUNT, AND JOHN S. WATKINS, TRUSTEES FOR CREDITORS AND STOCKHOLDERS OF THE FIRST NATIONAL BANK OF GRANVILLE, v. E. STRADLEY VEASEY.

(Filed 15 June, 1938.)

Appeal and Error §§ 38, 49—

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed and becomes the law of the case without becoming a precedent for other cases.

APPEAL by defendant from *Williams, J.*, at November Term, 1937, of GRANVILLE. Affirmed.

This is a controversy without action, under an agreed statement of facts. The judgment of the court below is as follows:

"This cause coming on to be heard and being heard before the undersigned judge of the Superior Court holding by exchange courts of the Tenth Judicial District, presiding at the November Term, 1937, of the Superior Court of Granville County, upon statement of facts contained in the case agreed, submitted to the court as a controversy without action, and the court being of the opinion that upon the facts contained in said

agreed statement the deed tendered by the plaintiffs, when delivered, conveys a fee simple title in and to the lands described therein:

"It is therefore considered, ordered and adjudged that upon delivery of said deed the defendant pay to the plaintiffs the sum of $4,000, the same being the purchase price stipulated for said lands, and that upon delivery of said deed the defendant is the owner and holder of title to said lands in fee simple.

"It is agreed that the judgment herein may be rendered and signed in or out of term, in or out of the county. This 1 December, 1937. Clawson L. Williams, Judge of the Superior Court Holding the Courts of the Tenth Judicial District by Exchange."

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

Parham & Taylor for plaintiffs.
Royster & Royster for defendant.

PER CURIAM. The Court being evenly divided in opinion, *Devin, J.*, not sitting, the judgment of the Superior Court is affirmed and stands, according to the uniform practice of appellate courts, as the decision of this case without becoming a precedent in other cases. *Seay v. Insurance Co.*, 208 N. C., 832.

So far as the title in the present action is concerned, the judgment becomes *res judicata*. *Seay v. Insurance Co.*, 213 N. C., 660.

The judgment of the court below is

Affirmed.

KENNETH ROTHROCK, BY HIS NEXT FRIEND, T. S. ROTHROCK, v. ALBERT ROBERSON (COLORED), JAMES H. BAGGS, S. B. HANES, AND SUPREME OIL COMPANY.

(Filed 15 June, 1938.)

Automobiles § 24a—Evidence held insufficient to show, on any aspect, that service station attendant was employee of the lessor of the station.

Evidence that an oil company leased a filling station with all necessary equipment for sale of products of the company, that the company had no control over or right to employ or discharge attendants at the station, and that an attendant caused the injury in suit while driving to the station with a car to be serviced in accordance with the orders of the lessee of the station, *is held* insufficient, in any aspect, to hold the oil company liable for the alleged negligence of the attendant on the doctrine of *respondeat superior*.

ROTHROCK *v.* ROBERSON.

APPEAL by plaintiff from *Hill, Special Judge,* at January Term, 1938, of FORSYTH. Affirmed.

This was an action for damages for personal injury caused by the negligent operation of an automobile driven by defendant Roberson, who was alleged to have been the agent and employee of his codefendants.

Plaintiff entered voluntary nonsuit as to defendant Hanes. At the close of plaintiff's evidence the court sustained motion for judgment of nonsuit as to defendant oil company. Thereupon the court, without objection, withdrew a juror and ordered a mistrial as to defendants Roberson and Baggs. From judgment dismissing the action as to defendant oil company the plaintiff appealed.

Hoyle C. Ripple and Parrish & Deal for plaintiff, appellant.

W. F. Wimberly and Ratcliff, Hudson & Ferrell for defendant, appellee.

PER CURIAM. While it may be conceded for the purpose of this appeal that there was evidence of negligence on the part of defendant Roberson, and that he was, at the time of the injury complained of, an employee of defendant Baggs, the testimony fails to show that Roberson was in the employ of the defendant oil company, or that he was at the time acting within the scope of such employment.

It appears that defendant oil company leased to defendant Baggs a service station with all necessary equipment for the sale of petroleum products to be purchased from the oil company, with provision in the contract for the cancellation of the lease on twenty-four hours' written notice for certain enumerated causes. It was testified that Baggs alone had the right to employ and discharge such servants and employees as he needed in the operation of the service station, and that the oil company had no control over the conduct of Baggs' employees. On the occasion alleged, S. B. Hanes requested Baggs to have his automobile washed and greased and gave him the automobile keys, and thereupon Baggs sent his employee Roberson to drive the automobile to the service station for this purpose. En route the Hanes automobile, driven by Roberson under these circumstances, collided with a motorcycle on which plaintiff was riding, causing him injury.

There was nothing in the contract of lease by the oil company to Baggs which affords any tenable ground for holding that Roberson was an employee of the oil company at the time and on the occasion of the injury complained of, and we conclude that the evidence offered does not support the contention that the negligence of Roberson, in any view of the facts here presented, may be imputed to the defendant oil company, and that the judgment of nonsuit as to it was properly entered.

The ruling of the court below is fully sustained by *Hopper v. Ordway,* 157 N. C., 125, 72 S. E., 839; *Inman v. Refining Co.,* 194 N. C., 566,

140 S. E., 289; *Teague v. R. R.*, 212 N. C., 33; *Liverman v. Cline*, 212 N. C., 43; *Shapiro v. Winston-Salem*, 212 N. C., 751; *Shell Petroleum Corp. v. Linham*, 163 Sou. (Miss.), 839.

The facts in the instant case differ from those upon which the decision in *Evans v. Lumber Co.*, 174 N. C., 31, 93 S. E., 430, was based.

Judgment affirmed.

STATE v. WILLIAM TROLLINGER, JR.

(Filed 15 June, 1938.)

Rape § 8—

Circumstantial evidence of defendant's felonious intent, viewed in the light most favorable to the State, *held* sufficient to be submitted to the jury in this prosecution for assault with intent to commit rape.

APPEAL from *Williams, J.*, at February Term, 1938, of ALAMANCE. No error.

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

Harper Barnes, H. J. Rhodes, and John J. Henderson for defendant, appellant.

PER CURIAM. The defendant was convicted of an assault with intent to commit rape, and from judgment of imprisonment predicated upon the verdict defendant appealed, assigning errors.

The assignments of error most strongly stressed in the argument and in the defendant's brief relate to the court's denial of the motion for judgment as of nonsuit upon the charge of "intent to commit rape." While the evidence bearing upon this phase of the case was circumstantial, it was sufficient, when viewed in the light most favorable to the State, to be submitted to the jury.

The other assignments of error are to the rulings of the court upon the admission and exclusion of evidence, and to portions of the charge. We have examined with care each of these assignments. They present no new questions of law calling for discussion. Suffice it to say that we find among them no prejudicial error.

This case presented clear-cut issues of fact, which were impartially presented, and the jury, after viewing the witnesses and hearing their testimony, answered them against the defendant.

In the trial below we find

No error.

MARYLAND CASUALTY COMPANY, A CORPORATION, v. NELLO L. TEER.

(Filed 15 June, 1938.)

Attorney and Client § 10—Under provisions of surety bond, surety was given right to employ an attorney of its own selection, and principal was liable for fees.

While ordinarily a defendant has the right to employ counsel of his own choosing, when he contracts with the surety on a bond executed by them that the surety should be at liberty to employ an attorney of its own choosing and defend the suit, and that the principal should indemnify the surety for all expenses, including attorney's fees, the principal may not escape liability for fees of the attorney selected by the surety by giving notice to the surety before trial that he is ready and able to take care of the defense and would not reimburse the surety.

APPEAL by defendant from *Ervin, Jr., Special Judge,* at October Term, 1937, of DURHAM. Affirmed.

The plaintiff sued to recover the sum of $150.00 alleged to be due it from the defendant for its reasonable fees paid to attorneys in defending a case for tort brought against this defendant, as principal, and the plaintiff, as surety, on a bond heretofore executed by them.

That contract of insurance, among other things, provided: "Second: The undersigned will at all times indemnify and keep indemnified the company, and hold and save it harmless from and against any and all liability for damages, loss, costs, charges and expenses of whatever kind or nature (including counsel and attorney's fees, which the company shall or may, at any time, sustain or incur by reason or in consequence of having executed the bond herein applied for, or any and all other bonds executed for us at or at our instance and request), etc."

"Third: The undersigned does hereby further agree to indemnify the said Maryland Casualty Company against any suit or claim brought or instituted against said company, whether such suit or claim be rightfully or wrongfully brought or instituted, and in case suit shall be brought upon said bond, the surety shall be at liberty to employ an attorney of its own selection to appear and defend the suit in its behalf at the expense of the undersigned."

When service of summons was made upon the defendant Teer and the casualty company, Teer notified the casualty company not to employ counsel or to go to any expense in connection with the case, since he was in position to defend the suit and would not pay any expense incurred by the company as attorney's fees in connection with the case.

Notwithstanding the notice, this plaintiff did employ counsel, who actively participated in the case, filing a demurrer for the surety company, which was sustained. This defendant also employed counsel in the case.

There is no controversy as to the reasonableness of the fees paid by the plaintiff.

From the judgment in favor of the plaintiff, the defendant appealed.

R. M. Gantt for plaintiff, appellee.
W. P. Farthing for defendant, appellant.

PER CURIAM. The defendant argues that the notice which he gave the plaintiff to the effect that he was ready and able to take care of the defense of the case in which they were jointly sued, himself employing attorneys and paying fees, and would not reimburse plaintiff for attorney's fees paid by it, had the legal effect of relieving the defendant of any obligation on his contract in this respect.

The right of a person against whom a suit has been brought to employ counsel of his own choosing is rather fundamental in our practice. We are inclined to sustain it as being reasonable, unless it is found to be abrogated by contract. We find in the contract between the parties no provision to which the privilege claimed by the defendant can be referred, and we are not persuaded that it arises as a legal incident to the relation of principal and surety in the indemnity bond. Indeed, as we see it, some violence must be done the treaty between the parties to reach such a result, since in the contract it is expressly provided that in case of suit the plaintiff surety company may employ counsel of its own choosing.

We conclude, therefore, that the notice given by the defendant to the plaintiff did not have the legal effect of relieving him from the obligation to reimburse the plaintiff for attorney's fees paid in defense of the former suit, and the judgment is

Affirmed.

ORANGE COUNTY BUILDING & LOAN ASSOCIATION v. SOUTHGATE JONES AND WIFE, NANCY G. JONES.

(Filed 15 June, 1938.)

Constitutional Law § 22: Limitation of Actions § 1: Mortgages § 36—

Ch. 529, Public Laws of 1933, providing a one-year limitation for actions for deficiency judgments after foreclosure, protects all substantial rights of the parties and its application *held* not unconstitutional as impairing the obligations of the contract.

APPEAL by plaintiff from *Bone, J.*, at October Term, 1937, of ORANGE. Affirmed.

COPLEY *v.* SCARLETT.

The plaintiff sued to recover a deficiency judgment upon a note secured by a mortgage deed upon certain land, after foreclosure. More than one year had elapsed after the mortgage sale, and the defendants pleaded the statute of limitations—chapter 529, Public Laws of 1933; Code 1935, sec. 437 (a).

From an adverse judgment, plaintiff appealed.

L. J. Phipps and Bonner D. Sawyer for plaintiff, appellant.
J. S. Patterson and Brawley & Gant for defendants, appellees.

PER CURIAM. The legal principles involved in this case are very thoroughly discussed in *Bateman v. Sterrett,* 201 N. C., 59, 159 S. E., 14, and in this case there is a full citation of authority which we think substantially covers the controverted principles of law in the present case. We have examined chapter 529, Public Laws of 1933—Code 1935, sec. 437 (a)—and find no constitutional difficulty in its application to the facts of this case. We think all the substantial rights of the parties have been sufficiently protected in the cited statute, and its application constitutes no impairment of the obligation of plaintiff's contract. Plaintiff, having set the statute in motion by its foreclosure sale, neglected to bring action upon the note within one year thereafter, and this action is therefore barred.

The judgment is

Affirmed.

STATE OF NORTH CAROLINA EX REL. HILDA COPLEY v. CHARLES SCARLETT, GUARDIAN, FIDELITY & DEPOSIT COMPANY OF MARYLAND, AND CHARLES ZUCKERMAN.

(Filed 15 June, 1938.)

1. Limitation of Actions § 2e—

An action against the surety on a guardianship bond is barred after three years from the breach complained of. C. S., 441 (6).

2. Limitation of Actions § 3—

The right of action against the surety on a guardianship bond for failure of the guardian to pay all sums due the ward upon her majority, accrues six months after the date of the ward's majority, C. S., 2188, and is barred three years thereafter.

3. Limitation of Actions § 12b—

The liability of the surety on a guardianship bond is secondary, and payment of interest or principal by the guardian does not affect the running of the statute of limitations in favor of the surety.

COPLEY *v.* SCARLETT.

APPEAL by plaintiff from *Spears, J.,* at 8 April, 1938, Term, of DURHAM. Affirmed.

This is an action brought by plaintiff against the defendant Charles Scarlett, guardian of Hilda Copley, and his surety Fidelity & Deposit Company of Maryland, to recover certain amount alleged to be due. The defendant Scarlett denied the material allegations of plaintiff, pleaded settlement, and the Fidelity & Deposit Company of Maryland pleaded the three-year statute of limitations.

On 31 May, 1937, the matter was referred by consent "of all attorneys representing the plaintiff and the defendants, by virtue of which Allston Stubbs was named and appointed referee in the above entitled action and ordered to hear the evidence in this action and to report to the court his findings of fact and conclusion of law."

Among the findings of fact by the referee is the following: "From the evidence I find a balance due as of 31 July, 1937, by Charles Scarlett, guardian, to his former ward, Hilda Copley, the sum of $1,553.80. Hilda Copley became twenty-one years old 18 February, 1931, and this action was commenced on 24 November, 1934. After the ward became of age and before the filing of this complaint the guardian, on 8 May, 1933, made a payment of $500.00 on the principal sum due his former ward. That after the ward became of age the guardian made certain payments to cover administration expenses from time to time until his final report was filed on 17 February, 1937."

Among the conclusions of law is the following: "The Fidelity & Deposit Company of Maryland is liable as surety and not as coprincipal on the guardianship bond. The ward became of age 18 February, 1931, and as the guardian has failed to file his account within six months of this date, as required by law, the three-year statute of limitations began to run in favor of the Fidelity & Deposit Company of Maryland on 18 August, 1931. The payment of $500.00 made by the guardian on the *corpus* of the ward's estate on 8 May, 1933, subsequent to the ward's coming of age and prior to 18 August, 1934, did not revive the statute of limitations which began to run in favor of the Fidelity & Deposit Company on 18 August, 1931. That the cause of action against the Fidelity & Deposit Company of Maryland was barred on 18 August, 1934, and as the summons and complaint in this action were not filed until 24 November, 1934, the cause of action against the Fidelity & Deposit Company of Maryland is forever barred by the three-year statute of limitations, which was properly pleaded. See *Finn v. Fountain,* 205 N. C., 217. The plaintiff Hilda Copley, former ward of Charles Scarlett, her guardian, is entitled to recover judgment against the said Charles Scarlett in the sum of $1,553.80, with interest from 21 July, 1937, until paid, and the cost of this action, and the action against the Fidelity & Deposit Company of Maryland should be dismissed."

The judgment of the court below was as follows: "This cause coming on to be heard before the undersigned, the Honorable Marshall T. Spears, resident judge of the Tenth Judicial District, at chambers, upon the appeal of the plaintiff from the report of the referee, Allston Stubbs, Esq., the referee heretofore appointed in this action; and after hearing argument of counsel representing the plaintiff and the defendants, and after consideration of the report of the referee, the evidence offered before the referee, the pleadings in the case, and a research into the law involved in said case, it is considered, ordered, adjudged and decreed that the findings of fact and conclusions of law of the referee, as set forth in his report, be and they hereby are in all respects confirmed. This 8 April, 1938. (Signed) Marshall T. Spears, Resident Judge of the Tenth Judicial District of North Carolina."

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

Malcolm M. Young for plaintiff.

Fuller, Reade & Fuller for defendant Fidelity & Deposit Company of Maryland.

PER CURIAM. The defendant was a surety on the bond of Charles Scarlett, guardian of Hilda Copley.

N. C. Code, 1935 (Michie), Art. 5, sec. 436, is as follows: "The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this article.

Section 441: "Within three years an action . . . (6) Against the sureties of any executor, administrator, collector or guardian on the official bond of their principal; within three years after the breach thereof complained of."

Section 2188: "A guardian may be required to file such account at any time after six months from the ward's coming of full age or the cessation of the guardianship; but such account may be filed voluntarily at any time, and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk of the Superior Court."

In *Finn v. Fountain,* 205 N. C., 217 (220), it is written: "The period prescribed by the statute within which an action against the sureties on the official bond of a guardian must be begun is three years after the breach complained of as the cause of action alleged in the complaint. C. S., 441 (6). In the instant case, the cause of action alleged in the complaint accrued at the expiration of six months from the date when the plaintiffs, respectively, arrived at the age of twenty-one years. C. S., 2188. The statute of limitations began to run against each of the plaintiffs and in favor of the sureties on the bond at said date, and continued to run for more than three years and six months before the action was

begun. The running of the statute as against the plaintiffs and in favor of the sureties was not suspended by the payment of interest by the guardian on the amount due by him to each of the plaintiffs. The liability of the sureties on the bond is a conditional liability, dependent upon the failure of the guardian to pay the damages caused by his breach of the bond. The guardian and the sureties are not in the same class. For that reason the payment by the guardian of interest on the amount due by him to his former wards did not suspend the statute of limitations, which began to run against each of his wards when she became twenty-one years of age."

The plaintiff contends: "If not overruled, the doctrine of the *Finn case, supra,* should be limited to payments of interest and not extended to cases involving payments of principal." We cannot so hold, as we cannot differentiate.

The judgment of the court below is

Affirmed.

STATE v. WILEY BRICE.

(Filed 15 June, 1938.)

1. Criminal Law § 79—

The failure of defendant to file briefs works an abandonment of the assignments of error.

2. Criminal Law § 80—

When defendant has filed no brief, the motion of the Attorney-General to dismiss will be allowed. Rules of Practice in the Supreme Court Nos. 27 and 28, but in a capital case, the motion will be allowed only when an examination of the record fails to disclose error.

APPEAL by defendant from *Bone, J.,* at November Criminal Term, 1937, of ALAMANCE.

Motion by State to dismiss appeal of defendant.

Attorney-General McMullan for the State.

No counsel contra.

PER CURIAM. The defendant was tried upon a bill of indictment charging him with the murder of one Shealey Lea, *alias* Shelly Lea, on 17 April, A.D. 1926. There was verdict of murder in the first degree. All the evidence tends to show that the crime was committed on the day named in the bill of indictment, and prior to 1 July, 1935, the date on which the statute providing for death by administration of lethal gas

became effective. Public Laws 1935, ch. 294. Judgment is that defendant suffer the penalty of death by electrocution. *S. v. Hester,* 209 N. C., 99, 182 S. E., 738; *S. v. Dingle,* 209 N. C., 293, 183 S. E., 376; *S. v. McNeill,* 211 N. C., 286, 189 S. E., 872. Defendant gave notice of appeal to the Supreme Court, and was permitted to appeal *in forma pauperis.* The court below ordered that the cost of appeal, including transcript of evidence, cost of mimeographing statement of case on appeal and defendant's brief be paid by Alamance County. 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, supra; S. v. Robinson,* 212 N. C., 536, 193 S. E., 701; *S. v. Hadley,* 213 N. C., 427, 196 S. E., 361, except those appearing on the face of the record, which are cognizable *ex mero motu. S. v. Edney,* 202 N. C., 706, 164 S. E., 23.

The Attorney-General moves to dismiss the appeal for failure to comply with Rules 27 and 28 of this Court as to filing briefs. This motion 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 record is regular. The exceptions presented are without merit. The case on appeal reveals competent evidence sufficient to sustain the verdict. The charge of the court below fully and fairly presented the case to the jury. We find no error.

Judgment affirmed and appeal dismissed.

STATE v. TOM LINNEY (ALIAS BUFFALO).

(Filed 15 June, 1938.)

1. Criminal Law § 80—

When defendant has filed no brief, the motion of the Attorney-General to dismiss will be allowed, Rules of Practice in the Supreme Court Nos. 27 and 28, but in a capital case, the motion will be allowed only when an examination of the record fails to disclose error.

2. Criminal Law § 58—

The trial court's finding from the affidavits filed that the motion for a new trial for newly discovered evidence was based upon hearsay evidence, *is held* correct in this case, and the motion was properly denied.

APPEAL by defendant from *Phillips, J.,* at January Term, 1938, of FORSYTH. Judgment affirmed and appeal dismissed.

Attorney-General McMullan and Assistant Attorney-Generals Bruton and Willis for the State.

No counsel for defendant.

PER CURIAM. This case was here at Fall Term, 1937, and is reported in 212 N. C., 739. There the defendant appealed from judgment imposing sentence of death upon conviction of murder in the first degree. This Court found no error in the trial. Thereafter the defendant filed motion in the Superior Court of Forsyth County for a new trial on the ground of newly discovered evidence. *S. v. Casey,* 201 N. C., 620, 161 S. E., 81. The judge of the Superior Court, after considering the defendant's motion and the affidavits filed in support, denied the motion, holding that the evidence was not sufficient to sustain it. Defendant again appealed to this Court, but has filed no brief. The Attorney-General moves to dismiss the appeal for failure to comply with Rules 27 and 28 of this Court. The motion of the Attorney-General must be allowed. *S. v. Kinyon,* 210 N. C., 294, 186 S. E., 368; *S. v. Robinson,* 212 N. C., 536.

However, as is customary in capital cases, we have examined the record and the affidavits filed in support of defendant's motion, and find that the court below has correctly ruled that the new evidence is hearsay and that the affidavits offered are insufficient to justify a new trial.

Judgment affirmed and appeal dismissed.

J. D. RAGAN v. MAGNOLIA RAGAN.

(Filed 15 June, 1938.)

1. Pleadings § 23—

The trial court has discretionary power to allow amendment to verification in a divorce action after remand of the case by the Supreme Court for correction of the record.

2. Divorce § 5—

Allegations in the cross action for divorce *a mensa et thoro*, set up by defendant wife in the husband's action for divorce, *held* sufficient. C. S., 1660.

3. Divorce § 11—

When the facts alleged in the answer are sufficient to support an order for alimony *pendente lite* and for counsel fees, C. S., 1666, it is sufficient for the court to find that the facts are as alleged in the answer.

4. Appeal and Error § 13—

When plaintiff appeals from judgment of the court allowing an amendment to the verification and alimony *pendente lite*, the case is no longer pending in the Superior Court, and it is without authority to enter a subsequent order, while the appeal is pending, allowing additional fees to counsel of defendant.

APPEALS by plaintiff from *Williams, J.*, at first week of March Term, 1938, and from *Burgwyn, J.*, at fourth week of March Term, 1938, of DURHAM.

Action for absolute divorce and cross action for divorce *a mensa et thoro*, and for alimony *pendente lite*.

This action was heard and dismissed on former appeal to this Court. 212 N. C., 753, 194 S. E., 458. A recital of the allegations of the complaint and of the answer, and of the findings of fact and of the terms of the decree for alimony *pendente lite* and counsel fees, is there set forth.

Thereafter, and at the March Term, 1938, on hearing before Williams, J., decree was entered permitting the defendant to amend verification of answer, and, *ex mero motu*, correcting the judgment entered in this action at the September Term, 1937, from which former appeal was taken, to speak the truth and express the correct judgment, so that as corrected *plaintiff* be required to pay alimony *pendente lite* and counsel fees in amount and on dates therein provided.

To this decree plaintiff excepted and appealed to the Supreme Court, and assigns error.

Subsequently, and during the fourth week of said March Term, upon motion of defendant, Burgwyn, Special Judge presiding, entered a decree for an allowance of additional fees to counsel for the defendant. To this decree plaintiff excepted, and appealed to the Supreme Court, and assigns error.

J. W. Barbee for plaintiff, appellant.
Bennett & McDonald for defendant, appellee.

PER CURIAM. Plaintiff challenges the judgment of Williams, J., on three grounds, neither of which is tenable: (1) That the court erred in permitting the defendant to amend verification. It is discretionary with the trial judge to allow such amendment. *Moore v. Moore*, 130 N. C., 333, 41 S. E., 943. (2) That the allegations of the cross action do not state facts sufficient to constitute a cause of action. The allegations are sufficient to bring the cross action within the provision of C. S., 1660. (3) That the findings of fact are insufficient to support an award of alimony and counsel fees. It is sufficient for the court to find that the facts are as alleged in the answer. *Hennis v. Hennis*, 180 N. C., 606, 105 S. E., 274; *Massey v. Massey*, 208 N. C., 818, 182 S. E.,

446; *Vaughan v. Vaughan,* 211 N. C., 354, 190 S. E., 492. The facts alleged comply with the requirements of C. S., 1666, for alimony *pendente lite.*

The exception to the decree of Burgwyn, J., is well taken. The case was pending on appeal in the Supreme Court. The court below was then without authority to make the order. *Vaughan v. Vaughan, supra.*

The judgment of Williams, J., is

Affirmed.

The judgment of Burgwyn, J., is

Reversed.

D. C. PATTERSON v. SOUTHERN RAILWAY COMPANY; WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY; ATLANTIC AND YADKIN RAILWAY COMPANY; ATLANTIC COAST LINE RAILROAD COMPANY; ABERDEEN AND ROCKFISH RAILROAD COMPANY; HIGH POINT, RANDLEMAN, ASHEBORO AND SOUTHERN RAILROAD COMPANY; YADKIN RAILROAD COMPANY; AND PIEDMONT AND NORTHERN RAILWAY COMPANY.

(Filed 22 June, 1938.)

1. Pleadings §§ 3a, 6—

A party is entitled of right to put in his pleading a concise statement of his cause of action or defense, and nothing more. C. S., 506, 519.

2. Pleadings § 29—

A party is entitled, as a matter of right, to have irrelevant or redundant matter which is prejudicial to him, or scandalous, stricken from his opponent's pleading upon motion aptly made.

3. Same—Test of relevancy is whether the matter alleged is competent to be shown upon the hearing.

Plaintiff is entitled to have allegations of the defense stricken out only when they contain no averment competent or necessary to the defense, while defendant is entitled to have them stand, even if prejudicial or scandalous, if they contain a valid defense, the test being whether the matter alleged is competent to be shown on the hearing.

4. Monopolies § 3a—Allegations that agreement resulted in lower prices to public held no defense to action for damages for alleged unlawful conspiracy.

Plaintiff, a carrier by truck, instituted this action against certain railroad companies, to recover damages to his business, which he alleged resulted from an unlawful conspiracy between defendants to reduce transportation rates in order to eliminate plaintiff as a competitor, with the purpose of raising rates after competition had been removed. Defendants alleged that the reduction in rates resulted in lower prices to the consuming public on the products on which the rates had been reduced. *Held:* The matter alleged does not constitute a defense to the action, since

the express policy of the State is against both the raising and lowering of prices by unlawful means for an unlawful purpose, C. S., ch. 53, and since the law is interested in preserving competition rather than obtaining for the public temporary benefits from price wars in which competition is extinguished.

5. Carriers § 5: Actions § 4—Failure of carrier by truck to obtain proper licenses for trucks does not render the business illegal.

Plaintiff, a carrier by truck, instituted this action under C. S., 2574, against certain railroad companies to recover damages to his business, alleged to have resulted from the unlawful conspiracy of defendants. Defendants alleged in their answers that plaintiff was a carrier by truck for hire, and had obtained from the Commissioner of Revenue only licenses as a private hauler, and had made false and fraudulent misrepresentations as to the weight of his trucks and trailers, and thereby obtained licenses at a lower cost, thereby defrauding the State. *Held:* The statutes requiring licenses for operating trucks and trailers on the highways of this State are for revenue purposes and not for police regulation, and therefore the operation of motor vehicles without appropriate licenses subjects the operator to the penalty prescribed by statute, C. S., 2621 (13), but does not render the business itself illegal, and the allegations of the answer, if established, would not prevent plaintiff from maintaining the action to recover damages to his business.

6. Monopolies § 3a: Pleadings § 29—Allegations held properly stricken from the answer, the matter alleged not constituting a defense.

Plaintiff, carrier by truck, instituted this action under C. S., 2574, against certain railroad companies to recover damages to his business alleged to have resulted from the unlawful conspiracy of defendants, C. S., 2563 (3). *Held:* The allegations in defendants' answers to the effect that the reduction of transportation rates complained of resulted in benefit to the public in reduced retail prices on the products, and that plaintiff was operating his trucks on the highways of the State without obtaining appropriate licenses therefor, were properly stricken out on motion of plaintiff aptly made, C. S., 537, the matter alleged not constituting a defense to plaintiff's cause of action.

DEVIN, J., dissenting.

BARNHILL, J., concurs in dissent.

APPEAL by defendants from *Bone, J.*, at April Civil Term, 1938, of ALAMANCE. Affirmed.

The plaintiff sued for recovery of damages caused by alleged injury to his business of hauling gasoline and kerosene, by means of a conspiracy entered into by the defendants to reduce transportation rates in order to eliminate plaintiff as a competitor, with the purpose of raising such rates after competition had been removed. The defendants answered the complaint, denying the material allegations thereof and setting up numerous defenses, amongst which are the following:

1. Paragraph 7 of the first further defense of defendants (except Piedmont & Northern Railroad Company): "The effect of the railroad

rate reductions of August, 1935, and of May, 1936, has been beneficial to the public of this State. This defendant alleges on information and belief that immediately after the railroad rate reductions of August, 1935, the price of gasoline to consumers in the areas to which such rates were applicable was decreased by approximately one-half cent per gallon, and that immediately after the railroad rate reductions of May, 1936, there was a further decrease in the price to consumers of approximately one-half cent per gallon. Said reductions to the consuming public were the direct and immediate results of the competitive rates so established by the railroads by the said reductions."

2. Paragraph 8 of the said first further defense of all of said defendants (except Piedmont & Northern Railroad Company): "As the result of the railroad rate reductions of August, 1935, and of May, 1936, competition between trucks and railroads at Wilmington has been preserved and the price of gasoline to consumers has been reduced. Should plaintiff prevail in this action, it will result in an increase in rail rates and the elimination of all rail competition for the transportation of petroleum products out of Wilmington and an immediate increase in the price of gasoline to North Carolina consumers. This defendant alleges and says that such result is contrary to the public policy of this State and will be injurious to the citizens of this State, that the objective of plaintiff's suit is contrary to law and contrary to public policy, and that plaintiff should not prevail. The facts set forth herein are pleaded by this defendant as a defense to plaintiff's right to recover in this action."

3. Paragraph 6 of the second further defense of all of said defendants (except Piedmont & Northern Railroad Company): "This defendant alleges on information and belief that immediately after the rate reduction of 17 August, 1935, and because of such railroad rate reduction, the price of gasoline distributed by plaintiff in the vicinity of Burlington was reduced approximately one-half cent per gallon; that immediately after the said railroad rate reduction of 5 May, 1936, and because of such reduction, the price of gasoline distributed by plaintiff in the vicinity of Burlington was reduced approximately one-half cent per gallon."

4. Portions of the fifth further defense of all of said defendants (except the Piedmont & Northern Railroad Company), and portions of the second further defense of Piedmont & Northern Railroad Company, being the whole of paragraphs 3 to 12, inclusive, of all of said answers: "For the year 1935 application was made by plaintiff to the Commissioner of Revenue of the State of North Carolina for the issuance of a private hauler license of each tractor or truck and trailer used by plaintiff in such transportation."

"For the year 1936 application was made by plaintiff to the Commissioner of Revenue of the State of North Carolina for the issuance of a

private hauler license for each tractor or truck and trailer used by plaintiff in such transportation."

"For the year 1937 application was made by plaintiff to the Commissioner of Revenue of the State of North Carolina for the issuance of a private hauler license for each tractor or truck and trailer used by plaintiff in such transportation."

"In each such application plaintiff represented to the Commissioner of Revenue that such tractor or truck and trailer would not be used in any contract or for hire haul."

"On the strength of such representations the Commissioner of Revenue of North Carolina, for the years 1935, 1936, and 1937, issued to plaintiff for each such tractor or truck and trailer used by plaintiff a private hauler license, and for each such license plaintiff paid an amount of money substantially less than would have been required for a contract hauler license."

"In performing all of the transportation of petroleum products mentioned in the complaint, plaintiff has operated under private hauler licenses."

"That the private hauler licenses were obtained by plaintiff with the purpose and intention of using said licenses for the transportation of petroleum products for hire and under contract of hire."

"That in obtaining said private hauler licenses and so using them plaintiff has defrauded the Department of Revenue of the State of North Carolina and the State of North Carolina, and the transportation of petroleum products for hire under contract of hire by him in vehicles licensed solely as private haulers has been in violation of the laws of the State of North Carolina."

"In securing the 'private hauler' licenses above mentioned for all of the vehicles used by plaintiff in his transportation of petroleum products as described in the complaint, plaintiff has stated the combined weights of the tractors, trailers and loads to be driven over the roads of the State. In connection with the issuance of each such license plaintiff has knowingly and intentionally and with the intent to defraud the State, grossly understated the combined weight of tractors, trailers and loads and has obtained from the State licenses based upon weights greatly less than the actual and true weights. By such fraudulent misrepresentations plaintiff has obtained licenses for sums greatly less than would have been charged by the State had plaintiff truly and correctly stated such weights. In connection with all of the transportation performed by plaintiff, as alleged in the complaint, plaintiff has operated his motor vehicles and containers under licenses fraudulently obtained by the understatement of weights and has operated each such vehicle contrary to the provisions of the laws of this State."

"In the transportation of petroleum products described in the complaint plaintiff has regularly and consistently and knowingly and intentionally violated the laws of the State of North Carolina as has been set forth above in this further answer and has knowingly and intentionally conducted an illegal business, and plaintiff is not entitled to recover any damage or loss of profits in this action, and plaintiff should not be permitted to claim or recover any profits growing out of his illegal operations and should not be permitted to claim or recover any damages to his illegal business. Defendant specifically pleads the illegality of plaintiff's transportation operations in bar of any right which plaintiff may have to recover in this action."

The plaintiff moved to strike out certain portions of the answer, including the above, upon the ground that they were irrelevant, redundant, and prejudicial. C. S., 537. The judge, allowing such motion in part, struck out all of the foregoing paragraphs of the answer, and defendants excepted and appealed.

Cooper, Curlee & Sanders for plaintiff, appellee.

Craige & Craige and Murray Allen for Winston-Salem Southbound Railway Company.

Hobgood & Ward for Atlantic and Yadkin Railway Company.

R. B. Gwathney and Murray Allen for Atlantic Coast Line Railroad Company.

Robert H. Dye for Aberdeen & Rockfish Railway Company.

W. T. Joyner for High Point, Randleman, Asheboro and Southern Railroad Company.

W. T. Joyner for Yadkin Railroad Company.

W. T. Joyner and Long, Long & Barrett for Southern Railway Company.

W. S. O'B. Robinson, Jr., and Fuller, Reade & Fuller for Piedmont & Northern Railway Company, defendants, appellees.

SEAWELL, J. In *Parsley v. Nicholson,* 65 N. C., 207, it is said: "The object of pleading, both in the old and new systems, is to produce proper issues of law or of fact, so that justice may be administered between parties litigant, with regularity and certainty." Pleadings serve to confine the controversy between the parties to some issue relating to a justiciable cause, so that the field of investigation may be defined and brought within reasonable limits. A party to an action is entitled as a matter of right to put into his pleading a concise statement of the facts constituting his cause of action or defense, and nothing more. C. S., 506; C. S., 519.

Upon motion made in apt time, an aggrieved party may have irrelevant or redundant matter stricken from his opponent's pleading, espe-

cially when such matter is prejudicial to him, or scandalous. C. S., 537. A motion under this statute has been held to be made as a matter of right and not addressed to the discretion of the court. *Bank v. Atmore,* 200 N. C., 437, 439, 157 S. E., 129.

Upon motion of plaintiff made under this statute, the trial judge struck out the paragraphs of the answers above listed, finding them to be irrelevant and prejudicial.

If the matter stricken out should be found to contain a valid defense not asserted elsewhere in the pleading, the defendants would be entitled to have it stand, no matter how prejudicial or scandalous. *Powell v. Cobb,* 56 N. C., 1; *Mitchell v. Brown,* 88 N. C., 156. And they could not complain if the matter stricken out contained no averment competent or necessary to the defense. This case, therefore, turns upon the relevancy of the deleted paragraphs of the answer, as setting up matters of defense.

An approved test of relevancy is whether the matter alleged is competent to be shown on the hearing. *Pemberton v. Greensboro,* 203 N. C., 514, 515, 172 S. E., 196.

The paragraphs stricken out of the answer by sections 1, 2, and 3 of the judgment are of the same tenor and may be considered together. They set up as a defense that the reduction of rates made by defendants has had the effect of reducing the price of gasoline to the consumer, with special reference to the vicinity of Burlington; that the result of a recovery by the plaintiff will be to destroy competition at Wilmington and raise the price of gasoline, and would therefore be in contravention of public policy, and his action is therefore legally barred.

If the defendants could establish the causal sequence between their reduction of rates and the lowering of prices on gasoline, it would not be available as a defense in this action. Such a result is as likely to follow an unlawful reduction of rates in carrying out the conspiracy charged in the complaint as it is to follow a lawful reduction brought about solely by economic conditions.

The public has no vested right in a pecuniary or economic advantage produced by an unlawful invasion of private right, designed to injure an individual.

As to the policy involved, the State has no policy directed toward the lowering of the price of gasoline, or any other commodity, although there is a strong public desire in this direction. The policy of the State on this subject is comprised and declared in the Constitution (Article I, section 31), in the statutes on Monopolies and Trusts (chapter 53 of the Consolidated Statutes), and in the common law on this subject, still recognized as in force here; and it comprehends both the raising and lowering of prices by unlawful means and for an unlawful purpose.

Generalizations respecting monopoly statutes, their purpose and effect, cannot be expected equally to fit them all, but it may be laid down as a principle common to our own laws that where an act has been directly condemned by the statute, no power resides in the court to balance the advantages of continuing the situation produced by defendants' violation of law against the advantages of granting the relief sought in the action, thereby making such a violator of the law a sort of economic Robin Hood who may, with judicial approval, plunder the individual in the interest of the needy public.

In the North Carolina case cited in defendants' brief, *Mar-Hof Co. v. Rosenbacker,* 176 N. C., 330, 97 S. E., 169, this Court had to reconcile a statute aimed against restraint of trade with the right of contract in partial restraint of trade, and held only that the restrictive terms of the statute did not affect that right. Of a similar nature are the decisions of the United States Supreme Court on the Sherman Anti-Trust Law cited in the brief. The conclusions drawn from them are not germane to the question before us.

Here we have a much more particularized law to deal with. It has nothing to do with the limitations of private contract or their relation to public policy or statutes against restraint of trade.

The suggested conflict between public interest and private right said to arise under the Sherman Anti-Trust Act cannot obtain under the North Carolina statute, as applied to this case, since that statute gives the individual whose business is destroyed a cause of action of such a nature, and under such conditions, that the temporary advantage incident to the process of eliminating a competitor must have been considered and subordinated to a superior legislative intent. The law looks at the transaction "in the long run," adopting the philosophy that the public is more interested in continuing competition than in reaping the temporary rewards of a fight in which it is extinguished. C. S., 2559; C. S., 2563 (3); *S. v. Coal Co.,* 210 N. C., 742, 188 S. E., 412.

We think, therefore, that this portion of the pleading was irrelevant.

The contention of the defendants that plaintiff was engaged in an illegal business and, *ipso facto,* could have no recovery for injury to such business, is not tenable under the alleged facts in this case.

There is no privilege license required in this State, either for the business of contract hauling or the business of private hauling, and there is no law which makes either unlawful because of noncompliance with any condition bearing upon the business itself. If this business was illegal, such result must come about through a construction of the motor vehicle laws cited in defendants' brief, which patently do not apply to the business in which the plaintiff was engaged, and not even to the manner in which it must be carried on, but only to the physical means which happened to be employed by plaintiff in its prosecution. Indeed, if the

business itself had required a license, the defendants would not be materially helped, since the trend of authority on this subject is to the effect that when a person engages in a business without procuring the license which the State requires for the privilege, he incurs the penalties which the statutes pertaining to the license provide, and none other. The matter rests between him and the licensing authorities, and the fact that the business is carried on without license is ordinarily not available as a defense by a third party in a suit growing out of liability incurred in the course of the business, or in relation thereto. 31 C. J., page 259, section 137. There are cases, not inconsistent with this view, holding *contra,* (a) where the licensing statute directly forbids the business itself, if carried on without license; (b) where the nature of the business renders it a proper subject of police regulation and the license is clearly referable to an exercise of that power; (c) and where the statute itself expressly denies to the unlicensed person any recovery in the courts upon contracts made in the course of business. They may be found under above citation.

In *Vermont Loan & Trust Company v. Hoffman,* 5 Idaho, 376, 49 P., 314, the Court passed upon a statute of Idaho requiring a license to be procured before engaging in the business of loaning money and declaring it a misdemeanor to transact such business without it. Defendant, in an action to recover for money loaned, set up as a defense that the business was unlawful, and the plaintiff having no license to engage in it was violating a state law and could not recover. In affirming the action of the trial court in sustaining a demurrer to that defense, the Supreme Court said: "From a careful study of all the authorities, we think that the better class of authorities and the better reasoning leads to the conclusion that, where the prohibition is implied from a penalty imposed, as in the case at bar, the prohibition being for the protection of the public revenue, and no declaration in the statute making the prohibited act void, the doing of such act is not illegal. There is nothing in our statutes which makes it unlawful to loan money at interest. There is nothing in our statutes which says that it is unlawful to follow the business of loaning money at interest. Such business is not *malum in se,* nor is it *malum prohibitum.* Anyone may conduct the business, but, under our statutes, if he does so, he must obtain the license, and if he carries on such business without paying the license tax and obtaining the license, he is guilty of a misdemeanor. The offense consists not in doing the business, for that is not prohibited, but in failing to pay the license tax. The statute was passed, not to protect the public, not to protect the borrower, nor to prevent the loaning of money at interest, but for the purpose of raising the revenue to be derived from the license taxes to be collected from those persons who should engage in the business of loaning money at interest. . . ."

In *Wood v. Krepps,* 168 Cal., 382, 143 P., 691, an authority much cited on this subject, the foregoing from *Vermont Loan & Trust Company v. Hoffman, supra,* is approved, and the Court concludes as to the case before it as follows: "The Legislature may, within the limits of the Constitution, prescribe traffic regulations, and may impose upon a business a tax, and require persons intending to engage in such business to obtain, before doing so, a license; and we think the Legislature might go one step further and say that whoever should engage in any business upon which a license tax is imposed without first paying such license tax should not only be fined and imprisoned, one or both, but that such person should not recover upon any contract made by him while engaged in such business without a license. But the Legislature has not done so, nor has it shown any intention to attend such forfeiture upon a person violating the statute. Having specified the penalty for a violation of the statute, and further provided for the collection of the license tax with damages, we are authorized to and do conclude that the Legislature did not intend that any further punishment should be inflicted."

When the object of a statute requiring those who transact certain business to be licensed is the production of revenue and not the regulation of the business, in the interest of public health, morals, or policies, contracts made in the course of such business are valid. *Wood v. Krepps, supra,* 141 P., 691, 692; *Mandelbaum v. Gregovich,* 17 Nev., 87, 28 P., 121; *Howard v. Lebby,* 197 Ky., 324, 246 S. W., 828.

The statutes discussed in *Coates v. Locust Point Company,* 102 Md., 291, 62 Atl., 625, and in *Banks v. McCosker,* 82 Md., 518, 34 Atl., 625, required a license to do the particular business and made it a misdemeanor to do business without it. The Court said: "When the law declares the consequence of its violation, the contract can in no sense be regarded as illegal unless the law itself, either by its manifest intent or in express terms, so declares it. The provisions of the Code referred to neither directly nor indirectly refer to any consequences save the payment of a fine." The Court held the business not to be illegal. *Sunflower Lumber Co. v. Turner Supply Co.,* 158 Ala., 191, 48 So., 510; *Armstrong v. Tolar,* 11 Wheat., 258, 6 L. Ed., 468; *Larned v. Andrews,* 106 Mass., 435; *Hughes v. Snell,* 28 Okla., 828; *Fairley v. Wapoo Mills,* 44 S. C., 227, 22 S. E., 108; *S. v. Pierce Co., Super Ct.,* 42 Wash., 675, 85 P., 669. Citations may be made in almost unlimited number.

The Motor Vehicle Act, N. C. Code, 1935, sec. 2621, *et seq.,* requiring that licenses be procured for motor vehicles used upon the highways, is based upon the servitude put upon the highways by such use, and the advantage which the improved highways may afford the business in which the motor vehicle is employed. Sec. 2621 (31) (c). The difference in the cost of license is based—roughly, it may be—upon the usage to which the road is subjected, either by the weight of the loading

or by the frequency of the use, or both. The license pertains to the motor vehicle and not to the business in which it is used.

Various statutes denounce as misdemeanors acts and omissions in connection with the procurement and use of motor vehicle licenses, and the use of the road without proper license. They are far too numerous to mention here, and most of them have no relation to the matter at hand. The most restrictive of these statutes are quoted in defendants' brief, which relies particularly on sec. 2621 (29), which statute makes it a misdemeanor to operate a motor vehicle without a license; and we assume that this may be construed to mean without the appropriate license designated by the law.

Practically all of the authorities cited in defendants' brief, in support of their position that the plaintiff was engaged in an illegal business, deal with laws referable to the exercise of the police power and these laws bear directly upon the business concerned.

In *Lloyd v. R. R.,* 151 N. C., 536, 66 S. E., 604, the Court was dealing with a personal injury action, growing out of chapter 456 of the Public Laws of 1907, relating to hours of labor—distinctly a police regulation—and the citations are all pertinent to that principle. In *Courtney v. Parker,* 173 N. C., 479, 92 S. E., 324, the Court was dealing with chapter 77 of the Public Laws of 1931, regulating the conducting of business under an assumed name, and making certain conditions precedent thereto —again a police regulation. In *Godwin v. Telephone Co.,* 136 N. C., 258, the Court declined to compel the installation of a telephone in a bawdy house in aid of a business *per se* illegal. In *Finance Co. v. Hendry,* 189 N. C., 549, 127 S. E., 629, the statute considered was again —C. S., 3288—regulating the carrying on of a business under an assumed name. In *Fashion Co. v. Grant,* 165 N. C., 453, 81 S. E., 606, the Court was dealing with contracts made in violation of the express provisions of chapter 167, section 1 (a), of the Public Laws of 1911, forbidding agreements that the purchaser should not sell the same commodity in his store manufactured by other parties. In *Pfeifer v. Israel,* 161 N. C., 409, 77 S. E., 421, and *Pfeifer v. Drug Co.,* 171 N. C., 214, 88 S. E., 343, the Court was dealing with the unlicensed sale of liquor. In *Young v. Stevens,* 75 Ark., at page 183, and in *Stephenson v. Primrose,* 8 Port. (Ala.), 155, 167, the Court dealt with matters strictly of a police nature. Indeed, the position of the Supreme Court of Alabama on this subject may be found in *Morgan v. Whatley,* 205 Ala., 170, 87 So., 846, 849, and in *Sunflower Lumber Co. v. Turner Supply Co., supra,* and it is contrary to the position taken by the defendants.

There seems to be no authority for the position that the failure to procure proper licenses for the trucks employed in the plaintiff's business would so affect the business as to make it illegal and bar recovery, and we are of the opinion that there is nothing in the cited statutes which can have that effect.

It must be observed further with regard to this part of the answer that the plaintiff is also charged with fraud and misrepresentation and a violation of the criminal law in procuring the licenses for his trucks and trailers. There is no logical connection between such fraud, if it existed, and any defense which is competent for the defendants to make in this action.

Since the matter stricken out constitutes no valid defense, there is nothing of which the defendants can complain. But it is not improper to refer briefly to the propriety of allowing the motion to strike out.

The matters alleged in the answer could hardly be considered as entirely without prejudicial effect on plaintiff's case. The answer prominently features a reduction in the price of gasoline as being a desirable result, a point on which there is some unanimity of opinion; and it may not be merely casual that, in a selective paragraph, the spearhead of this attack on plaintiff's position is directed toward Alamance County, from which the jury must be drawn, and where the case must be tried. Also, since the plaintiff is charged with a violation of the criminal law and of defrauding the State of its revenues in a way calculated to be offensive to taxpayers, this would hardly recommend his cause to the jury.

The defendants have been deprived of no competent defense which may not be adequately presented under the present pleadings, and the judgment is

Affirmed.

DEVIN, J., dissenting: 1. I find myself unable to agree with the majority opinion that the allegations in the answers of the defendants, that the reduction in freight rates has resulted in lowering the price of gasoline to consumers, should be stricken out as irrelevant. The basis for the court's ruling is that evidence of that fact would be inadmissible in the trial.

The gravamen of the charge in the complaint is that the defendants entered into an unlawful conspiracy in restraint of trade and for the promotion of a monopoly in the transportation of gasoline, with the purpose and intention of injuring the business of the plaintiff. By this action plaintiff seeks to recover compensation for losses sustained, and for treble damages, under the punitive provisions of the statute. Is it then improper for the defendants in the denial of an unlawful conspiracy, and in support of allegations of proper exercise of legal rights, to allege, in further defense, the establishment of competitive rates and the favorable result of such competition to the public? Are not all the circumstances relating to and attendant upon the wrongful acts complained of competent to be shown in evidence?

The acts alleged in the complaint and relied upon to show an unlawful conspiracy in restraint of trade, under the statute, C. S., 2563 (3), must have been willfully done and with the purpose and intention of injuring the business of a competitor. While the plaintiff in this action is not concerned with the public policy of monopoly statutes, it must not be overlooked that in the interpretation of these statutes and their enforcement the public interest is necessarily to some extent involved. The main purpose of these laws is to protect the public from monopolies and contracts in restraint of trade. Individual action is incidental. It was held in *Standard Oil Co. v. U. S.*, 221 U. S., 1, that the prevention of injury to the public by undue restraint on trade or commerce is the foundation upon which the prohibitions of the statute rests. The basis of every monopoly statute and of every monopoly suit is the welfare of the public. Hence, the nature of the restraint and its effects are to be considered as bearing on the legality of the contract alleged to have been entered into with the intent to injure the business of the complainant.

The rule laid down by the Supreme Court of the United States in construing similar Federal statutes on this subject is "that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated act, prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade." *Nash v. U. S.*, 229 U. S., 373. This statement was quoted with approval in the recent case of *Appalachian Coals, Inc., v. U. S.*, 288 U. S., 344.

While these statements by the Court were made with reference to criminal prosecutions under the Federal statutes, in *Mar-Hof Co. v. Rosenbacker,* 176 N. C., 330, 97 S. E., 169, *Hoke, J.,* states the rule under the North Carolina statute as follows: "Originally at common law, agreements in restraint of trade were held void as being against public policy. The position, however, has been more and more modified by the decisions of the courts until it has come to be the very generally accepted principle that agreements in partial restraint of trade will be upheld when they are 'founded on valuable considerations, are reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest.'" And there is the further statement in the opinion in the *Mar-Hof Co. case, supra,* that the purpose of the Legislature in these statutes was "to subject agreements coming under the provisions of this section to the standard of their reasonableness, to be determined by the character of the transaction and the purpose of the parties concerning it as disclosed in the contract and the facts and circumstances permissible and relevant to its proper interpretation." See *Shoe Co. v. Department Store,* 212 N. C., 75; *S. v. Coal Co.,* 210 N. C., 742, 188 S. E., 412.

Can it be said, in a case instituted under our monopoly statutes, that under no circumstances and in no view of the case would the effect of the alleged unlawful combination between the defendants to lower freight rates on gasoline be admissible in evidence. If not, then there was error in striking out the pertinent allegations of the answers.

2. I am unable to agree with the majority opinion that the allegations in the answers, to the effect that the plaintiff in the conduct of his business was operating trucks improperly licensed and in violation of law, should be stricken out as irrelevant and in no view of the case admissible in evidence.

It is fundamental that an action will not lie when the plaintiff must base his claim in whole or in part upon his own wrongful or unlawful conduct or on a violation by himself of the criminal laws of the State. *Lloyd v. R. R.*, 151 N. C., 536, 66 S. E., 604; *Brown v. Brown*, 213 N. C., 347. The established rule is that to constitute a defense on this ground, the illegality with which plaintiff is chargeable must have a causative connection with the particular transaction out of which the action arose, that is, when the illegality relied on is inherent in the cause of action, and directly connected with the relief sought. *Laughran v. Laughran*, 292 U. S., 216; 1 Corp. Jur. Secundum, 1000.

Here, the complaint alleges a cause of action for damages for injury to plaintiff's business which consisted in the operation of motor trucks on the State Highway in the transportation of gasoline. In the answer it is alleged that plaintiff, in the conduct of the very business which he claims was injured, was operating unlicensed or improperly licensed trucks in violation of the law, and that each time he used a truck in his business of transporting gasoline he committed a misdemeanor, and that his business, which he alleges was wrongfully injured by the acts of the defendants, consisted in operations forbidden by law. It would seem that the illegality alleged in the answers has direct relation to the transactions out of which the alleged cause of action arose, and hence may properly be set up in the answer as a defense. If, as alleged, plaintiff was using only unlicensed trucks, in violation of the penal provisions of the motor vehicle law, he could not lawfully operate them on the highway, whether loaded with gasoline or not, and loss of profits therefrom would not constitute a legitimate element of damages.

While the several answers in setting out this defense may be subject to the criticism of prolixity and redundancy, the material allegations of violation of law in the use of plaintiff's trucks on the highway should not be stricken out as irrelevant and as containing matters incompetent to be shown in evidence.

Relative to motions to strike out, it has been well said in several recent decisions of this Court that "the questions involved could be better determined by rulings upon the competency of the evidence, if and when

offered, than by undertaking to chart the course of the trial by passing upon allegations as yet undenied." *Pemberton v. Greensboro,* 205 N. C., 599, 172 S. E., 196; *Hardy v. Dahl,* 209 N. C., 746, 184 S. E., 480; *Scott v. Bryan,* 210 N. C., 478, 187 S. E., 756; *Poovey v. Hickory,* 210 N. C., 630, 188 S. E., 78.

The plaintiff's suggestion that the matters asked to be stricken out might prove unduly prejudicial to the plaintiff, a resident of Alamance County, before an Alamance County jury, when read from the answers of the several railroad companies, defendants, does not afford serious ground of apprehension.

BARNHILL, J., concurs in dissent.

IN THE MATTER OF THE APPEAL OF DR. H. R. PARKER.

(Filed 22 June, 1938.)

1. Appeal and Error § 40a—

A judgment entered on findings of fact will not be disturbed on an exception to an immaterial finding which has no substantial bearing upon the merits of the controversy.

2. Municipal Corporations § 37—

A zoning ordinance will not be declared unconstitutional unless it is clearly arbitrary or irrational without substantial relation to the public health, morals, safety, or welfare, and any reasonable doubt will be resolved in favor of a valid exercise of the police power.

3. Same—

The burden rests upon petitioner to show the invalidity of a zoning ordinance attacked by him.

4. Same—Zoning ordinance will not be declared invalid because it works injustice in particular instance if its purpose is within police power.

The fact that a zoning ordinance, because of the particular circumstances, may work hardship and result in serious depreciation of value of certain property, or prohibits a structure innocuous at the particular place because of such particular circumstances, does not render the ordinance invalid if the end in view justifies the general rule of the ordinance as a valid exercise of the police power, and the ordinance includes only a reasonable margin to insure effective enforcement.

5. Constitutional Law § 15a—Depreciation in value of property caused by operation of valid zoning ordinance is not a taking of property.

An individual is not entitled to use his property to the detriment of the public, and depreciation of the value of property by reason of the opera-

tion of a municipal zoning ordinance which is within the police power in the promotion of the public welfare, is not a taking of property for which compensation must be paid.

6. Municipal Corporations § 37—

Increased congestion in cities, resulting in increased traffic and fire hazards, require progressively stricter regulations for the public welfare, and while esthetic considerations are not controlling, they may be given consideration in determining the reasonableness of a municipal ordinance.

7. Same—Zoning ordinance restricting walls around corner lots held not invalid as applied to petitioner's property.

The zoning ordinance in question restricted walls around corner lots where they abutted lots facing the side street of such corner lot, to five feet, provided the wall was not over 60 per cent solid, and exempted from its provisions necessary retaining walls. Petitioner built a solid brick wall around the back of his corner lot to an alley in the rear, which wall was partly a retaining wall, but which varied in height from 14 to 16 feet along the side street. *Held:* It cannot be determined as a matter of law that the ordinance, as applied to petitioner's property, has no substantial relation to the public safety, since the height of the wall would obstruct the vision of motorists using the alley in the rear to the danger of pedestrians and motorists along the side street, and to some extent would obstruct the view of motorists at the intersection of the streets, and would interfere with fighting and preventing the spread of fire on petitioner's property, and an order requiring plaintiff to remove all portions of the wall not constituting a necessary retaining wall, is without error.

STACY, C. J., and WINBORNE, J., dissent.

CLARKSON, J., dissenting.

APPEAL by H. R. Parker, petitioner, from *Bivens, J.*, at March Civil Term, 1938, of GUILFORD. Affirmed.

The city of Greensboro has adopted a zoning ordinance which is now in force, the pertinent provisions of which are as follows:

"Section 13. Set Back Building Lines.

"(a) Except as specified in sections 13 and 17, no part of any building or structure shall be within 25 feet of any street line in any residence district."

"Section 17. Projection and Encroachments in Yards and Courts.

"(f) The set back and yard requirements of this ordinance shall not apply to any necessary retaining wall, or to any fence or wall which is less than five feet high and less than 60 per cent solid. Nothing herein shall prevent the construction of a rear line fence or wall to a height not exceeding six feet, except that where the rear of any corner lot abuts any lot facing on a street which is a side street with reference to said corner lot, any fence built on the rear lot line shall not be in excess of five feet in height and shall be less than 60 per cent solid."

The petitioner, who is the owner of a corner lot at the intersection of South College Park Drive and Mayflower Drive in said city, began the

erection of a line fence or wall, the height of which exceeded the limitations set in said ordinance. After the wall had been completed except for stuccoing thereof, the city building inspector issued his order to Dr. Parker, calling attention to the fact that said wall violated section 17 (f) of the zoning ordinance and directing him to remove the violation within seven days. The petitioner appealed to the board of adjustment. On the hearing of said appeal by the board of adjustment the order of the building inspector was affirmed. On application of the petitioner, a writ of *certiorari* was issued and on the return thereof the cause was duly heard.

The court below found the facts, including the following:

"5. The petitioner Dr. H. R. Parker is the owner of a lot located in a residence A district of the city of Greensboro as such a district is defined in the zoning ordinance. The lot is situated at the southeast corner of the intersection of South College Park Drive and Mayflower Drive. It fronts about 62 feet on South College Park Drive and extends southwardly some 150 to 160 feet along Mayflower Drive to a private alleyway which runs in an eastwardly direction from Mayflower Drive. Certain other lots south of the petitioner's lot and south of the alley front on Mayflower Drive. On the petitioner's lot is situated a dwelling house in which the petitioner and his wife reside.

"6. The petitioner's lot is considerably above the level of the abutting streets, the highest part of the lot being approximately 21.6 feet above the level of South College Park Drive and approximately 15.1 feet above the level of Mayflower Drive. The lot slopes from the highest part thereof toward South College Park Drive on the north and toward Mayflower Drive on the west.

"7. Between October 5, 1937, and October 12, 1937, the petitioner built a wall around the rear of his lot.

"8. The wall is a solid brick wall, eight inches thick, except that it is 21 inches thick at the base. The height of the wall is as follows:

"a. The portion of the wall which connects the house with the east wall: approximately seven feet above the natural level.

"b. The east wall: approximately 6.5 feet above the natural level.

"c. The south, or rear, wall: approximately 6.5 feet above the level at the southeast corner of the lot, increasing along approximately a 2.64 per cent grade, to nine feet above the natural level at the southwest corner of the lot.

"d. The west wall: 14.3 feet above the sidewalk at the southwest corner of the lot, increasing along approximately a 8.3 per cent grade to 16.9 feet above the sidewalk at the northwest corner of the wall.

"e. The portion of the wall which connects the house with the west wall: 16.9 feet above the sidewalk at the northwest corner, decreasing to 9.5 feet above the natural level at the point of junction with the house.

"Along the sides of the lot the wall extends from the rear of the lot approximately 30 feet toward the front of the lot and then on each side turns toward and joins the house near the rear thereof.

"9. That the wall described in finding of fact No. 8 of this judgment is contrary to and in violation of the city ordinances of the city of Greensboro as set out in paragraph two hereof."

The court thereupon adjudged that said ordinances are valid and that said wall upon the premises of the petitioner is in direct violation of the same; and ordered the petitioner to tear down said wall or make it comply with the ordinances above set out. The petitioner excepted and appealed.

Moseley & Holt for the petitioner, appellant.

Hoyle & Hoyle, H. C. Wilson, and Stern & Stern for respondent, appellee.

BARNHILL, J. The petitioner's exception No. 2 is directed to the alleged error of the court in finding that Harry Sabel, one of the protestants, acquired title to the property abutting thereon and occupied by the petitioner subsequent to the passage of the ordinances hereinbefore referred to and before the erection of the wall hereinbefore described and that various other property owners in the immediate vicinity purchased said properties both prior and subsequent to the passage of said ordinances. This finding of fact is immaterial and has no substantial bearing upon the merits of this controversy. Exception thereto is not of sufficient merit to warrant a disturbance of the judgment below.

Petitioner's third exception is to the signing of the judgment set out in the record. The facts found by the court below are fully sufficient to sustain the judgment. The judgment was in accordance with the facts found, to which no exception was entered, and must be sustained, unless there is merit in the petitioner's only other exception.

This brings us to petitioner's exception No. 1, which is the meat of the controversy and presents the contention upon which the petitioner must and does rely. This exception is to the refusal of the court below to make the following finding, to wit: "To the extent that the zoning ordinance of the city of Greensboro prohibits the construction of the petitioner's wall, it bears no substantial relation to the public health, safety, morals, or general welfare. To such extent the ordinance is an arbitrary and unreasonable restriction upon the petitioner's property rights, deprives the petitioner of his property without compensation and without due process of law, and is in violation of the fundamental law of North Carolina and section 1 of the 14th Amendment to the Constitution of the United States."

It appears from this exception that the petitioner does not challenge the constitutionality of the zoning ordinances of the city of Greensboro as a whole. The validity of comprehensive zoning ordinances has been recognized by the Supreme Court of the United States and held not violative of the provisions of the Federal Constitution. *Euclid v. Ambler Realty Co.*, 272 U. S., 365, 71 L. Ed., 303, 54 A. L. R., 1016; *Nectow v. Cambridge*, 277 U. S., 183, 72 L. Ed., 842; *Zahn v. Board of Public Works*, 274 U. S., 325, 71 L. Ed., 1074.

Zoning ordinances adopted under authority of our statute, C. S., 2776 (r), have been recognized and enforced by this Court. *Harden v. Raleigh*, 192 N. C., 395; *Little v. Raleigh*, 195 N. C., 793; *Elizabeth City v. Aydlett*, 201 N. C., 602; *In re Broughton Estate*, 210 N. C., 62.

The courts will not invalidate zoning ordinances duly adopted by a municipality unless it clearly appears that in the adoption of such ordinances the action of the city officials "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Euclid v. Ambler Realty Co., supra; Nectow v. Cambridge, supra.*

When the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare. *Euclid v. Ambler Realty Co., supra; Radice v. New York*, 264 U. S., 292, 68 L. Ed., 690; *Hadacheck v. Sebastian*, 239 U. S., 394, 60 L. Ed., 348, Ann. Cas. 1917-B, 927; *Thos. Cusack Co. v. Chicago*, 242 U. S., 526, 61 L. Ed., 472, L. R. A. 1918-A, 136, Ann. Cas. 1917-C, 594; *Rast v. Van Deman and L. Co.*, 240 U. S., 342, 60 L. Ed., 679, L. R. A. 1917-A, 421, Ann. Cas. 1917-B, 455; *Price v. Illinois*, 238 U. S., 446, 59 L. Ed., 1400; *Zahn v. Board of Public Works, supra. Harden v. Raleigh, supra,* in which the Court quotes with approval from *Rosenthal v. Goldsboro*, 149 N. C., 128, as follows: "It may now be considered as established with us that our courts will always be most reluctant to interfere with these municipal governments in the exercise of discretionary powers conferred upon them for the public weal and will never do so unless their action should be so clearly unreasonable as to amount to an oppressive and a manifest abuse of their discretion. This position is, we think, supported by the better reason and is in accord with the decided weight of authority." *Parks v. Commissioners*, 186 N. C., 490; *Lee v. Waynesville*, 184 N. C., 568; *S. v. Vanhook*, 182 N. C., 831; *Dula v. School Trustees*, 177 N. C., 426; *Rollins v. Winston-Salem*, 176 N. C., 411.

It is declared in the ordinances that the provisions thereof constitute the minimum requirements for the promotion of public health, safety and general welfare of the city. This is presumed to be correct and the burden rested upon the petitioner to show that the pertinent part of the ordinance in fact bears no substantial relation to the public health, safety, morals or general welfare. In declining to make the finding requested by the petitioner and in sustaining the validity of the ordinance the court below, by inference at least, found that the petitioner had failed to carry the burden.

The petitioner complains that the ordinance is an arbitrary and unreasonable restriction upon the petitioner's property rights. That he, due to the particular circumstances of his case, may suffer hardship and inconvenience by an enforcement of the ordinance is not sufficient ground for invalidating it. *State v. Christopher,* 317 Mo., 1179. The fact that the ordinance is harsh and seriously depreciates the value of complainant's property is not enough to establish its invalidity. *American Woods Products Co. v. Minneapolis,* 21 F (2nd), 440; *Hadacheck v. Sebastian, supra.* There is no serious difference of opinion in respect of the validity of laws and regulations fixing the heights of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. *Euclid v. Ambler Realty Co., supra.* When such restrictions are made it may develop that not only offensive or dangerous industries or structures will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect to practice-forbidding laws, which the courts have upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. *Hebe Co. v. Shaw,* 248 U. S., 297, 63 L. Ed., 255; *Pierce Oil Co. v. Hope,* 248 U. S., 498, 63 L. Ed., 381; *Euclid v. Ambler Realty Co., supra.*

The inclusion of a reasonable margin to insure effective enforcement will not put upon a law otherwise valid the stamp of invalidity. Such laws may also find their justification in the fact that in some fields the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some structures of an innocent character might fall within the prescribed class. It cannot be said that the ordinance in this respect "passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purety Extract & Tonic Co. v. Lynch,* 226 U. S., 192, 57 L. Ed., 184.

Each person holds his property with the right to use the same in such manner as will not interfere with the rights of others, or the public interest or requirement. It is held in subordination to the rights of society. He may not do with it as he pleases any more than he may act in accordance with his personal desires. The interests of society justify restraints upon individual conduct and also upon the use to which the property may be devoted. The provisions of the Constitution are not intended to so protect the individual in the use of his property as to enable him to use it to the detriment of the public. When the uses to which the individual puts his property conflict with the interest of society the right of the individual is subordinated to the general welfare and incidental damage to the property resulting from governmental activities or laws passed in the promotion of the public welfare is not considered a taking of the property for which compensation must be made.

The present motorized age has created much more rapid and congested traffic on the public streets of cities, greatly increasing the hazard of traffic for pedestrians and the users of vehicles alike. This in turn demands and requires legislation much more restrictive of individual rights than has heretofore been known to the law. The safety of the public now requires open and unobstructed street crossings and intersections. Large and congested urban areas increase fire hazards, requiring regulations which would be oppressive in rural sections or small villages; and while esthetic considerations are by no means controlling, it is not inappropriate to give some weight to them in determining the reasonableness of the law under consideration.

A consideration of the evidence in this case, and particularly of the photographs offered in evidence, makes it appear that the users of automobiles entering the street from the alley at the rear of the petitioner's property would cross the sidewalk of Mayflower Drive from behind a solid wall more than fifteen feet high. It cannot be said that this would not increase the hazard to pedestrians on Mayflower Drive, as well as to vehicular travel on the street. To some extent, at least, the wall, being more than 16 feet high at the point nearest Southern College Park Drive, obstructs the view of those who approach the Southern College Park Drive intersection. The wall encloses the rear portion of petitioner's house and is high enough to conceal the larger portion of the rear end of the house. It is reasonable to assume that in case of fire this wall would materially hamper the fire department in extinguishing the fire on the petitioner's property or on adjoining property, and in the prevention of a spread of such fire. Certainly we cannot say as a matter of law that these considerations are not sufficient to support the wisdom of the legislation and the validity of the ordinance.

Upon the record here we find no warrant for saying that the ordinance is unconstitutional as applied to the facts in the present case, or that it "passes the bounds of reason and assumes the character of a merely arbitrary fiat," having no substantial relation to the public safety and public welfare of the community.

It appears from the record in this cause that a considerable portion of the wall built by the petitioner is in fact a retaining wall. As the ordinance expressly excepts any necessary retaining wall so much of the wall as extends from the street line to the natural level of petitioner's lot is not prohibited. In the interpretation and enforcement of the judgment below it should be understood that the same relates only to that portion of the wall which is above the natural level of petitioner's lot. The petitioner has the right to remove so much of the wall as now constructed as will bring it within the terms of the ordinance, and as thus reduced in height, maintain the same, if he is so advised.

Affirmed.

STACY, C. J., and WINBORNE, J., dissent.

CLARKSON, J., dissenting: When an ordinance is subject to two or more interpretations, one of which involves the destruction of private property without compensation and the other of which involves merely the clarification of an ordinance within the ordinance powers, is the Court justified in accepting the former view and rejecting the latter? In the instant case the majority opinion, in interpreting an ambiguous ordinance, accepts the view that this ordinance prohibits, within the residence area of the city, *any* fence which either exceeds five feet in height *or* is more than 60% solid; further, the majority view approves such an interpretation of the ordinance as a valid exercise of the police powers of a municipality. In accordance with the view of the majority the judgment in the instant case orders the destruction of the upper portion of the wall constructed by petitioner on his property. With this result I cannot concur. In my opinion such an interpretation of the ordinance involves an unreasonable invasion of the traditional and accepted rights of property owners. Furthermore, I think the ordinance in question is subject to an interpretation which not only embraces a valid exercise of the police power but likewise will permit the petitioner's wall to be constructed in such a way as to accomplish, in part at least, the purpose of the present wall.

Zoning regulations are predicated upon the exercise of granted police powers. The valid exercise of these powers must always be grounded in necessity, and that necessity must be in the interest of the public safety, health, morals, or general welfare. See *Munn v. Illinois,* 94 U. S., 113; *Nectow v. Cambridge,* 277 U. S., 183. Granting that reason-

able zoning regulations are permissible, under the express and implied powers delegated to municipalities, the question here is merely whether an ordinance subject to several interpretations shall be upheld under a view which safeguards the long-established and well-recognized rights of ownership or shall be approved as to an interpretation which carries with it the destruction of private property by court order.

The topography of petitioner's corner lot is somewhat unusual. The lot is highest near the center; at the highest point on one street it is 21.6 feet above the street level and on the other street, at its highest point, it is 15.1 feet above the street level. Accordingly, the lot slopes from the residence toward the streets, but even at the street lines a retaining wall is necessary due to the natural elevation of the lot at its outer edges. The wall objected to forms a court at the rear of petitioner's home, the wall itself extending along an alley to the rear of the lot and for a short distance along the side street on which petitioner's lot abuts. As the level of the top of the wall around the court is constant, due to the slope of the lot the height of the wall at different points varies from 6.5 feet to 16.9 feet. The portion along the side street varies from 14.3 feet to 16.9 feet in height above the sidewalk level, the residence being located about twenty feet above the level of one street and ten feet above the level of the other.

Petitioner is a physician, who is necessarily often away from home at night, thus leaving his wife alone in the house. Accordingly, he consulted an architect and requested that a wall be planned in the interest of privacy and safety but in keeping with the style of the house, which the photographs filed in the case show to be a mixed Spanish and Italian type of architecture. The wall as built was declared by architectural experts to be well adapted to the house and the lot. One landscape architect declared that it "improved the appearance of the property and the neighborhood," and another declared that when it has been stuccoed and covered with vines it will be "one of the most attractive gardens in Greensboro." The city's superintendent of parks stated that it was in no way objectionable from an esthetic point of view, and a number of petitioner's neighbors testified to the same effect. Both the city and county health officers testified that the wall does not interfere with the light or ventilation of petitioner's or of neighbor's properties, and architects and contractors joined them in testifying that the wall is carefully and substantially constructed and in no way endangers public safety. No criticism of the wall related to public morals, or phases of the general welfare which have not already been discussed here.

Against this factual background the ordinance itself may be analyzed. "(f) The set back and yard requirements of this ordinance shall not apply to any necessary retaining wall, or to any fence or wall which is less than five feet high and less than 60 per cent solid. Nothing herein

shall prevent the construction of a rear line fence or wall to a height not exceeding six feet, except that where the rear of any corner lot abuts any lot facing on a street which is a side street with reference to said corner lot, any fence built on the rear lot line shall not be in excess of five feet in height and shall be less than 60 per cent solid." From what level the five foot and six foot limitations are to be measured, whether from the street level, the natural level, the level of the highest point of the lot, or the top of a necessary retaining wall where one is needed, is left in complete darkness. Whether there is to be any limitation whatever on a retaining wall is discouragingly vague. Whether the retaining wall may be solid or is to be subjected to the peculiar condition that it shall be "less than 60 per cent solid" is not clear. What is meant by "solid" is not explained. What the restrictions are upon rear line fences are almost as difficult to perceive. The ordinance is well nigh void for uncertainty. *S. v. Crenshaw,* 94 N. C., 877.

It is admitted that a retaining wall along the edges of this lot was necessary. It is not denied that such a retaining wall could have been lawfully constructed to the natural level of the lot, although it is denied that the wall could have been (as it was) constructed lawfully to the height of this wall, a point approximately the same height as the highest point of the lot. There is no contention that the five foot or six foot limitations apply to the height of retaining walls as measured from the street levels; they may be as high as is "necessary." The majority view declares that "as the ordinance expressly excepts any necessary retaining wall," "so much of the wall as extends from the street line to the natural level of petitioner's lot is not prohibited" and "it should be understood that the (judgment) relates only to that portion of the wall which is above the natural level of petitioner's lot." Under this interpretation, where there are retaining walls, the ordinance is treated as prohibiting any portion of the wall rising above the natural level of the lot at the sidewalk edge. Not only does such an interpretation prohibit an owner of a lot which is *above the street level* from having any wall whatever beyond the minimum requirements of a "necessary retaining wall," but it would produce the same result as to owners of lots lying *below the street level.* Thus, owners who have retaining walls will be prohibited from constructing a wall which rises above the natural level of their lots, but citizens not having retaining walls can construct fences rising to five, or even six feet. This result can scarcely be labeled other than arbitrary and discriminating, and is contrary to the settled law of this State. *S. v. Roberson,* 198 N. C., 70 (72), and cases cited.

The ordinance declares, "The set back and yard requirements of this ordinance shall not apply to any necessary retaining wall, *or* to any fence or wall which is less than five feet high and less than 60 per cent solid." In other words, there are two exceptions to these restrictions:

(1) Necessary retaining walls, and (2) walls less than five feet high which are also less than 60 per cent solid. This case is one admittedly involving a retaining wall. Accordingly, a literal interpretation of the ordinance would result in a complete elimination of *all* restrictions as to such necessary walls as the one under consideration, *i.e.*, a retaining wall.

"Zoning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner." *In re Appeal of Supply Co.*, 202 N. C., 496 (500).

What, then, is a necessary retaining wall? One which is no higher than is reasonably necessary to retain the soil of the lot at the sidewalk edge. How much higher than this may the wall be extended? The ordinance gives no guide except that, by implication only, the five-foot, 60 per cent limit might be read into this exception. Unless persons having retaining walls are to be prohibited entirely from having fences or walls around their properties, by necessary implication they may extend such walls not exceeding five feet above the top of the retaining walls so long as the extended portion is not exceeding 60 per cent solid. Even this interpretation may be subject to the criticism that it is an unreasonable restriction upon the rights of the property owners, but it is certainly one indicating a more sympathetic regard for long-established property rights than does the majority view; and, where such a fence limitation is imposed only upon corner lots at street intersection corners in the interest of public safety, it might well be upheld as a valid ordinance. It is worth noting that no such limitations are involved in the instant case, as the present wall does not corner on the intersection of two streets but merely at the intersection of a street and an alley. As nearly every residence lot has an alley intersecting with a street, ordinances seeking to render more safe vehicular travel in and out of said alleys must be careful not to impose confiscatory restrictions upon the owners of the land merely to the end that drivers of cars and trucks be relieved of the ordinary duties of due care.

"Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." *Seattle Trust Co. v. Roberge*, 278 U. S., 116 (121), and cases cited. "It is also fundamental that such power must be exercised so as not to infringe arbitrarily or unnecessarily upon private rights." *Downey v. Sioux City*, 208 Iowa, 1273, 1276, 227 N. W., 125, 126-7; 43 C. J., sec. 230, p. 230. "Laws enacted in the exercise of the police power, whether by municipal corporations acting in pursuance of the laws of the state or by the state itself, must be reasonable, and are always subject to the provisions of both the Federal and state constitutions, and they are always subject to

judicial scrutiny." *McCray v. City of Chicago,* 292 Ill., 60, 126 N. E., 557, cited with approval in *Bettey v. City of Sidney,* 79 Mont., 314, 257 Pac., 1007, 1009.

Whether or not an ordinance is reasonable is a matter subject to determination in the courts. The reasonableness of an ordinance is a question of law for the court. *Hawes v. City of Chicago,* 158 Ill., 653, 42 N. E., 373; *Continental Oil Co. v. City of Twin Falls,* 49 Idaho, 89, 286 Pac., 353; 2 McQuillan, Mun. Corp., Second Ed., p. 860. An ordinance will be declared void by the courts "because unreasonable upon a state of facts being shown which makes it unreasonable." 2 Dillon, Mun. Corp., 5th Ed., sec. 581, quoted with approval in *Bettey v. City of Sidney, supra.* The rule as to reasonableness and the power of the courts to pass upon this element in ordinances is summarized, after a review of the authorities, as follows, in *Mayor and Council of Pocamoke City v. Standard Oil Co.,* 162 Md., 368, 159 Atl., 902 (906): "(1) That restrictions imposed by the state or some agency of the state upon the use of private property cannot be justified under the police power unless they are *reasonably necessary* for the adequate protection of the public welfare, safety, health, comfort, or morals; (2) that whether such restrictions are reasonable in fact is a judicial question. . . ." In *Wonrak v. Kelley,* 129 Ohio St., 268, 195 N. E., 65, the Court declared void an ordinance limiting the height of fences and in doing so concluded with these words, which are, in my opinion, appropriate here: "The ordinance here under consideration has no real or substantial relation to the needs of the public health, morals, welfare, or public safety, and it is unreasonable and arbitrary in character. It unduly invades the right which the property owner has in his property . . ."

As interpreted by the majority, the instant ordinance, in my opinion, is unreasonable and void in that (1) it bears no substantial relation to the public health, safety, morals, or general welfare, and (2) is an unwarranted and arbitrary restriction upon the essential and fundamental rights of residence owners. Further, in ordering the destruction of part of petitioner's wall, in my opinion, petitioner is deprived of property without compensation. "We must avoid the belief that under the police power 'all private property is held subject to the temporary and passing phases of public opinion, dominant for a day, in legislative or municipal assemblies.' . . . Not only do our constitutions, Federal and state, forbid the taking of private property without just compensation, but the consensus of opinion throughout the land cries out against such unfair, arbitrary, oppressive action entirely out of harmony with the spirit of just government." 3 McQuillan, Mun. Corp., Second Ed., p. 359. In the instant case it is not denied that the petitioner would have the right to fill in his lot to the level of the highest point of that lot, yet he is

prohibited from building a fence or wall which at its highest point above the street level is nearly five feet lower than the highest point of his lot. An ordinance which permits appellant's wall to stand provided he fill his back yard with dirt but condemns it if he leave it a garden, rests upon no solid foundation. It is further observed that the zoning ordinance does not require a permit for the construction of the wall. The authority of the inspector to condemn it finds no sanction in the law. This proceeding, therefore, should be dismissed as nugatory.

In constructing such a wall in the interest of the privacy and safety of his home it seems to me that he has but exercised the inalienable rights granted to every man in the protection of his "castle." Those rights I consider so well grounded in our system of government and the political tradition of our people that they are secure alike from interference by individual or government. I cannot put from my mind that which I have through most of my four-score years regarded as fundamental—free governments primarily exist for the protection of the rights of the individual governed, not for the destruction of those rights. If this ordinance is valid, then a privet, spruce or white pine hedge around, or partly around, a man's home could be destroyed by the whim of a municipality inclined to nervous particularity bordering on absurdities.

HOME REAL ESTATE LOAN & INSURANCE COMPANY AND W. F. SHAFFNER, v. C. B. PARMELE.

(Filed 22 June, 1938.)

1. Waters and Water Courses § 13—

The common law rule that streams are navigable only as far as tidewater does not obtain in this State, our rule being that waters are navigable if they are, or may be, used for commerce of substantial and permanent character.

2. Same—

Waters covering marsh lands at high tide so that boats drawing up to 20 inches may navigate same, but receding at low tide below the land, are not navigable waters.

3. State § 4a: Waters and Water Courses § 15a—

Title to tide-lands is in the State.

4. Same—

Marsh lands of more than 2,000 acres are not subject to entry and grant. C. S., 7540 (3).

5. State § 4a: Waters and Water Courses § 15a—State Board of Education is vested with title to State lands.

The State Board of Education, as successor to all powers and trusts of the president and directors of the Literary Fund of North Carolina, N. C. Constitution, Art. IX, sec. 10, is vested with title to all public lands, including marsh lands, owned by said Fund at the time of the adoption of the said provision of the Constitution.

6. State § 4b: Waters and Water Courses § 15a—

The State Board of Education may sell and convey the fee in marsh lands which comprise one tract of marsh lands of more than 2,000 acres. C. S., 7621.

7. Same—

The fact that marsh lands conveyed by the State Board of Education are thereafter filled in and reclaimed by the purchaser does not divest the title of the purchaser, C. S., 7540 (2), since the conveyance is of the fee and not an easement in the lands.

8. Same—

The deed of the State Board of Education to the marsh lands in question *is held* good as against the State. Whether the purchaser's title is good as against the United States upon reclamation of the land in the construction of an inland waterway, C. S., 7583, is not decided.

APPEAL by defendant from *Cranmer, J.*, at March Term, 1938, of NEW HANOVER. Affirmed.

This is a controversy without action involving title to marsh lands conveyed by the State Board of Education to the plaintiffs submitted under C. S., section 626.

The agreed facts upon which the controversy hinges are as follows:

"1. That the plaintiff, Home Real Estate Loan & Insurance Company, is a corporation, duly created, organized and existing under and by virtue of the laws of North Carolina, with its principal place of business in the city of Winston-Salem, county of Forsyth, in said State; that the plaintiff, W. F. Shaffner, is a resident of the county of Forsyth, in the State of North Carolina, and that the defendant is a resident of the county of New Hanover, in the State of North Carolina.

"2. That by deed dated August 4, 1930, and recorded August 7, 1930, in Book 215, at page 511, in the office of the register of deeds of New Hanover County, the State Board of Education of the State of North Carolina conveyed to the plaintiffs a tract of marsh land in Myrtle Grove Sound, described in said deed, which said deed is attached hereto and marked Exhibit A, and made a part hereof as fully as if the same were incorporated herein.

"3. That by instrument in writing, signed by them, dated December 20, 1937, the plaintiffs offered to sell to the defendant for the sum of $25,000 a part of the lands mentioned in the second paragraph hereof

and more particularly described in said instrument which is attached hereto and marked Exhibit B, and made a part hereof as fully as if the same were incorporated herein; and thereafter, to wit: December 22, 1937, the defendant accepted, in writing, signed by him, said offer, subject to his attorney's approval of title to the lands and premises.

"4. That the plaintiffs have offered to deliver to the defendant a good and sufficient deed, with covenants of warranty, conveying the fee simple title to the lands described in the above mentioned Exhibit B, and the defendant has refused to accept said deed and pay therefor the agreed purchase price, for that he has been advised by his attorney that the plaintiffs were not possessed of an indefeasible fee in and to said lands, for that the same are, or will be, reclaimed land.

"5. Myrtle Grove Sound is one continuous tract comprising more than 2,000 acres of marsh land, extending from the highwater mark on the mainland to the highwater mark on the banks land. The land covered by the water at high tide, but exposed at low tide, is covered either with marsh grass or with a layer of mud anywhere from six inches to two feet deep.

"6. Practically all of the lands referred to in the second and third paragraphs hereof are located south of Snow's Cut in the Intra-Coastal Waterway, which said Snow's Cut is the land out of said waterway which connects Myrtle Grove Sound with the Cape Fear River.

"7. The waters in Myrtle Grove Sound south of Snow's Cut and at the *locus in quo* are affected by the daily tides in the Cape Fear River and the Atlantic Ocean and at low tide practically all of the soil in the sound at the *locus in quo* is exposed and above the level of the water. There is a rather narrow strip of water in what is called the channel located close to the western (or mainland) edge of the sound. However, no part of said channel is within the boundaries of the tracts of land described in the third paragraph hereof, which constitute the subject of this controversy. The nearest inlet from the sea for the above mentioned body of water, and the lands covered thereby, is approximately 12 miles, although prior to 1918 there was, and had been for about 10 years, a shallow inlet from the sea located approximately one mile north of the above mentioned Snow's Cut, but the said inlet no longer exists.

"8. When the United States Government started the dredging of the Intra-Coastal Waterway near the *locus in quo,* its contractor requested and received permission from the plaintiffs to deposit material excavated in the digging of said waterway upon the lands purchased by the plaintiffs from the State Board of Education of North Carolina; and thereafter material excavated in the digging of said waterway was deposited upon a portion of said land, which said portion constitutes the first tract of land referred to in the third paragraph hereof, and said tract of land is now above the level of the water in the sound at high tide.

"9. Prior to the construction of the aforesaid waterway, all the lands described in the third paragraph hereof, as well as the lands described in the second paragraph hereof, were covered by water at high tide, upon which small fish boats, pleasure boats, batteaus and skiffs, none drawing more than twenty inches, had been operated for a number of years, but none of said boats so used in the sound could be classified as vessels engaged in transportation or commerce. At low tide, however, the lands described in the second tract referred to in the third paragraph hereof are now, and were, above the level of the water in the sound.

"10. At low tide a boat drawing more than 8 or 10 inches of water cannot navigate the channel on the west side of the sound, hereinbefore referred to, but at high tide it is possible for small boats drawing less than 12 inches to go over approximately one-half of the lands described in the second tract of the third paragraph hereof covered by the tidal waters.

"10-A. Prior to the construction of the Intra-Coastal Waterway referred to in the eighth paragraph hereof, and except for the period of existence of the shallow inlet referred to in the last sentence of the seventh paragraph hereof, the waters of Myrtle Grove Sound at the *locus in quo* and for some distance to the north thereof, were not affected by the daily tides, and the depth of the water was affected by the winds; if a northerly wind prevailed, then the water was backed up in the sound sometimes to a depth of two feet; but if a southerly wind prevailed, then the water was blown out of the sound, and the sound has been entirely without water for at least three successive days at a time.

"11. The plaintiffs are the owners of all of the land adjacent to the eastern shore of Myrtle Grove Sound, north of Twelfth Avenue in the town of Carolina Beach, and extending northwardly to the southern line of the late R. B. Freeman tract of land, having purchased the same from the Carolina Beach Corporation, and title to the same has been out of the State of North Carolina for more than thirty years. The western boundary of said tract is the eastern boundary of the tracts of land described in the 3rd paragraph hereof.

"12. As a part of the contract entered into between the plaintiffs and defendant, as set forth in the 3rd paragraph hereof, the plaintiffs have agreed and promised to construct a canal, as shown on a map which is attached hereto and marked Exhibit C, and is made a part hereof, having a depth of six feet at mean low water, and a width of sixty feet at the bottom thereof, over the extreme western and southern portions of the first and second tracts of land described in the 3rd paragraph hereof, and deposit all material excavated in the construction of said canal upon the *locus in quo*, so that all of said lands will be above the level of the waters of Myrtle Grove Sound at high tide.

"13. The plaintiffs contend that the defendant should be required to purchase under their contract, for that they are the owners in fee simple of the *locus in quo*, and that the public generally, and that landowners to the north and south of the *locus* in particular, have no right, title or interest, riparian or otherwise, in said lands; and that by virtue of their ownership of said land they have the lawful right to construct the above mentioned canal and fill in the above mentioned lands so that the same will be above the level of the waters of Myrtle Grove Sound at high tide.

"14. The defendant contends that the title of the plaintiffs to the first tract of land described in the 3rd paragraph hereof is not good, for that the same are lands reclaimed from tidal waters and by virtue of such reclamation now belongs to the State of North Carolina. The defendant also contends that the title to the second tract of land described in the 3rd paragraph is not good and that he should not be compelled to purchase the same under his contract for that the plaintiffs have no lawful right to construct the said canal and upon the filling in of said lands the same would immediately become reclaimed land, and would be the property of the State of North Carolina.

"15. It is agreed that if the title to the first and second tracts of land referred to in the 3rd paragraph hereof is good that the defendant will fully comply with the said contract of purchase; it is further agreed that if the title to the first tract of land described in the 3rd paragraph hereof is good and that title to the second tract in said 3rd paragraph hereof is not good, then the plaintiffs are bound to convey, and the defendant is bound to purchase said first tract at a price of $20,000; and if the said title to the said second tract is good and title to the said first tract is not good, then the plaintiffs are bound to convey and the defendant is bound to purchase said second tract at a price of $5,000."

The deed from the State Board of Education of the State of North Carolina to the plaintiffs is dated 4 August, 1930; conveys all that certain tract of marsh land in Myrtle Grove Sound between the mainland and the development known as the town of Carolina Beach, therein particularly described, together with the water and riparian rights, easements and privileges thereunto belonging in fee simple, without reservations. Said deed is duly executed and recorded.

The court below entered judgment (after making certain findings of fact) as follows:

"It is, therefore, ordered, adjudged and decreed, that the deed of the State Board of Education, dated 4 August, 1930, to the Home Real Estate Loan & Insurance Company and W. F. Shaffner, conveyed the 110 acres of land described therein in fee;

"That the said lands, and especially that part of it agreed to be sold to Mr. C. B. Parmele, are at no stage of the tide covered by navigable waters:

"That the plaintiffs can convey said land conveyed to them by the State Board of Education, and any part thereof, in fee simple."

To said judgment the defendant duly excepted and appealed.

Kellum & Humphrey for plaintiffs, appellees.
Stevens & Burgwin for defendant, appellant.

BARNHILL, J. The common law rule that streams are navigable only as far as tidewater extends developed from the fact that England does not have to any great extent nontidal waters which are navigable. This common law rule has been discarded in this country. Here, the term "navigable waters" has reference to commerce of a substantial and permanent character to be, or which may be, conducted thereon. *Leovy v. United States,* 177 U. S., 621, 44 L. Ed., 914. By "navigable waters" are meant such as are navigable in fact and which by themselves or their connection with other waters, form a continuous channel for commerce with foreign countries or among the states. *United States v. The Montello,* 11 Wall., 411, 20 L. Ed., 191; *Miller v. New York,* 109 U. S., 385, 27 L. Ed., 971.

In *S. v. Glenn,* 52 N. C., 321, it is said: "We hold that any waters, whether sounds, bays, rivers or creeks, which are wide enough and deep enough for navigation of sea vessels are navigable waters." Following these decisions it appears that the court below properly concluded that the *locus in quo* is not covered by navigable waters.

It is likewise accepted law that each state has full jurisdiction over the lands within its waters, including the beds of streams and other waters. *Kansas v. Colorado,* 206 U. S., 46. And the title to tidelands is in the state. *Mann v. Tacoma Land Co.,* 153 U. S., 273, 38 L. Ed., 714; *U. S. v. Mission Rock Co.,* 189 U. S., 391; *Knight v. United Land Assn.,* 142 U. S., 161, 35 L. Ed., 974.

Before flats lying between highwater mark and the channel of navigable waters are reclaimed by the owner, the public and adjoining owners may exercise paramount right of navigation over them, but if the owner elects to reclaim them he has a right to do so, and if the result is less beneficial to the adjoining owners they cannot complain. *Richardson v. Boston,* 19 How., 263, 15 L. Ed., 639.

The state may either sell or convey its title to lands below highwater mark to a riparian owner or his assigns, or, in case of their neglect to take from the state its grants on the terms offered them, to a stranger, who succeeding to its title has no relation to the adjacent riparian owner except that of common boundary. *Hoboken v. Pennsylvania R. R. Co.,* 124 U. S., 656, 31 L. Ed., 543.

As the *locus* was originally the property of the State, does it possess the power to part with the title thereto, and, if so, in what manner?

The rights of the parties to this controversy are to be determined by the answers to these questions.

The authorities bearing upon this subject in other states are conflicting and it is difficult to thread our way through the divergent decisions. To some extent this conflict may be explained by noting the distinction between the titles to flats and marshes over which the tide ebbs and flows, but which are not in any correct sense of the term navigable waters, and those cases in which the land sought to be recovered is covered by navigable water. *Land Co. v. Hotel,* 132 N. C., 517, 44 S. E., 39. The apparent conflict in some of our decisions arises from the fact that under our law there are two methods by which the State may part with its title to public lands. In respect to navigable waters the State has no right to grant or convey the land under such waters for any purpose which will destroy or materially impede the use of such waters for navigation. C. S., 7543, makes provision for this situation and permits the grant of an easement for the purpose of erecting wharves on the side of the deep waters of any navigable sound, river, creek or arm of the sea next to the lands of the person erecting such wharves. Entries for this purpose are limited to those who own the adjacent land. The decisions in *R. R. v. Way,* 172 N. C., 774, 90 S. E., 937, and *Land Co. v. Hotel, supra,* are made to turn on the provisions of this statute, and they are not authoritative in this controversy.

The right of an individual citizen to make entry on vacant land belonging to the State, and the right of the Secretary of State to issue grants therefor are limited by our statute. All vacant and unappropriated lands belonging to the State are subject to entry by any citizen thereof and to grant by the Secretary of State except: "(1) Lands covered by navigable waters; (2) lands covered by the waters of any lake, or which, though now covered, may hereafter be gained therefrom by recession, draining or diminution of such waters, or have been so gained heretofore and not lawfully entered; (3) marsh or swamp land, where the quantity of land in any one marsh or swamp exceeds 2,000 acres, or where if of less quantity the same has been surveyed by the State, or by the State Board of Education with a view to draining and reclaiming the same." C. S., 7540. An entry made to swamp land when the body contains more than 2,000 acres is void and a grant under such entry is void. *Board of Education v. Lumber Co.,* 158 N. C., 314, 73 S. E., 994.

The statute, C. S., 7542, provides that the words "marsh and swamp land" and "swamp lands" employed in the statute creating the Literary Fund and Literary Board of North Carolina, and the State Board of Education of North Carolina and in any act in relation thereto, shall be construed to include all those lands which have been, or may now be known and called "swamp" or "marsh" lands, etc.

The *locus in quo* is marsh land and constitutes a part of one continuous tract comprising more than 2,000 acres of marsh land. Thus it appears that no part thereof is subject to entry or grant under the pertinent statutes. How, then, if at all, may the State part with title thereto? Under the terms of C. S., 7542, the State Board of Education is authorized to sell and convey marsh and swamp lands at public or private sale. However, neither our present Constitution nor our statute law specifically vests title to marsh and swamp lands in the State Board of Education, which is a body corporate under the terms of C. S., 5394. Article IX, sec. 10, of the Constitution provides that the Board of Education is successor to all the powers and trusts of the president and directors of the Literary Fund of North Carolina. An examination of our former statutes discloses that the acts of the General Assembly, session 1825, chapter 1, created "the president and directors of the Literary Fund of North Carolina" a body corporate and vested title to all public lands, including marsh and swamp lands, in said corporation. The provisions of this statute were brought forward in chapter 66 of the revised statutes of 1836. As the corporation thus created held title to all public lands at the time the present Constitution was adopted, the provisions of Article IX, sec. 10, thereof vested title thereto in the present State Board of Education, and C. S., 7621, authorized the latter corporation to sell and convey the same.

It follows that the deed from the State Board of Education to the plaintiffs conveyed a valid title to the lands therein described, which include the *locus in quo*. And the plaintiffs can convey a good title to the defendant unless such title is affected by the fact that the lands described in the deed to the plaintiffs has been reclaimed since the plaintiffs acquired title thereto.

The deed to the plaintiffs conveys more than an easement. It conveys a fee simple title. The mere fact that the plaintiffs have improved the lands thus acquired by filling in and reclaiming the same could not be held to divest them of title. Their deed covered marsh land and conveyed a fee. In *R. R. v. Way, supra,* the plaintiff owned an easement for the purpose of maintaining a wharf in navigable waters. Herein lies the distinction.

We are of the opinion that the State Board of Education was vested with title to the property conveyed to the plaintiffs; that its deed to the plaintiffs conveyed a valid title in fee; and that the deed tendered by the plaintiffs to the defendant conveys a fee simple title to the lands therein described.

C. S., 7583, provides that: "Whenever in the construction of the inland waterway, or in the improvement of any other waterway within this State, lands theretofore submerged shall be raised above the water by deposit of excavated material, the land so formed shall become the

property of the United States for a distance of 1,000 feet on either side of the center of such canal or channel. It does not appear from the agreed statement of facts, and we cannot definitely determine from an inspection of the plat filed as a part of the record herein, whether any portion of the *locus in quo* is located within 1,000 feet of the center of the inland waterway canal. We, therefore, express no opinion as to the title of the plaintiffs to said lands as against the United States. We merely adjudge that the plaintiffs' title is good as against the State of North Carolina.

Affirmed.

A. B. COVINGTON v. DR. W. D. JAMES AND HAMLET HOSPITAL.

(Filed 22 June, 1938.)

1. Physicians and Surgeons § 15c—Evidence held sufficient to overrule nonsuit in this action against physician for malpractice.

Plaintiff's evidence tended to show that he was taken unconscious to a hospital after an accident which broke the small bone in his leg between the knee and the ankle, that while unconscious a cast was put on his leg, that later he was anaesthetized and the larger bone broken and the bones reset, that for seven days after the cast was put on his leg the attendant physician failed to give him further attention and that during this time his leg swelled up and burst and abscesses formed, and that when discharged from the hospital the foot on the injured leg was turned inward at nearly a right angle, so that plaintiff could not walk. *Held:* The granting of defendant's motion to nonsuit at the close of plaintiff's evidence was error, plaintiff's injury being simple in its nature and the results shown by the evidence being so grotesquely contrary to all human experience as to afford some evidence for the jury that the bones were never properly set or were permitted to grow out of their proper relation through want of due care and attention.

2. Same: Negligence § 19c—Res ipsa loquitur may apply when matter is not highly technical and result is contrary to human experience.

The doctrine of *res ipsa loquitur* in malpractice cases is not limited to instances in which foreign substances are left in the body after an operation, but the doctrine may be applied when the original conditions are known and the matter does not fall within the range of highly scientific and technical knowledge, and a result is shown which is grotesquely contrary to all human experience.

3. Physicians and Surgeons § 15a—

A physician or surgeon is not a guarantor of the result of treatment.

4. Trial § 22b—

Upon motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff and assumed to be true.

STACY, J., concurring in part.

WINBORNE, J., concurs in concurring opinion.

COVINGTON *v.* JAMES.

APPEAL by plaintiff from *Phillips, J.,* at February Term, 1938, of RICHMOND. Reversed.

This was a civil action brought by the plaintiff to recover damages for an alleged injury caused by the negligence of the defendants in not using due skill and care in his treatment while a patient in the Hamlet Hospital.

In his complaint plaintiff alleged, in substance, that he had a small bone in his left leg broken between the knee and ankle, and entered the hospital and was accepted for treatment; that he employed the defendant Dr. W. D. James "as surgeon and physician, to dress, heal, and cure said injured leg," and that Dr. James undertook the treatment; that his leg was placed in a cast after examination and diagnosis; but that the defendant James negligently, carelessly, and unskillfully performed the examination and diagnosis, and did not use proper skill in the treatment and care of plaintiff's injury; carelessly and negligently failing to treat the dislocation of the bone and to properly set it, so that the bone refused to heal and became permanently dislocated. Plaintiff further complained that at the time he placed himself under Dr. James for treatment only the small bone in his leg was broken, and that the defendant negligently broke the large bone and attempted to set it, but negligently failed to properly do so, so that the leg is now crooked and deformed, the bones of the leg never having been placed together. He claims that he remained in the hospital seventy days for treatment, and, after five weeks at home, went back to the hospital on crutches; that his leg is warped and crooked and he is unable to walk on that foot, because while he is standing up the foot on the left leg—the injured member—points inward to such an extent that it catches behind his right leg, and that he has virtually lost the use of that leg and has become a cripple.

He further complains that he was cut and seriously injured by faulty equipment used while he was confined to bed.

There is a further allegation that the negligent and unskillful manner in which his injury was treated caused the glands in his leg to swell up, abscess, and burst. There follow the usual allegations of physical suffering, mental anguish, and permanent injury.

The defendants, answering, deny these allegations, and in a further defense set up that the plaintiff's condition, if he suffers from any injury at all, came about through his own carelessness and negligence in refusing to follow instructions given to him at the time he left the hospital.

Upon the trial the case, in the main, was presented in the plaintiff's own testimony and the exhibition of the injured member. There was corroboration in some material parts, to which it is needless here to refer.

The evidence was substantially along the line of the pleading. Plaintiff testified that he was fifty-four years of age and a cotton mill worker; that he was struck from the rear by the fender of an automobile on the

back of the left leg, just below the knee; that he was unconscious when he was taken to the hospital, but woke up next morning, finding his leg hurt and in a "short cast"; that he had a conversation with Dr. James, who told him that he had a small fracture of the leg.

According to his narrative, after he was carried from the operating room he stayed in the room to which he was carried from 5 December to 29 December, when X-ray pictures were again made of the injured member. When carried back to his room, he stayed there that night without a cast on the leg, and was again taken to the operating room, and there Dr. James told him that the fracture was not set and knitting like it ought to; that he would have to put plaintiff to sleep and reset it.

Plaintiff's leg swelled up so that he could not move it, abscessed, and burst. He called his condition to the attention of Dr. James, who promised to come back in the room in a few minutes, but did not return for seven days.

Plaintiff gave further details as to his treatment in the hospital along the same line.

He testified that he saw Dr. James on 6 March and that the doctor told him his leg was not broken when he went to the hospital; that he, the doctor, had broken it and did not know why he did so, but promised to take him to a specialist to have some treatment.

Plaintiff exhibited his leg to the jury and gave testimony as to its condition, stating that the left foot would not pass the right foot in walking, because of the extent to which it was turned inward.

There was other evidence of a similar character, to which we need not advert. There was no evidence for defendants. Upon motion of the defendants' counsel, the court below rendered a judgment as of nonsuit and the plaintiff appealed.

J. C. Pittman and H. F. Seawell, Jr., for plaintiff, appellant.
Sapp & Sapp and Fred W. Bynum for defendants, appellees.

SEAWELL, J. The court below allowed defendant's motion to nonsuit upon the theory that in the absence of expert testimony the evidence, serious as it is, is not sufficient to go to the jury on the issue of defendant's failure to exercise due skill and care in his treatment of plaintiff.

We are urged to adopt the view that recovery cannot be had in any suit against a physician or surgeon for malpractice in the absence of expert medical testimony, except where the facts give rise to the application of the doctrine *res ipsa loquitur*. *Pendergraft v. Royster*, 203 N. C., 384; *Ferguson v. Glenn*, 201 N. C., 128; *Nash v. Royster*, 189 N. C., 408; and *Connor v. Hayworth*, 206 N. C., 721, are amongst the authorities cited in defendant's brief in support of this position.

It is further contended that the doctrine *res ipsa loquitur* applies only in instances where foreign substances, such as sponges, towels, needles, glass, etc., are introduced into the patient's body and left there.

In the case at bar, are the facts of the testimony competent to go to the jury without explanation by medical expert, either in their simple character as evidence, or as raising the doctrine *res ipsa loquitur?*

In the present case there are three outstanding phases of the evidence which may be discussed in this connection:

(a) The plaintiff testified that he was admitted to the hospital with a simple fracture of the small bone of the lower left leg; that he was unconscious when he was admitted to the hospital; that while he was unconscious a cast was put upon this leg, and later he was carried to the operating room, anaesthetized, and the bone reset; that the defendant later admitted that he had at this time broken the larger bone of the leg without knowing why.

(b) He testified that after the cast was put upon his leg, the defendant failed to give him further attention and did not see him for seven days. During this time his leg swelled up and burst and abscesses formed upon it and in the groin and burst.

(c) He further testified that when discharged from the hospital plaintiff's foot was turned inwardly at nearly a right angle to the line of advance in walking, and had to be swung out and around to get it from behind the other foot.

We are unwilling to decide that the doctrine of *res ipsa loquitur* as an instrument of proof in malpractice cases applies only where foreign substances have been introduced into the body during an operation and left there, although such instances are often used by way of illustration. With reference to the rule requiring expert medical testimony under certain conditions, the Court, in *Pendergraft v. Royster, supra,* adopts the following: "There is, however, a well recognized exception to the above rules, 'where there is manifest such obvious gross want of care and skill as to afford, of itself, an almost conclusive inference' of negligence (*Simak v. Foster,* 106 Conn., 366; *Donahoo v. Lovas,* 288 Pac., 698). In such cases, neither affirmative proof of negligence, nor expert testimony as to want of skill, need be given by the plaintiff. This presumption of negligence from certain proven facts, otherwise known as the doctrine of *res ipsa loquitur,* has been frequently applied, in actions for malpractice, to cases where the surgeon has left a foreign substance, such as sponges or gauze, in the patient's body after an operation."

This further quotation is made from Sherman and Redfield on Negligence, section 59: "The maxim *res ipsa loquitur* applies in many cases, for the affair speaks for itself. It is not that in any case negligence can be assumed from the mere fact of an accident and an injury, but in these cases the surrounding circumstances which are necessarily brought

into view, by showing how the accident occurred, contain without further proof sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof that the injured person is able to offer or that it is necessary to offer."

Without the application of that doctrine to the incident of breaking plaintiff's leg during the course of the operation, it is sufficient to say that the evidence, especially in view of the admission of the defendant, and taken in connection with the result produced, is sufficient to carry the case to the jury.

"Res ipsa loquitur"—if we may use the phrase to represent the doctrine—is itself a mere mode of proof. After rebutting testimony is offered, it is still evidence to be reckoned with by the jury, just as any other evidence, according to its probative force. Frequently, evidence which is not attended with any technical presumption is more cogent.

We cannot accept the sweeping conclusion that no evidence except that presented in the guise of *res ipsa loquitur* is competent for the jury, in the absence of expert medical testimony. Such a ruling is neither justified by the present condition of medical and surgical science and practice, high as the standards are, nor is it consistent with the facts of common knowledge, experience, and ordinary intelligence. It would expropriate to the medical or surgical expert the entire field of human knowledge on a subject, some phases of which, at least, are sufficiently simple to be well understood and intelligently discussed by men and women in everyday life.

No doubt there are many instances in which the disease or injury involved, and its commendable treatment, belong to a high order of scientific and technical knowledge where expert medical testimony may be essential. But, does it require a medical expert to know that it is not always, at least, necessary to break the large bone of the leg in order to set the small bone? Does it take an expert to understand that seven days inattention, during which patient's leg swelled up and burst, indicates a want of the application of due skill and care?

The evidence of neglect of the patient for the prolonged period of seven days, while under the care of the defendant, and the attendant evidence of what took place during that time stands upon its own peculiar ground. There was no treatment involved in this upon which an expert witness might be called to pass. There was an utter want of the treatment—the failure to apply the due skill and care which the defendant under the law was bound to give; and this could be shown by the patient, a nonexpert witness.

We have left to consider the condition of the plaintiff's leg when discharged from the hospital and when exhibited to the jury. We do not

have to decide here that such a condition would raise the doctrine of *res ipsa loquitur,* or whether, standing alone, it would afford evidence of malpractice, since it must be considered in the light of other competent evidence.

It is true that the physician or surgeon is not a guarantor of the result, but when the original conditions are known and the matter does not fall within the range of highly scientific and technical knowledge a result might be so grotesquely contrary to all human experience as to afford some evidence to go to the jury on such a question. It does not seem to be too far beyond the comprehension of the jury that in simple conditions, at least, broken bones will knit when the ends are brought together, and that the parts, by the application of ordinary skill and care such as is possessed and exercised by physicians and surgeons ordinarily, may be kept in reasonable relation, such, for instance, as to produce an approximately forward aspect of the toes of the foot. Some inference might be drawn from the existing condition, in view of the other evidence with which it is accompanied, that the bones were never properly set or were permitted to grow out of their proper relation through the want of due care and attention.

The condition of the plaintiff's leg and foot, as exhibited to the jury, could well be considered as corroborating the testimony of the plaintiff that the large bone in his leg had been broken during the operation, since it is difficult to see how the foot could have been rotated upon the axis of the limb to the extent described while the large bone was intact. At any rate, we cannot say that there is no evidence of negligence in this case to which the jury might not attribute the unfortunate condition exhibited by the plaintiff.

Upon considering a motion for nonsuit, the law requires us to take the evidence of the plaintiff in its most favorable light, assuming it to be true. As to the truth or falsity of the charges made, we express no opinion. No doubt, the defendant upon the trial of this cause will introduce evidence contradictory to that we have been discussing; but at present the evidence is too challenging in its effect not to require explanation.

The judgment of nonsuit is

Reversed.

STACY, C. J., concurs on the ground that what was done while plaintiff was unconscious or under the influence of an anesthetic calls for explanation in view of defendant's purported statement and the results obtained, but does not assent to the position that the doctrine of *res ipsa loquitur* applies generally to the case. *Smith v. McClung,* 201 N. C., 648, 161

S. E., 91; *Springs v. Doll,* 197 N. C., 240, 148 S. E., 251; *Byrd v. Hospital,* 202 N. C., 337, 162 S. E., 738.

It is no evidence of negligence for a physician to reset a fractured *fibula* in the left leg, place it in a plaster cast and leave the patient in a hospital for seven days without further personal visit where there is no suggestion of any adverse report, call or complaint in the meantime. *Gower v. Davidian,* 212 N. C., 172, 193 S. E., 28; *Connor v. Hayworth,* 206 N. C., 721, 175 S. E., 140. At least, this record affords no basis for pronouncing such treatment evidence of malpractice. *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356; *McLeod v. Hicks,* 203 N. C., 130, 164 S. E., 617. For aught we know—and this is a matter which we can know judicially only from the record—the conduct of the defendant in the circumstances may have been well within the range of permissible practice. *Mitchem v. James,* 213 N. C., 673, 197 S. E., 127; *Ferguson v. Glenn,* 201 N. C., 128, 159 S. E., 5; *Smith v. Wharton,* 199 N. C., 246, 154 S. E., 12. "A doctor is neither a warrantor of cures nor an insurer." *Pendergraft v. Royster,* 203 N. C., 384, 166 S. E., 285.

Nor does the doctrine of *res ipsa loquitur* apply to the swelling and bursting of plaintiff's leg. *Smith v. McClung, supra; Springs v. Doll, supra; Davis v. Pittman,* 212 N. C., 680, 194 S. E., 97. In a malpractice case, if plaintiff be entitled to recover at all, he is "entitled to recover compensation only for those injuries which proximately result from defendant's negligent treatment." *Payne v. Stanton,* 211 N. C., 43, 188 S. E., 629; *Blaine v. Lyle,* 213 N. C., 529, 196 S. E., 833.

WINBORNE, J., concurs in this opinion.

ANNIE RUTH SURLES GRAHAM v. O. I. FLOYD, LYDIA P. FLOYD, CHESTER BRANCH AND WIFE, LALLAGE BRANCH.

(Filed 22 June, 1938.)

1. Executors and Administrators § 13a—

When the personalty of the estate is insufficient to pay debts and charges of administration, the administrator, at any time after the granting of letters, may apply to the Superior Court for authority to sell real estate to make assets. C. S., 74.

2. Executors and Administrators § 13b—

When it is made to appear to the court by petition and satisfactory proof that a private sale rather than a public sale of real estate to make assets will be to the advantage of the estate, the court may authorize such sale. C. S., 86.

3. Same—

The heirs are necessary parties to a proceeding to sell realty to make assets to pay debts, and heirs under 14 years of age must be served as provided in C. S., 483 (2), and must defend by their general or testamentary guardian, if any, and if none, then by a guardian *ad litem*.

4. Same—

The court may proceed to sign order for the sale of realty to make assets to pay debts after twenty days notice to the parties by service of the summons and complaint in the special proceeding, and after answer is filed by the guardian *ad litem* of minor heirs, C. S., 451, it being the duty of the guardian to file answer. C. S., 453.

5. Infants § 15—

It is the duty of a guardian *ad litem* for minor heirs in a special proceeding to sell real estate to make assets, to file answer and to protect the interests of the heirs.

6. Infants § 12: Executors and Administrators § 13b—

A creditor of the estate for the payment of whose claim the administrator files petition to sell realty to make assets, is not a proper person to be appointed guardian *ad litem* for the minor heirs.

7. Infants § 15: Executors and Administrators § 13e: Judicial Sales § 8—

The guardian *ad litem* of minor heirs in a proceeding to sell lands to make assets to pay debts of decedent may not purchase at the sale, directly or indirectly, and if he does so he becomes a constructive trustee for his ward.

8. Same—

When the guardian *ad litem* for a minor heir in proceedings to sell lands to make assets, purchases the property at the sale, the sale is not void, but voidable only, and the minor heir may have the sale set aside as against the guardian or hold the guardian liable for the true value of the property as a constructive trustee, even in the absence of fraud.

9. Executors and Administrators § 13f: Judicial Sales § 6—

A purchaser at a judicial sale, or his grantee, obtains good title in the absence of fraud or the knowledge of fraud, if the record shows jurisdiction of the court over the parties and subject matter, and the judgment on its face authorizes the sale.

10. Same—Record held to show jurisdiction of the court and order of sale sufficient to protect purchaser in absence of fraud or knowledge thereof.

The record in this proceeding to sell lands to make assets to pay debts of decedent, although showing minor irregularities, *is held* sufficient to show jurisdiction of the court over all the parties and subject matter, and the order of sale by the clerk and confirmation by the court, so that a purchaser from the purchaser at the sale would obtain good title in the absence of fraud or knowledge of fraud, and minute details appearing of record are insufficient to charge the purchaser with knowledge that the guardian *ad litem* of the minor heir purchased the property directly or indirectly, but upon proof of alleged fraud in the purchase of the prop-

erty by the guardian *ad litem*, and actual knowledge of such fraud by the guardian's grantee, the guardian's grantee would not be an innocent purchaser for value, and the sale may be set aside as to all parties.

11. Same—

When a guardian *ad litem* for a minor heir in proceedings to sell lands to make assets to pay debts, purchases the property at the sale, either directly or indirectly, the fact that he stands by and permits the property to be sold at a price far below its true value is some evidence of fraud to be considered with other evidence in the case upon the issue.

12. Judgments § 26—

A *prima facie* presumption of jurisdiction arises from the fact that a court having jurisdiction over the subject matter has acted.

BARNHILL, J., concurring in part.

APPEAL by plaintiff from *Spears, J.*, at February-March Term, 1938, of ROBESON.

Civil action for recovery of land and to remove cloud on title thereto, and for damages.

Plaintiff alleges and offers evidence tending to show that Ila Surles died on 28 August, 1915, intestate, and seized of a certain tract of land in Robeson County containing 19½ acres, more or less, and leaving surviving her husband, E. H. Surles, and the plaintiff, who was then an infant; that on 16 October, 1915, E. H. Surles was appointed and qualified as administrator of the estate of Ila Surles, and filed bond as such administrator with the defendant O. I. Floyd, and W. Lennon as sureties, that on 23 October, 1915, a special proceeding, entitled "E. H. Surles, Administrator of Ila Surles, deceased, *v.* Annie Ruth Surles," was instituted in the Superior Court of Robeson County, to sell lands to make assets to pay debts of the estate; that on the same day defendant O. I. Floyd was appointed as guardian *ad litem* for Annie Ruth Surles; that on 25 October, 1915, by reading same to her, and by leaving copy with Mrs. Jane Butt, with whom she resided, summons was served on Annie Ruth Surles, and service of summons accepted by O. I. Floyd as guardian *ad litem;* that on 29 October, 1915, petition was filed, in which it is alleged that the debts listed in the petition consisted of three notes dated 27 October, 1914, aggregating $228.40, alleged to be due O. I. Floyd; the personal property is insufficient to pay debts of the estate and costs of administration; the land is "valued at about $500"; and E. H. Surles, husband, and Annie Ruth Surles are heirs at law of Ila Surles; that O. I. Floyd, as guardian *ad litem,* on 29 October, 1915, filed answer admitting all the allegations of the petition; that on 9 November, 1915, the clerk of the Superior Court, finding that the personal estate is insufficient to pay debts of estate, and that "it is for the best interest of all parties," ordered the lands in question to be sold at private sale, and appointed Woodberry Lennon as commissioner to make the sale; that

on the same day the commissioner reported that on *8* November, 1915, he sold the lands to one L. P. Floyd for $500 cash, which he considered fair and reasonable and recommended that the sale be confirmed and deed made to the purchaser; that on the same day, without any proof as to the adequacy of the purchase price, the sale was confirmed by the clerk of the Superior Court, who ordered deed executed and delivered to the purchaser upon payment of the purchase price, which order was approved by the judge of the Superior Court "presiding" in the Ninth Judicial District; that the commissioner executed a deed to L. P. Floyd, dated 8 November, 1915; that on 30 September, 1918, defendant O. I. Floyd and wife, Lydia P. Floyd, who is the L. P. Floyd to whom the deed was made, conveyed the land in question, with other land, to Cheston Branch and wife for the recited consideration of $2,000; that the plaintiff Annie Ruth Surles Graham was born on 25 June, 1913; that she became twenty-one years of age on 25 June, 1934; that this action was instituted 16 June, 1937; that the land in question was reasonably worth the sum of $200 per acre in 1915.

Plaintiff further alleges that the original papers in the said special proceedings tend to show that the answer of O. I. Floyd, as guardian *ad litem,* was prepared by the same attorney who prepared the petition; and that in the report of the commissioner and in the decree of confirmation the name of O. I. Floyd was typed and that the initials "O. I." were erased and "L. P." inserted in lieu thereof. For inspection and in support of these allegations plaintiff introduced in evidence the original unregistered judgment roll in said special proceeding.

Plaintiff alleges and contends that on the face of the petition O. I. Floyd appeared as the only creditor of her mother's estate; that as guardian *ad litem* he admitted the debt, became the purchaser of the land, and had title taken in the name of his wife, L. P. Floyd; and that by reason of these matters the proceeding is a fraud upon the right of the plaintiff, and void; and that the defendant Branch purchased with notice.

Plaintiff further alleges and contends that, if the defendants Branch are purchasers for value without notice, she is entitled by reason of the fraud of defendants Floyd to recover of them the value of the lands.

Defendants deny material allegations, and plead the 3-year statute of limitations. C. S., 441.

From judgment as of nonsuit at the close of plaintiff's evidence, the plaintiff appealed to the Supreme Court, and assigns error.

Caswell P. Britt and F. D. Hackett, Jr., for plaintiff, appellant.
Johnson & Floyd for defendants Floyd, appellees.
Robt. E. Lee and W. Osborne Lee for defendants Branch, appellees.

WINBORNE, J. The plaintiff challenges the correctness of the judgment as of nonsuit. We think the challenge good.

When the personal estate of a decedent is insufficient to pay his debts and charges of the administration, the administrator may, at any time after the granting of letters, apply to the Superior Court for authority to sell the real estate to create assets with which to pay the debts. C. S., 74. "If it be made to appear to the court by petition and by satisfactory proof that it will be more for the interest of the said estate to sell such real estate by private sale" the court may authorize such sale. C. S., 86.

The heirs of the decedent are necessary parties to the proceeding. In such proceeding if any of the defendants are infants under 14 years of age, summons shall be served as provided in C. S., 483 (2). They must defend by their general or testamentary guardian, if they have any within the State. If they have no such guardian, and have been summoned, the court in which the special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian *ad litem* to defend in behalf of such infants. After twenty days notice of the summons and complaint in the special proceeding and after answer is filed by the guardian *ad litem,* the court may proceed to sign judgment. C. S., 451. *Young v. Young,* 91 N. C., 359; *Welch v. Welch,* 194 N. C., 633, 140 S. E., 436. The guardian *ad litem* shall file answer. C. S., 453. It is the duty of the guardian *ad litem* to protect the interest of the infant.

In *Ellis v. Massenburg,* 126 N. C., 129, 35 S. E., 240, it is said: "The court has no higher duty than the protection of infant defendants, and there can be no trust more sacred than that of a guardian, who must be absolutely free from any interest or motive that can possibly interfere with the faithful performance of his duties. If he has any interest at all in the suit it must be thoroughly consistent with that of his ward's. Even his attorney must be equally disinterested, and a mere colorable interest is a sufficient disqualification for either, if at all adverse. . . . We think that this rule is analogous to that forbidding a trustee to deal with himself, which, though founded upon natural justice and public policy, has become too firmly imbedded in our jurisprudence by repeated decisions to need citation of authorities.

"We may say here that the object of the appointment of a guardian *ad litem* is to protect the interest of the infant defendant, to which protection he is entitled at every state of the proceeding." *Covington v. Covington,* 73 N. C., 168; *Holt v. Ziglar,* 159 N. C., 272, 74 S. E., 813; *Morris v. Gentry,* 89 N. C., 248.

The defendant O. I. Floyd, asserting a claim against the estate, was disqualified to act as guardian *ad litem.* But, assuming to act, it was his duty to be faithful to the trust throughout the entire proceeding.

He was in no position to buy at the commissioner's sale, either directly or indirectly. If he bought at the sale, he became constructively trustee for his ward. If he stood by and permitted his wife to buy the land at a price greatly less than its real value, this would be evidence for consideration by the jury in passing on the issue of fraud.

In *Patton v. Thompson,* 55 N. C., 285, it is aptly said: "Who but the guardian can be relied on to show the property to persons wishing to buy, and to take the necessary steps to make it bring a fair price? Who but the guardian can the court look to for information as to whether the matters have been conducted in such a way as to bring the property to sale under the most advantageous terms, and that in fact it did sell for a fair price?" There the guardian bought at judicial sale. The Court declared that he held the property in trust.

In *Froneberger v. Lewis,* 79 N. C., 426, after reviewing pertinent authorities, the Court said: "Thus it will be seen that we have a train of decisions—all to the same effect, that a trustee cannot buy the trust property, either directly or indirectly. And, if he does so, he may be charged with the full value, or the sale may be declared void at the election of the *cestui que trust,* and this without regard to the question of fraud, public policy forbidding it." *Council v. Land Bank,* 213 N. C., 329, 196 S. E., 483; *Smith v. Land Bank,* 213 N. C., 343, 196 S. E., 481.

Plaintiff contends that the property was worth $3,900 at the time of sale, and that defendant O. I. Floyd bought it through his wife for $500. If the value of the land were greatly in excess of the bid, it would be a circumstance for the consideration of the jury on the issue of fraud. Mere inadequacy of purchase price alone is not sufficient to upset a sale when duly and regularly made. "But gross inadequacy of consideration, when coupled with other inequitable element, even though neither standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties." *Weir v. Weir,* 196 N. C., 268, 145 S. E., 281; *Roberson v. Matthews,* 200 N. C., 241, 156 S. E., 496; *Creech v. Wilder,* 212 N. C., 162, 193 S. E., 281.

The special proceeding to which the present action relates is extremely irregular, but the judgment is not void—but voidable. By reason of the irregularities the judgment may be vacated as to all parties, unless the defendants Branch are innocent purchasers. If it should appear upon the hearing that they are purchasers for value without notice, then the plaintiff is not entitled to recover as against them. "A purchaser for value from one whose deed was procured by fraud gets a good title if he had no notice of the fraud." *Phillips v. Lumber Co.,* 151 N. C., 519, 66 S. E., 603; *Martin v. Cowles,* 18 N. C., 29; *Saunders v. Lee,* 101 N. C., 3, 7 S. E., 590; *Odom v. Riddick,* 104 N. C., 515, 10 S. E., 609; *Cheek v. Squires,* 200 N. C., 661, 158 S. E., 198.

It is well settled that, in the absence of fraud or the knowledge of fraud, one who purchases at a judicial sale, or who purchased from one who purchased at such sale, is required only to look to the proceeding to see if the court had jurisdiction of the parties and of the subject matter of the proceeding, and that the judgment on its face authorized the sale. *Sutton v. Schonwald,* 86 N. C., 198; *Morris v. Gentry,* 89 N. C., 248; *England v. Garner,* 90 N. C., 197; *Fowler v. Poor,* 93 N. C., 466; *Dickens v. Long,* 112 N. C., 311, 17 S. E., 150; *Barcello v. Hapgood,* 118 N. C., 712, 24 S. E., 124; *Smith v. Huffman,* 132 N. C., 600, 44 S. E., 113; *Millsaps v. Estes,* 137 N. C., 536, 50 S. E., 227; *Carraway v. Lassiter,* 139 N. C., 145, 51 S. E., 968; *Card v. Finch,* 142 N. C., 140, 54 S. E., 1009.

In the present case the evidence discloses that on the face of the record in the former special proceeding it appears that the summons was served on the infant defendant, though not in strict compliance with the statute; that a guardian *ad litem* was appointed upon application of the attorney for petitioner, though the appointment was made before service of summons upon the infant; that the guardian *ad litem* filed answer; that the petition alleged and the clerk in the order of sale finds that the personal property is insufficient to pay the debts of the estate; that the intestate died seized of the land in question leaving as her only heirs at law, her husband, the administrator, and the infant defendant therein; that the clerk finds that a private sale is to the best interest of all parties, and orders such sale; that the bid of L. P. Floyd is reported and confirmed, and the order of confirmation is approved by the judge presiding over the courts of the district. On these appearances we think the defendants Branch had the right to rely, unless they had actual knowledge of fraud, if any, in the conduct of the proceeding or in the sale of the property.

Plaintiff contends, however, that on reading the petition defendants Branch saw that the only creditor was O. I. Floyd, who was the guardian *ad litem* of the infant defendant therein. She further contends that, in view of the fact that the judgment roll of the proceedings is not registered, any one examining the title would have read the original papers, and in them have seen that in the report of sale and in the order of confirmation the name of the bidder was typed as "O. I. Floyd," and that the initials "O. I." were erased and the "L. P." inserted in lieu, and that the answer of the guardian *ad litem* was written on the same typewriter on which petition was written.

We cannot agree that one examining the title is held to constructive knowledge of so minute details. It would be otherwise if there were actual knowledge thereof.

We think the orders of sale and confirmation by the clerk of the Superior Court approved by the Superior Court judge holding the

courts of the district are within the jurisdiction of the court. "That the clerk in the exercise of his probate jurisdiction is an independent tribunal of original jurisdiction is settled." Mordecai in his Law Lectures, Vol. 2, p. 1190, quoted in *Hardy v. Turnage,* 204 N. C., 538, 168 S. E., 823. "The performance of a judicial act necessarily implies a court with both jurisdiction and discretion to hear and rule." *Hardy v. Turnage, supra.* "A *prima facie* presumption of rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in the matter. *S. v. Adams,* 213 N. C., 243, 195 S. E., 822, and cases cited.

However, if the defendant O. I. Floyd bought the land in question, and had the title conveyed to his wife, and they having conveyed the same to innocent purchasers, he may be charged with the full value of the land, and this without regard to the question of fraud.

If the defendant L. P. Floyd, the wife of O. I. Floyd, in reality bid $500 for the land, and he, acting as guardian *ad litem,* knew that the real value of the land greatly exceeded that amount, and stood by and permitted it to be sold to his wife, this would be a breach of faith and considered on the issue of fraud.

The judgment below is

Reversed.

BARNHILL, J., concurring: I agree in the result of the majority opinion. However, I consider the discussion of the force and effect of the record evidence as it affects the rights of the defendants Branch premature and statements in that connection as *dicta,* not binding upon this Court or the court below.

The special proceedings to sell land for assets is voidable as to all who took title with notice of the various irregularities therein. The burden is on the defendants Branch to show that they are innocent purchasers for value without notice. In the trial it may develop that they had knowledge of the various serious irregularities in the special proceedings under which the land was sold, including knowledge that the creditor for whose benefit the land was being sold purported to represent the infant as guardian *ad litem;* that the clerk was then without authority to order a private sale in proceedings to sell land to make assets, Public Laws 1917, ch. 127; that he made the order without a proper showing even under the law as it now exists, C. S., 86; that the complaint does not sufficiently state a cause of action, *McNeill v. McBryde,* 112 N. C., 408; and that the land brought a grossly inadequate price, if that shall finally be established as a fact. Therefore, we should not at this time, even by *dicta,* undertake to limit the trial as to them to the proof of want of knowledge of actual fraud.

GOODRICH SILVERTOWN STORES v. QUITTIE C. CAESAR AND PAUL BENNETT MOTOR COMPANY.

(Filed 22 June, 1938.)

1. Chattel Mortgages § 6a—

The doctrine of accession is inapplicable when the personal property placed upon the personal property mortgaged may be conveniently detached without injury to the property mortgaged, and tires placed upon an automobile do not become a part thereof by accession.

2. Chattel Mortgages § 6b—Mortgage given to cover after-acquired property covers such property only in the condition in which buyer receives it.

The purchaser of an automobile executed a conditional sales contract to the seller, which contract provided that the lien should cover any equipment, repairs, replacements or accessories thereafter placed on the car. Thereafter the buyer purchased tires which were placed on the car, and executed a conditional sales contract on the tires and the automobile to secure the balance of the purchase price of the tires. Upon default, the seller of the car repossessed same, and the seller of the tires instituted claim and delivery proceedings for the tires alone. *Held:* The tires came into the hands of the buyer subject to the lien of the conditional sales agreement executed thereon, and the tire dealer's lien is not affected by the agreement relating to after-acquired property, and is superior to the lien of the automobile dealer, and the tire dealer is entitled to repossess the tires or to recover the value thereof from the automobile dealer if delivery cannot be had.

APPEAL by the plaintiff from *Phillips, J.*, at February Term, 1938, of FORSYTH. Reversed.

Fred Hutchins, Harvey A. Lupton and H. Bryce Parker for plaintiff, appellant.

D. L. Bell and Ratcliff, Hudson & Ferrell for corporate defendant, appellee.

SCHENCK, J. This is an action in claim and delivery to recover the possession of certain automobile tires and tubes, or the value thereof in the event that delivery cannot be had, heard upon an agreed statement of facts.

The facts agreed upon are substantially as follows: On 24 March, 1937, the defendant Paul Bennett Motor Company sold a 1931 Model AA Ford truck to Quittie C. Caesar for $125.00 and took a conditional sales agreement retaining title of the truck to secure the unpaid balance of the purchase price, which agreement was duly recorded 30 March,

1937. On 17 May, 1937, the plaintiff sold to Quittie C. Caesar two Silvertown Universal casings, Serial Nos. T939053473 and T103772828, and two Silvertown tubes for the price of $102.02. At the time of the sale Quittie C. Caesar executed to the plaintiff a chattel mortgage on the tires and tubes and also on the truck on which the corporate defendant held its conditional sales agreement, which chattel mortgage was duly recorded on 2 June, 1937. Quittie C. Caesar defaulted in his payments to the corporate defendant and it repossessed the truck and advertised it for sale under the terms of the agreement. At that time the tires and tubes on which the plaintiff held its chattel mortgage were on the truck. Before the advertised date of the sale the plaintiff instituted this claim and delivery proceeding against the corporate defendant, asking for possession of the tires and tubes, or their value, and asking judgment against Quittie C. Caesar, who had defaulted in the payment of the chattel mortgage which he had given to the plaintiff, for the balance owing on the tires and tubes, which amounted to $75.54. Service was never had on the defendant Caesar. The value of the tires and tubes at the time of the institution of this action was $35.00.

The conditional sales agreement executed by Quittie C. Caesar to the defendant Paul Bennett Motor Company contained a clause providing that the buyer shall have no right to create any lien on said car for repairs, replacements, equipment or improvements thereto and that any equipment, repairs, replacements or accessories placed upon said car should be at the buyer's expense and should become a component part thereof and included in the terms of the agreement. The corporate defendant permitted the said Quittie C. Caesar to maintain possession of the truck and to use it in his business.

The trial judge held and adjudged that the plaintiff was not entitled to recover the tires and tubes, or their value, from the corporate defendant, and dismissed the action. From this judgment the plaintiff appealed, assigning error.

The plaintiff does not contend that it has any right to the truck, or its value, superior to the rights of the corporate defendant by reason of its conditional sales agreement.

The question presented for decision is: Where the seller of automobile tires and tubes, at the time of the sale, takes a chattel mortgage on the tires and tubes, and also on a truck, to secure the balance of the purchase price of the tires and tubes, and thereafter the tires and tubes are placed on the truck, is the seller of the tires and tubes, upon default in the payments, entitled to recover them, or their value, from the seller of the truck, who has repossessed it, with the tires and tubes on it, under a prior conditional sales contract on the truck which contains an after-acquired property clause?

Since the plaintiff had a chattel mortgage on the tires and tubes, upon default in payment it was entitled to possession of the mortgaged property or to recover its value, unless such rights be denied it by the principle of accession and the clause in the conditional sales agreement held by the corporate defendant to the effect that any equipment or accessories placed upon the truck shall become a component part thereof and be included in the terms of the agreement.

The doctrine of accession is inapplicable in cases where personal property is placed upon other personal property if the property so placed had not become an integral part of the property to which it was attached and could be conveniently detached. In applying this principle the courts of the various jurisdictions have practically universally held that tires placed upon automobiles do not become part of the automobile by the principle of accession.

"These tires being easily identified by serial numbers, and being so attached that they are easily removed, without injury to the automobile, do not become a part of the automobile by the rule of accretion or accession." *Firestone Service Stores, Inc., v. Darden,* 96 S. W. (2d), 316 (Texas, 1936).

"We think it plain that one who attaches tires which he does not own to a motor truck which he does not own does not thereby pass title in the former to the owner of the latter. The doctrine of accession of chattels does not help the defendant. That doctrine applies where something is added to, attached to, or mixed with something else so that it cannot again be separated without the destruction or serious injury of the whole so formed. . . . Automobile tires such as were here dealt in can be detached from an automobile without destruction or injury to it, even where, as here the evidence tended to show, many parts have to be removed and replaced in the operation." *Bousquet v. Mack Motor Truck Co.,* 168 N. E., 800 (Mass., 1929).

See, also, *General Motors Truck Co. v. Kenwood Tire Co.,* 179 N. E., 394 (Ind., 1932); *K. C. Tire Co. v. Way Motor Co.,* 287 Pacific, 993 (Okla., 1930); *Tire Shop v. Peat,* 161 Atl., 96 (Conn., 1932); *Franklin Service Station v. Sterling Motor Truck Co.,* 147 Atl., 754 (R. I., 1929); *Clark v. Johnson,* 187 Pacific, 510 (Nev., 1920); *Motor Credit Co. v. Smith,* 24 S. W. (2d), 974 (Ark., 1930).

The conditional sales agreement was between the defendant Paul Bennett Motor Company, as seller, and Quittie C. Caesar, as buyer, and the agreement by the buyer "that any equipment, repairs, replacements or accessories placed upon said car shall be at the buyer's expense and shall become a component part thereof and included in the terms of this agreement" inured to the benefit of the motor company only to the extent of whatever property Caesar may have had in any accessories,

including tires and tubes, placed upon the truck, and Caesar never had any property in the tires and tubes not subject to the purchase price chattel mortgage executed by him to the plaintiff. Therefore, the plaintiff, as holder of a past-due chattel mortgage thereon, had a right to the possession of the tires and tubes, unless they had become so attached to the automobile as to become such an integral part thereof as not to be removable without detriment to the automobile.

In 10 Am. Jur., Chattel Mortgages, par. 205, p. 851, it is written: "A mortgage given to cover after-acquired property covers such property only in the condition in which it comes into the hands of the mortgagor. If that property is already subject to mortgages or other liens at that time, the general mortgage does not displace them although they may be junior to it in point of time. It attaches only to such interest as the mortgagor acquires. If he purchases property and gives a mortgage for the purchase money, the bill of sale which he receives and the mortgage which he gives are regarded as one transaction, and the prior mortgage cannot displace such mortgage for the purchase money."

In the case of *Goodrich Silvertown Stores v. Pratt Motor Co.*, 269 N. W., 464 (Minn., 1936), the defendant had sold to one Ordeman an automobile and took a chattel mortgage to secure the purchase price, in which it was provided that all additions to the automobile should become security for the debt. The agreement was properly recorded. Subsequent thereto, the plaintiff sold to Ordeman a battery and casings and took a conditional sales agreement thereon and recorded it. Ordeman placed the battery and casings on the automobile sold to him by the defendant. Upon default in payments of the purchase price the defendant under the terms of its agreement repossessed the automobile, and the plaintiff sued for the battery and casings, or their value, and it was held that the plaintiff was entitled to them, or their value, the Court saying: "It should be noted here that Ordeman did not get title to the battery and casings. Title remained in the plaintiff, vendor, under the provisions of the conditional sales contract. . . . As between defendant and Ordeman, the casings and battery would be held to be subject to the defendant's chattel mortgage, but as to persons like this plaintiff, who had sold these items to Ordeman on conditional sales contract, the defendant's mortgage attached only to the actual interest acquired by Ordeman under such sales contract."

The case at bar is distinguishable from *Twin City Motor Co. v. Rouzer Motor Co.*, 197 N. C., 371, relied upon by the appellee, in that the plaintiff in the Twin City Motor Company case elected to release the automobile, with a new motor it had placed therein, and relinquished its right to hold the automobile for the motor and work performed (C. S., 2435),

and contented itself with taking a chattel mortgage upon the automobile, which mortgage turned out to be subsequent to a conditional sales agreement on the automobile to secure the purchase price thereof. The plaintiff was denied recovery on its chattel mortgage as against the prior conditional sales agreement duly assigned to the defendant finance corporation.

We are of the opinion, and so hold, that, under the agreed statement of facts, his Honor erred in dismissing the action, and that the plaintiff is entitled to recover of the defendant Paul Bennett Motor Company the possession of the tires and tubes, and in the event such possession cannot be delivered, that it recover of the said corporate defendant $35.00 (the agreed value of the tires and tubes), and the costs of the action.

The case is remanded for judgment accordant with this opinion.

Reversed.

S. M. MEARS, W. O. ROBERSON, P. J. MILLER, L. R. HAWKINS, M. C. SLUDER, D. M. SNELSON, S. C. TEAGUE, CLYDE SALES, O. M. MORGAN, L. M. DAVIS, ARTHUR BROWN, R. N. BROOKSHIRE, A. J. TEAGUE, C. C. GIBBS, H. M. MORGAN, L. C. JONES, C. D. WEST, J. W. HUTCHINSON, D. J. GADDY, W. A. COLE, MILLARD SHOOK, R. W. SHOOK, FLOYD SHOOK, L. A. SLUDER, L. L. WEST, W. F. ROBERSON, T. M. MARTIN, R. L. GILLESPIE, CLYDE MOSS, L. C. BROOKS, R. B. ROGERS, W. C. ROGERS, J. R. TEAGUE, P. V. REEVES, RED PENLAND, C. M. GILLESPIE, AND CHARLESTON COLE, FOR AND ON BEHALF OF THEMSELVES AND ALL OTHER TAXPAYERS OF LEICESTER SCHOOL DISTRICT OF BUNCOMBE COUNTY, NORTH CAROLINA, THAT WISH TO MAKE THEMSELVES PARTIES TO THIS ACTION, v. THE BOARD OF EDUCATION OF BUNCOMBE COUNTY, NORTH CAROLINA, A BODY CORPORATE; AND C. J. EBBS, B. E. MORGAN, J. C. RICH, WORTH McKINNEY, JAMES S. HOWELL, T. L. MANEY, AND A. O. MOONEYHAM, MEMBERS OF SAID BOARD OF EDUCATION; AND THE COUNTY OF BUNCOMBE, AND H. GRADY REAGAN, CHAIRMAN AND COMMISSIONER OF FINANCE; H. L. PARKER, COMMISSIONER OF PUBLIC INSTITUTIONS; AND JOHN C. VANCE, COMMISSIONER OF HIGHWAYS.

(Filed 22 June, 1938.)

1. Mandamus § 1—

Mandamus will lie against a board of county commissioners, as well as a board of county education, but the writ will lie only to compel the performance of an established legal duty at the instance of those having a clear legal right to demand performance.

2. Mandamus § 2c—

Mandamus will lie to compel the performance of a legal duty only in accordance with the procedure therefor established by law.

3. Schools § 26—Procedure for obtaining appropriation and tax levy for adequate school buildings.

In order to provide new necessary school buildings it is required that the county board of education file a "capital outlay" budget in addition to the "operating" budget, and have same approved in accordance with the statutory procedure in June of the year in time for the inclusion of the necessary outlay in the computation and levy of *ad valorem* taxes, ch. 394, Public Laws of 1937, and it is provided that the county commissioners shall be given reasonable time to investigate and provide the necessary funds, C. S., 5467, and that the board of education shall not be authorized to erect any building that is not in accordance with plans approved by the State Superintendent, nor invest more money therein than is made available for its erection. C. S., 5468.

4. Same: Mandamus § 2c—Mandamus will not lie to compel performance of legal duty prior to time statutes require such duty to be performed.

An application for writ of *mandamus* against the board of county commissioners and the county board of education to compel the erection of necessary school buildings, is properly dismissed at the January Term of the Superior Court, since it may not then be determined that defendants will not pursue the proper statutory procedure at the proper time to provide the necessary buildings, but plaintiffs should not be precluded from renewing their application for the writ if circumstances should later appear to warrant the relief.

CLARKSON, BARNHILL, and SEAWELL, JJ., dissent.

APPEAL by plaintiffs from *Alley, J.*, at January Term, 1938, of BUNCOMBE. Affirmed.

This was an application for writ of *mandamus* by certain citizens and taxpayers of Leicester School District to compel the board of education and the board of county commissioners of Buncombe County to provide adequate school building and equipment in said school district, and to compel the levy of an *ad valorem* tax on all property in the county sufficient to provide funds for the construction and equipment of said building. It is alleged that the present building is inadequate, out of repair, and unsafe from the standpoint of fire protection, and that a school building to contain twenty-four or more rooms, properly equipped, is necessary. It is also alleged that some five hundred school children of said district are being taught on the first floor of said building and in smaller buildings in and around the school grounds, while two hundred high school and other pupils are transported fourteen miles to another school, and that the defendants have failed and refused to provide for the construction and equipment of adequate school buildings for said district.

The defendants demurred *ore tenus*, on the ground that the petitioners

do not have a clear legal right to *mandamus* in this case, that petitioners have adequate legal remedy, and that the duties alleged in the complaint are in the discretion of defendants.

The following judgment was rendered: "Upon a careful study and consideration of the pleadings, the oral arguments of counsel, the briefs filed and authorities cited, the court being of opinion that the complaint does not state such a cause of action as would at the present status of the proceedings entitle plaintiffs to a remedy by *mandamus,* it is therefore considered and adjudged that the said demurrer *ore tenus* be and it is sustained."

Plaintiffs appealed.

J. W. Haynes for plaintiffs, appellants.

Claude L. Love for County Board of Education.

Brandon P. Hodges and R. R. Williams for Board of County Commissioners.

DEVIN, J. It has been established by the decisions of this Court that *mandamus* is available against a board of county commissioners, as well as a county board of education, to compel the performance of a ministerial duty obligatory upon the board. But those seeking the writ must have a clear legal right to demand it, and the board must be under a legal obligation to perform the act sought to be required. *Rollins v. Rogers,* 204 N. C., 308, 168 S. E., 206; *John v. Allen,* 207 N. C., 520, 177 S. E., 634. The writ will not be issued to enforce an alleged right which is in doubt. *Hayes v. Benton,* 193 N. C., 379, 137 S. E., 169; *Cody v. Barrett,* 200 N. C., 43, 156 S. E., 146; *Powers v. Asheville,* 203 N. C., 2, 164 S. E., 324. "The function of the writ is to compel the performance of a ministerial duty—not to establish a legal right, but to enforce one which has been established. The right sought to be enforced must be clear and complete." *Wilkinson v. Board of Education,* 199 N. C., 669, 155 S. E., 562.

Likewise, the court may not be called upon to issue the writ of *mandamus* to require public officials to perform an act otherwise than in accordance with the procedure therefor established by law. The statutes now in force prescribe the procedure by which the construction of adequate school buildings and the levy of tax therefor may be authorized, that is, by the filing by the board of education of a "capital outlay" budget, as well as an "operating" budget, with the proper taxing authorities, and, upon approval, submission to the State School Commission when proceeding under ch. 394, Public Laws 1937. This is required to be done in June each year, in time for the inclusion of the necessary outlay in the computation and levy of *ad valorem* taxes. Ch. 394, Acts 1937; *Board of Education v. Board of Commissioners,* 178 N. C.,

305, 100 S. E., 698; *Cody v. Barrett, supra.* The Court cannot now determine that this course will not be pursued at the proper time by the defendants, and adequate provision made to supply the needs of the school district. 38 C. J., 581. The court below ruled "that the complaint does not state such a cause of action as would at the present status of the proceedings entitle plaintiffs to the remedy by *mandamus.*" The application for the writ of *mandamus* was presented to the court at January Term, 1938, and the judgment appealed from was rendered at that time. On the record before us, we think the ruling of the judge below must be upheld.

While school buildings and their proper equipment are declared by statute to be necessary for the maintenance of the six months' school term, it is provided that the county commissioners shall be given reasonable time to supply the funds found upon investigation to be necessary (C. S., 5467), and it is further provided that "the board (of education) shall not be authorized to invest any money in any new house that is not built in accordance with plans approved by the State Superintendent, nor for more money than is made available for its erection." C. S., 5468.

If it appeared that the building was necessary and that the board of education and the board of commissioners of Buncombe County, at the proper time and in accord with the procedure prescribed by law, had refused to take any action, and that the desired result could be accomplished by means presently available to these defendants, a different question would be presented. If the defendants are proceeding in the most expeditious manner, in good faith, to supply the needs of the school, the present status would not present a case for the interference of the courts. Whether, under the circumstances, as stated in the argument, it would be wiser to repair the present building or construct a new one, becomes a matter for the exercise of sound judgment on the part of the local authorities who are charged with responsibility to provide adequate facilities for public education in this district.

To this end, the plaintiffs should not be precluded from further proceeding in the matter, if the circumstances should appear to warrant renewal of the application for the exercise of the mandatory power of the court.

As thus modified, the judgment of the court below is

Affirmed.

CLARKSON, BARNHILL, and SEAWELL, JJ., dissent.

STATE v. ED ALSTON.

(Filed 22 June, 1938.)

1. Homicide § 4c—

Premeditation and deliberation is an essential element of the crime of murder in the first degree, and a defendant may show as an affirmative defense to a charge of this degree of the crime, mental incapacity to premeditate and deliberate, including such incapacity brought about by drunkenness.

2. Homicide §§ 16, 27b—Defendant does not have burden of proving beyond reasonable doubt his defense of intoxication to first degree murder charge.

Defendant's defense to the charge of murder in the first degree that at the time he was mentally incapable, because of intoxication, of premeditation and deliberation, must be supported by his own evidence or that of the State, but he is not required to establish the defense beyond a reasonable doubt, and an instruction susceptible of the construction that the burden was on him to prove the defense beyond a reasonable doubt is reversible error.

APPEAL by defendant from *Burgwyn, Special Judge,* at Special February Term, 1938, of DURHAM. New trial.

The defendant was tried at a special term of the Superior Court of Durham County, beginning on 14 February, 1938, upon an indictment charging him with murder.

Upon the trial, evidence was introduced in behalf of the defendant tending to show that he was intoxicated at the time of the commission of the crime, from which evidence the jury might have drawn the inference that he was incapable of forming the deliberate purpose of killing the deceased.

Relating to this evidence and to this defense, the trial judge instructed the jury as follows: "(a) Now the defendant has pleaded not guilty in this case. He says and contends that he is not guilty, that first, he did not strike the old lady any blow at all, and secondly, he says that if you are satisfied from the evidence and beyond a reasonable doubt that he did do so, which he contends you should not be from the testimony, then he contends that you should not find him guilty of murder in the first degree because he contends that at the time of the alleged killing of the old colored lady by himself, the defendant, that he, the defendant, was so much under the influence of intoxicating liquor or whiskey that he, the defendant, could not then form or premeditate and deliberate a fixed design or purpose to kill or to perpetrate or to attempt to perpetrate a robbery upon the person of the deceased. And I charge you in that

connection that it is very generally understood that voluntary drunkenness is no legal excuse for crime. This principle, however, will not be allowed to prevail where in addition to the overt act it is required that a definite specific intent be established as an essential feature of the crime; and I charge you that a person who commits a crime, in this case the crime of murder, if you are satisfied beyond a reasonable doubt from the testimony that the defendant killed the deceased while so drunk as to be incapable of forming a deliberate and premeditated design to kill or to perpetrate or to attempt to perpetrate á robbery upon her person, he is not guilty of murder in the first degree; and if you find from the evidence beyond a reasonable doubt that the defendant did kill the deceased and that at the time the defendant was so drunk or intoxicated as to render it impossible for him to form a willful, deliberate, and premeditated intent to take the life of the deceased or to perpetrate or attempt to perpetrate a robbery from her person, the law reduces the grade of the homicide from murder in the first degree to murder in the second degree. (b)."

The jury found the defendant guilty of murder in the first degree and, from the sentence of death, the defendant appealed to this Court.

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

Sigmund Meyer and C. W. Hall for defendant, appellant.

SEAWELL, J. Upon the question of premeditation and deliberation, an essential element of the crime of first degree murder, the defendant may make the affirmative defense that, because of want of mental capacity, he was incapable of forming the deliberate purpose to kill; and may show that such mental incapacity was brought about by drunkenness. *S. v. Edwards,* 211 N. C., 555; *S. v. Murphy,* 157 N. C., 614; *S. v. Shelton,* 164 N. C., 513.

It is incumbent upon a defendant who relies upon such a defense to find support for it in his own evidence or that of the State; but it is not required that it be proven beyond a reasonable doubt. Since the instruction to the jury is not clear on that point, but is susceptible to the interpretation that the burden was upon the defendant to prove his matter of defense beyond a reasonable doubt, it must be held for error.

New trial.

IN RE DISBARMENT OF JOHN M. BRITTAIN.

(Filed 22 June, 1938.)

1. Attorney and Client §§ 12, 15—Disbarment ordered in this case by Supreme Court on motion of Attorney-General, it appearing respondent had confessed in open court to guilt of crimes involving moral turpitude.

When on appeal to the Supreme Court in disbarment proceedings instituted before the Trial Committee of the State Bar, it appears that respondent has confessed his guilt in open court to four crimes, all involving moral turpitude, and nothing is offered in defense or by way of excuse, respondent will be disbarred by order of the Supreme Court upon motion of the Attorney-General without the necessity of deciding the questions sought to be presented by the appeal.

2. Appeal and Error § 31e—

When order of disbarment entered by Supreme Court renders academic the question sought to be presented by the appeal in the disbarment proceedings instituted before the Trial Committee of the State Bar, the appeal will be dismissed.

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

APPEAL by North Carolina State Bar from *Rousseau, J.*, at December Term, 1937, of RANDOLPH.

Disbarment proceeding instituted 10 December, 1935, by the North Carolina State Bar, under authority of ch. 210, Public Laws 1933, and amendments thereto, on allegations showing:

1. That the respondent, John M. Brittain, was duly licensed to practice law in 1920, and is a member of the North Carolina State Bar.

2. That on 17 October, 1933, the respondent pleaded guilty in the District Court of the United States for the Middle District of North Carolina, Rockingham Division, to an indictment charging him with forgery with intent to obtain $208.50 from the United States on a falsely endorsed Veteran's Administration check, and with uttering said falsely endorsed instrument on or about 9 August, 1932; that upon said plea the respondent was sentenced to a term of two years in the Federal penitentiary in Atlanta, and that he was thereupon disbarred from practicing law in said court.

3. That thereafter, at the January Term, 1935, Superior Court of Montgomery County, the respondent pleaded guilty in three cases to charges of embezzlement, forgery and false pretense in obtaining $2,395.93 on or about 17 January, 1933, upon a forged check, and was sentenced to twelve months in the State's Prison at Raleigh, N. C.

Wherefore, the respondent was ordered to appear before the Trial Committee of the Bar, etc.

At the hearing before the Trial Committee, the respondent being present in person and represented by counsel, "stipulates that the allegations in the complaint are true in fact, as therein stated, but in apt time demurs to the jurisdiction of the Council of the North Carolina State Bar to pass upon said matter, for that all the offenses complained of in the said complaint occurred prior to the first day of July, 1933," the effective date of the act incorporating the State Bar.

The demurrer was overruled and the committee recommended disbarment, which was adopted by the Council and disbarment ordered 16 July, 1937.

On appeal to the Superior Court of Randolph County, December Term, 1937, the respondent's demurrer was sustained and the order of the Council reversed.

From this ruling, the North Carolina State Bar appealed, assigning errors.

On the argument, the respondent further challenged the constitutionality of the act incorporating the State Bar. Ch. 210, Public Laws 1933, as amended by ch. 51, Public Laws 1937.

It appearing that the facts are not in dispute, but are admitted, and that the case is a clear one for disbarment, the Attorney-General intervened and suggested the propriety of action by the court without further proceedings in the matter.

Gover & Covington and Hugh L. Lobdell for North Carolina State Bar, appellant.

R. L. Brown, Jr., G. D. B. Reynolds, and G. Hobart Morton for respondent, appellee.

STACY, C. J. The constitutionality of the act incorporating the State Bar is not perforce presented on the present record. *In re Parker,* 209 N. C., 693, 184 S. E., 532. Nor is it necessary that we here decide whether the General Assembly intended to make its provisions retroactive as well as prospective in effect. *Ashley v. Brown,* 198 N. C., 369, 151 S. E., 725. The respondent has confessed his guilt in open court to four crimes, all involving moral turpitude, and he has been disbarred from practicing in the District Court of the United States. Nothing is offered in defense or by way of excuse. The record engenders but a single conclusion.

The respondent's admissions require his disbarment, and the action of the Attorney-General is well advised. *S. v. Spivey,* 213 N. C., 45, 195 S. E., 1; *S. v. Harwood,* 206 N. C., 87, 173 S. E., 24; *In re West,* 212 N. C., 189, 193 S. E., 134, and cases there cited. This course renders academic the question presented by the appeal. What shall it profit the respondent if he gain the whole case and lose his own license? Disbarment must ultimately result in any event.

Nor is it necessary that there should be further proceedings in the matter. The facts are not in dispute, and the indictments, pleas and judgments in the criminal prosecutions speak for themselves. Respondent's disqualification is complete. But even if the record were less compelling or respondent's peccancy less glaring, the findings and recommendation of the Trial Committee, approved and adopted, as they are, by the Council of the State Bar, would perhaps afford sufficient predicate for disbarment on motion of the Attorney-General.

Respondent disbarred.

Appeal dismissed.

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

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

(Filed 22 June, 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 plaintiff from *S. J. Ervin, Jr., Special Judge,* at Extra March Civil Term, 1938, of MECKLENBURG. Affirmed.

Chase Brenizer for plaintiff.

J. Clyde Stancill and Henry E. Fisher for defendant.

PER CURIAM. The question involved: In determining the amount of the 1937 *ad valorem* taxes to be assessed and imposed by Mecklenburg County upon the taxable "solvent credits" of the Hardware Mutual Fire Insurance Company, is the Hardware Mutual Fire Insurance Company entitled to deduct from its otherwise taxable "solvent credits" the amount of its "unearned premiums" as of the tax return date?

The Court being evenly divided in opinion, *Seawell, J.,* not sitting, the judgment of the Superior Court is affirmed and stands as the decision of this action without becoming a precedent. *Nebel v. Nebel,* 201 N. C., 840; *McMahan v. Basinger,* 211 N. C., 747; *Braswell v. Town of Wilson,* 212 N. C., 833.

The judgment of the court below is

Affirmed.

PIEDMONT FIRE INSURANCE COMPANY, A CORPORATION, v. J. W. STINSON, TREASURER OF MECKLENBURG COUNTY, N. C., AND MECKLENBURG COUNTY, N. C.

(Filed 22 June, 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 plaintiff from *S. J. Ervin, Jr., Special Judge,* at Extra March Civil Term, 1938, of MECKLENBURG. Affirmed.

Guthrie, Pierce & Blakeney for plaintiff.
J. Clyde Stancill and Henry E. Fisher for defendant.

PER CURIAM. The question involved: In determining the amount of the 1937 *ad valorem* taxes to be assessed and imposed by Mecklenburg County upon the taxable "solvent credits" of the Piedmont Fire Insurance Company, is the Piedmont Fire Insurance Company entitled to deduct from its otherwise taxable "solvent credits" the amount of its "unearned premiums" as of the tax return date?

The court being evenly divided in opinion, *Seawell, J.,* not sitting, the judgment of the Superior Court is affirmed and stands as the decision of this action without becoming a precedent. *Nebel v. Nebel,* 201 N. C., 840; *McMahan v. Basinger,* 211 N. C., 747; *Braswell v. Town of Wilson,* 212 N. C., 833.

The judgment of the court below is

Affirmed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1938

R. L. HINTON v. MRS. ADA V. WHITEHURST AND HUSBAND, CECIL WHITEHURST; MRS. FLOSSIE NOSAY AND HUSBAND, HENRY NOSAY; MRS. SOPHIA W. MORGAN AND HUSBAND, J. C. MORGAN; AND H. P. WILLIAMS, CONSTABLE.

(Filed 21 September, 1938.)

1. Judgments § 22—In action to cancel judgment on ground that it is void plaintiff must allege facts upon which that conclusion is based.

Whether a judgment is void presents a mixed question of law and fact, and a party seeking to set aside a judgment on the ground that it is void must allege facts upon which that conclusion is based so that the court may determine whether the facts alleged constitute a good cause of action.

2. Pleadings § 3a—

The complaint must contain a plain and concise statement of the facts constituting the cause of action, C. S., 506, and mere allegation of the conclusion which the pleader conceives should be drawn from the evidence he intends to offer is insufficient.

3. Judgments § 22—Sole remedy for relief against erroneous judgment is by appeal.

The judgment against plaintiff was rendered at one term of court, for maladministration of the estate of which he was executor, and another judgment, involving the same estate, was rendered at a subsequent term, against the heirs and distributees for rents and profits, which later judgment was reversed on appeal. No appeal was taken from the former judgment. Plaintiff instituted this action to set aside the former judgment on the ground that the decision of the Supreme Court setting aside

the second judgment rendered the first judgment void, and also on the ground that the first judgment was predicated on an earlier judgment affirmed by the Supreme Court setting aside the purported will of testator. *Held:* The allegations amount to no more than that plaintiff herein would have had a valid defense to the judgment attacked, and that it was rendered under misapprehension of the correct principles of law, which, even conceding the truth of the allegations, would establish that the judgment attacked was erroneous, and defendants' demurrer to the complaint was properly sustained, since the sole remedy against an erroneous judgment is by appeal, the judgment not being void or irregular.

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

APPEAL by plaintiff from *Hamilton, Special Judge,* at May Term, 1938, of PASQUOTANK. Affirmed.

This is an action under C. S., 1743 to remove a cloud from the title to certain property in Pasquotank County owned by plaintiff. The alleged cloud upon the title of plaintiff's property is caused by a duly docketed judgment rendered at the May Term, 1934, of Pasquotank Superior Court, which judgment the plaintiff alleges is null and void and of no effect.

After alleging the ownership of the property, the rendition, docketing and existence of the judgment, the plaintiff further alleges: "6. That this judgment is null and void and of no effect by reason of the fact that said judgment was predicated upon the decision of the Supreme Court of North Carolina in the case of *'In re: Hinton,'* as set out in N. C. 180, page 213, and that subsequent to the rendition of the Supreme Court of North Carolina the Supreme Court of North Carolina has in a subsequent decision, to wit, in the case of *Whitehurst, et als., v. Hinton, et als.,* who are the same parties in interest as the parties in the case of *In re Hinton,* in legal force and effect rendered the judgment herein complained of as null and invalid and void, the said Supreme Court holding that, 'From the date of the probate in common form of the last will and testament of John L. Hinton, deceased, to wit, 29 January, 1910, to the date of the final judgment of the Superior Court in the *caveat* proceedings instituted by the plaintiffs, the defendants and their ancestors were the owners and in the lawful possession of all the lands of which John L. Hinton died seized and possessed. These lands were devised to them by the last will and testament of John L. Hinton, which was duly probated in common form on 29 January, 1910. This probate was conclusive evidence of the validity of said will, until the same was set aside by the judgment in the *caveat* proceeding. There is no evidence in the record in this appeal tending to show that at any time prior to the institution of the *caveat* proceeding the defendants or their ancestors had any knowledge or intimation that the plaintiffs would attack the validity of the will under which they claimed. Nor is there any

evidence in the record tending to show that any of the devisees in said will procured its execution by John L. Hinton by undue or fraudulent influence. For that reason the defendants and their ancestors were entitled to the rents and profits of the lands devised to them until the probate was set aside and the will adjudged void. C. S., 4145."

R. L. Hinton and his brother, C. L. Hinton, qualified as executors of the last will and testament of their father, John L. Hinton, and proceeded to administer the estate until they were succeeded in administration by R. M. Davis on or about 19 March, 1921. A *caveat* was filed to the will and upon hearing of said *caveat,* upon issues answered by the jury, it was adjudged that the paper writing propounded was not the last will and testament of the deceased. This judgment was affirmed in *In re Hinton,* 180 N. C., 206. Thereafter the defendants herein instituted an action against this plaintiff. The cause was referred and when the matter was heard upon report of the referee the court, among other things, found:

"Sixth: That defendant wrongfully expended out of the funds belonging to the estate sums of money for attorneys' fees and expenses incurred in connection with the defendant's defense of the alleged will, which purported will had been obtained by undue influence on the part of defendant and others while said John L. Hinton was not possessed of testamentary capacity, said expenditures totaling $6,493.53.

"Seventh: That the said defendant in his final account wrongfully retained commissions on the disbursements set out in finding of fact No. 6 herein, which said commissions so wrongfully retained totaled three hundred twenty-four and sixty-seven/100 ($324.67) dollars."

Judgment was thereupon entered against this plaintiff for $1,136.36 with interest thereon from 18 March, 1921, and costs. This is the judgment which is the subject matter of the action.

The defendants herein demurred to the complaint for that the same does not state a cause of action, in that the complaint does not set out any facts upon which is predicated the conclusion of law contained in the complaint that the judgment under which said execution was issued was void, but, on the other hand, it appears from said complaint that plaintiff in this action is seeking to again litigate matters which have in truth and in fact been finally determined by a final judgment rendered at May Term, 1934, of the Superior Court of Pasquotank County, said judgment being unexcepted to and unappealed from. The court below sustained the demurrer and dismissed the action. The plaintiff excepted and appealed.

George J. Spence and Q. C. Davis, Jr., for plaintiff, appellant.

P. W. McMullan and John H. Hall for defendants, appellees.

BARNHILL, J. To procure the cancellation of a judgment it is not sufficient to merely allege that it is void. The complaint must state the facts upon which that conclusion is based, so that the court may determine whether the facts alleged, if supported by evidence, in fact rendered the judgment invalid. The complaint must contain "a plain and concise statement of the facts constituting a cause of action." C. S., 506. The mere allegation of the conclusion which the pleader conceives should be drawn from the evidence he intends to offer is insufficient. *Hartsfield v. Bryan,* 177 N. C., 166, 98 S. E., 379; *Eddleman v. Lentz,* 158 N. C., 65, 73 S. E., 1011.

In the instant case the judgment below must be affirmed unless the complaint sets forth with some reasonable degree of particularity the facts upon which the plaintiff relies to establish the invalidity of the judgment. Whether a judgment is void presents a mixed question of law and fact and without a statement of the facts the court is unable to determine that plaintiff has a good cause of action.

This brings us to a consideration of the allegations contained in paragraph six of the complaint. To fully understand the allegations therein it is necessary to consider the cases therein referred to. *In re Hinton,* 180 N. C., 213, is an appeal by the propounder, the plaintiff herein, from a judgment of the Superior Court of Pasquotank County, setting aside the will of John L. Hinton and affirms the decision below. *Whitehurst v. Hinton,* 209 N. C., 392, is "an action for an accounting by the defendants to the plaintiffs for rents and profits received by the defendants (plaintiff herein) from lands described in the complaint, and owned by the plaintiffs and defendants as tenants in common since the death of John L. Hinton in 1910." Judgment therein was entered at the June Term, 1934, Pasquotank Superior Court. The judgment which the plaintiff seeks to invalidate was rendered at the May Term, 1934, Pasquotank Superior Court, in an action against the plaintiff herein for maladministration of the estate of John L. Hinton and to recover funds belonging to said estate wrongfully retained by the plaintiff herein under credits claimed by him in his account, to which the court adjudged he was not entitled.

The judgment set out in the complaint was not "predicated upon the decision of the Supreme Court of North Carolina in the case of *In re Hinton*" and has no relation thereto, except that it involves the same estate. Nor did the opinion in *Whitehurst v. Hinton, supra,* in legal force and effect render the judgment complained of null and void. It likewise has no relation to the judgment set out in the complaint except that it involves matters relating to the same estate. It, therefore, appears that the allegations contained in paragraph six of the complaint amount to nothing more than a statement that under the law declared

in *Whitehurst v. Hinton, supra,* the plaintiff herein, had he been so advised, would have had a valid defense in the cause in which the judgment set out in the complaint was rendered. This is not conceded. Even so, the judgment rendered by a court of competent jurisdiction in an action properly before it is not rendered void by reason of the fact that the court entered the judgment under a misapprehension of the correct principles of law. The proper remedy was by appeal. *Finger v. Smith,* 191 N. C., 818, 133 S. E., 186; *Phillips v. Ray,* 190 N. C., 152, 129 S. E., 177.

It affirmatively appears in the complaint that the judgment therein set out was rendered by a court having jurisdiction of the subject matter and of the parties and was rendered according to the course and practice of the court. The complaint fails to state any facts which would tend to vitiate or nullify this judgment. While we find nothing in the complaint, or in the cases therein cited, which would indicate that the judge who signed the judgment did not apply proper legal principles in arriving at his conclusions upon which he based the judgment, we may concede that he did, and yet it will not avail the plaintiff. Such action on the part of the court does not invalidate the judgment.

After a careful consideration of the complaint, including the cases cited therein, we are of the opinion that the judgment below must be

Affirmed.

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

MRS. FREEMAN EDWARD EARLY, WIDOW FREEMAN EDWARD EARLY, DECEASED, EMPLOYEE, v. W. H. BASNIGHT & COMPANY, INC., EMPLOYER, AND GREAT AMERICAN INDEMNITY COMPANY, CARRIER.

(Filed 21 September, 1938.)

1. Master and Servant § 41a—Where for exceptional reasons computation of "average weekly wage" by enumerated methods would be unfair, Compensation Commission may resort to other methods of computation.

When, in determining the amount to be awarded the dependents of a deceased employee, the methods of computing the "average weekly wage" enumerated in the first paragraph of subsection "e," N. C. Code, 8081 (i), would be unfair because of exceptional circumstances, the Industrial Commission is authorized by the second paragraph of said subsection to use such other method of computation as would most nearly approximate the amount which the employee would be earning if living, and the provisions of the second paragraph of the subsection apply to all three of

the methods of computation enumerated in the first paragraph, and such other method of computation may be invoked for exceptional reasons even though the employee had been constantly employed by the employer for fifty-two weeks prior to the time of the injury causing death.

2. Master and Servant § 55d—

The findings of fact by the Industrial Commission, when supported by any competent evidence, are binding on both the Superior and Supreme Courts.

3. Master and Servant § 41a—Evidence held sufficient to support findings of fact constituting "exceptional reasons" as matter of law within meaning of N. C. Code, 8081 (i) (e).

The Industrial Commission found upon supporting evidence that the deceased employee had been employed by defendant employer for a number of years, that he had been promoted successively from truck driver to stock clerk to salesman with increased wages from time to time, and that he had been given a raise in the last position less than three months prior to the time of injury resulting in death, part of the supporting evidence being testimony by the employee's superior that "with the business he was getting" he would had had further increases. *Held:* The findings are sufficient in law to constitute "exceptional reasons" within the meaning of subsection "e," N. C. Code, 8081 (i), and the employee's "average weekly wage" was properly fixed at the amount he was earning weekly at the time of the injury, it being patent that the wages he was then receiving were not temporary and uncertain, but constitute a fair basis upon which to compute the award to his dependents.

APPEAL by defendants from *Hamilton, J.*, at June Term, 1938, of EDGECOMBE.

Proceeding under North Carolina Workmen's Compensation Act to determine liability of defendants to dependents of Freeman Edward Early, deceased.

The only controversy in this case revolves around the amount of "average weekly wages" on which to base the award of benefits to dependents.

The testimony of W. I. Johnston, manager of W. H. Basnight & Company, is the only evidence offered. He testified substantially as follows: The company is engaged in the business of wholesale distributor of general merchandise. Freeman Edward Early was employed by the company seven or eight years prior to his death. He entered the employment as a truck driver, and then for three or four years he worked as a stock clerk in the warehouse, at a salary of $20 per week for the last two years of that time. Six months prior to his death he was employed as a traveling salesman with about 350 miles of territory per week. At first he was paid a salary of $20 per week, but in January, 1937, his salary was increased to $100 per month, with traveling expense allowance of $21 per week. He was out in the territory five days per week, but spent only one night there. There was likelihood of Early

receiving consideration of further increase in wages. He was put in as salesman as an experimental proposition at first, in new territory, at his old salary. At time of his death, he had had one raise in salary, and the witness said: "With the business he was getting, he would have had further advances in line with other salesmen. . . . The next lowest salesman we had at that time was drawing $125, and Mr. Early would probably have gone to $125 in a short time." The salaries of the six salesmen employed by the company range from $100 to $150 per month.

The North Carolina Industrial Commission, on appeal from the findings of fact, conclusions of law and award of the hearing Commissioner made these findings of fact:

"(1) That the plaintiff's deceased had been regularly employed in one capacity or another by W. H. Basnight & Company for three or four years, and that all except the last six months of said employment has been in the warehouse.

"(2) That approximately six months prior to the injury by accident to plaintiff's deceased and his death 16 March, 1937, said deceased had been promoted to the position of salesman.

"(3) That as a warehouse clerk he had received an average weekly wage of $20 and continued to receive said wage for three months following his promotion to the position of salesman, and that on 1 January, 1937, his salary was increased to $100 per month, or $23.07 per week.

"(4) That for exceptional reasons the average weekly wage of the plaintiff's deceased over the twelve months immediately preceding his injury and death would be unfair to the deceased employee and his dependents.

"(5) That the plaintiff's deceased would have been earning $23.07 per week if it had not been for the injury."

Thereupon the Industrial Commission awarded compensation on the basis of the increased weekly wages received by the deceased after 1 January, 1937. In the opinion of the Commission it is stated: "The Full Commission has not taken into consideration the anticipated increase, but has given consideration to the actual increase that the deceased received from 1 January to 16 March."

From judgment of the Superior Court, on defendant's appeal, affirming the findings of fact and the award of the North Carolina Industrial Commission, defendants appealed to the Supreme Court and assign error.

No counsel for plaintiff, appellee.
H. S. Merrell and Battle & Winslow for defendants, appellants.

WINBORNE, J. These four questions are presented on this appeal:

1. Where an employee has been employed for the fifty-two weeks prior to the time of the injury which results in death, at wages the

weekly average of which is definitely ascertainable by dividing the total by fifty-two, does the North Carolina Workmen's Compensation Act require that method of computing the average weekly wages of such employee to be followed?

2. Or, upon finding that for exceptional reasons that that method would be unfair to employee, may the North Carolina Industrial Commission resort to such other method as would most nearly approximate the amount which the injured employee would be earning were it not for the injury?

3. Is there sufficient competent evidence in the record on this appeal to support the fourth finding of fact as to "exceptional reasons?"

4. If so, as a matter of law, do the facts found constitute such "exceptional reasons" within the meaning of subsection "e" of section 2 of chapter 120, Public Laws 1929; C. S., 8081 (i) (e)?

We answer the first question in the negative, and the last three in the affirmative.

1-2. It will be noted, by reference to the North Carolina Workmen's Compensation Act, Public Laws 1929, ch. 120, sec. 38; C. S., 8081 (tt), that where death of employee results from injury by accident "the employer shall pay . . . to the dependents of the employee . . . a weekly payment equal to 60 per centum of his average weekly wages . . ." In subsection "e" of section 2 of the act, "average weekly wages" is defined and methods of computing same with reference to three given situations, prior to injury, are set forth: (a) Where the employment has been continuous for at least fifty-two weeks; (b) where the employment has extended over a period of less than fifty-two weeks; and (c) where, by reason of a shortness of time during which the employee has been in the employment of his employer, or the casual nature or terms of his employment, it is impracticable to compute the average weekly wages as above defined. The three situations are treated in the same paragraph. Then there follows in a new paragraph of the same section this provision: "But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."

The words "the foregoing" clearly refer to the preceding paragraph, which includes the three methods of computation above described. Hence, it is manifest that where exceptional reasons are found which make the computation on the basis of either of "the foregoing" methods unfair to the employee, the Legislature intended that the Industrial Commission might resort to such other method of computing the average weekly wages as would most nearly approximate the amount the injured

employee would be earning if he were living. The act is so expressed in clear language which requires no interpretation. If construction were required, the Workmen's Compensation Act should be liberally construed so as to effectuate the legislative intent or purpose which is to be ascertained from the wording of the act. *Borders v. Cline,* 212 N. C., 472, 193 S. E., 826, and cases cited.

3-4. The findings of fact by the North Carolina Industrial Commission, when supported by any competent evidence, are binding on both the Superior and Supreme Courts. Public Laws 1929, ch. 120, sec. 60; C. S., 8081 (ppp); *Johnson v. Hosiery Co.,* 199 N. C., 38, 153 S. E., 591; *Southern v. Cotton Mills Co.,* 200 N. C., 165, 156 S. E., 861; *West v. Fertilizer Co.,* 201 N. C., 556, 160 S. E., 765; *Dependents of Poole v. Sigmon,* 202 N. C., 172, 162 S. E., 198; *Nissen v. Winston-Salem,* 206 N. C., 888, 175 S. E., 310; *Saunders v. Allen,* 208 N. C., 189, 179 S. E., 754; *Hildebrand v. Furniture Co.,* 212 N. C., 100, 193 S. E., 294; *Walker v. Wilkins & Co.,* 212 N. C., 627, 194 S. E., 89.

There is sufficient competent evidence on this record to support the finding of fact as to "exceptional reasons." Here the employee, during the long period of employment, had made successive advancements from truck driver to stock clerk to salesman with increased wages from time to time. While he had been in the last position less than three months, the evidence discloses that as salesman he entered a new territory, and, in the language of his superior, "with the business he was getting, he would have had further advances . . ." Thus, it is patent that the wages he was receiving at the time of his death were not temporary and uncertain, and constituted a fair basis upon which to compute the award of benefits.

On this record the facts found are sufficient in law to constitute "exceptional reasons" within the meaning of provision of the North Carolina Workmen's Compensation Act, to which hereinabove reference is made.

Affirmed.

STATE v. JETHRO MIDGETT, JR.

(Filed 21 September, 1938.)

Criminal Law § 23—Acquittal on charge of reckless driving will not bar prosecution for manslaughter arising from same occurrence.

An acquittal on a charge of reckless driving in the recorder's court will not bar a prosecution of defendant in the Superior Court upon a charge of the felony of manslaughter arising out of the same occurrence, the two offenses differing both in grade and kind and not being the same in law

or in fact, and the one not being a lesser degree of the other, and the recorder being without jurisdiction over the charge of manslaughter, but having bound defendant over to the Superior Court on that charge.

APPEAL by defendant from *Burgwyn, Special Judge,* at May Term, 1938, of DARE.

Criminal prosecution tried upon indictment charging the defendant in three counts, first, with the felonious slaying of one Ethel D. Hartley; second, with the felonious slaying of one Winston Green; and, third, with the felonious violation of the "hit and run" statute (1937, ch. 407, sec. 128) at the time of the accident or injury which resulted in the double homicide of the said Hartley and Green.

The evidence on behalf of the State tends to show that on 2 September, 1937, at about 8:00 p.m., the defendant, while driving his automobile on the highway near Manteo on Roanoke Island, ran into and killed two pedestrians, Ethel D. Hartley and Winston Green; that the defendant was driving on his left-hand side of the road at the time, without lights, at a rate of 40 or 45 miles an hour, and that it was dark. The evidence is conflicting as to how the accident occurred.

On the following day two warrants were issued and served upon the defendant, one charging him with manslaughter, and the other (1) with operating a motor vehicle on the public highway while under the influence of intoxicating liquors, morphine, opiates or other drugs (1937, ch. 407, sec. 101), and (2) with operating a motor vehicle on the public highway in a reckless, careless and wanton manner without regard to the rights and safety of others, against the form of the statute in such cases made and provided (1937, ch. 407, sec. 102) and against the peace and dignity of the State.

Thereafter, on 7 September, 1937, in the recorder's court of Dare County, the defendant was acquitted on the warrant charging him with drunken and reckless driving, and bound over to the Superior Court for action on the warrant charging him with manslaughter.

A true bill was returned at the October Term, 1937, to which said bill the defendant duly entered pleas of former acquittal or former jeopardy on the first and second counts and "not guilty" as to the entire bill.

The court held that the defendant's plea of former acquittal, or former jeopardy, was not good, and instructed the jury accordingly. Exception.

Verdict: Guilty on the first and second counts in the bill, and not guilty on the third.

Judgment: Imprisonment for not less than one nor more than three years and assigned to work upon the roads.

Defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Wettach and Gregory for the State.

Worth & Horner and McMullan & McMullan for defendant.

STACY, C. J. The question for decision, as debated on argument and in brief, is whether an acquittal of the defendant on a charge of reckless driving will bar a further prosecution for manslaughter when the two charges stem from the same occurrence. The pertinent authorities answer in the negative. *Usary v. State,* 112 S. W. 2d (Tenn.), 7; *S. v. Yuse,* 191 Wash., 1, 70 P. (2d), 797; *People v. Townsend,* 214 Mich., 267, 183 N. W., 177, 16 A. L. R., 902; *S. v. Empey,* 65 Utah, 609, 239 P., 25, 44 A. L. R., 558; *Henson v. Commonwealth,* 165 Va., 829, 183 S. E., 438; *Commonwealth v. Jones,* 288 Mass., 150, 192 N. E., 522; *Commonwealth v. McCan,* 277 Mass., 199, 178 N. E., 633, 78 A. L. R., 1208; 42 C. J., sec. 1385.

In the first place, the two offenses are not the same, either in law or in fact. *S. v. Gibson,* 170 N. C., 697, 86 S. E., 774; *S. v. Hankins,* 136 N. C., 621, 48 S. E., 593; *S. v. Yancy,* 4 N. C., 133, 6 Am. Dec., 553; *S. v. Williams,* 1 N. C., 591; 8 R. C. L., 149. Nor is the one a lesser degree of the other. C. S., 4640; *S. v. Albertson,* 113 N. C., 633, 18 S. E., 321; *S. v. Lewis,* 9 N. C., 98; *S. v. Ingles,* 3 N. C., 4. They differ both in grade and kind. *S. v. Taylor,* 133 N. C., 755, 46 S. E., 5. The one is a misdemeanor, made so by statute; the other a felony. *S. v. Moore,* 136 N. C., 581, 48 S. E., 573. Additional facts must be alleged and proved to establish the greater which need not appear on the trial of the lesser offense. *S. v. Pierce,* 208 N. C., 47, 179 S. E., 8; *S. v. Hooker,* 145 N. C., 581, 59 S. E., 866; *S. v. Robinson,* 116 N. C., 1046, 21 S. E., 701; *S. v. Stevens,* 114 N. C., 873, 19 S. E., 861.

We have a number of decisions to the effect that when the same act constitutes a violation of two statutes, a prosecution for the violation of the one need not bar a subsequent prosecution for the violation of the other. *S. v. Malpass,* 189 N. C., 349, 127 S. E., 248; *S. v. Hooker, supra; S. v. Lytle,* 138 N. C., 738, 51 S. E., 66; *S. v. Birmingham,* 44 N. C., 120.

"The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense." *Morey v. Commonwealth,* 108 Mass., 433; *Gavieres v. U. S.,* 220 U. S., 338; *S. v. Dills,* 210 N. C., 178, 185 S. E., 677; *S. v. Freeman,* 162 N. C., 594, 77 S. E., 780; *S. v. Jesse,* 20 N. C., 95; *S. v. Dewees,* 76 S. C., 72, 11 Ann. Cas., 991, and note.

The authorities are in disagreement as to what constitutes the "same offense"; also as to when more than one punishment may be applied to the same transaction. 8 R. C. L., 145, *et seq.* Some courts have gone to

the extent of holding that there can be but one punishment for one criminal transaction, while others have held that one act may constitute any number of crimes, for each of which the actor may be prosecuted, and a conviction of one will not bar a prosecution for another. *S. v. Ross,* 72 Tenn., 442; 8 R. C. L., 148.

An interesting and helpful summary of the "general rules deductible from principle and authority," as applied to pleas of *autrefois, acquit* and *convict,* was made by the writer of the opinion, *Mr. Justice Cook,* in *Dowdy v. State,* 158 Tenn., 364, 13 S. W. (2d), 794. His conclusions follow:

"1. Where two or more offenses of the same nature are by statute carved out of the same transaction and are properly the subject of a single investigation, an acquittal or conviction for one of the several offenses bars subsequent prosecution for the others.

"2. When the facts constitute but one offense, though it may be susceptible of division into parts, as for stealing several articles from the same person at the same time, conviction for stealing one of the articles will bar subsequent prosecution for stealing the others.

"3. When the facts constitute two or more offenses, wherein the lesser offense is necessarily involved in the greater—as an assault is involved in an assault and battery, as an assault and battery is involved in an assault and battery with intent to commit felony and as a larceny is involved in a robbery—and when the facts necessary to convict on a second prosecution would necessarily have convicted on the first, then the first prosecution to a final judgment will be a bar to the second.

"4. But when the same facts constitute two or more offenses, wherein the lesser offense is not necessarily involved in the greater, and when the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act."

It seems clear, from what is said above, that the instant case falls within the terms of the fourth class as set out by *Mr. Justice Cook* in the *Dowdy case, supra.*

There is also authority for the position that jeopardy incident to a trial before an inferior court does not extend to an offense beyond its jurisdiction—the theory being that, to be in jeopardy, there must be not only a sufficient legal charge, but also a sufficient jurisdiction to try the charge. *S. v. Garcia,* 198 Iowa, 744. According to this view, all that could be claimed for the jeopardy incident to a trial before an inferior court is that it protects the accused from being again prosecuted for the "same offense" and that this same offense be not thereafter treated as included, as a lesser offense, in any greater charge. *Diaz v. U. S.,* 223 U. S., 442; *S. v. Cale,* 150 N. C., 805, 63 S. E., 958.

It follows, therefore, that the plea of former jeopardy cannot avail on the instant record. The judgment of the recorder on the warrant is not a bar to the prosecution of the indictment. The ruling to this effect is correct. *S. v. White,* 146 N. C., 608, 60 S. E., 505.

It only remains to notice the authorities cited by the defendant. He relies upon the decisions in *S. v. Clemmons,* 207 N. C., 276, 176 S. E., 760; *S. v. Bell,* 205 N. C., 225, 171 S. E., 50, and particularly upon what was said in *S. v. Rawlings,* 191 N. C., 265, 131 S. E., 632, but each of these cases is distinguishable by reason of a different fact situation. It would only be a work of supererogation to point out the differences in detail. As to the *Rawlings case, supra,* it is perhaps enough to say that the holding there in respect of contradictory findings upon the same record is not authority for defendant's position here.

The remaining exceptions are too attenuate to require elaboration. They are not sustained.

The verdict and judgment will be upheld.

No error.

E. G. TOLLEY v. W. M. RITTER LUMBER COMPANY AND CHARLES WILSON.

(Filed 21 September, 1938.)

1. Removal of Causes § 4b—Petition for removal on ground of fraudulent joinder must allege facts compelling that conclusion.

A petition for removal on the ground of fraudulent joinder is properly denied when the petition amounts merely to a denial of the allegations of the complaint and does not allege facts leading to or compelling the conclusion, aside from the deductions of the pleader, that the joinder is fraudulent and made without right as a matter of law.

2. Removal of Causes § 4a—

Upon petition for removal on the ground of separable controversies the complaint is determinative, and the petition must be denied if the complaint states a joint cause of action.

3. Same—Complaint in this case held to state a joint cause.

Plaintiff, a fireman on a locomotive, alleged that the engineer gave him an order, which he was required to obey in the performance of his duties, to open a valve under the tender of the locomotive while it was in motion, that as he was attempting to execute the order, his clothing caught in gears of the engine, that plaintiff hollered and signaled the engineer to stop the train, that the engineer saw and heard, or should have seen and heard the signals and shouts of plaintiff, but failed to stop the train, and that plaintiff's injuries were the proximate result of the engineer's negligent order and negligent failure to keep a proper lookout and stop the

train. *Held:* The complaint states a joint cause of action against the engineer and defendant employer, and the corporate defendant's motion to remove on the ground of separable controversies was properly denied.

APPEAL by corporate defendant from *Alley, J.*, at July Term, 1938, of SWAIN. Affirmed.

Motion to remove cause to the District Court of the United States for the Western District of North Carolina for trial. Motion denied, and corporate defendant appeals.

Edwards & Leatherwood for plaintiff, appellee.
Landon C. Bell and Johnson & Uzzell for defendant, appellant.

SCHENCK, J. The plaintiff E. G. Tolley is a citizen and resident of North Carolina. The defendant, the W. M. Ritter Lumber Company, is a corporation organized and existing under the laws of the State of West Virginia, and is a resident of said state. The defendant Charles Wilson is a citizen and resident of North Carolina. The plaintiff demands in his complaint the sum of $30,000 for damages alleged to have been caused by the joint negligence of the defendants.

The corporate defendant bottoms his motion for removal, first, upon the theory that there has been a fraudulent joinder of parties defendants for the purpose of preventing removal of this cause to the District Court of the United States, and, second, upon the theory that the complaint states separable controversies between the plaintiff and the corporate defendant and between the plaintiff and the individual defendant.

After alleging that the plaintiff and the defendant Wilson were employed as fireman and engineer, respectively, on a railroad engine of the corporate defendant, the complaint further alleges:

"7. That while said engine and train of cars was being operated over the defendants' line of railway track by the said defendant Chas. Wilson, as engineer on the date aforesaid, said train was proceeding and traveling about four miles an hour, and at said time the said defendant Chas. Wilson ordered and directed plaintiff to get off the engine to the ground and go to the rear of the said engine and open a certain valve that was located under the rear of the tender of said engine for the purpose of turning water on the rails of the track over which said train was traveling. That in order to carry out and obey the orders of the said Chas. Wilson, as plaintiff was required to do under the terms of his employment, he got off said engine and attempted to reach said valve under said tender as aforesaid for the purpose of turning on the water and opening said valve, which was the only way plaintiff could turn water from the tender on said railway tracks, and it was necessary for him to reach under the tender to turn and open said valve. That while

plaintiff was attempting to reach the said valve and exercising all care and caution, his clothing was caught in the gears of said engine and by a cotter key which was projecting from the main shaft on said engine and plaintiff was pulled and dragged into the gear and machinery of said engine and seriously and permanently injured." And

"That said defendant Chas. Wilson, when he ordered plaintiff to open said valve as aforesaid, well knew and realized the hazard and danger plaintiff would incur in carrying out said order and it thereupon became and was the duty of the said Chas. Wilson, which he owed plaintiff in the exercise of ordinary care, to keep a proper lookout from his engine so that he might see and observe plaintiff while he was carrying out said orders to open said valve, and hear, see and heed any signals or warnings from plaintiff so that said engine and train of cars could be stopped in case of danger or threatened injury to plaintiff; but, to the contrary, the said defendant Charles Wilson negligently, carelessly and recklessly failed and neglected to keep a proper lookout and watch and observe plaintiff in the performance of his duties so that when plaintiff was caught in said gearing and by said cotter pin, as aforesaid, although plaintiff hollered and signaled said defendant Charles Wilson to stop said engine and train of cars, said defendant Chas. Wilson negligently, carelessly and recklessly continued to operate said engine and train of cars in a heedless way and manner, indifferent to plaintiff's danger and peril and negligently failed to release the motive power on said engine and caused and allowed said engine and cars to run twenty feet, or more, after plaintiff was caught and dragged into said gearing as aforesaid, in spite of plaintiff's signals and shouts, which said defendant Chas. Wilson saw and heard, or could have seen and heard if he had exercised due and proper care by keeping a proper lookout, and could have stopped said engine and train of cars instantly and prevented any injury to plaintiff. That plaintiff was caught in the gears of said engine and by said cotter pin as aforesaid, in plain view of the defendant Chas. Wilson, but said defendant Chas. Wilson negligently continued to operate and move said train and drag plaintiff for a distance of twenty feet or more, thereby crushing and breaking plaintiff's bones and body while plaintiff was hollering and giving signals for the engine to be stopped; that at said time said engine and train of cars was moving slowly and could have been stopped instantly by the defendant Chas. Wilson."

The petition for removal, while it contains allegations of certain additional facts incidental to the manner and way in which the plaintiff was injured, amounts to nothing more than a denial of the allegations of the complaint and the conclusion of the pleader that there has been a fraudulent joinder. The facts alleged in the petition fail to lead unerringly to the conclusion, or to rightly engender and compel the conclusion,

as a matter of law, aside from the deductions of the pleader, that the joinder is a fraudulent one in law and made without right. *Crisp v. Fibre Co.*, 193 N. C., 77.

The second theory upon which the motion for removal is based, namely, separable controversies, cannot be sustained for reason that the question of separability is to be determined by the manner in which the plaintiff has elected to state his cause of action, whether separately or jointly, and the plaintiff in the instant case has elected to state his cause of action jointly. *Hurt v. Mfg. Co.*, 198 N. C., 1.

We think this case is governed by the principles enunciated in *Crisp v. Fibre Co., supra,* and *Hurt v. Mfg. Co., supra,* and the judgment below is therefore

Affirmed.

DR. J. R. SPENCER v. H. W. BROWN AND E. R. EVANS, INDIVIDUALLY, AND PARTNERS TRADING AS BROWN & EVANS.

(Filed 21 September, 1938.)

1. Trial § 29b—

The trial court is required to state in a plain and correct manner the evidence given in the case and to declare and explain the law on every substantive and essential feature of the case arising on the evidence. C. S., 564.

2. Negligence § 20: Automobiles § 18h—Instruction on issue of contributory negligence held for error in failing to explain law arising upon evidence relating to violations of safety statutes relied on by defendant.

In this action to recover for injuries resulting from an automobile collision, defendant pleaded contributory negligence and alleged violation by plaintiff of several safety statutes as the proximate cause of the accident. On the issue of contributory negligence, the court, after correctly placing the burden of proof and defining contributory negligence and proximate cause in general terms, stated the respective contentions of the parties as to the manner in which defendant claimed plaintiff was guilty of contributory negligence proximately causing the accident, but failed to declare and explain the law arising upon the evidence as it related to the several alleged violations by plaintiff of the safety statutes relied on by defendant. *Held:* Such failure constituted a failure to explain the law on substantive features of the case arising on the evidence, affecting a substantial right of defendant and entitling him to a new trial.

3. Appeal and Error § 39e—

The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial, even in the absence of a request for special instructions.

APPEAL by defendant H. W. Brown from *Thompson, J.*, at March Term, 1938, of CAMDEN.

Civil action for recovery of damages for injury to person and property resulting from alleged actionable negligence.

This action was instituted in the Superior Court of Camden County.

On the night of 5 October, 1935, plaintiff's automobile, while being operated by him and traveling in a northerly direction on the George Washington Highway in Camden County, North Carolina, came into collision with an automobile of defendant partnership traveling in a southerly direction while being operated by defendant H. W. Brown, who was accompanied by a young lady.

The plaintiff alleges negligence and damage. In answer filed the defendants denied the allegations of the plaintiff, and, in pleading contributory negligence, allege:

"Tenth—That . . . such damages and injuries as plaintiff may have sustained to his property and person were proximately caused by the carelessness and negligence of the said plaintiff in that, (a) he operated his said automobile at said time and place at a dangerous and unlawful rate of speed, and particularly at a rate of speed in excess of forty-five (45) miles per hour; (b) he operated said motor vehicle at a speed greater than was reasonable and prudent under the conditions then existing on said highway, and particularly in the light of the fact that visibility on said road at said time was greatly lessened because of rain and fog then and there existing; (c) he drove his said automobile to the left of the center of said highway; (d) he failed to have his said car under proper control; (e) he failed to keep a proper lookout along said road in the direction in which he was traveling; (f) the head lamps on his said motor vehicle were so constructed and arranged that they projected a glaring and dazzling light to persons in front of said head lamps, and particularly to the car then and there being operated by this said defendant, and then and there, as aforesaid, approaching in an opposite direction from that in which the said plaintiff was traveling; (g) he failed to dim his said head lamps as he approached the car which was being driven by this defendant, though this said defendant had repeatedly signaled to the plaintiff with reference thereto; (h) he operated said motor vehicle in a careless and reckless manner and without due caution or circumspection and in willful and wanton disregard of the rights and safety of others, particularly the rights and safety of this defendant; and (i) he failed to operate said motor vehicle at said time and place at a careful and prudent speed, not greater than was reasonable and proper, having due regard to the traffic, surface and width of the highway, and of the other conditions then existing on said highway at said time and place."

By consent of counsel for plaintiff and for defendant, the action was removed to the Superior Court of Pasquotank County for trial. On

trial in the latter court, and at conclusion of plaintiff's testimony, the court sustained motion for judgment as of nonsuit as to all defendants except H. W. Brown, individually. Verdict for the plaintiff was set aside for errors committed on the trial and a new trial ordered.

Subsequently, upon motion of plaintiff, the presiding judge, upon facts found, entered an order setting aside the order of removal and sent the case back to Camden County for trial. To this order the defendant excepted, but has not preserved the exception. At the trial which followed the parties introduced evidence tending to support their respective allegations. Issues of negligence, contributory negligence, accident and damages were submitted to the jury.

From judgment on verdict for plaintiff, defendant H. W. Brown appeals to the Supreme Court, and assigns error.

W. I. Halstead and R. Clarence Dozier for plaintiff, appellee.
John H. Hall for defendant, appellant.

WINBORNE, J. Defendant's assignment of error to the failure of the court below to "declare and explain the law arising" upon the evidence offered in support of the various allegations of contributory negligence is well taken, and entitles the defendant to a new trial.

It is the duty of the judge presiding at the trial of an action which is submitted to the jury "to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon." C. S., 564. This statute "confers upon litigants a substantial legal right and calls for instructions as to the law upon all substantial features of the case." *Williams v. Coach Co.*, 197 N. C., 12, 147 S. E., 435, and cases cited. The "requirements are not met by a general statement of legal principles which bear more or less directly, but not with absolute directness, upon the issues made by the evidence. While the manner in which the law shall be applied to the evidence must to an extent be left to the discretion of the judge, he does not perform his duty if he fails to instruct the jury on the different aspects of the evidence and to give the law which is applicable to them, or if he omits from his charge an essential principle of law." *Williams v. Coach Co., supra; Comr. of Banks v. Mills*, 202 N. C., 509, 163 S. E., 598; *S. v. Bryant*, 213 N. C., 752, 197 S. E., 530.

In the instant case, after stating to the jury the correct rule as to the burden of proof on the issue of contributory negligence, and defining contributory negligence and proximate cause in general terms, the court stated the contentions of the defendant as to the manner in which defendant contends that the plaintiff was guilty of negligence which contributed to or concurred in the injuries which he suffered. The counter-

contentions of the plaintiff with respect thereto were then set forth. However, the court, inadvertently no doubt, failed to declare and explain the law arising upon the evidence as it related to the several allegations of defendant involving alleged violations by plaintiff of various sections of the statutes on the operation of motor vehicles in this State. This affected a substantial right of the defendant.

"When a statute appertaining to the matters in controversy provides that certain acts of omission or commission shall or shall not constitute negligence, it is incumbent upon the judge to apply to the various aspects of the evidence such principles of the law of negligence as may be prescribed by statute, as well as those which are established by common law"—*Adams, J.,* in *Bowen v. Schnibben,* 184 N. C., 248, 251, 114 S. E., 170.

The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial. This is true even though there is no request for special instruction to that effect. *S. v. Bryant, supra,* and cases cited.

As the case goes back for new trial for error stated, other exceptions will not be considered.

New trial.

BONNY FLEEMAN, BY AND THROUGH HER GUARDIAN, JAMES T. BALES, AND JAMES T. BALES, GUARDIAN OF BONNY FLEEMAN, v. CITIZENS TRANSFER & COAL COMPANY.

(Filed 21 September, 1938.)

1. Automobiles §§ 12a, 12c—Ch. 311, sec. 2, Public Laws of 1935, repeals sec. 4, Art. 2, of Motor Vehicle Act of 1927, relating to speed regulations.

Sec. 4, Art. 2, of the Motor Vehicle Act of 1927 was stricken out entirely by ch. 311, sec. 2, Public Laws of 1935, which later statute prescribed new speed regulations and provided that speeds in excess of the limits therein provided should be *prima facie* evidence that the speed is unlawful, and further provided that the twenty-five mile an hour limit prescribed for residential districts should not relieve the driver of a motor vehicle from the duty to decrease speed when approaching and crossing intersections, with further provision that local authorities might provide by ordinance for higher *prima facie* speeds between widely spaced intersections and upon through streets, provided signs are erected giving notice of the authorized speed.

2. Same: Automobiles § 18h—Instruction that speed in excess of 15 miles per hour at obstructed intersection was negligence per se held error.

Defendant's truck was traveling along a street designated by municipal ordinance as a through street and so marked by the city with proper

signs, and collided at an intersection with the vehicle in which plaintiff was riding as it attempted to traverse the intersection from a side street. *Held:* The speed restrictions prescribed by ch. 311, sec. 2, Public Laws of 1935, as modified by the municipal ordinance, apply, the accident having occurred prior to the ratification of ch. 407, Public Laws of 1937, and speed in excess of the prescribed limitations of the statute, by its express provisions, constitutes only *prima facie* evidence that the speed is unlawful, and an instruction that if the jury should find that the intersection was obstructed, a speed by defendant's truck in excess of fifteen miles per hour would constitute negligence *per se* is error entitling defendant to a new trial.

APPEAL by plaintiff and defendant from *Alley, J.*, at April Term, 1938, of BUNCOMBE.

On plaintiff's appeal, affirmed.

On defendant's appeal, dismissed.

This was an action instituted by plaintiff in the general county court of Buncombe County to recover damages for a personal injury alleged to have been caused her by the negligence of the defendant. From judgment on the verdict in the county court in favor of plaintiff, the defendant appealed to the Superior Court, assigning errors. In the Superior Court certain of the defendant's assignments of error were sustained and the case remanded to the county court for a new trial. From the judgment in the Superior Court the plaintiff appealed to the Supreme Court. The defendant likewise appealed in order to preserve its exceptions noted in the trial court which were overruled in the Superior Court.

C. C. Buchanan and Williams & Cocke for plaintiff.

Adams & Adams for defendant.

DEVIN, J. The injury of which plaintiff complains resulted from a collision between a motor driven ambulance and hearse, in which plaintiff was riding, and a motor truck of the defendant. The collision occurred 8 February, 1937, at the intersection of Choctaw and McDowell streets in the city of Asheville. The vehicle in which plaintiff was riding was proceeding westwardly along Choctaw Street, and the defendant's truck was being driven southwardly along McDowell Street.

Among other things, the plaintiff alleged and offered evidence tending to show that defendant's truck in approaching and entering the intersection of these streets was being driven at a rate of twenty-five miles per hour, and that the driver's view in approaching the intersection was obstructed.

The defendant noted exception to the following portion of the trial judge's charge to the jury in the county court: "If you find, by the greater weight of the evidence, that the defendant's driver of the truck

was unable to see when he was within 100 feet of that intersection in both directions on Choctaw Street for a distance of 200 feet and he failed when he was within fifty feet of the intersection to bring his car to a speed of 15 miles per hour, or that he was driving his car at that time in excess of 15 miles per hour, it would be negligence, and if you further find, by the greater weight of the evidence, the burden being upon the plaintiff to so satisfy you, that the failure to bring the car to a speed not in excess of fifteen miles per hour was the proximate cause of the collision and the consequent injuries to the plaintiff, the burden being upon the plaintiff to so satisfy you, that is, it was the cause or one of the causes without which no collision would have taken place and no injury would have been sustained by the plaintiff, then it would be your duty to answer the issue 'Yes.' "

On appeal to the Superior Court, defendant's assignments of error based upon this and another similar exception were sustained and the case remanded to the county court for a new trial. The appeal brings the case here for review.

The determination of the question presented by the appeal to this Court involves the correctness of the ruling of the judge of the Superior Court, and requires an examination of the pertinent statutes relative to the speed of motor vehicles at intersections of highways.

Chapter 107 of the Public Laws of 1913 fixed the speed limit for motor vehicles upon approaching and traversing intersecting highways at seven miles per hour, and by chapter 140 of the Public Laws of 1917, this speed limit was increased to ten miles per hour. The latter act was brought forward in the Consolidated Statutes as section 2616. The Act of 1925, ch. 272, sec. 1 (d), placed the speed limit of motor vehicles at fifteen miles per hour in traversing intersections of highways when the driver's view was obstructed, and this provision was brought forward in the Uniform Motor Vehicle Act of 1927, and appears in ch. 148, Art. 2, sec. 4, in substantially the same language.

But section 4, Article 2, of the Motor Vehicle Act of 1927 was stricken out entirely by ch. 311, sec. 2, Public Laws of 1935, and a new section enacted in lieu thereof containing new speed regulations. The substituted section 4, so enacted by ch. 311, sec. 2, Public Laws 1935, contains this general provision relative to the speed of motor vehicles: "Any speed in excess of said limits shall be *prima facie* evidence that the speed is not reasonable and prudent and that it is unlawful." Among the speed regulations in this same section 2 of the Act of 1935 was the provision (subsection [b]) that speed in excess of twenty-five miles per hour in residence districts should be *prima facie* evidence of unlawfulness, and also the following reference to speed at intersections: "The fact that the speed of a vehicle is lower than the foregoing *prima facie*

limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection."

Section 2 of the Act of 1935 contains this further provision (subsection [g]): "Local authorities in their respective jurisdictions may in their discretion authorize by ordinance higher *prima facie* speeds than those stated in subsection (b) herein upon through highways or upon highways or portions thereof where there are no intersections or between widely spaced intersections, provided signs are erected giving notice of the authorized speed."

This last quoted provision was a reënactment of a similar provision in the Act of 1927, ch. 148, Art. 2, sec. 4 (c).

Pursuant to the authority contained in these statutes, the city of Asheville adopted an ordinance, which was in force at the time of the injury complained of, the material portions of which are as follows: "Persons driving a vehicle on a street, highway or roadway shall drive the same at a careful and prudent speed, not greater than is reasonable and proper, . . . and in no event at a rate of speed greater than set out below. . . . (c) twenty miles an hour in a residential district, (d) thirty miles an hour on a through highway as defined in this ordinance."

The director of public safety, under supervision of the city manager, was directed to designate the highways and streets that were to be through highways and to place proper signs to so indicate. It is admitted that McDowell Street had been properly designated and marked as a through highway.

It will be noted that the injury complained of in this case occurred before the ratification of the Motor Vehicle Act of 1937 (ch. 407), and is unaffected by it.

It was said in the well considered case of *Woods v. Freeman,* 213 N. C., 314, *Barnhill, J.,* speaking for the Court: "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."

It becomes apparent from an examination of these statutes, in connection with the ordinance of the city of Asheville and the designation of McDowell Street as a through highway, that the portion of the charge of the trial judge excepted to was erroneous, and that the defendant's assignment of error thereto was properly sustained by the judge of the Superior Court.

The recent decisions of this Court in *Turner v. Lipe,* 210 N. C., 627, 188 S. E., 108, and *Pearson v. Luther,* 212 N. C., 420, cited by the

plaintiff, may not be held as authority for her position, or to support the instruction of the trial judge in the portion of his charge above quoted. *Woods v. Freeman*, 213 N. C., 314; *Sebastian v. Motor Lines*, 213 N. C., 770.

For these reasons, the judgment of the Superior Court on plaintiff's appeal is affirmed. This disposition of the case renders it unnecessary to consider defendant's appeal, and the same is dismissed.

On plaintiff's appeal, judgment affirmed.

On defendant's appeal, appeal dismissed.

C. M. BERNARD v. JOHN BOWEN AND WIFE, LUELLA BOWEN; HILORY KEY AND WIFE, JOSIE KEY; JOE WESTMORELAND AND WIFE, ANNIE WESTMORELAND; AND THE BOARD OF EDUCATION OF SURRY COUNTY.

(Filed 21 September, 1938.)

1. Deeds § 14b—

The right of the heirs of a grantor to reënter upon the land for breach of a condition subsequent will be deemed waived and lost by lapse of time when no action is taken for fifty-nine years after the supposed breach.

2. Same—Facts held not to show abandonment of use of property for school purposes so as to work forfeiture of title for breach of condition subsequent.

Land was conveyed to named commissions for religious and school purposes with provision for reversion to the grantor or his heirs if such purposes should be discontinued or fail. During the month of December some eighty-eight years thereafter the county board of education, successors in title of the original commissioners, planned to sell the property and received bids, but no sale was consummated, and the following spring nearly all the furniture was moved from the school building to a new building on adjoining land, but later in the same spring the county board of education rescinded its former plan to sell the property, and since that time has continued to use the building for purposes connected with the maintenance of the school. · *Held:* The facts presented are insufficient to show abandonment of the use of the property for school purposes or relinquishment of the board's right thereto, so as to authorize reëntry by the heirs of the grantor.

APPEAL by plaintiff from *Sink, J.*, at February Term, 1938, of SURRY. Affirmed.

R. Glenn Key for plaintiff.

Robert A. Freeman and Folger & Folger for Surry County Board of Education.

DEVIN, J. This appeal presents the question of title to certain real property in Surry County, and arose upon the following material facts which have been agreed to by the parties.

In 1848 Andrew Mathews executed and delivered deed conveying a small tract of land therein described to named commissioners of free schools of Pilot District, and their successors, for the purpose of enabling them to build a schoolhouse and church, said land to be held "so long as church is kept up on said lot and not to be used for any other purpose, and if at any time they should be discontinued or fail, the title to said lot to revert back to me (the grantor) and my heirs."

A schoolhouse was shortly thereafter erected on the premises and used for school and church purposes until 1878, when a church building was erected on an adjacent lot and the school building ceased to be used for church purposes. The school building (replaced by a new building in 1904) has continued to be used for school purposes uninterruptedly to the present time, unless the facts hereinafter set out constitute an abandonment or disuse.

In December, 1936, the defendant Board of Education planned to sell the property and offered it for sale and bids were placed thereon, but "the offer to sell was never approved nor confirmed by the said defendant," and no deed was ever executed. During the spring of 1937 nearly all of the school furniture was removed from the school building to a new school building erected on adjoining land. During the same spring of 1937 the defendant Board of Education established a high school and found it necessary to use the old school building on the property in question in connection therewith, and, in August, 1937, rescinded its former plan to sell the property, and has continued to use the building for purposes connected with the maintenance of the school. It was admitted "that the building is now being used by this defendant for a scientific laboratory in connection with the school."

The plaintiff instituted this action as the heir or one of the heirs of Andrew Mathews, claiming that the title to the property had reverted by reason of its abandonment for the purposes for which the land was originally conveyed.

No point was made by plaintiff that the property was no longer being used for church purposes, and properly so, for acquiescence by the heirs of the grantor in its disuse for that purpose and its use solely for school purposes for fifty-nine years would afford now no ground of complaint on that score. Right of forfeiture for that reason, if at all available upon proper construction of the language of the entire deed, would be deemed to have been waived and lost by lapse of time, and reëntry barred.

The court below held that there had been no abandonment of right to the property by the defendant Board of Education so as to divest its

title, and accordingly rendered judgment for defendant board and against the plaintiff. From this judgment the plaintiff appealed.

The facts agreed sustain the ruling of the court below.

In *Church v. Bragaw,* 144 N. C., 126, 56 S. E., 688, it was said: "Conditions subsequent, especially when relied upon to work a forfeiture, are strictly construed. *Woodruff v. Woodruff,* 44 N. J., 353. The word 'abandonment' has a well-defined meaning in the law which does not embrace a sale or conveyance of the property. It is the giving up of a thing absolutely, without reference to any particular person or purpose, and includes both the intention to relinquish all claim to and dominion over the property and the external act by which this intention is executed, and that is, the actual relinquishment of it, so that it may be appropriated by the next comer. 1 Cyc., 4."

"The act of relinquishment of possession or enjoyment must be accompanied by an intent to part permanently with the right; otherwise, there is no abandonment." 1 Am. Jur., 7.

To the same effect is 1 C. J. S., 6, 10; 18 C. J., 371.

The facts here presented are insufficient to show abandonment of the use of the property described or relinquishment of defendant's right thereto, so as to authorize reëntry by the heirs of the grantor.

Judgment affirmed.

STATE v. JIMMIE SPRUILL AND ROY ALEXANDER.

(Filed 21 September, 1938.)

1. Automobiles § 33—Mere ownership of vehicle, without more, is insufficient to establish criminal responsibility of owner for driver's acts.

The evidence tended to show that the owner of a truck was riding therein in an intoxicated condition, and that the driver of the truck, with the owner's permission, was driving the truck for his own purposes. There was no evidence that the owner exercised any authority, direction or control over the operation of the truck, or that the driver was intoxicated or otherwise incompetent, or if he were, that the owner had knowledge thereof. *Held:* The evidence is insufficient to establish criminal responsibility on the part of the owner for alleged criminal negligence in the operation of the truck on the part of the driver resulting in the death of a third person.

2. Same: Criminal Law § 8b—

The owner of a motor vehicle riding therein may not be held criminally responsible as an aider and abettor on a charge of manslaughter resulting from the operation of the vehicle by the driver when the driver is acquitted of all blame in the matter.

STATE *v.* SPRUILL.

APPEAL by defendant Spruill from *Thompson, J.*, at April Term, 1938, of TYRRELL. Reversed.

The defendants Spruill and Alexander were charged with the involuntary manslaughter of one Luther McClees. The jury acquitted the defendant Alexander and found the defendant Spruill guilty, and from judgment imposing sentence defendant Spruill appealed.

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

W. L. Whitley for defendant, appellant.

DEVIN, J. The appellant assigns as error the denial of his motion for judgment as of nonsuit, entered at the close of the State's evidence and renewed at the close of all the evidence.

The facts as disclosed by the record may be briefly summarized as follows:

The deceased Luther McClees, riding with others in a cart on the road near the town of Columbia, North Carolina, was struck by a motor truck and received injuries from which he shortly thereafter died. There was circumstantial evidence tending to show that the truck involved in the collision belonged to defendant Spruill, that it was at the time being driven by defendant Alexander, and that Spruill was in the truck and under the influence of intoxicating liquor.

There was also evidence from which the inference was permissible that the injury and death of deceased resulted from negligence in the operation of the motor truck. All the evidence tended to show that at the time of the accident the truck was being driven by the defendant Alexander, and that defendant Spruill at no time had his hand on the steering wheel or exercised any control over the operation of the truck. It also appeared that Alexender had driven the truck from the home of defendant Spruill to Columbia and beyond, along the road where the deceased was struck, by the permission of defendant Spruill, in order that the defendant Alexander might attend to certain business of his own, and that defendant Spruill was in the truck and too much under the influence of liquor to drive. There was no evidence that the defendant Alexander, prior to or at the time of the collision, had been drinking, though it was testified that subsequent to the collision he became intoxicated.

Both defendants were tried in the recorder's court of Tyrrell County on the charge of operating a motor vehicle on the highway while under the influence of intoxicating liquor, and both were acquitted. On the trial in the Superior Court on the charge of manslaughter the jury re-

turned a verdict of not guilty as to the defendant Alexander, and guilty as to the defendant Spruill, the appellant.

Does the ownership of a motor truck, or the mere presence of the owner in a truck which is being driven by another for the other's purposes, without more, impose criminal liability upon the owner for the culpable negligence of the driver or for the driver's violation of the motor vehicle law resulting in the injury or death of a third person? Upon reason and authority the answer must be in the negative. Those facts alone are insufficient to constitute guilt.

There was here no evidence that defendant Spruill had or exercised any authority, direction or control over the operation of the motor truck, or that the driver was intoxicated or otherwise incompetent to drive carefully, or, if such had been the fact, that defendant Spruill had knowledge thereof.

This case falls within the principle stated in *S. v. Creech,* 210 N. C., 700, 188 S. E., 316, where it was held: "There was no evidence that the appellant ever saw the driver, his codefendant, take a drink or knew that the driver was under the influence of liquor, or that the appellant was in any way directing the driving of the car. Mere ownership of the car is not sufficient to fix the owner with liability for the negligent acts of the driver. *Linville v. Nissen,* 162 N. C., 95; *White v. McCabe,* 208 N. C., 301."

This case is distinguishable from *S. v. Trott,* 190 N. C., 674, where a positive direction was given by the person in charge of the car to the driver.

The only theory upon which defendant Spruill could have been held guilty was that being present he aided and abetted, counseled or procured the driver Alexander to commit the offense charged, or that he authorized or directed the manner in which the motor truck was being driven by Alexander, so as to become responsible in law for its wrongful and unlawful operation. But, since defendant Alexander, the driver, has been acquitted of all blame in the matter, there would seem to be left no valid ground upon which to predicate the guilt of Spruill.

There was some suggestion that after Alexander left the truck another person got in and drove Spruill home, but there is no evidence that this took place until some time subsequent to the injury to the deceased.

We conclude that the denial of defendant's motion for judgment as of nonsuit must be held for error, and the judgment reversed.

This disposition of the case renders unnecessary the consideration of other questions presented by the appeal and discussed in the argument and by briefs.

Reversed.

STATE v. P. T. STIERS.

(Filed 21 September, 1938.)

Animals § 7—

Evidence in this prosecution of defendant for cruelty to animals *held* insufficient to be submitted to the jury.

APPEAL by defendant from *Sink, J.*, at January Term, 1938, of ROCKINGHAM. Reversed.

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

Karl R. Massey, B. W. Walker, Worth Henderson, and Frank P. Hobgood for defendant, appellant.

SCHENCK, J. The bill of indictment charges that the defendant "unlawfully, willfully and wantonly did cruelly beat, torment, wound and injure and deprive of necessary sustenances and caused to be deprived of necessary sustenances and needless(ly) kill certain useful animals, to wit: mules and horses and other livestock, the property of P. T. Stiers, . . ."

When the State had introduced its evidence and rested its case the defendant moved to dismiss the action and for judgment of nonsuit. This motion was refused and defendant excepted. After all the evidence in the case was concluded, the defendant again moved for a judgment of nonsuit, and motion was refused, and defendant excepted. C. S., 4643.

Upon a careful inspection of the evidence, considering it in the light most favorable to the State, we are of the opinion, and so hold, that it is insufficient to be submitted to the jury upon the charge laid in the bill of indictment. There is no evidence that the mules referred to in the evidence were "the property of P. T. Stiers," nor is there any evidence that the defendant Stiers did cruelly beat, torment, wound, injure or deprive of necessary sustenance, or caused to be deprived of necessary sustenance, or needlessly kill any useful animal. All the evidence tends to prove is that certain mules on certain farms were in "poor" condition and some of them died. This was insufficient to carry the case to the jury.

The judgment below is

Reversed.

RAY OGLE, BY HIS NEXT FRIEND, GRADY OGLE, v. C. L. GIBSON AND GIBSON-HOWELL COMPANY, INC.

(Filed 21 September, 1938.)

1. Automobiles § 18h: Negligence § 20—Instruction held for error as requiring defendants to show absence of negligence in order to prevail on issue of contributory negligence.

An instruction on the issue of contributory negligence that if the jury found by the greater weight of the evidence, the burden being upon defendants, that defendant was driving his car in a reasonable and prudent manner, and that plaintiff suddenly and voluntarily jumped in front of defendant's car, and that such negligence on the part of plaintiff was a proximate cause of the injury, the jury should answer the issue of contributory negligence in the affirmative, *is held* reversible error as placing the burden on defendants to show they were not guilty of negligence in order to be entitled to prevail on the issue of contributory negligence.

2. Negligence § 11—

Contributory negligence is negligence on the part of plaintiff which concurs with the negligence of defendant in proximately causing the injury, and there can be no contributory negligence unless defendant is also negligent.

APPEAL by defendants from *Alley, J.*, at June Term, 1938, of BUNCOMBE. New trial.

This action was brought by plaintiff to recover damages on account of an alleged injury caused by the negligent operation of an automobile by defendant C. L. Gibson.

There were three issues submitted to the jury, the first covering the negligence of the defendants, the second, contributory negligence on the part of the plaintiff, the third, the *quantum* of damages.

There was evidence submitted to the jury upon all the issues. The jury answered the first issue "Yes," the second issue "No," and the third issue "$2,875." On the second issue the trial judge instructed the jury as follows:

"So with respect to the second issue, the burden of which rests upon the defendants, I charge you that if you find, by the greater weight of the evidence, that on 7 February, 1938, while the defendant C. L. Gibson was driving the car of the defendant company along the Highway No. 10 at the place in question, at a reasonable and prudent rate of speed, and you further find that as he passed the two-horse wagon in question that just as the front of his car was passing the rear of the wagon, the plaintiff, who had been riding on the rear end of the coupling pole of said wagon, without any notice or warning to defendant, suddenly and voluntarily jumped from said coupling pole and jumped in front of the

defendants' car and was thereby stricken and injured as he complains, then that would be contributory negligence that would bar his recovery, and it would be your duty in that aspect of the case to answer the issue 'Yes,' provided that you go further and find that such negligence on the part of the plaintiff was the proximate cause, or one of the efficient contributing concurrent causes of his injury, which takes into consideration the rule that I have given you as applied to children of tender years. Consider that rule that I have given you in connection with your consideration and the answer to the second issue."

To this instruction the defendants excepted.

Lewis L. Rishel for plaintiff, appellee.
Smathers & Meekins for defendants, appellants.

SEAWELL, J. The jury might have inferred from the instruction given that the defendants could not prevail on the issue of contributory negligence unless they were free from negligence, placing the burden of such a showing upon the defendants.

There could be no contributory negligence unless the defendants were also negligent. *Ballew v. R. R.*, 186 N. C., 704, 120 S. E., 334. It is the contribution which the plaintiff makes to the negligence of the defendants as the proximate cause of the injury which bars the right to recover. *Davis v. Jeffreys*, 197 N. C., 712, 150 S. E., 488; *Elder v. R. R.*, 194 N. C., 617, 140 S. E., 298; *Construction Co. v. R. R.*, 185 N. C., 43, 116 S. E., 3.

We consider the instruction on this issue erroneous in this respect, entitling the defendants to a new trial.

We do not consider the other exceptions, since they may not recur on the next trial.

New trial.

C. H. HOLDER AND C. E. HOLDER v. HOME MORTGAGE COMPANY, VICTOR S. BRYANT, SUBSTITUTED TRUSTEE, AND FRED MOORE (ORIGINAL PARTIES DEFENDANT), AND UNIFIED DEBENTURE CORPORATION (ADDITIONAL PARTY DEFENDANT).

(Filed 21 September, 1938.)

1. Contracts § 6—

The terms of a contract must be sufficiently definite and complete to express with a reasonable degree of certainty the full intent of the parties, since neither the court nor the jury may make the agreement for them.

2. Reference § 9—Court may affirm, amend, modify or set aside findings or make additional findings in consent references.

Upon appeal upon exceptions duly filed to the referee's report in a consent reference, the court, under its supervisory power, and under C. S., 578, may affirm, amend, modify, set aside, make additional findings and confirm in whole or in part or disaffirm the report, provided there is competent evidence to support the findings approved or made by the court.

3. Mortgages § 2b—Evidence held to support finding that alleged contract to make mortgage loan was too indefinite to be enforceable.

Evidence *held* sufficient to support the court's finding, upon appeal from the referee in this consent reference, that the alleged agreement of one of defendants to lend upon mortgage security a sum sufficient to discharge prior liens against the land was too indefinite to be enforceable, and judgment that plaintiff was not entitled to damages for the alleged breach is upheld.

4. Mortgages § 30a—Right of holder of trust note to foreclosure may not be defeated by agreement of trustor with third person.

A holder of a note secured by a deed of trust is entitled to foreclosure upon default in accordance with the terms of the agreement, and the trustor is not entitled to enjoin such foreclosure in his action against the holder and the original *cestui que trust* upon allegations that the original *cestui que trust* agreed to lend trustor a sum sufficient to take up the first deed of trust and a second deed of trust thereafter executed to pay for improvements made on the land.

5. Mortgages §§ 14, 38—

When a deed of trust provides that taxes and insurance premiums paid by the *cestui que trust* should be secured thereby, sums so advanced by the *cestui* may be recovered upon foreclosure and have priority over the lien of a second deed of trust, even though the second deed of trust is executed prior to the time the advancements are made.

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

APPEAL by plaintiffs and defendant Fred Moore from *Clement, J.*, 22 June, 1938. From CHEROKEE. Affirmed on both appeals.

This is an action brought by plaintiffs against certain of the defendants to restrain a sale of real estate belonging to plaintiffs under deed of trust made by plaintiffs.

The judgment of Clement, J., indicates the controversy:

"This cause coming on to be heard before the undersigned judge of the Superior Court, on the report of Hugh Monteith, Esq., referee, and all parties, plaintiff and defendant, file exceptions to the report of the referee.

"The court, after reading the pleadings, the report of the referee and the evidence in the case, and the exceptions filed by all parties, and after hearing argument of counsel for plaintiffs and defendants, renders the following judgment:

"The court considered the exceptions of the Home Mortgage Company, V. S. Bryant, substituted trustee, and the Unified Debenture Corporation, and after considering the exceptions by said defendants, judicially determined that each of said exceptions was without merit, and overruled each of said exceptions.

"The court considered the exceptions of Fred Moore, and judicially determined the merits of said exceptions, and judicially determined that all of said exceptions should be overruled, with the exception of Exception No. 3 and the Exception No. 4 as to the findings of fact in the referee's report numbered 17 and 18. The court sustains the defendant Moore's said 3rd and 4th exceptions.

"The court considered the exceptions filed by the plaintiffs, C. E. Holder and C. H. Holder, and after duly considering same, judicially determined that all of the exceptions of said plaintiffs should be overruled except Exceptions Nos. 12 and 13, and the court sustains the plaintiffs' Exceptions Nos. 12 and 13.

"The court finds as a fact that Harry P. Cooper was an agent of the Home Mortgage Company at the time that the plaintiffs applied to the defendant, the Home Mortgage Company, for a loan of $5,500.

"The court hereby modifies paragraphs 17 and 18 of the referee's report, and from the evidence finds that Harry P. Cooper, at the time the plaintiffs made application for a loan of $5,500, was an agent of the Home Mortgage Company.

"The Court modifies and changes paragraph 18 of the referee's finding of fact as follows:

"That the Home Mortgage Company, through its vice president, Hodges, agreed to make the $5,500 loan to plaintiffs, the said $5,500 was to take up the $2,500 note that had previously been given by the plaintiffs and referred to in the pleadings.

"The court makes an additional conclusion of law as to the report of the referee, being paragraph 8, as follows:

"That the agreement by Hodges, vice president of the Home Mortgage Company, is so indefinite that it cannot be enforced, because stipulations necessary to a complete contract had not been discussed or agreed to.

"The court hereby approves, confirms and adopts as its own, in all respects, the report of the referee, except as to the changes heretofore set forth in this judgment:

"It is therefore ordered, adjudged and decreed that the Unified Debenture Corporation, co-holder of the said note and deed of trust described in the pleadings, recover of the plaintiffs the sum of $1,983.63, with interest from 25 June, 1931, at the rate of six per centum per annum, and that the said Unified Debenture Corporation recover the further sum of $1,441 by reason of certain advancements made by said defend-

ants in payment of taxes and insurance, with interest as follows: (setting same forth in detail).

"It is further considered, ordered, adjudged and decreed by the court: That the injunction heretofore issued in this cause be and the same is hereby dissolved.

"That said deed of trust executed by C. E. Holder and wife, Ola Holder, and C. H. Holder (unmarried), to the First National Bank of Durham, North Carolina, dated 1 November, 1927, and recorded in the office of the register of deeds for Cherokee County, North Carolina, in Book No. 94, at page 300, is a first lien upon the real estate described in the pleadings; and that the defendant Unified Debenture Corporation be and it is hereby authorized and empowered to apply to and request the trustee in said deed of trust to exercise the power of sale therein contained, and that said trustee be, and he is hereby authorized, empowered and directed to exercise the power of sale contained in said deed of trust; and that the proceeds from such sale, or so much thereof as may be necessary, shall be applied to the payment of said indebtedness due the defendant Unified Debenture Corporation, together with interest thereon.

"That said deed of trust executed by C. E. Holder and wife, Ola Holder, and C. H. Holder and wife, Flonnie Holder, to J. D. Mallonee, trustee, for the use and benefit of Moore Supply Company, dated 24 September, 1930, and recorded in the office of the register of deeds for Cherokee County, North Carolina, in Book No. 103, at page 109, securing the sum of $1,807.27, be and the same is hereby declared a second lien on the real estate described in the pleadings, and that any surplus remaining after paying the principal and interest of said indebtedness due the defendant Unified Debenture Corporation be applied to the satisfaction of said indebtedness due the defendant Fred Moore. This the 22nd day of June, 1938. J. H. CLEMENTS,

Judge Presiding."

The Exceptions Nos. 3 and 4 of Fred Moore to the findings of fact of the referee's report, Nos. 17 and 18, are sustained by the court below. The findings are:

"17. That Mr. Cooper was not at any time during the year of 1926, 1927, 1928, 1929, and 1930, the agent of the Home Mortgage Company for the purpose of obtaining loans for said Home Mortgage Company, and had no authority to bind the Home Mortgage Company to make any loans to the plaintiffs herein.

"18. That the Home Mortgage Company did not, through its loan committee or any other duly authorized officer, agree to make the $5,500 loan to the plaintiffs referred to in the complaint."

The Exceptions Nos. 12 and 13 of plaintiffs, which are sustained, are as follows:

"12. The plaintiffs except to the 17th finding of facts made by the referee for the same is contrary to the evidence and the referee should have found that for the years 1926, 1927, 1928, 1929 and 1930, Harry P. Cooper was agent for the Home Mortgage Company for the purpose of obtaining loans for said company, and that he had authority to bind the company.

"13. The plaintiffs except to the 18th finding of facts for that the same is contrary to the evidence in this case."

The plaintiffs and defendant Fred Moore made numerous exceptions and assignments of errors and appealed to the Supreme Court. The material ones and necessary facts will be considered in the opinion.

R. L. Phillips for plaintiffs.

Mallonee & Mallonee for defendant Fred Moore.

W. A. Devin, Jr., for Victor S. Bryant, substituted trustee, and Unified Debenture Corporation.

CLARKSON, J. When this action was here before, seeking an injunction, it was continued to the hearing—205 N. C., 206. From the referee's report and conclusions of law and the judgment of the court below, and a careful review of the entire record, we are persuaded that the judgment on both appeals should be affirmed. The findings of facts of the referee indicate that:

(1) C. E. Holder and wife, Ola Holder, and C. H. Holder (unmarried), on 1 November, 1927, executed a deed of trust to the First National Bank of Durham, N. C., to secure a long-time loan of $2,500, payable to bearer, 12 years after date with certain periodical payments, and also to pay all taxes, insurance, etc., tacked on the deed of trust. The loan was made through the Home Mortgage Company and the deed of trust was properly recorded.

(2) During the month of November, 1927, the Home Mortgage Company transferred for value to the First National Bank of Durham, North Carolina, the note and deed of trust executed by the plaintiffs. That between November, 1927, and February, 1932, the Fidelity Bank & Trust Company of Durham, North Carolina, became the holder and owner of said note and deed of trust hereinabove referred to. That the Fidelity Bank & Trust Company of Durham, North Carolina, was the holder and owner of said note and deed of trust between the dates of 15 February, 1932, and 25 August, 1936. That the Unified Debenture Corporation acquired title to the note of $2,500 dated 1 November, 1927, executed by C. H. Holder, C. E. Holder and Mrs. Ola Holder, payable

to bearer and secured by a first deed of trust on property in Murphy, North Carolina. That said United (Unified) Debenture Corporation acquired ownership or title to said note for value and became entitled to the possession of the deed of trust securing said note during the month of January, 1937, and is now the owner and holder for value of said note.

(3) The defendant Victor S. Bryant has been duly and legally appointed substitute trustee in the before mentioned deed of trust.

(4) That on 24 September, 1930, the plaintiffs executed to J. D. Mallonee, trustee, for the use and benefit of the defendant Fred Moore, trading as Moore Supply Company, a note in the amount of $1,807.27, payable on or before 24 September, 1931, which note was secured by a deed of trust on the lands mentioned and described in the deed recorded in the office of the register of deeds for Cherokee County, North Carolina, in Book 94, at page 300, which note and deed of trust were executed by the plaintiffs to the defendant Fred Moore to secure the payment of the account for the building material used in the construction of the stone building hereinabove referred to; that said deed of trust was filed for registration and recorded in the office of the register of deeds for Cherokee County, North Carolina, subsequent to the date of the filing and recording of the deed of trust executed by the plaintiffs to the First National Bank of Durham, trustee, dated 1 November, 1927.

(5) "That on or about 11 July, 1932, the plaintiffs were in default in the payment of the monthly installments provided for in the said deed of trust, and that further the plaintiffs were in default in the payment of the city and county taxes against the real estate described in the said deed of trust."

It was contended by plaintiffs that the defendant Home Mortgage Company had breached its contract to lend them $5,500, to take up the $2,500 mortgage and pay defendant Fred Moore for material, etc., in building a new house on the lot in question. The referee held that plaintiffs were not entitled to recover any sum for the alleged breach. The court below found "That the agreement by Hodges, vice president of the Home Mortgage Company, is so indefinite that it cannot be enforced, because stipulations necessary to a complete contract had not been discussed or agreed to.

In *Thomas v. Shooting Club*, 123 N. C., 285 (287), is the following: "'In order to constitute a valid verbal or written agreement, the parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean. And if an agreement be so vague and indefinite that it is not possible to collect from it the full intent of the parties it is void; for neither the court nor the jury can make an agreement for the parties.' Chitty on Contracts, p. 68."

The referee and the court below found all the material facts in favor of the defendant Unified Debenture Corporation. The reference in the present action was by consent. It is well settled in this jurisdiction that in a consent reference, upon exception duly filed to the report of a referee, the court below in the exercise of the supervisory power, and under C. S., 578, may affirm, amend, modify, set aside, make additional findings and confirm in whole or in part or disaffirm the report of the referee. *Anderson v. McRae,* 211 N. C., 197 (198); *Threadgill v. Faust,* 213 N. C., 226. The decisions are also to the effect that there must be some competent evidence to support the findings of the referee or the court below. We think there was sufficient competent evidence to support the findings of fact by the referee and the court below.

Conceding that there was a valid enforceable contract for the $5,500 loan, the undisputed evidence is that the Home Mortgage Company was not the owner of the note at the time. We may repeat what was said in *Leak v. Armfield,* 187 N. C., 625 (628): "If subsequent judgment creditors or litigants over the equity of redemption could 'tie up' a first mortgage and effect its terms, it would seriously impair a legal contract. It may be 'hard measure' to sell, but this is universally so. The mortgagee has a right to have her contract enforced under the plain terms of the mortgage. To hold otherwise would practically nullify the present system of mortgages and deeds in trust on land, so generally used to secure indebtedness and seriously hamper business. Those interested in the equity of redemption have the right of paying off the first lien when due. We can see no equitable ingredient in the facts of this case. The mortgage is not a 'scrap of paper.' It is a legal contract that the parties are bound by. The courts, under their equitable jurisdiction, where the amount is due and ascertained—no fraud or mistake, etc., alleged—have no power to impair the solemn instrument directly or indirectly by nullifying the plain provisions by restraining the sale to be made under the terms of the mortgage."

The taxes, insurance, etc., are clearly set forth and tacked on to the deed of trust and can be recovered—"The tail goes with the hide."

On both appeals the judgment of the court below is

Affirmed.

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

W. E. SHUFORD AND SINCLAIR REFINING COMPANY v. THE TOWN OF WAYNESVILLE, A MUNICIPAL CORPORATION: J. H. WAY, JR., MAYOR, AND S. H. JONES, M. M. NOLAND AND T. L. BRAMLETT, MEMBERS OF THE BOARD OF ALDERMEN OR GOVERNING BODY OF THE TOWN OF WAYNESVILLE, AND T. HENRY GADDY, INSPECTOR OF BUILDINGS FOR THE TOWN OF WAYNESVILLE, N. C.

(Filed 21 September, 1938.)

1. Municipal Corporations § 37—Ordinance held *not in substantial* compliance with C. S., ch. 56, Art. 11 (c).

An ordinance which does not provide a comprehensive plan for the zoning of the municipality, but merely designates approximately one block as a "business section, Zone A," and prescribes certain restrictions therein, without provision for a hearing or appeal, or the appointment of a zoning commission or board of adjustment, does not comply with the provisions of ch. 250, Public Laws of 1923 (Consolidated Statutes, ch. 56, Art. 11 [c]), and the ordinance cannot be upheld under the act.

2. Same—Zoning regulations held not to have been promulgated in substantial compliance with C. S., ch. 56, Art. 11 (c).

Defendant municipality adopted an ordinance restricting gasoline filling stations in a designated part of the town, which ordinance failed to comply with the requirements of ch. 250, Public Laws of 1923. After the institution of this action the municipality adopted a comprehensive zoning ordinance which provided for the appointment of a zoning commission and a board of adjusters as required by the act, and which attempted to incorporate therein the restrictions of the original ordinance, but the zoning commission appointed thereunder did not zone the town or file any final report with its legislative body. *Held:* Under the provisions of the act no zoning regulation may become effective until after a public hearing, and said public hearing may not be held until after the filing of the final report of the zoning commission, and therefore no zoning restriction under the second ordinance has been promulgated in substantial compliance with the statute, and the restriction incorporated in the second ordinance may not be upheld under the act.

3. Same—General law confers power on municipalities to regulate establishment of gasoline filling stations.

It is not necessary to the validity of an ordinance regulating the establishment of gasoline filling stations in a municipality that it substantially comply with the provisions of ch. 250, Public Laws of 1923 (Consolidated Statutes, ch. 56, Art. 11 [c]), since the regulation of filling stations comes within the State police power which has been conferred on municipalities by the general law. C. S., 2673, 2787.

4. Same—

A municipal ordinance regulating the establishment of gasoline filling stations within the city limits must be impartial, fair and general, and apply alike to all within the designated area.

5. Same—

A municipal ordinance forbidding the erection of gasoline filling stations within an area in which a gasoline filling station is already established and allowed to operate, is unlawful as discriminatory.

APPEAL by plaintiffs from *Clement, J.*, at March Term, 1938, of HAYWOOD. Reversed.

This is an action instituted by the plaintiffs under chapter 102, Public Laws 1931, known as the Uniform Declaratory Judgment Act, to determine their right to erect a filling station on certain property in the town of Waynesville under a building permit issued by the building inspector of said town and notwithstanding the terms of an ordinance adopted by the municipal authorities.

The plaintiff W. E. Shuford owns and has leased to the plaintiff Sinclair Refining Company a certain parcel of land situate on the west side of Main Street in said town. A building permit was duly issued, authorizing the plaintiff to erect a filling station on said premises to cost approximately $6,000. Plans have been prepared and the plaintiffs are now ready to commence the erection of said building, but the said authorities have notified them to desist. In prohibiting the erection of said building the city authorities are acting under and by virtue of the terms of an ordinance adopted by the governing authorities of said town in July, 1936, subsequent to the issuance of the building permit. This ordinance is as follows:

"Be it ordained by the mayor and board of aldermen of the town of Waynesville:

"Section 1. That in pursuance to chapter 250 of the Public Laws of the State of North Carolina, of 1923, and other statutes relating thereto, and for the purpose of promoting the health, safety and welfare of the community, be it ordained that the town of Waynesville be divided in the method provided by said statutes, into zones.

"Section 2. That there shall be set aside and established as the first zone, to be known as the Business Section 'A,' that portion of Main Street lying south of Depot Street and north of Church Street, and that the remainder of said town be hereafter set aside and established in separate zones as may be determined, pursuant to said statutes.

"Section 3. That within the limits and fronting on said Main Street between Depot Street and Church Street, named as Business Section 'A,' no gasoline service or filling station shall be built, enlarged or reconstructed, and the construction and erection of business houses or other buildings within said district shall be permitted only in accordance with the rules and regulations established for said zones.

"Section 4. That any person, firm or corporation violating any provision of this ordinance shall be guilty of a misdemeanor and upon conviction shall be fined $50.00 for each and every offense."

After institution of this action the governing board of the town of Waynesville adopted a Comprehensive Zoning Ordinance under the provisions of Article 11 (c) of chapter 56 of the Consolidated Statutes, which is a codification of chapter 250, Public Laws 1923, and acts amendatory thereof. The latter ordinance appoints a Zoning Commission and a Board of Adjusters as provided by said act. The Zoning Commission thus appointed has not zoned said town or recommended the boundaries of various original districts or adopted appropriate regulations to be enforced therein; nor has it filed any final report with the legislative body of said town. The plaintiffs tendered additional findings of fact which the court declined to make and the plaintiffs excepted. The plaintiffs likewise tendered judgment requesting the court to conclude as a matter of law that the ordinances in question are void and unenforceable, for that: (a) Same were not passed and promulgated as required by statute; (b) same are unreasonable, discriminatory and in violation of the State and Federal Constitutions; (c) they are designed to operate retrospectively in so far as the plaintiffs are concerned by seeking to disturb vested rights. The court declined to sign this judgment and the plaintiffs excepted. The court signed judgment against the plaintiffs, as appears of record, and the plaintiffs excepted and appealed.

Lee & Lee for plaintiffs, appellants.
Morgan & Ward for defendants, appellees.

BARNHILL, J. Governing authorities of municipal corporations in North Carolina were first vested with authority to adopt zoning ordinances by ch. 250, Public Laws 1923. This act requires that ordinances adopted under authority thereof shall: (a) Be made in accordance with a comprehensive plan; (b) provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced; (c) provide for the appointment of a commission to be known as the Zoning Commission to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein; (d) provide for the appointment of a Board of Adjustment to hear and decide appeals from and review any order, requirement, decision or determination made by administrative official charged with enforcement of any ordinance adopted pursuant to this act. It further provides that no regulation, restriction or boundary determined or established by proper authorities under said ordinance shall become effective until after a public hearing upon fifteen days notice is had, and that such hearing shall not be held until after the zoning commission has filed its final report recommending the boun-

daries of the various original districts and appropriate regulations to be enforced therein.

The original ordinance, adopted 15 July, 1936, is not in accord with a comprehensive plan and does not provide for the zoning of the town as a whole. It merely sets aside and establishes approximately one block of the business section of said town as "business section, Zone A." No provision for hearing or appeal is provided. No zoning commission or board of adjustment is appointed or provided for.

When measured by the requirements of the act of the Legislature, under authority of which it purports to have been adopted, it appears that the ordinance does not substantially comply with the terms of said legislation. It cannot be upheld under that act.

The adoption of the second ordinance will not avail the defendants. The town of Waynesville has not been zoned thereunder and plaintiffs' property has not been placed in any restricted zone or area. The zoning commission has not filed a report recommending boundaries of the various original districts and appropriate regulations to be enforced therein, or complied with the other requirements of the act. While this ordinance attempts to incorporate the original ordinance, it is expressly provided in the act of the Legislature that no regulation, restriction or boundary shall become effective until after a public hearing, and that said public hearing shall not be held until after the filing of the final report of the zoning commission. Consequently, the attempt in the second ordinance to zone business section "A" under the terms of said act is invalid.

That the ordinance under consideration fails to comply with the statute authorizing the zoning of a municipality does not necessarily mean that it is void. It has heretofore been held by this Court that the regulation of gasoline filling or gasoline storage stations, and other business establishments, comes within the police power of the State, and that such power is specifically conferred upon municipal corporations by the general law, C. S., 2673 and 2787, has been held by this Court in a number of cases. Ordinances prohibiting erection of a private hospital within 100 feet of a residence in the corporate limits of Winston-Salem, *Lawrence v. Nissen,* 173 N. C., 359; the establishment, maintenance or operation of a lumber yard or wharf in the residence section of New Bern, *Turner v. New Bern,* 187 N. C., 541; the erection and operation of a filling station in the residence section of Wake Forest, *Wake Forest v. Medlin,* 199 N. C., 83, 154 S. E., 29; the maintenance or operation of a gasoline filling station within 150 feet of the outside boundaries of the property of the Ahoskie Graded School, *Ahoskie v. Moye,* 200 N. C., 11, 156 S. E., 130, have been held valid and enforceable. See also *S. v. Bass,* 171 N. C., 781; *S. v. Vanhook,* 182 N. C., 831; *Barger v. Smith,*

156 N. C., 323; *Brunswick-Balke Co. v. Mecklenburg,* 181 N. C., 386. However, such ordinances are valid and enforceable only when they are not arbitrary or discriminatory and operate uniformly on all persons similarly situated, the district from which such business is excluded being selected in the exercise of that reasonable discretion necessarily accorded the lawmaking power. Whenever it appears on the face of the ordinance, or from the facts shown by the evidence, that persons, firms or corporations operating filling stations or other business establishments within the prescribed territory were exempted from the provisions of the ordinance, thus resulting in discrimination, the ordinance has been held void. *Burden v. Ahoskie,* 198 N. C., 92, 150 S. E., 808; *MacRae v. Fayetteville,* 198 N. C., 51, 150 S. E., 810; *Clinton v. Oil Co.,* 193 N. C., 432, 137 S. E., 183; *Bizzell v. Goldsboro,* 192 N. C., 348, 135 S. E., 50. Such ordinances must be in accordance with a general or uniform rule of action and must apply to all alike within the prescribed territory. It must be impartial, fair and general. It would be unreasonable and unjust to make under the same circumstances an act done by one person penal and done by another not so. Ordinances which have this effect cannot be sustained. *Barger v. Smith, supra; Bizzell v. Goldsboro, supra.*

A gasoline filling station is a legitimate enterprise and is not a nuisance *per se. MacRae v. Fayetteville, supra.* Ordinances prohibiting the maintenance and operation of filling stations within specified territory have been sustained upon the theory that the peculiar facts and circumstances of the situation made the operation of such stations within such locations a nuisance in fact. It is said by *Stacy, C. J.,* in *Wake Forest v. Medlin, supra,* that: "It is clearly within the police power of the State to regulate the business of operating such stations and to declare that in particular circumstances and in particular localities (*i.e.,* the residential section of a thickly populated town or city), a gasoline filling or gasoline storage station shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the State and Federal Constitutions. *Reinman v. Little Rock,* 237 U. S., 171, 59 L. Ed., 900. So long as the regulation is not shown to be clearly unreasonable and arbitrary, and *operates uniformly* on all persons similarly situated, the district itself being selected in the exercise of that reasonable discretion necessarily accorded the lawmaking power, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the law, within the meaning of the constitutional provisions on the subject."

The court below found as a fact "that within the area described in the ordinance of the defendants dated 15 July, 1936, and on the west

side of Main Street, there is a filling station in operation; that on the east side of Main Street, near and just below the point where Depot Street, which is not a through street, intersects with Main Street, a gasoline service station is in operation; that also on the east side of Main Street north of the point where it is intersected by Church Street, which is not a through street, and immediately south of the intersection of Pigeon Street with Main Street, two gasoline service stations are now in operation." Thus, it appears from said finding that the said ordinance is not uniform and does not apply alike to all within the designated territory. If the operation of plaintiff's filling station within said territory would constitute a nuisance and endanger the health or safety of the citizens of Waynesville the other filling station within this prohibited territory would of necessity likewise be a nuisance. The operation of one is prohibited; the operation of the other is not. Thus, the ordinance is arbitrary and discriminatory and constitutes an unlawful restriction of the property rights of plaintiffs. Its practical effect is to give a monopoly to the service station now being operated in the area and it falls within that class of ordinances condemned by this Court in *Burden v. Ahoskie, supra,* and *MacRae v. Fayetteville, supra,* and cases there cited.

There is presently no valid restriction upon plaintiffs' right to erect the proposed building. The judgment of the court below is

Reversed.

W. O. BURGIN v. NORTH CAROLINA STATE BOARD OF ELECTIONS ET AL.

(Filed 21 September, 1938.)

1. Elections § 7—State Board of Elections is given supervision over primaries and elections and has duty to compel observance of election laws.

The State Board of Elections has general supervision over the primaries and elections in the State, with authority to promulgate legally consistent rules and regulations for their conduct, and to compel the observance of the elections laws by county boards of elections, C. S., 5923, as amended by ch. 165, Public Laws of 1933, and the duty of the State Board to canvass the returns and declare the count, ch. 165, sec. 9, Public Laws of 1933, does not affect its supervisory power, which perforce must be exercised prior to the final acceptance of the returns made by the county boards.

2. Same—

The courts will not undertake to control the State Board of Elections in the exercise of its supervisory duties so long as such supervision conforms to the rudiments of fair play and the relevant statutes.

3. Elections § 17—In this action to restrain certification of candidate by State Board of Elections, validity of particular challenged votes held not presented for determination.

In an action to restrain the State Board of Elections from certifying a candidate as the Democratic nominee for Congress in a congressional district, on the ground that the State Board was without authority to instruct certain county boards of elections in the district in regard to the validity of challenged ballots, findings of the trial court that a number of unregistered persons voted in one of the counties and that certain absentee ballots were erroneously counted, and that Republican electors participated in the primary therein, are irrelevant, such matters not being properly before the Court upon the challenge of authority of the State Board of Elections. *Rowland v. Board of Elections*, 184 N. C., 78, cited and distinguished.

4. Elections § 16—Returns may not be impeached by chairman of county board who participated in meeting which passed upon and certified their correctness.

When a county board of elections makes amended returns in accordance with instructions of the State Board of Elections, which admittedly acted in good faith in issuing its instructions, and the amended returns are regular on their face, they may not be impeached by affidavit of the chairman of the county board who participated in the meeting which passed upon and certified to the correctness of the amended returns.

5. Same—County boards must act on instructions from State Board of Elections as a body in a duly assembled legal session.

When the State Board of Elections instructs certain county boards of elections to amend their respective returns in accordance with the State Board's rulings on protests challenging the validity of certain ballots, it is necessary for the county boards to hear the challenges and make the amended returns acting as a body in a duly assembled legal session, and action taken and amended returns made by two members of the county board of each county, respectively, without notice to the third member, are void as a matter of law.

6. Elections § 17—

A candidate is entitled to restrain the State Board of Elections from certifying his opposing candidate as the Democratic nominee until final returns have been received from all the county boards, each acting as a body in duly assembled legal session.

APPEAL by defendants from *Harris, J.*, at Chambers in Raleigh, 22 August, 1938. From WAKE.

Civil action to restrain the defendants from certifying C. B. Deane as the Democratic nominee for Congress in the Eighth Congressional District as a result of the run-off primary held on 2 July, 1938, and to require the defendants, by writ of *mandamus* and mandatory injunction, to declare the plaintiff the rightful Democratic nominee for said office as a result of the said primary election upon the basis of the lawful returns filed with the defendants.

The essential facts are these: W. O. Burgin and C. B. Deane were opposing candidates for the Democratic nomination for Congress in the Eighth Congressional District of North Carolina in the run-off primary of 2 July, 1938. Upon the face of the original returns made to the State Board of Elections by the several county boards of election comprising the district in question (twelve in number), the plaintiff, W. O. Burgin, received a majority of 75 votes over his opponent, C. B. Deane. After certification of the returns by the county boards as aforesaid, upon protests filed, recounts were ordered by the county boards of Davidson, Union, Montgomery and Richmond counties. As a result of these recounts and returns made thereon, the plaintiff's majority was increased to 135 votes—the total vote being: For Burgin, 19,285. For Deane, 19,144.

Thereafter, upon protest filed and demand made, hearings were held in Raleigh before the State Board of Elections with reference to the conduct of the said primary election in the four counties above named and the alleged invalidity and irregularity of certain ballots cast and counted or discarded in the said four counties. The State Board of Elections, by a majority vote, adopted separate resolutions, applicable to the counties named, and directed that the attention of the county board in each of the four counties be called to the resolution pertaining to said county.

UNION COUNTY.

It appears that in Union County a number of congressional ballots were found in boxes other than the congressional box, which were discarded by the precinct officials and the county board of elections pursuant to the long-established custom in said county, and also to the published instructions sanctioned by the county board of elections.

In the resolution of the State Board of Elections addressed to this situation it was provided that "the returns of the Board of Elections of Union County . . . be returned to the Board of Elections of Union County with instructions that said board cause all congressional ballots deposited in boxes other than the congressional box (except the recorder's box in North Monroe Precinct No. 2) to be counted and to cause said ballots so counted to be included in the certification to this board by the Union County Board," etc.

Thereafter, on 8 August, 1938, the Union County Board of Elections met and amended its returns by including therein 41 ballots found in boxes other than the congressional box (exclusive of the recorder's box in North Monroe Precinct No. 2), which were ascertained to be divided 11 for the plaintiff and 30 for his opponent.

MONTGOMERY COUNTY.

Protests were filed before the Montgomery County Board of Elections by candidate Deane challenging the validity of certain absentee ballots, and, as a result, 27 of said ballots were discarded as void and 53 were found to be valid. Both candidates, Burgin and Deane, appealed from this ruling to the State Board of Elections. The State Board sustained the county board in its ruling on the 53 ballots found to be valid, and reversed its ruling as to 25 of the 27 ballots found to be void. Upon such findings and conclusions of law, the State Board of Elections instructed the Montgomery County Board to amend its returns so as to show an additional 25 votes for candidate Burgin, which was accordingly done.

RICHMOND COUNTY.

A protest was filed before the Richmond County Board of Elections by candidate Burgin challenging the validity of certain absentee ballots, and, as a result, 95 of said ballots were discarded as void. Candidate Deane appealed from a portion of this ruling to the State Board of Elections. The State Board sustained the appeal as to 14 of said ballots and directed the Richmond County Board of Elections to reform its returns so as to include 14 additional votes for candidate Deane.

Pursuant to the order of the State Board, two members of the Richmond County Board signed what purports to be amended returns giving candidate Deane 14 additional votes, but this was done without any meeting of the board and without the knowledge or consent of the third member.

DAVIDSON COUNTY.

Protests were filed before the Davidson County Board of Elections by candidate Deane challenging the validity of certain votes, and, as a result, the returns were changed or corrected in several particulars. Not being satisfied with the disposition of his protests by the county board, candidate Deane appealed to the State Board of Elections. In his "case on appeal," and again at the hearing, new and additional challenges were made which had not been presented to or passed upon by the county board. As a result of the hearing before the State Board, the returns from the Davidson County Board were "rejected . . . and . . . returned to the Board of Elections of Davidson County for correction by eliminating therefrom fraudulent, illegal and void absentee votes"; and further, the county board was "directed forthwith to eliminate fraudulent and void ballots and to ascertain and certify the number of legal ballots cast," etc.

Conferences were held with two members of the Davidson County board who came to Raleigh and, under protest, certified that 162 ballots for Burgin and 6 ballots for Deane were voided "by order and direction of the State Board of Elections." This amendment to the returns, so signed and filed with the State Board of Elections, was not considered or passed upon by the entire membership of the county board, but was signed in the absence of and without notice to the third member of the board. No opportunity was given to the third member to consider the proposal or to present his views to the board, either in or out of meeting.

The amended returns from the four counties above mentioned, compiled and tabulated with the undisputed returns from the remaining eight counties in the district, show candidate Deane to have a majority of 23 votes. The State Board of Elections thereupon declared its intention so to certify the result; whereupon, the plaintiff instituted the present action.

The trial court being of opinion that the amended returns from Union, Richmond and Davidson counties were void as a matter of law, and that upon the basis of the legal and valid returns filed with the State Board of Elections, the plaintiff is entitled to be declared the Democratic nominee for Congress in the Eighth Congressional District of North Carolina, entered judgment accordingly, from which the defendants appeal, assigning error.

W. F. Brinkley, H. R. Kyser, and J. C. B. Ehringhaus for plaintiff, appellee.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Wettach for defendants, appellants.

L. P. McLendon, amicus curiæ.

STACY, C. J. It is provided by C. S., 5923, as amended by ch. 165, Public Laws 1933, that the State Board of Elections shall have "general supervision over the primaries and elections in the State," with authority to promulgate legally consistent rules and regulations for their conduct; and further: "It shall be the duty of the State Board of Elections: . . . To compel the observance, by election officers in the counties, of the requirements of the election laws, and the State Board of Elections shall have the right to act on complaints arising by petition or otherwise, on the failure or neglect of a county board of elections to comply with any part of the election laws pertaining to their duties thereunder."

The fact that after the returns are in, the State Board of Elections is to canvass the returns and "determine whom they ascertain and declare by the count" (1933, ch. 165, sec. 9) to be nominated or elected is not to

be construed as a denial or negation of its supervisory powers, which perforce are to be exercised prior to the final acceptance of the several returns. Nor will the courts undertake to control the State Board in the exercise of its duty of general supervision so long as such supervision conforms to the rudiments of fair play and the statutes on the subject. *Brown v. Costen,* 176 N. C., 63, 96 S. E., 659.

In the instant case, there is no charge of arbitrariness on the part of the State Board of Elections, only its authority is questioned. Indeed, it is found as a fact "that the State Board conducted said hearings and investigations in absolute good faith and with high purpose and that this has not been questioned by either the plaintiff or his attorneys."

What was said in *Rowland v. Board of Elections,* 184 N. C., 78, 113 S. E., 629, is not presently applicable, for there we were dealing with alleged disqualifications of electors on the ground of party affiliation, a matter at that time, and perhaps now, properly determinable by the local registrars and judges of election. C. S., 6031. At any rate, the original finding of the trial court that Republican electors participated in the primary in Richmond County is beside the point or *dehors* the inquiry. So, also, are his initial findings that a number of unregistered persons voted therein and that certain absentee ballots were erroneously counted. These matters were not properly before him. Furthermore, it will be observed that the authority of the State Board was not involved in the *Rowland case, supra,* and that the decision was rendered prior to the amendatory act of 1933.

With the power of general supervision residing in the State Board of Elections, here admittedly exercised in good faith, we fail to perceive wherein the amended returns from Union County can be declared void as a matter of law. *Bell v. Board of Elections,* 188 N. C., 311, 124 S. E., 311. They appear regular on their face, and they are impeached only by the affidavit of the chairman of the board who participated in the meeting, duly called and held for the purpose of passing upon the amended returns, and who certified to their correctness. As bearing upon this circumstance, it is recalled that jurors are not allowed to impeach their verdict, *Coxe v. Singleton,* 139 N. C., 361, 51 S. E., 1019, and the official return of a sheriff may not be overthrown by the oath of a single witness. *Comrs. v. Spencer,* 174 N. C., 36, 93 S. E., 435; McIntosh, N. C. Prac. & Proc., 851. There is error in the court's ruling in respect of these returns.

The amended returns from Montgomery County are not challenged, as they were favorable to the plaintiff.

Upon the facts appearing of record, to which no exception is taken, we agree with the trial court that the purported amendments to the returns from Richmond and Davidson counties are void as a matter of

law. They are not the result of action by the respective boards duly assembled for the purpose. *Britt v. Board of Canvassers,* 172 N. C., 797, 90 S. E., 1005. The decisions are generally to the effect that a governing body, *e.g.,* municipal council (19 R. C. L., 884) or board of county commissioners (7 R. C. L., 941), can only act as a body and when in legal session as such. *O'Neal v. Wake County,* 196 N. C., 184, 145 S. E., 28; *London v. Comrs.,* 193 N. C., 100, 136 S. E., 356; *Cotton Mills v. Comrs.,* 108 N. C., 678, 13 S. E., 271; *Rockingham County v. Luten Bridge Co.,* 35 F. (2d), 301. The same rule applies to an administrative agency when acting in a *quasi*-judicial capacity. Leastwise, a county board of elections may not change or amend its returns to the State Board without some official action on its part. *Bell v. Board of Elections, supra.*

Moreover, some of the challenges affecting the vote in Davidson County have not been presented to or heard by the Davidson County Board of Elections. This, likewise, might avoid the attempted amendment of the returns from that county, if due process is to be observed in such matters. *Morgan v. U. S.,* 82 Law Ed., 757; *Harrell v. Welstead,* 206 N. C., 817, 175 S. E., 283; *Markham v. Carver,* 188 N. C., 615, 125 S. E., 409.

Plaintiff is entitled to a stay until final returns have been received by the State Board of Elections from the county boards of Richmond and Davidson counties and to await the result of these returns. *Johnston v. Board of Elections,* 172 N. C., 162, 90 S. E., 143; *Swaringen v. Poplin,* 211 N. C., 700, 191 S. E., 746.

Error and remanded.

A. R. LONG v. EAGLE 5, 10 AND 25c STORE COMPANY, INCORPORATED, AND J. E. SENTER, ASSISTANT MANAGER.

(Filed 21 September, 1938.)

1. False Imprisonment § 2—Evidence held for jury on question of whether assistant manager of store caused arrest of customer.

Evidence that the assistant manager of a store immediately preceded a customer out of the store, that when the latter came out of the door the assistant manager was on one side of the door and a police officer on the other, that another officer in a police car was waiting in front of the store, that the officers arrested the customer without parley, and that the assistant manager got into the police car with them and was personally present and actively engaged in the search of the customer at the police station, and when asked by the customer whether he had had him arrested for stealing a screw driver, which was unwrapped in the customer's pocket,

stated he had seen the customer put it in his pocket without paying for it, *is held* sufficient to be submitted to the jury on the question of whether the assistant manager had caused the arrest of the customer.

2. Corporations §§ 20, 25: Principal and Agent §10—Evidence held for jury on question of authority of assistant manager to cause arrest of customer.

Evidence that the assistant manager of a store corporation had a customer arrested to recover goods he mistakenly thought the customer had stolen is sufficient to be submitted to the jury upon the question of whether causing the arrest was within the scope of the assistant manager's apparent authority to protect his employer's goods against injury and theft, and the arrest having been made as the customer was leaving the store and the customer having been searched at the instance of the assistant manager for an article still in his possession, the contention that the arrest was to avenge the supposed theft, which would be outside the assistant manager's apparent authority, is untenable, the arrest being a part of the *res gestæ*, and direct authority therefor or ratification by the principal being unnecessary.

3. False Imprisonment § 1—

The fact that an arrest is made by officers of the law is no defense to an action for false arrest when the officers make the arrest at the instance of the individual defendant acting within the apparent scope of his employment by the corporate defendant.

4. Master and Servant § 21b: Principal and Agent § 7—

When there is doubt as to the scope of the employee's authority, it must be resolved in favor of the injured third person and the question submitted to the jury, since the employer places the employee in position to do the wrongful act.

APPEAL by defendant Eagle 5, 10 and 25c Store Company from *Clement, J.*, at January Term, 1938, of HAYWOOD. No error.

The plaintiff brought this action to recover damages for a false arrest which in his complaint he alleges was brought about by the Store Company through J. E. Senter, assistant manager of defendant's department store in Canton. The Store Company answered denying the material allegations of the complaint, and then as a further defense denied liability upon the ground that the assistant manager was not acting within the scope of his authority in making the arrest.

The plaintiff testified that he went to the department store of the defendant in Canton, and while his wife was making other purchases, he was looking about the store, and purchased and paid for a five-cent screw driver, which he placed in his pocket unwrapped, which he was permitted to do by Miss Smathers, a salesgirl who sold him the screw driver. He remained in the store about twenty minutes, and when his wife had finished her purchases plaintiff walked down toward the front door. Senter had come down toward the front from the back end.

When plaintiff walked to the door there was a police car waiting in front of the store, while Senter stood on the right of the door and a policeman stood on the left. The policeman in the car called to Long and told him to come, that he would have to go to the town hall. Plaintiff protested that he did not have time to go, but was told by the policeman that he would have to go. He was compelled to go with the two policemen and Senter down to police headquarters, where he was compelled to empty his pockets, laying out upon the table his knife, pocketbook, a little daybook, his eyeglasses, and the screw driver. Quoting from the record: "When they said that was all I had, Senter said that was the screw driver I had and I asked him if he had me arrested for stealing a screw driver, and he said he saw me put it in my pocket without paying for it, and I said I had bought it, and he said, 'Who from?' and I said, 'From Katherine Smathers.' At the time of this conversation and at the time I pulled the articles out of my pocket Senter was standing by my side on the right side.

"After I had taken the things out of my pocket the police felt over me and searched me and Senter took the screw driver and said that was what I was arrested for."

After the explanation made by plaintiff, Senter and a policeman returned to the store, and another policeman in charge of the plaintiff, the latter still under restraint, followed. At this time plaintiff had the screw driver.

Upon returning to the store, plaintiff returned the screw driver to Senter and demanded his money back, and Senter returned the five cents paid for it. At the same time, Mrs. Long demanded back the money which she had paid for her purchases and, upon Senter's order, the money was refunded to her and she returned the purchases and they left the store.

It is not necessary here to summarize the evidence relating to the good character of the plaintiff and other testimony relating to the *quantum* of damages.

Smathers & Meekins for plaintiff, appellee.
Whitlock, Dockery & Shaw and F. E. Alley for defendant, appellant.

SEAWELL, J. The defendant relies entirely on the motion for nonsuit at the conclusion of the plaintiff's evidence. It insists that this motion should have been allowed upon the ground that there was no evidence from which a valid inference could be drawn that (1) Senter, the assistant manager, caused the arrest to be made, and (2) that he was acting within the scope of his duty and authority and about his master's business in making the arrest.

1. The evidence, both direct and circumstantial, is sufficient for submission to the jury on this point.

Senter, with timely precision, preceded the plaintiff to the exit, and when the latter came out of the door he found Senter standing on one side of the door, a policeman on the other side, and an officer in a police car, in readiness for his reception. The officers, without parley, proceeded to make the arrest. Information had obviously been given by the only person shown to have entertained the notion that plaintiff was a fit subject for police attention—Senter. Senter got into the police car and was personally present and actively participating in the search, identifying the screw driver, when found on plaintiff's person, as being the object of the search.

When asked by plaintiff if he had had him arrested for stealing a screw driver, Senter replied that he had seen him put it in his pocket without paying for it.

Defendant's counsel give more serious attention to the second proposition.

2. Senter was assistant manager of the Store Company. While such a description might not indicate the exact scope of his duties or authority, still, taken in its ordinary meaning, and in connection with the evidence as to the duties which Senter was openly performing in the store the day of the arrest, it was sufficient to raise an inference that he was at least clothed with authority to protect his employer's goods against injury and theft.

In *Kelly v. Shoe Co.*, 190 N. C., 409, 130 S. E., 32, *Justice Varser* said for the Court: "The term 'manager,' applied to an officer or representative of a corporation, implies the idea that the management of the affairs of the company has been committed to him with respect to the property and business under his charge. Consequently, his acts in and about the corporation's business, so committed to him, is within the scope of his authority. 5 Words and Phrases, 4319; *Sullivan v. Evans-Morris-Whitney Co.*, 54 Utah, 293. The designation 'manager' implies general power, and permits a reasonable inference that he was invested with the general conduct and control of the defendants' business centered in and about their Wilmington store, and his acts are, when committed in the line of his duty and in the scope of his employment, those of the company."

It is pointed out by the defendant, however, that even this does not warrant an inference that Senter had authority to proceed against this plaintiff in order to avenge any theft or supposed theft from the company, and to have the plaintiff punished therefor. The defendant contends that this was the sole purpose and effect of Senter's conduct and that, therefore, under the rule laid down in *Lamm v. Charles Stores,*

201 N. C., 134, 159 S. E., 444, the defendant is absolved from any liability in connection with the conduct of its assistant manager.

In this case the defendant is not particularly aided by the fact that the arrest and search of plaintiff was made by officers of the law. In *Dickerson v. Refining Co.*, 201 N. C., 90, 99, 159 S. E., 446, we find the pertinent observation: "When the servant is engaged in the work of the master, doing that which he is employed or directed to do, and an actionable wrong is done to another, either negligently or maliciously, the master is liable, not only for what the servant does, but also for the ways and means employed by him in performing the act in question. *Ange v. Woodmen* (173 N. C., 33, 91 S. E., 586); Reinhard on Agency, *supra; Bucken v. R. R.*, 157 N. C., 443, 73 S. E., 137;" etc. In so far as it affected the liability of the company, Senter's action in calling in the policemen put the defendant in no more advantageous position than if he had called to his assistance any other persons of sufficient strength and willingness to detain the plaintiff and search his person.

In some instances, as in *Lamm v. Charles Stores, supra* (where a warrant was sworn out more than three months after the supposed offense was committed), the arrest could hardly be considered as a part of the *res gestæ* attending the original transaction, since the time elapsed and the character of the proceeding taken might indicate that the conduct was merely in vindication of the law; and proof of a distinct and direct authorization or ratification of the act would be required, not to be inferred from the circumstances of the case, before liability is established on the theory of *respondeat superior*.

But in this case we do not have to go that far in order to attach liability to his employer for the conduct of Senter. The arrest of the plaintiff at the instance of defendant's assistant manager, and a search of his person for an article just acquired and still in his possession, in the immediate presence and at the instance of Senter, must be regarded as one continuous transaction, insulated by neither time nor circumstance from a valid inference which the jury might draw that the conduct of the assistant manager was directed, mistakenly as it proved, to the immediate protection of his employer's property against theft and its recovery from the thief, and that his action was well within the scope of his authority. *Kelly v. Shoe Co., supra; Berry v. R. R.*, 155 N. C., 287, 71 S. E., 322; *Brockwell v. Telegraph Co.*, 205 N. C., 474, 171 S. E., 784.

We are not unmindful of the suggestion of counsel that it was very improbable that Senter would have gone to all this trouble to recover a five-cent article. Perhaps five-cent articles comprised the bulk of defendant's stock. At any rate, it might be considered even more improbable that the assistant manager, independently of his relation to the

defendant, and the immediate necessity to protect its property, should have caused the arrest of the plaintiff in mere vindication of justice, and with such marked dispatch, for stealing a five-cent screw driver. In fact, this case is grounded upon the unwisdom of the assistant manager, and these matters were for the jury. It has been held that where there is doubt as to the servant's scope of authority, the trial judge is required to resolve the doubt in favor of the plaintiff and submit the evidence to the jury, upon the ground that the employer had placed the servant in position to do the wrongful act. *Dickerson v. Refining Co., supra.* If the evidence is competent to be submitted to the jury, the right of the jury to draw a reasonable inference from it cannot be questioned.

In some of the cases cited above, the authorities on the subject under discussion have been studiously and copiously collated and adequately discussed. We find no substantial conflict between them and refrain from adding to the burden of citation.

In the trial of this case we find

No error.

CHARLIE KATES v. W. S. HARRISON, TRADING AND DOING BUSINESS AS HARRISON AUTO PARTS COMPANY.

(Filed 21 September, 1938.)

Master and Servant § 11—Evidence held not to show that employee's injury was result of negligent act or omission on part of employer.

Plaintiff employee was employed to sell used parts from old automobiles. The evidence disclosed that plaintiff and two customers attempted to turn a car over to get some parts, instead of jacking the car up; that the customers turned the car loose when the door on the other side flew open and became an obstruction against turning the car over; that plaintiff could not hold the side of the car up alone, did not have room to get out of the way, and was injured when struck by the car. There was no evidence that plaintiff was ordered to do the work in this way by a superior. *Held:* The evidence fails to show that the alleged injury was proximately caused by any negligent act or omission of duty attributable to defendant employer.

APPEAL by plaintiff from *Johnston, J.*, at July Term, 1938, of BUNCOMBE. Affirmed.

The plaintiff brought action for damages alleged to have been sustained by him through the negligence of the defendant. The complaint contains the allegation that defendant had not brought himself within the provisions of the Workmen's Compensation Act.

The evidence tends to show that the plaintiff was employed by the defendant in the sale of parts from used automobiles on the defendant's premises. The cars were arranged in rows, with a roadway between them. Some of the cars, however, were close together, about four feet apart, and some not more than twelve inches apart.

On the day of the alleged injury two customers wanted a connecting rod out of a '28 Whippet Sedan. While the plaintiff was hunting a "jack" to lift the car body he observed the customers attempting to lift the car up by pulling upon the running board. Thinking that they needed help, plaintiff took hold of the running board with them, and the three of them started to turn the car over so as to get to the "pan" and get out the connecting rod. The door flew open on the other side, struck the ground, and became an obstruction against turning the car over. The other persons lifting the car turned it loose, leaving the entire load upon the plaintiff. Plaintiff says he could not step back out of the way because there was a car too close behind him.

There was evidence relating to the injury alleged to have been caused by the car striking the plaintiff on the side, under the above circumstances. The evidence does not disclose that the plaintiff was at the time ordered to do this work in this way by a superior.

Ford & Lee for plaintiff, appellant.
J. Frazier Glenn, Jr., for defendant, appellee.

PER CURIAM. The evidence does not show that the alleged injury was the natural and probable consequence of any negligent act or omission of duty attributable to defendant, and the judgment is therefore

Affirmed.

AMANDA CHEEK, ADMINISTRATRIX OF THE ESTATE OF J. H. CHEEK, DECEASED, v. SOUTHERN RAILWAY COMPANY AND J. M. STREET.

(Filed 28 September, 1938.)

1. Judgments § 32a—Where judgment of nonsuit may be based on either one of two grounds, whether it is res adjudicata as to one of them, quære.

Where motion for judgment as of nonsuit is based on the insufficiency of plaintiff's evidence both on the issue of negligence and the issues relating to whether the release introduced by defendant was obtained by fraud or through mutual mistake, and the motion is allowed by general judgment which does not specify on which ground it is based, whether the judgment constitutes *res adjudicata* in a subsequent action on the issues

relating to the release upon substantially identical evidence on those issues, *quære*, since the judgment of nonsuit may have been entered for insufficiency of evidence on the issue of negligence, and the party pleading estoppel by judgment has the burden of establishing the bar.

2. Cancellation of Instruments §§ 3, 13: Torts § 8b—Mistake must be mutual in order to entitle party to rescission on that ground.

A release from liability executed by plaintiff may be set aside for mutual mistake, but may not be set aside for unilateral mistake on the part of plaintiff or on the part of defendant, and an instruction that it might be avoided for mistake of either party is error.

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

APPEAL of defendants from *Alley, J.*, at January Term, 1938, of BUNCOMBE. New trial.

This action was brought by Amanda Cheek, administratrix of the estate of J. H. Cheek, deceased, to recover for the injury and death of her intestate, which she alleges was caused by the negligence of the defendants.

Defendants denied the material allegations of the complaint and pleaded a release executed by the deceased a short time after his injury; and the plaintiff replied, pleading mistake and fraud in procurement of the release.

The defendants pleaded that the matters in controversy had become *res adjudicata,* both as to the release and as to the merits of the case, because of a former judgment of involuntary nonsuit rendered in a former case between these parties involving substantially the same evidence.

In support of the plea of *res adjudicata* the defendants introduced the record of the former trial for the purpose of showing that substantially the same evidence was presented by the plaintiff in the first case, both on her allegations of fraud and mistake as to the release, and on the merits relating to negligence and injury.

On the questions of negligence and injury, the plaintiff at this trial introduced additional evidence tending to show that the engineer in the operation of the engine which struck the caboose in which the deceased was standing, thereby causing his injury, had neglected signals to stop and had not kept a proper lookout for the danger.

The defendants introduced the following judgment rendered on a former trial:

"Judgment. This cause coming on to be heard and being heard before the undersigned judge and a jury, and the defendants, and each of them, at the close of plaintiff's evidence, moved for judgment as of nonsuit. Motion was overruled. Whereupon, defendants and plaintiff introduced further evidence and at the close of hearing all the evidence, the defend-

ants and each of them renewed their motion for judgment as of nonsuit. Upon hearing argument of counsel for plaintiff and defendants, and after considering the matter, the court is of the opinion the motion should be sustained. It is therefore ordered and adjudged by the court that the action be and the same is hereby nonsuited and dismissed. (Signed) P. A. McElroy, Judge Presiding."

Plaintiff introduced evidence in support of her contention that the release was procured through fraud and made under a mistake of fact, and the defendants offered evidence to the contrary.

Three issues were submitted to the jury on this phase of the case, the first as to the making of the release, the second as to fraud and misrepresentation, which the jury answered "No," and the third as to mistake. The issue was as follows:

"Did the plaintiff's intestate execute said paper writing by reason of mutual mistake of himself and the defendant Southern Railway Company, as alleged in the reply?"

Upon this issue the judge instructed the jury as follows:

"Where a contract in writing is executed by only one of the parties under mistake as to the facts which is the essence of the contract, the mistake constitutes grounds for a court of equity to rescind and cancel as apparently written, and place the parties in *status quo,* that is, in the former condition. Mistake on either side is ground for rescinding a contract.

"It is a rule that misrepresentations of material facts, although innocently made, if acted on by the other party to his detriment, will cause a sufficient ground for a rescission and cancellation of a contract in equity. The real inquiry is not whether the party making the representations knew it to be false or whether the other party believed it to be true, and was misled by it in making the contract; and whether misrepresentations were made innocently or knowingly, the effect is the same. It is as conclusive a ground for relief in equity as a willful or false assertion, for it operates as a surprise and imposition on the other party; and in such case the party may be held to his representations.

"I charge you if you find by evidence clear, strong, cogent and convincing that at the time the release in question was executed by Mr. Cheek, that either Mr. Cheek or Mr. Cooper, representing the Southern Railway Company, were mistaken about the facts as they then existed with respect to Mr. Cheek's injury, and the nature of it, and the seriousness of it, and you further find by such evidence that they, or either of them, acted on the belief that he was only temporarily, not permanently injured, and you find that the consideration was grossly inadequate, then I charge you, gentlemen of the jury, that that would be such mistake of the facts as is defined by the law which I have just read to you, and

if you so find, by the kind and character of evidence I have defined, that is, gentlemen, by evidence clear, strong, cogent and convincing that the release was signed under a mistake of facts, as I have indicated, it would be your duty to answer the third issue 'Yes.' "

To each of these instructions the defendants excepted.

The jury answered the issue in favor of the plaintiff.

Edwards & Leatherwood and J. Y. Jordan, Jr., for plaintiff, appellee.
W. T. Joyner and Jones, Ward & Jones for defendants, appellants.

SEAWELL, J. 1. We do not think the present state of the record has placed the Court in a position to rule on the question of *res adjudicata* as applied to the release claimed to be effected by the involuntary nonsuit on the evidence in the first case.

If we assume that a substantial identity exists between the evidence on the first trial and that in the case at bar on this question, we are met with the difficulty that the judgment of involuntary nonsuit in the first trial is general in its character and does not specify any particular phase of the case to which it applied. That case was subject to nonsuit if the plaintiff failed to establish her contention of fraud or mistake by evidence sufficient to avoid the release, and equally so upon her failure to produce evidence sufficient to go to the jury on the question of negligence, injury, and damage. There was a further suggestion that the complaint in the first case was defective in not properly setting out facts as to the dependents of deceased and that the evidence in that respect was not addressed to an adequate declaration in the complaint.

While ordinarily a judgment under review may be sustained on any ground legally justifying it, even though the judgment itself may be predicated on a different ground, it is questionable, at least, whether this rule can be applied to a judgment in a former suit pleaded as *res adjudicata,* where the burden is on the pleader to bring itself within its terms. We do not pass upon this matter but refer to it in order that it may be understood that it has not escaped the attention of the Court.

2. On the trial, the question of fraud and misrepresentation was submitted under an appropriate issue, thus segregating that phase of the case and its pertinent evidence. The third issue related to mistake alone and was framed to present the question of *mutual* mistake.

On this issue, in the above excerpts from the charge the judge instructed the jury that the release could be avoided "by mistake of either party"—that is, by mistake of either the party seeking to avoid it or the party seeking to enforce it. This statement is so broad, and so untenable, as to suggest inadvertence.

A contract is the product of two or more consenting minds making a commitment about the same thing, binding on the parties at law or in equity. It is true that where there has been no meeting of the minds on the essentials of the treaty, no contract results. *Lumber Co. v. Boushall,* 168 N. C., 501, 84 S. E., 800. But if we can conceive of such a situation—or, indeed, of a case of "innocent misrepresentation"—that cannot be resolvable into mutual mistake (*Great Northern R. Co. v. Fowler,* 136 F., 118, 69 C. C. A., 106; *Seymour v. Chicago & N. W. Ry. Co.,* 181 Ia., 218, 164 N. W., 352, 357; Williston on Contracts, Rev. Ed., section 1551, and notes), still we can find no authority for the rescission of a contract for mistake at the instance of a party who has made no mistake.

If we confine the allusions in the instruction to the plaintiff seeking relief from his own mistake, it is still contrary to established precedent. This Court has not adopted the doctrine that an unilateral mistake—or mistake alone of the party seeking to avoid the contract—unaccompanied by fraud, imposition, undue influence, or like circumstances of oppression, is sufficient to avoid a contract. We do not undertake to catalogue the conditions which will give rise to equity jurisdiction. We simply say that the mere mistake of one party alone is not sufficient to avoid the contract. *Bean v. R. R.,* 107 N. C., 731, 747, 12 S. E., 600. To have that effect, the mistake must be mutual. *Ebbs v. Trust Co.,* 199 N. C., 242, 153 S. E., 858; *Hinsdale v. Phillips,* 199 N. C., 563, 572, 155 S. E., 238; *West v. R. R.,* 151 N. C., 231, 236, 65 S. E., 579; *White v. R. R.,* 110 N. C., 456, 461, 15 S. E., 197.

As we have seen, the issue submitted to the jury raises only the question of mutual mistake. The instructions given are not pertinent to such an inquiry, and as statements of law on the subject given the jury to consider they cannot be approved.

Other exceptions need not be considered.

For the errors noted, the defendants are granted a new trial.

New trial.

BARNHILL, J., dissenting: I concur in the conclusion of the majority opinion that there was error in the charge of the court below, which, in any event, entitles the defendants to a new trial. But I am of the opinion that the defendants' motion to dismiss as of nonsuit, made at the conclusion of all the evidence, should have been allowed for the reason that there is no evidence tending to show that the death of plaintiff's intestate proximately resulted from the injuries received by him while engaged in his work as an employee of the defendant Railway Company. The award of a new trial impliedly overrules defendants' exceptive assignment of error directed to the denial of the motion to nonsuit in the court below. As to this I am compelled to differ with my brethren.

There is evidence of negligence resulting in injury to the deceased. This is not sufficient to justify a recovery for the wrongful death of the deceased. There must be some evidence that the injuries received proximately caused the death.

On the first hearing the plaintiff tendered as witnesses the doctor who attended the deceased following his injuries and also the physician who made a *post-mortem* examination, and another doctor who examined him while he was suffering from his injuries. On the second hearing the plaintiff elected not to examine these doctors in her behalf, but instead tendered, as an expert witness, a physician who never saw the deceased. This witness was asked a hypothetical question which assumed the existence of all the facts and circumstances relied upon by the plaintiff, including the circumstances of the injury, his confinement in the hospital, the physical evidences of injury, such as swelling over his left chest and a spot which became discolored and remained discolored for some two weeks, his loss of time from his work, his loss of weight, his complaints about pain in his left chest, the circumstances of his sudden death and his physical appearance prior to the injury which showed no outward evidence of any disease. In answer to this question this witness testified: "I think that the blow might have accelerated his death." He further testified that if he had been present at the *post-mortem* examination and had found a highly enlarged heart approximately twice its normal size his diagnosis most likely would have been that the deceased died from heart trouble. This is the only evidence of proximate cause offered by the plaintiff.

The defendant offered the doctor who attended deceased during the time he was in the hospital and immediately thereafter, who, after describing the injuries and his treatment, testified: "In my professional opinion as an expert I do not think any injury which I found on Mr. Cheek when he was in the hospital, or any he received which caused him to go to the hospital on the 20th day of July, was sufficient to produce or cause death." Dr. Smith testified that he saw the deceased in the hospital and that: "In my opinion I cannot say that I found anything from the bruises that I saw and the examination that I made that would indicate that any injury received was either total or permanent. . . . The blue spot that was on Mr. Cheek's chest, or the blow, or whatever caused it, in my opinion was not of sufficient force to in anywise affect the heart or arteries. I think that it was a superficial wound, because after we got inside his chest cavity (this witness was present at the autopsy) there was no damage done to the chest wall. It was superficial. It was the heart that caused his death. In order for a lick to be of sufficient force to damage the heart it would also do damage to the chest wall. . . . The cause of death was a dilation of the heart and generalized arteriosclerosis."

Dr. Crump, who performed the autopsy and made the *post-mortem* examination, testified that he found a condition of hypertrophy, or an enlargement of the heart muscles and dilation and stretching of the chambers of the heart, which was in his opinion the cause of death; that the heart was dilated like an inflated balloon; that there was a hardening of the arteries generalized throughout the body, and including the arteries that supply the heart muscles and brain; that he found adhesions over the surface of the lungs, indicating inflammatory condition or pleurisy some time prior thereto; inflammatory condition of the gall bladder with gall stones, and inflammation of the prostate gland. In response to a hypothetical question on cross-examination, which question assumed all the facts and circumstances favorable to the plaintiff, he testified: "Under those circumstances the injury could have something to do with his death and, also, could have absolutely nothing to do with his death." He likewise testified that he found no evidence of injury to the walls of the chest.

This evidence offered by the defendant does not impeach or contradict the evidence offered by the plaintiff. It serves merely to amplify and explain plaintiff's testimony. It is, therefore, permissible and proper to consider it on a motion of nonsuit. *Hare v. Weil,* 213 N. C., 484, and cases there cited.

Whether we consider this medical testimony offered by the plaintiff and the defendants as a whole, or only consider the testimony of the plaintiff's expert witnesses, it appears that all that the plaintiff has been able to show is that there is a possibility that the death of the deceased was hastened or accelerated by the injuries to her intestate. This is not sufficient. There must be some substantive testimony that the injury received was the proximate cause of the death of the deceased before the plaintiff is entitled to have the cause submitted to a jury. She has been unable even to show that such injury probably contributed to the death of her intestate. All the evidence amounts to conjecture and the jury was left to surmise and guess at the cause of death, if they refused to accept the positive testimony that it was caused by a heart ailment. This is not sufficient. *Gower v. Davidian,* 212 N. C., 172. We permit the jury to say that the injuries proximately caused the death when the witness offered by plaintiff to show that particular fact is unwilling to say that there is any causal connection.

Plaintiff's intestate received his injuries 20 July, 1934. He returned to his work approximately one month thereafter and worked with reasonable regularity for a period of about four months before his death. During this time he was suffering from symptoms which are attendant upon and which are commonly recognized as indicative of heart trouble, and died suddenly under circumstances which the physicians say clearly

indicate death from heart failure. And yet, the jury finds that his death proximately resulted from injuries received five months prior thereto.

I am convinced that on the present record defendants are entitled to a judgment of involuntary nonsuit on the cause of action for wrongful death. This, however, does not bar recovery for the injuries received. The cause of action for such injuries survives under the Federal law. See *Railway Co. v. Craft,* 237 U. S., 648, 59 L. Ed., 1160.

PAGE CLARK KEEL, A MINOR, APPEARING HEREIN BY HIS NEXT FRIEND, J. W. KEEL, v. WILLIE BAILEY, ADMINISTRATOR C. T. A. OF THE ESTATE OF BETTIE BAILEY, AND J. G. FULGHUM, SHERIFF OF WILSON COUNTY.

(Filed 28 September, 1938.)

1. Judgments § 19b—

A judgment by confession, like any other judgment, becomes a lien on the judgment debtor's real estate as of the date the judgment is docketed. C. S., 614, 623-625.

2. Husband and Wife § 14—

Neither a judgment obtained by a third person against either spouse, nor a judgment obtained by one spouse against the other, is a lien on land held by them by entireties.

3. Judgments § 44—Judgment by confession held not canceled by later exchange of deeds between parties.

Judgment by confession was entered against a husband in favor of his wife. Thereafter the parties exchanged deeds in order to divide between them lands held by the entireties, which deeds contained no stipulation in regard to the judgment. *Held:* The deeds did not cancel the judgment.

4. Judgments § 19d: Husband and Wife § 14—Title to lands held by entireties vests in survivor, and lien of judgment against survivor attaches immediately and has priority over deed executed by him subsequent to the docketing of the judgment.

Husband and wife held several tracts of land by the entireties. Thereafter a valid judgment by confession was entered against the husband in favor of the wife, which judgment was duly docketed. Less than a year later the husband and wife exchanged deeds in order to divide the lands between them, and the land in controversy was conveyed by the wife to the husband, and the following day the husband executed a deed of trust on the land in controversy without the joinder of his wife. The deed of trust was foreclosed and plaintiff obtained title to the land in controversy by deed from the purchaser at the sale. Some four years after the execution of the deed of trust, the wife died, and plaintiff instituted this action to restrain her administrator from selling the land under execution to satisfy the judgment by confession. *Held:* The exchange of deeds between

the husband and wife did not cancel the judgment by confession, and whether the exchange of deeds extinguished the estate by entireties is not necessary to be decided, since upon the wife's death title was vested in the husband and the lien of the judgment by confession immediately attached and has priority over the attempted deed of trust executed after the judgment was docketed.

APPEAL by plaintiff from *Hamilton, Special Judge,* at June Term, 1938, of EDGECOMBE. Affirmed.

The judgment of the court below is as follows:

"This cause coming on to be heard before Honorable Luther Hamilton, Special Judge holding courts in the Second Judicial District, at the June, 1938, Term of the Superior Court of Edgecombe County, and being heard in chambers, and it appearing to the court that this is an action instituted by the plaintiff for the purpose of having a certain judgment declared not a lien upon his lands, and that at the institution of said action the plaintiff obtained a temporary restraining order enjoining the defendants from proceeding to sell said lands under execution issued on said judgment; that said restraining order was made returnable before Honorable Walter J. Bone, Resident Judge of the Second Judicial District, but that Judge Bone disqualified himself to hear the matter because he has been a counsel in one phase of this litigation before going on the bench; that therefore the hearing on the return of said restraining order was continued and now comes on for hearing by consent before the undersigned judge for a determination of whether said restraining order shall be dissolved or shall continue in force until the regular trial of the cause; that all the evidence is documentary and the plaintiff and defendants are permitted to file the respective pleadings as affidavits; that no issues of fact arise upon the pleadings and the injunctive relief sought by the plaintiff constitutes the primary cause: It is made to appear to the court, and the court finds as facts, as follows:

"(1) On 11 February, 1927, J. W. Robbins, commissioner, conveyed to Robert Bailey and wife, Bettie Bailey, as an estate by the entireties, a certain tract of land situate in Toisnot Township, Wilson County, North Carolina, and known as the Ben Dawes tract, containing 46 acres, more or less. The said Dawes tract is the land against which defendants assert the judgment lien. This deed was recorded on 14 February, 1927, in Book 165, page 443, Wilson County registry.

"(2) On 29 September, 1930, Robert Bailey entered a confession of judgment in favor of his wife, Bettie Bailey, in words and figures as follows: (There is set forth a copy of the confession of judgment and judgment upon confession for $6,900.)

"This judgment was duly docketed in the office of the clerk of the Superior Court of Nash County. A transcript was issued to Wilson

County on 29 September, 1930, and duly docketed there in the office of the clerk of Superior Court, on 1 October, 1930, in Judgment Book 11, page 143.

"(3) On 17 July, 1931, Robert Bailey and wife, Bettie Bailey, were the owners by the entireties of several tracts of land in Wilson and Nash counties, including the Dawes tract hereinbefore referred to, and on said date the said Robert Bailey and wife, Bettie Bailey, executed a joint deed which was recorded on 7 June, 1932, in Book 202, page 50, Wilson County registry, and is in words and figures as follows:

" 'North Carolina—Nash County.

" 'This deed, made this 17 July, 1931, by and between Bettie Bailey, party of the first part, and her husband, Robert Bailey, party of the second part, both of said county and State.

" 'Witnesseth: Whereas, that prior to this date parties of the first part and the second part hereto have been the owners for a number of years of two certain tracts or parcels of land conveyed to them as man and wife by two certain deeds, one made by J. W. Robbins, commissioner, which deed is of record in Book 165, page 443, Wilson County registry, dated 11 February, 1927; and the other made by David Bailey to the said parties of the first and second part hereto, and which deed is registered in Book 113, page 469, Wilson County registry, and dated 26 January, 1922, said two tracts of land being hereinafter fully described have been held and owned by the said Robert Bailey and wife, Bettie Bailey, under the terms and the estates as conveyed to them by the said two deeds above referred to.

" 'And whereas, the said parties of this deed have for a number of years likewise owned and occupied a tract of land in Rocky Mount Township, Nash County, North Carolina, upon which they now reside and have resided for a number of years, which tract is described in a deed from T. W. Williams and wife to the said Robert Bailey and Bettie Bailey by deed registered in Book 200, page 230, Nash County registry, and which has been at all times since held by them under the terms and the estate as conveyed to them under the said deed.

" 'And whereas, the said parties hereto have determined to divide their said lands so that the party of the first part hereto shall hereafter own the Nash County lands above referred to and the said party of the second part shall hereafter own the Wilson County lands above referred to, and the several deeds are at this time executed for the purpose of perfecting and carrying out said agreement.

" 'Now, therefore, in consideration of the premises and for the further consideration of Ten Dollars and other valuable consideration, said party of the first part has and does hereby release, remise and forever quit-

claim and does further hereby convey all her right, title and interest in and to the lands hereinafter described to the said Robert Bailey, husband of the said Bettie Bailey, his heirs and assigns forever, in as full and ample manner as she has a right to do, the following described lots, tracts or parcels of land, to wit:

" 'First Tract: A tract situate in Toisnot Township, Wilson County, North Carolina, and is bounded on the north by the lands of Charlie Lancaster and Wiley Williams; east and south by the lands of Wiley Barkley; west by the lands of Charlie Lancaster and Wiley Williams, it being the same tract of land which was conveyed 25 March, 1903, by John L. Bailey and wife to David Bailey by deed registered in Book 49, page 395, Wilson County registry, and contains 65 acres, more or less, and is also described in a deed registered in Book 113, page 469, Wilson County registry.

" 'Second Tract: A tract situated in Toisnot Township, Wilson County, North Carolina, and known as the Ben Dawes land and adjoins the land of Noah Turner, Wiley Williams and others and contains 46 acres, more or less, and is situated on the east side of Rocky Mount and Wilson road leading by Upper Town Creek Church and situate about three-quarters of a mile north of said Upper Town Creek Church. This is the identical land conveyed to Robert Bailey and wife, Bettie Bailey, by J. W. Robbins, commissioner, on 11 February, 1927, by deed recorded in Book 165, page 443, Wilson County registry.

" 'To have and to hold to him the said Robert Bailey, his heirs and assigns forever.

" 'And the said party of the first part expressly states and covenants that she has done nothing to impair the title to said lands since the same was conveyed to the parties hereto by the deeds above referred to.

" 'In testimony whereof, party of the first part has hereunto set her hand and seal, the day and year first above written.

" 'The said Robert Bailey subscribed his name hereto for the purpose of signifying his written assent to the execution hereof by his wife.

her
BETTIE X BAILEY (Seal)
mark
ROBERT BAILEY (Seal)'

(Acknowledgment and privy examinations duly taken and deed duly recorded.)

"(4) On the same date, 17 July, 1931, Robert Bailey executed a deed to Bettie Bailey purporting to convey all his right, title and interest in the Nash County land to her. This deed recites that it is in pursuance of the desire of the parties to make a division of the Nash and Wilson

County lands. This deed was recorded on 25 July, 1931, in Book 352, page 554, Nash County registry.

"(5) On 18 July, 1931, Robert Bailey, without the joinder of his wife, Bettie Bailey, executed a deed of trust to E. B. High, trustee, covering the Dawes tract, to secure an indebtedness of $365.00. This trust deed contains full covenants of warranty as to title. This instrument was recorded on 13 November, 1931, in Book 201, page 24, Wilson County registry.

"(6) There was default in the payment of the indebtedness secured by the deed of trust referred to, and sale under foreclosure was duly held on 1 February, 1932, when and where T. T. Thorne and J. W. Keel became the last and highest bidders. Accordingly, on 18 February, 1932, the trustee executed a deed to them conveying to them the said Dawes tract. This deed was recorded on 7 June, 1932, in Book 202, page 49, Wilson County registry.

"(7) Bettie Bailey died testate on 14 July, 1935, and Willie Bailey, one of the defendants, was appointed administrator *c. t. a.* of her estate.

"(8) On 23 December, 1935, J. W. Keel and wife, Frances C. Keel, conveyed the said Dawes tract to the plaintiff, Page Clark Keel, subject to the life estate of the grantors.

"(9) On 13 January, 1938, Willie Bailey, in his capacity as administrator *c. t. a.* of the estate of Bettie Bailey, issued execution to Wilson County on the judgment which Robert Bailey confessed in favor of Bettie Bailey with the purpose of having the said Dawes tract sold under execution to satisfy the said judgment. Thereupon the plaintiff instituted this action on 3 March, 1938, to have the judgment declared not a lien on said land, and secured a temporary restraining order enjoining the defendant, Willie Bailey, administrator *c. t. a.*, and the defendant, Sheriff of Wilson County, from proceeding with the execution sale.

"(10) Robert Bailey is still living.

"Upon a consideration of the foregoing facts, the court being of the opinion that the judgment constitutes a legal, valid and subsisting lien upon the lands of the plaintiff hereinbefore referred to, and that the defendant, Willie Bailey, administrator *c. t. a.*, is entitled to have said lands sold under execution to satisfy the lien of said judgment for the benefit of the estate of Bettie Bailey;

"It is now, therefore, considered, ordered and adjudged:

"(1) That the judgment confessed by Robert Bailey in favor of Bettie Bailey on 29 September, 1930, in the sum of $6,900 and costs, and docketed on 1 October, 1930, in Book 11, page 143, in the office of the clerk of the Superior Court of Wilson County, be and it hereby is declared a legal, valid and subsisting lien upon the land situate in Wilson County known as the Ben Dawes tract, containing 46 acres, more or less,

and more particularly described in the deed from J. W. Robbins, commissioner, to Robert Bailey and wife, Bettie Bailey, recorded in Book 165, page 443, Wilson County registry.

"(2) That therefore the said restraining order entered herein enjoining the defendants from proceeding to sell the said Dawes tract under execution issued on said judgment be and it hereby is dissolved and vacated and defendants are declared to be entitled to proceed with said execution sale.

"(3) However, that if the plaintiff files with the court the bond provided for by law in such cases, the amount of which is fixed in the appeal entries, the said restraining order shall continue in effect until a determination of the appeal from this judgment.

"(4) That the costs in this matter be taxed against the plaintiff.

"This 13 June, 1938. LUTHER HAMILTON,
Judge Presiding."

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

Keel & Keel and David W. Isear for plaintiff.
Harold D. Cooley, Dan S. Bryan, and Adams & Spruill for defendants.

CLARKSON, J. Does the judgment by confession in favor of Bettie Bailey and against Robert Bailey constitute a legal, valid and enforceable lien upon the Dawes tract? We think so.

In the judgment of the court below is the following: "That the judgment confessed by Robert Bailey in favor of Bettie Bailey on 29 September, 1930, in the sum of $6,900 and costs, and docketed on 1 October, 1930, in Book 11, page 143, in the office of the clerk of the Superior Court of Wilson County, be and it hereby is declared a legal, valid and subsisting lien upon the land situate in Wilson County known as the Ben Dawes tract, containing 46 acres, more or less."

N. C. Code of 1935 (Michie), sec. 614, is, in part, as follows—speaking of judgments: ". . . 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 . . ."

A judgment by confession, like any other judgment, becomes a lien on the debtor's real estate when docketed. C. S., 623-625; *Bank v. McCullers,* 201 N. C., 440 (444).

We have here a valid judgment by confession, duly docketed, in favor of Bettie Bailey against Robert Bailey. The land in controversy, the Ben Dawes tract, containing 46 acres more or less, was conveyed to Robert Bailey and wife, Bettie Bailey, as an estate by entireties on 11 February, 1927, by J. W. Robbins, commissioner. On 17 July, 1931, Robert Bailey and wife, Bettie Bailey, executed deeds (1) Bettie Bailey to Robert Bailey, the Ben Dawes tract held by entireties; (2) Robert Bailey to Bettie Bailey, all his right, title and interest in the Nash County land. The purpose of the parties was to make a division of the Nash and Wilson County lands. On 18 July, 1931, Robert Bailey (without joinder of his wife, Bettie Bailey) executed a deed of trust to E. B. High, trustee, covering the Dawes tract, to secure an indebtedness of $365.00. This trust deed contains full covenants of warranty as to title. The deed of trust was foreclosed and J. W. Keel *et al.*, became the purchasers.

Robert Bailey is still living. Bettie Bailey died testate on 14 July, 1935, and Willie Bailey, one of the defendants, was appointed administrator *c. t. a.* of her estate.

On 23 December, 1935, J. W. Keel and wife, Frances C. Keel, conveyed the said Dawes tract to the plaintiff, Page Clark Keel, subject to the life estate of the grantors.

On 13 January, 1938, Willie Bailey, in his capacity of administrator *c. t. a.* of the estate of Bettie Bailey, issued execution to Wilson County on the judgment which Robert Bailey confessed in favor of Bettie Bailey with the purpose of having the said Dawes tract sold under execution to satisfy the said judgment. Thereupon the plaintiff instituted this action on 3 March, 1938, to have the judgment declared not a lien on said land, and secured a temporary restraining order enjoining the defendant Willie Bailey, administrator *c. t. a.*, and the defendant Sheriff of Wilson County, from proceeding with the execution sale. The temporary restraining order was dissolved and vacated by the court below. In this we see no error.

It is well established in this jurisdiction that a judgment obtained by a third party against either spouse is not a lien on land held by them by the entireties. *Hood v. Mercer,* 150 N. C., 699; *Johnson v. Leavitt,* 188 N. C., 682. A judgment obtained by one spouse against the other is not a lien on property held by them by the entireties. *Mahen v. Ruhr,* 293 Mo., 500, 240 S. W., 164, briefed in 35 A. L. R., at 152 (1922); *Shinn v. Shinn,* 4 L. R. A., 224 (Kan., 1889).

The learned discussion of the able attorneys in their arguments and briefs as to whether one spouse can convey directly to the other in extinguishment of an estate by the entireties, is not necessary to be decided on this record.

(1) The judgment by confession made by Robert Bailey to Bettie Bailey for $6,900, duly docketed on 1 October, 1930, is not disputed.

(2) Thereafter, on 18 July, 1931, the deed of trust was executed by Robert Bailey to E. H. High, trustee, for the Dawes tract, without joinder of his wife. Plaintiff claims through this conveyance.

(3) Bettie Bailey died on 14 July, 1935, and left surviving her husband, Robert Bailey. On her death the estate by entireties ceased and the Dawes tract held by the entireties vested in Robert Bailey, and the lien of the judgment immediately attached and had precedence over the deed of trust made subsequently by Robert Bailey to E. H. High, trustee, through whom plaintiff claims.

In *Linker v. Linker,* 213 N. C., 351 (354-5), we find: "As to priority 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."

Recorded prior in point of time, we think the judgment lien will prevail over the attempted lien created by the deed of trust. See *Bliss v. Brown,* 78 Kan., 467, 96 Pac., 945 (1908); *Leslie v. Harrison Nat. Bank,* 97 Kan., 72, 154 Pac., 209 (1916); 15 R. C. L., sec. 284; *Weil Bros. v. Casey,* 125 N. C., 356; *Trust Co. v. Sterchie,* 169 N. C., 21.

If valid, in construing the deeds we think the language only applies to the division of the real estate and had no effect on the judgment. If the judgment was to be canceled, the deeds should have said so.

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

Affirmed.

BEMIS HARDWOOD LUMBER COMPANY, PLAINTIFF, v. GRAHAM COUNTY AND A. F. GHORMLEY, COUNTY ACCOUNTANT FOR GRAHAM COUNTY, DEFENDANTS.

(Filed 28 September, 1938.)

1. Taxation § 13—

Tax on property is a visitational tax and not an excise tax for the privilege of owning property.

2. Taxation § 32a—

The lien for taxes attaches to realty on the first day of April of each year, the date on which land is required to be listed in the name of the owner. Ch. 291, Public Laws of 1937, secs. 701, 1401, 302.

3. Taxation § 32c: Vendor and Purchaser § 6—Giving of option with right of entry in purchaser for certain purposes does not pass title.

Plaintiff executed to the United States Government an option on the lands in question which gave the Government certain privileges, including the right to enter upon the lands for examination of minerals, timber and other resources, pending the acceptance of the option, and which further provided that upon acceptance of the option and pending the vesting of title, *the Government might use the lands for the purpose of national* forests with certain limitations and restrictions. The Government accepted the option and exercised the privileges therein provided, and in February, 1937, the second year after its acceptance of the option, took steps for the transfer of the title by institution of condemnation proceedings as contemplated by the option. *Held:* Neither the option with the exercise of the privileges therein provided before acceptance, nor the surrender of the land to the Government under the stipulated restrictions for national forests purposes upon its acceptance of the option, had the effect of transferring ownership to the Government, and actual title not having passed until after 1 April, 1937, plaintiff, as owner, is liable for all taxes assessed for that year and the year prior thereto.

4. Eminent Domain § 25—Title passes in condemnation proceedings when award is paid into court after confirmation of commissioners' report.

While the value of lands taken in condemnation proceedings is fixed as of the date the petition is filed, title to the land does not pass until the award, as assessed by the commissioners, is paid into court after confirmation of the commissioners' report, since the statute, C. S., 1723, provides that title shall pass at that time, and since petitioner may withdraw at any time prior thereto, and in proceedings instituted by the United States, the Federal practice requires that the proceedings shall conform, as nearly as may be, to the law of the State in which they are brought.

5. Taxation § 32c—Title in condemnation proceedings held not to have passed prior to 1 April, and land was not relieved of taxation.

Condemnation proceedings were instituted by the Federal Government in February, 1937. The commissioners' report was confirmed on 25 June, 1937, and final decree of the court adjudging title to be divested from respondent and vested in the Federal Government was entered on 25

August, 1937. *Held:* Title was not divested from *respondent* until the date of the final judgment, and *respondent* being the owner of the land on 1 April, 1937, is liable for the taxes assessed against the property for that year.

APPEAL by defendants from *Clement, J.*, at March Term, 1938, of GRAHAM. Reversed.

This was an action brought by the plaintiff to recover of the defendants certain taxes paid under protest, and resulted in a recovery by the plaintiff in the amount of $209.15, taxes paid for the year 1937, with interest and costs.

Pertinent facts are as follows:

The plaintiff was the owner of certain lands in Graham County upon which the taxes were levied. On 15 May, 1935, plaintiff executed to the United States of America an option for the purchase of these lands, the said purchase depending upon the approval of the Attorney General of the United States as to the title. It was provided in the option that if the vendors were unable to show an established title, to the satisfaction of the Attorney General, the United States would, if it deemed advisable, institute proceedings for the condemnation of the lands.

The option permitted certain privileges to be exercised upon the lands by the United States pending the exercise of the privilege of purchase, among them that the optionee might enter the lands "for all proper and lawful purposes, including examination of lands, minerals, timber, and other resources," and that, pending the vesting of title of the lands in the United States, the latter, if it elected to do so, might, upon the acceptance of the option, use, occupy, and administer the lands for the purpose of national forests, or the establishment thereof, subject to the limitations and restrictions provided in the option.

On 30 July, 1935, the plaintiff, or its predecessor in title, had notice from the Department of Agriculture of the election to purchase the land under the provisions of the option. After this notification the Lumber Company surrendered the property to the United States of America and exercised no rights thereover except such as were reserved in the option.

On 10 February, 1937, the United States of America began proceedings for the condemnation of the land by filing a petition in the United States District Court for the Western District of North Carolina, at Asheville, and the condemnation proceeded in due form down to the confirmation of the report of the commissioners on 25 June, 1937, and the final decree of the court adjudging the title to be divested from this plaintiff (respondent in the condemnation proceedings), and vested in the United States of America, on 25 August, 1937.

Under the assumption that the lands in question were not subject to the county tax as property of the plaintiff, because of the option and the

pendency of the condemnation proceedings referred to, the plaintiff refused to list the lands for taxation during the year 1937; and, upon such failure, the lands were listed by the county authorities, as provided in the Machinery Act, and the taxes assessed. The plaintiff paid the taxes under protest, demanded the return thereof in apt time, and, upon failure of the defendants to make refund within the ninety days provided by the statute, brought this suit for their recovery.

R. L. Phillips for plaintiff, appellee.
Morphew & Morphew for defendants, appellants.

SEAWELL, J. The Machinery Act, chapter 291, Public Laws of 1937, governing the listing and appraisal of property and the levy and collection of taxes, contains the following provisions:

"Section 701. Except as hereinafter specified, real property shall be listed in the name of the owner; and it shall be the duty of the owner to list the same." (The situation with which we are dealing does not come within the exception.)

"Section 1401. Date as of Which Lien Attaches. The lien of taxes levied on property and polls listed pursuant to this act shall attach to real estate as of the day as of which property is listed, regardless of the time at which liability for the tax may arise or the exact amount thereof be determined."

"Section 302. Date as of Which Assessment Is to Be Made. All property, real and personal, shall be listed, or listed and assessed, as the case may be, in accordance with ownership and value as of the first day of April, one thousand nine hundred and thirty-seven, and thereafter all property shall be listed or listed and assessed in accordance with ownership and value as of the first day of April of each year."

Obviously section 1401, fixing the attachment of the lien as of April first, has reference to *S. v. Fibre Co.*, 204 N. C., 295, 168 S. E., 207, cited in defendants' brief, in which it was held that the date on which the lien attached was "when the taxes become due," that is, the first Monday in October of the year in which they are levied, while liability for the tax was held to arise on the first day of the fiscal year—1 July. Therefore, a brief reference to *S. v. Fibre Co., supra,* becomes pertinent.

In fixing the date of the attachment of the lien, the opinion in that case was not advertent to the fact that the statute itself, C. S., 7987 (see Michie's Code, same section), fixed the time at which the lien attached as the first day of June. This is recognized and approved by the Court in *Bryan v. Craven County,* 204 N. C., 729, 733, 169 S. E., 625, filed a little later and printed in the same volume. Apparently both the date for the attachment of the lien and that of the liability for the tax stated

in *S. v. Fibre Co., supra,* came about through an inadvertent blending of the Machinery Act, which pertains to property taxes exclusively, with the current Revenue Act, which provides principally for the taxation of privileges, and fixes the period during which they may be exercised under the license granted. The provisions of the latter act were thus incorporated into the former, although the two acts are separate and distinct, and relate to different subjects.

The tax on property is a visitational tax, and is the taking of a part of the taxpayer's wealth, represented by the property he owns, for the needs of Government. Under our present statute it is taken as a percentage of the ascertained value "according to ownership," as of the day of the visitation—1 April. It is not an excise tax for the privilege of owning property for the period of the fiscal year, or any other period.

Logically, therefore, the liability for the tax arises on the day the lien attaches to the property, and on the day the taxpayer is found to be in ownership thereof—1 April—and we so hold. The purpose and effect of the statute above quoted was to reinstate the law in this respect as it existed prior to *S. v. Fibre Co., supra,* here considered.

Since none of the steps taken by the United States Government with respect to the property antedated 1 April (the date we consider the property became subject to the tax, if it did at all), except the taking of the option and the commencement of the condemnation proceeding, the controversy is narrowed down to the question of whether this plaintiff was the owner of the lands upon the first day of April, 1937, within the meaning of the pertinent provisions of the Machinery Act. The plaintiff was such owner unless (1) the giving and acceptance of the option, and the acts of the optionee upon plaintiff's lands, or (2) the commencement of the condemnation proceedings, had divested him of such ownership and vested it in the United States of America. We are of the opinion that neither of these occurrences had that effect.

(1) Neither the option, whether standing alone or fortified by the acts done upon the lands, as set out in the findings of fact, nor the surrender of the lands to the United States Government for the uses to which they were put, in our opinion, had the effect of transferring the ownership to the United States. At all times, in so far as the option is concerned, until actual title to the land was acquired, the United States had the right to withdraw from the situation and leave the lands in the hands of this plaintiff.

(2) Condemnation proceedings in this case were instituted by the United States of America in accordance with the Federal practice which requires that such proceedings shall conform, as nearly as may be, to the procedure provided by law in the State in which they are brought. But at any time between the date of filing the petition on 10 February

and the signing of the final judgment on 25 August, 1937, the petitioner in this case had the power to withdraw from the situation at will, and to decline to take the property. If, then, the ownership of this property was vested in the United States on the first day of April, it must have been constructively so, by operation of some principle or policy of law of such superior dignity as to require recognition in spite of the actual facts and contrary to the implications of the statute—C. S., 1723. The plaintiff contends there is such a principle under the laws of this State, and cites as controlling authority *S. v. Floyd* and *S. v. Queen,* 204 N. C., 293, quoting from this opinion the following:

"For compensation purposes the commencement of the proceeding marks the time of the taking. Consequently, the owner of the land cannot recover for any improvement placed thereon or for enhancement thereof due to other causes. The obvious reason for such conclusion is that the first judicial act in the condemnation process is in contemplation of law a setting apart of the property for public use. Therefore, *if the proceeding is prosecuted to final conclusion* the sovereign is deemed to be the owner from the commencement of the proceeding." (Italics are ours.)

The statute cited provides that the title passes upon the confirmation of the report of the commissioners appointed to appraise the property and assess the damages, and when the award so assessed has been paid into court. Relating to this matter the opinion continues, somewhat inconsistently, we think:

"While the State does not get a fee simple title until the payment of the award, notwithstanding, the status of the landowner and of the property is established when the clerk of the Superior Court, upon exceptions filed, confirmed the report of the commissioner of appraisals."

And again:

"Nor is the fact that the Park Commission, even after final judgment, had the power to decline to take the land, entitled to prevailing significance. *Although clothed with such right, the commission did not exercise it, but pursued the proceeding to final conclusion.*" (Italics are ours.)

The plaintiff relies strongly upon this case to support its present contention that it was not the owner of the lands on the first day of April and is not liable for the tax.

It may be conceded that the condemnation proceeding under consideration by the Court in that case (chapter 48, Public Laws of 1927, and acts amendatory thereof), is sufficiently similar to that here considered to justify the application of *S. v. Floyd, supra,* if the Court were inclined to follow it. We think that without disturbing the result reached in that case, the principle upon which it was predicated should be re-

considered. However convenient it may be in other relations to refer a change in ownership to the filing of the petition as the date of the taking, such an interpretation not only contravenes the express terms of the statute under consideration, but it has no regard to the exigencies of the laws pertaining to taxation, or to the definition of ownership, in relation to tax liability, to which we feel compelled to adhere.

In *Land Co. v. Commissioners,* 174 N. C., 634, 94 S. E., 406, the Court gave the following definition of "owner" as within the meaning of a similar provision of the Machinery Act:

"By the owner is meant the person who has the legal right or estate to or in the land and not the one who by contract or otherwise has a mere equity thereon or a right to compel a conveyance of such legal title or estate to himself."

Since, under chapter 221, Public Laws of 1927, and amendments thereto (Michie's 1935 Code, section 8037, *et seq.*), the State, or county, as the case may be, must finally depend for the collection of its taxes upon a foreclosure suit operating upon the title to the property, there is a fundamental reason for maintaining the integrity of this definition.

Where the statute itself is silent on the point, the theory that the "taking" of the land in a condemnation proceeding occurs the day the petition is filed may be regarded as a fiction of law commonly employed to fix the date as of which the value shall be ascertained for purposes of compensation. The opinions cited in the *Floyd case, supra,* as supporting are all addressed to that feature of condemnation. The further application of the principle as fixing the ownership of the property for purposes of taxation is unnecessary and impracticable. Under it, ownership must be determined on the principle of "relating back" in case title is finally taken—a matter easily determined after the event, but unpredictable on the first day of April, when the property must be listed "according to ownership." No provision is made in the statute for postponement of the mandatory duties of officers and boards, nor does it make any provision for readjustment in case a wrong guess is made about the ownership.

There are, as we have before suggested, many statutes in the several states, and also in this State, under which the right of eminent domain may be exercised. In some of these, immediate appropriation and entry may be had by the petitioner. Such provisions are sometimes found in the charters of municipalities and public utilities and in statutes relating to the acquisition of easements for highways and streets. But under the statute relied on in this proceeding, not only is the entry of petitioner into the lands for purposes other than that specifically granted by the statute not contemplated, but it is contrary to law. *S. v. Wells,* 142 N. C., 590, 55 S. E., 210. Where the right of entry before confirmation

of the report of the commissioners and payment of award exists, it must be expressly conferred by the statute. *S. v. Jones,* 139 N. C., 613, 631, 52 S. E., 240; *S. v. Jones,* 170 N. C., 753, 87 S. E., 235; *R. R. v. Ferguson,* 169 N. C., 70, 85 S. E., 156; *S. v. Lyle,* 100 N. C., 497, 6 S. E., 379. The fact that under this law the supposed owner could not exercise any of the rights of ownership at the critical date is sufficient, we think, to demonstrate the unreality of such ownership.

On examination of *S. v. Floyd, supra,* it will be found that it was unnecessary to a decision of the case to hold that the petitioner was the owner of the lands at the time of filing the petition, since the report of the commissioners had been confirmed and the award had been paid into court before the lands became chargeable with the tax. Without questioning the propriety of the result, *S. v. Floyd, supra,* is disapproved in so far as it expresses a view contrary to the conclusion we have reached in the case at bar.

The lands described were properly listed to the plaintiff as owner on the first day of April, 1937, and became chargeable with the tax in its hands, and plaintiff had no right to recover the tax paid by it under protest.

In some respects the record in this case presents anomalies. The plaintiff complains only for a return of the 1937 taxes paid under protest, and the answer is addressed to such claim; but the thirteenth finding of fact, made upon what evidence we are unable to say, is as follows:

"That for the year 1936 the defendant, Graham County, listed the said lands against the plaintiff, Bemis Hardwood Lumber Company, and assessed taxes thereon at a valuation of $..... and levied a rate of $..... per hundred, amounting to $300.15."

The following paragraphs of the findings obviously relate to the taxes of 1937, alleged to have been paid under protest. It was the evident intention of the court to deduct $10.00 from the total levied taxes of $300.15, because of the taxability of certain rights reserved by the plaintiff, and again we cannot allocate this finding to any evidence in the cause as fixing a liability for $10.00 tax. Instead, however, of deducting $10.00, which would leave $290.15, the recovery was for $209.15.

The judgment itself makes no reference to the taxes of 1936. The plaintiff excepted to the judgment and gave notice of appeal, but made no assignments of error and no reference to the appeal in its brief.

In order that there may be no misunderstanding of the matter, however, we hold that on the foregoing reasoning and authority the lands in question were chargeable with the 1936 taxes, and the plaintiff is entitled to no relief in that respect.

The judgment is

Reversed.

CURLEY BRYANT v. JOHN CARRIER AND J. HARVEY CARPENTER, GUARDIAN OF JOHN CARRIER.

(Filed 28 September, 1938.)

1. Army and Navy § 4—Congress may exempt benefit payments to World War veterans from taxation and execution.

Congress has the unquestioned power to allow pensions and disability benefits to World War veterans, and to exempt such benefit payments from taxation and execution, but under the Federal Act of 1935, sec. 454-a, Title 38, U. S. C. A., such exemptions do not apply to *bona fide* investments made with the proceeds of such benefit payments.

2. Execution § 3a—Investments made with proceeds of War Risk Insurance are not exempt from execution.

The guardian of a World War veteran received the proceeds of payments made by the United States Government under War Risk Insurance on account of disability incurred by the veteran in the World War, and invested same in Government bonds and promissory notes. Judgment in a civil action was obtained against the veteran, and this action was instituted to enjoin execution under the judgment on the investments made by the guardian. *Held:* Under the provisions of the Federal Act of 1935, sec. 454-a, Title 38, U. S. C. A., the *bona fide* investments made with the proceeds of the War Risk Insurance are not exempt from execution by a creditor, and the temporary restraining order was properly dissolved.

APPEAL by defendants from *Pless, Jr., J.,* at Chambers, 24 August, 1938. From RUTHERFORD. Affirmed.

The order of Pless, Jr., J., indicates the controversy, and is as follows:

"This cause coming on to be heard before J. Will Pless, Jr., Resident Judge of the 18th Judicial District, on the return date, and being heard upon the application of J. Harvey Carpenter, guardian of John Carrier, for the continuance of the restraining order heretofore issued, and being heard, and it appearing to the court, and the court finding as a fact that the plaintiff, Curley Bryant, has obtained judgment in the Superior Court of Rutherford County against the defendant John Carrier in the sum of $1,500 (this judgment has been affirmed—see opinion at this term), on account of the alleged alienations of the affections and criminal conversation with the wife of said Bryant, and said cause is now pending on appeal to the Supreme Court of North Carolina; the defendant having filed no *supersedeas* bond to stay execution thereon, that the plaintiff has caused execution to issue; and

"It further appearing to the court, and the court finding as a fact, that the defendant, John Carrier, is a World War veteran and that he is the owner of United States bonds of the principal value of $8,397 and of promissory notes of the face value of $3,997, which are investments

made for him by his guardian from the proceeds of moneys paid to him by the United States Government on account of his disability incurred and insurance in the World War.

"The defendant invokes section 454 and section 454-a, Title 38, U. S. C. A., and contends that under the terms thereof, the property above referred to is exempt from execution, which contention is denied by the plaintiff.

"The court is of the opinion and so holds that the property above referred to now constitutes an investment and has lost its character as 'payment of benefit,' and is, therefore, subject to execution upon the facts herein presented and found.

"Upon said holdings, the court dissolves the injunction, having first required that the plaintiff give a justified bond in the sum of $2,000, to be approved by the clerk of the Superior Court of Rutherford County, to indemnify the defendant for any loss he may sustain upon the execution sought, in the event it shall be hereafter determined that said property is exempt from execution.

"It is now, therefore, ordered, adjudged and decreed that the restraining order heretofore issued be, and the same is hereby dissolved, and the plaintiff is authorized to proceed with execution as he may be advised.

"This order, however, is subject to the requirement and condition that before said execution shall be levied that the plaintiff shall file with the clerk of the Superior Court of Rutherford County justified bond in the sum of $2,000 to be approved by said clerk, providing that in the event it shall hereafter be determined that the properties sold under execution were exempt therefrom, that the plaintiff will reimburse immediately the defendant for all moneys received by virtue of said execution, together with interest thereon and costs. This 24 August, 1938.

J. WILL PLESS, JR.,
Resident Judge of the 18th Judicial District."

The defendants excepted and assigned error as follows: "(1) The court committed error in holding that the Government bonds and notes set forth in the inventory filed by J. Harvey Carpenter, which is shown and referred to as Investments, are subject to execution. (2) That the court committed error in dissolving the injunction theretofore issued for the reason that said assets and property of the defendant, John Carrier, appellant, is not subject to execution under and by virtue of sections 454 and 454-a of Title 38, U. S. C. A., said statute exempting said assets from sale under execution. (3) That the court erred in denying the appellants' motion to continue the restraining order in said cause and in dissolving the same."

Defendants appealed to the Supreme Court.

Hamrick & Hamrick for plaintiff.
Edwards & Edwards for defendants.

CLARKSON, J. The question involved: Are investments in negotiable notes and in United States bonds purchased with "payments of benefits" under the laws relating to World War veterans, exempt from execution on a judgment against the veteran? We think not.

The defendant John Carrier is a World War veteran, and owns United States bonds in the principal amount of $8,350, and promissory notes of the face value of $3,997. These are investments made for the defendant by his guardian from the proceeds of money paid to him by the United States Government on account of his disability incurred and insurance in the World War. These bonds and notes are shown as investments in the report of the guardian of the defendant, filed with the clerk of the Superior Court of Rutherford County on 15 February, 1938. The investments are set forth in the pleadings.

What is said in *United States v. Hall,* 98 U. S., at p. 343, is well worth repeating: "Power to grant pensions is not controverted, nor can it well be, as it was exercised by the states and by the Continental Congress during the War of the Revolution; and the exercise of the power is coeval with the organization of the government under the present Constitution, and has been continued without interruption or question to the present time. . . . (p. 350). Such laws had their origin in the patriotic service, great hardship, severe suffering, and physical disabilities contracted while in the public service by the officers, soldiers, and seamen who spent their property, lost their health, and gave their time for their country in the great struggle for liberty and independence, without adequate or substantial compensation . . . (p. 351). Bounties may be offered to promote enlistments, and pensions to the wounded and disabled may be promised as like inducements. Past services may also be compensated, and pensions may also be granted to those who were wounded, disabled, or otherwise rendered invalids while in the public service, even in cases where no prior promise was made or antecedent inducement held out." *Hinton v. State Treasurer,* 193 N. C., 496 (508).

The power of Congress to exempt from taxation and creditors is not questioned. The court below held that "the property above referred to now constitutes an investment and has lost its character as 'payment of benefit,' and is, therefore, subject to execution upon the facts herein presented and found."

What is the Federal law on the subject? The former act of 1924, Federal Statute 38, U. S. C. A., sec. 454, reads as follows: "Assignability and exempt status of compensation, insurance, and maintenance and support allowances. 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 claim of creditors of any person to whom an award is made under Parts II, III or IV; and shall be exempt from all taxation. Such compensation, insurance, and maintenance and support allowance shall be subject to any claims which the United States may have, under Parts II, III, IV, and V, against the person on whose account the compensation, insurance, or maintenance and support allowance is payable."

The 1935 Act, sec. 454-a, Title 38, U. S. C. A., has the following language: "Assignability and exempt status of payments of benefits. Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provisions shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payments."

In the case of *Trotter v. Tennessee,* 290 U. S., 354, 78 L. Ed., 358 (1933), the facts were: A veteran in Tennessee purchased land with money received from the United States Government as compensation for his services in the World War. The State of Tennessee sought to tax this property. The Supreme Court of the United States held that when the veteran invested his money in land, the money lost its identity as money, and lost its immunity under the statute. At page 360, L. Ed., *Mr. Justice Cordoza,* writing for the Court, says: "The moneys payable to this soldier were unquestionably exempt till they came into his hands or the hands of his guardian. *McIntosh v. Aubrey,* 185 U. S., 122, 46 L. Ed., 834, 22 S. Ct., 561. We leave the question open whether the exemption remained in force while they continued in those hands or on deposit in a bank. CF. *McIntosh v. Aubrey, supra; State ex rel. Smith v. Shawnee County,* 132 Kan., 233, 294 Pac., 915; *Wulson v. Sawyer,* 177 Ark., 492, 6 S. W. (2d), 825, and *Surace v. Danna,* 248 N. Y., 18, 24, 25, 161 N. E., 315. Be that as it may, we think it very clear that there was an end to the exemption when they lost the quality of moneys and were converted into land and buildings. The statute speaks of 'compensation, insurance, and maintenance and support allowance payable' to the veteran, and declares that these shall be exempt. We see no token of a purpose to extend a like immunity to permanent investments or the fruits or 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. The judgment of the Supreme Court of Tennessee disallowing the exemption has support in other courts. *State v. Wright,* 224 Ala., 357, 140 So., 584; *Martin v. Guilford County,* 201 N. C., 63, 158 S. E., 847, 76 A. L. R., 978. There are decisions to the contrary, but we are unable to approve them. *Rucker v. Merck,* 172 Ga., 793, 159 S. E., 501; *Atlanta v. Stokes,* 175 Ga., 201, 165 S. E., 270; *Payne v. Jordan,* 36 Ga. App., 787, 138 S. E., 262. Our ruling in *Spicer v. Smith,* 288 U. S., 430, 77 L. Ed., 875, 53 S. Ct., 415, 84 A. L. R., 1525, leaves no room for the contention that the exemption is enlarged by reason of payment to the guardian instead of payment to the ward. The judgment is affirmed."

It will be noted in the *Trotter case, supra,* a similar decision of this Court was upheld. *Martin v. Guilford County,* 201 N. C., 63, 76 A. L. R., 978.

In *State Hospital v. Bank,* 207 N. C., 697 (708), it was held: "Under the statute as construed by the Supreme Court of the United States and by this Court, the contention of the defendant cannot be sustained. The estate of Earl N. Betts, consisting of securities now held by his guardian, is subject to the claim of the plaintiff in this action, notwithstanding the fact that such securities were purchased by his guardian with moneys paid to them by the United States Government as compensation awarded under the Act of Congress to the said Earl N. Betts as a veteran of the Army of the United States." The *Trotter, Martin, and Hospital cases, supra,* undoubtedly sustain the liability of the veteran.

In *Lawrence v. Shaw,* 300 U. S., 245, 81 L. Ed., 623 (1936), decided under the 1935 Act, upon an appeal from the Supreme Court of North Carolina, *Mr. Chief Justice Hughes,* writing for the Court, says, at page 626, L. Ed.: "The World War Veterans' Act, 1924, provided that the compensation and insurance allowances should be 'exempt from all taxation.' The Act of 1935 is more specific, providing that the payments shall be exempt from taxation and shall not be liable to process 'either before or after receipt by the beneficiary.' There was added the qualification that the exemption should not extend 'to any property purchased in part or wholly out of such payments.' This more detailed provision was substituted for that of the earlier act and was expressly made applicable to payments theretofore made. We think it clear that the provision of the later act was intended to clarify the former rather than to change its import and it was with that purpose that it was made retroactive."

In the *Lawrence case, supra,* the Court says, at page 626, L. Ed. (Vol. 81): "In *Trotter v. Tennessee,* 290 U. S., 354, 78 L. Ed., 358, 54 Supreme Court, 138, *supra,* we considered the provisions of paragraph

22 of the World War Veterans' Act, 1924, in relation to investments by the guardian of an incompetent veteran of the moneys received from the Government for compensation and insurance. We held that land purchased by the guardian with such moneys was not exempt. We said: '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 of the fruits of business enterprises. Veterans who choose to trade in land or in merchandise, in bonds or in shares of stock, must pay their tribute to the State.'" The Court continues, on page 627, L. Ed.: "The provision of the Act of 1935 that the exemption should not apply to property purchased out of moneys received from the Government shows the intent to deny exemption to investments, as was ruled in the *Trotter case.* It is of course true that deposits in bank may be made under special agreement by which the deposits assume the character of investments and would lose immunity accordingly. No such agreement is shown here. Nor are the bank balances shown to be the proceeds of investments. They are stipulated to be 'uninvested balances' of the Government payments. . . . We hold that the immunity from taxation does attach to bank credits of the veteran or his guardian which do not represent or flow from his investments but result from the deposit of the warrants or checks received from the Government when such deposits are made in the ordinary manner so that the proceeds of the collection are subject to draft upon demand for the veteran's use. In order to carry out the intent of the statute, the avails of the Government warrants or checks must be deemed exempt until they are expended or invested. The answer by the state court is broad enough to cover bank deposits of that sort and we consider the ruling in that application to be contrary to the Federal statute."

We think that it is clear from the holding of the Supreme Court of the United States, in *Lawrence v. Shaw, supra,* that the Court intends to lay down the rule that investments of a World War veteran are subject to taxation, and to the claims of the veteran's creditors. This being so, the investments of the defendant in this case are clearly subject to the execution issued upon plaintiff's judgment. A case directly in point is *McCurry v. Peek,* 54 Ga. App., 341, 187 S. E., 854 (1936).

To stretch the United States statute of 1935 to cover the facts in this case, as found by the court below, would lead us into chaos. When the investments are *bona fide* made and a novation takes place, taxes attach and creditors have a right to collect their just debts. We hardly think that the noble, heroic veterans would have it otherwise.

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

Affirmed.

BERNICE LORENE ROBINSON, BY HER NEXT FRIEND, MRS. IRENE ROBINSON, v. L. F. McALHANEY AND JACK HEWITT.

(Filed 28 September, 1938.)

1. Master and Servant § 21b—In absence of ratification, master may be held liable for servant's tort only if committed in course of employment.

In order to hold the master liable for the negligent or malicious tort of his servant, the injured third party must show that the act done by the servant was in the scope of his employment and in furtherance of the work which the servant was employed to do, or that the master ratified the wrong, and in the absence of ratification the master may not be held liable for a tort committed by the servant in a spirit of vindictiveness or to gratify his personal animosity, or to carry out an independent purpose of his own outside the scope of his employment.

2. Same—Under the evidence, whether employee was engaged in employment at the time and committed the tort in furtherance thereof, held for jury.

The evidence tended to show that defendant employer was having furniture moved out of the cabin occupied by plaintiff and her sister and mother, that his employee was helping truckmen remove the furniture, and as a result of an altercation with plaintiff, struck her. The evidence was conflicting as to whether defendant employer instructed his employee to help remove the furniture or that defendant employer knew that he was in fact helping the truckmen remove same. *Held:* Under the evidence, it was for the jury to determine whether the employee was about the employer's business at the time, and if so, whether he was acting in the scope of his employment in assaulting plaintiff, and on appeal from the county court, the Superior Court properly sustained defendant employer's exceptions to the charge of the trial court in instructing the jury in effect that if the employer saw his employee about to commit the assault and did not stop him it would establish as a matter of law the employer's liability therefor, and in failing to give instructions requested that if the employee stepped aside from his employment and committed the tort in a spirit of personal vindictiveness, the employer would not be liable.

3. Damages § 8—Awarding of punitive damages is in the discretion of the jury.

The awarding of punitive damages is in the discretion of the jury even though the evidence is sufficient to support an award, and an instruction that if the jury found that the assault complained of was committed under circumstances of oppression or rudeness, it would be the duty of the jury to award punitive damages, is error.

APPEAL by plaintiff from *Alley, J.*, at April Term, 1938, of BUNCOMBE. Affirmed.

This is a civil action instituted in the general county court of Buncombe County to recover damages for the wrongful and malicious assault

upon the plaintiff by the defendant Hewitt; it being alleged that said defendant was at the time acting as the agent and employee of the defendant L. F. McAlhaney.

There was judgment for the plaintiff in the general county court. The defendants, assigning error, appealed to the Superior Court.

The defendant L. F. McAlhaney was in possession of a piece of property known as the Cherokee Tourist Home located on the waters of Oconaluftee River, at the entrance to the Great Smoky Mountains National Park in Swain County. There were a number of cabins on the property, one of which was occupied by the plaintiff and her mother and sister. The defendant McAlhaney operated the Cherokee Tavern, including dining room, a souvenir shop, a filling station and rooms, and in connection therewith employed Jack Hewitt. Plaintiff's mother went to Asheville, leaving furniture and other personal property in the cabin occupied by her. The defendant McAlhaney sent a truck and driver with helpers to move out the personal property left by plaintiff's mother and to place other furniture therein. The plaintiff and her sister objected. Thereupon Mr. Bryson, who was operating the truck, went to find Mr. McAlhaney. As he was away he spoke to Mr. Hewitt, who told him that he would have to wait until Mr. McAlhaney returned. Upon Mr. McAlhaney's return he went to the cabin with Dan Bryson, went in the cabin and began to direct the removal of the furniture. Hewitt followed and began to move the furniture from the porch to the truck. Plaintiff forbade the defendant Hewitt to enter the cabin. In the altercation which followed Hewitt struck the plaintiff.

In the county court issues were submitted to and answered by the jury as follows:

"1. Did the defendant Hewitt assault the plaintiff, as alleged in the complaint? Answer: 'Yes.'

"2. If so, was the defendant Hewitt at the time of the assault, and in making said assault, acting as the duly authorized agent of his co-defendant, L. F. McAlhaney? Answer: 'Yes.'

"3. What amount, if any, is plaintiff entitled to recover as compensatory damage? Answer: '$1,000.00.'

"4. What amount, if any, is plaintiff entitled to recover as punitive damage? Answer: '$100.00.'"

When the cause came on to be heard in the Superior Court, the court below sustained certain exceptive assignments of error made by the defendants and ordered a new trial, except as to the first issue. The plaintiff excepted and appealed.

Weaver & Miller and Irwin Monk for plaintiff, appellant.

Dan K. Moore, Baxter Jones, and Jones, Ward & Jones for defendants, appellees.

BARNHILL, J. This cause came on to be heard in the court below on questions of law raised by the defendants' exceptive assignments of error as provided by the act creating the general county court of Buncombe County. There were 47 assignments of error made by the defendants upon their appeal from the general county court. Of these the court below sustained twenty-five and overruled the others.

In the instant case the court below acted as an intermediate court of appeals and it was necessary for it to rule upon all of defendants' assignments of error. However, it is not necessary for us to discuss all of the questions presented on plaintiff's appeal. Disposition of two of the assignments of error requires the affirmance of the judgment below. The others may not again arise on the retrial of the cause.

The judge of the general county court declined to instruct the jury as requested by the defendants as follows: "The court charges the jury that where the servant steps aside from his master's business for however short a time to commit a wrong not connected with such business the relation of master and servant will be deemed for the time suspended and that the master is not liable therefor." Instead, on this aspect of the case, the court charged the jury: "Now, if you find from the evidence by the greater weight, the burden being on the plaintiff to so satisfy you that at the time the assault was committed the defendant Hewitt, was acting under the direction and authority of the defendant McAlhaney, either express or implied; that is, the circumstances may be such as to warrant an implication that he was acting under his authority if he saw him there working and did not stop him, or if he saw him about to commit the assault and did not interfere and intervene to prevent it the law would imply that the defendant Hewitt was acting for him. Or, if you find from the evidence, and the greater weight of the evidence, that he was expressly instructed, as the plaintiff contends that he was, to help these furniture men move the furniture into the cabin, then he would be acting within the scope of his employment and that would constitute him the agent for the purpose of helping to move the furniture in and would authorize you to answer the issue 'Yes.'"

The master is liable for the negligence and for the malicious torts of his employee whenever such wrongs are committed by the employee in the course of his employment and within its scope. *Ange v. Woodmen,* 173 N. C., 33, 91 S. E., 586; *Jackson v. Telephone Co.,* 139 N. C., 347, 51 S. E., 1015; *Munick v. Durham,* 181 N. C., 188, 106 S. E., 665. The decisive question is: "Was the agent's act in the course of his employment and whilst about the master's business?" No ironclad test can be given, but in all cases the question whether the act was committed by the servant in the service of his employer or for his own purpose is one for the jury in view of all the circumstances. Wood, Master and Servant,

594; *Hussey v. R. R.*, 98 N. C., 34, 3 S. E., 923; *Daniel v. R. R.*, 117 N. C., 592, 23 S. E., 327. The master is not liable for the resulting damage when his servant steps aside from the master's business to commit a wrong not connected with his employment. *Marlowe v. Bland*, 154 N. C., 140, 69 S. E., 752; *Dover v. Mfg. Co.*, 157 N. C., 324, 72 S. E., 1067; *Bucken v. R. R.*, 157 N. C., 443, 73 S. E., 137; *Snow v. DeButts*, 212 N. C., 120; *Linville v. Nissen*, 162 N. C., 95, 77 S. E., 1096; *Roberts v. R. R.*, 143 N. C., 176, 55 S. E., 509. To charge a third party with liability for the wrongs of another it must not only appear that the one who committed the wrong was in fact the agent or employee of the third party, but it must also be shown that at the time the wrong was committed the wrongdoer was about his master's business and acting within the range of his employment, unless his conduct was thereafter ratified by the principal. *Snow v. DeButts, supra*, and cases there cited. The test is: Was it done within the scope of his employment and in the prosecution and furtherance of the business which was given to him to do? If an assault is committed by the servant, not as a means or for the purpose of performing the work he was employed to do, but in a spirit of vindictiveness or to gratify his personal animosity or to carry out an independent purpose of his own, then the master is not liable. 30 C. J., 1307, L. R. A., 1918 F, 534; 10 A. L. R., 1079; *Jackson v. Scheiber*, 209 N. C., 441, 184 S. E., 17; *Snow v. DeButts, supra.*

There was conflicting evidence as to whether Hewitt was an employee of McAlhaney in assisting in the removal of property from the cabin, and as to whether the defendant McAlhaney knew that Hewitt was in fact assisting the truckmen. It was for the jury to determine whether Hewitt at the time was a servant and employee of McAlhaney and was about his master's business. It was likewise a question of fact for the jury as to whether, even though Hewitt was at the time a servant of McAlhaney, he acted within the scope of his authority and was about his master's business in assaulting plaintiff, or stepped aside from his employment to commit a wrong prompted by a spirit of vindictiveness or to gratify his personal animosity or to carry out an independent purpose of his own. Neither the fact that he was there working and McAlhaney did not stop him, nor the fact (if it be such) that McAlhaney saw him about to commit the assault and did not interfere and intervene to prevent it, establishes as a matter of law that Hewitt was acting for McAlhaney in committing the assault as the charge of the court clearly implies. Nor does proof that Hewitt was authorized to assist in the removal of the furniture necessarily require the conclusion that he was about his master's business in committing the assault. This is a question for the jury. It follows that there was error in declining to give the prayer requested by the defendant, as well as in the quoted portion of the charge.

The court likewise charged the jury on the fourth issue: "If you find that the assault was committed under circumstances of oppression or rudeness, then it would be your duty to answer the issue in some amount, whatever you consider, based on all the evidence, would be fair and reasonable under the circumstances, not to be arbitrary, to act only upon the evidence which you have heard."

The court below correctly ruled that this charge constituted prejudicial error.

A jury is never compelled to award punitive damages. If the evidence is such as to support an award of punitive damages it is still discretionary with the jury as to whether such damages will be allowed, subject only to the inherent power of the court to set aside an excessive or disproportionate award. As said in *Hayes v. R. R.,* 141 N. C., 195, 53 S. E., 847: "This Court has said in many cases that punitive damages may be allowed, or not, as the jury sees proper, but they have no right to allow them unless they draw from the evidence the conclusion that the wrongful act was accompanied by fraud, malice, recklessness, oppression, or other willful and wanton aggravation on the part of the defendant. In such cases the matter is within the sound discretion of the jury." *Knowles v. R. R.,* 102 N. C., 59, 9 S. E., 7; *Smith v. Ice Co.,* 159 N. C., 151, 74 S. E., 961; *Motsinger v. Sink,* 168 N. C., 548, 84 S. E., 847; *Huffman v. R. R.,* 163 N. C., 171, 79 S. E., 307; *Cobb v. R. R.,* 175 N. C., 130, 95 S. E., 92; *Ford v. McAnally,* 182 N. C., 419, 109 S. E., 91.

Plaintiff's exceptive assignments of error cannot be sustained. The court below will remand the cause to the general county court of Buncombe County for a new trial upon all the issues except the first.

Affirmed.

STATE v. JOE McGEE.

(Filed 28 September, 1938.)

1. Criminal Law § 43—Ordinarily courts will not inquire into the source of proffered evidence.

Our courts, under the common law rule, are required to determine only the competency of proffered evidence, and will not inquire into the collateral question of whether the evidence was obtained by lawful means unless expressly required to do so by statute, provided the accused is not compelled to do any act which incriminates himself, or a confession or admission is not extorted from him.

2. Same: Intoxicating Liquor § 9b—Ch. 339, sec. 1½, Public Laws of 1937, does not render incompetent evidence obtained by unlawful search without warrant.

Defendant's house was searched by officers without a search warrant, and a quantity of nontax-paid liquor was found on the premises. Defendant contended that the evidence obtained by the unlawful search of his premises was incompetent. *Held:* The provision of sec. 1½, ch. 339, Public Laws of 1937, that no facts discovered by reason of the issuance of an illegal warrant shall be competent, does not apply to evidence obtained by search without a warrant, the language of the statute being insufficient to require this conclusion, and the statute being in derogation of the common law rule.

DEVIN, J., dissenting.

STACY, C. J., concurs in dissent.

APPEAL by defendant from *Sink, J.*, at April Term, 1938, of SURRY. Affirmed.

This is a criminal action in which the defendant was tried under a bill of indictment charging the defendant with the unlawful possession of nontax paid liquor for the purpose of sale. Officers went to the premises of the defendant, took him into custody and searched his dwelling house and outbuildings. They found about twenty gallons of whiskey. There were 19 pint bottles, a 15-gallon keg, two one-gallon kegs and some fruit jars, all containing nontax paid liquor. There was a verdict of guilty. From judgment pronounced thereon defendant appealed.

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

W. M. Allen for defendant, appellant.

BARNHILL, J. The defendant does not contend that the evidence was insufficient to support the verdict. He challenges the competency of the testimony for that it was obtained as a result of an unlawful search and seizure. This presents but one question for determination: Do the provisions of sec. 1½ of ch. 339, Public Laws 1937, apply to a search without warrant and make evidence thus obtained incompetent?

Under the common law, with few exceptions, such as involuntary confessions, evidence otherwise competent is admissible irrespective of the manner in which it was obtained by the witness. The courts look to the competency of the evidence, not to the manner in which it was acquired. This rule has long been followed in the courts of North Carolina. *S. v. Graham,* 74 N. C., 646; *S. v. Mallett,* 125 N. C., 725 (affirmed by the United States Supreme Court on writ of error in *Mallett v. North Carolina,* 181 U. S., 589); *S. v. Thompson,* 161 N. C., 238, 76 S. E., 249; *S. v. Wallace,* 162 N. C., 623, 78 S. E., 1; *S. v.*

Neville, 175 N. C., 731, 95 S. E., 55; *S. v. Godette,* 188 N. C., 497, 125 S. E., 24; *S. v. Hickey,* 198 N. C., 45, 150 S. E., 615. The rule is stated in 1 Greenleaf Ev., sec. 254a, as follows: "It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question."

However unfair or illegal may be the methods by which evidence has been obtained in a criminal action, if relevant, it is as a rule admissible, provided the accused is not compelled to do any act which criminates himself, or a confession or admission is not extorted from him. Accordingly, evidence obtained by forcibly entering the house of an accused person and seaching it and the person accused, without any warrant or authority of law, is held not inadmissible to show the possession of articles tending to establish guilt, although the search and seizure may have been unlawful, unwarranted, unreasonable, and reprehensible. 10 R. C. L., page 932, sec. 98.

The courts determine the competency of evidence irrespective of the method by which it was procured. An objection to an offer of proof made on the trial of a cause raises no other question than that of its competency, relevancy and materiality. On such an objection the court cannot enter on the trial of a collateral issue as to the source from which the evidence was obtained, unless expressly required so to do by statute.

The pertinent section of the 1937 law provides: "Any officer who shall sign and issue, or cause to be signed and issued a search warrant without first requiring the complainant or other person to sign an affidavit under oath and examining said person or complainant in regard thereto shall be guilty of a misdemeanor; and no facts discovered by reason of the issuance of such illegal search warrant shall be competent as evidence in the trial of any action."

It is contended that the cited law made the testimony incompetent and inadmissible. We deem the language of the statute insufficient to require that conclusion. It constitutes a modification, and not an abrogation, of the common law rule. Whatever the intent of the Legislature may have been it failed to use language sufficient to extend beyond testimony acquired or discovered by reason, or through the use, of a search warrant issued in violation of the terms of the act. It cannot be given the force and effect of rendering incompetent evidence obtained through a search without warrant. The officers did not purport to act under authority of an illegal search warrant, but elected to proceed without any type of warrant.

As the common law rule of evidence existing in this State is abrogated only to the extent that evidence procured through the use of an illegal search warrant is now inadmissible, the court below properly admitted the testimony tendered by the State. The defendant's exceptions thereto cannot be sustained. The judgment below is

Affirmed.

DEVIN, J., dissenting: The only evidence in the case was that of the officer, who testified as follows: "I am the officer who investigated the case of Joe McGee. I went to the dwelling house of the defendant at State Road, N. C. I searched his dwelling house—where the defendant lives—Mr. McGee gave me no permission to search his premises, forbade me to search his place and objected to the search. I placed him under arrest before I searched his place and put him in a car with another officer. Nobody gave me permission to search his premises and in fact they objected to my search. He was in charge of the place and he objected to my search and told me not to search." The officer testified the search resulted in discovering twenty gallons of whiskey. It was admitted that the officer acted without any search warrant or warrant of arrest.

To this testimony defendant duly noted exception on the ground that it was rendered incompetent by ch. 339, Public Laws 1937, which provides that "no facts discovered by reason of the issuance of such illegal search warrant shall be competent as evidence in the trial of any action."

Prior to the enactment of this statute, unquestionably, the rule pervaded in North Carolina, as stated in the majority opinion, that evidence otherwise competent was admissible irrespective of the manner in which it was obtained by the witness, though a contrary rule obtained in other jurisdictions. 15 N. C. Law Review, 343.

But the Act of 1937 changed the rule as to evidence obtained by the use of illegal search warrants, and evinces the legislative intent by necessary implication that this remedial check upon acts in violation of common right should be extended to an unlawful search without a warrant. "The heart of a statute is the intent of the lawmaking body" (*Trust Co. v. Hood,* 206 N. C., 268, 173 S. E., 601). Since evidence so obtained is, by the statute, made incompetent upon the ground that the complainant failed to sign the affidavit to procure the warrant, the reason applies more strongly when the officer failed not only to verify his complaint but also to procure the warrant at all. If an illegal warrant fails to justify the search and renders the evidence obtained thereby incompetent, much more so should the absence of a warrant entirely be given the same effect. To hold otherwise is to miss the intent of the statute, and the purpose of its enactment. The manifest

intent of the act was to discourage unlawful searches by rendering evidence thereby obtained inadmissible.

True, in this case, evidence of commission of a misdemeanor on the part of the defendant was uncovered, but to do so the officer not only committed an assault upon the person of the defendant when he arrested him without a warrant for objecting to his home being entered, but also of trespass for invading the dwelling house of the defendant without the semblance of authority and after being forbidden so to do by the defendant and other members of his family then present. Two wrongs do not make a right. It would be much better if officers engaged in the enforcement of law would themselves be careful to observe the law. Violations of law by those clothed with authority in the misdirected effort to uphold the law bring discredit upon the administration of the criminal law.

This defendant may have violated the law and be guilty of a misdemeanor, but he is still a citizen of North Carolina and entitled to have his constitutional and legal rights respected. He is no outlaw, nor fleeing felon, and the unlawful invasion of his home, even by a zealous officer, should not be made the means of procuring evidence to convict him.

STACY, C. J., concurs in dissenting opinion.

C. W. COLE v. R. S. KOONCE AND M. B. KOONCE, TRADING AS MOTOR TRANSIT COMPANY.

(Filed 28 September, 1938.)

1. Negligence § 19b—

A motion to nonsuit on the ground of contributory negligence should be granted only when but one inference may be drawn from the evidence by reasonable minds, considering the evidence in the light most favorable to plaintiff.

2. Automobiles §§ 14, 18g—Question of contributory negligence held for jury in this action by motorist striking parked truck.

The evidence tended to show that defendant driver had parked defendant employer's truck on the side of the highway with the left rear of the truck protruding about 28 inches on the concrete, that the weather was dark and foggy, and that plaintiff, headed in the same direction, had just passed a truck going in the opposite direction, did not see the parked truck until within twenty or thirty feet, and was unable to avoid hitting the left rear of the truck. The evidence was conflicting as to whether parking lights were burning on the rear of the truck. The evidence also disclosed that there was ample room to the left of the truck for plaintiff to pass. *Held:* The granting of defendants' motion to nonsuit on the ground of contributory negligence was error.

COLE *v.* KOONCE.

APPEAL of plaintiff from *Williams, J.*, at May Term, 1938, of WARREN. Reversed.

This is an action to recover damages for personal injuries which the plaintiff alleges he sustained through the negligence of the defendants, whose servant had parked a truck partially on the paved highway, with which truck plaintiff's car collided.

The plaintiff testified substantially that on the morning of his injury he was driving his automobile on the paved highway between South Hill, Va., and Wise, N. C., and going southward into the latter village. That the time was about five o'clock in the morning, and the weather was dark and foggy; that he was traveling about twenty-five miles an hour, having slowed down in order to pass a large truck coming in the opposite direction; that after passing this truck he discovered another truck, twenty to thirty feet away, parked partially on the paved highway in a diagonal position. The rear of this truck, he testifies, encroached upon the pavement so that the rear left wheel was about two feet thereon, the body of the truck projecting farther toward the center; that there were no lights on the parked car. Plaintiff testified that he attempted to avoid the collision but was unable to do so, and that, upon striking the rear end of the truck, his car was overturned and he was caught underneath the car and lay stretched out on the road; that after remaining in this condition for some time, shouting for help, some men arrived and attempted to extricate him; and while they were doing so, another car approached rapidly, and they were compelled to desist to prevent being run over; that the driver of this car managed to miss the plaintiff by running into a ditch, and plaintiff was finally extricated. He testifies that he sustained a severe and permanent injury which necessitated treatment and kept him in bed for a long time. He testified that with the lights on his car showing down the road through the fog he could see approximately fifty to seventy-five yards, maybe more; but that under the weather conditions existing that morning he could not exactly have seen an object 75 yards away, but did see well enough to drive safely; that he was unable to say by the aid of his lights how far he could see; that he could see for thirty yards under the foggy weather condition; that he did not think by keeping an ordinary lookout on the highway, conditions were such that with the aid of his lights he could have observed much on the highway at fifty yards unless it had been directly in front of him. He could not tell the exact number of yards or feet. He testified that by his best estimate he could clearly observe the place and location of objects by the aid of his own lights for a distance of about thirty yards.

W. C. Thacker testified that he lived nearby, heard the noise of the collision, went to the scene of trouble and helped to extricate Mr. Cole. He said he found the driver of the truck asleep and woke him up; that

the front wheels of the trailer part of the truck were clear off the concrete and the left rear wheels were on the concrete, 22 inches, besides the width of the dual wheels, from the edge, the body projecting over the wheels about six inches. He stated that the collision occurred in Wise, about fifty feet south of an intersecting highway, and that there were buildings along the highway—a church, service station, stores, and residences; that the concrete was 18 feet wide, with enough room on the road and shoulder for three cars to stand abreast beside the trailer—about twenty feet between the trailer and the east edge. The witness testified that there were parking lights on the front of the truck when he saw it, and that two tail lights were burning—one on the right-hand corner and the other in the center—and that the one on the left-hand corner had been broken off.

Eugene Fleming testified that he heard the report that Mr. Cole had been hurt and heard him calling for help; that it was still dark; that there was sufficient space for the truck to park on the right-hand side of the road without any of it being on the highway; that between the trailer and the east edge you could not have met a big truck on the highway; that the highway was perfectly level, wide open and straight. He said he could just see the form of the truck about fifty feet away—supposed he could have seen it three or four times that far with lights—did not see any lights burning on the truck, saw reflectors.

Elmore King testified that he was sleeping in the store on the opposite side of the highway and was awakened by the noise of the collision; that he went to the rescue of Mr. Cole; that there was sufficient parking space for the truck on the right-hand side off the highway; that there was about 16 feet of the highway, plus the shoulder, of clearance on the east side of the truck; that he could see the outline of the truck without lights 65, 70, or 75 feet away, and possibly with lights three times that far; that he saw one reflector still on the truck but did not recall the lights, except that one was broken off.

There was other evidence bearing on the nature and extent of the injury.

The motion of defendants for judgment of involuntary nonsuit was allowed.

Banzet & Banzet and Yarborough & Yarborough for plaintiff, appellant.

Douglass & Douglass and W. W. Taylor, Jr., for defendants, appellees.

SEAWELL, J. It is a familiar rule that a judgment of involuntary nonsuit on the ground of contributory negligence of the plaintiff cannot be rendered unless the evidence is so clear on that issue that reasonable

minds could draw no other inference. *Pearson v. Luther,* 212 N. C., 412, 193 S. E., 739; *Mulford v. Hotel Co.,* 213 N. C., 603; *Corum v. Tobacco Co.,* 205 N. C., 213, 171 S. E., 78. This rule has nothing to do with the credibility of witnesses. It applies equally to the testimony of the plaintiff as to that of other witnesses; *Tomberlin v. Bachtel,* 211 N. C., 265, 268, 189 S. E., 769; *Matthews v. Cheatham,* 210 N. C., 592, 188 S. E., 87; *Smith v. Coach Line,* 191 N. C., 589, 591, 132 S. E., 567; and he is entitled also to the benefit of the rule that upon a motion to nonsuit the evidence must be considered in the light most favorable to the plaintiff. *Cole v. R. R.,* 211 N. C., 591, 191 S. E., 353; *Lynch v. Telephone Co.,* 204 N. C., 252, 167 S. E., 847; *Gilbert v. Wright,* 195 N. C., 165, 141 S. E., 577. Where the factors of decision are numerous and complicated, and especially where the opinions and estimates of witnesses play a prominent part, the court must exercise great care to avoid invading the province of the jury, when passing upon the conduct of the plaintiff and his ability, by the exercise of due care, to avoid the consequences of defendant's negligence. Practically every case must "stand on its own bottom."

We think there is a difference between the fact situation in the case at bar and that presented in *Lee v. R. R.,* 212 N. C., 340, and *Weston v. R. R.,* 194 N. C., 210, 139 S. E., 237, that would justify the submission of the evidence in this case to the jury, without impairing the authority of those cases. The evidence in this case cannot be said to point to the contributory negligence of the plaintiff with that clearness and singleness of inference which must obtain in order to justify the court in taking the case from the jury.

We refrain from comment on the evidence which might prejudice either party on a retrial.

The judgment of nonsuit is

Reversed.

CURLEY BRYANT v. JOHN CARRIER AND J. HARVEY CARPENTER, GUARDIAN FOR JOHN CARRIER.

(Filed 28 September, 1938.)

1. Insane Persons § 13: Damages § 7—

An insane person is liable civilly for compensatory damages for his torts, but not for punitive damages.

2. Damages § 11—Where defendant pleads insanity as bar to recovery of punitive damages, plaintiff is entitled to prove legal capacity.

Where defendant, who had been adjudged insane and a guardian appointed prior to the institution of the action, pleads insanity as a bar to

the recovery of punitive damages, plaintiff is entitled to show, if he can, that at the time defendant had legal capacity to commit the acts alleged with such elements of aggravation as would justify the award of punitive damages.

3. Evidence § 46—Witnesses testifying on question of sanity, may state facts showing their knowledge of the person in question.

Where the sanity of defendant is in issue, it is competent for witnesses who have testified as to their opinion on the question, to state facts showing their knowledge of defendant and the basis for their opinion, and exception to the testimony of one such witness that he had arrested defendant for a misdemeanor, and of another witness that defendant had been tried in his court, *is held* not objectionable when properly confined by the trial court to the question of the witnesses' opportunity to observe defendant and to note his mental condition.

4. Husband and Wife § 39—In action for criminal conversation, exclusion of evidence of character of woman with whom plaintiff was alleged to have had immoral relations, held not error.

In this action for criminal conversation, the court excluded evidence of the general character and character for chastity of a woman with whom plaintiff was alleged to have had improper relations. *Held:* The exclusion of the evidence, even conceding its materiality, cannot be held prejudicial in view of the admission of other testimony to the same effect without objection.

5. Husband and Wife § 41—

In an action for criminal conversation it is not error for the court to fail to instruct the jury that it was necessary for plaintiff to show that he and his wife were living together at the time, or, if separated, that the separation was due to no fault of plaintiff, in the absence of a prayer for special instructions.

6. Trial § 32—

A party desiring specific instructions on a particular phase of the law applicable to the evidence should aptly tender request therefor.

7. Husband and Wife §§ 37, 41—Consent of wife is no defense to action for criminal conversation.

The consent of the wife is no defense to an action for criminal conversation, and an instruction that the jury should answer the issue in plaintiff's favor if they should find from the greater weight of the evidence that at the times alleged plaintiff and his wife were lawfully married, and that at such times defendant had sexual intercourse with her.

8. Husband and Wife § 43—In action for criminal conversation, present value of future loss may be awarded upon supporting evidence.

In an action for criminal conversation, an instruction that the jury might award the present value of prospective damages if they found that plaintiff's injury and loss would continue in the future is not error when there is evidence supporting the instruction.

9. Husband and Wife § 40—

Evidence in this action for criminal conversation *held* sufficient to overrule defendant's motion to nonsuit.

10. Appeal and Error § 29—

Exceptions not brought forward in appellant's brief are deemed abandoned. Rule 28.

APPEAL by defendants from *Ervin, Special Judge,* at June Term, 1938, of RUTHERFORD. No error.

Action for alienation of affections and criminal conversation. Issues submitted to the jury were answered as follows:

"1. Did the defendant John Carrier alienate the affections of the plaintiff's wife, as alleged in the complaint? Ans.: 'No.'

"2. Did the defendant John Carrier have immoral relations with the plaintiff's wife, as alleged in the complaint? Ans: 'Yes.'

"3. What amount of actual damages, if any, is the plaintiff entitled to recover of the defendant John Carrier? Ans.: '$1,000.'

"4. Did the defendant John Carrier have sufficient mental capacity at the times named in the complaint to entertain and act with a wrongful intent with respect to the matters complained of? Ans.: 'Yes.'

"5. What amount of punitive damages, if any, is the plaintiff entitled to recover from the defendant John Carrier? Ans.: '$500.' "

From judgment on the verdict defendants appealed, assigning errors.

Hamrick & Hamrick for plaintiff, appellee.

Edwards & Edwards and McRorie & McRorie for defendants, appellants.

DEVIN, J. The appellants' principal assignments of error relate to the rulings of the court below on matters of evidence and to his charge to the jury.

The exceptions to the admission of the testimony of a witness that he had arrested the defendant for some misdemeanor, and of another that the defendant had been tried in this court, cannot be sustained. One of the issues in the case involved the question of the mental capacity of defendant Carrier, in order to determine his liability for punitive damages. It was alleged in the answer that he was *non compos mentis,* and it was admitted on the trial that at some time previous to the matters alleged in the complaint he had been declared legally insane and a guardian appointed. While an insane person is civilly liable for his torts, this liability is for compensatory damages only, and does not include punitive damages. *Moore v. Horne,* 153 N. C., 413, 69 S. E., 409; *Ballinger v. Rader,* 153 N. C., 488, 69 S. E., 497; *Jewell v. Colby,* 66 N. H., 399; 32 C. J., 751. Hence, it was competent for the plaintiff to show, if he could, that the defendant Carrier was not insane at the

time of the wrongs complained of, but was mentally competent, and that he had legal capacity to commit the acts alleged with such elements of aggravation as would justify the award of punitive damages. The testimony of the witnesses objected to was in support of their expressed opinion that he was mentally capable. It is uniformly held competent for a witness when testifying as to the mental capacity of a person to state facts showing the witness' knowledge of the person and the basis for his opinion (*In re Brown,* 203 N. C., 347, 166 S. E., 72; *McLeary v. Norment,* 84 N. C., 235; Lockhart on Ev., sec. 206), and this evidence was by the court carefully restricted to the question of the witness' opportunity to observe the defendant and to note his mental condition. *S. v. Ray,* 212 N. C., 725, 194 S. E., 482. It may also be noted that testimony of other witnesses to similar effect was admitted without objection. *Thompson v. Buchanan,* 198 N. C., 278, 151 S. E., 861.

Appellants further excepted to the exclusion of testimony as to the general character and character for chastity of one Alice Surratt, with whom the plaintiff is alleged to have had improper relations. Alice Surratt was not offered as a witness by either side and did not go upon the stand, and it is not perceived how evidence of her character could be held material. Lockhart on Evidence, sec. 187. However, the testimony of numerous witnesses as to the conduct of plaintiff with her was admitted without objection. 30 C. J., 1164.

Appellants excepted to the charge of the court for the reason that it failed to instruct the jury that it was necessary for plaintiff to show that plaintiff and his wife were living together at the time of the alleged criminal conversation, or, if separated, that the separation was not due to the fault of the plaintiff. There was no request that this instruction be given, and there was evidence that the intercourse occurred before the separation, but appellants contend the court should have so charged without formal prayer. "It is well settled as the practice in this State that if a party desires the judge to present a particular theory of the case, or a particular phase of the law applicable to the facts as the jury shall find them from the evidence, he should request the judge to do so by prayers for instruction tendered in apt time, and that unless this is done, he cannot raise the objection that the judge failed in his charge to instruct the jury with respect to such theory, or such phase of the law." *Chestnut v. Sutton,* 207 N. C., 256, 176 S. E., 743.

The court charged the jury, "If the plaintiff has satisfied you from the evidence and by the greater weight thereof, that at the times alleged in the complaint the plaintiff was lawfully married to Effie Bryant, and that during the existence of such marriage between plaintiff and Effie Bryant the defendant John Carrier had sexual intercourse with

plaintiff's wife, Effie Bryant, then you will answer the second issue 'Yes.'" The instruction of the court upon this issue was in accord with the decisions in this jurisdiction embodying the applicable principles of law relating to actions for criminal conversation. In *Cottle v. Johnson,* 179 N. C., 426, 102 S. E., 769, it was said: "The authorities show the husband has certain personal and exclusive rights with regard to the person of his wife, which are interfered with and invaded by criminal conversation with her; that such an act on the part of another man constitutes an assault even when, as is almost universally the case as proved, the wife in fact consents to the act; because the wife is in law incapable of giving any consent to affect the husband's right as against the wrongdoer."

"The gravamen of the cause of action for criminal conversation is the defilement of plaintiff's wife by the defendant." *Chestnut v. Sutton,* 207 N. C., 256, 176 S. E., 743. The consent of the wife is no defense.

"The mere fact of separation will not bar an action for criminal conversation occurring during separation." 30 C. J., 1156; *Cross v. Grant,* 62 N. H., 675, 13 R. C. L., 1488.

The exception to the charge of the court on this point cannot be sustained.

The exception to the court's instruction to the jury, that if they found the plaintiff's injury and loss would continue in the future they should award the present value of such prospective damages as they found would accrue, cannot be sustained. While compensation cannot be based upon a mere conjectural probability of future loss (17 C. J., 764), here there was evidence to justify the instruction to which the exception was noted. "If it appears that the estrangement (between husband and wife) or its effects will be permanent, or will continue for some time in the future, the damages must cover this once and for all." McCormick on Damages, 409; *Riggs v. Smith,* 62 Idaho, 43; 17 C. J., 762; 30 C. J., 1148.

The defendant's motion for judgment of nonsuit was properly denied. There was sufficient evidence of criminal conversation between defendant Carrier and plaintiff's wife to warrant the submission of the case to the jury. Other exceptions noted by defendants during the trial were not brought forward in their brief and are deemed abandoned. Rule 28.

In the trial we find

No error.

VIRGINIA TRUST COMPANY v. LAURA S. DUNLOP, JOS. P. DUNLOP, JR., AND CHARLES S. DUNLOP, EXECUTORS OF THE ESTATE OF JOS. P. DUNLOP, DECEASED.

(Filed 28 September, 1938.)

1. Pleadings § 29—

On a motion to strike out, the test is whether the pleader would be entitled to introduce evidence in support of the allegations sought to be stricken.

2. Mortgages § 36—Defense that property was worth debt at time it was bid in by cestui is available to guarantor on note.

This action by the *cestui que trust* to recover the balance due on the note secured by the instrument after foreclosure and the application of the proceeds of sale to the note, was instituted against the personal representatives of the guarantor of payment on the note. Defendants alleged as a further defense that the property was bid in by a subsidiary of the *cestui* for the benefit of the *cestui* and that at the time the value of the property exceeded the amount of the debt. Ch. 275, Public Laws of 1933 (Michie's Code, 2593d.) Plaintiff moved to strike out the further defense. *Held:* Defendants were entitled to make the defense, and the motion to strike out was properly denied. C. S., 3101-3103.

3. Appeal and Error § 2—

Whether the denial of a motion to strike out is appealable under C. S., 638, *quære*, since the same question may be presented by objections to the evidence and determined upon review of the final judgment.

APPEAL of plaintiff from *Johnston, J.*, at August Term, 1938, of BUNCOMBE. Affirmed.

The plaintiff sued the defendants, executors of the will of Joseph P. Dunlop, deceased, upon a guaranty made by said Dunlop on certain notes of Charles S. Dunlop, secured by a trust deed.

The plaintiff filed its complaint, alleging in substance that Charles S. Dunlop made the notes to bearer and executed a deed of trust securing the same to P. B. Watt and W. B. Jerman, trustees; and that after the execution of the notes and deed of trust, and before delivery or negotiation of said notes, or the delivery and recording of the deed of trust, Joseph P. Dunlop, defendants' testator, for value received, and as a condition precedent, endorsed and signed upon the promissory notes the following guaranty:

"The undersigned hereby guarantees the prompt payment of the within obligation, both principal and interest, as and when same becomes due according to its terms, and agrees not to claim any right to be subrogated to the rights of the holder thereof until after the payment in full of all obligations described in the within mentioned deed of trust.

The undersigned further agrees to remain bound notwithstanding any extension of time which may be granted to the maker of the within obligation, hereby waiving all claim to any homestead exemption as to this obligation. Witness the following signature and seal on the day and year of the within mentioned obligation. Jos. P. Dunlop, (Seal)."

It was further alleged that the notes so guaranteed were negotiated for full value, and before maturity and default, to the plaintiff, and that the deed of trust was delivered and recorded. That upon default in the payment of the notes, and after notice to both maker and guarantor, the deed of trust was duly foreclosed and the net proceeds from the foreclosure sale credited on the amount then due on the notes, leaving a balance of $3,975.14 still due. That Dunlop died testate, leaving the defendants as executors of his will; and when plaintiff filed proof of claim for the amount alleged to be due, with interest, the defendants denied the claim. That by reason of these facts the estate of Dunlop is indebted to the plaintiff in the sum aforesaid, with interest thereon, recovery of which plaintiff demanded.

The defendants, in their further answer, set up as a defense against plaintiff's claim that the plaintiff had caused the property to be bought in at the foreclosure sale by the Investors Service Corporation for plaintiff's benefit; that the Investors Service Corporation was a subsidiary of the plaintiff, which held all or a substantial part of the capital of said subsidiary; that plaintiff was the owner and in control of the corporation; and that an understanding existed between the Investors Service Corporation and the plaintiff at the time of the foreclosure that the Investors Service Corporation would accept and hold the title to the lands so foreclosed, and would hold and dispose of the title thereto at the direction and for the use and benefit of the plaintiff.

The defendants further alleged that the plaintiff was really the purchaser of the foreclosed land, and that the same was indirectly conveyed to the plaintiff by a conveyance thereof to the Investors Service Corporation by deed dated 1 September, 1937. That the Investors Service Corporation paid no consideration for the land described in the deed of trust, or that if it did, the consideration was provided by the plaintiff. That at the time of the sale of the land, and improvements thereon, it was reasonably and fairly worth the amount of the debt secured by said deed of trust and that its market value was in excess of such indebtedness; and that under the law the debt of the plaintiff was fully satisfied and paid, and the estate of Joseph Dunlop was thereby fully released and discharged.

The plaintiff moved to strike out this further defense, on the ground that the statutory defense provided in chapter 275 of the Public Laws of 1933 (section 2593d, Michie's 1935 Code), is available only to defend-

ants in a suit "against the mortgagor, trustor, or other maker of any such obligation whose property has been so purchased (at foreclosure)," and that such special defense is unavailable to a guarantor of the debt.

The statute referred to provides substantially that where a foreclosure of property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee, or other holder of the obligation thereby secured becomes the purchaser and takes title, either directly or indirectly, and thereafter sues for and undertakes to recover a deficiency judgment "against the mortgagor, trustor, or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as a matter of defense and offset . . . that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale . . . and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part."

The trial judge refused to strike out the further answer and defense, and plaintiff excepted and appealed.

DuBose & Orr for plaintiff, appellant.
Parker, Bernard & Parker for defendants, appellees.

SEAWELL, J. On a motion to strike out, the test of relevancy of a pleading is the right of the pleader to present the facts to which the allegation relates in the evidence upon the trial. *Pemberton v. Greensboro,* 203 N. C., 514, 515, 166 S. E., 396; *Patterson v. R. R., ante,* 38, 43. If the defense provided in chapter 275, Public Laws 1933, is available to the defendants in this case, they are entitled to introduce evidence of the facts constituting such defense on the trial.

At this juncture of the case we are not able to agree with the plaintiff that the suggested defense is not available to defendants as executors of the guarantor of the notes upon which this suit is brought.

It might be contended, with reason, that a proper construction of the statute should regard the act of a mortgagee, or trustee, or holder of the notes secured by the mortgage, in acquiring the mortgaged premises at a foreclosure sale had at its instigation and for its benefit, as an act going to the discharge of the instrument and giving to the guarantor the benefit of this defense under the Negotiable Instruments Law—C. S., 3101-3103. It would not be an unreasonable interpretation of the statute to hold that it proceeds upon the equitable assumption that the debtor has received payment in full when, by his own choice, he takes the land, and that the purpose of the law is, under such circumstances, to discharge the debt.

It is not, of course, for us to say whether the defendants can make good the allegations of their further defense: We only say that at this stage of the case we do not deny their right to make it.

We are not sure of plaintiff's right to appeal on this matter under C. S., 638, since the same question could have been raised on objections to the evidence and, if necessary, reviewed on appeal from the final judgment, and it does not now appear that any substantial right has been affected. *Pemberton v. Greensboro, supra.* But since the holding is adverse to plaintiff's contention, and the appeal has precedent, we prefer to decide the matter upon the merits.

The judgment denying the plaintiff's motion is

Affirmed.

GEORGIA L. PRIVOTT, WIDOW, WOOD PRIVOTT AND WIFE, CORNELIA J. PRIVOTT, GEORGE E. PRIVOTT AND WIFE, MARY PRIVOTT, JOHN M. PRIVOTT (UNMARRIED), SARAH P. SPIVEY AND HUSBAND, M. R. SPIVEY, CAROLINE P. SWINDELL AND HUSBAND, J. D. SWINDELL, v. ANNE S. GRAHAM.

(Filed 28 September, 1938.)

1. Wills §§ 38, 42: Descent and Distribution § 1—

Lapsed, void or refused devises pass under the residuary clause if there be one, and in the absence of a residuary clause they descend to the heirs at law as in case of intestacy.

2. Wills § 33c—Devise in this case held to create defeasible fee in remainder in testator's children.

A devise in the residuary clause to testator's widow for life, with remainder over to testator's children with further provision that if any child should die leaving no issue who shall attain the age of twenty-one, the share of such deceased child should go to his living brothers and sisters, does not pass the indefeasible fee to testator's children, since all the children might die without issue attaining the age of twenty-one, in which event the testator would die intestate as to the reversion after the defeasance of the fee.

3. Descent and Distribution § 1—

The heirs at law of a deceased are to be determined as of the date of his death.

4. Wills § 46: Descent and Distribution § 15—Plaintiffs held owners of fee either as heirs at law or as devisees, and could convey title.

Plaintiffs, children of testator, were the owners of the defeasible fee in the land in question under the residuary clause of the will, and were the heirs at law entitled to the reversion if the fee should be defeated. *Held:* Plaintiffs were the owners of the land either as devisees under the will or as heirs at law of testator, and their deed would convey a good, indefeasible fee to the *locus in quo.*

PRIVOTT *v.* GRAHAM.

APPEAL by defendant from *Thompson, J.*, at Chambers in Elizabeth City, 12 August, 1938. From CHOWAN. Affirmed.

W. D. Pruden for plaintiffs, appellees.
John W. Graham for defendant, appellant.

SCHENCK, J. This is a controversy without action submitted under the provisions of C. S., 626, *et seq.*

The plaintiffs have contracted to convey to the defendant an indefeasible fee simple title to the property in controversy and have tendered her a deed purporting to convey the same with full covenants of warranty. The defendant has contracted to pay the purchase price agreed upon but has declined to accept the deed tendered and pay said price, contending that the plaintiffs cannot convey to her an indefeasible fee simple title.

The property in controversy was owned by H. C. Privott, who had an indefeasible fee simple title thereto at the time of his death. The plaintiffs are the widow and five children of H. C. Privott, and are his only heirs at law and their respective wives and husbands; and the plaintiffs also claim as devisees under the will of H. C. Privott, deceased.

The property involved was specifically devised to the testator's son, Wood Privott, one of the plaintiffs, subject to a charge of $5,000, the language of the will being:

"3rd. I give and bequeath to my son Wood the Dowdy & Wool lots on which my store and two warehouses stand, the use of which he has had in his mercantile business since Jan'y 1923—this property I value at five thousand ($5,000.00) dollars and he is to be charged with that sum against his share of my estate."

The devisee, Wood Privott, refused to accept said devise, and so notified all persons interested in the estate and attached notice of such refusal to the record of the will.

It is settled law that void, lapsed or refused devises pass by the residuary clause if there be one, *Reid v. Neal,* 182 N. C., 192 (199); Page on Wills (2d Ed.), par. 875, p. 1473; and if no such clause, they descend to the heirs at law as in case of intestacy. *Cheek v. Gregory,* 197 N. C., 761.

By virtue of the residuary clause of the will under consideration, the property in controversy went to the widow of the testator for life with remainder to his five children, who were also his only heirs at law, subject to the following provision: "If any of said children die leaving no living issue who shall attain the age of 21 years then his or her bequest shall revert to the living brothers or sisters of such deceased children share and share alike."

If the provision superimposed upon the residuary clause prevents the children from taking an indefeasible fee simple title after the death of the life tenant for the reason that all the children might die without leaving issue who would attain the age of 21 years, thereby causing the estate of the children to be defeated, and the testator to die intestate as to the reversion after the defeasance of the fee, the plaintiffs, being the heirs at law of the testator, would take this reversion. The heirs are ascertained as of the time of the death of the testator, rather than at the time of the defeasance or termination of the intermediate estate. *Baugham v. Trust Co.*, 181 N. C., 406; *Jones v. Frank*, 211 N. C., 281.

Whether the plaintiffs take by the will or by inheritance, they are the owners in fee simple of the land in controversy, and their deed tendered to the defendant conveyed to her a good indefeasible title. We are therefore of the opinion, and so hold, that his Honor's judgment that the defendant be required to accept the deed tendered and that the plaintiffs recover the price agreed upon is correct.

Affirmed.

TERESA McGREGOR v. GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION.

(Filed 28 September, 1938.)

1. Insurance § 38—Definition of "disease."

A "disease" may be defined as a "deviation from the healthy or normal condition of any of the functions or tissues of the body" or as "a morbid condition of the body."

2. Same—Evidence held insufficient to show that insured suffered from a disease within the meaning of health policy.

Evidence that an X-ray disclosed that insured had impacted wisdom teeth, that they had given her no trouble, pain or illness, and might never have done so, but that insured voluntarily submitted to an operation for their removal, *is held* insufficient to show that insured suffered a disease within the meaning of the policy of health insurance issued by defendant, since it discloses that the disability resulted from the operation rather than the condition of the teeth.

3. Insurance § 39—Evidence held insufficient to show that alleged "disease" was contracted after the policy had been in force 30 days.

The health policy sued on provided benefits in case insured should suffer disease commencing during the life of the policy and after it had been in force for thirty days. Insured's evidence disclosed that less than thirty days after the issuance of the policy her dentist discovered by means of X-rays that insured had fully developed, impacted wisdom teeth, and that

more than thirty days after the issuance of the policy insured submitted to an operation for their removal. *Held:* Conceding that impacted wisdom teeth constitute a "disease" within the meaning of the policy, the evidence discloses that the condition existed long before the issuance of the policy and that insured knew of the condition less than thirty days after the issuance of the policy, and therefore the condition was not contracted during the life of the policy and after it had been in force for thirty days.

APPEAL by defendant from *Johnston, J.*, at April Term, 1938, of RUTHERFORD.

Civil action to recover on policy of health insurance.

This action was instituted in the justice of peace court of Rutherford County, and, on appeal, was tried *de novo* in the Superior Court.

The evidence tends to show these facts:

On 4 September, 1936, defendant issued to plaintiff a policy of health and accident insurance which contained these pertinent provisions: "Part 1. The Insuring Clause: This policy insures against . . . (b) loss from disease contracted during the life of this policy and after it has been maintained in continuous force for thirty (30) days from its date, disease so contracted being hereinafter referred to as 'such illness,' —as hereinafter limited and provided." . . . "Part 8. Monthly Illness Indemnity. Section A. If on account of 'such illness,' not hereinafter excepted, the insured shall, commencing during the life of this policy, be necessarily and continuously confined within the house . . ."

Prior to 3 October, 1936, plaintiff discovered, through X-ray by her dentist, that she had four impacted wisdom teeth—fully developed and grown across her mouth. She had not had any trouble, pain or illness from them. Plaintiff testified: "Some people keep them all their days and they don't bother you." On 3 October, 1936, her dentist informed her that he had an engagement for her to see a doctor in Charlotte on 5 October for examination and, if that doctor thought it necessary, for an operation. She went to Charlotte and the operation was performed on 5 October. As a result of the operation she was confined to her bed and room two weeks, and was unable to do any work for three more weeks.

Motions of defendant, in apt time, for judgment as of nonsuit were overruled. Exception.

There was verdict for plaintiff. From judgment thereon defendant appealed to Supreme Court, and assigns error.

Wade B. Matheny for plaintiff, appellee.

J. Laurence Jones and Horace Kennedy for defendant, appellant.

WINBORNE, J. Taken in the light most favorable to plaintiff, the evidence fails to bring her disability within the provisions of the policy of health insurance upon which this action is based. The policy insures against loss resulting from disability from disease contracted during the life of the policy and after it has been in continuous effect for thirty days from its date. The language is clear and unmistakable and needs no interpretation. Hence, we inquire: Did the disability of plaintiff result from "disease"? "Disease" has been defined as "an alteration in the state of the human body . . . or of some of its organs or parts interrupting or disturbing the performance of the vital functions, or of a particular instance or case of this;" as "deviation from the healthy or normal condition of any of the functions or tissues of the body"; and as "a morbid condition of the body." These definitions have been adopted in one form or the other in the decisions of numerous courts. Black's Law Dictionary, 3rd Ed.; 18 C. J., 1139. *Order of the United Commercial Travelers v. Nicholson,* 9 F. (2 d), 7-14; *Perry v. Van Motre,* 176 Mo. App., 100, 161 S. W., 643-647; *Merrion v. Hamilton,* 64 Ore., 476, 130 P., 406-407; *Pilgrim Health & Life Ins. Co. v. Gomly,* 40 Ga. App., 30, 148 S. E., 666. *Sovereign Camp, Woodmen of the World v. Treanor,* 217 S. W., 204-206; *Independent Life Ins. Co. v. Butler,* 221 Ala., 501, 129 So., 466.

Applying these definitions to the facts of the case at bar, can it be said that impacted teeth, which have caused no trouble, pain or illness, constitute a disease? We cannot so hold. The plaintiff did not know she had them until the X-ray was made. They had given her no trouble or pain. There was no disturbance in the performance of any of the functions or tissues of the body. No morbid condition existed.

The evidence shows that the sickness was the result of the operation to which plaintiff voluntarily submitted. She might never have had any trouble, pain or sickness from the teeth if they had not been removed. It was the removing of them that caused her trouble.

If, however, it should be conceded that the impacted teeth constituted a disease, the evidence is clear that that condition had existed for a long time before the policy was issued. The teeth were fully developed. And, the plaintiff knew of the condition, certainly within the thirty-day period next after the date of the policy.

Defendant's motion for judgment as of nonsuit should have been sustained. The judgment below is

Reversed.

W. E. MATTHEWS AND D. B. MATTHEWS v. ROSCOE MATTHEWS (MINOR) AND PLANTERS NATIONAL BANK & TRUST COMPANY, GUARDIAN OF ROSCOE MATTHEWS (MINOR).

(Filed 28 September, 1938.)

1. Wills § 33b—Rule for application of rule in Shelley's case.

Ordinarily, the rule in *Shelley's case* applies when the term "heirs" or "heirs of his body" is used in its technical sense of heirs *qua* heirs as an entire class or denomination of persons and not merely as *descriptio personarum* of individuals embraced within that class.

2. Wills § 34—

The term "bodily heirs" when used as *descriptio personarum* is broader than the term "children," and means lineal descendants, including grandchildren and other lineal descendants.

3. Same—First taker's grandchild held entitled to share in estate under this devise.

Testator devised the lands in question to his son for the term of his natural life and after his death to his "bodily heirs, if any survive him, and should he die without issue, I will and desire that said land revert back to my heirs at law." Testator's son died leaving him surviving two children and a child of a deceased child. *Held:* If the devise conveyed a defeasible fee to testator's son under the rule in *Shelley's case*, then the contingency upon which the fee was to be defeated did not happen, and the devisee's grandchild is entitled to one-third thereof as a representative of her parent, or if the devise created a life estate only in the first taker, then the terms of the limitation over are sufficiently broad to include the first taker's grandchild as his lineal descendant, and she is entitled to a one-third interest therein with her uncles, sons of the first taker.

APPEAL by plaintiffs from *Bone, J.*, in Chambers, 15 July, 1938. From NASH. Affirmed.

This is a special proceedings for the partition of land, in which the plaintiffs allege tenancy in common with the defendant as to four tracts of land described in the petition, and assert sole ownership in the first tract therein described. The defendant, answering, alleges that he is the owner of one-third interest as tenant in common with the plaintiffs of the first tract, as well as of the other four tracts.

An issue of fact having been raised, the cause was transferred to the civil issue docket and heard by consent by Bone, J.

The controversy involves an interpretation of the fifth paragraph of the will of John G. Matthews, which reads as follows:

"Fifth: I loan to my son, Jno. W. T. Matthews, one hundred and seventy-eight acres of land on which he now resides during his natural life and after his death I give and devise said lands to his bodily heirs, if any survive him, and should he die without issue, I will and desire

that said land revert back to my heirs at law. For a more particular description of said lands see deeds from V. B. Batchelor and wife to myself, registered in the Register's office of Nash County in Book 59, page 131, and deed from Simon Jones to myself, registered in said office."

The devisee therein named, upon the death of the testator, took possession of said tract of land and held the same until his death in March, 1937. The devisee, John W. T. Matthews, had six children, two of whom died in infancy or early childhood, one of whom died without issue in the year 1924, and another one of whom, to wit: Roscoe D. Matthews, died in the year 1918, leaving him surviving the defendant in this proceeding. He likewise left surviving two children, the plaintiffs herein. The court below adjudged that the defendant Roscoe Matthews is the owner in fee of a one-third undivided interest in the 178-acre tract of land described in paragraph one of the petition. The plaintiffs excepted and appealed.

I. T. Valentine for plaintiffs, appellants.
Wilkinson & King for defendant, appellee.

BARNHILL, J. The difficulty the courts have encountered in applying the rule in *Shelley's case* does not arise out of any complexity in the rule itself. The application of the rule to particular facts presented is what has called forth much discussion in many decisions and which has caused such confusion as may exist in the minds of the legal profession in determining just when the rule applies. Generally speaking, the rule applies and a fee is conveyed when "heirs" or "heirs of the body" are used in their technical sense and carry the estate to the entire line of heirs to hold as inheritors under our canons of descent. For a devise of land to come within the meaning of the rule in *Shelley's case* the subsequent estate must be limited to the heirs *qua* heirs of the first taker, or to the heirs or heirs of the body as an entire class or denomination of persons, and not merely to individuals embraced within that class. The rule does not apply when such terms are used as *descriptio personarum*. Interesting discussions of the subject are contained in *Price v. Griffin*, 150 N. C., 523, 64 S. E., 372; *Puckett v. Morgan*, 158 N. C., 344, 74 S. E., 15; *Pugh v. Allen*, 179 N. C., 307, 102 S. E., 394; *Wallace v. Wallace*, 181 N. C., 158, 106 S. E., 501; *Benton v. Baucom*, 192 N. C., 630.

In deciding the question here presented it is unnecessary for us to enter into any discussion of the rule in *Shelley's case*, or to determine whether the term "bodily heirs" was used to indicate an entire class or denomination of persons, or to merely embrace individuals within that class. Whether the devise to John W. T. Matthews in the fifth paragraph of the testator's will vests the devisee with a fee simple estate

defeasible upon his death without issue, or a life estate, is now immaterial. In either event, the result is the same. It is to be noted, however, that the testator uses the words "bodily heirs" and "issue" interchangeably as synonymous terms.

If the first taker by said devise acquired a defeasible fee in the lands described, then upon the admitted facts he died with issue surviving, so that the contingency upon which the fee was to be defeated did not happen. Defendant, a grandchild, is an heir and shares equally as a representative of her father, son of the first taker, with the plaintiffs. If John W. T. Matthews, the first taker under said devise, acquired only a life estate under the terms thereof, then the language of the limitation over is sufficiently broad to require the inclusion of the defendant and she would take a one-third interest in said land.

The term "bodily heirs" as used in this devise is more comprehensive than the term children, and means progeny or issue, and includes children, grandchildren and other lineal descendants. It is true that in some of the cases in which this term is interpreted when used as *descriptio personarum,* it is said that it means children. However, an examination of those cases will disclose that only children were concerned and no grandchildren were involved. It clearly appears that the term is here used as indicating issue or lineal descendants.

The testator indicated his intent to be that if his son John W. T. Matthews should die without lineal descendant, or issue, to whom the title could pass, then such title should revert to the testator's heirs at law.

We concur in the opinion of the court below that the defendant is the owner of one-third interest in the tract of land first described in the petition as a tenant in common with the plaintiffs.

Affirmed.

CHRISTINE B. WARREN v. VIRGINIA-CAROLINA JOINT STOCK LAND BANK.

(Filed 28 September, 1938.)

1. Pleadings § 29—

A motion to strike out as a matter of right made after answer and on the day the case is calendared for trial, is properly denied for the reason that it is not made in apt time. C. S., 537.

2. Same—

Even though a motion to strike out is not made in apt time, the court has discretionary power to allow the motion during the term at which the case is calendared for trial.

3. Appeal and Error §§ 39, 40b—Where motion to strike out is addressed to court's discretion, it will not be presumed that court denied the motion for want of power.

Defendant moved to strike out certain allegations of the complaint on the day the case was calendared for trial, and asked that the motion be allowed as a matter of discretion. The court denied the motion on the ground of want of power. Three days later, when the case was called for trial, the motion was again made and denied, the record failing to show more than the denial of the second motion. *Held:* The record failing to show that the second motion was denied on the ground of want of power, it will be presumed on appeal that the motion was denied as a matter of discretion, and the exception to the denial of the first motion becomes immaterial.

4. Appeal and Error § 40b—Denial of motion to strike out held not prejudicial when no evidence in support of irrelevant allegations is admitted.

When a motion to strike out is addressed to the discretion of the trial court at the term the case is calendared for trial, a denial of the motion on the ground of want of power to entertain it cannot be held prejudicial when no evidence in support of the irrelevant allegations sought to be stricken out is admitted on the trial.

5. Mortgages §§ 35a, 39e—Where one employee of cestui holds the sale and another employee bids in property, sale is voidable.

In an action for damages for wrongful foreclosure, uncontradicted evidence that the sale was made by one employee of the *cestui que trust* and the property bid in by another employee of the *cestui*, and that the advertisement did not specify place of sale is sufficient to support the ruling of the court that he would instruct the jury that the sale was not a proper and valid foreclosure and that plaintiff trustors were entitled to the difference between the value of the land at that time and the amount bid.

APPEAL by defendant from *Bone, J.*, at February Term, 1938, of BEAUFORT. No error.

This was an action to recover damages for wrongful foreclosure and sale of plaintiff's land. The record discloses the following material facts:

In 1928 plaintiff borrowed $2,500 from the defendant Land Bank, and to secure the same executed deed of trust on her land to the Southern Trust Company, trustee. The name of the trustee was subsequently changed to the Southern Loan & Insurance Company. Default having been made in the payment of the debt, foreclosure sale was had on 14 November, 1934, and the defendant Land Bank became the last and highest bidder for the land in the sum of $2,400. Report of sale was filed with the clerk 18 January, 1935, and on same date deed from the trustee to the Land Bank was executed. On the following day, 19 January, 1935, the defendant Land Bank conveyed the land to E. H. and G. M. Swanner for the consideration of $3,500.

The plaintiff, conceding that the Swanners were innocent purchasers for value, brought her action against the Land Bank alleging an invalid

foreclosure, and offered evidence tending to show that the advertisement of the foreclosure sale did not specify the place of sale, that the sale was made by one employee of defendant and bid off for the Land Bank by another employee of defendant, and that the land was worth much more than the price at which it was bid off and conveyed to the Land Bank.

The trial judge stated that upon this evidence he would charge the jury that the sale of the land was not a proper and valid foreclosure of plaintiff's equity of redemption therein, and that the plaintiff was entitled to recover the difference between what the jury should find the land was worth in January, 1935, and the amount of plaintiff's debt. It was thereupon agreed by defendant (reserving its exceptions to the court's ruling with respect to the validity of the foreclosure sale) that the following issue should be submitted to the jury: "What was the value of plaintiff's land, referred to in the complaint, on 19 January, 1935?" It was further agreed that the court might deduct the amount of plaintiff's debt from the amount found by the jury in answer to said issue.

The jury answered the issue $5,000 and the court deducted $3,242.87 as amount of plaintiff's debt and rendered judgment in favor of the plaintiff for the difference, to wit, $1,757.13. From this judgment defendant Land Bank appealed.

Rodman & Rodman for plaintiff, appellee.
Grimes & Grimes and Worth & Horner for defendant, appellant.

DEVIN, J. Defendant's principal assignment of error is based upon the denial of its motion to strike certain allegations from the complaint, on the ground that they were irrelevant and prejudicial.

The motion, however, was made after answer and on the day the case was calendared for trial, and was denied for the reason that it was not made in apt time (C. S., 537). The defendant then asked that its motion be allowed as a matter of discretion, and this was denied as not being a matter in the court's discretion. When the case was reached for trial three days later the defendant again moved to strike out the offending allegations, and the motion was denied.

While the motion to strike was not made in proper time, that did not divest the court of the power, in the exercise of its sound discretion, to allow the motion during the term at which the case was on the calendar for trial, and the statement of the judge below, in denying the motion when first made, that it was not a matter of discretion, was an inadvertence (*Hines v. Lucas,* 195 N. C., 376, 142 S. E., 319; *Washington v. Hodges,* 200 N. C., 364, 156 S. E., 912; C. S., 536). But the motion to strike was made later in the week before the trial was begun, and the record at that time shows merely that the motion was denied. No

reason was assigned for the action of the court. There is no presumption that the later ruling was based upon want of power. The record does not preclude the assumption that the motion was denied in the exercise of discretion, since, as was said in *Hogsed v. Pearlman,* 213 N. C., 240: "The ruling of the court below, in the consideration of an appeal, is presumed to be correct." In this view the defendant's exception to the former ruling of the court would seem to be without merit. Nor do the facts show an abuse of discretion. But if it be conceded that the last ruling of the court was also based on the erroneous view of want of power and that there was a failure to exercise the discretion vested in the court, nevertheless it appears that in the trial no evidence was admitted in support of the irrelevant allegations sought to be stricken from the complaint, and we cannot hold that the jury was influenced or the defendant prejudiced thereby, so as to require the granting of a new trial.

The uncontradicted evidence bearing on the invalidity of the foreclosure was sufficient to sustain the ruling of the trial judge thereon (*Davis v. Doggett,* 212 N. C., 589; *Warren v. Susman,* 168 N. C., 457, 84 S. E., 760; *Hayes v. Pace,* 162 N. C., 288, 78 S. E., 290; 41 C. J., 953), and this left as the only controverted issue the value of the land at the time the title passed to innocent purchasers for value. The form of the issue was agreed to by the defendant. There was competent evidence to support the verdict of the jury and the charge of the court was free from error.

We have examined the other exceptions noted by defendant during the trial and find therein no sufficient ground upon which to overthrow the verdict and judgment below.

No error.

J. L. HALSEY v. CLARA E. SNELL, EXECUTRIX OF A. D. SNELL.

(Filed 28 September, 1938.)

1. Wills § 5—In action for breach of contract to bequeath, evidence of financial worth of testate at that time is irrelevant.

Where plaintiff introduces competent evidence that defendant's testate promised to bequeath plaintiff a certain sum of money in consideration of plaintiff's forbearing to sue for injuries received in intestate's logging mill, evidence that the financial worth of testate at the time of the alleged contract was little more than the amount plaintiff claimed testate promised to bequeath him, is irrelevant.

2. Trial § 31—Instruction held for error as expression of opinion as to credibility of testimony.

Plaintiff introduced testimony of several witnesses tending to establish the contract sued on. In its charge, the court named only two of plain-

tiff's witnesses and instructed the jury that if they believed the testimony of these two witnesses, and found by the greater weight of the evidence the facts to be as they had testified, to answer the issue in plaintiff's favor, *is held* prejudicial as amounting to an intimation that the jury might disregard the testimony of the rest of plaintiff's witnesses, or that such evidence was without significance.

APPEAL by plaintiff from *Bone, J.*, at January Term, 1938, of WASHINGTON. New trial.

The plaintiff sued for damages arising out of a breach of an alleged contract between himself and the deceased, A. D. Snell, by the terms of which Snell had agreed to make a will in which he would leave $10,000 to the plaintiff, in consideration for injuries done to the latter while working in a logging mill for Snell, and in consideration of foregoing suit upon this claim.

Snell died some years later, leaving the plaintiff nothing by his will.

The plaintiff introduced evidence tending to show the nature and seriousness of the injuries he had sustained at the mill, the existence of the alleged contract, and the failure of Snell to provide for him in the will as agreed. Plaintiff introduced a number of witnesses, among them Mrs. J. L. Halsey, his wife, Mrs. J. W. Halsey, his mother, Paul Woodley, Louis Bateman, A. R. Patrick, W. B. Cox, and various other persons, whose testimony was directed toward establishing the contract.

Of these Mrs. J. L. Halsey and Paul Woodley testified that they heard the contract made between the plaintiff and Snell, and related its terms. Louis Bateman testified that Snell told him that "Johnnie"—the plaintiff—"was going to sue him but that he had made it all right with him and was going to leave him $10,000 in his will." A. R. Patrick testified that Snell told him that "Johnnie had got hurt in a log mill of his and he was going to give him $10,000 at his death." Mrs. J. W. Halsey, a sister of Asa Snell and mother of the plaintiff, testified that she had a conversation with Snell, in which he told her he had heard "Johnnie was going to sue him," and she had suggested that Asa ought to help him. Snell said he "was going to leave Johnnie $10,000 in his will, and asked her to tell him so," which she subsequently did. This witness testified further that she saw Snell later and he told her he had "seen Johnnie and made it all right with him by telling him he was going to leave him $10,000, and he said Johnnie had agreed not to enter any suit against him."

The defendant executrix, in rebuttal, introduced evidence tending to show the value of Snell's property at the time of the alleged contract, to which plaintiff objected and excepted.

Upon the issue relating to the existence of the contract the trial judge instructed the jury, as follows:

"I instruct you, gentlemen, that if you believe the evidence of the plaintiff's wife, Mrs. J. L. Halsey, and the evidence of the plaintiff's witness, Paul Woodley, and find by the greater weight of the evidence the facts to be as their evidence tends to show, you would answer the first issue 'Yes.' If you do not so find, do not believe their evidence, you would answer the issue 'No.' "

To this plaintiff excepted.

W. M. Darden, Jr., Z. V. Norman, and McMullan & McMullan for plaintiff, appellant.

W. L. Whitley, H. S. Ward, and Rodman & Rodman for defendant, appellee.

SEAWELL, J. We have set out in some detail the portions of the evidence relating to the two exceptions we think it proper to consider.

(a) An aggrieved party may recover for the breach of a contract, made upon sufficient consideration, that the promisor will make him the beneficiary of a bequest or devise in his will, but such a contract must be established by the mode of proof legally permissible in establishing other contracts.

In the case at bar the defendant introduced, in rebuttal, evidence tending to show that the financial worth of deceased at the time of the alleged contract was little more than the amount he promised the plaintiff, to be given in his will.

If we were considering the will itself, with reference to its construction, or upon an issue of *devisavit vel non,* evidence of the testator's financial worth and details as to the value of the component parts of his estate might be relevant upon some of the questions involved. Here, however, the contract is entirely separate from the will and the relevancy of the evidence is not aided by the fact that the subject of the contract is a testamentary disposition of property. At best, the proposed evidence is of such doubtful import that we must consider it irrelevant.

(b) Generally speaking, it is error for the trial court to single out any of a number of witnesses and give the jury an instruction bearing upon the issue, based solely upon the credibility of such witnesses, and upon the facts as testified by them. In this case it cannot be said that the testimony of Mrs. J. L. Halsey and Paul Woodley constituted all the evidence tending to prove the contract, or that the evidence of some of the other witnesses mentioned—for instance, that of Mrs. J. W. Halsey—had no other function than to corroborate them. The plaintiff is, therefore, prejudiced because the jury may have construed the instruction as an intimation that they might disregard other evidence

supporting plaintiff's claim, or that such evidence was without significance. *Taylor v. Meadows,* 182 N. C., 266, 267, 108 S. E., 755; *Bowman v. Trust Co.,* 170 N. C., 301, 87 S. E., 46; *Jackson v. Commissioners,* 76 N. C., 282; *Anderson v. Steamboat Co.,* 64 N. C., 399.

Upon the errors noted, the plaintiff is entitled to a

New trial.

J. T. BAILEY, H. A. OSBORNE, EDWIN FINCHER AND M. T. McCRACKEN, CITIZENS, TAXPAYERS AND QUALIFIED VOTERS OF HAYWOOD COUNTY, v. GUDGER BRYSON, W. H. NOLAND AND VIRGE McCLURE, COUNTY BOARD OF ELECTIONS OF HAYWOOD COUNTY; AND DAVID N. CABE, ON THE PART OF HIMSELF AND OTHER CITIZENS AND TAXPAYERS.

(Filed 28 September, 1938.)

1. Intoxicating Liquor § 2—Order restraining election on liquor question is properly continued when petition does not affirmatively show that signers were qualified and did vote in last election for Governor.

Ch. 49, Public Laws of 1937, requires that a petition for the submission to a vote of the question of setting up and operating liquor stores in the county should be signed by at least 15% of the registered voters of the county that voted in the last election for Governor, and where, in a suit to restrain such election, it is found that the petition fails to show that the persons signing the petition voted in the last election for Governor, or were qualified to so vote, the temporary order is properly continued to the hearing for the determination of this question.

2. Injunctions § 11—

Ordinarily, in a suit for a permanent injunction, the temporary order will be continued to the hearing when the evidence raises serious question as to the existence of facts, which, if established, would entitle plaintiff to the relief sought.

CLARKSON and DEVIN, JJ., concur in result.

APPEAL by defendant David N. Cabe from *Alley, J.,* at July Term, 1938, of HAYWOOD.

Civil action to enjoin the holding of an election in Haywood County on the question of setting up and operating therein county liquor control stores under the provisions of chapter 49 of Public Laws 1937.

The action was instituted against the county board of elections. Thereafter David N. Cabe, a citizen, taxpayer and qualified voter of Haywood County, in behalf of himself and others, citizens, taxpayers and qualified voters of said county, was permitted to become a party defendant.

The record discloses that, acting under the provisions of chapter 49, Public Laws 1937, upon petition of registered voters of Haywood

County filed with it, the board of elections of said county has called an election at which there shall be submitted to the qualified voters of said county the question of setting up and operating liquor stores therein.

Plaintiffs in their complaint challenge the sufficiency of the petition on which the board of elections acted. Temporary injunction was signed and served. All defendants have answered.

On hearing of motion of defendants to dissolve the injunction, the court below finds, among other things, "that the petition upon which the election referred to in the pleadings was called fails to show affirmatively that the persons signing said petition voted in the last election for Governor of North Carolina, or were qualified so to vote; and it further appearing that the answer filed by the board of elections of Haywood County admits that the petitions filed with said board calling for said election do not designate the signers other than that they are duly qualified voters of Haywood County, and that the said defendants in receiving said petitions and in ordering said election counted the signers thereof, but had no way of determining whether or not said signers were duly and properly registered, and had no knowledge or information as to whether or not the signers of said petition were persons who voted in the last election for Governor of North Carolina."

From judgment continuing the injunction to the final hearing, the defendant David N. Cabe appealed to the Supreme Court and assigns error.

T. A. Clark for plaintiffs, appellees.
W. T. Crawford for defendant, appellant.

WINBORNE, J. The appellant, David N. Cabe, excepted to the judgment entered below, and, on this appeal, assigns as error the signing of the judgment. This is the only question presented. The assignment is not tenable.

The act relating to the setting up and operating county liquor control stores requires as condition precedent that the question be submitted to and approved by the qualified voters of such county, at an election called "by the board of elections of such county only upon the written request of the board of county commissioners therein, or upon a petition to said board of elections signed by at least fifteen per centum of the registered voters in said county that voted in the last election for Governor." Section 25, chapter 49, Public Laws 1937.

On the findings of fact, to which there is no exception, the court below properly continued the injunction to the hearing.

"Where the main purpose of an act is to obtain a permanent injunction and the evidence raises serious question as to the existence of facts

which if established would entitle the plaintiff to the relief demanded, the usual practice is to continue the temporary restraining order to the hearing." *Springs v. Refining Co.*, 205 N. C., 444, 171 S. E., 635, and cases there cited.

Whether the defendants will be able to show at the trial that the signers of the petition have the qualifications required by the statute is not now before this Court.

The judgment below is

Affirmed.

CLARKSON and DEVIN, JJ., concur in this result.

JAMES WEST, BY HIS NEXT FRIEND, W. C. WEST, v. F. W. WOOLWORTH COMPANY AND ROBERT E. ANTHONY.

(Filed 28 September, 1938.)

1. Courts § 2a—Superior Court has discretionary power to reinstate appeal from county court upon motion aptly made.

The Superior Court has the discretionary authority to reinstate an appeal from a general county court upon motion made at the same term the appeal is dismissed for failure of appellant to comply with the statutory requirements governing such appeals, since the statute, C. S., 1608 (cc), provides that such appeals shall be governed by the rules for appeals from the Superior Court to the Supreme Court, and such procedure is provided by the Rules of Practice in the Supreme Court (Rule 17), and the Superior Court obtains jurisdiction through the motion to reinstate aptly made, and may pass upon the motion at that or a subsequent term.

2. Judges § 2c: Courts § 4—Judge holding courts for Spring circuit has jurisdiction of entire term beginning in June and running into July.

When a term of court begins the last part of June, the judge of the Superior Court assigned to that district for the Spring circuit has authority throughout the term of court, even though the term runs over into July, C. S., 1446, since any term which begins in June "falls" between January and June within the meaning of the statute.

APPEAL by defendant F. W. Woolworth Company from *Alley, J.*, at June Term, 1938, of BUNCOMBE.

Civil action for recovery of damage for alleged slander.

The action was instituted in the general county court of Buncombe County. On the trial at January Term, 1938, of said court there was verdict in favor of the plaintiff against the defendant Robert E.

Anthony, but the jury found that at the time of the alleged slander he was not "acting within the course and scope of his authority" as assistant manager for defendant F. W. Woolworth Company. Motion of plaintiff to set aside the verdict as to the issue of agency and for new trial thereon was denied. From judgment on the verdict plaintiff appealed to the Superior Court and assigned error.

At the June Term, 1938, of the Superior Court, on motion of defendant F. W. Woolworth Company, and, upon findings of fact to the effect that plaintiff had failed to comply with the statutory requirements and rules of the court governing the docketing and perfecting of appeals from the general county court to the Superior Court in the respects therein set forth, an order was entered dismissing the appeal of plaintiff and affirming the judgment of the general county court. Thereupon, at the same term of the Superior Court, in open court and on the day that the order dismissing the appeal was signed, plaintiff filed a motion to vacate the said order and for reinstatement of the appeal for causes stated, notice of which was given to counsel for defendant.

The motion to reinstate the appeal being heard on 1 July, 1938, at and during the next succeeding term of the Superior Court, the regular 2-weeks June, 1938, mixed term, which convened on 20 June, and which was presided over by the judge regularly assigned to hold the Spring Terms, 1938, of the Superior Court of Buncombe County, the court, upon further facts found and "in the exercise of its discretion and in the furtherance of justice," entered an order that the plaintiff's appeal to the Superior Court be reinstated, from which defendant F. W. Woolworth Company, appealed to the Supreme Court, and assigns error.

Pritchard & James for plaintiff, appellee.
Parker, Bernard & Parker for defendant, appellant.

WINBORNE, J. The questions presented are: (1) Does the judge of Superior Court, after having dismissed an appeal from the general county court, have the authority, on motion of appellant made at the same term, to reinstate the appeal when the motion is not heard until the next succeeding term?

(2) When a regular spring term of Superior Court of a county begins in June and runs into July, does the presiding judge regularly assigned to hold the courts of the district in which such county is situated for the Spring circuit, have authority during such term to act as such after the month of June has expired? Both questions are answered "Yes."

(1) The general county court of Buncombe County was established in 1929 pursuant to the provisions of chapter 159 of Public Laws of

1929, which brought Buncombe County under and within the operation of the general statutes on the subject. Public Laws 1923, ch. 216, as amended by Public Laws, Extra Session 1924, ch. 85. *Jones v. Oil Co.*, 202 N. C., 328, 162 S. E., 741; *Grogg v. Graybeal*, 209 N. C., 575, 184 S. E., 85. The general statute provides in part that "appeals in civil actions may be taken from the general county court to the Superior Court of the county in term time for errors assigned as matters of law in the same manner as is now provided for appeals from the Superior Court to the Supreme Court . . ." C. S., 1608 (cc); Public Laws 1923, ch. 216, sec. 18; Public Laws, Extra Session 1924, ch. 85, sec. 24f; Public Laws 1929, ch. 159; Public Laws 1933, ch. 109; Public Laws 1937, ch. 84.

Under Rule 17 of the Rules of Practice in the Supreme Court (200 N. C., 816), if the appellant in a civil action shall fail to bring up and file transcript of record in accordance with the provisions thereof, the appellee may move to docket and dismiss the appeal. The motion will be allowed "with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the case." *Mirror Co. v. Casualty Co.*, 157 N. C., 28, 72 S. E., 826.

In the instant case, upon the plaintiff filing motion at the same term for reinstatement of the appeal, the court acquired jurisdiction through the motion and could, in its discretion, pass upon the same at that or a subsequent term.

(2) On the second question it is sufficient to refer to pertinent statutes. C. S., 1446, provides: "The judge riding any spring circuit shall hold all the courts which fall between January and June, both inclusive, and the judge riding the fall circuit shall hold all the courts which fall between July and December, both inclusive."

C. S., 1443, reads in part: "Each county shall have the number of regular weeks of Superior Court as set out in this section (Public Laws 1913, chapters 63 and 196). . . . The Nineteenth District shall be composed of the following counties, and the Superior Courts thereof shall be held at the following times, to wit: Buncombe . . . the third Monday in June, to continue for two weeks, for the trial of both criminal and civil cases." Public Laws 1923, ch. 31.

The courts which "fall" between January and June, both inclusive, include any term which begins in June. The word "fall" in the ordinary sense in which it is used in the statute means "to come, or become; to occur; to arrive." The intention of the Legislature is manifest from a reading of the statute.

The judgment below is

Affirmed.

S. A. STEVENS v. CORNELIA VANDERBILT CECIL. THE BILTMORE COMPANY AND BILTMORE DAIRY FARMS, INC.

(Filed 28 September, 1938.)

1. Process § 5—

In an action *quasi in rem* against a nonresident defendant it is necessary to a valid service of process by publication that the defendant have property in the State and that such property has been actually subjected to the control of the court by attachment.

2. Same—

No valid service of process by publication can be had against a nonresident defendant in an action *in personam*.

APPEAL by the plaintiff from *Alley, J.*, at March Term, 1938, of BUNCOMBE. Affirmed.

Don C. Young and Wells, Carter & Hipps for plaintiff, appellant.
Adams & Adams for defendant, appellee.

SCHENCK, J. This is an action to vacate and set aside a certain consent judgment of the Superior Court rendered in an action wherein the plaintiff herein was the plaintiff and the defendant Cecil was the defendant for the reason that the plaintiff's consent to said judgment was induced and procured by the willful frauds and deceptions practiced upon him by the agent of the defendant Cecil, who was the general manager of the dairy business of said defendant, and the immediate superior of the plaintiff as an employee of such defendant in the conduct of her said dairy business; said judgment purporting, for a nominal consideration, to release said defendant from any manner of employer's liability to the plaintiff for injuries which he claims he suffered while engaged in the discharge of the duties of his said employment, in consequence of the negligence of his said employer.

The defendant Cornelia Vanderbilt Cecil entered a special appearance and moved the court to dismiss the action as to her for the reason that the court had acquired no jurisdiction over her property or person. This motion was allowed, and the plaintiff excepted and appealed to the Supreme Court.

It appears from the record that there has been no personal service of summons made upon the defendant Cecil, and that there has been no waiver of service by said defendant, and that the only attempt at service has been by publication. The record further divulges that no attachment has issued against the property of the defendant Cecil.

Chief Justice Clark, in *Bernhardt v. Brown*, 118 N. C., 701 (705), says: " 'Due process of law' requires that service of process shall always be made. There are three modes in which this can be done:

"1. By actual service (or, in lieu thereof, acceptance of service or a waiver of service by an appearance in the action). Whether actual service shall be made by reading the summons or notice to the defendant, or leaving a copy with him personally or at his usual place of residence, is for the Legislature to prescribe. The Code, secs. 214, 217, 597.

"2. By publication of summons in cases in which it is authorized by law, in proceedings *in rem*. In these cases the court already has jurisdiction of the *res*, as to enforce some lien or a partition of property in its control, or the like, and the judgment has no personal force, not even for the costs, being limited to acting upon the property.

"3. By publication of the summons, in cases authorized by law, in proceedings *quasi in rem*. In those cases the court acquires jurisdiction by attaching property of a nonresident or of an absconding debtor, and in similar cases, and the judgment has no personal efficiency, extending no farther than its enforcement out of the property seized by attachment." See, also, *Vick v. Flournoy*, 147 N. C., 209; *Orange County v. Jenkins*, 200 N. C., 202 (206), and cases there cited; N. C. Prac. & Proc. (McIntosh), par. 322, pp. 317-18.

There was no actual service, nor acceptance nor waiver of service to bring the instant case within the first mode in which service of process may be made.

The instant case does not fall within the second mode in which service of process may be made by publication of summons, since it is not an action *in rem* in which the court already had jurisdiction of the *res*.

If the instant case be an action *quasi in rem* as specified in the third mode of service of process, the absence of attachment was fatal to the plaintiff's cause. In the absence of personal service, acceptance and waiver of service, and in the absence of the court already having jurisdiction of the *res*, the court has no jurisdiction of a nonresident defendant or one who cannot after due diligence be found within the State, unless (1) he has property in the State and (2) such property has been actually subjected to the control of the court by attachment. *Pennoyer v. Neff*, 95 U. S., 714 (24 Law Ed., 565); *Winfree v. Bagley*, 102 N. C., 515; *Long v. Insurance Co.*, 114 N. C., 466; *May v. Getty*, 140 N. C., 310; *Currie v. Mining Co.*, 157 N. C., 209; *Everitt v. Austin Brothers*, 169 N. C., 622.

If the instant case be an action *in personam* against a nonresident, or one who cannot after due diligence be found within the State, constructive service by publication is ineffective for any purpose. *Hinton v. Ins. Co.*, 126 N. C., 18; *Winfree v. Bagley, supra*. "Where the entire

object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam,* constructive service in this form (by publication) upon a nonresident is ineffectual for any purpose. *Pennoyer v. Neff, supra.*

The judgment of the Superior Court dismissing the action is Affirmed.

IN RE ADMINISTRATION OF THE ESTATE OF LOUIS B. SUSKIN.

(Filed 28 September, 1938.)

1. Executors and Administrators § 4—

The appointment of an administrator *c. t. a. ipso facto* revokes and supersedes letters of administration theretofore issued for the estate.

2. Appeal and Error §§ 3a, 31e—Appellant held not party aggrieved and appeal is dismissed.

Letters of administration were issued to appellant upon affidavit of deceased's brother. Thereafter an administrator *c. t. a.* was appointed. No question of disqualification or default under C. S., 31, and no question of preferential right of nomination and substitution was involved, and no effort to impeach any acts of plaintiff as administrator was made. *Held:* The appointment of the administrator *c. t. a.* revokes the first letters of administration, and the revocation of the first letters separated plaintiff from all connection with the estate, and he is not the "party aggrieved" by the second order, C. S., 632, and no substantial right of his was thereby affected, C. S., 638, and his appeal therefrom is dismissed.

APPEAL by John Archbell Wilkinson from *Thompson, J.,* at May Term, 1938, of BEAUFORT.

The record discloses that on 11 February, 1938, the clerk of the Superior Court of Beaufort County issued general letters of administration on the estate of Louis B. Suskin, deceased, to John Archbell Wilkinson upon the affidavit of Raymond Suskin, brother of the deceased, in which it is stated "that Louis B. Suskin, late of said county, is dead, without leaving will and testament," and upon the further affidavit of Leon Suskin, nephew of the deceased, in which it is stated "that Louis B. Suskin, late of the city of Baltimore, Md., died in said city on or about 12 January, 1935, and this affiant is informed and believes that Louis B. Suskin left a last will and testament."

Thereafter, on 15 April, 1938, R. H. Hodges was appointed administrator *c. t. a.* of the estate of Louis B. Suskin, deceased, by the clerk of the Superior Court of Beaufort County, and the following notice was issued to John Archbell Wilkinson:

"Please take notice, that the will of Louis B. Suskin, deceased, has been proven and that letters testamentary are issued thereon. Wherefore the letters of administration issud on February 11, 1938, to you, John Archbell Wilkinson, as administrator of the estate of Louis B. Suskin, are revoked."

On appeal to the Superior Court, the judge approved and affirmed the order granting to R. H. Hodges letters of administration *c. t. a.* on the estate of Louis B. Suskin, deceased; and, further: "The letters purporting to be letters of administration granted to John Archbell Wilkinson are adjudged to have been improvidently granted, and are revoked." From this ruling, John Archbell Wilkinson appeals, assigning errors.

R. E. Whitehurst and L. I. Moore for appellant.

J. C. B. Ehringhaus, W. B. R. Guion, and Rodman & Rodman for appellee.

STACY, C. J. To determine whether the appointment of John Archbell Wilkinson administrator of the estate of Louis B. Suskin, deceased, was void *ab initio,* because improvidently made in a case of testacy, *Springs v. Irvin,* 28 N. C., 27, or *de facto* sufficient until revoked, *Shober v. Wheeler,* 144 N. C., 403, 57 S. E., 152, would avail but little on the present record, for, so far as the instant case is concerned, both alternatives lead to the same result. C. S., 30. See 23 C. J., 1032; Croswell's Executors and Administrators, ch. 21, p. 432. It is enough to observe that the revocation was not for disqualification or default under C. S., 31; and that no question of priority or preferential right of nomination and substitution is here involved. *In re Estate of Smith,* 210 N. C., 622, 188 S. E., 202. The granting of the second administration *ipso facto* superseded the first. 11 R. C. L., 90; Croswell's Executors and Administrators, *supra.*

Moreover, it appears that no one interested in the estate, and no one claiming a legal right to administer it, is undertaking to prosecute the present appeal. *Pratt v. Kitterell,* 15 N. C., 168. The revocation of the first letters of administration separated John Archbell Wilkinson from any connection with the estate. No effort is being made to impeach any of his acts. *Shields v. Ins. Co.,* 119 N. C., 380, 25 S. E., 951. He is not the "party aggrieved" in any legal sense, C. S., 632; and no substantial right of his has been affected by the ruling. C. S., 638; *In re Will of Hargrove,* 206 N. C., 307, 173 S. E., 577; 3 C. J., 644. The appeal is not according to the practice of the common law; and it is not contemplated by statute. *Conrad v. Button,* 28 Mich., 365; 23 C. J., 1066.

Appeal dismissed.

COLUMBUS L. LITTLEJOHN AND WIFE, LULA LITTLEJOHN, v. M. G. JOHNSON.

(Filed 28 September, 1938.)

Fraud § 11—Evidence in this action for fraud held sufficient to overrule defendant's motion to nonsuit.

Evidence *held* sufficient to overrule nonsuit in this action for fraud upon allegations that defendant prevented plaintiff from entering an increase bid to save his land from sale under commissioner's deed to defendant by fraudulent misrepresentations that defendant would cancel a deed of trust on other lands of plaintiff, it being alleged that at the time defendant had already had the deed of trust foreclosed and had bid in the property at the sale.

APPEAL by plaintiff from *Olive, Special Judge,* at August Term, 1938, of RUTHERFORD. Reversed.

Plaintiffs alleged and offered evidence tending to show that prior to 1932 they owned three tracts of land, first tract containing 25.4 acres, second tract containing 74.83 acres, and third tract containing 26.5 acres; that upon the third tract defendant Johnson held a deed of trust; that the first and second tracts were sold by commissioners, under judgment of the court, 31 July, 1933, and bid off by the defendant for $1,500; that within ten days of the commissioner's sale plaintiff Columbus Littlejohn went to the courthouse to raise the bid, having made arrangements so to do; that on the way he met the defendant and told him he had arranged to raise the bid and the defendant said if plaintiff would not interfere with the sale, he would cancel his deed of trust on the third tract and that plaintiffs would have the land (26.5 acres) free and clear of encumbrance; that relying upon the defendant's promise plaintiff did not raise the bid, and plaintiff continued to cultivate the 26.5-acre tract without being asked for rent, until 1936; that in 1936 plaintiffs learned for the first time that defendant had had his deed of trust foreclosed in December, 1932, had bid the land in and had deed executed to himself, though he did not record his deed until 1936; that the 26.5-acre tract was worth $2,000.

Plaintiffs allege fraud in that the promise to cancel the deed of trust on the 26.5-acre tract was made with the present intention not to perform it, and that defendant fraudulently failed to disclose the fact that said land had already been sold under the deed of trust and bought by defendant.

At the close of plaintiffs' evidence, defendant's motion for judgment of nonsuit was sustained, and plaintiffs appealed.

Oscar J. Mooneyham and M. P. Spears for plaintiffs.

B. T. Jones, Jr., for defendant.

DEVIN, J. Without discussing the evidence further, and without expressing any opinion as to the probative value of the testimony offered, it appears that there was sufficient evidence to be submitted to the jury in support of the allegations in plaintiff's complaint, and that the court below erred in sustaining the motion to nonsuit.

Reversed.

MATTIE SHERLIN, ADMINISTRATRIX OF THE ESTATE OF C. C. SHERLIN, DECEASED, v. SOUTHERN RAILWAY COMPANY AND W. H. McLEAN, ENGINEER.

(Filed 28 September, 1938.)

1. Railroads § 10—Evidence held to show contributory negligence as matter of law on part of pedestrian struck on trestle.

Evidence tending to show that a pedestrian stepped upon a railroad trestle when the train was approaching and undertook to run across the trestle before the train reached him, and further that the trestle was floored and surfaced with chats with a clear space of three or four feet between the end of the crossties and the retaining sill of the trestle on which pedestrians could stand with safety while a train passed, and that the train hit the pedestrian while he was running between the rails on the trestle, *is held* to disclose contributory negligence as a matter of law on the part of the pedestrian.

2. Same: Negligence § 10—Doctrine of last clear chance held inapplicable to evidence in this case.

The evidence tended to show that a pedestrian was struck while running across a railroad trestle in front of a train, which had signaled its approach with its whistle, that the trestle was floored and surfaced with chats for a distance of three or four feet on either side of the ends of the crossties where a person could stand with safety while a train passed. There was no evidence that defendant's engineer knew of any defect in the pedestrian's hearing. *Held:* The engineer had the right to assume up to the last moment that the pedestrian would get off the track and avoid injury, and the doctrine of last clear chance is inapplicable.

APPEAL by plaintiff from *Alley, J.*, at March Term, 1938, of BUNCOMBE.

Civil action for recovery of damages for alleged wrongful death.

The complaint of plaintiff alleges negligence and damages. Defendants deny the material allegations in the complaint and plead, among other things, contributory negligence of the plaintiff's intestate. Plaintiff, in reply filed, denies contributory negligence, and alleges the last clear chance.

On the trial below plaintiff offered evidence tending to show that: On 24 June, 1937, about 7 o'clock p.m., plaintiff's intestate, C. C. Sherlin, 56 years of age, was struck and killed by a freight train, consisting of 15 to 20 cars and pulled by two engines, the property of the

defendant company, and operated by defendant, W. H. McLean, at the Smith Crossing Trestle in Buncombe County, North Carolina, on the Murphy Branch of the Southern Railway system. The train was coming from the west towards Asheville, North Carolina. The trestle is located within the corporate limits of Asheville but in a "remote, rural and undeveloped section," 1,389 feet north of the Johnson Boulevard public crossing and 465 feet south of the County Home public road crossing. The roadbed of the trestle has flooring for its entire length which extends 3.75 feet on each side of the ends of the crossties to a retaining sill, and is filled in with crushed stone or chats between the ties and out to the retaining sill on a level with them from side to side. The trestle has a maximum height of 23 feet and is 213 feet long. The track to the south towards Johnson Boulevard crossing is straight for approximately 670 feet. At that distance it curves. People walk over the trestle both between and on the outside of the rails. When a train is going over the trestle, the cars do not extend to the end of the ties. This leaves a clear space of three or four feet between the end of the ties and the retaining sill within which to walk while the train is passing. There is a path on the ground along the railroad under the trestle.

The intestate was seen to walk up to the end of the trestle, and to look in the direction from which the train was coming. About that time the train blew for the Johnson Boulevard crossing. Intestate then started to run across the trestle, between the rails, at a rate of speed of seven or eight miles per hour. He did not look back. The train continued to blow several times as it came down the railroad toward the trestle and until the intestate was struck, near the north end of the trestle before he had crossed it. Persons who were 850 feet farther away from the train than intestate heard the crossing and other train blows. The train was traveling at the rate of forty to fifty miles per hour and didn't check up until after it hit him. It stopped with cab on the trestle, about forty-four feet from the end of the trestle next to Asheville, and with the engine beyond the County Home Road crossing. There was evidence that the intestate "couldn't hear good." But there is no evidence that defendants knew about it. There is no evidence as to the distance in which a train of this character making the speed stated above could have been stopped, except the evidence as to where the train did stop.

From judgment as of nonsuit at the close of plaintiff's evidence, plaintiff appealed to the Supreme Court, and assigns error.

Paul J. Smith and W. Harold Sams for plaintiff, appellant.
W. T. Joyner and Jones, Ward & Jones for defendant, appellee.

PER CURIAM. Conceding, but not deciding, that there is evidence of negligence on the part of the defendant, all the evidence leads to the

conclusion that the intestate was guilty of contributory negligence as a matter of law under the well settled decisions of this Court. In such case the doctrine of last clear chance does not apply. *Redmon v. R. R.*, 195 N. C., 764, 143 S. E., 829; *Rives v. R. R.*, 203 N. C., 227, 165 S. E., 709; *Rimmer v. R. R.*, 208 N. C., 198, 179 S. E., 753; *Stover v. R. R.*, 208 N. C., 495, 181 S. E., 345; *Reep v. R. R.*, 210 N. C., 285, 186 S. E., 318; *Lemings v. R. R.*, 211 N. C., 499, 191 S. E., 39.

All the evidence shows that the intestate stepped upon the trestle when the train was approaching and undertook to run across before the train reached there, and failed. The evidence shows that the trestle was not of the open type in the reported cases, but it was floored and surfaced with chats. Outside the ends of the crossties there was sufficient space for a person to walk or stand there in safety as the train passed.

But, on this record there is not sufficient evidence to justify the submission of an issue of last clear chance. It appears that the intestate was in the apparent possession of his faculties, and there was nothing to put the engineer on notice of any impairment in his hearing, or that he would not step off the track to an existent place of safety before the train hit him. The engineer had the right to assume up to the last moment that he would get off the track, and protect himself.

The judgment below is

Affirmed.

JULIAN A. WOODCOCK, JR., AND BLANCHE B. WOODCOCK AND JULIAN A. WOODCOCK, JR., TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF JULIAN A. WOODCOCK, DECEASED, v. WACHOVIA BANK & TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF S. JOHNSTON WOODCOCK, DECEASED.

(Filed 12 October, 1938.)

1. Declaratory Judgment Act § 2a: Wills § 39—

When a *bona fide* dispute exists between an executor and the beneficiaries under the residuary clause of the will as to the validity of a charitable bequest therein, action for the determination of the legal effect of the bequest is properly instituted under the Declaratory Judgment Act, ch. 102, Public Laws of 1931.

2. Trusts § 1d—

A charitable trust may be created for almost any purpose that tends to promote the well-being of social man unless forbidden by law of public policy, and the protection of animals is a permissive objective of a charitable trust.

3. Same: Trusts § 8g—

The English statute of charitable uses, 43 Elizabeth, ch. 4, prevailed in this State until superseded by C. S., 4033, and equities raised by chari-

table bequests have been administered by our courts, independent of the statute, in accord with applicable principles of equity.

4. Trusts § 1d: Wills § 33h—Definiteness required in designating beneficiaries and purpose of charitable trust.

Indefiniteness of the beneficiaries is a characteristic of charitable trusts, and designation of the purpose of the trust to benefit members of a class, with power in the trustees to select individuals of that class as specific beneficiaries is sufficient, but the purpose of the trust must be sufficiently definite and complete to be administered.

5. Same—

The doctrine of *cy pres* has no application in this State, and while the courts will seek to effectuate the intent of the donor of a charitable trust if his purpose is expressed with sufficient certainty, they will not undertake to substitute a similar trust for one that fails.

6. Same—Charitable trust which leaves funds in uncontrolled discretion of trustees' donees held void for uncertainty.

Testator bequeathed a certain sum to his executors to be held in trust, and paid out in twenty years "to such corporations or associations of individuals as will in their judgment best promote the cause of preventing cruelty to animals in the vicinity of Asheville." *Held:* Ch. 264, Public Laws of 1925, provides that a bequest for charitable purposes shall not be held void for indefiniteness of the beneficiary or because discretionary power is conferred upon the trustee to select and designate the beneficiary, while in the present case not only is the purpose of the trust indefinite and the beneficiaries unnamed, but the sum is left to the uncontrolled discretion, not of the trustees, but of the beneficiaries to be selected by the trustees, and therefore goes one step beyond the curative provisions of the statute, and the bequest must be held void for uncertainty.

APPEAL by defendant from *Johnston, J.*, at July Term, 1938, of BUNCOMBE. Affirmed.

This was an action by interested parties to construe the fourth paragraph of the will of S. Johnston Woodcock, deceased. From judgment for plaintiffs defendant appealed.

Geo. H. Wright for plaintiffs, appellees.
Parker, Bernard & Parker for defendant, appellant.

DEVIN, J. S. Johnston Woodcock, a resident of Buncombe County, North Carolina, died 31 December, 1927, leaving a last will and testament wherein he named his brothers, Julian A. Woodcock and Rufus J. Woodcock, and the Wachovia Bank & Trust Company as executors. The question presented by the appeal concerns a bequest contained in the fourth paragraph of the will, in these words: "I then give and bequeath to my said executors the sum of $10,000, to be held in trust and paid out and appropriated by them within twenty years after my death, in entirety or in installments, principal and interest, to such corporations or

associations of individuals as will in their judgment best promote the cause of preventing cruelty to animals in the vicinity of Asheville."

It is admitted that distribution of the estate has not been made and that the trust referred to in paragraph four has not been set up or paid out. Both the personal executors, the brothers of the deceased, have died, one in 1936, and the other in 1937, leaving the defendant Bank & Trust Company the sole surviving executor. Those now entitled under the residuary clause of the will of S. Johnston Woodcock claim that the bequest in paragraph four is void and that they are entitled to have the amount of the fund distributed as part of the residue of the estate. The corporate executor, claiming the bequest to be valid, proposes to set aside the $10,000 fund to be paid out as provided in this paragraph of the will.

A case for a declaratory judgment, under the provisions of ch. 102, Public Laws of 1931, is thus made for the construction of paragraph four above quoted, and for the determination of its legal effect. The court below held that the bequest was void for indefiniteness and uncertainty, and that it was one which could not be executed by the corporate defendant.

The question arises, Can the bequest be upheld as a charitable trust? It was said in *Ould v. Washington Hospital,* 95 U. S., 303, that "a charitable use, when neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-being of social man," and it has been uniformly held that a bequest for the protection of animals is classed as a charitable trust. *Minns v. Billings,* 183 Mass., 126; *Shannon v. Eno,* 120 Conn., 77; 66 A. L. R., 465; Bogert on Trusts, 1210; *Barden v. R. R.,* 152 N. C., 318, 67 S. E., 971.

Trusts for charitable uses are of ancient origin. The jurisdiction of courts of chancery in England was grounded upon the common law and the civil law, and upon this was engrafted the English statute of charitable uses, 43 Elizabeth, ch. 4, enacted in 1601. The principles of the English statute, defining and regulating the enforcement of charitable trusts, have been modified by statute in America, and the subject treated as one within the inherent powers of courts of equity. The statute of Elizabeth was in force in this State until superseded by our act concerning charities, now C. S., 4033 (*S. v. Gerard,* 37 N. C., 210), and the equities raised by charitable bequests have been considered by our courts and administered as part of their equitable jurisdiction, independent of the statute, and in accord with applicable principles of equity.

While one of the characteristics of charitable trusts, in addition to the expression of a definite charitable purpose, is the indefiniteness of the beneficiaries, as distinguished from a direct bequest, the instrument creating the trust must not be incomplete and must be capable of execution. With respect to the certainty with which the purposes of the trust

must be pointed out and the beneficiaries designated, there is lack of uniformity in the decisions of the courts, though it is generally held that if the instrument states the purpose of the charity in general terms and designates the beneficiaries who are to partake of the benefits as those of a class, conferring power on the trustee to select the individuals of that class, it will be upheld and enforced. But the purpose must not be so uncertain that it cannot be administered. 10 Am. Jur., 643.

It is needless to attempt to cite decisions from other jurisdictions upon the question of indefiniteness and uncertainty in charitable trusts. Many cases will be found collected and annotated in elaborate notes in 14 L. R. A. (N. S.), 1-155. This Court has considered the subject many times, and it is not always easy to draw the distinction between trusts held void for uncertainty and those sustained and held capable of enforcement. It is well settled, however, that the doctrine of *cy pres* has no application in North Carolina. The courts here will not undertake to substitute a similar charity for one that fails, their only purpose being to effectuate the will of the donor, if sufficiently expressed in the instrument.

In the following instances gifts of property for charitable uses were upheld: For the erection and maintenance of a schoolhouse for indigent scholars (*Griffin v. Graham,* 8 N. C., 96); "to the use of a free public school for the benefit of the poor of Duplin County" (*S. v. McGowen,* 37 N. C., 9); "to the poor of the county," lands to be held "as the wardens of the poor deemed advisable" (*S. v. Gerard,* 37 N. C., 210); to Bishop Atkinson for benefit of "poor orphans" to be selected by him (*Miller v. Atkinson,* 63 N. C., 537); for "poor children" to be designated by the trustee (*Newton Academy v. Bank,* 101 N. C., 483, 8 S. E., 174); for educating "poor mutes" (*School for D. & D. v. Institution for D. & D.,* 117 N. C., 164, 23 S. E., 171); to the Moravian Church for building church and school (*Keith v. Scales,* 124 N. C., 497, 32 S. E., 809); to "conserve, protect and beautify" certain land and "to erect an auditorium thereon" (*Trust Co. v. Ogburn,* 181 N. C., 324, 107 S. E., 238); "for public school purposes" to be cared for by school committee (*Chandler v. Board of Education,* 181 N. C., 444, 107 S. E., 452); land "for a home for the minister" (*Holton v. Elliott,* 193 N. C., 708, 138 S. E., 3), to trustees for education of a girl to be selected by them (*Humphrey v. Board of Trustees,* 203 N. C., 201, 165 S. E., 547).

In *Whitsett v. Clapp,* 200 N. C., 647, 158 S. E., 183, a bequest of a sum derived from certain rents to be paid annually to the trustees of a church for the purpose of keeping up preaching in said church, remainder of rents to trustees of Orange Presbytery for the purpose of keeping up preaching in weak churches, and bequest of income from another fund to be paid trustees of Orange Presbytery to be used for home missionary work, were upheld, the Court saying: "The trustees of Spring-

wood Church and of Orange Presbytery are beneficiaries with capacity to invoke the equitable jurisdiction of the courts, as are also the members of a board or department whose duty it is to raise funds for home mission work and the support of weak churches—churches whose maintenance is dependent upon financial aid. We are therefore of opinion that the trusts created by the will are not void, but are sufficiently definite to be enforced."

In *Miller v. Atkinson, supra,* the Court said: "A charitable trust is not too indefinite, provided the purposes of the trust are indicated with enough certainty to enable courts to see that there may be ways and means to give effect to them."

In *Benevolent Society v. Orrell,* 195 N. C., 405, 142 S. E., 493, and in *Hass v. Hass,* 195 N. C., 734, 143 S. E., 541, it was held the devise vested ownership in the beneficiary, as was also held in case of a deed in *St. James v. Bagley,* 138 N. C., 384, 50 S. E., 841.

In the following instances the gift was declared void as being too indefinite and uncertain to be enforced:

In *Holland v. Peck,* 37 N. C., 255, the bequest of a fund to be paid by executors for the benefit of the Methodist Episcopal Church, to be disposed of by the conference of members composing same as they shall "in their godly wisdom judge most expedient for the increase and prosperity of the Gospel." It was held unenforceable, the Court (opinion by *Gaston, J.*) saying: "The bequest was made to this body (M. E. Church) for carrying into effect an ulterior and higher purpose of the testator, that the money, the subject of this bequest, might be disposed of by the governing ministers of the church to such objects, and in such manner, as they should determine." It was held that this was a bequest upon trust which conferred an uncontrollable power of disposition on the ministers, which could not be carried into execution and was void.

In *White v. University,* 39 N. C., 19, a devise of property to executors "to be sold and proceeds laid out in building convenient places of worship for the use of all Christians" was held void. The Court there said, *Ruffin, C. J.,* speaking for the Court: "Gifts to public and charitable uses will be sustained in equity when not opposed to the express provisions or plain policy of law, provided the object is so specific that the Court can by decree effectuate it . . . by keeping the subject within the control of the Court so as always to have the will of the donor observed."

In *Bridges v. Pleasants,* 39 N. C., 26, a bequest of $1,000 "to be applied to foreign missions and to the poor saints, this to be disposed of and applied as my executor may think the proper objects according to the Scriptures," was held void, the Court saying: "A bequest for religious charity must, like others, be to some definite purpose, and to some

body or association of persons, having a legal existence, and with capacity to take."

In *Thomas v. Clay,* 187 N. C., 778, 122 S. E., 852, a bequest of property in the hands of trustee "to be invested by him in such worthy objects of charity as he shall determine upon as being in accord with what my wishes and tastes in that direction were when living," was held void for uncertainty.

In *Weaver v. Kirby,* 186 N. C., 387, 119 S. E., 564, it was held that the testator's request that his wife should devise the property bequeathed her "to the person or persons who have been kindest to us" was inoperative and void. It was there said, "A trust without a definite beneficiary, who can claim its enforcement, is void." See, also, *Haywood v. Craven,* 4 N. C., 360; *McAuley v. Wilson,* 16 N. C., 276; *Redmond v. Coffin,* 17 N. C., 437.

In *Dry Forces v. Wilkins.* 211 N. C., 560, 191 S. E., 8, it was held that a bequest to "any organization which may be organized for the purpose of enforcing prohibition laws in Gaston County" conferred an uncontrollable power of disposition and did not purport to create a charitable trust but to vest ownership, if there had been anyone capable of taking, citing *Hester v. Hester,* 37 N. C., 330; *St. James v. Bagley,* 138 N. C., 384; and *McLeod v. Jones,* 159 N. C., 74.

The general rule as to certainty in charitable trusts is stated in 10 Am. Jur., at page 654, as follows: "The rule is well settled that the scheme of charity must be sufficiently indicated or a method provided whereby it may be ascertained, and its object must be made sufficiently certain to enable the court to enforce the execution of the trust according to such scheme and for such object. It must be of such tangible nature that the court can deal with it."

The rule for the construction of gifts for charitable uses prescribed by the Act of 1925, ch. 264, has removed some of the objections to the enforcement of charitable trusts on the ground of uncertainty. This statute is in the following words: "No gift, grant, bequest or devise, whether in trust or otherwise, to religious, educational, charitable or benevolent uses or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, shall be invalid by reason of any indefiniteness or uncertainty of the object or beneficiaries of such trust, or because said instrument confers upon the trustee or trustees discretionary powers in the selection and designation of the objects or beneficiaries of such trust or in carrying out the purpose thereof, or by reason of the same in contravening any statute or rule against perpetuities."

From an analysis of the language of this statute, as applicable to the instant case, it is apparent that the rule of construction thus established

is that a devise of property in trust for a charitable purpose shall not be held invalid, (1) for indefiniteness or uncertainty of the beneficiary, (2) or because discretionary power is conferred upon the trustee to select and designate the beneficiary of such trust or in carrying out its purposes. The things affected by the statute are uncertainty of beneficiary, and discretionary power of the trustee to designate the beneficiary or to carry out the purpose of the trust. Here the fund was bequeathed to executors to be held in trust, and paid out within twenty years "to such corporations or associations of individuals as will in their judgment best promote the cause of preventing cruelty to animals in the vicinity of Asheville." It is apparent that the uncertainty and indefiniteness in the bequest extend not only to the beneficiary, that is, "to such corporations or associations" as the executors may select, not only to the discretionary power conferred on the executors to select the beneficiary, but the indefiniteness and uncertainty extend to the ultimate purpose of the trust, to "promote the cause of preventing cruelty to animals." By what means is the promotion of the cause to be effectuated? The executors are required to pay $10,000 to an unnamed nonexistent beneficiary for the indefinite purpose of promoting the cause of preventing cruelty to animals, with no directions to the corporation or association to be selected, or means of assurance that the ultimate recipient will use the fund for the purpose indicated, with no power of control or supervision over its administration. Not only is the purpose of the trust indefinite and uncertain, but the fund is left to the uncontrolled discretion, not of the trustees, but of the trustees' donee, one step further than the curative statute purports to extend. There is here no charitable organization with well-defined purposes and plans for the carrying out of benevolences, such as a church, a board of missions, school committee, or other established institution, capable of administering a trust of an eleemosynary nature.

"It is essential to a valid gift for a charitable use, not only that the gift be for a purpose recognized in law as charitable, but that the instrument creating the gift point out such purpose with reasonable definiteness and certainty." 11 C. J., 327.

Whatever purpose the testator may have had in mind is without guide, plan or scheme. The ten thousand dollar fund is left to the uncontrolled discretion of an unnamed recipient to be designated by the executor for the indefinite purpose of promoting the cause of preventing cruelty to animals.

For these reasons we conclude that the ruling of the learned judge of the Superior Court upon the question presented in the construction of the fourth paragraph of the will must be

Affirmed.

ROSA WHITLEY BELL AND HUSBAND, PAUL V. BELL, AND EULA WHITLEY CULPEPPER, *v.* MRS. MOLLIE WHITLEY THURSTON AND PAUL D. WHITLEY.

(Filed 12 October, 1938.)

1. Wills § 31—

In construing a will, the testator's intent, as gathered from the entire instrument, should be given effect, and every part and clause considered and harmonized, provided the result is not inconsistent with the general intent.

2. Same—When will is not ambiguous, no evidence outside the instrument is competent on the question of intent.

When the language of testator is not ambiguous, no evidence outside the instrument is competent in determining its intent, and the fact that the instrument contains misspelling, improper capitalization and punctuation and grammatical errors does not take it out of the rule when the testator's intent clearly appears therefrom.

3. Same—

When a word is used in one part of the will in a certain sense, the same meaning will be given the word in construing other parts of the instrument.

4. Wills §§ 33a, 38—Clause held to refer to personalty only, and was not residuary clause devising land not specifically devised.

By one item testator devised certain of his lands to his wife for life with remainder in his nieces. By subsequent item he devised to her in fee certain other realty, and then all his personalty followed by the words: "All of this i give to her; with all house hole and ketchen furniture and all stock on the farms and money that i have on hand. All this to Mollie Whitley to do as she please; Everything I one at my death my wife is to take hole of my estate." He then appointed his wife his executrix. *Held:* The clause "Everything I one at my death my wife is to take hole of my estate" is not a residuary clause devising the wife real estate not specifically devised, it being clear that the word "hole" should be construed as "hold," and refers to the wife taking hold of the estate as executrix, since the dispositive words used in other parts of the will were "give" and "devise," and the word "hole" was used and misspelled in the phrase "house hole and ketchen furniture," and testator died intestate as to real estate not specifically devised.

5. Dower § 6—

When a widow fails to dissent from the will of her husband in the manner and within the period allowed by the statute, testamentary provision for her in real property excludes her from dower, nothing else appearing.

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

APPEAL by defendant, Mrs. Mollie Whitley Thurston, from *Bone, J.*, at February Term, 1938, of NASH.

Civil action for determining adverse claims to real estate under C. S., 1743.

The action was heard by consent at February Term, 1938, of Nash Superior Court.

Willie J. R. Whitley died during the month of June, 1922, leaving his widow, Mollie E. Whitley, now the defendant, Mollie Whitley Thurston, and the plaintiffs, Rosa Whitley Bell and Eula Whitley Culpepper, and defendant Paul D. Whitley, children of C. H. Whitley, a deceased brother, as his only heirs at law. At his death the said Willie J. R. Whitley was seized and possessed of two tracts of land: (1) An 86.5-acre tract acquired by him in 1902 in the division of the lands of his father, Henry R. Whitley, deceased; and (2) a 43.8-acre tract acquired by him in the division of the lands of his sister, Mollie Whitley Landing, who acquired same in the division of the lands of their father in 1902. The said Willie J. R. Whitley left a last will and testament, which reads in part as follows:

"THIRD: I give and devise to my wife, Mollie E. Whitley home track of land, her life time and after her death to C. H. Whitley tow girls, Roser and Eula and their heirs.

"FOURTH: I give to my wife 3 lots in Rocky Mount, Edgecombe County and half interest in the land we bout together, to my wife all my personal property. All of this i give to her; with all house hole and ketchen furniture and all stock on the farms and money that i have on hand. All this to Mollie Whitley to do as she please; Everything I one at my death my wife is to take hole of my estate.

"I hereby constitute and appoint my trusty friend wife my lawful executor to all intents and purposes to execute this my last will and testament, according to the true intent and meaning of the same, will."

Pertinent portions of the judgment below are as follows:

"It appears to the court that three questions are raised by the pleadings: (1) Whether the 'Home Track of land' devised in Item Third of the will of Willie J. R. Whitley included the 43.8-acre tract of land above mentioned, (2) whether the phrase 'Everything I one at my death my wife is to take hole of my estate' constituted a residuary clause which would pass undevised realty, and (3) whether the defendant Mollie Whitley Thurston, as widow of Willie J. R. Whitley, would be entitled to dower in the undevised realty, if any; the attorneys for the plaintiffs at the outset stated that in the event the court held that the clause mentioned was not a residuary clause and would not pass undevised realty, and in the further event the court held that the defendant Mollie Whitley Thurston was not entitled to dower in the undevised realty, then in those events plaintiffs would concede the contentions of the defendants that the 43.8-acre tract did not constitute a part of the 'Home Track of land'; thereupon the court, on motion of attorneys for the plaintiffs, heard arguments upon the effect of the clause, 'Everything I one at my death my wife is to take hole of my estate'; no evidence

dehors the will was offered by either plaintiffs or defendants upon this question, but as to other matters the court finds the following facts:

"That Mollie Whitley Thurston has received and accepted real and personal property under the will of Willie J. R. Whitley and has not dissented from said will; that the statutory period for dissenting to said will has expired and no dissent may now be made:

"It is therefore ordered, adjudged, and decreed as follows:

"1. That the last clause in Item Fourth of the will of Willie J. R. Whitley, which reads, 'Everything I one at my death my wife is to take hole of my estate' constitutes a cumulative expression of the property devised and bequeathed by Item Fourth of said will. It is restricted in its operation to the property contained in Item Fourth and does not constitute a residuary clause which would operate upon any property, real or personal, not otherwise devised or bequeathed by the provision of said will.

"2. That the 43.8-acre tract of land in dispute, of which Willie J. R. Whitley died seized and possessed and which he acquired in the special proceeding entitled, 'C. H. Whitley *v.* Willie J. R. Whitley,' recorded in Book of Orders and Decrees No. 15, page 337, *et seq.*, does not constitute a part of the 'Home Track' of land and was not devised by Item Third of the Will of Willie J. R. Whitley, deceased.

"3. That the 43.8-acre tract of land above mentioned constitutes realty of which Willie J. R. Whitley died seized and possessed and not devised by his will.

"4. That the defendant, Mrs. Mollie Whitley Thurston, widow of Willie J. R. Whitley, has failed to dissent from the will of her husband within the statutory period and is not entitled to dower interest in the aforesaid 43.8-acre tract of land as undevised realty.

"5. That the 43.8-acre tract of land as undevised realty of Willie J. R. Whitley, deceased, descends by operation of law to his heirs at law as tenants in common in fee simple as follows: Paul D. Whitley, Eula Whitley Culpepper and Rosa Whitley Bell, and it is hereby adjudged that said parties are seized of said 43-acre tract of land as tenants in common in fee simple and are entitled to the immediate possession of the same, and that the defendant, Mrs. Mollie Whitley Thurston, has no interest or estate in said tract of land."

From judgment as signed, defendant, Mrs. Mollie Whitley Thurston, appealed to the Supreme Court and assigns error.

Adams & Spruill for plaintiffs, appellees.

Wilkinson & King for defendant, appellant.

WINBORNE, J. The determinative questions are: (1) Does the clause "Everything I one at my death my wife is to take hole of my estate" in the Fourth Item of the will of Willie J. R. Whitley constitute a residu-

ary clause which would operate to pass land not specifically devised? (2) Is Mollie Whitley Thurston, widow of Willie J. R. Whitley, entitled to dower in any undevised realty of which her husband died seized?

Each question is answered "No."

(1) "The rule is to construe a will so as to give effect to every part and clause thereof, and to harmonize the several clauses, provided the effect is not inconsistent with the general intent and purpose of the testator, as gathered from the entire will." *Stacy, C. J.*, in *Richardson v. Cheek*, 212 N. C., 510, 193 S. E., 705; *Herring v. Williams*, 153 N. C., 231, 69 S. E., 140; *Goode v. Hearne*, 180 N. C., 475, 105 S. E., 5; *Reid v. Neal*, 182 N. C., 192, 108 S. E., 769; *Haywood v. Rigsbee*, 207 N. C., 684, 178 S. E., 102; *Heyer v. Bulluck*, 210 N. C., 321, 186 S. E., 356; *Barco v. Owens*, 212 N. C., 30, 192 S. E., 862; *Hampton v. West*, 212 N. C., 315, 193 S. E., 290.

There appears no such uncertainty in the meaning of the language used as to permit us to go beyond "the four corners" of the will for aid in arriving at the intention of the testator. Nor does the fact that it appears that some of the words are misspelled and others not properly capitalized, some of the sentences are grammatically incorrect, there is improper punctuation, and the will was not written by one learned in the law, take the case out of the rule that we would ascertain the intention by reference to the language used. *Freeman v. Freeman*, 141 N. C., 97, 53 S. E., 620.

"When it becomes necessary to do so in order to effectuate the testator's intention as ascertained from the context of the will, the court may disregard clerical mistakes in writing, improper use of capital letters, paragraphing, abbreviation of words, punctuation, misspelling, and grammatical inaccuracies, especially where the will is written by an unlearned or illiterate person . . ." 69 C. J., sec. 1143; *Tayloe v. Johnson*, 63 N. C., 381; *Carroll v. Mfg. Co.*, 180 N. C., 366, 104 S. E., 895.

In *Taylor v. Taylor*, 174 N. C., 537, 94 S. E., 7, *Allen, J.*, said: "If words are used in one part of the will in a certain sense, the same meaning is to be given to them when repeated in other parts of the will, unless a contrary intent appears."

Bearing these principles in mind, let us see the provisions of the will: Manifestly, the writer of the will was unlearned. It is clear that the word "one" is the misspelling of the word "own." Disregarding punctuation, the clause "Everything I own at my death," as counsel for appellee aptly state, "appears as the culminating expression of the testator in a series of expressions regarding personal property." These expressions are significant of the testator's intention to give to his wife all personal property which he owned at his death.

It is noted that the word "hole" in "take hole" is previously used and misspelled in the phrase "with all house hole and ketchen furniture

. . ." Giving to it the same meaning, it is patent that the testator intended the clause to read "My wife is to take *hold* of my estate." For there immediately follows the sentence appointing his wife as executrix. As executrix she could take hold of the estate.

It is contended, however, that the clause should read, "My wife is to take *whole* of my estate." In this connection it is appropriate to note that the testator used the verb "I give" in making all specific devises and bequests. We find these expressions: "I give and devise to my wife;" "I give to my wife;" "All of this I give." Having used the words "I give" so often, it is not reasonable to conclude that the testator would have changed to "take whole" if he intended that she should take anything other than that which he had given to her thereinbefore. If the clause should be construed to read "My wife is to take the whole of my estate" an inconsistency is created. In Item Three the testator gives to his wife only a life estate in the home tract, with remainder to Rosa and Eula. If the wife is to take the whole of his estate, repugnancy exists and then the estate given to Rosa and Eula would be wiped out.

In *Williams v. Best,* 195 N. C., 324, 142 S. E., 2, the Court said: "If possible, apparent repugnancies must be reconciled, for, as suggested in *Dalton v. Scales,* 37 N. C., 521, it is not to be admitted, unless the conclusion is irresistible, that the testator had two inconsistent intents." *Richardson v. Cheek, supra.*

2. Unless the widow dissents from the will of her husband in the manner and within the period allowed by statute, C. S., 4096, *et seq.,* and thereby elects to take according to her legal rights, testamentary provision for her in real property excludes her from dower, nothing else appearing. *Brown v. Brown,* 27 N. C., 136.

The judgment below is

Affirmed.

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

MARYLAND CASUALTY COMPANY, A CORPORATION, v. E. C. LELAND, R. L. JOHNSON, H. E. PACE AND D. W. PACE, COMPRISING THE BOARD OF COMMISSIONERS OF THE CITY OF SALUDA, ET AL.

(Filed 12 October, 1938.)

1. Mandamus § 2c: Municipal Corporations § 45b—Ordinarily, mandamus will lie to compel municipality to levy taxes to pay valid judgment.

Mandamus to compel the levying of a tax sufficient to pay a debt arising *ex contractu* is the appropriate remedy to collect the debt from the

municipality, with the further requirement, imposed by statute (C. S., 867, as amended by ch. 349, Public Laws of 1933), that the claim must have been reduced to judgment, but the writ will not lie when it would result in the imposition of a tax in excess of constitutional or statutory limitations, or in diverting funds from necessary governmental functions.

2. Mandamus § 1—

The issuance of a writ of *mandamus* is no longer discretionary with the courts, but ordinarily must issue the writ when it is sought to enforce a clear legal right to which it is appropriate.

3. Mandamus § 2c: Municipal Corporations § 45b—When municipality has power to levy tax in excess of governmental needs, mandamus will lie to compel levy of tax to pay judgment on tax anticipation notes.

Plaintiff owned tax anticipation notes issued by defendant municipality, reduced same to judgment, and sought by this action *mandamus* to compel the municipality to levy a tax sufficient to pay the judgment. Defendant municipality contended that the levying of a higher tax would result only in foreclosure, that its current revenue was required for necessary governmental functions, and that the granting of the writ would work unjust preference in plaintiff's favor over other holders of the municipality's obligations. *Held:* Plaintiff is entitled to the writ, since it does not appear that the issuance of the writ would result in the immediate exhaustion of revenues available for governmental functions, mere speculation that this result might occur being insufficient, and since it does not appear that the commissioners have exhausted their authority to levy taxes in excess of governmental needs, and since any preference which plaintiff might obtain would result from his more diligent resort to a remedy open to all creditors alike.

APPEAL by plaintiff from *Pless, J.*, at August Term, 1938, of POLK. Reversed.

The plaintiff had reduced to judgment certain tax anticipation notes made by the town of Saluda, and brought this proceeding for a writ of *mandamus* to compel the defendants, commissioners of the town, to levy a sufficient tax to pay the judgment.

The complaint alleges that for a period of more than five years the defendants failed and refused to levy any tax to take care of the notes and interest, paying thereon during said time only the sum of $89.85 in August, 1936; that the notes were anticipation notes which the town was authorized to issue against expected collection of taxes for the year in which they were issued, and that plaintiff had secured judgment thereon; that the town had as resources available to pay the judgments: (a) taxes for the year 1936 and prior years uncollected and pledged, $25,000; (b) cash on hand, $1,000; (c) actual value of all property belonging to the city, other than above enumerated, sought to be subjected to additional taxation, $600,000. The complaint further sets out that a large part of the taxes pledged to discharge plaintiff's notes had

been collected by defendants and applied to other purposes and diverted to the payment of junior claims; and that defendants have refused to perform their legal duty in the levy of tax sufficient to pay plaintiff's lawful demands.

The defendants admit the validity of plaintiff's judgment and that the commissioners have failed for five years to levy a tax to liquidate the debt. They deny that the financial condition of the town is as stated in the complaint, alleging that the assessed valuation of property in the city for the year 1936 was $525,202, and for the year 1936 approximately $500,000.

As a further defense, defendants allege that the population of Saluda is only 524, and that the income of the inhabitants has been much reduced by reason of the depression; that many summer houses have been abandoned without payment of taxes, and that it has been impossible to collect taxes; that in view of the large outstanding bonded indebtedness of the town, it would be "unfair, unjust, and inequitable" for the writ of *mandamus* to issue, and defendants "invoke the equitable aid of the court" in requiring that creditors be treated alike.

Parts of the answer not considered pertinent to this opinion are omitted.

By agreement, the case was submitted to the judge without jury, and findings of fact were made.

As to the financial condition of the town, the court finds that it owes $332,470 principal, and that the total value of property in the town subject to taxation for the year 1937 was $436,000—making the debt 76% of the total property valuation; that the city tax rate is $1.60 on the $100.00 valuation, and the county rate $2.35, making a total of $3.95 per $100.00.

It is found that upon a rate of $1.60 per $100.00, the city collects $7,000 a year, and that the operating expenses are $7,500 a year. It is found that the population is 558; that the citizens are unable to pay any higher rate; that the imposition of further taxes will result in foreclosure; that uncollected taxes amount to $25,000 or $30,000, and that only $5,000 or $6,000 may be ultimately realized from this source.

The judgment concludes:

"Upon the foregoing findings of fact, the court concludes as a matter of law that the remedy sought by the plaintiff does not lie, for that the issuance of a writ of *mandamus* would result in the assured foreclosure of the property of the citizens of Saluda for the purpose of requiring the payment of its bonded indebtedness in preference to the right of the city to function as a municipality and to supply to its citizens necessary services usually rendered."

Redden & Redden for plaintiff, appellant.

Massenburg, McCown & Arledge and Hamrick & Hamrick for defendants, appellees.

SEAWELL, J. From early times in this State, and generally elsewhere, *mandamus* has been recognized as a proper proceeding to compel a levy of tax to pay a judgment against a municipality. *Gooch v. Gregory,* 65 N. C., 142; *Lutterloh v. Comrs.,* 65 N. C., 403; *Allen v. Drainage Comrs.,* 175 N. C., 190, 95 S. E., 170.

In fact, it is often the only remedy, since the property of a municipality necessary to carry on government is not subject to execution. *Hardware Co. v. Schools,* 151 N. C., 507, 66 S. E., 583; *Brockenbrough v. Comrs.,* 134 N. C., 1, 46 S. E., 28; *Weber v. Lee County,* 73 U. S., 210, 18 L. Ed., 781. Formerly, the writ was available to compel the levy of taxes to pay the principal and interest on bonds and liabilities arising *ex contractu,* which had not been reduced to judgment. *Pegram v. Comrs.,* 64 N. C., 557; *Leach v. Comrs.,* 84 N. C., 829; *Comrs. v. MacDonald,* 148 N. C., 125, 61 S. E., 643; *Spitzer v. Comrs.,* 188 N. C., 30, 123 S. E., 636. Chapter 349, Public Laws of 1933, amended C. S., 867, relating to *mandamus* proceedings to enforce a money demand, by providing, among other things, that the petitioner must show that the claim has been reduced to judgment. Michie's Code, 1935, section 867. With this distinction, the principles involved in all the cited cases are the same, and they are pertinent to this discussion.

Settled authority and precedent in the use of *mandamus* to enforce a money demand so limit the jurisdiction and discretion of the court as to preclude a favorable consideration of many of the matters urged upon us as equitable defenses in the case at bar, and which seem to have had an influence in the decision of this case in the trial court.

Such proceedings are not proceedings in equity. *Walkley v. Muscatine,* 6 Wall. (U. S.), 481; *Thompson v. Allen County,* 115 U. S., 550. Under our own practice, *mandamus* is put to statutory uses, and both by custom and authority has been deprived of much of its common law character. The writ is no longer, as at common law, a high prerogative writ; *Belmont v. Reilly,* 71 N. C., 260; *Burton v. Furman,* 115 N. C., 166, 168, 20 S. E., 443; and the court has no discretion to refuse it when it is sought to enforce a clear legal right to which it is appropriate. *Hammond v. Charlotte,* 206 N. C., 605, 175 S. E., 148; *Hickory v. Catawba County,* 206 N. C., 165, 173 S. E., 56; *Braddy v. Winston-Salem,* 201 N. C., 301, 159 S. E., 310; *Cody v. Barrett,* 200 N. C., 43, 156 S. E., 146; *Hayes v. Benton,* 193 N. C., 379, 137 S. E., 169; *Person v. Watts,* 184 N. C., 499, 115 S. E., 336. *Mandamus* is as much an instrument of enforcement at law as it is an aid in equity, and, as sought here, may be considered the equivalent of execution. *Bear v. Comrs.,*

124 N. C., 204, 210, 32 S. E., 558; *United States v. Oswego,* 28 Fed., 55; *Chicago v. Hasley,* 25 Ill., 595.

Inhibitions against its use will be found to arise more out of the nature of the subjects to which it is applied, and the powers and functions of officers upon which it is intended to operate, rather than anything inherent in the writ. Of course, it will not issue to require a levy of taxes beyond the constitutional or statutory limitations, where such limitations exist; and even within these limits it may be accepted as established law that private right must be subordinated to public necessity in the sense that needs of government, economically administered, have a prior demand on the proceeds of taxation. *Cromartie v. Comrs. of Bladen,* 85 N. C., 211. So the writ will not be issued when the effect will be to divert the funds from necessary governmental uses to the satisfaction of a private claim. But such diversion must appear as the immediate consequence of exhaustion of revenues available for governmental purposes and of the power to tax. The Court cannot consider speculative consequences, to be brought about by an increased burden of taxation, the difficulty of collecting the taxes and consequent foreclosure, and the diminution of tax revenues from similar causes which eventually might come about and defeat government. Where there is a margin between the needs of government, as above defined, and the limit of authority to levy the tax, there seems to be no question that the writ must issue. *Cromartie v. Comrs. of Bladen, supra.*

We have no definite classification as to the kind of service a municipality may furnish its citizens to the postponement or defeat of its obligations to creditors. In *Cromartie v. Comrs. of Bladen, supra,* there is more than a suggestion that such classification may not be made arbitrarily, at the pleasure of the commissioners or governing body of the municipality, and in the exercise of an unreviewable discretion. But it is not necessary to decide that matter at this time, however interesting it may be in its relation to the facts in the record.

In passing on plaintiff's right to the writ of *mandamus,* the Court must be guided by the principles above enunciated, and not by general rules which it might call to its aid in a distinctly equitable proceeding.

It follows that mere amelioration of the burden of taxation is not a proper consideration. The unfortunate condition of the town in that respect might possibly have been foreseen and prevented, since it is difficult to see how a town of 558 inhabitants could incur a bonded debt of $330,000 without the sanction of its citizens at the polls.

Nor have we any discretion to refuse the writ on the ground that it might work a preference of plaintiff's claim over those of other creditors. Whatever preference may ensue upon the issuance of the writ began when plaintiff brought suit on its claim, and may be referred to its more diligent resort to a remedy open to all creditors alike.

It does not affirmatively appear in the record or in the findings of fact that in providing for the needs of government the commissioners of the town have reached the limit of their authority to levy taxes, and we think there was error in refusing the writ.

The judgment is

Reversed.

R. C. FREEMAN AND C. A. McNEIL v. CHAS. C. MORRISON.

(Filed 12 October, 1938.)

1. Vendor and Purchaser § 39—

A purchaser takes title subject to a lease recorded prior to the registration of his deed. In this case the lease was recorded ten minutes prior to the registration of the deed.

2. Deeds § 3: Acknowledgment—

Certificates of acknowledgment will be liberally construed and will be upheld if in substantial compliance with the statute. Michie's Code, 3323.

3. Same—

The word "acknowledgment," as used with respect to the execution of instruments, describes the act of personal appearance before a proper officer and there stating to him the fact of the execution of the instrument as a voluntary act.

4. Same—

An acknowledgment taken by a notary public is presumed to be regular, and when the clerk certifies the instrument for registration his certificate implies that every requirement of law has been met, unless the instrument or the certificates themselves disclose a material omission.

5. Same—Acknowledgment in this case held sufficient to sustain probate and registration.

The lease involved in this case had subscribed the following notary's certificate: "Acknowledged to before me, this June 4th, 1936. Mary L. Mathis, N. P. My commission expires June 25—36." *Held:* The following facts required by the statute, N. C. Code, 3323, to be shown by acknowledgments, appear from the acknowledgment or by direct reference to the instrument acknowledged: (1) Name and title of the official taking the acknowledgment; (2) name of the grantor; (3) personal appearance of the grantor before the officer; (4) acknowledgment of grantor to the officer of the execution of the instrument; (5) date; and (6) signature of the officer and the seal required for the instrument; the fact of personal appearance of the lessor being assumed from the meaning of the word "acknowledged" used in the notary's certificate, and from the presumption of regularity of acts of public officers, and the acknowledgment is in substantial compliance with the statute and supports probate and registration.

APPEAL by plaintiffs from *Clement, J.*, and a jury, at July Term, 1938, of SURRY. No error.

This is an action brought by plaintiffs to recover of the defendant a certain piece of land, 75 feet by 75 feet, on which is located a filling station, in the town of Elkin, Surry County, N. C., and rent for the premises."

The plaintiffs claim under deed dated 23 March, 1937, from W. S. Gough (widower). The deed was filed for registration on 24 March, 1937, at 10:40 o'clock a.m., and duly registered in Book 129 of Deeds, on page 178, etc.

The defendant claims under a lease from W. S. Gough of the *locus in quo* for a period of five years to start 17 June, 1935, and terminating 16 June, 1940. This lease was filed for registry at 10:30 a.m., 24 March, 1937, in the office of the register of deeds and duly recorded. The lease stipulated that the rental should be 1c a gallon on gasoline sold.

The defendant introduced (1) a check payable to the order of McNeil & Freeman for $18.92—"Rent for 4th month." (2) A sales slip "Received for rent $14.98."

The plaintiffs offered the following testimony in rebuttal: "Plaintiffs offered in evidence the original instrument, dated 1 June, 1935, signed by W. S. Gough, C. C. Morrison and Leslie Morrison, which is offered for the purpose of attack only. This instrument was admitted and marked Plaintiffs' Exhibit B, a photostatic copy of which is attached to this case on appeal."

The court below charged the jury as follows: "Gentlemen of the jury: There is only one issue submitted to you in this case, 'Are the plaintiffs entitled to the possession of the lands described in the affidavit in this cause?' If you find the evidence to be true as testified to by the witnesses, and as shown by the record evidence, the court instructs you to answer the issue 'No,' and with your permission I will answer it for you."

The issue submitted to the jury and their answer thereto is as follows: "Are the plaintiffs entitled to possession of the lands described in the affidavit in this cause? Answer: 'No.'"

The court rendered judgment on the verdict. The plaintiffs made the following exceptions and assignments of error and appealed to the Supreme Court.

"1. The court erred in admitting the evidence, over the objection of the plaintiffs, page 9 of Book 130, in the office of register of deeds of Surry County, and allowing the instrument appearing thereon to be read to the jury.

"2. The court erred in refusing to strike out the record, on page 9 of Book 130.

"3. The court erred in instructing the jury as follows: 'If you find the evidence to be true as testified to by the witness, and as shown by the

record evidence, the court instructs you to answer that issue "No," and with your permission, I will answer it for you.' "

Folger & Folger for plaintiffs.
Earl C. James for defendant.

CLARKSON, J. The lease herein involved was recorded ten minutes prior to the deed of plaintiffs. Accordingly, if the acknowledgment, probate and registration of defendant's lease was regular, it takes precedence. N. C. Code, 1935 (Michie), secs. 3308, 3311. *Knowles v. Wallace,* 210 N. C., 603 (606). However, plaintiffs contend that the acknowledgment of the lessors' execution of the lease was in form insufficient to predicate a valid probate and registration of the lease.

Immediately following the signature and seals of the lessors at the end of the lease, there appeared the following:

"Witness:
Clay L. Church.
(Seal.)
"Acknowledged to before me, this June 4th, 1936.
Mary L. Mathis, N. P.
"My commission expires June 25—36."

Upon this acknowledgment the order of probate and the registration were made. Was this acknowledgment sufficient? The answer is "Yes."

As early as *Horton v. Hagler,* 8 N. C., 48, it was held that when the clerk of a court of record certifies that an instrument has been "duly proved," it is implied that everything required by law has been complied with, upon the maxim, *res judicate pro veritate accipitur.* But when the record also states how it was to be proved and admits a material circumstance required by law the certificate of due proof is disregarded because the certificate itself shows that it was not duly proved. See *Starke v. Etheridge,* 71 N. C., 240, 246; *McClure v. Crow,* 196 N. C., 657, 660. In the instant case, section 3323, N. C. Code, 1935 (Michie), is pertinent; there a model form of acknowledgment is given as follows:

"North Carolina, ...County.

"I (here give name of the official and his official title), do hereby certify that (here give the name of the grantor or maker), personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and (where an official seal is required by law) official seal, this the.....day of..... (year).

"(Official Seal.) .....
Signature of Officer."

This section requires that "the form of acknowledgment shall be in substance" that of the statutory model. The precise question here is whether the acknowledgment of the lease is a substantial compliance with the requirements of the statute; this question is here answered in the affirmative.

Upon analysis of the statute it is apparent that the following facts should appear in the certificate, either by incorporation or direct reference to the instrument acknowledged: (1) Name and title of the official taking the acknowledgment; (2) name of grantor; (3) personal appearance of the grantor before the officer; (4) acknowledgment of grantor to the officer of the execution of the instrument; (5) date; and (6) signature of the officer, and, if required by law otherwise, his seal. An examination of the lease and acknowledgment in the instant case, when taken together, clearly reveals each of these facts, with the possible exception of the fact of the personal appearance of the lessor before the notary. As to this item, it does not affirmatively appear that the lessor did not come before the notary; the contrary is clearly implied in the statement that he "acknowledged" the lease before the notary. The factual possibility of this assumption is strengthened by the realization that the word "acknowledge," as used with respect to the execution of instruments, is a "short-hand" expression descriptive of the act of personal appearance before a proper officer and there stating to him the fact of the execution of the instrument as a voluntary act. In both *Starke v. Etheridge,* 71 N. C., 240, and *Moore v. Quickle,* 159 N. C., 129, the single word "jurat" was interpreted to mean "proved," within the requirements of our law, and in *Finance Co. v. Cotton Mills,* 182 N. C., 408, "subscribed and sworn to" was treated as the equivalent of "acknowledged." Such a liberal interpretation of the meaning of the word "acknowledge" is here adopted in this case. The presumption of regularity attaching to the act of every public officer also supports this view. In *Power Corp. v. Power Co.,* 168 N. C., 219, 221, it was stated: "In *Quinnerly v. Quinnerly,* 114 N. C., 147, it is said: 'There was no evidence to show that the probate here was insufficient. The presumption is that it was properly taken.'" This presumption of regularity attaches generally to judicial acts, and, as pointed out in *McClure v. Crow,* 196 N. C., 657, at pp. 659-660, "Taking the acknowledgment of proof of a deed or admitting it to probate is a judicial or *quasi*-judicial act." To the same effect, see *Best v. Utley,* 189 N. C., 356, 362.

The conclusion here adopted is in agreement with the authorities generally. "Probably in all jurisdictions the courts strongly advocate a liberal interpretation of the statutes, in order that acknowledgments may be upheld whenever there has been a substantial compliance with the law and no suspicion of fraud or unfairness attaches to the transaction. . . . Acknowledgments also are aided by the presumption that public

officers do their duty, and in further support of the officer's certificate resort may be had to the instrument acknowledged." 1 Am. Jur., "Acknowledgments," sec. 169, at p. 388. "The courts uniformly give to certificates of acknowledgment a liberal construction, in order to sustain them if the substance be found, and the statute has been substantially observed and followed. It is accordingly a rule of universal application that a literal compliance with the statute is not to be required of a certificate of acknowledgment, and that, if it substantially conforms to the statutory provisions as to the material facts to be embodied therein, it is sufficient." 1 C. J., "Acknowledgment," sec. 183, p. 841. See, also, secs. 183, 184, pp. 842-843. "The certificate, as regards its form and contents must substantially meet the requirements of the statute. . . . The form is sometimes given in the statute, but usually such form is only a suggestion of what is sufficient, and not strictly obligatory." 4 Thompson, Real Property, sec. 3774, p. 846. "The policy of the law favors registration and will not suffer its purpose and effect to be defeated on account of immaterial omissions, patent mistakes, and inartificial expressions in the certificate. As a rule, the courts have given a liberal construction to the ordinary certificate of acknowledgment, and have permitted the omission of entire phrases of a formal character, although contained in the specific form prescribed by the statute." Webb, Record of Title, 2nd Ed., 79, p. 136. "It is not necessary that the exact language of the statutory requirements be followed, provided the necessary facts are expressed in words of substantially equivalent import. In fact, it is the policy of the law to construe certificates of acknowledgment liberally, and not allow them to be defeated by technical or unsubstantial objections, provided they are sufficient to serve the purpose for which used, and are in fairly substantial conformity with the requirements of statute." Patton, Land Titles, sec. 204, pp. 689-690.

We hold that the acknowledgment in the lease herein considered, although technically inexact and informally stated, to be in substantial conformity to the requirement of our statute.

We find in the record

No error.

JAMES W. JENKINS v. CITY OF HENDERSON, D. C. LOUGHLIN, T. W. ELLIS AND F. B. HIGHT.

(Filed 12 October, 1938.)

1. Municipal Corporations § 11d: Principal and Agent § 8b—Ordinarily, an agent is not liable on a contract signed for the principal, even though the contract is ultra vires the principal.

The individual defendants, acting as a committee for the municipal defendant, executed a contract for the municipality by which it agreed to

assume certain liabilities because of damages which the parties contemplated would result to plaintiff's property by reason of the changing of the grade of a street in front of the property. *Held:* The individual defendants having acted in the scope of their authority and having executed the contract for the municipality as its agents, and having been dealt with by plaintiff solely as representatives of their principal, the contract was the contract of the principal, and the individual defendants may not be held personally liable thereon, even though the contract was *ultra vires* the municipality, since there is no implied warranty on the part of an agent that his principal has authority to execute the contract, and there being no evidence that the individuals represented that their principal had authority to do so.

2. Municipal Corporations § 12—

The repairing and grading of its streets is a governmental function of a municipality, and it is not liable in damages resulting to property by reason of a change in grade of the street in front of the property.

3. Same: Municipal Corporations § 19b—Municipality may not contract to assume liability for damages resulting from change in street grade.

Since a city is not liable for damages resulting to property by reason of a change in grade of the street upon which the property abuts, such damages cannot constitute a valid consideration for a contract by the city to regrade the private property, and pay for and pour cement thereon in making changes made necessary by the change in grade of the street, and such contract is *ultra vires* the city, since it may not assume a liability where none exists, there being no contention that the city took any part of plaintiff's property or imposed additional burdens thereon.

4. Municipal Corporations § 19c—

The fact that the other party has expended money in reliance on a contract of a municipality cannot estop the city from pleading that the contract was *ultra vires*, and there can be no ratification of the contract except by the Legislature.

APPEAL by plaintiff from *Parker, J.*, at March Term, 1938, of VANCE. Affirmed.

This is a civil action to recover damages for breach of contract. The facts in relation thereto are as follows: In 1936 the State Highway and Public Works Commission, with the aid of Federal funds, began the construction of an underpass under the S. A. L. Railway tracks in the city of Henderson, at the Charles Street intersection. This necessitated the grading of Williams Street, on which plaintiff's property abuts. The plaintiff, being apprehensive that the grade was to be materially lowered at the location of his property, on which he maintained and operated a filling station, thereby materially affecting the use and occupation of his property, called upon the city officials in respect thereto. At that time it was understood that the grade would be lowered about 18 inches and the plaintiff was so advised. Plaintiff thereupon made complaint and claimed damages. The board of aldermen appointed a committee composed of the individual defendants, who were authorized

and empowered to represent the city of Henderson in all matters pertaining to and affecting the property of the plaintiff or the street in front of his filling station. After several conferences and after viewing and inspecting the property the said committee agreed that the plaintiff would sustain certain damages for which the city of Henderson would be properly liable. The committee thereupon entered into a contract with the plaintiff as follows:

"State of North Carolina—County of Vance.

"*Know all men by these presents:*

"That the city of Henderson, through its duly authorized committee, for value received, agrees with Col. James W. Jenkins as follows:

"(a) At its own expense and cost, to grade that lot rented by him from Clarence Kerner, *et al.*, to the new street level; upon which lot is located the Serve-All Service Station, and upon which will be located a new service station;

"(b) At its own cost and expense, to remove all concrete;

"(c) At its own cost and expense, to relay certain concrete that is torn up, together with such additional concrete as may be required to complete the new service station as per plans of Gulf Oil Corporation—#C-1179;

"(d) To repay Colonel James W. Jenkins the money advanced by him for cement, which the city will purchase, but for which he is advancing the money;

"(e) The said Colonel James W. Jenkins agrees with the city to furnish, at his own cost, all forms for pouring the concrete—further, the cement which is to be purchased will be stored by him in the garage of the Serve-All Service Station.

"It is well understood that the concrete to be laid is to be of the same mixture and the same depth as the present old concrete.

"It is further understood that the city of Henderson will pour this concrete and do the work in question when called upon by the said Col. James W. Jenkins or his contractor.

"In order that there may be no misunderstanding, the amount of yardage of concrete to be laid is well known to the Street Supervisor, W. M. Coffin, and to the said Col. James W. Jenkins, which amount is estimated at 980 yards.

"To the faithful performance of this understanding, we, as a committee, set our names this the 15th day of March, 1937.

"(Signed) D. C. LOUGHLIN,
" F. B. HIGHT,
" T. W. ELLIS."

This contract was reported to the board of aldermen of the city of Henderson and was approved and ratified by it as recorded in its min-

utes. The plaintiff then proceeded to lease additional land, to demolish the building formerly used as a service station and to make contracts for the purchase of materials for the erection of a new building. The corporate defendant did some grading and poured some concrete on plaintiff's property. It then ceased its work and refused to further comply with the terms of the contract. After notice to the city and after its failure to comply the plaintiff proceeded to do the work stipulated in the contract at a cost of $1,587.60. Plaintiff then demanded of the city the payment of the amount so expended, which payment the defendant declined to make. The plaintiff now seeks to recover said sum as representing the damages sustained by him by reason of the breach of said contract. It is now admitted that the grade of said street was not lowered more than four or five inches.

At the conclusion of plaintiff's evidence, on motion of the defendants, judgment of nonsuit was duly entered. Plaintiff excepted and appealed.

Perry & Kittrell for plaintiff, appellant.

A. A. Bunn, Jasper B. Hicks, and J. H. Bridgers for defendants, appellees.

BARNHILL, J. If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone, unless credit has been given expressly and exclusively to the agent, and it appears that it was clearly his intention to assume the obligation as a personal liability and that he has been informed that credit has been extended to him alone. 2 Amer. Jur., page 247, and numerous authorities cited in note. *Way v. Ramsey,* 192 N. C., 549, 135 S. E., 454.

The presumption is that where one known to be an agent deals or contracts within the scope of his authority, credit is extended to the principal alone and the act or contract is his engagement as if he were personally present and acting or contracting. 2 Amer. Jur., page 247. There is no implied warranty by an agent that his principal has authority to make a contract signed by the agent; and the agent, acting within the scope of his authority, is not answerable upon such a contract where his principal is not bound by it merely because he had no authority to enter into the particular contract. *Ellis v. Stone,* L. R. A., 1916 F, 1228. Upon like principle, the American Law Institute has advanced the general rule that an agent making a contract for a disclosed principal whose contracts are voidable because of lack of full capacity to contract, or for a principal who, although having capacity to contract generally, is incompetent to enter into the particular transaction, is not thereby liable to the other party by reason of the failure of the principal to perform, unless he contracts or represents that the principal has capacity

or unless he has reason to know of the principal's lack of capacity and of the other party's ignorance thereof. 2 Amer. Jur., 249; Restatement, Agency, sec. 332.

The plaintiff dealt with the individual defendants as a committee representing the corporate defendant. The committee acted within the scope of the authority vested in them by the board of aldermen and no credit was extended to them as individuals. Furthermore, the contract purports to impose liability only on the city of Henderson. In no event, on the facts appearing on this record, is the plaintiff entitled to recover of the individual defendants. The judgment dismissing the action as to them is sustained.

In repairing and grading its streets a city acts in a governmental capacity and is not liable for resulting damages to abutting property. This question was first considered by this Court in 1848 and exhaustively discussed by *Judge Pearson,* who reached the conclusion that where a municipal corporation has authority to grade its streets it is not liable for consequential damages unless the work was done in an unskillful and incautious manner. *Meares v. Wilmington,* 31 N. C., 73. This case has been approved and consistently followed in many adjudications of this Court since that date. *Dorsey v. Henderson,* 148 N. C., 423, and cases there cited. *Calhoun v. Highway Commission,* 208 N. C., 424. In *Thomason v. R. R.,* 142 N. C., 307, it is stated that this is "the settled doctrine of the State." It is almost universally so held by the state courts in this country, as well as the courts of the United States and of England. 2 Dillon on Municipal Corp., sec. 1040; Pollock on Torts (7th Ed.), 128; 10 Am. and Eng. Enc. of Law (2nd Ed.), 1124 FF. *Transport Co. v. Chicago,* 99 U. S., 635; *Smith v. Washington,* 20 Howard, 135; Cooley on Const. Lim., 542, and notes; *Manufacturers v. Meredith,* 4 Durn. and East Term, 794-796; *Sutton v. Clark,* 6 Taun., 28; *Bolton v. Crowther,* 2 Barn. and Cres., 703.

If a contract is *ultra vires* it is wholly void and (1) no recovery can be had against the municipality; (2) there can be no ratification except by the Legislature; (3) the municipality cannot be estopped to deny the validity of the contract. 3 McQuillin, Municipal Corporations, 2nd Ed., page 817. "A contract of a corporation which is *ultra vires,* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore, beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of

action upon it." *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S., 24, 35 L. Ed., 55; *Realty Co. v. Charlotte*, 198 N. C., 564.

A city is not estopped from pleading *ultra vires* in defense of an action on contract by the fact that the other party to the contract expended money to perform his part of the agreement. *Mealy v. Hagerstown*, 92 Md., 741, 48 Atl., 746. The fact that the other party to the contract has fully performed his part of the contract, or has expended money on the faith thereof, will not preclude the city from pleading *ultra vires*. *Dawson v. Dawson Waterworks*, 106 Ga., 696, 32 S. E., 907; *Mealy v. Hagerstown, supra*. No subsequent action on the part of the municipal corporation will prevent it from denying the validity of such contract. *State ex rel. v. Murphy*, 134 Mo., 548, 56 Am. State Reports, 515, 34 L. R. A., 369; *Realty Co. v. Charlotte, supra*.

There is no allegation in the complaint that in grading Williams Street the city took any part of plaintiff's property or imposed any additional burden thereon. It clearly appears that the consideration for the contract was the apprehended damages resulting from the lowering of the grade of said street where the plaintiff's property abutted thereon.

Conceding that if the city took the property of the plaintiff it could pay just compensation therefor in money or by the services contemplated by the contract, this would not avail the plaintiff here. Such damages as the plaintiff sustained, and such as were within the contemplation of the parties at the time the contract was made, resulted from the lowering of the grade of Williams Street. This constitutes no valid consideration for the contract and the city authorities were without lawful authority to make the contract sued upon or to expend public funds therefor. A municipal corporation cannot assume a liability where none exists and the defendant's act in entering into the contract sued upon was *ultra vires*. The corporate defendant is not liable for any damages resulting from the breach thereof. It follows that the city of Henderson likewise was entitled to a judgment of dismissal on its motion to nonsuit.

Affirmed.

STATE v. CLAUDE BOWSER, JR.

(Filed 12 October, 1938.)

1. Homicide § 3—

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation.

2. 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.

3. Same—

Premeditation and deliberation are not presumed from an intentional killing with a deadly weapon, but must be established beyond a reasonable doubt.

4. Homicide § 4c—

Premeditation means thought beforehand for some length of time, however short.

5. Same—

Deliberation implies an intention to kill executed by defendant in a cool state of blood in furtherance of a fixed design.

6. Homicide §§ 20, 21—

Evidence of threats made by defendant are competent upon the question of malice, and upon the question of premeditation and deliberation.

7. Same—Testimony of threats held competent, the threats having been given sufficient individuation.

While threats must be directed against the victim with sufficient certainty, testimony of general threats is competent when the other evidence gives individuation to the threats, and testimony that defendant threatened to "kill a girl" *is held* competent when taken in connection with evidence that defendant had been going with deceased and killed her within two and a half hours after making the threat, with further evidence tending to show specific threats against her.

8. Homicide § 21—

The conduct of defendant before and after, as well as at the time of, the homicide, and the manner of the killing are competent on the question of premeditation and deliberation.

9. Homicide § 25—Evidence held sufficient to be submitted to the jury on question of defendant's guilt of first degree murder.

Evidence that defendant made threats against deceased shortly before the homicide, that after he had killed his victim he was cool and collected and stated he had committed the act, and thereafter told officers he had killed her because he loved her, together with evidence of the peculiarly atrocious manner in which he cut her throat and killed her, *is held* sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree.

10. Homicide § 27b—

Where the court defines murder in the first degree and murder in the second degree and correctly places the burden of proof on the State, and defines reasonable doubt, failure to charge on the presumption of innocence will not be held for error.

11. Criminal Law §§ 5a, 5d, 53e—Instruction on defense of insanity held without error.

The defense of insanity is an affirmative defense which admits defendant's commission of the act but denies criminal responsibility therefor, and therefore in a homicide prosecution in which defendant pleads insanity, an instruction that if the jury should find that at the time defend-

ant killed deceased, he was incapable of having a criminal intent, etc., will not be held for error as an expression of opinion by the court as to whether the evidence sufficiently showed defendant killed deceased.

12. Criminal Law § 53g—

Objection to instructions on the ground of a misstatement of the evidence in stating a contention of the State will not be sustained when the matter is not called to the court's attention at the time.

APPEAL by defendant from *Burgwyn, J.*, at April Term, 1938, of HALIFAX.

Criminal indictment for the murder of one Lizzie Bowser.

The State introduced evidence tending to show that: Lizzie Bowser was killed on the night of 22 February, 1938. On that night, she, Dora Bowser and Gertrude Brown together attended school exercises at the London Schoolhouse between Littleton and Roanoke Rapids. A few minutes after Lizzie went into the school building defendant, who was sitting in an automobile with Levi Epps, said: "The law is looking for me because I have killed a girl." To Levi's remark that he had not because, if he had, he would be running, defendant replied: "No, I ain't killed nobody, but I is." Defendant and Lizzie Bowser had been going together. She had talked to him at her home earlier that evening. Then, apparently, they were friendly.

When the school exercises, which in the various estimates of witnesses lasted from an hour to two and a half hours, were over, A. Brinkley Pierce joined Dora Bowser, and they, followed by Lizzie Bowser and Gertrude Brown, started walking home. As they reached the road in going from the school grounds the defendant came up beside Lizzie Bowser, who said to him: "Bud, you might as well go on home. I told you you could not go home with me tonight." Then she and Gertrude Brown walked on up the road. When they reached the mail box at the entrance to the path that leads to her home, Lizzie Bowser and Gertrude Brown stopped, but Dora Bowser and A. Brinkley Pierce walked on along the path. Alex Powell came along then, as did the defendant. Lizzie Bowser called to Alex Powell and said that she had something to tell him. She walked toward Alex Powell. The defendant walked up behind her and said something to her. She then stated to Alex Powell, "That is all right, I will tell you another time." Whereupon Alex Powell went up the road, and Lizzie Bowser again said to defendant: "Bud, you might as well go on home. I told you you were not going home with me tonight." Then she started to run and ran up the path. Defendant also ran, following close behind her. As she passed by, she said, "Come on, Gertrude," but did not appear to be frightened. Gertrude testified that in a very short time she heard Lizzie holler twice. Dora Bowser and A. Brinkley Pierce also heard her and stopped and

turned back to go to her. They found her one hundred eighteen steps away lying in the path. This point was one hundred twenty steps from where Gertrude Brown was when she heard her. She was dead. Before they reached her, defendant called to Brinkley and said: "A. B., come here and get Lizzie. I done killed her." To Brinkley's question: "What in the world were you thinking about?" defendant made no reply but walked on down the path. He had met them about half the distance from where they turned back and the body. He had a knife in his right hand and it was bloody. Lizzie Bowser's throat was cut on the right side and on the left side with only a small place in front and a small place in the back that were not cut in two. There were signs of scuffling in the path.

Defendant was arrested about 1 a.m. that night at the home of his father about three-quarters of a mile away. When officers reached the house defendant was standing in the middle of the floor. On being asked for his knife, he gave it to the officer. It was bloody. He had told his father and mother that he had killed the girl. The officer asked him: "Why did you kill that woman?" He said: "I killed her because I loved her, and I told her if I ever caught her I was going to kill her." He told the officer that "the girl had her head lying on his shoulder when he cut her throat on the right side and then turned her head over and cut her on the left side."

While defendant was in jail, he demonstrated to Sheriff Riddick how he and Lizzie stood when he cut her, and how he cut her on both sides. Then he told the sheriff that he ran his finger in her throat, put his knife under the windpipe and cut it in two. Also, while defendant was in jail, on being asked by the clerk of Superior Court why he killed the girl, he again stated that he killed her because he loved her. Then he described the killing and told a story to the effect that the girl was pregnant and that they couldn't get married, and that they wanted to get out of it the best they could. There was testimony to the effect that the girl was not pregnant. Defendant did not go upon the stand, but relied upon plea of transitory insanity and offered testimony tending to show insanity of his grandmother, and tending to show incidents of curious ways and peculiar conduct on his part. The State offered evidence *contra*.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

Defendant appeals to Supreme Court, and assigns error.

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

Kelly Jenkins and Irwin Clark for defendant, appellant.

WINBORNE, J. (1) The exceptive assignment principally pressed on this appeal is the refusal of the court to allow defendant's motion for judgment as of nonsuit on the first degree murder charge made in compliance with the statute. C. S., 4643. The motion challenges the sufficiency of the evidence to show premeditation and deliberation beyond a reasonable doubt. *S. v. Bittings,* 206 N. C., 798, 175 S. E., 299, and cases cited.

It is pertinent, therefore, to refer to principles applicable to the case in hand.

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,* 213 N. C., 719, 197 S. E., 573, and cases cited.

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, supra,* and cases cited.

"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,* 197 N. C., 445, 149 S. E., 590; *S. v. Payne, supra.*

"Premeditation means 'thought beforehand' for some length of time, however short." *S. v. Benson,* 183 N. C., 795, 111 S. E., 869, at p. 871; *S. v. McClure,* 166 N. C., 321, 81 S. E., 458; *S. v. Payne, supra,* 197 S. E., 579, and cases cited.

"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. Payne, supra.*

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. Payne, supra,* and cases cited.

"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,* 166 N. C., 306, 81 S. E., 333; *S. v. Payne, supra.*

"The manner of the killing by defendant, his acts and conduct attending its commission, and his declaration immediately connected therewith,

were evidence of express malice." *S. v. Robertson,* 166 N. C., 356, 81 S. E., 689; *S. v. Cox,* 153 N. C., 638, 69 S. E., 419.

"In determining the question of premeditation and deliberation it is proper for the jury to take into consideration the conduct of the prisoner, before and after, as well as at the time of, the homicide, and all attending circumstances." *Stacy, C. J.,* in *S. v. Evans,* 198 N. C., 82, 150 S. E., 678.

Applying these well settled principles, the evidence in the case at bar is sufficient to be submitted to the jury on the first degree murder charge. The threat at the schoolhouse, though general, was given individuation when the defendant, within two and a half hours after making it, did the very thing he threatened to do—killed a girl. And it is pertinent both on malice and on premeditation and deliberation. His declaration and conduct immediately after committing the act manifests a coolness worthy of consideration by the jury. The statement to the officers, "I killed her because I loved her, and I told her if I ever caught her I was going to kill her" is expressive of specific threat. Then, too, the atrocious manner in which he cut her throat is evidence of express malice and a fixed purpose to make the deed complete.

(2) Did the court below commit error in failing to charge the jury on the presumption of innocence of defendant. This question has been decided adversely to defendant in the cases of *S. v. Boswell,* 194 N. C., 260, 139 S. E., 374; *S. v. Rose,* 200 N. C., 342, 156 S. E., 916; and *S. v. Herring,* 201 N. C., 543, 160 S. E., 891. In the charge to the jury, the court below defined murder in the second degree, and murder in the first degree in accordance with the well settled law of this State. The court clearly placed the burden of proof upon the State to satisfy the jury from the evidence beyond a reasonable doubt that the defendant prior to the time of the killing formed a purpose to kill the deceased, and that such design to kill was formed with deliberation and premeditation, and that in pursuance of such design the defendant killed the deceased. The court fully defined reasonable doubt. No exception is taken to any part of the charge on the law so declared by the court.

(3) There is exception to this portion of the charge: "And I charge you that in order for this plea of insanity to be a complete defense in this case, you must find that the prisoner at the time he killed deceased was incapable of having a criminal intent." This is part of a sentence in which the court correctly charged on the burden of proof upon this plea. It is contended that the portion to which exception is taken is an expression of opinion forbidden by C. S., 564. This position is not well taken. It is settled law in this State that when, in a homicide case, the defendant interposes a plea of insanity, he says by this plea that he did the killing, but the act is one for which he is not responsible. *S. v.*

Terry, 173 N. C., 761, 92 S. E., 154. This is an affirmative defense. *S. v. Alston, ante*, 93.

(4) Exception is taken to what is contended by defendant to be a misstatement of the evidence by the court in stating a contention of the State. If incorrectly stated, the matter was not called to the attention of the court at the time, and cannot be held for prejudicial error. *S. v. Burton*, 172 N. C., 939, 90 S. E., 561; *Sorrells v. Decker*, 212 N. C., 251, 193 S. E., 14.

After most careful consideration, we are of opinion that the case has been fairly tried, and we find

No error.

J. H. MORGAN v. E. J. SPRUILL.

(Filed 12 October, 1938.)

1. Appeal and Error § 40c—

Upon appeal from judgment as of nonsuit the evidence will be considered in the light most favorable to plaintiff.

2. Money Received § 1—Elements and essentials of cause of action to recover money paid under mistake of fact.

An action to recover money paid under mistake of fact will lie only when money is paid under mistake of fact in the legal sense, which does not embrace complete ignorance of the facts or neglect to ascertain the facts after being put upon inquiry, but implies misinformation or unconscious forgetfulness or a wrong conclusion, and it must be made to appear further that the party receiving payment was thereby unjustly enriched and in equity and good conscience should repay the sum, and where money is paid voluntarily with knowledge of the facts, the party making the payment may not change his mind and recover it back.

3. Money Received § 3—Evidence held insufficient to overrule nonsuit in this action to recover money paid under mistake of fact.

The evidence tended to show that plaintiff's nephew was arrested on a charge of issuing worthless checks and that plaintiff paid the amount of the checks to secure his nephew's release, that the checks had been given defendant in payment of merchandise, that all but the first check had been given under agreement between defendant and plaintiff's nephew under which defendant agreed to hold the checks until payment could be made, that thereafter plaintiff's nephew executed a second mortgage on realty as additional security for the checks, and that plaintiff was told the mortgage had been given as security for the checks prior to the time plaintiff paid the checks, and that the realty was later foreclosed under a first lien and did not bring any surplus to be applied on defendant's mortgage. *Held:* The evidence is insufficient to be submitted to the jury in an action for money paid under mistake of fact, since even if it be conceded that the execution of the mortgage constituted a novation, and

discharged the checks, plaintiff paid the checks without investigation or ascertaining the facts, although he had been told by his nephew of the execution of the mortgage, and the evidence discloses that plaintiff, to secure his nephew's release, voluntarily paid the checks, one of which, at least, was issued in violation of the statute, and fails to show any duress or mistake of fact in the legal sense, and further fails to show that defendant, who had surrendered the checks and could not be placed *in statu quo*, had been unjustly enriched or that in equity and good conscience he should not be permitted to retain the money paid.

APPEAL by plaintiff from *Thompson, J.*, at April Term, 1938, of CHOWAN. Affirmed.

This is a civil action to recover $436.00 alleged to have been paid under mistake of fact.

The defendant was operating a fishery, selling his "catch" to dealers for wholesale and retail trade. Frank Jones, nephew of the plaintiff, was at the times alleged a wholesale and retail fish dealer. In the spring of 1937 Frank Jones contracted with the defendant for 100,000 herring and gave his check for $25.00 to confirm the bargain. This check was paid. Later he sent for and received 35,000 or 40,000 herring, giving his check in payment therefor. The payment of this check was refused by the bank on account of insufficient funds. Jones then saw the defendant and told him that he did not have the money with which to pay for the fish. The defendant advised him to send for the fish he had purchased and give his check therefor and he, the defendant, would hold same until paid. Under this arrangement Jones gave several checks, which were not honored by the bank.

Upon demand for payment Jones agreed to give a second mortgage on his home in Ahoskie as additional security. At the instruction of the defendant he procured a lawyer to prepare the papers. He signed them and the lawyer procured the recordation of the mortgage, but did not send the note and mortgage to the defendant, or advise him of its execution. The land embraced in the mortgage was foreclosed under a prior lien. After the payment of the first mortgage and accrued taxes there was no excess to be applied on defendant's debt.

Some time thereafter the defendant went to the home of Jones to obtain a settlement. Finding that Jones was no longer in Chowan County, but had gone to Norfolk, Va., the defendant procured the issuance of a warrant charging him with unlawfully issuing checks in violation of the statute.

Jones was arrested in Norfolk, Va., on information from the sheriff of Washington County and on order of a Norfolk magistrate. Thereupon, Jones wrote his uncle, the plaintiff, a note, telling him: "I am in jail over E. J. Spruill's checks. He had me locked up. Come and get me out if you will." The plaintiff, upon receipt of the note, went to the

office of the justice of the peace in Norfolk and paid him $436.00, the amount of the checks. He then visited Jones in jail but asked him nothing about the debt. The next day the money was paid to the sheriff of Washington County and Jones was released from custody.

Prior to the arrest of Jones he encountered difficulty about other obligations. The plaintiff settled these debts in the office of the sheriff of Hertford County. At that time the plaintiff asked Jones if there was anything else, to which Jones replied: "The Spruill checks, but they are being taken care of. Mr. Spruill has agreed to take a mortgage on my house and lot to secure him."

At the conclusion of plaintiff's evidence, on motion of the defendant, the action was dismissed by judgment of involuntary nonsuit. The plaintiff excepted and appealed.

John F. White and W. D. Pruden for plaintiff, appellant.
Carl L. Bailey for defendant, appellee.

BARNHILL, J. There is evidence in the record tending to show that the facts are not so favorable to the plaintiff as here stated. However, there was a judgment of nonsuit and we consider the evidence in the light most favorable to the plaintiff.

An action to recover money paid under a mistake of fact is an action in *assumpsit* and is permitted on the theory that by such payment the recipient has been unjustly enriched at the expense of the party making the payment and is liable for money had and received. It is well settled that money paid voluntarily with knowledge of the facts cannot be recovered back. If a man chooses to give away his money, or to take his chances whether he is giving it away or not, he cannot afterwards change his mind. 2 R. C. L., 784. Likewise, one who waives investigation and pays money after his attention has been called to the possibility of the existence of facts which might affect his decision to pay is not acting under a mistake of fact in the legal sense. He cannot carelessly settle, trusting to future investigation to show mistake of fact which will enable him to recover back the amount paid. If the payment is made by a mistake which arose from the fault or negligence of the party paying the money, and it cannot be recovered without prejudice to the party who has received it, the action will not lie. 64 Am. Dec., 631, note. The plaintiff must show more than ignorance of the fact which implies a total want of knowledge in reference to the subject matter. He must establish a mistake of fact which admits knowledge, but implies an unconscious forgetfulness or a wrong conclusion. Furthermore, to maintain the action it must be made to appear that the defendant had received or obtained possession of the money of the plaintiff to which he

is not justly entitled and which in equity and good conscience he ought to pay over to the plaintiff.

Measuring the plaintiff's evidence by these fundamental principles of law governing his cause of action, it appears that the judgment below must be affirmed.

In the argument here the plaintiff insists that the payment by the plaintiff was made under duress. As to this, we do not consider that there is sufficient allegation in the complaint to support the contention, and there is no sufficient evidence to sustain that theory of plaintiff's cause of action.

The plaintiff's allegation of mistake of fact is: "The plaintiff having been notified of the arrest and imprisonment of his nephew, and being ignorant of the fact that the said checks had been paid by the note and mortgage as aforesaid, and in order to obtain the release of his nephew, paid the said checks by paying the amount thereof into the hands of the magistrate, etc."

Accepting for the time being the plaintiff's contention that there had been a novation or payment of the debt evidenced by the checks by the execution of the note and mortgage, it appears from the record that Jones had advised the plaintiff that he had made some adjustment with Spruill under which the defendant was to accept a note and mortgage. Notwithstanding this fact the plaintiff went to Norfolk and made the payment to the magistrate without choosing to visit Jones and ascertain the true facts, or to make other investigation until after he had paid the money.

The record, however, does not sustain this contention. Jones testified: "It was agreed that he (Spruill) was going to take a second mortgage as security for the checks for what I owed him. He was still to hold the checks until it was all paid. . . . It was agreed that he would hold the checks until the mortgage was paid." The debt evidenced by the checks, on plaintiff's own evidence, was still outstanding and unsatisfied at the time plaintiff made the payment.

That the plaintiff voluntarily made the payment in order to procure the discharge of his nephew from arrest appears from his testimony as follows: "I voluntarily paid it as a loan to my nephew, Frank Jones, to be paid for the redemption of these checks. I paid it for Frank to get him out of jail. I did not have to pay it. His mother requested it."

The only reasonable conclusion to be drawn from this testimony and the other evidence offered by the plaintiff is that the plaintiff acted voluntarily and intentionally in complete ignorance of the facts as he contends them to be, and not through any mistake or misinformation as to the true facts or through any temporary forgetfulness thereof. The amount paid was due the defendant and he was justly entitled thereto.

The defendant has surrendered the checks, at least one of which apparently was issued in violation of statute, and he cannot be put *in statu quo*. Therefore, it cannot be said that in equity and good conscience the defendant should be required to return the money so received.

In our opinion, the evidence does not tend to show that the payment was made by the plaintiff under duress or by mistake of fact. In addition thereto, the plaintiff has failed to establish an essential element of his cause of action—that the defendant in equity and good conscience should not be permitted to retain the money paid.

Affirmed.

ROBERT ROYAL v. SAMPSON COUNTY, A. E. BAGGETT, AS CHAIRMAN, AND J. C. BUTLER AND H. SIVERTSEN, AS MEMBERS, AND GERTRUDE WEST, AS CLERK, RESPECTIVELY, OF THE BOARD OF COMMISSIONERS OF SAMPSON COUNTY.

(Filed 12 October, 1938.)

1. Taxation § 3b—Debt retired by application of sinking fund is reduction of outstanding indebtedness within constitutional limitation.

When a county retires certain of its bonds from its sinking fund, such transaction constitutes a reduction in its outstanding indebtedness within the constitutional provision limiting the contracting of debt by a county or municipality to two-thirds of the amount by which its outstanding indebtedness was reduced during the prior fiscal year, even though the sinking fund was collected over a period of years, the reduction in an outstanding indebtedness being accomplished not when funds are placed in a sinking fund to be applied to the debt, but when the funds are applied to the debt and the obligation extinguished. Art. V, sec. 4.

2. Same—Failure to complete refunding operation within fiscal year has no material bearing on constitutional limitation on increase of debt.

During the prior fiscal year defendant county began refunding operations, and during that year issued its refunding bonds, but did not retire the bonds refunded until the first day of the present fiscal year. Plaintiff contended that since both the refunding bonds and the bonds refunded were outstanding during the prior fiscal year, there had been an increase rather than a decrease in the county's outstanding indebtedness during the prior fiscal year. *Held:* The failure of the county to complete its refunding operations during the prior fiscal year is immaterial, and the refunding bonds should not be included in determining the amount by which the county had reduced its outstanding indebtedness during the prior fiscal year within the meaning of the constitutional limitation on an increase of debt by counties and municipalities. Art. V, sec. 4.

APPEAL by plaintiff from *Grady, J.*, at September Term, 1938, of SAMPSON. Affirmed.

The plaintiff brought his action to enjoin the defendants from issuing bonds representing a new indebtedness of the county, as being, under the facts presented, in violation of Article V, section 4, of the Constitution, restricting the creation of debt. The restraining order was dissolved, the injunction denied, and plaintiff appealed. The facts are stated in the opinion.

Woodrow H. Peterson for plaintiff, appellant.
Howard H. Hubbard for defendants, appellees.

SEAWELL, J. Except for certain purposes expressly named, the North Carolina Constitution prohibits counties and cities from contracting 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 a particular county or municipality." Constitution, Article V, section 4.

The county of Sampson passed the necessary ordinances and proposes to issue and sell $49,500 bonds during the present fiscal year without submission to a vote of the people of the county, basing the right to do so upon the retirement by the county of $89,000 of its outstanding indebtedness during the fiscal year 1937-1938. Such retirement was accomplished by the application of appropriate tax revenues supplemented by a payment from sinking funds which were lawfully applicable to the debt, but in large part collected prior to the "preceding fiscal year." Except for the application of these sinking funds, the reduction of indebtedness would be substantially insufficient to justify the bond issue, since such bond issue would be, in that case, more than two-thirds of the amount to which the indebtedness had been reduced.

Furthermore, during the year 1937-1938, the county of Sampson undertook to refund an indebtedness of $99,000 by the issuing of a similar amount of bonds which had been sold during the fiscal year, but the actual retirement of the bonds they were intended to refund did not take place until 1 July, 1938.

Contending (a) that an application of the sinking fund does not accomplish a reduction of the outstanding indebtedness within the meaning of the Constitution at the time of such application, but that reduction really occurs when the sinking fund is collected for the purpose, which occurred prior to the "preceding fiscal year," and that the bond issue was, therefore, invalid, and (b) that the refunding bonds constituted an increase of indebtedness for the preceding fiscal year, the plaintiff taxpayer brought this action to enjoin the issue of the bonds, and, from an adverse judgment in the Superior Court, appealed.

1. The "net debt" theory advanced by the plaintiff—that is, that in considering the total indebtedness the sinking fund applicable to that debt must first be deducted, has some support. *Briggs v. Greenville County,* 137 S. C., 288, 135 S. E., 153; *German Insurance Co. v. City of Manning* (C. S.), 95 Fed., 597, 610; *Levy v. McClellan,* 196 N. Y., 178, 89 N. E., 569. The contrary is maintained by well reasoned authority. *City of Chicago v. McDonald,* 176 Ill., 404, 52 N. E., 982; *Council Bluff v. Stewart,* 51 Iowa, 385, 1 N. W., 628.

Most of the cases adopting the net debt theory are liberalizing, rather than restrictive, in their tendency to permit municipalities to incur debt beyond the apparent terms of the limiting provisions. They rationalize restrictions according to the prevailing conception of the purpose of the law. From certain points of view we can understand how the conclusion is reached that restrictions upon the power to incur a debt are reasonably satisfied when funds are in hand with which to pay it. *German Insurance Co. v. City of Manning, supra.*

What this Court might do if similar conditions were presented would certainly be *obiter* in this opinion. A conservative view might be that as a legal assumption the inevitability of the application of the sinking fund to the debt is too optimistic.

But these cases cannot be considered compelling authority as applied to the case at bar, since the constitutional and statutory restrictions considered in them are different in important respects from those with which we are dealing, and give rise to substantial differences in construction.

In so far as we have been able to ascertain, the particular form of debt restriction contained in Article V, section 4, of the State Constitution, is peculiar to this State. One important distinction we find is the use of the term "outstanding" as qualifying the indebtedness required to be reduced; and we think this offers a serious obstacle to the adoption of the theory advanced by the plaintiff. The Century Dictionary defines "outstanding": "3. To stand out, remain untouched, unimpaired, unsettled, uncollected, unpaid, or otherwise undetermined." Webster's Unabridged Dictionary defines it: "Undischarged, uncollected, or unpaid." Black's Law Dictionary—on authority of *New York Trust Company v. Portland R. Co.,* 197 Appellate Division, 422, 189 N. Y. S., 346, 350—defines "outstanding" as "constituting an effective obligation."

With the above definitions in mind, the propriety of applying the "net debt theory" to the constitutional provisions under consideration may be tested by shifting the period to be considered. If we select the "preceding fiscal year" as the period during which additions are made to the sinking fund, the rule would permit the county to count such

increase in sinking funds as a debt reduction, although nothing had been paid and the debt had been left outstanding.

The language used in the Constitution seems to be plain and uninvolved and does not contemplate striking a balance between liabilities and assets, even though certain funds may be earmarked for application to the debt. The transaction to which it refers must be carried out actually rather than constructively.

Speaking strictly to the question presented under this head, we are of the opinion that no reduction of outstanding indebtedness occurs by the mere collection of a sinking fund, but does take place when actual payment is made to the creditor out of the sinking fund or other applicable revenues, which results in the extinction of the debt and leaves the creditor without further demands on the revenues or taxing powers of the county or municipality for its satisfaction.

It follows that the county may base its right to incur a new indebtedness upon an application of the sinking fund to the debt when made within the preceding fiscal year, although such sinking fund was collected prior thereto.

2. On the second proposition, it is contended that since Sampson County had a road bond issue in the amount of $99,000 due on 1 July, 1938, and was in the process of refunding this issue by bonds in the same amount, issued on 14 June, 1938 (dated 1 June, 1938), and since both sets of bonds were outstanding on 1 July, 1938, both sets of bonds must be counted in the total indebtedness, which brought about an increase in the indebtedness for the year 1937-1938, rather than a reduction.

We are convinced that the failure to complete the refunding operation within the fiscal year has no material bearing adverse to the present bond issue. By express provision of the Constitution, the restriction placed upon the power of the county or municipality does not extend to the contracting of debts for the purpose of funding or refunding a valid existing debt; and we think the precise point at issue is covered in *Hallyburton v. Board of Education,* 213 N. C., 9, 15, as follows:

"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." Quoted and approved in *Gill v. Charlotte,* 213 N. C., 160, 162.

We regard this as authority for the position that the bonds in question should not be considered an increase of indebtedness because of the fact that the refunding process had not completely cleared during the fiscal year.

3. As we have decided the matter upon the merits of the controversy, we do not consider it necessary to go into the question whether the plaintiff brought his action within the statutory period.

The judgment of the court below is

Affirmed.

MRS. IRENE ROBINSON v. L. F. McALHANEY.

(Filed 12 October, 1938.)

Election of Remedies § 2—Party must elect between action for breach of contract and action for fraud inducing its execution.

A party may not sue to recover damages for breach of contract and at the same time recover damages for fraud inducing the execution of the instrument, and in this action instituted in the general county court to recover damages for breach of contract, the Superior Court on appeal correctly sustained defendant's exceptions to evidence and the charge of the court relating to plaintiff's allegations that defendant induced plaintiff to enter into the contract by reason of false and fraudulent representations.

APPEAL by plaintiff from *Alley, J.*, at April Term, 1938, of BUNCOMBE.

Civil action to recover damages for breach of contract.

This action was instituted in the general county court of Buncombe.

Plaintiff alleges in substance, and on trial in the general county court offered evidence tending to show: That in February, 1936, she entered into a contract with defendant by which it was agreed that if she would procure a lease on tourist home owned by H. L. Lambert and consisting of store, restaurant, rooms and cabins located at the entrance to the Great Smoky Mountain National Park above the Cherokee Indian School in Swain County, and give to defendant the benefit of her experience and good will in the community, and her knowledge of trading with the Indians, he would finance the entire proposition, furnishing the necessary funds for the payment of rents, purchasing of Indian craft, and all expenses incidental to such business, and providing for plaintiff and her two minor daughters board and lodging on the premises—she to manage the business, be in full, complete and sole charge of the premises, and to receive three and one-half per centum of the gross receipts from the business; that she obtained a five-year lease to defendant to become effective on 1 April, 1936; and that she remained upon the premises, and complied with the terms of the agreement until about 1 June, 1936, during which period the defendant breached the contract in numerous respects specified, "all to her great loss and damage."

Plaintiff further alleges and, over defendant's objection, offered evidence tending to show: That, by reason of false and fraudulent representations made by defendant, she was induced to enter into the contract "all to her great loss and damage." Plaintiff further alleges: "That by virtue of the matters and things hereinabove set out, this plaintiff has been damaged by the defendant's breach of contract, his deceits and misrepresentations, and his fraudulent breach of the contract, in the sum of at least $30,000."

Defendant denied material allegations of the complaint and objected to the admission of testimony.

These issues were submitted to and answered by the jury:

"1. Did the defendant contract with the plaintiff, as alleged in the complaint? Answer: 'Yes.'

"2. If so, did the defendant breach the contract, as alleged in the complaint? Answer: 'Yes.'

"3. Did the defendant induce the plaintiff to enter into said contract by reason of the fraudulent representations, as alleged in the complaint? Answer: 'Yes.'

"4. What amount, if any, is the plaintiff entitled to recover of the defendant on account of board for herself and two daughters, as alleged in the complaint? Answer: 'None.'

"5. What amount has plaintiff obtained by way of compensation from other employment subsequent to the breach of the contract and prior to 8 July, 1937? Answer: 'None.'

"6. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: '$5,750.'"

From judgment on verdict defendant appealed to the Superior Court, and presented one hundred four assignments of error covering one hundred four exceptions taken during the trial and to the charge of the judge in the general county court. Thirty-eight of the assignments were sustained and the others were overruled. The verdict on the first, second and fourth issues was sustained. The verdict on the third issue was set aside for errors committed in the trial, and "for the further reason that plaintiff, suing upon the contract and asking a recovery under its terms, is precluded from attacking the contract for fraud." The verdict on the fifth and sixth issues was set aside, and a new trial ordered on those two issues.

From judgment in accordance with the rulings of the judge of Superior Court, plaintiff appeals to Supreme Court, and assigns error.

Weaver & Miller and Irwin Monk for plaintiff, appellant.

B. C. Jones, Dan K. Moore, and Jones, Ward & Jones for defendant, appellee.

WINBORNE, J. The record on this appeal discloses error in the trial in the general county court of Buncombe County which was assigned on appeal to, and declared in the Superior Court. Many of the assignments of error, which were sustained, cover exceptions to the admission of testimony, to the statement by the court of contentions of plaintiff, and to the charge on the law, all relating to and bearing upon the plaintiff's allegation that she was induced to enter into the contract by reason of false and fraudulent representations of the defendant upon which she relied to her loss and damage.

Evidence was introduced over defendant's objection and exception. Exception was not taken at the time to the contentions based on the evidence, but the court then gave this instruction to the jury: "Now, if you find from this evidence, and by the greater weight of it, that the defendant and the plaintiff entered into the contract as she alleges, and at the time of the execution and delivery of the lease on the premises by Mr. Lambert, that the defendant then had in his mind the intention not to perform the contract and that he made the representations to her that he would perform it; that the representations so made were false and were made with the intention of deceiving her; that they did deceive her; that she reasonably relied on his representations; that she sustained damages thereby, you would answer the third issue, 'Yes.'"

The evidence was incompetent. The charge was prejudicial error. Exceptions thereto are well taken. Plaintiff cannot treat the contract as in force for the purpose of recovering damages for its breach, and at the same time recover damages as a result of fraudulent inducement. *Food Co. v. Elliott,* 151 N. C., 393, 66 S. E., 451.

It is manifest that the jury may fairly have understood that, in assessing damages, any fraud found could be taken into consideration. It is unnecessary to discuss other exceptions. *Robinson v. McAlhaney, ante,* 180.

The judgment below is

Affirmed.

EUGENIA TWITTY v. MRS. MINNIE COCHRAN, ADMINISTRATRIX OF THE ESTATE OF JOHN COCHRAN, DECEASED; AND MRS. MINNIE COCHRAN, INDIVIDUALLY.

(Filed 12 October, 1938.)

1. Deeds § 10a—Connor Act extends protection only to creditors and purchasers for value.

Where the verdict of the jury establishes that plaintiff's deed was voluntary and was executed fraudulently, in which fraud plaintiff participated, for the purpose of depriving defendant of her life estate in the

land, theretofore created by paper writing executed by plaintiff's grantor, the Connor Act, C. S., 3309, does not apply, and defendant's rights are superior to those of plaintiff under the registered deed, even though the paper writing giving defendant a life estate was not registered, since the protection of the Connor Act extends only to creditors and purchasers for value.

2. Deeds § 6—

A voluntary deed is good as between the parties, even though executed for the fraudulent purpose, participated in by the grantee, of depriving a third person of a life estate created by a prior unregistered paper writing executed by the grantor.

3. Ejectment § 16—Judgment in this action in ejectment held erroneous as exceeding the bounds authorized by the verdict.

Defendant claimed a life estate in the *locus in quo* under an unregistered paper writing. Plaintiff was the grantee in a registered deed subsequently executed by the same grantor. The jury found from the evidence under a correct charge that the deed was a voluntary conveyance executed for the purpose of depriving defendant of her life estate under the unregistered paper writing. *Held:* Upon the verdict defendant was entitled to judgment that plaintiff is not entitled to the possession of the *locus in quo* as against defendant, and is not entitled to recover rents therefor, and that the rights acquired by plaintiff under her deed are subordinate to the rights of defendant under the paper writing, and judgment declaring plaintiff's deed to be void and ordering it canceled of record, and adjudicating that defendant is entitled to a life estate in the land under her paper writing, is erroneous as exceeding the bounds authorized by the verdict.

4. Judgments § 17b—

Judgment in this case *held* for error in exceeding the bounds authorized by the verdict.

APPEAL by plaintiff from *Johnston, J.,* at April Term, 1938, of RUTHERFORD. Modified and affirmed.

This is an action in common law ejectment, in which the plaintiff seeks to recover possession of approximately 2½ acres of land now occupied by the defendant Minnie Cochran, and to recover rents therefor.

At the hearing it was agreed that there was no controversy as to the actual boundaries of the land, same being known to both parties and easily located, and that, therefore, neither the plaintiff nor the defendant need encumber the record with evidence tending to locate the boundaries of the land in question as ordinarily required.

The *locus* was originally owned by R. M. Twitty, father of the plaintiff. About ten years ago R. M. Twitty executed and delivered to John Cochran, now deceased, and his wife, Minnie Cochran, the defendant, a paper writing in words and figures as follows: "This agreement entered into this day between R. M. Twitty, party of the first part, and John Cochran and wife Minnie Cochran, parties of the second part, the said

R. M. Twitty, party of the first part, has agreed to give free of rent the house known as the Giving house near the Giving spring on back side of his farm, together with the land on north side of spring branch to the spring, embracing about three acres, so long as he lives and during his wife's life or widowhood if they wish it. The said John Cochran and wife Minnie Cochran, parties of the second part, agree to keep the building and land in repairs and pay its proportional part of tax." Upon receipt of said paper writing John Cochran and his wife entered into possession of said land, repaired the house thereon, which was at the time in a dilapidated condition, and remained in possession thereof until the death of John Cochran. Since his death Minnie Cochran has continued in possession thereof.

On 17 July, 1935, R. M. Twitty executed and delivered to his daughter, Eugenia Twitty, the plaintiff, a deed for said premises, which deed was duly recorded. Thereupon, on 22 July, 1935, plaintiff instituted this action by procuring the issuance and service of summons. The defendant, in her answer, alleged that the deed from R. M. Twitty to the plaintiff was a voluntary conveyance without consideration and was executed for the purpose of depriving John Cochran, now deceased, and the defendant Minnie Cochran, of the possession of said premises and for the fraudulent purpose, participated in by the plaintiff, of procuring the ejectment of the defendant from said land and depriving them of the value of improvements and repairs made by them in good faith upon said land.

While there were nine issues submitted to the jury, only one was answered, as follows: "1. Was the deed from R. M. Twitty to Eugenia Twitty, bearing date of 17 July, 1935, a voluntary conveyance, made for the purpose of depriving John Cochran and his wife Minnie Cochran of a life estate in said property under the paper writing signed by R. M. Twitty? Answer: 'Yes.'"

Upon the coming in of the verdict the court below signed judgment:

1. That the deed to plaintiff dated 17 July, 1935, is null and void, and the same is hereby ordered to be canceled of record.

2. That the plaintiff take nothing by her action; that the same be dismissed, etc.

3. That the grant from R. M. Twitty to John Cochran and Minnie Cochran, his wife, be and the same hereby is adjudged in all respects valid and binding. It was further decreed that Minnie Cochran is entitled to a life estate in the lands described in the judgment in accordance with the agreement as to the boundary thereof.

4. That the bonds executed by the defendant John Cochran be discharged.

The plaintiff excepted and appealed.

M. P. Spears and J. S. Dockery for plaintiff, appellant.
Hamrick & Hamrick for defendant, appellee.

BARNHILL, J. There was sufficient evidence to sustain the answer of the jury to the first issue. The assignments of error directed to the admission of evidence on this issue, and to the charge of the court relating thereto, are without substantial merit. The jury having failed to answer the other issues, the remaining exceptions become immaterial and do not require consideration.

The deed to plaintiff being a voluntary one made for a fraudulent purpose, the Connor Act, now C. S., 3309, has no application here. This act protects only creditors or purchasers for a valuable consideration against unrecorded deeds, mortgages, leases and other paper writings affecting the title to the lands conveyed. *Tyner v. Barnes,* 142 N. C., 110, 54 S. E., 1008; *Harris v. Lumber Co.,* 147 N. C., 631, 61 S. E., 604; *Spence v. Pottery Co.,* 185 N. C., 218, 117 S. E., 32; *Eaton v. Doub,* 190 N. C., 14, 128 S. E., 494; *Gosney v. McCullers,* 202 N. C., 326, 162 S. E., 746. In the last cited case, *Stacy, C. J.,* speaking for the Court, says: "And by the express terms of the Connor Act, chapter 147, Laws 1885, now C. S., 3309, only creditors of the donor, bargainor or lessor, and purchasers for value are protected against an unregistered conveyance of land, contract to convey, or lease of land for more than three years."

It follows, therefore, that the plaintiff through her deed from R. M. Twitty acquired no rights in the *locus* superior to the rights of the defendant under the paper writing signed by plaintiff's grantor even though the paper writing held by the defendant was not of record at the time plaintiff received and filed her deed for recordation. On the contrary, her rights in the land are subordinate to the rights of the defendant, who has been in possession of said premises under said paper writing since about 1928. But this does not invalidate the deed of plaintiff. It is good as between the parties thereto. The verdict of the jury did not warrant a judgment invalidating the deed and directing its cancellation of record.

Likewise, an adjudication of the force and effect of the paper writing held by the defendant and the rights of the defendant thereunder cannot be predicated upon the verdict rendered. The judgment of the court below exceeds the bounds authorized by the verdict.

On the present record the defendant is entitled to a judgment that the plaintiff is not entitled to the possession of the *locus in quo* as against the defendant and is not entitled to recover rents therefor; that the rights acquired by the plaintiff under her deed are subject or subordinate

to the rights of the defendant under the paper writing executed by her grantor to the defendant and her husband; and that the action be dismissed at the cost of plaintiff. The verdict warrants no other or further relief.

The judgment below must be modified to accord with this opinion.

Modified and affirmed.

FRED ROGERS AND THE TRAVELERS INSURANCE COMPANY v. SOUTHEASTERN CONSTRUCTION COMPANY.

(Filed 12 October, 1938.)

1. Master and Servant § 44—Third person tort-feasor is liable only for amount sufficient to compensate employee for injury.

When an action is maintained by the insurance carrier in the name of the injured employee against the third person tort-feasor causing the injury, the tort-feasor is liable for the amount ascertained by the jury as sufficient to compensate the employee for the injuries sustained, which the statute prescribes shall be first applied to the actual court costs, then to the payment of attorneys' fees when approved by the Commission, then to the reimbursement of the insurance carrier for money paid by it under the award, and any remaining excess to the injured employee, and an instruction on the issue of damages that defendant would be liable for such sum as would reimburse the insurance carrier and would fairly compensate the injured employee is error. Michie's Code, 8081 (r); Public Laws of 1933, ch. 449.

2. Appeal and Error § 39e—Error in instruction on material feature is not cured by correct charge on the point in other parts of the charge.

An erroneous instruction on the measure of damages is not cured by the fact that the court may have laid down the correct rule in other portions of the charge, since it cannot be presumed that the jury was able to distinguish at which time the court was laying down the correct rule.

APPEAL by defendant from *Alley, J.*, at June Term, 1938, of BUNCOMBE. New trial.

Johnson & Uzzell and W. W. Candler for plaintiff, appellee.
Smathers & Meekins for defendant, appellant.

SCHENCK, J. By amendment to the complaint this is an action by the Travelers Insurance Company in the name of Fred Rogers to enforce its rights as insurance carrier of the American Enka Corporation, employer of said Rogers, against the Southeastern Construction Company, by reason of compensation paid to said Rogers under an award by the Industrial Commission, and to recover for said Rogers against said

Southeastern Construction Company for injuries negligently inflicted upon him by said Construction Company. N. C. Workmen's Compensation Act, N. C. Code of 1935 (Michie), sec. 8081 (r), Public Acts 1933, ch. 449.

According to the allegations of the complaint, the plaintiff Fred Rogers was an employee of the American Enka Corporation, and while engaged in placing certain boilers for his employer, he was injured by a falling piece of timber, negligently allowed to drop upon him by the defendant Southeastern Construction Company, which was engaged in certain construction work about the premises of the American Enka Company; and further that the Travelers Insurance Company was the insurance carrier of the American Enka Company and has made certain payments under the award of the Industrial Commission to the plaintiff Fred Rogers pursuant to the terms of the policy issued by it to said Enka Company.

The case was tried upon appropriate issues which were answered in favor of the plaintiff. Upon the fourth issue, which related to the measure of damages, the court charged the jury as follows: "The sum fixed by the jury should be such as would reimburse Travelers Insurance Company for its outlay on account of compensation, and would fairly compensate Fred Rogers for the injuries which he has suffered in the past and those likely to occur in the future." To this charge the defendant, appellant, reserved exception, and we are constrained to sustain it.

The North Carolina Workmen's Compensation Act, as amended (Public Laws 1933, ch. 449, North Carolina Code of 1935 [Michie], sec. 8081 [r]), in part reads: "Provided, however, that in any case where such employee, his personal representative, or other person may have a right to recover damages for such injury, loss of service, or death from any person other than the employer, compensation shall be paid in accordance with the provisions of this act: Provided, further, that after the Industrial Commission shall have issued an award, the employer may commence an action in his own name and/or in the name of the injured employee or his personal representative for damages on account of such injury or death, and any amount recovered by the employer shall be applied as follows: First to the payment of actual court costs, then to the payment of attorneys' fees when approved by the Industrial Commission; the remainder or so much thereof as is necessary shall be paid to the employer to reimburse him for any amount paid and/or to be paid by him under the award of the Industrial Commission; if there then remain any excess, the amount thereof shall be paid to the injured employee or other person entitled thereto." And further, "When any employer is insured against liability for compensation with any insurance carrier, and such insurance carrier shall have paid any compensation for which the employer is liable or shall have assumed the liability

of the employer therefor, it shall be subrogated to all rights and duties of the employer, and may enforce any such rights in the name of the injured employee or his personal representative; . . ."

From the foregoing excerpts it is apparent that it was error to charge that the sum fixed by the jury should be such as would reimburse the Travelers Insurance Company for its outlay on account of compensation *and* would fairly compensate the plaintiff for injury which he had sustained. The measure of damage in cases brought by the insurance carrier under the quoted statute is such an amount as would fairly compensate the plaintiff for his injury, which amount the law applies first to the actual court costs, then to payment of attorneys' fees when approved by the commission, and to the insurance carrier so much as is necessary to reimburse it for any amount paid under an award of the commission, and any remaining excess to the injured employee. The amount paid by the insurance carrier to the employee is not recoverable from a third party tort-feasor in addition to the fair compensation for injury received, but is only to be paid from the amount of such fair compensation, provided such compensation be sufficient for that purpose.

The fact that the court may have laid down the correct rule for the admeasurement of damages in other portions of the charge does not cure the error to which exception is reserved for the reason that it cannot be presumed that the jury was able to distinguish at which time the court was laying down the correct rule. *May v. Grove,* 195 N. C., 235, and cases there cited.

For the error indicated, there must be a

New trial.

B. J. KENNEDY, IN BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF THE TOWN OF WILKESBORO, WHO CARE TO MAKE THEMSELVES PARTIES, PLAINTIFF, v. TOWN OF WILKESBORO AND J. R. HENDERSON, TOWN CLERK AND TAX COLLECTOR FOR THE TOWN OF WILKESBORO, DEFENDANTS.

(Filed 12 October, 1938.)

Municipal Corporations §§ 11b, 42—Levy made and reaffirmed by de jure officers held valid notwithstanding intervening acts of de facto officers.

The duly elected officers of defendant municipality adopted a budget and fixed the tax rate of the town. Thereafter, in a contest over the election, *de facto* officers went into office, and fixed a lower tax rate. Payment of taxes were made by owners of property under the lower rate. Later the *de jure* officers were reinstated, and they reaffirmed the original tax levy made by them. *Held:* The tax levy as made by the *de jure* officers and later reaffirmed by them is controlling, and taxpayers who had made payment under the lower rate are liable for taxes computed on that rate subject to a credit for the amount paid under the lower rate.

KENNEDY *v.* WILKESBORO.

APPEAL by plaintiffs from *Pless, J.*, at June Term, 1938, of WILKES. Affirmed.

This was an action to determine the lawful tax rate for the town of Wilkesboro for the year 1935, and to restrain the enforcement of the collection of taxes alleged to have been improperly levied for that year.

It was agreed that the judge presiding below should find the facts in the case "from the pleadings filed therein, and draw his conclusions of law from the facts so found." There appears to be no controversy as to the facts alleged in the pleadings.

Thereupon his Honor found the following facts:

"C. E. Lenderman, Joe R. Barber, R. R. Reins, and L. B. Dula were legally elected as the Board of Commissioners of the town of Wilkesboro at the municipal election for said town, held in May, 1935, and that W. E. Harris was elected mayor in the same election; that there was a contest over said election in which certain litigation was had, and pending the final determination of the litigation, another group of officers were installed as the officials of said town for a period of several months; but it was finally determined that the officials as above named were the duly elected officials of the town. Pending the time of the election and the installation of the *de facto* board of officials the legally elected officials properly adopted a budget and fixed as tax levy on the property in said town at $1.50 per hundred dollars valuation, all said adoption and levy being regular and legal in every respect; but the proceedings were not recorded upon the books of the town at that time. Following this, the *de facto* board took office, and finding no record of said budget and levy, adopted a budget and fixed a levy of $1.25 per hundred, and while said levy was in effect some of the citizens and property owners of the said town paid taxes upon that basis and received receipts therefor. By the final decree in the litigation the officers named were reinstalled in office; and they adopted proper resolution declaring that a regular budget and tax levy upon the rate of $1.50 had theretofore been made by them, all as shown in paragraph 12 of the complaint herein, and again fixed the tax rate at $1.50 per hundred dollars.

"It is conceded as a matter of law by all parties hereto that the officials named above were the duly and legally elected officials of said town and that the temporary board was acting in a *de facto* capacity during its tenure.

"Upon the foregoing findings of fact the court concludes as a matter of law that the legal tax rate for the town of Wilkesboro for the fiscal year 1935 is $1.50 per hundred; that payments made to the temporary board at the rate of $1.25 were legally and properly made, and that the persons making said payments are entitled to full credit for the amount

so paid, but that they are still indebted to the said town for the difference between the two rates, to wit, 25c per $100.00 valuation.

"It is therefore considered, ordered and decreed that the petition herein be denied, and the restraining order dismissed, and it is further decreed that the legal and valid tax rate of said town for the year 1935 is $1.50 per hundred, and that payments made by taxpayers upon any other basis should be credited accordingly and the difference thereupon collected by the authorities of said town, and the tax collector of said town is hereby authorized and directed to proceed in accordance with this decree."

Plaintiffs appealed.

W. H. McElwee for plaintiffs, appellants.

A. H. Casey for defendants, appellees.

DEVIN, J. The facts found by the court below are sufficient to support the judgment.

Questions involved in the litigation over the municipal offices in the town of Wilkesboro in 1935 were considered by this Court in *Harris v. Miller,* 208 N. C., 746, 182 S. E., 663; *Wilkesboro v. Harris,* 208 N. C., 749, 182 S. E., 665; and *Wilkesboro v. Jordan,* 212 N. C., 197, 193 S. E., 155. The action of the *de facto* board of commissioners in levying a tax rate of $1.25 per hundred dollars valuation, could not be upheld as the valid act of the taxing authorities of the town for the reason that, as found by the court, the legal or *de jure* board had previously, when in the unobstructed possession of the offices and in regular and proper form, adopted a budget and fixed the tax rate at $1.50, and had again later reaffirmed said rate. *Baker v. Hobgood,* 126 N. C., 149, 35 S. E., 253; *Smith v. Carolina Beach,* 206 N. C., 834, 175 S. E., 313.

Judgment affirmed.

S. A. STEVENS v. CORNELIA VANDERBILT CECIL, THE BILTMORE COMPANY, AND THE BILTMORE DAIRY FARMS, INC.

(Filed 12 October, 1938.)

Judgments § 22a—Complaint held insufficient to state cause of action against corporate defendants in this action to set aside judgment.

A consent judgment was entered in an action to recover for personal injuries received by plaintiff in which the present plaintiff and the present individual defendant were the sole parties. This action was instituted to set aside said consent judgment on the ground of fraud, and the corporate

defendants were joined upon allegations that the individual defendant had transferred personal property to one of the corporate defendants as her personal holding company "subject to existing current accounts and notes," and that said corporation had in turn transferred certain assets to the other corporate defendant subject to the assumption of all outstanding accounts, notes and other liabilities. *Held:* Plaintiff's claim for damages is neither a "current account" nor "note," and therefore was not assumed by the first corporation under plaintiff's allegation, and since the first corporation did not assume such liability, its grantee, the second corporation, did not assume it, and there being no allegation that the individual defendant had failed to retain assets sufficient to pay her obligations or that the corporations were organized for the purpose of defrauding creditors, the demurrers of the corporate defendants should have been sustained.

APPEAL by the corporate defendants from judgment of *Alley, J.*, at January Term, 1938, of BUNCOMBE, overruling their demurrer upon the ground that the complaint fails to state facts sufficient to constitute a cause of action against them. Reversed.

Don C. Young and Wells, Carter & Hipps for plaintiff, appellee.
Adams & Adams for corporate defendants, appellants.

SCHENCK, J. This is an action to vacate a judgment in a previous action between the plaintiff and the individual defendant Cecil, which judgment affected the release of a personal injury claim of the plaintiff against said individual defendant, wherein it is alleged that said judgment was procured by the fraud of the individual defendant and her agent, and wherein it is further alleged that the individual defendant organized the corporate defendants as holding corporations and conveyed to them large property interests. There is no allegation that the corporate defendants participated in the fraud in procuring the judgment sought to be vacated. In fact, it appears from the complaint that they were organized several years after the judgment was procured. There is no allegation that the organization of the corporate defendants was accomplished for the purpose of defrauding the creditors of the individual defendant, and no allegation that the individual defendant has failed to retain property sufficient to pay her obligations.

The complaint alleges that the individual defendant "conveyed to said personal holding corporation (The Biltmore Company) all said property hereinbefore described, . . ." and that the personal property so conveyed was "conveyed to said defendant (The Biltmore Company) subject to existing current accounts and notes payable incurred in the name of the Biltmore Estate, Biltmore House and Gardens and Biltmore Farms, not exceeding the sum of $75,000." The alleged cause of action

of the plaintiff against the individual defendant for personal injuries negligently inflicted cannot be said to be included either in "current accounts" or "notes payable" and was therefore not assumed by The Biltmore Company by reason of the personal property being conveyed subject to current accounts and notes payable.

It is further alleged that The Biltmore Company subsequently conveyed to The Biltmore Dairy Farms, Inc., "mediately another corporate instrumentality of said Cornelia Vanderbilt Cecil, all the business, personal property and assets, conducted, held, used and managed in the Dairy Farms Department of The Biltmore Company, including all cash on hand, in banks, accounts, and other receivables, machinery and other equipment of all kinds, motor vehicles, tools, appliances, furniture, fixtures, livestock, inventories, good will, trade names and trademarks, supplies, farm, dairy and creamery products, growing crops, and all contracts, licenses, rights and franchises relating to said business, subject to the assumption of payment by the purchaser of all outstanding accounts and notes payable, and other liabilities, . . ." Since it does not appear that The Biltmore Company, the grantor, ever assumed liability for the plaintiff's alleged cause of action against the individual defendant, The Biltmore Dairy Farms, Inc., the grantee, by virtue of the conveyance to it, never assumed such liability.

The relief demanded is in the following language: ". . . it appertains to equitable justice and common right that the plaintiff's said *retraxit* be canceled and the aforementioned judgment of nonsuit be stricken out and that said former action be reinstated on the civil issue docket of this court for trial according to the course and practice of the courts, with appropriate leave to the parties respectively to replead therein in the fuller light of subsequent events.

"Wherefore, the plaintiff prays the judgment of the court for the particular relief hereinbefore specified, and for all such other, further and general relief as to equitable justice may appertain, and for costs." There is no relief asked against the corporate defendants, appellants, and no facts alleged upon which any such relief can be predicated, since neither of them was a party to the action wherein the judgment sought to be vacated was rendered.

We are of the opinion, and so hold, that his Honor erred in overruling the demurrer of the corporate defendants, and the judgment below is therefore

Reversed.

STATE v. JAY L. INGLE.

(Filed 12 October, 1938.)

1. Plumbing and Heating Contractors § 2—Journeyman plumber held not to carry on business of plumbing and heating contractor within penal provisions of statute.

A journeyman plumber, contracting and agreeing with various persons to perform labor required to install certain plumbing at a stipulated lump sum price, and who does not maintain a fixed place of business or sell or contract to furnish materials, supplies or fixtures of any kind, and who fails to obtain a license from the State Board of Examiners of Plumbing and Heating Contractors, is not guilty of a misdemeanor under the provisions of sec. 10, ch. 52, Public Laws of 1931, since his occupation does not constitute carrying on the "business of plumbing and heating contracting" within the meaning of the penal provisions of the statute.

2. Statutes § 8—

Penal provisions of a statute must be strictly construed.

3. Indictment § 9—

The use of "and/or" in a warrant disapproved.

APPEAL by State from *Alley, J.*, at June Term, 1938, of BUNCOMBE.

Criminal prosecution tried upon warrant charging the defendant with "carrying on the Plumbing and/or Heating contracting business, without having obtained a license to carry on the business of Plumbing and Heating contracting in this State."

There was a special verdict in which it was found that the defendant was duly licensed as a journeyman plumber in the city of Asheville; that at sundry times he contracted and agreed with various persons to perform labor required to install certain plumbing at a stipulated lump sum price for his labor, but at no time has the defendant entered into any contract or agreement which involved or contemplated the furnishing by him of any materials, supplies or fixtures of any kind; that he maintains no office, shop, or fixed place of business; nor does he own, sell or offer for sale any plumbing or heating supplies or fixtures, and that the defendant has never been licensed by the State Board of Examiners of Plumbing and Heating Contractors.

Upon this special verdict, the defendant was declared "not guilty," from which ruling the State appeals, assigning error.

Attorney-General McMullan for the State, appellant.
Brooks, McLendon & Holderness, amicus curiæ.
Adams & Adams for defendant, appellee.

STACY, C. J. It is provided by ch. 52, Public Laws 1931, sec. 6, that in cities of more than thirty-five hundred inhabitants, persons, firms or corporations desiring to enter into or carry on "the Plumbing and/or Heating Contracting business," shall first apply to the State Board of Examiners of Plumbing and Heating Contractors for examination and license, at least thirty days prior to "engaging in said business."

In section 8, it is provided that the board shall have power to revoke the license of any "Plumbing and/or Heating Contractor," who, after hearing, is found to be guilty of any fraud or deceit in obtaining license, or gross negligence, incompetency or misconduct in the carrying on of the business of "Plumbing or Heating Contracting."

And in section 10 of the act it is provided that "Any person . . . who has not been licensed to carry on the business of Plumbing and Heating Contracting in this State, according to the provisions of this act, or who shall practice or offer to practice or carry on said business . . . shall be guilty of a misdemeanor," etc.

It is the position of the defendant, and his view prevailed in the court below, that section 10 of the act in question, imposing criminal liability, applies only to those who have not been licensed to carry on the business of "Plumbing and Heating Contracting" in this State, and who practice, or offer to practice, or carry on "said business"; and that a journeyman plumber does not come within the terms of this section. It must be conceded that the language of the act supports the defendant's position. A journeyman plumber, as defined on the instant record, is not one who is engaged in the business of "plumbing and heating contracting." At any rate, it could hardly be said the defendant here is practicing, or offering to practice, or carrying on "said business."

In construing the penal section of a statute, the rule is, that everything not fairly within the scope of the language used is to be excluded from its operation. *S. v. Whitehurst,* 212 N. C., 300, 193 S. E., 657; *U. S. v. Wiltberger,* 5 Wheat., 76; 25 R. C. L., 1076.

Whether the defendant comes under sections 6 and 8 of the act is not before us for decision. *Roach v. Durham,* 204 N. C., 587, 169 S. E., 149.

While there was no motion to quash the warrant, it may not be amiss to observe that it charges the defendant with "carrying on the Plumbing and/or Heating contracting business." *S. v. Williams,* 210 N. C., 159, 185 S. E., 661; *S. v. Van Doran,* 109 N. C., 864, 14 S. E., 32. The use of "and/or" in the warrant adds nothing to its clarity. *Freeman v. Charlotte,* 206 N. C., 913, 174 S. E., 453; 3 C. J. S., 1069.

The correct conclusion has been reached on the record as presented.

No error.

V. B. BAILEY v. STATE HIGHWAY AND PUBLIC WORKS COMMISSION.

(Filed 12 October, 1938.)

Eminent Domain § 12—In awarding damages for relocation of highway, both special and general benefits should be allowed as offsets.

In an action to recover damages resulting from the relocation of a public road through the lands of plaintiff, both the special and general benefits accruing to plaintiff by reason of the construction of the highway should be allowed as offsets against any damages which plaintiff might have sustained, Michie's Code, 3846 (bb), and an instruction that limits offsets to special advantages that accrued to plaintiff is erroneous.

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

APPEAL by the defendant from *Alley, J.*, at April Term, 1938, of BUNCOMBE. New trial.

This is a civil action to recover damages resulting from the relocation of a public road through the lands of the plaintiff.

From a verdict and judgment awarding plaintiff the sum of $2,500 the defendant appeals, assigning error.

C. E. Blackstock and R. M. Wells for plaintiff, appellee.
Charles Ross for defendant, appellant.

SCHENCK, J. The appellant assigns as error the following excerpt from his Honor's charge: "So, in arriving at the compensation which the plaintiff ought to receive, the jury should estimate the value of the land taken and the damage, if any, to the rest of the plaintiff's tract by reason of the location and construction of the road and from such sum there should be taken as a counterclaim or set-off any benefits which the plaintiff has sustained by reason of the addition to the value, if any, of his tract of land by reason of the special advantages thereto which is not shown to the lands of others in that section." We are constrained to sustain this assignment.

The statute, N. C. Code of 1935 (Michie), sec. 3846 (bb), provides, *inter alia*, that "Whenever the State Highway Commission and the owner or owners of the lands, materials, and timber required by the State Highway Commission to carry on the work as herein provided for, are unable to agree as to the price thereof, the State Highway Commission is hereby vested with the power to condemn the lands, materials, and timber, and in so doing the ways, means, methods and procedure of chapter thirty-three, entitled 'Eminent Domain,' shall be used by it as near as the same is suitable for the purposes of this law, and in all instances the general and special benefits shall be assessed as offsets

against damages; . . ." The vice of the instruction to which exception is reserved consists in the limiting of the amount of the offsets against any damages which the plaintiff might have sustained to the special advantages that accrued to him. Such offsets should also include the general benefits accruing to the plaintiff by reason of the construction of the highway. *Wade v. Highway Commission,* 188 N. C., 210; *Goode v. Asheville,* 193 N. C., 134.

For the error assigned, there must be a

New trial.

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

A. C. WARD v. H. P. SEWELL.

(Filed 12 October, 1938.)

Reference § 3—Pleas in bar must be determined before order of reference may be made.

Pleas in bar must be determined in a cause before an order of reference may be made, and when notwithstanding such pleas a compulsory reference is ordered, the Supreme Court on appeal need not consider the debated question of whether plaintiff waived jury trial upon his exceptions to the referee's report by failure to tender proper issues upon the exceptions, since such reference must be eventually set aside, and the order of reference is vacated and the cause remanded for further proceedings according to law.

APPEAL by plaintiff from *Williams, J.,* at May Term, 1938, of BERTIE.

Civil action (1) to restrain foreclosure of mortgage, and (2) for accountings of two partnerships.

Plaintiff seeks to enjoin foreclosure of mortgage executed 16 January, 1920, to secure note of $4,000 due 1 January, 1921, upon pleas of payment and the statute of limitations. He also asks for accountings of two partnerships, one existing during the year 1920, and the other over the years 1922-1930.

The defendant pleaded in defense and by way of counterclaim full settlement and satisfaction had in January, 1936, the plaintiff agreeing at that time to pay the defendant $3,000, the balance ascertained to be due on his mortgage note.

There was an order of compulsory reference to which both parties duly objected, excepted and reserved their rights to a jury trial. When the matter was called for hearing before the referee, the plaintiff and

defendant each renewed his objection to the compulsory reference, tendered issues, and demanded a jury trial.

The referee found with the defendant on his plea of settlement.

Upon the coming in of the report of the referee, the plaintiff filed exceptions, tendered an issue upon his plea of payment and also one of indebtedness arising out of the two partnerships, and demanded a jury trial upon the issues thus tendered.

The court being of opinion that "the plaintiff has waived his right to a jury trial upon the issues in this cause by failure to tender proper issues upon each exception made to the report of the referee," entered judgment that plaintiff's motion for a jury trial be denied and that the cause be retained for rulings by the court upon exceptions filed to the report of the referee. From this ruling the plaintiff appeals, assigning error.

J. H. Matthews for plaintiff, appellant.

J. A. Pritchett and Gillam & Spruill for defendant, appellee.

STACY, C. J. It hardly seems worth while to debate the question whether plaintiff has waived his right to a jury trial by failure to tender proper issues upon his exceptions to the report of the referee when it appears on the face of the record that a compulsory reference was ordered without first disposing of the pleas in bar. *Graves v. Pritchett,* 207 N. C., 518, 177 S. E., 641; McIntosh N. C. Prac. and Proc., 564. Why engage in the fruitless task of deciding a question of procedure in a reference which eventually must be set aside? *Pritchett v. Supply Co.,* 153 N. C., 344, 69 S. E., 249.

The order of reference will be vacated and the cause remanded for further proceedings as to justice appertains and the rights of the parties may require.

Remanded.

MRS. SAM D. STONE v. TOWN OF BENSON, NORTH CAROLINA, AND E. S. TURLINGTON, TRADING AS E. S. TURLINGTON & CO.

(Filed 12 October, 1938.)

1. Municipal Corporations § 14—

Nonsuit *held* proper as to defendant municipality in this action to recover for fall on sidewalk alleged to have been caused by the presence of oil thereon.

2. Appeal and Error § 40a—

The verdict of the jury is conclusive in the absence of error of law in the trial.

FARFOUR *v.* FAHAD.

APPEAL by plaintiff from *Harris, J.,* at February Term, 1938, of JOHNSTON. No error.

Action for damages for personal injury. Plaintiff alleged she sustained an injury resulting from a fall on the sidewalk of the town of Benson and in front of defendant Turlington's store, and that her fall was caused by the presence of oil on the sidewalk negligently permitted there by the defendants.

At the close of plaintiff's evidence motion for judgment of nonsuit as to the town of Benson was allowed. Issues submitted to the jury as to the defendant Turlington were answered as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Ans.: 'Yes.'

"2. Did the plaintiff, by her own negligence, contribute to her said injury, as alleged in the answer? Ans.: 'Yes.'

"3. What damages, if any, is the plaintiff entitled to recover of the defendant? Ans.: 'None.' "

From judgment for defendants, plaintiff appealed.

R. L. Godwin and Ezra Parker for plaintiff, appellant.
Larry F. Wood and L. L. Levinson for defendants, appellees.

DEVIN, J. Upon the evidence offered on the trial judgment of nonsuit as to the town of Benson was properly entered. The controverted issues of fact as to the liability of defendant Turlington have been determined in his favor. The assignments of error as to the judge's charge cannot be sustained. In the trial we find

No error.

MRS. CAMELIA FARFOUR v. K. FAHAD AND REV. ELIAS ZAYTOUN.

(Filed 19 October, 1938.)

1. Courts § 11: Automobiles § 19—

In an action by a guest to recover for injuries sustained in an automobile accident occurring in the State of Virginia, liability of defendants, if any, must be determined by the laws of that State, which requires a showing of gross negligence in order for the guest to recover.

2. Automobiles § 9—Evidence held insufficient to support inference that accident was result of sleepiness of driver.

The evidence disclosed that the driver of a car ran into a curbing surrounding a grass plot separating the highway into north and southbound traffic, that the accident occurred in the State of Virginia at three o'clock in the morning as the car was being driven on a trip from a

point in this State northward. Plaintiff introduced testimony that just after the accident the driver remarked that his eyes were tired. *Held:* Testimony as to the remark of the driver, even taken in connection with attendant circumstances, is not relevant to show that the driver negligently ignored premonitions of sleep, and is insufficient to support the inference that the accident was the result of sleepiness on the part of the driver.

3. Trial § 22b—

The fact that defendant fails to object to the admission of certain evidence which might be relevant in these connections, does not preclude the court from determining its irrelevancy in passing upon the probative value of the evidence.

4. Automobiles § 10—Held: Evidence failed to show causal connection between failure to keep in right lane and the accident in suit.

The evidence disclosed that the highway in the State of Virginia where the accident occurred was divided in the center by a grass plot surrounded by a curb, that there were two lanes for traffic divided by a middle line on each side of the grass plot, and that the driver of the car in which plaintiff was riding hit the curbing bounding the left traffic lane on the part of the highway for traffic going in his direction, and that there was no other traffic on the road at the time. Plaintiff introduced in evidence statute of the State of Virginia requiring cars on such highways to keep to the right lane unless passing other vehicles or preparing for a left turn, of the State of Virginia requiring cars on such highways to keep to the right lane has no causal connection with the accident, since a like disastrous result might have occurred had he run off the right side of the road, the purpose of the statute being to prevent collisions between vehicles.

5. Automobiles § 18a—

There must be a causal connection between the violation of a safety statute and the injury in order for the negligence to be actionable.

6. Automobiles § 22—Laws of Virginia do not preclude appellate court from determining sufficiency of evidence of gross negligence.

While the courts of Virginia treat the difference between simple negligence and gross negligence as one of degree, and while ordinarily the evidence must be submitted to the jury upon proper instructions from the court as to the degree of negligence involved, the verdict of the jury is not conclusive, and the matter is not beyond review in the appellate court.

7. Same—Evidence held insufficient to show gross negligence in this action by guest to recover for injuries under Virginia law.

This action was instituted by a guest in a car to recover for injuries received in an accident in the State of Virginia. The evidence disclosed that the car was being driven northward and that the driver of the car ran into the curbing bounding the left traffic lane and separating the northbound traffic from the lanes for southbound traffic, that the accident occurred early in the morning when there was no other traffic on the highway. Neither party contended that the doctrine of *res ipsa loquitur* applied. *Held:* The evidence fails to show that the accident resulted from the negligent failure of the driver to heed premonitions of sleep, and fails to show a causal connection between the driver's failure to keep in the

right northbound traffic lane, and the injury in suit, and defendants' motions to nonsuit should have been granted for failure of the evidence to disclose gross negligence required under the Virginia law to support a recovery.

APPEAL by defendants from *Hamilton, Special Judge,* at April Term, 1938, of WAYNE. Reversed.

The plaintiff brought this action to recover damages for injuries which she alleges she sustained through the negligence of the defendants while riding as a guest of Fahad in a car driven by Zaytoun within the State of Virginia.

The evidence pertinent to this opinion is substantially to the following effect:

A party composed of Mrs. Farfour, the plaintiff, Mrs. Kanan, H. Simon, and Father Zaytoun left Wilson, North Carolina, about seven o'clock in the evening in a car driven by Zaytoun, intending to attend a funeral at Dover, New Hampshire. Fahad had asked Zaytoun to drive the car, carrying the others as guests, and had arranged with Simon to go with the party, and "pay all the expenses." They arrived at a point near Alexandria, Va., about three o'clock in the morning, Zaytoun driving. At this point, just beyond a crossroad coming in from the right, there were two one-way roads, each about twenty feet wide, separated by a grass plot, which was surrounded by a concrete curbing from five to eight inches high. Each one-way road had a line marking the middle, dividing the road into two lanes. The car was going about 45 miles an hour, and, just beyond the intersecting road mentioned, entered the right-hand one-way road, struck the curbing on the left-hand side of this road, ran up on the grass plot, turned over, and injured the plaintiff.

H. Simon testified that he was on the trip in the front seat with Zaytoun, who was driving; that when they got to the point mentioned they did not see anything ahead of them except the "boulevard," and: "We hit the next one and the back wheel of the car hit the next curb and turned around and turned over. It was a pretty fair night. It was a one-way road. There was a little grass boulevard between the two one-way roads. There was a side road on our one-way road on the right side leading into it just before the collision. . . . We were traveling about 45 miles an hour. . . . It didn't skid. . . . After it hit the curbing, I looked at the road and where it had hit. It was a paved road. I seen oil that probably came out of the car. I didn't see any oil except that right at the car. . . . There were no cars meeting us, or ahead of us, just before we got to the place of the collision. The road was entirely clear. . . . In my conversation with him (Father Zaytoun) afterwards, he said he was tired; he said his eyes were kind of

tired. It was three o'clock in the morning. I can't tell if he was asleep; I didn't see him asleep. That's what he said, that he was tired, his eyes tired. . . . Father Zaytoun had been driving all of the way; he had been driving very carefully and probably knew what he was doing. . . . At the point of the second grass plot there was a little curbing around the grass. The front part of the car passed that curbing, but the back wheel hit the curbing. The back wheel of the car slid, or skidded, or did something to get into the curbing and it stopped immediately, went only just a few feet from that immediate point and turned around. After it turned around it turned over on its side."

On cross-examination: "I don't know what caused the left rear to slide into the side of that pavement. I didn't say 'slided'; I said 'hit the curb.' I don't know how he got to it. The front part of the car was going straight. No part of the car touched the paving, except the left rear wheel."

Joe Hallow testified that he went to the scene of the collision some forty or fifty days afterwards and was shown the place. He testified that there was a black line dividing the two lanes of the one-way road which was twenty feet wide. He stated that Father Zaytoun told him his front wheel went over first and his back wheel got broken before the car turned over; that he asked Father Zaytoun as to whether he was asleep, and the latter said he "didn't think he was asleep. He said he wasn't asleep."

Mrs. Margaret Kanan testified that prior to the accident, Father Zaytoun was driving at a high rate of speed "and the first thing we knew we just hit this curbing." . . . That "the front wheels hit and then we went over the parkway, and then the left rear wheel hit the curbing, and that's when it broke down and caused the car to turn over on its side." Witness further testified that the lanes were about twenty feet wide, the black lines on the surface in the center; that the automobile did not slacken its speed on or before it hit the curbing and turned over, but it seemed like the car was going faster instead of slower after it struck.

On cross-examination, this witness stated the rate of speed was about 45 or 50 miles an hour.

The plaintiff offered in evidence the entire 1936 Motor Vehicle Code of the State of Virginia, and called special attention to the following provisions:

Section 2154, subsection 109: . . . "Reckless driving within the meaning of this section shall be deemed to include the following offenses, which are expressly prohibited: . . . Driving to the left of the center of the street or highway." Section 2152, subsection 112: . . . "Except as otherwise provided in section 2154-115" (that is, as to pass-

ing other vehicles), upon all highways of sufficient width the driver of a motor vehicle shall drive the same upon the right half of the highway, unless it is impracticable to travel on such side of the highway, and except when overtaking or passing another vehicle."

"113. In crossing an intersection of highways the driver of a vehicle shall at all times cause such vehicle to travel on the right half of said highway, unless such right side is obstructed or impassable."

"114. Whenever any highway has been divided into clearly marked lanes for traffic, drivers of vehicles shall obey the following regulations: A vehicle shall normally be driven in the lane nearest the right-hand lane, edge, or curb of the highway, when said lane is available for travel, except when overtaking any vehicle, or in preparation for a left turn. A vehicle shall be driven as nearly as practicable entirely within a single lane, and shall not be moved from such lane until the driver has ascertained such movement can be made with safety."

In addition to this, numerous opinions of the Supreme Court of Virginia, dealing with "guest cases," were introduced by plaintiff and by the defendants.

At the conclusion of the plaintiff's evidence, and again at the conclusion of all the evidence, the defendants moved for judgment as of nonsuit, which was denied.

The trial resulted in a verdict for the plaintiff, and defendants appealed.

Ehringhaus, Royall, Gosney & Smith, P. B. Edmundson, and Howard E. Manning for plaintiff, appellee.

Langston, Allen & Taylor for defendants, appellants.

SEAWELL, J. Since the alleged negligent act or omission of duty, and the injury consequent thereupon, occurred in the State of Virginia, the liability of the defendants, if any, must be judged by the laws of that State. *Rodwell v. Coach Co.*, 205 N. C., 292, 295; *Wise v. Hollowell*, 205 N. C., 286, 289; *Howard v. Howard*, 200 N. C., 574. Under the Virginia law, a guest in an automobile may not recover for simple or ordinary negligence of the host, but only when the negligence has been gross. *Margiotta v. Aycock*, 162 Va., 557, 174 S. E., 831; *Boggs v. Plybon*, 157 Va., 30, 160 S. E., 77, 80; *Jones v. Massie*, 158 Va., 121, 163 S. E., 63. Admitting this, plaintiff argues that she has shown gross negligence in the case at bar; and that, furthermore, where there is negligence shown, it is for the jury alone, at least under the circumstances of this case, to say whether it is ordinary or gross, the difference being one of degree only, and the verdict in favor of the plaintiff withdraws that phase of the case from review, citing *Thomas v. Snow*, 174

S. E. (Va., 1934), at pages 838 and 839; *Yonker v. Williams,* 192 S. E. (Va., 1937), 753, 755.

Considering the evidence on defendants' motion for judgment of nonsuit in the light most favorable to plaintiff, we may well doubt whether there is sufficient evidence of negligence, either simple or gross, to go to the jury.

It is agreed by both counsel for plaintiff and counsel for defendants that the doctrine *res ipsa loquitur* does not apply—by the plaintiff's counsel because, as they contend, they have shown the negligent cause of the collision; by the defendants' counsel because, as they contend, the collision itself might point to many things, some of them not inconsistent with due care. *Kline v. Buten,* 169 Wis., 395; *Butner v. Whitlow,* 201 N. C., 749, 751, 161 S. E., 389; *Rigsby v. Tritton,* 143 Va., 903, 129 S. E., 493. But plaintiff emphasizes two phases of the evidence as showing negligence: The testimony of H. Simon, with attendant circumstances, from which plaintiff contends it may be inferred that the driver of the car negligently ignored premonitions of sleep; and evidence that at the time of the collision with the curb the driver was on the wrong side of the road, in violation of the Virginia traffic law.

As to the first proposition, it may be conceded that if the evidence is sufficient to warrant the inference of fact suggested, plaintiff might recover on a showing of gross negligence. *Lee v. Moore,* 191 S. E. (Va.), 589. The only evidence which the plaintiff points out as warranting an inference of drowsiness or sleep is the statement of Simon to the effect that Zaytoun admitted after the occurrence that his eyes were tired, and such circumstances as may have strengthened or given further significance to such statement. We think this circumstance, as evidence that a condition of drowsiness or sleepiness had supervened, is wanting in relevancy, and the suggested inference is speculative and unwarranted; and the evidence for the plaintiff strongly tends to contradict that theory. The fact that the defendants did not object to the introduction of this testimony, which might have been relevant from other points of view, is not material, since we are discussing only its probative value.

As to the other proposition, that is, that the collision with the curbing was caused because of the negligence of the defendant Zaytoun in driving on the left-hand lane of a one-way road, we have to examine the conditions of traffic existing at the time of the occurrence, as well as the apparent purpose of the Virginia law requiring that the driver of an automobile use the right-hand lane.

The evidence shows that the road was free from traffic—no cars going or coming either way—and the apparent purpose of the statute was to prevent collisions with oncoming or passing cars by requiring the driver

to keep within his own lane. The disaster could hardly be attributed to the violation of this particular traffic law. While, of course, it is true that the defendant would not have come in contact with the left-hand curb if he had been driving on the right-hand side, this may have served merely to shift the location of the accident, just as the stage reached in their journey located it, geographically, in the State of Virginia. That the car went off the left-hand side of the road, under the circumstances, seems to us to have no more significance than if it had gone off the right-hand side, which seemed to offer equal facilities for dangerous contact. "The breach of a statute is negligence *per se*, but there must be a causal connection between the disregard of the statute and the injury inflicted." *Burke v. Carolina Coach Co.*, 198 N. C., 8, 150 S. E., 636; *Ledbetter v. English*, 166 N. C., 125, 81 S. E., 1066; *Chancey v. R. R.*, 174 N. C., 351, 93 S. E., 834; *Elder v. R. R.*, 194 N. C., 617, 140 S. E., 298; *Gaines v. Campbell*, 159 Va., 504, 514, 166 S. E., 704; *Gilley v. Simmons*, 145 Va., 549, 134 S. E., 550. At any rate, we cannot see in it anything approaching gross negligence.

While the Virginia courts regard the difference between simple, or ordinary negligence, and gross negligence, as one of degree, and while ordinarily the evidence must be submitted to the jury upon proper instructions from the court as to the degree of negligence involved (*Thomas v. Snow, supra; Yonker v. Williams, supra*), we do not understand that the verdict of the jury is necessarily conclusive, and the matter beyond review in the appellate court. *Boggs v. Plybon, supra, Margiotta v. Aycock, supra. Stubbs v. Parker*, 169 Va., 683, 192 S. E., 820, 822, quotes with approval from *Margiotta v. Aycock, supra:*

"Of course the jury's verdict is not always conclusive. In cases of ordinary negligence this Court has always freely exercised its right to say that it is unsupported by the evidence. By the same token it has the right to say, notwithstanding the verdict, that there is no evidence whatever of gross negligence." *Jones v. Massie, supra; Young v. Dyer*, 161 Va., 434, 170 S. E., 737; and *White v. Gregory*, 161 Va., 414, 170 S. E., 739.

Even making the cautious approach to the subject required under the rule in *Thomas v. Snow, supra*, and *Yonker v. Williams, supra*, we feel free to say that if there was any negligence of the defendants at all, it was no more than simple or ordinary negligence, and there is no evidence of gross negligence in the record. *Boggs v. Plybon, supra; White v. Gregory*, 161 Va., 414, 170 S. E., 739; *Young v. Dyer, supra.*

We therefore think there was error in refusing defendants' motion for judgment as of nonsuit, and the judgment is

Reversed.

NAOMI TEACHEY AND HUSBAND, LEON TEACHEY; RUTH CRUMPLER AND HUSBAND, ALBERT CRUMPLER; NANNIE SMITH AND HUSBAND, J. H. B. SMITH; VARA MOORING AND HUSBAND, W. P. MOORING; LIZZIE SMITH AND HUSBAND, LLOYD SMITH; LAULAS NEWSOME AND HUSBAND, JOHN D. NEWSOME; MABEL COKER AND HUSBAND, RILEY COKER; ROBERT SMITH AND WIFE, ... SMITH; SARAH EMMA SMITH, AVA SMITH, NORA SMITH, AND ..... SMITH, THE LAST FOUR BEING MINORS, AND BEING REPRESENTED IN THIS ACTION *by* THEIR NEXT FRIEND, J. H. B. SMITH; EDGAR GURLEY; LEAMOND GURLEY AND WIFE, LILLIAN GURLEY; LEONARD GURLEY AND WIFE, MAUDE GURLEY; WILLIE BURGUS GURLEY AND WIFE, ELLEN GURLEY; ADDIE GURLEY AND TOM GURLEY, THE LAST TWO BEING MINORS AND REPRESENTED IN THIS ACTION BY THEIR NEXT FRIEND, J. H. B. SMITH; ADELINE PARKS AND HUSBAND, JOE P. PARKS, v. W. G. GURLEY AND WIFE, ANNIE GURLEY; JOHN HENRY GURLEY AND WIFE, MARGARET GURLEY; DAVID GURLEY AND WIFE, ELIZABETH GURLEY; JOSEPH ISAAC GURLEY AND WIFE, CLARA MAE GURLEY; W. B. THOMPSON, B. G. THOMPSON AND J. B. THOMPSON, TRADING AS B. G. THOMPSON AND SONS, MORTGAGEE; AND JOHN W. THOMPSON, TRUSTEE (ORIGINAL PARTIES DEFENDANT), AND W. G. GURLEY AND JOHN HENRY GURLEY, EXECUTORS OF THE ESTATE OF MARY GURLEY, DECEASED (ADDITIONAL PARTIES DEFENDANT).

(Filed 19 October, 1938.)

1. Trusts § 1a—

Express trusts are created by contract, express or implied.

2. Trusts § 15—

A resulting trust is created when one person's money is invested in land and the conveyance taken in another's name.

3. Same—

A constructive trust arises when land is acquired through fraud, or when, though acquired originally without fraud, it is against equity that it should be retained by him who holds it.

4. Same—

Resulting and constructive trusts arise independent of any contract and no trust or confidence is present, but the trust relation is imposed by equity in order to work out the remedy.

5. Limitation of Actions § 3—

No statute of limitation runs against an express trust until the trustee repudiates the trust with the knowledge of the *cestui*, or until demand and refusal, or termination of the trust by death, or the trust is closed, since until one of these contingencies occurs no cause of action rests in the *cestui*.

6. Limitation of Actions § 2e—

Since occurrences which constitute a breach of an express trust amount in effect, and usually in fact, to a breach of contract, a cause of action for such breach is barred at the expiration of three years from such breach. C. S., 441.

7. Limitation of Actions § 3—

An action to enforce a resulting or constructive trust is based on the original wrongful or tortious act of the person holding title, and the cause of action arises and the statute begins to run immediately the wrongful act is committed.

8. Limitation of Actions § 2a—

Since an action to enforce a resulting or constructive trust is based upon a wrongful or tortious act, the ten-year statute of limitations applies. C. S., 445.

9. Limitation of Actions § 2a—Action held to establish express trust, and cause was barred by the three-year statute.

The owner of lands devised same to his wife for life, remainder to his children and certain of his grandchildren. Some of the lands were subject to deeds of trust in favor of the same *cestui*, and some of the lands were unencumbered. The encumbered lands were sold under foreclosure, and the unencumbered lands were sold to make assets, and all the lands were purchased by or for the *cestui* in the deeds of trust. Plaintiffs, some of the heirs at law of testator, instituted this action, alleging that the purchaser bought the lands under an agreement to reconvey to the widow upon her agreement to execute a deed of trust on all the lands to secure the debt, that the purchaser refused to reconvey to the widow, and so informed her, but conveyed the lands to defendants, the remaining heirs at law of testator, who assumed the debt. It appeared from the evidence that the widow died before the institution of the action and that the lands were so conveyed to defendants almost six years prior to her death. *Held:* Taking the evidence in the light most favorable for plaintiffs, it tends to establish an express trust, and the three-year statute of limitations applies, C. S., 441, and it appearing that more than three years elapsed from the breach of the trust to the knowledge of the *cestui*, the action was properly dismissed upon defendants' plea of the statute.

10. Equity § 2—Delay which will constitute laches depends on facts and circumstances of each particular case.

The doctrine of laches is more flexible than the statute of limitations, and may bar an equitable remedy by reason of inexcusable or prejudicial delay for a period even shorter than the statutory period of limitations, and delay which will constitute laches depends on the facts and circumstances of each case, and the doctrine will apply when lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim.

11. Same—Under facts of this case, laches of plaintiffs held bar to recovery.

The owner of lands devised same to his wife for life, remainder to his children and certain grandchildren. Some of the lands were encumbered and some were unencumbered. The encumbered lands were sold under foreclosure, and the unencumbered lands were sold to make assets, and all the lands were purchased at the sales by or for the benefit of the *cestui que trust* in the encumbrances. Plaintiffs, some of the heirs at law of testator, and devisees under the widow's will, instituted this action, alleging that the purchaser at the sales bought the lands under an agreement to reconvey to the widow upon her agreement to execute a deed of trust on all the lands to secure the indebtedness, that the purchaser

refused to reconvey to the widow, and so informed her, but conveyed the lands to defendants, the remaining heirs at law. It appeared that the widow died before the institution of the action and that the lands were so conveyed to defendants almost six years prior to her death, that defendants had assumed the indebtedness, had made improvements on the lands, and had sold part of same. *Held:* The delay during which defendants had assumed and attempted to pay off the debt and had made improvements on the property to the knowledge of plaintiffs, and during which the lips of the widow, the primary beneficiary, were closed in death, constitute laches barring plaintiffs' action to set aside the sales or to set up an express trust therein.

APPEAL by plaintiffs from *Cowper, Special Judge,* at March Term, 1938, of WAYNE. Affirmed.

This is a civil action instituted by plaintiffs, heirs at law of W. M. Gurley, against the mortgagees of W. M. Gurley and certain other of his heirs at law, in which the plaintiffs seek to vacate and annul a foreclosure sale under a mortgage on the lands of the deceased and to enforce a contract alleged to have been entered into by the mortgagee to purchase the land at the sale and reconvey.

W. M. Gurley died testate, having devised all of his land to his widow, Mary Gurley, for life, with remainder, subject to the life estate, to his children and certain grandchildren. All of said children and grandchildren are parties plaintiff except W. G. Gurley, Annie Gurley, John Henry Gurley, David Gurley, and Joseph Isaac Gurley, who are parties defendant.

At the time of his death W. M. Gurley was seized and possessed of more than 400 acres of land, consisting of a number of tracts. At that time he was indebted to the defendants B. G. Thompson and Sons in an amount in excess of $24,000. There was an outstanding mortgage to B. G. Thompson & Sons securing $24,000, and an outstanding trust deed to John W. Thompson, trustee, securing $7,000. Part of the land was unencumbered. The widow, Mary Gurley, was surety upon some of the outstanding notes.

The mortgage and the trust deed were foreclosed and Wm. B. Thompson became the purchaser. There was a proceeding to sell the unencumbered land to make assets, under which a commissioner was appointed to make sale, and this land was likewise purchased by Wm. B. Thompson. Shortly thereafter Wm. B. Thompson, at the direction of B. G. Thompson, conveyed all of said land by warranty deed to the defendants Gurley. The grantees in said deed in turn conveyed said property to secure the amount due the defendants B. G. Thompson and Sons, it having been agreed that the land was to be conveyed to said grantees in consideration of their assumption and agreement to pay the amount due B. G. Thompson & Sons by the estate of W. M. Gurley. In

purchasing said land at said sales Wm. B. Thompson acted as the agent of B. G. Thompson. All of these conveyances were made in the spring of 1931, the last one to the defendants Gurley being dated 29 April, 1931. Mary Gurley died in 1937, having left a will, in which she devised her property to her living children and to the children of such of her children as predeceased her, *per stirpes.*

At the conclusion of all the evidence, on motion of defendants, the action was dismissed as of involuntary nonsuit. The plaintiffs, other than the husbands of the *feme* plaintiffs, who had theretofore taken a voluntary nonsuit, excepted and appealed.

J. Faison Thomson and Walter T. Britt for plaintiffs, appellants.

Royall, Gosney & Smith and Howard E. Manning for defendants, appellees.

BARNHILL, J. The only exceptive assignment of error which requires consideration on this appeal is the one which challenges the correctness of the judgment of nonsuit entered on motion of the defendants at the conclusion of all the evidence.

Plaintiffs offered a number of witnesses who testified as to the alleged contract made by B. G. Thompson. Each in almost identical language testified that "he was going to sell the land as he promised he would do; he was going to bid it in at the lowest figure, and was going to deed it back to her (Mary Gurley) as he told her he would do, and let her divide it among each and all of the children." No witness for the plaintiff testified that the defendant B. G. Thompson agreed to convey the property to any person other than Mary Gurley. All testified that this was to be done so that she could divide it among each and all of her children. In that connection it is also alleged in the complaint that the property was to be bid in by B. G. Thompson and he was to hold the title to the same in trust for Mary Gurley and that Mary Gurley was thereupon to execute a mortgage or deed of trust to secure the amount due B. G. Thompson by the estate of W. M. Gurley, which deed of trust was to embrace all the lands sold by B. G. Thompson and J. B. Thompson, mortgagee, by John W. Thompson, trustee, and by Mary Gurley under the order of court.

It is unnecessary to decide whether this evidence tends to establish an express trust by contract in favor of Mary Gurley or merely amounts to a contract to purchase and reconvey. We may assume for the purposes of this decision that considered in the light most favorable to the plaintiffs it tends to show an express trust.

Shortly after the sales were had the defendant B. G. Thompson told Mrs. Gurley in the presence of the witness Parks that he was not going

to let her have the land back as he had promised her to do. Likewise, within a few days after the sales, on 29 April, 1931, Thompson actually conveyed the property to the defendants Gurley in direct violation of the alleged agreement.

It appears, therefore, from plaintiffs' evidence that the agreement to reconvey, which was in effect an agreement by Thompson to purchase as trustee for Mary Gurley, was breached in April, 1931, to the knowledge of the *cestui que trust.* Mary Gurley died in February, 1937. She lived almost six years after the known breach of the contract creating the trust relationship without taking any action. Is plaintiffs' cause of action barred by the statute of limitations—that is, does the three-year statute or the ten-year statute apply? Counsel seem to agree that this is the determinative question on this appeal.

Any seeming conflict or confusion in our decisions in applying the statute of limitations to trusts (commented on by counsel) arises only when the decisions are considered without reference to the several types of existing trusts, of which there are three: *First,* express trusts, which are created by contract, express or implied; *second,* resulting trusts, which arise when a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another. Under such circumstances equity creates a trust in favor of such other person commensurate with his interest in the subject matter. A trust of this sort does not arise from or depend on any agreement between the parties. It results from the fact that one man's money has been invested in land and the conveyance taken in the name of another. It is a mere creature of equity. And *third,* constructive trusts, which are such as are raised by equity in respect to property which has been acquired by fraud, or where though acquired originally without fraud, it is against equity that it should be retained by him who holds it. This type of trust likewise arises purely by construction of equity independently of any contract or of any actual or presumed intention of the parties to create a trust and is generally thrust on the trustee for the purpose of working out the remedy. The relief in such cases is predicated on fraud and not on trust. Equity declares the trust in order that it may lay its hands on the thing and wrest it from the possession of the wrongdoer.

Strictly speaking, resulting trusts and constructive trusts are not trusts, but equity imposes a trust relation because morality, justice, conscience and fair dealing demand that the relation be established. In neither does the relation of trustee and *cestui que trust* actually exist for the element of trust and confidence is absent. The holder of the legal title is declared to be a trustee on equitable principles by reason of some tortious or wrongful act of his.

1. Where there is an express trust based on contract, express or implied, the statute of limitations has no application and no length of time is a bar unless and until there has been (1) a repudiation or disavowal of the trust, or (2) a demand and refusal, or (3) the trust has been terminated by death, or (4) has been closed. 17 R. C. L., 708, and numerous authorities cited in notes. The reason for the rule is that the possession of the trustee is presumed to be the possession of the *cestui que trust*. As long as the relation of trustee and *cestui que trust* is admitted to exist, and there is no assertion of adverse claim or ownership by the trustee, no refusal on demand to comply with the terms of the trust, and no repudiation or disavowal of the trust, no cause of action rests in the *cestui que trust*. The cause of action arises when and only when there has been some assertion of adverse claim or ownership, or a refusal to comply upon demand, or a disavowal or repudiation of the trust. Perry on Trusts and Trustees, 7th Ed., Vol. 2, page 1468, etc. Bogert on Trusts and Trustees, Vol. 4, page 2758, etc. *Hinton v. Gilbert*, 70 A. L. R., 1192; *Cavanaugh Bros. Horse Co. v. Gaston*, 47 A. L. R., 1; 17 R. C. L., 708; *Edwards v. University*, 21 N. C., 325; *Bradsher v. Hightower*, 118 N. C., 399, 24 S. E., 120; *Lowder v. Hathcock*, 150 N. C., 438, 64 S. E., 194; *Hospital v. Nicholson*, 190 N. C., 119, 129 S. E., 149; *Efird v. Sikes*, 206 N. C., 560, 174 S. E., 513; *Bacon v. Reeves*, 160 U. S., 107; *Coxe v. Carson*, 169 N. C., 132, 85 S. E., 224, in which it is said that the statute begins to run when the trust is closed or when the trustee disavows the trust with the knowledge of the *cestui que trust*, or holds adversely to the claim of those he represents. If a trustee repudiates a trust by clear or unequivocal acts or words and claims thenceforth to hold the estate as his own, not subject to any trust, and such repudiation and claim are brought to the notice or knowledge of the *cestui que trust* in such manner that he is called upon to assert his rights the statute will begin to run from the time that such knowledge is brought home to the *cestui que trust* and he will be completely barred at the end of the statutory period.

In such instances the breach of the trust is in effect and, usually, in fact a breach of contract, express or implied. Actions thereon are necessarily based on the contract and the breach thereof. This being true, C. S., 441, applies and the right of action is barred at the expiration of three years after such breach, repudiation or disavowal. *Robertson v. Dunn*, 87 N. C., 191; *Edwards v. University*, 21 N. C., 325; *Dunn v. Dunn*, 137 N. C., 533, 50 S. E., 212; *County Board v. State Board*, 107 N. C., 367, 12 S. E., 452; *House v. Arnold*, 122 N. C., 220, 29 S. E., 334; *Davis v. Doggett*, 212 N. C., 589.

2. Actions to enforce constructive or resulting trusts are based on the original wrongful or tortious act of the person holding title, by reason

of which equity impresses a trust upon his title. No contract relation exists. A cause of action arises when the wrong is committed. Therefore, the statute of limitations immediately begins to run and the ten-year statute applies, unless sooner barred under the doctrine of laches. C. S., 445.

None of the decisions cited by the plaintiffs are in conflict with the views herein expressed. In *Ritchie v. Fowler,* 132 N. C., 788, 44 S. E., 616; *McAden v. Palmer,* 140 N. C., 258, 52 S. E., 1034; and *Norcum v. Savage,* 140 N. C., 472, 53 S. E., 289, constructive trusts were under consideration. In *Gentry v. Gentry,* 187 N. C., 29, 121 S. E., 188; *Sexton v. Farrington,* 185 N. C., 339, 117 S. E., 172; *Marshall v. Hammock,* 195 N. C., 498, 142 S. E., 776; and *Miller v. Miller,* 200 N. C., 458, 157 S. E., 604, resulting trusts are discussed. The decisions in *Rouse v. Rouse,* 176 N. C., 171, 96 S. E., 986, and in *Latham v. Latham,* 184 N. C., 55, 113 S. E., 623, are based on laches. In the latter case, which deals with an active trust which had become passive by the death of the *cestui que trust,* it is stated that the action would be barred at most within ten years. However, some thirty years had expired since the trust became passive. *Spence v. Pottery Co.,* 185 N. C., 218, 117 S. E., 32, was an action to reform a deed for mistake of the draftsman. In *Cunningham v. Long,* 186 N. C., 526, 120 S. E., 81, the statute of limitations was not pleaded and the court held that there was no evidence of unreasonable delay.

Whether courts of equity apply a limitation upon actions in obedience to the statute or by analogy is of little importance, for courts of equity have their own rule of laches which is much more flexible than the statute of limitations and is usually applied to bar equitable rights and remedies when there has been unreasonable, inexcusable and prejudicial delay, equal to and even less than the statutory period of limitations. *Patterson v. Hewitt,* 195 U. S., 309; *Hammond v. Hopkins,* 143 U. S., 224; *Sawyer v. Cook,* 188 Mass., 163, 74 N. E., 356; Perry on Trusts and Trustees, Seventh Ed., Vol. 2, page 1457. In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied. Hence, what delay will constitute laches depends upon the facts and circumstances of each case. Whenever the delay is mere neglect to seek a known remedy or to assert a known right, which the defendant has denied, and is without reasonable excuse, the courts are strongly inclined to treat it as fatal to the plaintiff's remedy in equity, even though much less than the statutory period of limitations, if an injury would otherwise be done to the defendant by reason of the plaintiff's delay. Thus, where the property has greatly increased in value, especially if through the efforts of the

defendant, unexplained delay of a very short time may be laches. This is likewise true where the defendant's means of proving his side of the case has been materially weakened by the lapse of time, as, for example, by reason of the death of parties, loss of evidence, change of title, intervention of equities, or otherwise. *Hammond v. Hopkins, supra;* Perry on Trusts and Trustees, *supra,* page 148, and cases noted.

We are prone to hold, therefore, that irrespective of the statute of limitations the *laches* of the plaintiffs is such as to bar any recovery in this action. They waited for approximately six years after the trust was disavowed and after the property had been conveyed by the alleged trustee and until after the lips of the primary beneficiary were closed in death. In the meantime, one of the plaintiffs and her husband lived on the property for a period as tenants. During the full time all the plaintiffs were in a position to know that the defendants Gurley were making improvements upon the property, had conveyed a part of it and were undertaking to pay off the debt originally created by the ancestor of the plaintiffs. And yet, to this day neither the original beneficiary nor the plaintiffs have offered to comply with their part of the contract, but have consistently acquiesced in the ownership of the defendants Gurley. Under such circumstances one whose *laches* is so pronounced cannot successfully seek relief in a court of equity. *Jones v. Stewart,* 212 N. C., 228.

Plaintiffs' cause of action is barred by the three-year statute of limitations, C. S., 441 (1), and under the doctrine of *laches,* each of which was duly pleaded in defense.

The judgment below is

Affirmed.

SAM P. BRILEY v. VANCE L. ROBERSON AND WIFE, MYRTLE ROBERSON, HELEN ROBERSON MARDRE AND HUSBAND, GEORGE L. MARDRE, AND DELLA LOUISE ROBERSON, INDIVIDUALLY, AND VANCE L. ROBERSON, HELEN ROBERSON MARDRE AND DELLA LOUISE ROBERSON, EXECUTORS OF THE WILL OF J. H. ROBERSON, JR.

(Filed 19 October, 1938.)

1. Trial § 22b—

Upon a motion to nonsuit, the evidence tending to support plaintiff's cause of action is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. Judgments § 33a—Voluntary nonsuit will not bar subsequent action.

While C. S., 415, relating to the time of institution of an action in regard to the statute of limitations, provides that an action may be insti-

tuted within one year from judgment as of nonsuit, provided the original action was not brought *in forma pauperis*, a voluntary nonsuit will not bar a subsequent action even though the original action nonsuited was brought *in forma pauperis*.

3. Trusts § 15—Grantor may engraft constructive trust upon his warranty deed upon a showing of fraud.

While a parol trust cannot be engrafted on a warranty deed in favor of the grantor therein in the absence of fraud, mistake, or undue influence, in this case instituted by an old, feeble and illiterate Negro of good character to have his warranty deed set aside or declared to be an equitable mortgage, the evidence of fraud *is held* sufficient to be submitted to the jury.

4. Limitation of Actions § 4—Whether action was instituted within three years from discovery of alleged fraud held for jury.

Plaintiff, an old, feeble, illiterate Negro, instituted this action attacking a warranty deed executed by him on the ground that the grantees therein fraudulently procured the execution of the instrument, and that at the time plaintiff thought and intended to execute only a mortgage for the security of his debt. *Held:* Whether the cause of action was barred by the statute of limitations should have been submitted to the jury upon the evidence under the provisions of the statute that a cause of action for relief on the ground of fraud or mistake shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. C. S., 441 (9).

APPEAL by plaintiff from *Williams, J.*, at April Term, 1938, of MARTIN. Reversed.

This is an action brought by plaintiff against defendants to set aside a deed for 108.35 acres of land in Martin County, N. C., made 19 December, 1930, by plaintiff to J. H. Roberson, Jr., on the ground of fraud. The consideration set forth in the deed is $2,000. The complaint alleges that "not one cent of said amount was paid to plaintiff," and further alleges:

"That plaintiff was, and said J. H. Roberson, Jr., and the defendant Vance L. Roberson, well knew at the time he executed said deed that he was helpless to meet their demands to pay his debt to them in full; that he had implicit confidence in their said representations; that he was too old, feeble and illiterate to understand the difference in the written provisions of a deed, deed of trust and mortgage deed, and that plaintiff was placing his trust and confidence in them to write the instrument in a manner which would permit him to redeem his said farm upon the payment of said debt in the manner then and there agreed upon.

"That said farm was at the time herein referred to and is now well worth the sum of seven thousand ($7,000) dollars, which was more than twice the amount plaintiff owed all of his creditors, secured and unsecured.

"That the plaintiff is informed and so believes and alleges, that the said representations made by said J. H. Roberson, Jr., and the defendant Vance L. Roberson, to plaintiff prior to and at the time he executed said deed were false, known to them to be false, and made for the purpose of defrauding plaintiff of his said tract of land. That the said J. H. Roberson, Jr., and the defendant Vance L. Roberson intentionally failed to write the defeasance or redemption clause in said conveyance for the purpose of defrauding plaintiff of his said farm. That the said J. H. Roberson, Jr., and defendant Vance L. Roberson knew said farm was worth a large amount more than the debts thereon, and that if their said deed of trust had been foreclosed, the said lands would have sold for a large amount more than the debts against same, and that plaintiff would never have executed said deed had he known that he would not have had an opportunity to redeem said farm.

"That plaintiff is informed and believes, and so alleges, that the said J. H. Roberson, Jr., and the defendant Vance L. Roberson entered into said scheme to defraud plaintiff of his said farm, believing that plaintiff would thereafter be unable to borrow the money necessary to pay said debt or that he would soon die, and that the transaction would never be investigated.

"That by reason of said false and fraudulent representations, upon which the plaintiff relied and was induced to deed away his said farm, believing that he was only executing a form of security for said debt he owed, he has been greatly damaged and injured, and said deed should be declared a mortgage and an accounting had to determine the amount, if any, plaintiff is indebted to defendants, and that he be permitted to pay same into a court and recover the title and possession of his said farm. That plaintiff is ready, willing and able to pay all that he justly owes the defendants.

"That defendants Vance L. Roberson, Della Louise Roberson and Helen Roberson Mardre are the sole devisees of said J. H. Roberson, Jr., and the defendant George Mardre is the husband of the defendant Helen Roberson Mardre, and the defendant Myrtle Roberson is the wife of the defendant Vance L. Roberson.

"That plaintiff brought his action *in forma pauperis* on or about 26 January, 1937, and was granted a voluntary nonsuit during the November Term of court, 1937.

"Wherefore, plaintiff prays that the deed herein referred to be reformed and declared a mortgage; that an accounting be had of the rents and profits from said farm and the debts due defendants, and for such other and further relief as plaintiff may be entitled to herein."

The judgment of the Superior Court in the former action is as follows: "This cause coming on to be heard, now upon motion of the plain-

tiff it is ordered, adjudged and decreed that the plaintiff be and he is hereby *granted a voluntary nonsuit.* Walter J. Bone, Judge Presiding."

The material allegations of the complaint were denied by the defendants. For further answer these defendants aver that plaintiff's cause of action, if he ever had one, which is denied, arose more than three years prior to the institution of this original action on 26 January, 1937, and more than three years prior to the institution of this renewal action on 11 January, 1938, and is barred by the lapse of time and the defendants hereby plead the three-year statute of limitations. For further answer, these defendants aver that plaintiff's cause of action, if any he ever had, which is denied, is an oral contract for the sale of land, and not being in writing is in violation of the provisions of Consolidated Statutes, 988, and is therefore void, and is barred by the statutes of frauds, and same is hereby pleaded in bar thereof."

The present action was brought 6 January, 1938. The court below rendered the following judgment: "This cause coming on to be heard at the above term of court before his Honor, Clawson Williams, Judge presiding, and a jury; and the plaintiff having offered his evidence in support of his contentions as set out in his complaint and rested his case. The defendant thereupon made motion for judgment of nonsuit. After argument of counsel on each side, the motion was granted and this action dismissed. Clawson L. Williams, Judge Presiding."

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

Coburn & Coburn for plaintiff.
J. C. Smith, Hugh Horton, and Grimes & Grimes for defendants.

CLARKSON, J. At the close of plaintiff's evidence the defendants in the court below made a motion for judgment as in case of nonsuit. N. C. Code, 1935 (Michie), sec. 567. The court below granted the motion of defendants and in this we think there was error.

The evidence which makes for plaintiff's claim, or tends to support his cause of action, is to be taken in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

The plaintiff in the court below, in the former action, was granted "a voluntary nonsuit."

N. C. Code, *supra,* sec. 415, is as follows: "If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff, or, if he dies and the cause of action survives, his heir or representative may commence a new action within one year after such nonsuit, reversal, or

arrest of judgment, if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought *in forma pauperis.*"

In *Chappell v. Ebert,* 198 N. C., 575 (576), is the following: "It is not enough, to sustain a plea of *res judicata,* that the former suit between the same parties, concerning the same subject matter, should have been nonsuited on its merits, but, in addition, the evidence in the two cases must be the same or substantially the same. *Hampton v. Spinning Co., ante,* 235." *Ingle v. Cassady,* 211 N. C., 287.

In *Slade v. Sherrod,* 175 N. C., 346 (348), we find: "However that may be, the plaintiff is not estopped by his pleadings in the first action, for there was no judgment, but merely a voluntary nonsuit." N. C. Practice & Procedure in Civil Cases (McIntosh), p. 700, sec. 627. On the present record the plaintiff had a right to institute the present action.

In *Caldwell v. Ins. Co.,* 140 N. C., 100 (101), the facts were: "The testimony on the part of plaintiff tends to show that she is an illiterate colored woman, having ten (10) children." At pp. 104-5, the Court said: "She narrates her trials in her own simple and natural way, showing that she was bewildered in the intricate mazes and confusing obscurities of life insurance policies. In this respect she is not singular. In the only way open to her she was constantly protesting that something was wrong about her insurance. She does not appear to have received much light from the source to which she went and was entitled to go. . . . She proved an excellent character; her testimony both in manner and matter was well calculated to carry conviction to the minds of the jurors. The plaintiff is evidently one of the few remnants of a type of her race illustrating its highest virtues. In the simple duties of life incident to her station, she exhibits a store of saving common sense, when sought out and invited by an insurance agent to visit his office and discuss the most intricate, promising and sometimes disappointing mode of investing surplus earnings, she tells the agent that she knows nothing of it, and will know nothing when he has illuminated the subject, it is not strange that she gets into trouble. She could not read the policies and it is no serious reflection upon her intelligence to surmise that if she could have done so, she would have been very much wiser. . . . When, however, the appeal is made to that fear which so constantly throws its dark shadows over human life, poverty in old age—and the assurance is given, as found by the jury, that at the end of ten years she could draw out her claim, she consents to 'be written up.'" *Dunbar v. Tobacco Growers,* 190 N. C., 608 (610); *Hinton v. West,* 207 N. C., 708.

In *Waddell v. Aycock,* 195 N. C., 268 (269), it is written: "That while parol trusts are recognized, and under certain conditions are

upheld in our jurisprudence, in the absence of fraud, mistake, or undue influence, they cannot be engrafted in favor of the maker upon a warranty deed conveying to the grantee an absolute and unqualified title in fee. *Gaylord v. Gaylord,* 150 N. C., 222; *Tire Co. v. Lester,* 192 N. C., 642." We think the allegations and proof of fraud sufficient to be submitted to the jury. The plaintiff was an old, feeble and illiterate Negro of good character. N. C. Code, *supra* (Limitations), sec. 441, in part, is as follows: "Within three years—(9) For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

We think the evidence sufficient to be submitted to the jury on the aspect of the statute of limitations. As the case goes back for trial, we will not emphasize the evidence on the different disputed views. It is sufficient to say that the matter should be submitted to a jury.

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

Reversed.

C. P. SELLARS, ADMINISTRATOR OF THE ESTATE OF THE LATE C. P. SELLARS; MRS. VIVIAN SHOBER SELLARS, VIVIAN GREY SELLARS, ANNIE ELIZABETH SELLARS WATKINS, CHARLES P. SELLARS, AND MARIA HUNDLEY SELLARS v. THE FIRST NATIONAL BANK IN HENDERSON, N. C., AND W. J. ALSTON, J. B. HICKS AND E. R. BOYD, TRUSTEES FOR FIRST NATIONAL BANK OF HENDERSON, HENDERSON, N. C.

(Filed 19 October, 1938.)

1. Limitation of Actions § 10—Assertion of right to retain insurance funds as assignee of policy is not claim against the estate.

A party asserting the right as assignee of an insurance policy to retain the proceeds thereof for obligations he contends were secured by the assignment is not barred by C. S., 100, from asserting such right after the lapse of more than six months as against the administrator of the deceased insured in the administrator's action to recover the funds, the defense not constituting a prosecution of a claim against the administrator which had been denied.

2. Limitation of Actions § 1—

The assertion of the right to retain proceeds of a policy of insurance as assignee of the policy, the funds then being in the hands of the person asserting such right, constitutes a defense to an action to recover the funds, and such defense is not barred by the three-year statute.

3. Trial § 22b—

Defendant's evidence, which does not contradict or impeach plaintiff's evidence, but serves only to amplify and explain it, is properly considered on defendant's motion to nonsuit.

4. Pledges § 3—

The burden is on the party claiming under the assignor to show that the debts for the payment of which the collateral was pledged have been discharged and the collateral thus released.

5. Banks and Banking § 9b: Pledges § 1—Pledge of collateral held sufficiently broad to cover secondary liability of pledgor to bank.

A borrower pledged as collateral for a note a life insurance policy. The note recited that the collateral was security for "this or any other liability or liabilities of mine or ours to said bank, due or to become due, or which may hereafter be contracted." The assignment of the life insurance policy provided that it was to secure "my debts, obligations, endorsements and liabilities to said bank." *Held:* The assignment of the policy was sufficiently broad to include the liability of the borrower as endorser on other notes held by the bank at the time of the assignment, and upon the exhaustion of the remedies against the maker of such other notes leaving a balance due thereon in a sum greater than the proceeds of the insurance policy, the bank is entitled to retain the whole of the proceeds of the policy as against the borrower's administrator.

6. Banks and Banking § 9b: Pledges § 2—Pledgee may apply collateral pledged to payment of debt secured without instituting action.

A borrower assigned a life insurance policy as collateral for a note at the bank. Upon the death of the borrower, his administrator demanded the balance of the proceeds of the insurance after payment of the note on which intestate was maker, and the bank contended that the assignment covered other liabilities of the borrower to the bank. The parties agreed that the balance of the insurance fund should be deposited in the bank and held pending the determination of the rights of the parties. Thereafter the receiver of the bank applied the proceeds of the policy to other liabilities of the borrower. *Held:* The agreement did not require the bank to institute suit to determine the rights under the assignment, and in the administrator's action in which it is determined that the bank had the right to so apply the funds, the administrator cannot complain that the bank so applied the funds prior to final determination of the controversy.

APPEAL by plaintiff from *Parker, J.,* at March Term, 1938, of VANCE. Affirmed.

This is a civil action to recover as a special deposit and preferred claim $2,175.68, with interest, the proceeds of a life insurance policy, deposited in the First National Bank of Henderson, 17 September, 1930, by the original administrator of the estate of C. P. Sellars. The First National Bank of Henderson became insolvent and the defendant, the First National Bank in Henderson, was organized and took over the assets and assumed seventy per cent of the deposits of the defunct bank. The individual defendants are trustees for creditors in possession of the assets of said defunct bank not acquired by the new bank.

On 21 May, 1930, C. P. Sellars executed to the old bank his note in the sum of $700.00 in evidence of money borrowed. As collateral security he assigned a life insurance policy in the Pilot Life Insurance Company in the sum of $3,500, then in possession of the bank as

assignee. The note recited that the collateral was security for "this or any other liability or liabilities of mine or ours to said bank, due or to become due, or which may hereafter be contracted." The official assignment of the life insurance policy was dated 5 February, 1926, was duly filed with and accepted by the insurer and recited that the policy was assigned "to secure the payment of my debts, obligations, endorsements and liabilities to said bank, subject to the interest of the Pilot Life Insurance Company on account of a policy loan existing against the policy." At the time of this assignment said Sellars was indebted to the said bank as endorser on the notes of the Mixon Jewelry Company, of which he was president, in the total sum of $4,000. On 1 August, 1930, the old bank paid the insurance company the sum of $160.74 in payment of premium due and added the amount to the principal of the $700.00 note.

After the death of Sellars new officers were elected for the Mixon Jewelry Company and the obligations of said company were consolidated and renewed in the sum of $3,250, the amount then due. The bank retained the old notes on which Sellars was endorser as collateral.

After the death of C. P. Sellars the insurance company issued its check in payment of its liability under the insurance policy payable jointly to R. S. McCoin, administrator, and the old bank, as assignee. The administrator admitted the right of the bank to deduct from the proceeds of said policy the amount due on the $700.00 note, including premium paid, totaling $865.56, but denied the right of the bank to the remainder of said proceeds to be applied to the endorsement liability of the deceased on the notes of the Mixon Jewelry Company. Thereupon, said administrator and the bank entered into an agreement, reciting in substance the foregoing facts and containing in addition the following provisions:

"Upon these foregoing facts it is mutually agreed between the First National Bank of Henderson, N. C., party of the first part, and R. S. McCoin, administrator, party of the second part, that the said check for $3,041.24 is to be cashed, and that said R. S. McCoin, administrator, is to pay out of said check $865.56, which is the full amount of the personal note of said C. P. Sellars and which amount is to be credited on said note and stop interest on same. The said First National Bank refuses to surrender said note, but agrees to hold same subject to future adjustment or an order of the court.

"It is further understood and agreed that the balance of the said check after paying the personal note of $2,175.68, is to be deposited in a special account in the First National Bank to the joint credit of R. S. McCoin, administrator, and the First National Bank, where it is to remain until this matter is mutually adjusted, or until it is disposed of by judgment of the court.

"It is further understood and agreed that neither party to this agreement waives any rights or defenses that it may have by reason of this agreement. That this agreement is made and entered into for the sole purpose of stopping interest on the C. P. Sellars personal note, and hold secure the balance of the money until it can be disposed of by mutual agreement or by an order of the court.

"It is further understood and agreed that this special deposit is to bear 4% interest, provided it remains in said bank for as long as 3 months.

"Witness our hands and seals, this the 17th day of September, 1930."

The Mixon Jewelry Company became insolvent and was liquidated. Its liability as principal on the notes endorsed by the deceased, after crediting the amount received in the liquidation of said corporation, exceeded the amount of said deposit.

The new bank, in compliance with its agreement, paid the defendant trustees seventy per cent of said deposit of $2,175.68 and such payment was credited upon the endorsement liability of the deceased.

The original administrator having departed for parts unknown, C. P. Sellars was appointed administrator of the estate of the deceased and he, as administrator, and the other plaintiffs, the heirs at law of the deceased, instituted this action to recover the amount deposited, alleging that said deposit was a special deposit and constituted a preferred claim; that the defendants had failed to institute an action on its claim against the administrator within six months after such claim was denied and that under the assignment said deposit was not applicable to the payment of any endorsement liability of C. P. Sellars on the notes of the Mixon Jewelry Company.

At the conclusion of all the evidence, on the motion of the defendants, judgment was signed dismissing the action as of involuntary nonsuit. The plaintiffs excepted and appealed.

J. P. & J. H. Zollicoffer, appellants.

A. A. Bunn, Jasper B. Hicks, and J. H. Bridgers for defendants, appellees.

BARNHILL, J. The defendants are not prosecuting a claim against the administrator which had been denied. They are merely asserting the right to apply the proceeds of collateral in their possession to the satisfaction of obligations for the payment of which said collateral was pledged. Furthermore, the original administrator signed the creditor's agreement, and the agreement entered into by him with the bank at the time said deposit was made expressly recites that neither party waives

any rights or defenses. C. S., 100 has no application and the defendants are not barred by the terms thereof from asserting their right to the proceeds of said deposit. The three-year statute of limitations is equally inapplicable.

The plaintiffs offered in evidence the agreement entered into between the original administrator and the old bank. This agreement recites "that the said bank now holds two other notes made and executed by Mixon Jewelry Company as principal and endorsed by C. P. Sellars as surety. One of these notes for $2,500 due on 16 January, 1930, and the other for $1,500 due on 3 March, 1930. The total amount of the two notes with interest to date, less reduction, is $3,400. These two notes are held as collateral to a new note of Mixon Jewelry Company dated 5 August, 1930, for $3,400." The defendant offered evidence establishing said debt and showing that the total amount of same after the application of all credits was and is in excess of the amount of the deposit. This testimony did not tend to contradict or impeach the evidence of the plaintiff. It only served to amplify and explain the same. It was a proper subject of consideration on the motion to nonsuit. *Hare v. Weil,* 213 N. C., 484. In any event the burden rested upon the plaintiffs to show that the debts for the payment of which the collateral was pledged had been discharged, thus releasing the collateral. This they have failed to do.

We consider the assignment of the policy of insurance sufficiently broad to include the liability of C. P. Sellars, deceased, as endorser on the notes of Mixon Jewelry Company. This being true, the defendants have at all times been entitled to the proceeds of said life insurance policy. The plaintiffs cannot complain that the bank applied said proceeds to the payment of said indebtedness before the controversy was "mutually adjusted, or until it is disposed of by judgment of the court."

All the evidence considered in the light most favorable to the plaintiffs fails to disclose that the plaintiffs, or either of them, have any right to recover any part of said deposit either as a general deposit or as a preferred claim. Nor can the plaintiffs complain that the defendants did not institute an action under the agreement to adjudicate the rights of the parties. If the controversy could not be mutually adjusted the obligation to institute the suit rested upon plaintiffs as much as upon the defendants, and all rights and defenses were reserved.

The judgment below is

Affirmed.

DR. J. B. SURLES ET AL. v. C. G. GRADY, MAYOR, D. H. SANDERS, JR., ET AL., COMMISSIONERS FOR THE TOWN OF FOUR OAKS.

(Filed 19 October, 1938.)

1. Municipal Corporations § 44—Held: Election was held under charter provisions requiring approval of majority of qualified voters.

This action was instituted to restrain defendant town commissioners from issuing bonds for water and sewerage systems. Plaintiffs contended that the election under which the question was submitted to the voters of the town was governed by the town charter, ch. 211, sec. 57, Private Laws of 1929, requiring the approval of a majority of the qualified voters of the town, while defendants contended that the election was held under the Municipal Finance Act, as amended, C. S., 2948 (1), requiring the approval only of a majority of the qualified voters voting in the election. The bond ordinances respectively recited that they were to take effect when approved in an election as provided by the Municipal Finance Act and the town charter, but the notice of the election posted and published by the commissioners recited that a majority of the qualified voters of the town was required in order for the bonds to be issued. *Held:* Regardless to what extent the provisions of the Finance Act and the charter, respectively, were followed, the charter provision requiring the approval of a majority of the qualified voters of the town was followed and was intended to govern the election, and that provision of the charter is controlling.

2. Taxation § 38a—Upon facts found, plaintiff held entitled to permanent order restraining issuance of municipal bonds.

Where a municipal bond issue is required to be approved by a majority of the qualified voters of the town, and upon the findings of the court it appears that a majority of the voters of the town did not vote for the issue, plaintiff is entitled to have the temporary order restraining the issuance of the bonds made permanent, even in the absence of a specific finding by the court that a majority of the qualified voters of the town failed to vote for the issuance of the bonds.

APPEAL by plaintiffs from judgment dissolving restraining order entered by *Williams, J.*, at Chambers in Sanford, on 11 July, 1938. From JOHNSTON. Reversed.

Parker & Lee and Pou & Emanuel for plaintiffs, appellants.
Abell & Shepard for defendants, appellees.

SCHENCK, J. This was an action instituted by plaintiffs, citizens and taxpayers of the town of Four Oaks, to restrain the issuance of bonds of said town for the purpose of constructing water and sewerage systems, respectively, in said town without the approval of a majority of the

qualified voters of said town cast at an election held for that purpose. It is the contention of plaintiffs that for said bond issue to be valid the approval of a majority of the qualified voters of said town was necessary, in compliance with the provisions of chapter 211, section 57, Private Laws of 1929, amending the charter of said town; it is the contention of the defendant town commissioners that said Private Laws did not apply, but that the election was governed by the general law contained in C. S., 2948 (1), being a part of the Municipal Finance Act of 1917, as amended, under which only the affirmative vote of the majority of the voters voting was sufficient.

Section 57, chapter 211, Private Laws 1929, amending the charter of the town of Four Oaks, provides: "That the board of commissioners shall not issue the said bonds nor any of them nor levy nor collect said tax until it shall have been authorized and empowered to do so by a majority of the qualified voters of the town of Four Oaks at an election to be held at such time as said board may appoint of which election notice shall be given . . ."

The Municipal Finance Act of 1917, as amended, C. S., 2948 (1), provides: "If however, the bonds are to be issued for necessary expenses, the affirmative vote of the majority of the voters voting on the bond ordinances shall be sufficient to make it operative, in all cases where the ordinance is required by this act to be submitted to the voters."

On 2 May, 1938, the defendant commissioners adopted two ordinances, one for the issuance of bonds for the construction of a water system, and the other for the issuance of bonds for the construction of a sewerage system. In the first of these ordinances it was provided: "Section 7. This ordinance shall take effect when approved by the voters of the town of Four Oaks, N. C., at an election to be called and held as provided for in the town charter and the Municipal Finance Act, 1921." And in the second ordinance it was provided: "Section 6. This ordinance shall take effect when approved by the voters of the town of Four Oaks, N. C., at an election to be called and held as provided in the Municipal Act, 1921, and the town charter as amended by legislative act, 1929."

In the ordinance adopted by the board of commissioners of the town of Four Oaks calling for an election to pass upon the issuance of bonds for the construction of a water system and sewer system, respectively, the following appears: "Whereas it is necessary that the town of Four Oaks raise or furnish 55 per cent of said project, the estimated cost of the project being $80,000, and whereas it is required by the charter of the town of Four Oaks as amended by the North Carolina Legislature in Session of 1929, that an election be held in said town for the purpose of voting for improvements or against improvements of this nature, a

majority of the qualified votes in said town being necessary for the issuance of general obligation bonds for the purpose of making improvements as asked in said application referred to above."

The notice of the election posted and published by the board of commissioners contained the following: "Pursuant to the provisions of chapter 211 Public Local and Private Laws 1929 Session of the North Carolina Legislature, notice is hereby given that an election will be held in Four Oaks, North Carolina, on Tuesday, 21 June, 1938, for the purpose of voting for or against a water and sewer system for said town, it being proposed to issue bonds in an amount not exceeding $44,000, same to be supplemented by a grant of $36,000 from the Public Works Administration, said bonds not to bear interest at a greater rate than 6 per cent and to be retired within 30 years. Those favoring a water and sewer system and the issuance of said bonds will vote 'Improvements' and those not favoring same will vote 'No Improvements.' A majority of the qualified voters of the town of Four Oaks must vote for 'Improvements' in order for the bonds to be issued and the system installed."

In his Honor's judgment dissolving the restraining order there appears the following: "And the court being of the opinion that said election was called and held under the Municipal Finance Act and that bonds for water and sewerage construction constitute a necessary expense of the town of Four Oaks and that an affirmative vote of the majority of the voters voting is sufficient to carry said election." The plaintiffs, appellants, make this conclusion of law the subject of an exceptive assignment of error in the following language: "1. For that the trial court erred in holding, as a matter of law, that said election was called and held under the Municipal Finance Act and that an affirmative vote of the majority of the voters voting was sufficient to carry the election." We are constrained to sustain this assignment.

We are of the opinion, and so hold, that it appears from the record that the election was held pursuant to the provisions of the Municipal Finance Act of 1917 and of the charter of the town of Four Oaks, chapter 211, Public-Local Laws of 1929. To what extent the provisions of the Finance Act and of the charter, respectively, were followed, or intended to be followed, is unnecessary for us to decide, but we do decide that the provision of the charter that the board of commissioners shall not issue bonds until it shall have been authorized and empowered so to do by a majority of the qualified voters of the town was followed, and was intended to govern the election when the same was called. Therefore, if there was only a majority of the votes of those voting cast for the issuance of the bonds, instead of a majority of the votes of the quali-

fied voters of the town of Four Oaks, the bond issue failed to obtain the majority required, and the judgment dissolving the restraining order was erroneous.

His Honor does not find specifically that a majority of the qualified voters of the town of Four Oaks failed to vote for the issuance of the bonds, but is content to find that such majority was not necessary, and that a majority of those voting was sufficient to authorize the issuance of the bonds, and that such latter majority was obtained. However, from the record and other findings by his Honor it is apparent that the vote of a majority of such qualified voters was not obtained for the bond issue.

According to paragraph fourth (b) of the defendant's answer and the affidavit of S. M. Boyette, registrar of the election, introduced by the defendants, the total number of registered voters in the town of Four Oaks was 263. His Honor in the judgment finds that 143 votes were cast for the bond issue, but that 7 of the votes so cast were cast by disqualified voters and were illegal, leaving the net number of 136 qualified registered votes cast for said bond issue. His Honor further finds that 71 votes were cast against the bond issue, that 16 qualified voters were stricken from the registration book who were entitled to vote and would have voted against the issue if allowed to vote, and that 10 qualified voters were denied registration who would have registered and voted against the issue if permitted to do so, making a total of 97 votes cast and that would have been cast against the bond issue. By adding the 16 voters whose names were wrongfully stricken from the registration book and the 10 qualified voters denied registration to the 263 voters on the books the result is a total of 289, and by subtracting therefrom the 7 affirmative votes found to be illegal there is left a net total of 282 qualified voters of the town of Four Oaks. The 136 legally qualified votes cast for the bond issue falls short of a majority of the 282 qualified legal voters by 6.

The provision of the charter of the town of Four Oaks requiring a majority of the qualified voters to approve a bond issue should have been applied and the restraining order against the issuance and sale of the bonds for the construction of the water and sewer systems should have been made permanent.

For the reasons given, the judgment below is

Reversed.

MRS. BERTIE T. GOWER AND HUSBAND, F. G. GOWER, v. TOWN OF CLAYTON AND R. U. BARBER, SHERIFF OF JOHNSTON COUNTY.

(Filed 19 October, 1938.)

1. Assistance, Writ of, § 1—Grounds for writ of assistance in general.

A writ of assistance issues from a court having equitable jurisdiction to enforce its decrees or orders conferring a clear right to the present possession or enjoyment of real property, and ordinarily it issues only on motion after due notice and against parties or persons bound by the terms of the decree.

2. Process § 4—When original summons is not kept alive by alias and pluries summons, it works discontinuance of action as to that party.

When a party is not served with original summons, and process against her is not kept alive by *alias* and *pluries* summons as required by statute, C. S., 480, it works a discontinuance of the action as to her, and summons thereafter served constitutes a new action as of that date. C. S., 481.

3. Assistance, Writ of, § 1: Taxation § 42—Held: Municipality failed to show right to writ of assistance for land sold for taxes.

Where one of the tenants in common in lands conveys her interest therein prior to the institution of tax foreclosure suit against her by the service of summons, it would seem that the purchaser from the tenant is not bound by the judgment in the tax foreclosure suit, and the municipality foreclosing the taxes is not entitled to a writ of assistance for possession of the lands.

APPEAL by plaintiff from *Harris, J.*, at Chambers, 2 July, 1938. From JOHNSTON.

Civil action to restrain execution of writ of assistance.

The uncontroverted facts are substantially these:

The town of Clayton, on 30 September, 1935, instituted an action in the Superior Court of Johnston County for the foreclosure of real estate tax sales certificates for taxes listed in the name of Ashley Horne estate for the years 1928 to 1932, both inclusive.

At that time the heirs at law of Ashley Horne were Chas. W. Horne, Mrs. W. M. Priddy and Mrs. E. H. McCullers. Chas. W. Horne was then in bankruptcy and C. A. Gosney was the trustee in charge of the bankrupt's estate. Dr. E. H. McCullers, Melba Misenheimer and I. W. Farmer, receiver, had acquired the interest of Mrs. McCullers. C. A. Gosney, as trustee, Mrs. W. M. Priddy, Dr. E. H. McCullers, Melba Misenheimer and I. W. Farmer, receiver, were named defendants. In due time summons was served upon all of them except Mrs. Priddy, who was not served until 14 February, 1938. In the meantime no *alias* or *pluries* summons had issued for her. Interlocutory judgment was entered on 21 March, 1938. Sale was had on 20 April, 1938. The town

of Clayton became the purchaser and the sale was confirmed and deed executed and delivered to the town and filed for registration on 2 May, 1938, and registered the next day.

On 13 November, 1936, C. A. Gosney, as trustee in bankruptcy of Chas. W. Horne, sold and conveyed the interest of Chas. W. Horne in the real estate in question to the plaintiff therein, Mrs. Bertie T. Gower, who then went into, and has since continued in actual possession of the real estate.

On 28 January, 1938, Jas. D. Parker and Norman C. Shepard, commissioners, under a judgment of the Superior Court of Johnston County in a special proceeding entitled, "Swannanoa H. Priddy *et al. v.* C. A. Gosney *et al.*," sold and conveyed to Mrs. Bertie T. Gower all of the interest of the heirs in and to the real estate in question, deed for which was filed for registration on 30 April, 1938, and registered on 2 May, 1938.

The plaintiff, Mrs. Bertie T. Gower, was not a party to the tax foreclosure suit hereinabove described.

Writ of assistance issued on 12 May, 1938.

Thereupon temporary injunction was obtained against the execution of the writ. From judgment dissolving the injunction to the end that the writ be executed, plaintiffs appealed to the Supreme Court, and assign error.

J. M. Broughton, J. A. Narron, and Wm. H. Yarborough, Jr., for plaintiffs, appellants.

Abell & Shepard and Ed. F. Ward for defendants, appellees.

WINBORNE, J. On this record writ of assistance will not issue.

"The writ of assistance, in its ordinary acceptance, is one issuing from a court having general equitable jurisdiction for the enforcement of decrees or orders conferring a right to the present possession or enjoyment of property. It usually issues on motion after notice duly served, when the right thereto is clear, and, as a rule, only against parties or persons bound by the terms of the decree," *Hoke, J.*, in *Clarke v. Aldridge*, 162 N. C., 326, 78 S. E., 216. *Knight v. Houghtalling*, 94 N. C., 408; *Coor v. Smith*, 107 N. C., 430, 11 S. E., 1089; *Exum v. Baker*, 115 N. C., 242, 20 S. E., 448; *Wagon Co. v. Byrd*, 119 N. C., 460, 26 S. E., 144; *Lee v. Thornton*, 176 N. C., 208, 97 S. E., 23; *Bank v. Leverette*, 187 N. C., 743, 123 S. E., 68; *Warehouse Co. v. Willis*, 197 N. C., 476, 149 S. E., 679.

Here, while Mrs. W. M. Priddy was named a party defendant to the tax foreclosure suit, she was not served with original summons. The

process was not kept alive by *alias* and *pluries* summons as required by statute. C. S., 480. This worked a discontinuance of the action as to her. Summons served thereafter constituted a new action against her, "beginning when the summons was issued"—14 February, 1938. C. S., 481.

Prior thereto, on 28 January, 1938, the interest of Mrs. Priddy had been sold and conveyed to plaintiff, Mrs. Bertie T. Gower, by the commissioners, Parker and Shepard. Therefore, it would seem that at least in so far as that interest is concerned, the plaintiffs would not be bound by the judgment in the said tax foreclosure suit. Hence, tested by the above stated rule of law, it does not appear that the town of Clayton has a clear right to the possession of the real estate in question—and there is error in dissolving the injunction.

Other questions discussed in briefs here need not now be considered.

The judgment below is

Reversed.

GEORGE WORLEY AND WIFE, HAZEL WORLEY, v. A. K. WORLEY.

(Filed 19 October, 1938.)

1. Mortgages § 30b—Power of sale in mortgage is contractual.

While a mortgagee is entitled to foreclose same upon default in payment of an interest installment when due, when authorized by the instrument, notwithstanding that the notes secured are not due, the right to foreclose is contractual, and default must have occurred strictly within the terms of the instrument conferring the right to foreclose in order to entitle the mortgagee to pursue this remedy.

2. Same—Held: Under the terms of the mortgage involved, the mortgagee was not entitled to foreclose prior to maturity of the first note.

The first note secured by the mortgage in question provided that interest thereon should be due and payable annually, but the due date of the note was approximately 18 months from date of its execution. The mortgage provided that the mortgagee might foreclose upon default in payment of any part of the note or interest at maturity. *Held:* Regardless of whether interest on the note was payable under its terms a year from its date, the power of sale contained in the mortgage provided for foreclosure upon default at "maturity" of the note, and advertisement made more than a year after the execution of the instrument but prior to the maturity of the first note, is premature.

3. Mortgages § 39e—Question of damages for wrongful advertisement held for jury.

Where a mortgagee establishes that the lands were advertised for sale under foreclosure prior to default giving the mortgagee the right to foreclose, he establishes a cause of action, and evidence of some loss and

inconvenience resulting therefrom justifies the submission of the issue of damages to the jury, and the refusal of the trial court to set aside the verdict in his favor will not be held for error.

APPEAL by defendant from *Harris, J.*, at February Term, 1938, of JOHNSTON. No error.

Action to recover damages for wrongful advertisement of plaintiffs' land in attempted foreclosure of defendant's mortgage.

Issues submitted to the jury were answered in favor of the plaintiffs and damages assessed in the sum of $200.00. From judgment on the verdict defendant appealed.

A. M. Noble for plaintiffs, appellees.
Parker & Lee for defendant, appellant.

DEVIN, J. Appellant's principal assignment of error relates to the court's instruction to the jury that at the time of the advertisement there had been no default in the payment of the notes secured by defendant's mortgage.

It was admitted that on 21 May, 1935, plaintiffs for value executed and delivered to defendant four notes, each in the sum of $60.00, due respectively 1st days of November, 1936 to 1939, inclusive, and at the same time to secure said notes executed a mortgage on described land. It was provided in the mortgage that "if default be made in the payment of said bonds or the interest on same, or any part of either at maturity," it should be lawful for the mortgagee to sell said land after due advertisement. The first note is in words and figures following: "$60.00. On or before November 1st, 1936, with interest from date at 6% per annum, we promise to pay to the order of A. K. Worley, Sixty and No/100 Dollars, for value received. Interest due and payable annually. George Worley (Seal)—Hazel Worley (Seal)."

It was admitted that no interest was paid at the end of one year from the date of execution of the notes, and that on 5 June, 1936, defendant advertised the land for sale under the power contained in the mortgage. Sale was enjoined, and the notes eventually paid in full. This action is to recover damages for losses sustained by plaintiffs on account of the premature and unlawful advertisement of their land.

The question arises, Did the defendant have the right to institute foreclosure proceedings upon failure of plaintiffs to pay interest on 21 May, 1936? If not, a cause of action would lie and plaintiffs be entitled to recover for injuries proximately resulting.

It has been uniformly held that where the mortgage authorizes a sale upon failure to pay the notes or bonds secured, or the interest thereon,

or any part of either at maturity, the mortgagee has the right to foreclose upon failure of payment of any installment of interest when due, and that it is not essential to the power of sale that all the notes be due. *Capehart v. Dettrick,* 91 N. C., 344; *Kitchin v. Grandy,* 101 N. C., 86, 7 S. E., 663; *Gore v. Davis,* 124 N. C., 234, 32 S. E., 554; *Sanderlin v. Cross,* 172 N. C., 234, 90 S. E., 213; *Miller v. Marriner,* 187 N. C., 449, 121 S. E., 770; *Raper v. Coleman,* 192 N. C., 232, 134 S. E., 481.

The power of sale in a mortgage is contractual, and in its exercise the terms and conditions contained in the mortgage must be strictly complied with, unless inconsistent with the statute. *Eubanks v. Becton,* 158 N. C., 230, 73 S. E., 1009. "The court cannot shorten the time on which the parties have expressly agreed." *Raper v. Coleman, supra; Harshaw v. McKesson,* 66 N. C., 266.

Applying the applicable principles of law deduced from the authorities cited to the facts in the instant case, it appears that the note quoted above recites that it shall become due and payable 1 November, 1936, with interest from date (21 May, 1935), and that at the bottom of the note is added the words, "interest due and payable annually." However, the power of sale in the mortgage is authorized only if default be made in the payment of the note or the interest on same, or any part of either at maturity. While there is ground for appellant's position that the words "interest due and payable annually" indicate the intent of the parties as expressed in the note that interest be paid one year after the date of the note, we think the language in which the power of sale is conferred in the mortgage, in case of default, limits the right to sell to the maturity of the note. It is expressly provided that the power of sale may be exercised only in case of default in the payment of any part of the note or interest at maturity. The word "maturity" could only refer to the due date of the note, that is, 1 November, 1936. To authorize a sale the default must have been within the terms of the mortgage. *Brown v. Jennings,* 188 N. C., 155, 124 S. E., 150. The ruling of the court below will be upheld.

There was evidence that the plaintiffs suffered some inconvenience and loss, caused by the wrongful advertisement of their land for sale, in the attempt to foreclose defendant's mortgage thereon. This was sufficient to justify the submission of the issue of damages to the jury and the refusal of the trial judge to set aside the verdict will not be held for error. The triers of the facts have determined the controverted issues, and in the trial we find no prejudicial error of which the defendant can complain.

No error.

ALICE McGEE SMITH v. CAROLINA COACH COMPANY.

(Filed 19 October, 1938.)

1. Trial § 22b—

Upon motion to nonsuit, the evidence must be viewed in the light most favorable to plaintiff, giving her the benefit of every reasonable intendment and inference.

2. Automobiles §§ 13, 18g—Evidence that driver failed to signal his intention to stop held sufficient for jury on issue of negligence.

Plaintiff's evidence tended to show that she was driving her automobile on the highway following a bus going in the same direction, that the bus driver suddenly stopped the bus without giving the signal required by C. S., 2621 (59). *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence notwithstanding evidence tending to show a sudden emergency making such stop imperative, and that the bus was equipped with signal lights that lighted when the brake was applied, such evidence being for the jury and not the court on defendant's motion to nonsuit.

3. Automobiles §§ 11, 18g—Evidence held not to show that plaintiff's failure to see if she could pass bus in safety was proximate cause of injury.

Evidence that plaintiff started to pass defendant's bus going in the same direction, saw a car approaching from the opposite direction, and pulled her car back in line behind the bus, and thereafter struck the rear of the bus when it stopped without signal, *is held* not to show contributory negligence barring recovery as a matter of law for failure of plaintiff to ascertain she could not pass the bus in safety before attempting to do so, since the evidence does not show that such failure was a proximate cause of the injury.

4. Automobiles §§ 9b, 18g—Whether plaintiff failed to keep proper distance behind bus held for jury under the evidence.

Plaintiff's car hit the rear of defendant's bus when the bus suddenly stopped without warning on the highway. Defendant moved to nonsuit upon the ground that plaintiff's evidence showed contributory negligence as a matter of law for failure of plaintiff to keep a reasonable and prudent distance behind the bus, as required by statute, Michie's Code, 2621 (57). Plaintiff testified that she was driving her car at about 40 miles per hour behind the bus and that she could see the pavement between her car and the bus for a distance as far as from the witness stand to the jury box. *Held:* Whether, under the circumstances, this was a shorter distance than was reasonable and prudent, was for the jury.

5. Automobiles §§ 12a, 18g—Whether speed of 40 miles per hour was negligent under the circumstances held for jury.

Defendant moved to nonsuit for that plaintiff's evidence that she was traveling about 40 miles per hour established contributory negligence as a matter of law. *Held:* Such speed is neither negligence *per se* nor *prima facie* evidence of negligence, and whether it was negligent under the circumstances was a question for the jury.

STACY, C. J., and BARNHILL and WINBORNE, JJ., dissent.

SMITH *v.* COACH CO.

APPEAL by defendant from *Harris, J.*, at April Term, 1938, of JOHNSTON. No error.

Royall, Gosney & Smith and Abell & Shepard for plaintiff, appellee.
J. M. Broughton for defendant, appellant.

SCHENCK, J. This is an action to recover damages alleged to have been proximately caused by the negligence of the defendant in bringing about a collision between a passenger automobile operated by the plaintiff and a bus operated by the agent and servant of the defendant on Highway No. 10 between Garner and Raleigh. The usual issues of negligence, contributory negligence and damage were submitted and all answered in favor of the plaintiff. From judgment predicated on the verdict the defendant appealed, assigning but one error, namely, that the court erred in disallowing its motion for judgment as of nonsuit made at the close of the plaintiff's evidence and renewed at the close of all the evidence. C. S., 567.

The bus of the defendant and the automobile of the plaintiff were both proceeding in a northwardly direction toward Raleigh and the plaintiff's automobile collided with the rear end of the defendant's bus, causing said automobile to leave the highway with resulting personal injury to the plaintiff and damage to her automobile. The evidence viewed in the light most favorable to the plaintiff, giving her the benefit of every reasonable intendment and inference, which we must do upon a demurrer to the evidence, tends to show that the plaintiff was driving behind the defendant's bus, that she attempted to pass the bus, but upon pulling her automobile to the left preparatory to passing she saw a car approaching from the opposite direction, and pulled her automobile back behind the bus, and while driving at a rate of speed of about 40 miles per hour, in a reasonable distance of the bus, the bus was suddenly stopped without any signal being given by the driver of the bus of his intention to stop, and as a result of the sudden stopping of the bus the plaintiff was unable to stop her automobile in time to avoid a rear end collision therewith.

C. S., 2621 (59), provides that "the driver of any vehicle . . . before . . . stopping . . . shall first see that such movement can be made in safety . . . and whenever the operation of any such vehicle may be affected by such movement shall give a signal as required in this section plainly visible to the driver of such other vehicle of the intention to make such movement. . . . Whenever the signal is given the driver shall indicate his intention to . . . stop . . . by extending the hand and arm from and beyond the left side of the vehicle . . . hand and arm pointing down. . . ."

There is evidence tending to show that no signal was given before the bus was brought to a sudden stop. While there is evidence introduced by the defendant tending to show a sudden emergency making such stop imperative, and that the bus was equipped with signal lights that lighted when the brake was applied, this evidence was for the consideration of the jury, and not of the court upon a motion for judgment as of nonsuit.

We hold that there was sufficient evidence to be submitted to the jury upon the first issue.

The defendant contends, however, that even if it be conceded that there was sufficient evidence to be submitted to the jury on the first issue, the plaintiff's own evidence establishes, as a matter of law, contributory negligence.

The defendant's first contention is that it is shown by the plaintiff's own testimony that she was negligent in not ascertaining that a car was approaching from the opposite direction before attempting to pass the bus. This contention is untenable for the reason that it cannot be held as a matter of law that her failure to first ascertain the approach of another car from the opposite direction was the proximate cause of the plaintiff's injury and damage.

The defendant's second contention is that the plaintiff was contributorily negligent, as a matter of law, for the reason that her own testimony showed she was driving too close behind the bus. This contention is likewise untenable. N. C. Code of 1935 (Michie), 2621 (57), provides: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent with regard for the safety of others and due regard to the speed of such vehicles and the traffic upon and condition of the highway." The evidence most favorable to the plaintiff upon this aspect of the case is the testimony of the plaintiff that she could see the pavement between her automobile and the bus for a distance as far as from the witness stand to the jury box, and whether this was a distance shorter than was reasonable and prudent, having regard for the traffic and condition of the highway, was a question for the jury.

The defendant's third contention is that the plaintiff's testimony shows she was operating her automobile at a negligent rate of speed. The plaintiff's testimony is to the effect that she was driving about 40 miles per hour. Driving 40 miles per hour is neither negligence *per se* nor *prima facie* evidence of negligence. Whether such driving was negligent under the circumstances under which the plaintiff was operating her automobile was a question of fact to be ascertained by the jury.

While the evidence adduced by the defendant presents a sharp conflict with that of the plaintiff and the jury might have been fully warranted in answering either the first or second issue in favor of the defendant,

we cannot hold as a matter of law that the evidence was such as to impel the court to allow the defendant's motion for judgment as of nonsuit based upon a demurrer to all of the evidence.

No error.

STACY, C. J., and BARNHILL and WINBORNE, JJ., dissent.

STATE v. CHARLIE MILLER.

(Filed 19 October, 1938.)

1. **Criminal Law § 77c—When statement has become case on appeal by agreement, trial court is without authority to change it.**

When the solicitor accepts service of case on appeal by defendant, and thereafter agrees that the statement as served should constitute the case on appeal, it becomes the case on appeal, C. S., 643, and, in connection with the record, may alone be considered in determining the rights of the parties, and motion by the State for *certiorari* to the end that the case on appeal may be corrected must be denied, the trial court being without authority to change the case on appeal fixed by agreement, even though regarded by him as erroneous.

2. **Fornication and Adultery § 2—Record evidence held insufficient to overrule nonsuit on charge of fornication and adultery.**

The evidence appearing in the record on the charge of fornication and adultery that defendant and the woman in question were seen together in public places on numerous occasions, *is held* insufficient to overrule defendant's motion to nonsuit on the charge, C. S., 4343, it appearing from the case on appeal that other evidence relating to the charge was excluded on defendant's objection.

APPEAL by defendant from *Rousseau, J.*, at August Term, 1938, of WILKES.

Criminal prosecution on indictment for fornication and adultery. C. S., 4343.

Verdict: Guilty of fornication and adultery.

Judgment: Fifteen months in jail to be worked on the public roads under the supervision of the State Highway and Public Works Commission.

Defendant appeals to the Supreme Court and assigns error.

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

Trivette & Holshouser and Whicker & Whicker for defendant, appellant.

STATE *v.* MILLER.

WINBORNE, J. Is the defendant entitled to judgment as of nonsuit? On this record, Yes.

Defendant was charged in three separate bills of indictment with the crimes of (1) fornication and adultery with one Hazel Church, (2) prostitution and assignation and aiding and abetting prostitution and assignation, (3) public cursing. By consent, the three cases were consolidated for the purpose of trial. The jury acquitted defendant on the charges in the second and third bills of indictment. Following the imposition of sentence on verdict of guilty under the first bill, and notice of appeal given in open court, defendant, within the time allowed, presented to the solicitor of the judicial district for acceptance of service, and the solicitor accepted service of statement of case on appeal. Four days later the solicitor agreed that the statement as served should constitute the case on appeal to the Supreme Court.

At the call of appeals from the 17th Judicial District, on 28 September, 1938, the Attorney-General suggested a diminution of the record, and moved for *certiorari* to the end that the case on appeal might be corrected by the trial judge with respect to a ruling on evidence. The case on appeal shows that the State offered evidence tending to show that late one evening Sheriff Doughton discovered Hazel Church and the defendant in a tourist cabin—she in bed and he partially undressed; that defendant's objection to this testimony was sustained on the charge of fornication and adultery and using profane language, but overruled as to the other charges, and defendant excepted. The State contends that the trial judge overruled the objection as to the charge of fornication and adultery, but sustained it as to the other charges, and that, if permitted to do so, the trial judge will make the correction. The motion must be denied. *S. v. Moore,* 210 N. C., 686, 188 S. E., 421. The trial judge is without authority to change the appellant's case on appeal, though regarded by him as erroneous, when that case has become the case on appeal. Under C. S., 643, if the case on appeal as served by the appellant be approved by the respondent or appellee, it becomes the case and a part of the record on appeal, and, in connection with the record, may alone be considered in determining the rights of the parties involved in the appeal. *S. v. Humphrey,* 186 N. C., 533, 120 S. E., 85; *S. v. Palmore,* 189 N. C., 538, 127 S. E., 599; *Carter v. Bryant,* 199 N. C., 704, 155 S. E., 602; *S. v. Ray,* 206 N. C., 736, 175 S. E., 109; *Abernethy v. Burns,* 210 N. C., 636, 188 S. E., 97; *S. v. Moore, supra.*

The appeal must be heard and determined on the agreed case appearing in the record. In that respect the Attorney-General frankly concedes that the sufficiency of the evidence to take the case to the jury on the charge of fornication and adultery depends upon the admissibility

of the evidence of Sheriff Doughton, which the record shows was excluded on defendant's objection. Without it, the evidence is insufficient to support the verdict. The rest of the evidence to sustain the court's denial of motion for judgment as of nonsuit consists of instances where witnesses saw the defendant and Hazel Church together, sometimes by day and sometimes by night, but always on the street or in public places or in the defendant's truck, but not under circumstances tending to show conduct condemned by the statute on fornication and adultery. C. S., 4343.

The judgment below is

Reversed.

STATE v. ADAM JOHNSON.

(Filed 19 October, 1938.)

Courts §§ 2a, 7—Mayor's court held without jurisdiction of charge of operating motor vehicle under influence of intoxicating liquor.

Defendant was tried in the mayor's court of North Wilkesboro on charges of operating a motor vehicle while under the influence of intoxicating liquor and reckless driving. On appeal to the Superior Court, judgment was pronounced exceeding that permitted for the offense of reckless driving alone. *Held:* The mayor's court was without jurisdiction of the charge of operating a motor vehicle while under the influence of intoxicating liquor, and even conceding it had jurisdiction of the charge of reckless driving, the sentence exceeded that permitted for that offense, and the trial of defendant in the Superior Court upon the warrants, without a bill of indictment first being found and returned was a nullity. Ch. 144, Private Laws of 1913; C. S., 2621 (102).

APPEAL by defendant from *Pless, J.*, at March Term, 1938, of WILKES. Remanded.

This is a criminal action tried on warrants issued by the mayor of North Wilkesboro. The defendant was tried in the mayor's court of said town under two warrants in which he was charged with the crime of reckless driving and the crime of operating a motor vehicle on the public highways of North Wilkesboro while under the influence of intoxicating liquors. He was convicted on each of said charges and he appealed from the judgments pronounced. In the Superior Court, there being certain other charges against this defendant and one Green Johnson, all of the cases were consolidated for trial. The jury returned a verdict against this defendant of guilty of operating a car while under the influence of liquor and of reckless driving. It failed to agree as to the other charges and as to them a mistrial was ordered.

From judgment pronounced on the verdict of the jury the defendant appealed.

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

Trivette & Holshouser and Hayes & Hayes for defendant, appellant.

BARNHILL, J. The defendant in due time appeared and filed a motion in this Court to dismiss this action for that the court below was without jurisdiction to try the defendant and to impose sentence upon the verdict rendered.

In the court below the defendant was put to trial on the warrants issued by the mayor of North Wilkesboro. No bill of indictment was found and returned against him. This was permissible only in the event the mayor of North Wilkesboro had final jurisdiction under the warrants issued by him.

The charter of the town of North Wilkesboro was revised and amended by chapter 144, Private Laws 1913. By the terms of said act the mayor of said town was constituted a special court with limited jurisdiction of criminal offenses occurring within the limits of said town and within two miles from the corporate limits thereof. This statute in section 9 enumerates in detail the several offenses of which the said court is given jurisdiction and provides further: "And all misdemeanors as contained in chapter 81 of the Revisal of 1905 of North Carolina, and acts amendatory thereof, where the punishment does not exceed a fine of $200.00 and imprisonment for one year, and all crimes which under the common law are misdemeanors wherein the punishment is in the discretion of the court." Amendments to said act, ch. 286, Private Laws 1915, ch. 34, Private Laws Extra Session, 1920, are not here material.

Neither reckless driving nor operating a motor vehicle while under the influence of intoxicating liquors is included in the list of offenses of which the mayor's court of North Wilkesboro is given jurisdiction. Neither offense is a common law misdemeanor. The punishment for operating a motor vehicle while under the influence of liquor is not limited to a fine of not more than $200.00 and imprisonment for not more than one year. *S. v. Jones,* 181 N. C., 543. Reckless driving is defined and made a criminal offense under the motor vehicle law and is not an act amendatory of ch. 81, Revisal 1905. But even if it be conceded that the mayor had jurisdiction of this charge the sentence imposed exceeds that permitted by statute for the commission of this offense. C. S., 2621 (102). The jurisdiction of the mayor was limited to that of a committing magistrate. The trial of the defendant upon

the warrants, without a bill of indictment first being found and returned, was a nullity.

This cause is remanded with directions that judgment be entered striking out the former judgment and the verdict of the jury herein. This is without prejudice to the right of the solicitor to proceed under bills of indictment if he may be so advised.

Remanded.

STATE v. CHRIS MOSCHOURES.

(Filed 19 October, 1938.)

1. Intoxicating Liquor § 9f—

A charge of unlawful possession of intoxicating liquors for the purpose of sale and a charge of unlawful sale of intoxicating liquors, C. S., 3411 (b), are distinct charges of separate offenses, and support separate sentences by the court on a general plea of guilty.

2. Same: Constitutional Law § 32—Sentence held not objectionable as imposing cruel or unusual punishment.

A sentence of imprisonment for 18 months on the first count of unlawful possession of intoxicating liquors for the purpose of sale, and a like sentence on the second count of unlawful sale of intoxicating liquors, suspended for five years upon condition that defendant does not violate the criminal laws of the State, does not impinge the constitutional provision against cruel or unusual punishment. N. C. Constitution, Art. I, sec. 14.

APPEAL by the defendant from *Alley, J.*, at February Term, 1938, of BUNCOMBE. Affirmed.

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

Worth McKinney and T. O. Pangle for defendant.

PER CURIAM. The defendant entered a general plea of guilty, and on the first count in the warrant his Honor imposed sentence of imprisonment for 18 months to be assigned to labor under the supervision and control of the State Highway and Public Works Commission, and on the second count a similar sentence, commencing at the expiration of the sentence on the first count, suspended for five years upon condition that the defendant does not violate the criminal laws of the State.

To the judgment entered the defendant reserved exception and appealed, contending that the warrant charged but one offense and sup-

ported but one sentence. With this contention we cannot concur. The affidavit upon which the warrant was predicated reads as follows: "T. K. Brown, being duly sworn, complains and says, that at and in said county, on, or about the 4th day of December, 1937, Chris Moschoures did unlawfully, willfully and feloniously have and keep in his possession for the purpose of sale or barter a quantity of intoxicating whiskey. 2nd Count—Chris Moschoures on said date at and in said county, did unlawfully, willfully barter, sell, give away, furnish, deliver, exchange and otherwise dispose of intoxicating liquors, contrary to the form of the statute, and against the peace and dignity of the State." The first count clearly contains a charge of unlawful possession of intoxicating liquors for the purpose of sale and the second count a charge of unlawful sale of intoxicating liquors. C. S., 3411 (b). These are distinct charges of separate offenses, and support the separate sentences imposed.

Defendant also contends that the sentences inflicted cruel and unusual punishment in violation of Article I, sec. 14, of the Constitution of North Carolina, with which contention we likewise cannot concur. "It is equally well settled that when no time is fixed by the statute, this Court will not hold imprisonment for two years cruel and unusual." *S. v. Farrington*, 141 N. C., 844; *S. v. Daniels*, 197 N. C., 285, and cases there cited.

The judgment below is

Affirmed.

STATE v. MINSON McLAMB.

(Filed 19 October, 1938.)

1. Criminal Law §§ 77b, 80—

While failure of the record to show the organization of the court or the jurisdiction thereof warrants dismissal of the appeal, where a serious question is presented the Supreme Court in its discretion may disallow the motion to dismiss.

2. Bastards § 3: Criminal Law § 56—

The warrant in a prosecution under ch. 228, Public Laws of 1933 (Michie's Code, 276 [a]), must allege that the failure or refusal of defendant to support his illegitimate child was willful, and where it does not do so, defendant's motion in arrest of judgment should be allowed.

APPEAL by defendant from *Harris, J.*, at June Term, 1938, of JOHNSTON. Reversed.

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

J. R. Barefoot and L. L. Levinson for defendant.

PER CURIAM. The Attorney-General lodged motion to dismiss the appeal under Rule 19 of this Court for reason that the record does not show the organization of the court below or the jurisdiction thereof. This motion may be well bottomed and warrant the dismissal of the appeal. However, where "a serious question is presented," this Court has "sometimes not dismissed." *S. v. May,* 118 N. C., 1204. A question serious at least to the defendant is here presented, namely, whether he must serve sentence of six months imprisonment. Under the circumstances divulged upon the imperfect record we feel constrained to disallow the motion.

It was evidently intended to charge the defendant with a violation of ch. 228, Public Laws 1933, being "An act to amend chapter six of the Consolidated Statutes of North Carolina on Bastardy," N. C. Code of 1935 (Michie), sections 276 (a), *et seq.* The affidavit upon which the warrant was predicated fails to allege or charge that the defendant willfully neglected or refused to support and maintain his illegitimate child, the language of the affidavit being "and has failed to support the same." The defendant moved in arrest of judgment, and we are constrained to hold that there was error in disallowing the motion. *S. v. Cook,* 207 N. C., 261; *S. v. Tarlton,* 208 N. C., 734. In fact, the Attorney-General on the argument confessed error in the event his motion to dismiss was disallowed.

The motion in arrest of judgment is allowed and the judgment below is Reversed.

J. C. JERVIS v. THE TOWN OF MARS HILL.

(Filed 19 October, 1938.)

Eminent Domain § 24—

Where, in an action to recover damages for the taking of land for use as a sidewalk by defendant municipality, the jury finds plaintiff is entitled to recover nothing, the court may properly tax the costs against defendant. C. S., 1725.

APPEAL by defendant from *Alley, J.,* at March Term, 1938, of MADISON. Affirmed.

John H. McElroy for plaintiff, appellee.
Calvin R. Edney for defendant, appellant.

PER CURIAM. This is an action to recover damage for the taking of a portion of the lot of the plaintiff by the defendant in the construction of a sidewalk. The jury, under appropriate issue, found that the plaintiff was entitled to recover nothing from the defendant and the court entered judgment that the plaintiff take nothing by his action, but taxed the costs against the defendant. To the taxing of the costs against it the defendant reserved exception and appealed.

The judgment contains the following: "This being in the nature of a condemnation proceeding, the plaintiff suing to recover damages because of the taking of certain lands described in the complaint, for the defendant's use as an easement for a sidewalk." Since the facts support this finding, C. S., 1725, warrants the taxing of the costs against the defendant.

The judgment is

Affirmed.

W. O. BURGIN v. NORTH CAROLINA STATE BOARD OF ELECTIONS ET AL.

(Filed 19 October, 1938.)

1. Elections § 17: Mandamus § 2d—Court should determine from facts found when State Board has received final returns from counties.

A candidate is entitled to restrain the State Board of Elections from declaring his opponent the nominee in a primary until complete, legal and final returns from all the counties of the district have been made, filed and accepted, or as a matter of law ought to have been accepted, and the court should determine as a matter of law without the intervention of a jury whether such returns have been received, and whether upon such returns plaintiff is entitled to a writ of *mandamus* to compel the State Board to declare him the nominee, and enter judgment accordingly.

2. Mandamus § 2d—

Petitions in the Supreme Court of opposing candidates, each seeking *mandamus* for the respective petitioner to compel the State Board of Elections to declare him the party nominee are dismissed, neither petitioner having shown on the uncontested facts a clear legal right to the writ.

On petition and counter petition for *mandamus* or remedial writ. It is now admitted that the several county boards of elections in all of the counties composing the Eighth Congressional District have made returns

to the defendant board which have been accepted, except the board of the county of Davidson. With this modification, the facts are fully stated in *Burgin v. Board of Elections, ante,* 140.

W. F. Brinkley, H. R. Kyser, and J. C. B. Ehringhaus for plaintiff, appellee.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Wettach for defendants, appellants.

L. P. McLendon, amicus curiæ.

PER CURIAM. In the opinion in this case filed 21 September, 1938, it was said: "The fact that after the returns are in the State Board of Elections is to canvass the returns and determine whom they ascertain and declare by the count (Public Laws 1933, ch. 165, sec. 9) to be nominated or elected is not to be construed as a denial or negation of its supervisory powers, which perforce are to be exercised prior to the final acceptance of the several returns." It was further stated in the opinion: "Plaintiff is entitled to a stay until final returns have been received by the State Board of Elections from the county boards of Richmond and Davidson counties and to await the result of these returns."

In accordance with this opinion, which embodies the law of the case, the judge of the Superior Court will proceed to determine as a matter of law on the facts found, without the intervention of a jury, whether complete, legal and final returns from all the counties in the Eighth Congressional District have been made, filed and accepted, or as a matter of law ought to have been accepted, by the State Board of Elections. If it be made to appear that such returns have been so made, the court shall thereupon dissolve the restraining order herein, and determine whether upon such returns the plaintiff has shown a clear legal right to the writ of *mandamus,* and enter judgment accordingly. Unless so shown, plaintiff's application therefor should be dismissed.

In determining what is a valid return, the court below will follow the former opinion of this Court as the law of the case.

On consideration of the petitions herein, it appears that neither party has shown on the uncontested facts presented a clear legal right to a peremptory writ of *mandamus* from this Court, and the petitions are dismissed.

Dismissed.

STATE v. ROBY M. HAWKINS.

(Filed 2 November, 1938.)

1. Criminal Law § 34c—Silence of defendant in face of accusation of guilt held competent as implied admission.

Evidence that shortly after his wife's death when her assailant was unknown, defendant remained silent when he was accused of having killed her by his twelve-year-old son while they were in a room across the hall from where her body lay, defendant having shown no emotion when viewing the body, *is held* competent as a circumstance to be considered by the jury, since the occasion was such as to call for a denial by defendant.

2. Homicide § 21—

Evidence of threats are competent as tending to show premeditation and deliberation and previous express malice.

3. Same—Where evidence discloses repeated threats, remoteness of first threat goes to its weight and not its competency.

The State offered evidence that more than two years prior to the homicide defendant threatened to kill deceased, that a month prior thereto he made another threat, and testimony of a declaration of defendant's son, made after the homicide, that defendant had said he was going to kill her (deceased) and had done so. *Held:* The remoteness of the first alleged threat does not render it incompetent, since the remoteness goes to the weight of the evidence and not to its competency.

4. Criminal Law § 33—

Voluntary confessions are competent against the party making them; involuntary confessions are not.

5. Same—

Confessions otherwise competent are not rendered incompetent by the fact that at the time they are made defendant is under arrest.

6. Same—

The competency of an alleged confession is for the judge.

7. Same—Testimony held properly admitted as being of voluntary confession.

The State introduced evidence that the coroner told defendant after his arrest that "it looks like they have got you on the spot and the only way for you to get out of it is to plead insanity." To which defendant replied, "Well, I will never do it." The court admitted the testimony after it had heard evidence tending to show that defendant's statement was voluntary. *Held:* If the coroner's statement be interpreted as an accusation of guilt, the reply was not an admission, but if the reply be interpreted as a confession, the court in effect found that it was voluntary, and its ruling thereon is not error.

8. Criminal Law § 29a—

In criminal cases every circumstance that is calculated to throw any light upon the supposed crime is permissible.

9. Homicide § 17—Evidence of defendant's mistreatment of his wife held competent in prosecution for her murder.

Defendant was charged with murdering his wife. The State offered evidence tending to show that defendant, over a period of years, had beaten and mistreated his wife, and had had altercations with her brother over his treatment of her, and had threatened to kill her brother. *Held:* The remoteness of some of the facts testified to does not render the testimony incompetent but goes only to its weight, and the admission of the evidence generally will not be held for error in the absence of a request by defendant that the part of the evidence competent only as corroborating evidence be so restricted in its admission and in the court's charge.

10. Criminal Law § 48b—

The general admission of evidence competent for a restricted purpose will not be held for error in the absence of a request by defendant that its admission be restricted, and failure to charge specifically upon the nature of the evidence will not be ground for exception in the absence of a request for special instructions.

11. Criminal Law § 31b—

A witness who is a physician but not a psychiatrist, but who has talked with defendant and had an opportunity to observe him, may testify as to defendant's sanity.

12. Homicide § 27c—

The court's charge on defendant's contention that he was mentally incapable of premeditation and deliberation by reason of drunkenness, *held* without error, and the refusal of defendant's request for instructions on this aspect was proper.

13. Homicide § 3—

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation.

14. 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. C. S., 4200.

15. Same—

Premeditation and deliberation are not presumed from an intentional killing with a deadly weapon, but must be established by the State beyond a reasonable doubt.

16. Homicide § 4c—

Premeditation means thought beforehand for some length of time, however short.

17. Same—

Deliberation implies an intention to kill executed by defendant in a cool state of blood in furtherance of a fixed design.

18. Homicide § 21—

The conduct of defendant before and after, as well as at the time of, the homicide, and all attendant circumstances, are competent on the question of premeditation and deliberation.

19. Homicide § 25—Evidence held sufficient to be submitted to the jury on question of defendant's guilt of first degree murder.

In this prosecution of defendant for the murder of his wife, evidence tending to show threats made by defendant against her life, of defendant's conduct before and after the homicide, and silence in the face of accusation of guilt under circumstances calling for a denial, and other evidence tending to identify defendant as the perpetrator of the crime, together with other circumstantial evidence of guilt, *is held* sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree.

20. Criminal Law § 57—

Defendant's motion in the Supreme Court to set aside the verdict of guilty of first degree murder, made on the ground that the jury saw a moving picture show depicting a murder mystery, is denied.

APPEAL by defendant from *Grady, J.*, at April Term, 1938, of CRAVEN.

Criminal action on indictment charging defendant with the murder in the first degree of one Mittie Geneva Hawkins.

Verdict: Murder in the first degree.

Judgment: Death by asphyxiation.

Defendant appeals to Supreme Court and assigns error.

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

A. D. Ward, H. P. Whitehurst, and R. E. Whitehurst for defendant, appellant.

WINBORNE, J. After careful consideration of all exceptive assignments, we find no error.

On the trial below the State offered evidence tending to show that: The dead body of defendant's wife, Mittie Geneva Hawkins, was found crumpled on the floor in the front room of their home near Cove City in Craven County, about 3 o'clock p.m. on 9 March, 1938. There were no eye-witnesses to the tragedy. A sound as of gunshot indoors was heard by neighbors about one-thirty o'clock. She had been shot over the heart with a shotgun, and No. 4 shot were taken from her body. An ironing board was near by and a shirt was in her hand. An empty shell recently fired and a shell loaded with No. 6 shot were found by the coroner in the hallway of the house.

The defendant was not then at home. Just before one o'clock on that day he went to a nearby store and bought "a quarter's worth" of gun shells loaded with No. 4 shot, seven shells of the same kind as those found in the house. On leaving the store defendant joined his father and R. M. White between the store and his house and tried to borrow a mule and plow from White to do some plowing. White testified: "He

seemed just like he had been for the past two years—under the influence of liquor, . . . acting like he had been on a drunk, or something. He acted nervous and could not use his tongue as he should."

Defendant was next seen about two o'clock, approximately a half mile to the rear of his home, coming up a path to the edge of a newground being cleared. He had a double barreled gun in his hand. He stopped, laid the gun down and sat down on the ground. He stayed there about an hour and a half. In the meantime he motioned for Willie Mitchell, who was working there, to come to him, and asked if he had any money. Mitchell talked with him five or ten minutes. His brother, Ernest, came there. Later defendant's brother, Levi, came. Soon thereafter defendant was seen to go toward the home of his father and in a short time came back, going in the direction of his home. When defendant reached his home the coroner, the sheriff and others were there to make an investigation. Defendant told the coroner that when he went to his mother's he found out his wife was dead. On being questioned by the sheriff, defendant said: "I hope you don't think I did it."

The coroner asked defendant if he wished to see his wife; he replied, "Yes," and, on being shown the wound, he "lit a cigarette and walked on out." He did not make comment or inquire as to how it happened. "He was just staunch." He showed no emotion.

Defendant told the sheriff that he owned a double barreled shotgun but that his brother, Ernest, borrowed it about two months before. The gun was found the next day under a pile of brush near the newground where defendant was seen the day before. Levi Hawkins pointed out the place. Both barrels of the gun were empty, but one barrel bore evidence of having been recently shot.

Walter Yates testified: "I had a conversation with Roby Hawkins in jail. I asked him if he was the young gentleman who killed his wife, and he said, 'Yes, sir.' "

The evidence tended to show that the defendant had been a heavy drinker for several years, and for the past year or more he had been drinking constantly.

Defendant testified substantially: That he had been drinking heavily for ten years; that he drank on the day of his wife's death; that he didn't remember seeing his father or Mr. White down town, nor going to dinner, but did remember talking with Willie Mitchell some time after dinner; that he did not kill his wife; that he knew he did not kill her; that he had no reason to kill her; and that he guessed he would have sense enough to know right from wrong. He denied buying the shells at the nearby store. He stated that, while he and his wife had fusses during their married life, he held no grudge or malice against her at any time. He testified that he knew nothing about the death of his wife

until he reached his father's home, where his sister informed him she was dead. He denied that his son had accused him of killing his wife. He denied that he had made the statement attributed to him by Walter Yates.

Royall Hawkins, twelve-year-old son of defendant, testified that he did not accuse his father of killing his mother. He further denied that, on learning that his mother was dead, he rode down town crying that his daddy said he was going to kill his mother and now he has done it.

The State offered evidence tending to contradict the son. Much evidence was introduced bearing on the extent to which defendant had been and was drinking, and as to his mental condition.

Other evidence will be referred to in treating the exceptions which we deem of sufficient importance to require consideration.

1. The defendant stresses on exceptive assignment the admission of the testimony introduced by the State tending to show that defendant remained silent when, soon after the discovery of the body, Royall Hawkins, the twelve-year-old son of defendant, was heard to cry out and say to his father, "You are the one that killed my mammy, too," and also, "You said you were going to kill her and you killed her and she is dead."

In *S. v. Wilson,* 205 N. C., 376, 171 S. E., 338, it is said: "When a statement is made, either to a person or within his hearing, implicating him in the commission of a crime to which he makes no reply, the natural inference is that the implication is perhaps well founded, or he would have repelled it. *S. v. Suggs,* 89 N. C., 527. But the occasion must be such as to call for a reply. 'It is not sufficient that the statement was made in the presence of the defendant against whom it is sought to be used, even though he remained silent; but it is further necessary that the circumstances should have been such as to call for a denial on his part, and to afford him an opportunity to make it.' 16 C. J., 659.

"Silence alone, in the face or hearing of an accusation, is not what makes it evidence of probative value, but the occasion, colored by the conduct of the accused or some circumstance in connection with the charge, is what gives the statement evidentiary weight. *S. v. Burton,* 94 N. C., 947; *S. v. Bowman,* 80 N. C., 432."

"The general rule is that statements made to or in the presence and hearing of a person, accusing him of the commission of or complicity in a crime, and, when not denied, admissible in evidence against him as warranting an inference of the truth of such statements." . . . *S. v. Wilson, supra.*

At the time the charges were made defendant was in a room across the hall from the room in which the body of his wife lay. It was not then known who killed her. Defendant manifested no emotion. Under well settled principles of law, the occasion called for a denial. The circum-

stance is competent for consideration by the jury. *S. v. Jackson,* 150 N. C., 831, 64 S. E., 376; *S. v. Burno,* 200 N. C., 142, 156 S. E., 783; *S. v. Wilson, supra.*

2. The State, over defendant's objection, offered evidence tending to show threats of defendant against his wife, the deceased: (1) Mrs. Larry McCoy testified that in the summer of 1935, on being attracted by the children screaming, she heard defendant say that he was going to kill his wife; and (2) Mrs. Jessie Johnson testified that she heard Royall Hawkins, the twelve-year-old son of defendant, in the house soon after the discovery of the body, say to his father, "You said you were going to kill her and you killed her and she is dead," to which defendant was not heard to reply. Also, without objection, the State offered the testimony of the ten-year-old daughter of defendant that about a month before her mother's death, "I heard him say that he was going to kill her if she stayed there and he was going to kill her if she left." In the admission of this testimony there is no error.

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. Payne,* 213 N. C., 719, 197 S. E., 573, and cases cited; *S. v. Bowser, ante,* 249.

The fact that the first alleged threat was made more than two years prior to the homicide does not render such evidence incompetent as a matter of law. 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; *S. v. Payne, supra.*

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,* 198 N. C., 762, 153 S. E., 395, wherein the Court said: "Evidence of the threats first made is competent at least in corroboration." *S. v. McDuffie,* 107 N. C., 885, 12 S. E., 83.

3. The coroner, as witness for the State, was permitted over defendant's objection to testify that on the trip to jail he heard the sheriff say to defendant, "Roby, it looks like they have got you on the spot and the only way for you to get out of it is to plead insanity," to which defendant replied: "Well, I will never do it." The evidence was admitted after the court asked the witness: "Was anything said to him or any threats used to make him talk, or were any inducements made to him to say anything?" to which the witness answered, "No, sir, we told jokes along the road."

Defendant here insists that the statement of the sheriff, as quoted by the coroner, constitutes not merely a charge of the crime alleged, but a threat, which could reasonably have been interpreted as the holding out of hope, and inducement to defendant to plead insanity. If the statement be interpreted as an accusation of guilt, the answer is certainly not an admission. If the answer can be interpreted as a confession, the court, in effect, finds that it is voluntary.

Confessions are voluntary or involuntary. Voluntary confessions are admissible in evidence against the party making them; involuntary confessions are not. *S. v. Stevenson,* 212 N. C., 648, 194 S. E., 81.

Where there is no duress, threat or inducement, and the court so finds, the fact that defendant was under arrest at the time the confessions are made, does not *ipso facto* render them incompetent. *S. v. Stefanoff,* 206 N. C., 443, 174 S. E., 411. The competency of the confession is a matter for the judge. *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603; *S. v. Stevenson, supra.* The judge ruled the statement and answer competent, and in this ruling we find no error.

Defendant relies upon *S. v. Davis,* 125 N. C., 612, 34 S. E., 198. The factual situation there is different from that here, and the case is distinguishable. There the defendant confessed.

4. The State, over defendant's objection, offered evidence tending to show that a few months before the homicide defendant had struck his wife and inflicted bruises on her lips and hips; that about four years prior thereto H. L. Civils, a brother of deceased, had talked with defendant about his whipping her; that about three or four years prior thereto her brother, Dr. Harvey Civils, had accosted defendant in regard to mistreatment of her; that on several occasions within the last year Dr. Civils and others had seen bruises on the person of deceased; that six days before her death, deceased went to the office of Dr. Civils crying and that at that time he saw bruises; that the day before her death a colored woman saw deceased crying, and also saw a knot on her head and bruises on her hip; that about four years ago witness heard defendant threaten to kill Dr. Harvey Civils, and, on asking in presence of defendant what he was mad at Dr. Civils about, the deceased said, "Just a little fight Roby and myself had, and Dr. Civils got mad about the way he was treating her, that's all"; and that the day before the homicide defendant was fussing and cursing in talking about deceased buying clothes.

Defendant entered a general objection to all questions along this line of evidence.

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. Dickens,* 189 N. C., 327, 127 S. E., 256; *S. v. Lawrence,* 196 N. C., 562, 146 S. E., 395; *S. v. Payne,* 213 N. C., 719, 197 S. E., 579.

It is contended that evidence as to what transpired three or four years ago is incompetent as too remote. The remoteness goes to the weight, and not to the competency of the testimony.

It is also contended that if some of this testimony be competent at all it is only corroborative, and should have been limited to that purpose at the time of its admission, or at least in the charge, which the court failed to do. Defendant made no request to so limit the testimony.

"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 specifically upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground for 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." Rule 21 of Rules of Practice in the Supreme Court, 213 N. C., 821; *S. v. Steele,* 190 N. C., 506, 130 S. E., 308; *S. v. McKeithan,* 203 N. C., 494, 166 S. E., 336; *S. v. Tuttle,* 207 N. C., 649, 178 S. E., 76.

5. Exceptions to the admission of testimony of a physician, but not psychiatrist or expert in mental diseases, relating his opinion of mental condition of defendant formed after short conversation and observation, are untenable.

"Anyone who has observed another, or conversed with him, or had dealings with him, and a reasonable opportunity, based thereon, of forming an opinion, satisfactory to himself, as to the mental condition of such person, is permitted to give his opinion in evidence upon the issue of mental capacity, although the witness be not a psychiatrist or expert in mental disorders." *White v. Hines,* 182 N. C., 275, 109 S. E., 31; *S. v. Houser,* 202 N. C., 738, 164 S. E., 114; *S. v. Jones,* 203 N. C., 374, 166 S. E., 163; *S. v. Keaton,* 205 N. C., 607, 171 S. E., 179; *S. v. Stefanoff,* 206 N. C., 443, 174 S. E., 411.

"One not an expert may give an opinion, founded upon observation, that a person is sane or insane." *Whitaker v. Hamilton,* 126 N. C., 465, 35 S. E., 815.

6. Mental incapacity of defendant to form an intent to kill brought about by drunkenness is pleaded as a defense to the charge of murder in the first degree. Exception is taken to the charge of the court in that respect. It is sufficient to say that, by comparison, the charge given is in substantially the language of this Court in numerous cases, and fully presented the question to the jury. *S. v. Murphy,* 157 N. C., 614, 72 S. E., 1075; *S. v. Shelton,* 164 N. C., 513, 79 S. E., 883; *S. v. Foster,* 172 N. C., 960, 90 S. E., 785; *S. v. Ross,* 193 N. C., 25, 136 S. E., 193; *S. v. Edwards,* 211 N. C., 555, 191 S. E., 1.

Nor do we find error in the refusal to give requested instructions relating to the same subject.

7. Defendant earnestly contends that there is error in the refusal of the court to allow his motion for judgment as of nonsuit on the first degree murder charge in compliance with the statute. C. S., 4643. The motion challenges the sufficiency of the evidence to show premeditation and deliberation beyond a reasonable doubt. *S. v. Bittings*, 206 N. C., 798, 175 S. E., 299, and cases cited; *S. v. Bowser, ante*, 249.

It is appropriate, therefore, to recur to principles applicable to the case.

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, supra*, and cases cited; *S. v. Bowser, ante*, 249.

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, supra*, and cases cited; *S. v. Bowser, supra*.

"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*, 197 N. C., 445, 149 S. E., 590; *S. v. Payne, supra; S. v. Bowser, supra*.

"Premeditation means 'thought beforehand' for some length of time, however short." *S. v. Benson*, 183 N. C., 795, 111 S. E., 869, at 871; *S. v. McClure*, 166 N. C., 321, 81 S. E., 458; *S. v. Payne, supra*, and cases cited.

"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. Payne, supra*.

"In determining the question of premeditation and deliberation it is proper for the jury to take into consideration the conduct of the defendant, before and after, as well as at the time of, the homicide, and all attending circumstances." *Stacy, C. J.*, in *S. v. Evans*, 198 N. C., 82, 150 S. E., 678; *S. v. Bowser, supra*.

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. Payne, supra; S. v. Bowser, supra*.

Applying these principles, the evidence in the instant case is abundantly sufficient to be submitted to the jury on the first degree murder charge.

Motion of defendant made in this Court to set aside the verdict and judgment upon the ground that the jury was permitted and did attend a moving picture show depicting a murder mystery is denied.

In the judgment below there is

No error.

J. B. PETTIT v. WOOD-OWEN TRAILER COMPANY, EMPLOYER, LUMBER MUTUAL CASUALTY COMPANY OF NEW YORK, CARRIER.

(Filed 2 November, 1938.)

Master and Servant § 45c—Ten-day period required for cancellation of policy runs from receipt of notice of cancellation by mail.

The policy of compensation insurance involved in this case provided that it might be canceled at any time by either party upon ten days written notice to the other party. Insurer mailed defendant employer notice of cancellation by registered mail, and claimant employee was injured more than ten days after notice was mailed, but less than ten days after receipt of notice by defendant employer. C. S., 922. The Industrial Commission found that there was no unreasonable delay in receipt of said notice by defendant employer. *Held:* The ten-day period of cancellation began to run from receipt of the notice by the employer and not from the date the notice was mailed, and the finding of the Industrial Commission that the policy was in effect at the time of the injury is supported by the evidence and is binding on the courts. This construction of the rights of the parties, though contractual, is strengthened by analogy to C. S., 6437, relating to cancellation of fire policies, and the decision in *Wilson v. Ins. Co.*, 206 N. C., 635, construing that statute.

APPEAL by plaintiff from *Alley, J.*, at February, 1938, Regular Term of BUNCOMBE. Reversed.

The findings of facts and judgment of the trial Commissioner, which was approved by the Full Commission, in part, is as follows: "There is no question but that the employer is responsible in this case. The main question to be determined is whether the Lumber Mutual Casualty Company of New York was carrying the compensation coverage for the Wood-Owen Trailer Company, Incorporated, at the time the claimant was injured—a few minutes before twelve o'clock, noon, 3 December, 1936. In this connection the Commissioner finds as a fact from the evidence offered in the case and from additional evidence recorded and from stipulations forwarded to the Commission and entered into by agreement since the hearing, that for some time prior to 3 December,

1936, the Lumber Mutual Casualty Insurance Company of New York had carried the compensation insurance for the Wood-Owen Trailer Company. The question before the Commission now is as to whether their attempt at cancellation of their policy of insurance was effective at twelve o'clock noon, or thereabouts, on 3 December, 1936.

"According to the statement of the postmaster at Asheville, North Carolina, contained in his letter which has been made a part of the record in this case by agreement, the letter from the carrier to the employer carrying notice of cancellation arrived at the Biltmore Station of the Asheville post office at approximately eleven-thirty a.m., 23 November, 1936, it being a registered letter, and that notice of arrival of said registered letter was placed in the post office box which was being rented by the addressee, the Wood-Owen Trailer Company, at approximately twelve o'clock noon, 23 November, 1936, and that the registered letter itself was delivered to C. H. Harrison (officer in charge of the Wood-Owen Trailer Company) on 24 November, 1936. The Commissioner finds as a fact that the delay in receiving said letter from twelve o'clock noon, 23 November, 1936, was not an unreasonable delay in the receiving of said mail.

"The Commissioner further finds as a fact from the records in the office of the Industrial Commission, which were agreed to as being a part of the evidence in this case, that notice of cancellation of the policy US35278, issued by the defendant carrier to the defendant employer, was received by the Rating Bureau on 23 November, 1936, and was not received by the Industrial Commission until 24 November, 1936, and that under the Rating Bureau's rules the coverage would extend through 3 December, 1936, and under the Commission's rules would extend coverage through 4 December, 1936.

"Wherefore, the Commission finds as a fact that the policy of insurance above referred to and issued by the defendant carrier to the defendant employer was in full force and effect on 3 December, 1936, at the time of the injury sustained by the claimant in this case and finds that the defendant carrier is bound by the terms of this policy to pay compensation as awarded in this case not inconsistent with the provisions of the North Carolina Workmen's Compensation Act.

"It is therefore directed that an award shall issue directing the defendants to pay the claimant compensation, jointly or severally, for temporary total disability for a period of seven (7) weeks beginning 3 December, 1936, and for injury to claimant's hand of a permanent nature, as provided for by statute, together with all medical costs and hospital costs incident to said injury, when approved by this Commission. Defendants will pay the cost of the hearing. Compensation shall be based on a wage in excess of $30.00 per week. An attorney's fee of $50.00 is

hereby approved by the Commission for the attorney who represented the claimant in this case. Said fee shall be paid direct to the attorney and deducted from compensation awarded herein."

The judgment of the court below, in part, is as follows:

"This cause coming on to be heard before Hon. Felix E. Alley, Judge presiding, at the February, 1938, Regular Term of Superior Court of Buncombe County on an appeal by the Lumber Mutual Casualty Insurance Company of New York from an award of the North Carolina Industrial Commission; and the court being of the opinion as a matter of law, after reading the record and the argument of counsel, that the Lumber Mutual Casualty Insurance Company of New York was not the compensation insurance carrier for the Wood-Owen Trailer Company at the time of the occurrence of the accident on 3 December, 1936, and the court being of the opinion that the policy of compensation insurance issued by the Lumber Mutual Casualty Insurance Company to the Wood-Owen Trailer Company was legally cancelled as of 12:01 a.m., 3 December, 1936, and the court being of the opinion and so holding as a matter of law that the Lumber Mutual Casualty Insurance Company is not liable for the payment of any compensation to the plaintiff in this case since its policy was not in force and effect at the time of the sustaining of the injury by the plaintiff; now, therefore, it is ordered, adjudged and decreed that the award of the North Carolina Industrial Commission directing the payment of compensation to the plaintiff by the Lumber Mutual Casualty Insurance Company be and the same is hereby reversed and the Lumber Mutual Casualty Insurance Company is dismissed as a party defendant in this cause. This 8 March, 1938. Felix E. Alley, Judge Presiding."

The material exception and assignment of error is as follows: "To the action of the Superior Court in signing and entering the judgment reversing the award of the North Carolina Industrial Commission in finding that the Lumber Mutual Casualty Insurance Company of New York was the compensation insurance carrier of the Wood-Owen Trailer Company at the time of the accident on 3 December, 1936, when the claimant J. B. Pettit was injured, and for holding that the Lumber Mutual Casualty Insurance Company of New York was not liable for the payment of any compensation to the plaintiff because its policy was not in force and effect at the time the plaintiff sustained the injury."

Worth McKinney and Cecil C. Jackson for plaintiff.

Walter Hoyle for defendant Insurance Company.

CLARKSON, J. The questions involved: Was the Lumber Mutual Casualty Insurance Company of New York the compensation insurance

carrier for the Wood-Owen Trailer Company at noon on 3 December, 1936, when the plaintiff was injured? We think so. Where the cancellation provision of the policy provides for mailing of notice, does the ten-day period of cancellation notice provided in the policy start running from the date of the mailing of the notice? We think not.

We think the finding of fact and conclusion of law by the trial Commissioner approved by the Full Commission correct, except we do not think it necessary to determine whether notice to the North Carolina Rating Bureau by compensation carrier that it is canceling a compensation policy is notice to the Industrial Commission.

The cancellation provision in the policy is as follows: "*This policy may be canceled at any time by either of the parties upon written notice to the other party stating when, not less than ten days thereafter, cancellation shall be effective. The effective date of such cancellation shall then be the end of the policy period.* (Italics ours.) The law of any state, in which this policy applies, which requires that notice of cancellation shall be given to any board, commission or other state agency is hereby made a part of this policy and cancellation in such state shall not be effective, except in compliance with such law. The remuneration of employees for the policy period stated in said declarations shall be computed upon the basis of the actual remuneration to the date of cancellation determined as herein provided. If such cancellation is at the company's request, the earned premium shall be adjusted pro rata as provided in Condition A. If such cancellation is at this employer's request, the earned premium shall be computed and adjusted at short rates, in accordance with the table printed hereon, but such short rate premium shall not be less than the minimum premium stated in said declarations. If this employer, when requesting cancellation, is actually retiring from the business herein described, then the earned premium shall be computed and adjusted pro rata. Notice of cancellation shall be served upon this employer as the law requires but, if there is no different requirement, notice mailed to the address of this employer herein given shall be a sufficient notice, and the check of the company, similarly mailed, a sufficient tender of any unearned premium."

In 6 Cyc. of Insurance Law (Couch), part sec. 1440, p. 5095, it is written: "But, as above stated, there is a conflict of authority as to the necessity that the notice be received, if sent by mail. And, as a matter of fact, the weight of authority seems to regard receipt of the notice as a condition precedent to cancellation."

N. C. Code, 1935 (Michie), sec. 6437 (providing for cancellation of a fire insurance policy), in part, is as follows: "Cancellation of policy—This policy will be canceled at any time at the request of the insured, in which case the company shall, upon demand and surrender of the

policy, refund the excess of paid premium above the customary short rates for the expired time. The policy may be canceled at any time by the company by giving to the insured a five days written notice of the cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation must state that the excess premium (if not tendered) will be refunded on demand."

In *Wilson v. Ins. Co.*, 206 N. C., 635 (639), is the following: "All the evidence shows that the defendant desired to cancel the policy, and proceeded to do so in accordance with its provisions, without the consent of the plaintiff. The cancellation by the defendant did not and could not under the provisions of the policy take effect until the expiration of five days from the receipt of the written notice by the plaintiff. This provision of the policy was manifestly for the protection of the plaintiff. *Dawson v. Ins. Co.*, 192 N. C., 312, 135 S. E., 34."

N. C. Code, *supra*, sec. 922, is as follows: "The time within which an act is to be done, as provided by law, shall be computed by excluding the first and including the last day. If the last day is Sunday, it must be excluded." *Olsen v. McGraw* (Minn.), 247 N. W. Rep., 8.

Although we are construing a contract, we think that the construction given is correct, and strengthened by analogy to the above decision and statute.

The North Carolina Industrial Commission found as a fact, upon sufficient competent evidence, which findings are binding upon this Court: That there was no unreasonable delay in the Wood-Owen Trailer Company receiving notice of cancellation, which notice was received by it on 24 November, 1936, and therefore, the first of the ten-day period would commence to run 25 November, 1936, therefore, the policy was in full force and effect when plaintiff was injured a few minutes before noon on 3 December, 1936.

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

Reversed.

MRS. BERTHA HARRIS SEAGLE v. GEORGE HARRIS, EXECUTOR OF WILL OF H. W. HARRIS, AND GEORGE HARRIS AND CARROLL HARRIS.

(Filed 2 November, 1938.)

1. Conversion § 1—

Equitable conversion is the change in property from real to personal, or from personal to real, the change not actually taking place, but being presumed by application of the maxim that equity regards that as done which ought to be done.

2. Conversion § 2—

Direction in a will that the executor sell certain lands and use the proceeds of sale to pay debts of the estate, and divide the balance among testator's three children, are imperative directions constituting an equitable conversion of the property into personalty.

3. Conversion § 4—All beneficiaries must unite in electing a reconversion.

When property is converted by will from realty to personalty for division among designated beneficiaries after payment of certain debts, all the beneficiaries must unite in order to constitute a reconversion by election, and such election must be expressly made or inferred from acts and conduct which manifest an unequivocal intention to do so, and the circumstances relied on by plaintiff beneficiary are held insufficient to justify a finding that defendant beneficiaries had joined in an election for a reconversion, and judgment of the trial court that plaintiff beneficiary was not entitled to hold one-third the land in question in severalty upon tender of her *pro rata* part of the debt, is without error.

4. Executors and Administrators § 12b—

Finding of the court that the executor had not abused his discretion in sale of lands under direction of the will, upheld.

APPEAL by plaintiff from judgment rendered by *Rousseau, J.*, at Chambers, 28 April, 1938. From CATAWBA. Affirmed.

This was an action to restrain the sale of certain lands by defendant executor, and for the allotment of one-third in value of said lands to the plaintiff in severalty. It was agreed that the judge of the Superior Court should find the facts and render judgment out of term and out of the district. From judgment dissolving the temporary restraining order and denying plaintiff's right to actual partition of the lands, plaintiff appealed.

Chas. W. Bagby and C. David Swift for plaintiff.
J. L. Murphy and M. H. Yount for defendants.

DEVIN, J. H. W. Harris, the father of the plaintiff and the defendants, died leaving a last will and testament wherein, after devising certain property to his children, he made the following disposition of the remainder of his estate: "Eighth: All the remainder of my property, both real and personal, not hereinbefore devised, I leave to my executor hereinafter named, to sell and dispose of, either at public or private sale, and at such times as in his judgment he may deem best; and out of the proceeds from the property left to him in this clause of my will, I direct him to pay all my funeral expenses and other just debts and obligations, other than open accounts that may be due by the store for goods bought in connection with that business, all of which accounts are to be paid out of any money on hand at the time of my death due said store business; after paying all my just debts and funeral expenses of

myself and wife, including a suitable monument, and the cost of administration of my estate out of the proceeds from the sale of the property specified in this clause of my will, the remainder shall be divided equally between my three children, to wit: George Harris, Carroll Harris, and Mrs. Bertha Harris Seagle."

George Harris was named executor. The indebtedness of the estate referred to in the quoted paragraph of the will was found to amount to about $12,000.

The executor advertised for sale in Hickory, North Carolina, at public auction for cash the various tracts of land which passed under the eighth item of the will, when plaintiff instituted this action and obtained a temporary restraining order restraining the sale. Plaintiff in her complaint asked that her one-third share in the property directed by the will to be sold be allotted to her in severalty. She offered to pay one-third of all debts and charges, and to pay the cost of partition, and for this purpose tendered into court $4,000. The plaintiff further alleged that the defendant executor had abused his discretion as to the time and method of sale of the land as further ground for the continuance of the restraining order.

The court found, among other things, that the property mentioned in item eight of the will had a market value of approximately $41,000, consisting of nineteen or more tracts of land, both farm property and city lots, two or more of the tracts being located in counties other than Catawba County, and "that the lands mentioned in item eight are capable of actual partition with very slight, if any, difference in the value thereof."

The court, after making certain other findings not material to the determination of the questions here involved, concluded as follows: "Upon the foregoing facts the court is of the opinion and so holds that item eight of the will worked a conversion of the property therein mentioned; that the plaintiff elected to reconvert; that the defendants did not join in such election to reconvert; that all three must elect to reconvert before there can be a valid reconversion; that the plaintiff's complaint and replication do not state a cause of action or entitle her to restraining order; and that the restraining order should be, and it is hereby dissolved; and that the executor has not abused his discretion."

The direction in the will that lands be sold and that the proceeds of sale, after the payment of debts, be divided among the testator's three children, constitutes an equitable conversion, as an application of the maxim that equity regards that as done which ought to be done, and requires the court to treat the property as having that character which by the terms of the will it was directed to have. "Equitable conversion is a change of property from real into personal, or from personal into real, not actually taking place, but presumed to exist only by construc-

tion or intendment of equity." *Clifton v. Owens*, 170 N. C., 607, 87 S. E., 502; *Duckworth v. Jordan*, 138 N. C., 520, 51 S. E., 109; Bispham's Equity, sec. 307. Land directed to be sold and turned into money is considered as that species of property into which it is directed to be converted, and the rights of the parties are regarded as subject to the rules applicable to the property in its changed and not in its original state, although the change may not have actually taken place (Bispham's Equity [10th Ed.], sec. 307), and persons claiming property under an instrument directing its conversion must take it in the character which the instrument has impressed upon it, and its subsequent disposition will be governed by the rules applicable to that species of property. *McIver v. McKinney*, 184 N. C., 393, 114 S. E., 399; *Brown v. Wilson*, 174 N. C., 636, 94 S. E., 416; *Benbow v. Moore*, 114 N. C., 263, 19 S. E., 156; *Brothers v. Cartwright*, 55 N. C., 113; *Proctor v. Forebee*, 36 N. C., 143.

The correlative doctrine of reconversion is the imaginary process by which a prior constructive conversion is annulled and the property restored in contemplation of equity to its original actual quality. This may be accomplished when the direction to convert is revoked by act of law, or where the parties entitled to the property elect to take in its original form. In the latter case the rule is stated in *Clifton v. Owens, supra*, as follows: "But where there are several beneficiaries they must all, as a general rule, unite in the election to make it effective." And in *Duckworth v. Jordan, supra*: "Reconversion can be effected where all the parties, beneficially interested in the property, by some explicit and binding action, direct that no actual conversion shall take place, and elect to take the property in its original form." In 13 C. J., 889, it is said: "Where land is directed to be converted into money, or money directed to be converted into land, all the parties entitled beneficially thereto have the right to take the property in its unconverted form, and thus prevent the actual conversion thereof. . . . In the case of land, the election of one of the beneficiaries alone will not change the character of the estate; all the persons so beneficially interested must join, and all must be bound." *Walling v. Scott*, 50 Ind. A., 23; *McWilliams v. Gough*, 116 Wis., 576. All beneficiaries must unite to elect. Bispham's Eq. (10th Ed.), sec. 323. "When the direction is to turn land into money, one co-owner cannot elect to keep his share in land." 3 Pom. Eq. Jur., sec. 1176 (note 2). In order to render the principle of conversion applicable, the power to sell and convert must be imperative, and when a conversion has been effected, the election of the parties to take the property in its original form may be inferred from acts and conduct which manifest an unequivocal intention to do so. *Phifer v. Giles*, 159 N. C., 142, 74 S. E., 919. Reconversion is the result of an

election expressly made or inferred by a court of equity. 3 Pom. Eq. Jur., sec. 1175.

In the instant case the remainder of the real as well as personal property was devised to the executor with direction to sell, and, out of the proceeds, to pay all the testator's debts and obligations (except those incurred in the store business), and divide the balance among the three children, the plaintiff and the defendants. Under the circumstances of this case, considering the imperative directions contained in the will (*Mewborn v. Moseley,* 177 N. C., 110, 97 S. E., 711), and in accord with the well established principles of equity stated in the decisions of this Court and the authorities cited, the ruling of the court below that the plaintiff was not entitled to have one-third of the lands embraced in item eight of the will allotted to her in severalty without the consent of the other beneficiaries must be upheld. The plain provision of the will may not be disregarded save by the consent of all.

Plaintiff's assignment of error that the court failed to find that defendants, as well as plaintiff, had elected to reconvert, cannot be sustained. The finding of the court on this point is in accord with the evidence. The circumstances relied on by plaintiff are insufficient to justify a finding that defendants had joined in an election for a reconversion and for partition of the lands in severalty.

The finding of the court that the executor has not abused his discretion will not be disturbed on this record.

The judgment below is

Affirmed.

MRS. J. M. LITTLE AND S. E. LITTLE v. N. F. STEELE, W. H. NORTON, T. L. MATLOCK, ASSIGNEES, I. W. SOMERS, ATTORNEY IN FACT.

(Filed 2 November, 1938.)

1. Banks and Banking § 16—When statutory liability of stockholder is reduced to judgment it becomes fixed asset for benefit of creditors.

The statutory liability of stockholders of a bank exists solely for the benefit of creditors of the bank, and the solvent bank has no property interest therein, but upon insolvency of the bank it is the duty of the Commissioner of Banks, upon taking over its assets, to reduce the statutory liability to judgment by the expeditious procedure provided by statute (Public Laws of 1927, ch. 113, subsec. 13; Michie's Code, 218 [c]), and when the statutory liability of a stockholder is thus reduced to judgment it becomes a fixed asset to be collected by the Commissioner of Banks and applied to the payment of creditors.

2. Banks and Banking § 19: Judgments § 36—Commissioner of Banks may assign stock assessment judgment in sale of assets to pay creditors.

When the statutory, contingent liability of a stockholder has been reduced to judgment and thus made a fixed liability of the stockholder, the Commissioner of Banks may collect same in the manner which to him appears most advantageous to the creditors of the bank, and when the total assets of the bank are insufficient to pay creditors in full, the Commissioner of Banks may sell and assign the stock assessment judgment with the consent and approval of the Superior Court, Public Laws of 1927, ch. 113, subsec. 7, and apply the proceeds of sale to the payment of creditors of the bank, and when this has been done the assignee of the judgment obtains title thereto and the judgment continues in force as a lien on the real estate of the judgment debtor unaffected by the fact that the judgment was assigned in the sale in bulk of the assets remaining after substantial liquidation, or the fact that no specific value was placed on the stock assessment judgment.

3. Bills and Notes § 3—Cancellation of stock assessment judgment is valid consideration for notes executed to assignee of judgment.

The Commissioner of Banks in the liquidation of the remaining assets of an insolvent bank, sold same in bulk to defendants. Among the assets so sold was a stock assessment judgment against the owner of land. After the judgment debtor's death, plaintiffs, the owners of the land by descent, attempted to sell the land, but the prospective purchaser required the cancellation of the stock assessment judgment. Thereupon, plaintiffs executed their notes to defendants for the amount of the judgment, and defendants canceled the judgment of record. *Held:* The judgment was regular on its face and constituted an apparent lien on the realty, and the cancellation of the judgment was a sufficient consideration for the notes, and plaintiffs are not entitled to the surrender and cancellation of the notes for want of consideration, even if it be conceded that the assignment of the judgment to defendants was void.

APPEAL by defendants from *Ervin, J.*, at February Term, 1938, of ALEXANDER. Reversed.

Civil action to procure the surrender and cancellation of two notes executed by plaintiffs payable to defendants.

J. M. Little, now deceased, was a stockholder in the Bank of Alexander at the time said bank was placed in process of liquidation. On or about 26 May, 1932, a stock assessment judgment was entered against him in the sum of $650.00. J. M. Little died 22 December, 1934, leaving surviving him Vensia Little, his widow, and S. E. Little, his son, plaintiffs herein.

Preparatory to the final liquidation of the bank the liquidating agent advertised for sale in bulk the uncollected assets of the bank, including said judgment, and pursuant to said advertisement sold said assets to the defendants. The sale was reported to and confirmed by the Superior Court of Alexander County and the Commissioner of Banks was directed

in the order of confirmation to transfer and assign said assets to the purchasers without recourse. Thereupon, the Commissioner of Banks, or his duly constituted agent, executed and delivered to the defendant a paper writing transferring and assigning said assets to defendants. Thereafter the plaintiffs undertook to sell a small parcel of land containing 4½ acres owned by J. M. Little at the time of his death. J. M. Alexander offered to purchase upon condition plaintiffs would procure a cancellation of the stock assessment judgment lien upon said land. Plaintiffs executed a note for $279.00 payable to W. H. Norton and one for $558.80 payable to N. F. Steele pursuant to an agreement that upon the execution and delivery of said notes defendants would cancel said judgment. Defendants canceled the judgment of record and plaintiffs perfected the sale of said land. They now allege that said judgment was not assignable and that the notes were executed without consideration.

The parties waived jury trial and consented for the court below to find the facts and enter judgment. After finding the facts the court concluded that the superadded liability of a stockholder is not assignable as a matter of law and that the admitted assignment of the stock assessment judgment against J. M. Little was and is invalid and without legal effect and vested no right or title in the purchasers; that the purported cancellation of the judgment was invalid and void and constituted no consideration in law for said notes, and that said notes were executed without any legal consideration therefor and are invalid and void. Judgment was thereupon entered requiring the surrender and cancellation of said notes. The defendants excepted and appealed.

Ray Jennings and Burke & Burke for plaintiffs, appellees.
Scott & Collier for defendants, appellants.

BARNHILL, J. The plaintiffs contend that the liability of stockholders for assessment in case of insolvency is a contingent asset and constitutes a trust fund for the benefit of depositors and creditors of the bank. They take the position that this liability is not an assignable asset of the bank, *Hood, Commissioner, v. Realty, Inc.*, 211 N. C., 583; and that it constitutes a trust fund to be equitably distributed for the benefit of all creditors, *Hood, Commissioner, v. Trust Co.*, 209 N. C., 367, 184 S. E., 51. It has been so held by this Court in the cases cited and relied on by plaintiffs and in many other decisions without exception. In each instance, however, the Court was discussing the double liability of stockholders prior to the rendition of judgment thereon.

The rights of a bank as a going concern and of the Commissioner of Banks as a statutory receiver in charge of an insolvent bank in process of liquidation in relation to this liability are distinctly different. A solvent bank has no property interest in the contingent fund thus provided for by statute. It exists solely for the protection of creditors of the bank. On the other hand, so soon as the Commissioner of Banks assumes control of an insolvent bank for the purpose of liquidation it becomes his duty to reduce the liability to judgment and thus make it a fixed and available asset to be applied to the payment of creditors.

To the end that an expeditious and inexpensive method might be provided to enable the Commissioner of Banks to make this fund quickly available, C. S., 218 (c), was revised, amended and reënacted in 1927. Public Laws 1927, ch. 113; Michie's Code of 1935, sec. 218 (c). After the expiration of thirty days from the date of the filing of the notice of the taking possession of a bank, in the office of the clerk of the Superior Court, the Commissioner of Banks may levy an assessment equal to the stock liability of each stockholder in the bank and shall file a copy of such levy in the office of the clerk of the Superior Court, which shall be recorded and indexed as judgments, and shall have the force and effect of a judgment of the Superior Courts of this State; and the same shall become due and payable immediately. And all sums collected under the levy shall become immediately available as general assets of the bank for distribution as other assets. Public Laws 1927, ch. 113, subsection 13. When judgment is so rendered it becomes a fixed liability of the stockholder and is a general assignable asset to be collected by the Commissioner of Banks in the manner which to him appears to be the most advantageous and beneficial to creditors. He has the authority, by and with the consent and approval of the Superior Court, to sell, compromise or compound any bad or doubtful debt or claim, and upon such approval may sell the real and personal property of such bank. Public Laws 1927, ch. 113, subsection 7.

The judgment rendered against J. M. Little became and was a general asset of the bank. It was sold by the Commissioner of Banks under authority of the Superior Court. Upon the assignment thereof title thereto vested in the defendants and it continued in force as a lien upon the real estate of the judgment debtor. Neither the fact that the uncollected assets of the bank remaining after it had been substantially liquidated were sold in bulk, nor the fact that in said sale no particular valuation was placed upon the stock assessment judgment affects the regularity of said sale or the validity of the transfer of assets so sold. The Commissioner of Banks pursued a method of realizing upon this judgment which is specifically authorized by statute and, admittedly,

he received the consideration paid therefor which, together with the other assets of the bank, was insufficient to pay creditors in full.

In any event the judgment was regular upon its face and constituted an apparent lien upon the land plaintiffs desired to sell. The purchaser required the cancellation of the judgment before he would buy. Even if it be conceded that the judgment was invalid for the reasons alleged by plaintiff, it constituted a cloud on the title of the plaintiffs. Therefore, its cancellation was a sufficient consideration for the execution of the notes in controversy.

We conclude that the notes executed by plaintiffs which they now seek to have surrendered and canceled are valid subsisting obligations based on a legal and valuable consideration. This conclusion is not in conflict with any former decision of this Court.

The judgment below is

Reversed.

LEON SUSKIN v. MARYLAND TRUST COMPANY AND SIDNEY R. TRAUB, EXECUTORS AND TRUSTEES OF THE ESTATE OF LOUIS B. SUSKIN; AND SUSKIN & BERRY, INC. (ORIGINAL PARTIES DEFENDANT), AND JOHN ARCHIBELL WILKINSON, ADMINISTRATOR OF LOUIS B. SUSKIN, DECEASED (ADDITIONAL PARTY DEFENDANT).

(Filed 2 November, 1938.)

1. Abatement and Revival § 10—

The common law rule that a personal right of action dies with the person has been changed by statute so that causes of action, except in specified instances, C. S., 162, survive and are maintainable by or against the deceased person's personal representative, C. S., 159, 461.

2. Same: Executors and Administrators § 19—Cause of action for unliquidated damages survives only against personal representative of tort-feasor.

Plaintiff instituted this action against the executors and trustees of deceased, alleging that the deceased had converted plaintiff's stock and dividends thereon, from a specified year, to his own use, and prayed damages for the wrongful conversion. The action as against defendant executors was dismissed upon their special appearance. *Held:* Plaintiff's cause of action against the trustees is not for the recovery of the "*res*," there being no allegation that the property converted or property acquired with the proceeds thereof was in the possession of the trustees, but is based on a claim for unliquidated damages which survives only against the tort-feasor's personal representative, and the trustees' demurrer to the complaint was properly sustained. Whether the action could be maintained against the trustees after the claim had been reduced to judgment against the executors and thus made a debt under C. S., 59, is not presented for decision.

SUSKIN *v.* TRUST CO.

APPEAL by plaintiff from *Frizzelle, J.*, at Chambers, 26 July, 1938. From CRAVEN. Affirmed.

This is a civil action to recover damages for the wrongful conversion of stock and dividends thereon.

The plaintiff is a resident of Craven County. The original parties defendant are executors and trustees of the estate of Louis B. Suskin, late of the city of Baltimore, Md., who died 12 January, 1935, leaving a last will and testament in which he named the Maryland Trust Company and Sidney R. Traub executors and devised to them as trustees the major portion of his estate.

The plaintiff alleges that the Standard Overall Company, a Maryland corporation, on 15 September, 1919, issued and delivered to plaintiff three certificates for a total of fifty shares of its preferred stock; that said stock has never been transferred or assigned by him; that the deceased was in control of and dominated the Standard Overall Company and that through his position of influence with the said corporation he wrongfully and unlawfully caused and procured said company to issue to him and in his name a certificate for fifty shares of preferred stock of said corporation in lieu of the three certificates issued to the plaintiff for the total amount of fifty shares; that the deceased thereafter wrongfully and unlawfully converted all dividends issued on said stock, including a certificate for twenty-one shares of the common stock issued to the deceased in lieu of dividends, to his own use. The plaintiff's stock was issued to him 15 September, 1919, and he alleges that the deceased received the certificate for the twenty-one shares of common stock 7 February, 1927, and that he converted all dividends paid since 1926.

The plaintiff prays judgment for $40,000 damages for the wrongful and unlawful conversion of the property of the plaintiff; for the sum of the total of the amounts of all dividends and accruals wrongfully collected; and for the value of the stock wrongfully converted.

The Maryland Trust Company and Sidney R. Traub as trustees made a general appearance and demurred to the complaint for that it does not state a cause of action. The demurrer was sustained and the plaintiff appealed.

L. I. Moore and R. E. Whitehurst for plaintiff, appellant.

W. B. R. Guion and J. C. B. Ehringhaus for defendant trustees.

BARNHILL, J. The defendant executors, on special appearance, moved the court to dismiss the action as to them. This motion was allowed and an order entered accordingly. On appeal the order was sustained.

Suskin v. Trust Co., 213 N. C., 388. The defendant John Archbell Wilkinson, administrator, was removed from office by the clerk of the Superior Court of Beaufort County and an administrator *c. t. a.* was appointed in his stead to administer North Carolina assets of decedent's estate. The defendant Wilkinson's appeal from the order of removal was dismissed. *In re Estate of Suskin, ante,* 218. As the ancillary administrator *c. t. a.* has not been made a party defendant, this action as now constituted is against the Maryland Trust Company and Sidney R. Traub as trustees of the estate of Louis B. Suskin, and Suskin & Berry, Inc., which is a party defendant only as a garnishee.

In the written demurrer filed the defendants assert that no cause of action is alleged in favor of the plaintiff and against these defendants for that:

"5. The cause of action, if any, is therefore, for a tort committed in the State of Maryland by a man who lived and died domiciled in Maryland and with reference to property the *situs* of which was at all times and still is in the State of Maryland and nine years or more before the death of the tort-feasor all of which appears in the complaint, paragraph 5. The personal action, if any, arising therefrom, died with Suskin, the tort-feasor, and survives, if it survives at all, only by virtue of, under and in accord with the laws of the State of Maryland.

"7. And even if the Maryland law be presumed or shown to be the same as ours, the action could survive only against the tort-feasor's personal representative, namely, his executors named in his will, and as such but not against the trustees who take as trustees after and in subordination to the administration of decedent's estate, their trusteeship having come into existence after the death of the tort-feasor. Neither at common law nor under any statute does an action for tort committed by a decedent survive against any one other than the personal representative as such.

"9. And while it might be that an action could once have been maintained in the Maryland jurisdiction for recovery against the trustees for the 'res' converted if in their possession no suit or right of action for damages on account of Suskin's conversion has ever existed against them anywhere or right of action for and on account of what was done by Suskin whether nine days or nine years prior to his death.

"Upon the basis of these facts all of which appear in the complaint, these defendants demurring being merely trustees under a trust which, under the allegations of the complaint, came into being after the death of the alleged tort-feasor and long after the conversion complained of, may not be sued for damages resulting therefrom and no cause of action

exists or survives against them as trustees merely because their trusteeship was created by the alleged tort-feasor. As to them clearly the complaint fails to state a cause of action."

The rule of the common law is that a personal right of action dies with the person. This rule has been changed by legislative enactment and, except in specified instances, C. S., 162, causes of action now survive and an action originally maintainable by or against the deceased person is now maintainable by or against his personal representative. The cause of action survives, if it survives at all, in favor of or against the personal representative. C. S., 159; C. S., 461.

While counsel cite no Maryland statute or authority to the effect that the cause of action for the alleged tort survives, it seems that under the Maryland law plaintiff's alleged cause of action does survive against the personal representative of the deceased. Bagby's Ann. Code of Md., 2nd Vol., Art. 93, sec. 106.

The facts alleged in the complaint on demurrer are deemed to be true. These facts, considered in the light most favorable to the plaintiff, cannot be construed to constitute an action for the recovery of the *"res."* There is no allegation in the complaint that the property converted, or property acquired with the proceeds thereof, has ever been delivered to or is now in the possession of the defendants.

Plaintiff's action is based on a claim for unliquidated damages. Until reduced to judgment liquidating the amount of the claim it is not a debt under C. S., 59, *et seq.* Under the statutory provisions of the State of Maryland and of this State the action can be maintained only against the personal representative of the deceased.

Whether, after recovering judgment against the executors and thus establishing the amount due, thereby converting the claim for unliquidated damages into a debt, plaintiff could in any event pursue property which had been delivered to the trustees for the satisfaction of his judgment is not before us for decision. *Zollickoffer v. Seth,* 44 Md., 359; Story's Eq. Juris., 2nd Vol., sec. 1251.

Plaintiff's claim as presently constituted is not maintainable against the trustees under the will of Louis B. Suskin, deceased.

The judgment below is

Affirmed.

SAMUEL B. WELLS v. JEFFERSON STANDARD LIFE INSURANCE COMPANY, A CORPORATION,

and

SAMUEL B. WELLS, ADMINISTRATOR OF THE ESTATE OF MARY NICHOLSON WELLS, v. JEFFERSON STANDARD LIFE INSURANCE COMPANY, A CORPORATION,

and

MARTHA J. NICHOLSON v. JEFFERSON STANDARD LIFE INSURANCE COMPANY, A CORPORATION.

(Filed 2 November, 1938.)

Insurance § 31b—Evidence held for jury on question of insured's misrepresentations which were material as a matter of law.

Defendant insurer introduced evidence that at the time of the issuance of the policies in suit insured made written representation to the effect that she was not pregnant and that her menstruation was regular and normal, in reaffirming her representations to this effect made in her application, that insured's last menstruation period was over two months prior to the issuance of the policies, and that had insured disclosed the facts the policies would not have been issued by the insurer or by the re-insurer. The policies were issued after medical examination. *Held:* The evidence was sufficient to be submitted to the jury, and upon an affirmative finding that insured had made such misrepresentations, insurer is entitled to the cancellation of the policies, the representations being material as a matter of law.

PETITION by plaintiffs to rehear the above case on appeal as it relates to the second and third actions reported in 213 N. C., 801, 196 S. E., 326.

These three civil actions, consolidated for the purpose of trial, are to recover on three policies of insurance issued by the defendant on the life of Mary Nicholson Wells: one, dated 7 July, 1935, in which her husband, Samuel B. Wells, is the beneficiary; and two others dated 1 November, 1935, in which the administrators, executors or assigns of the insured, and her mother, Martha J. Nicholson, respectively, are the beneficiaries. From judgment as of nonsuit at the close of the plaintiffs' evidence the cases were heard here on former appeal reported in 211 N. C., at 427, 190 S. E., 744. The judgment was reversed, and on retrial in the court below, these issues were submitted to and answered by the jury as follows:

"1. Did Mary A. Wells represent in her application for the insurance policy sued on that she had not consulted a doctor for any cause, prior to her said application? Ans.: 'Yes' (by consent).

"2. Was the applicant, Mary A. Wells, treated for malaria during the month of May, 1935, by Dr. C. F. Hawes? Ans.: 'Yes' (by consent).

"3. Was the said representation material to a contract of insurance between the said Mary A. Wells and the defendant? Ans.: 'No.'

"4. Did the applicant, Mary A. Wells, represent in her application for the insurance policy sued on that her menstruation was regular and normal. Ans.: 'Yes' (by consent).

"5. Was said representation true? Ans.: 'Yes.'

"6. Was said representation material to a contract of insurance between the said Mary A. Wells and the defendant? Ans.: 'No.'

"7. Did the said Mary A. Wells represent in her application for the insurance policy sued on that she was not pregnant? Ans.: 'Yes' (by consent).

"8. Was the said representation true? Ans.: 'Yes.'

"9. Was said representation material to a contract of insurance between the said Mary A. Wells and the defendant? Ans.: .....

"10. Did the said Mary A. Wells, on August 5, 1935, prior to the delivery of policies Nos. 549703 and 551126 reaffirm the representations, agreements and statements contained in her said application? Ans.: 'Yes.'

"11. Was the said Mary A. Wells pregnant on 5 August, 1935? Ans.: 'Yes.'

"12. Was said Mary A. Wells' menstruation regular and normal on 5 August, 1935? Ans.: 'No.'

"13. Were said representations, or either of them, material to the contract of insurance between the said Mary A. Wells and the defendant, as contained in policies Nos. 549703 and 551126? Ans.: 'Yes.'

"14. Was Mary A. Wells in good health at the time of the execution and actual delivery of the policies? Ans.: 'No.'

"15. In what amount, if any, is defendant indebted to plaintiffs? Ans.: ....."

Plaintiffs appealed from judgment denying recovery in the second and third actions. On the call of the case in this Court, defendant made motion to be permitted to amend its answer in said actions to aver, in substance, that, in August, 1935, prior to the delivery of the policy on which each action is based, Mary Nicholson Wells was pregnant, and her menstruation was not regular and normal, to her knowledge; that she failed to inform the defendant of these facts, but on the contrary reaffirmed her agreements and statements contained in the original application; that knowledge of her condition in those respects was material to the risks; that defendant did not have knowledge thereof, and that, if it had had such knowledge, the policy would not have been issued. There is evidence tending to support the averments as set forth in this amendment. Other pleas of defendant are set out in the former appeal, 211 N. C., 427, 190 S. E., 744.

Upon consideration of the record and case on appeal in the light of the pleadings as so amended, the Court being evenly divided, *Connor, J.*, not sitting, the judgment below was affirmed.

The plaintiffs now petition for rehearing on the ground that there is "lack of relevant evidence to support any of the issues 12 to 14, . . . inclusive."

Oscar B. Turner and Norwood B. Boney for petitioners.

Beasley & Stevens and Smith, Wharton & Hudgins for defendant, appellee.

WINBORNE, J. The petition to rehear presents one question: Is there sufficient evidence to support any of the issues 12 to 14, both inclusive? We think so.

There is evidence tending to show that prior to 5 August, 1935, the last menstruation of insured was on 20 May, 1935. There is also evidence tending to show that the policies of insurance would not have been issued by the defendant, or by the Pilot Life Insurance Company, the re-insurer, if the insured had disclosed the true facts with reference to her pregnancy and menstruation. There is also evidence that the questions and answers with respect thereto are in writing.

It is settled law in North Carolina that answers to specific questions like the ones asked in the case in hand, where there has been medical examination, are material as a matter of law. *Petty v. Ins. Co.*, 212 N. C., 157, 193 S. E., 228, and cases cited.

As to the 14th issue, it is stated in the judgment below that the defendant, for the purpose of the trial, in open court waived any and all rights that it has or might have thereunder.

In the judgment below we find no error, and the petition is

Dismissed.

DAVID IRVING SCHRUM v. CATAWBA UPHOLSTERING COMPANY AND THE MARYLAND CASUALTY COMPANY.

(Filed 2 November, 1938.)

Master and Servant § 41a—Employee is entitled to full compensation for loss of vision although prior to accident he had astigmatism.

Claimant suffered an accident arising out of and in the course of his employment which resulted in the total, irremediable loss of vision in one eye. Prior to the accident claimant suffered from astigmatism which caused a forty per cent uncorrected loss of vision, but by the use of

glasses his vision was practically normal. There was no evidence that the accident would not have resulted in the destruction of his vision had the former condition not existed. *Held:* Claimant is entitled to full compensation for the total loss of vision of the eye, Michie's Code, 8081 (mm), subsec. (q) (t), and it is error to first deduct the forty per cent loss of vision from astigmatism and award claimant only sixty per cent of the amount recoverable for total loss of vision. The provisions of sec. 8081 (ee), does not alter this result, the intent of this section being to prevent double compensation when an employee has suffered two compensable permanent injuries.

APPEAL by plaintiff from *Rousseau, J.*, at February Term, 1938, of CATAWBA. Reversed.

This is a proceedings before the Industrial Commission for compensation for total loss of vision of one eye.

It is agreed that the claimant is entitled to the minimum rate of compensation. The controversy involves only the amount of compensation claimant is entitled to recover. The Commission awarded sixty per cent of the amount recoverable for the total loss of vision. In the court below the plaintiff tendered judgment "that the plaintiff have and recover of the defendants compensation for the complete loss of vision in his eye at the rate of $7.00 per week for 100 weeks, in accordance with section 8081 (mm), subsection (q), of the Consolidated Statutes of North Carolina." The court below declined to sign said judgment and in lieu thereof signed judgment approving and affirming the award of the Industrial Commission. The plaintiff excepted and appealed.

Russell W. Whitener for plaintiff, appellant.
W. C. Ginter and F. D. Pearce for defendants, appellees.

BARNHILL, J. The claimant, at the time he suffered an injury by accident arising out of and in the course of employment which resulted in total destruction of vision of his right eye, was suffering from astigmatism of said eye, which caused a forty per cent uncorrected loss of vision. By the use of proper glasses his vision was from ninety to one hundred per cent normal.

The hearing Commissioner found that "the accident destroyed the source and substance of vision, that which the claimant possessed and which enabled him to establish a vision close to normal which cannot be established in any part by the use of a lens since the accident occurred." The Full Commission on review affirmed the findings of fact of the hearing Commissioner, but concluded that the claimant was entitled to recover only for sixty per cent loss of vision, that is, the loss of vision suffered by him after first deducting the uncorrected loss of vision due to the astigmatism.

In its opinion the Commission states the question of law presented as follows: "Shall the plaintiff be paid for the loss of corrected vision under section 31 (q); or shall he be paid for the uncorrected loss of vision?"

The statute, Michie's Code of 1935, sec. 8081 (mm), subsection (q), provides that an employee shall receive sixty per centum of his average weekly wages during 100 weeks for the loss of an eye. In subsection (t) thereof it is provided that the loss of vision of an eye shall be considered as equivalent to the loss of an eye. The Commission based its decision reducing the amount of compensation on the provisions of section 8081 (oo), which is as follows: "PRORATING PERMANENT DISABILITY RECEIVED IN OTHER EMPLOYMENT.—If any employee has a permanent disability or has sustained a permanent injury in service in the Army or Navy of the United States, or in another employment other than that in which he received a subsequent permanent injury by accident, such as specified in section 8081 (mm), he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed."

An analysis of this section, in connection with its caption, clearly indicates that it was the intention of the Legislature to provide for the deduction of prior compensable injuries and thus to prevent double compensation. Where there are two compensable permanent injuries, in determining the degree of impairment caused by the second injury, the degree of the injury caused by the first must be deducted from the total injury resulting from the two accidents to determine the compensable injury caused by the second accident. Had the claimant theretofore suffered an injury to his eye which impaired his vision forty per cent and then suffered a second injury which further impaired his sight, so that he then had only forty per cent vision remaining he would be entitled to compensation for the second injury on the basis of twenty per cent impairment.

Whether the section applies when there has been a total loss of an eye, or arm, or leg, we need not now decide, for we are of the opinion that there is nothing on this record or in said section which justified the conclusion that deduction should be made for a defective vision due to astigmatism. To so hold would require an examination into the condition of vision of the eye of every employee who suffered a loss of vision arising out of and in the course of his employment. And it is well known that few people of mature age possess perfect vision. Thus few, if any, employees who suffered the loss of vision of an eye could recover the compensation the Legislature clearly intended should be awarded in such an event.

The compensation provided is for the "loss of vision of an eye." The sense of sight is just as precious to the person who is suffering from a defective vision due to astigmatism which may be, and is, corrected by the use of glasses, as it is to one whose sight is unimpaired. It is for this loss of vision the statute seeks to compensate.

This employee, by the use of glasses, possessed vision which is considered normal or perfect, and there is nothing in this record which indicates that the accident would not have resulted in the destruction of his vision had the former condition not existed. This "source and substance of vision" has been destroyed by the injury he sustained. For this loss he is entitled to the full compensation provided by statute. We are of the opinion, therefore, that there was error in the refusal of the court to sign the judgment tendered by the claimant and in the judgment affirming the award of the Commission.

In the opinion of the Full Commission it is stated: "In an effort to be liberal the Commission from the beginning has ruled that where there is an injury to the eye and there is loss of vision, but where this vision could be in part compensated by the proper fitting of glasses, the Commission has awarded compensation based upon the uncorrected vision and at the same time required the defendants to furnish glasses." There is no fault to be found with this rule of procedure in the award of compensation where the accident does not result in a complete loss of vision. However, on this record, the application of this rule in the instant case where there has been a complete loss of vision is not warranted under the statute.

This cause is remanded to the Superior Court for judgment in accord with this opinion.

Reversed.

H. F. WALTER, TRADING AS WALTER & GURLEY AUCTION COMPANY, v. MATTIE L. WINECOFF AND D. K. WINECOFF.

(Filed 2 November, 1938.)

1. Appeal and Error § 6g—

Appellants may not complain of the charge relative to an issue answered in their favor.

2. Contract § 23: Brokers § 12—Charge in this action for damages for breach of brokerage contract held sufficiently full.

In this action for damages for breach of a brokerage contract the issue as to the execution of the contract was answered in the affirmative by consent. Plaintiff contended that he secured a prospective purchaser and then found defendants had breached the contract by selling the land. Defendants contended that at the time the brokerage contract was exe-

cuted they were negotiating for the sale to their purchaser and that plaintiff and defendants agreed that the brokerage contract should not be effective if defendants were able to consummate that sale. The court properly placed the burden of proof on the issue relating to the alleged condition precedent on defendants, stated the evidence relating thereto, and declared and explained the law arising thereon. *Held:* The controverted question was the existence of the alleged condition precedent, and not what constitutes a contract, and defendants' exception to the charge on the ground that it failed to define the word "contract" and failed to declare and explain the law arising on the evidence, C. S., 564, is without merit.

APPEAL by defendants from *Frizzelle, J.*, at May Term, 1938, of LENOIR. No error.

John G. Dawson and J. A. Jones for plaintiff, appellee.
Hartsell & Hartsell and W. S. Bogle for defendants, appellants.

SCHENCK, J. This is an action to recover damages for alleged breach of contract to pay commissions upon the sale of real estate. The plaintiff alleges that the defendants contracted in writing to employ the plaintiff to sell a certain tract of land in Cabarrus County and agreed therein to pay the plaintiff certain commissions on the amount realized upon sale or sales made by him, and that while plaintiff was making preparation for an auction sale of the land, and within a few days after the signing and delivery of the contract, the defendants sold the lands to a third party, thereby rendering the performance of such contract impossible. The defendants while admitting that they signed and delivered to the plaintiff a paper writing purporting to be such a contract, allege that the delivery of such paper writing was made with the understanding and upon the condition that the same was to be ineffective and void if defendants consummated a sale of the land to one Brown with whom they were then negotiating, and that such a sale to said Brown was consummated in a few days after the signing and delivery of the paper writing to the plaintiff.

The issues submitted and the answers made thereto were as follows:

"1. Did the defendants execute the contract dated 16 April, 1937, as alleged in the complaint? Answer: Yes.

"2. Did the defendants enter into a contract with George C. Brown for the sale of said lands prior to 16 April, 1937? Answer: Yes.

"3. If so, was the contract to the plaintiff signed and delivered upon the condition that it was not to be binding if the contract with George C. Brown was consummated? Answer: No.

"4. What amount, if any, is the plaintiff entitled to recover of the defendants? Answer: $750.00."

From judgment that the plaintiff recover of the defendants the sum of $750.00, the defendants appealed.

The sole assignment of error is that "The court erred in charging the jury, for that the court did not state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon, as required by section 564 of the Consolidated Statutes, especially in that the court did not define the word 'contract' or tell the jury what a contract is and in that he did not explain the law that if the jury should find that there was a condition precedent to the signing of the contract of sale, to wit, that if the trade to Brown was consummated, then the contract to the plaintiff would be inoperative, which was the defendants' whole defense; in that the court did not declare and explain the law on any of the issues."

The first issue was answered by consent, thereby eliminating the necessity for any statement of the evidence and explanation of the law relating to it.

The second issue having been answered in favor of the defendant appellant, any omission in the charge relative to it became immaterial.

The third issue, as stated by his Honor, "largely becomes the crux of the matter." The defendants, upon whom the court properly placed the burden of proof of this issue, offered their own testimony and the testimony of others tending to show that prior to the signing and delivery of the paper writing to the plaintiff they told him of the negotiations they were having with one Brown and exhibited to him a check of Brown that they held as part payment for the land if the sale was consummated, and that when the plaintiff took the paper writing he assured the defendants that in the event they consummated the sale to Brown their contract with him would be ineffectual and he (the plaintiff) would destroy the paper writing delivered to him. On the other hand the plaintiff testified and offered other evidence tending to show that he never heard of any negotiations between the defendants and Brown until he had secured an offer for the land as a whole and had gone to so inform the defendants and ask them if they cared to accept such offer, when he was informed by the defendants that they had sold the land to Brown. The real controversy in this case was whether the defendants gave the plaintiff notice of their negotiations with Brown and made as a condition precedent to the validity of the paper writing delivered to the plaintiff the failure to consummate a sale to Brown. His Honor stated the evidence upon this controversy in a plain and correct manner, and declared and explained the law arising thereon. There was no prayer for special instruction, and no omission to charge upon any substantial feature of the issue. There was no controversy between the parties as to what it took to constitute a contract, the sole question of

difference was whether the paper writing purporting to be a contract with the plaintiff was signed and delivered upon the condition that it was not to be binding upon the defendants if their contract with Brown was consummated. The answer to this question was for the determination of the jury, with the burden of proof upon the defendants, and this the court clearly explained to the jury.

As to the charge upon the fourth issue relative to the measure of damages the appellants make no objection in their exception or discussion in the brief.

We have carefully examined the charge of the court and we think, and so hold, that it was a substantial compliance with C. S., 564.

In the trial below we find

No error.

MRS. BANNER HEFFNER v. JEFFERSON STANDARD LIFE INSURANCE COMPANY, INC., AND L. F. LONG.

(Filed 2 November, 1938.)

1. Judgments § 9—Defendant has thirty days from determination of motion to strike out in which to answer or demur.

A motion to strike out is required to be made before answer or demurrer, and therefore when such motion is made within thirty days from the filing and service of summons and complaint, and notice of the motion is mailed to and received by plaintiff's attorney within that time, plaintiff is not entitled to judgment by default prior to the final determination of the motion, since defendants have thirty days after final determination of the motion in which to answer or demur. C. S., 509, 537.

2. Pleadings § 29: Notice—Receipt of notice of motion to strike out by mail held to render service by officer unnecessary.

Plaintiff is not entitled to have notice of motion to strike out served on her by an officer, C. S., 914, especially so when reason for such service is rendered nugatory by a finding that notice was mailed to and received by plaintiff's attorneys within the time allowed.

APPEAL by plaintiff from *Rousseau, J.*, at May Term, 1938, of CATAWBA. Affirmed.

Fred D. Caldwell and W. H. Childs for plaintiff, appellant.

Smith, Wharton & Hudgins and W. C. Feimster for defendants, appellees.

SCHENCK, J. This is an action to recover, in addition to the single indemnity heretofore paid her, double indemnity for accidental death alleged to be due the plaintiff as beneficiary under a life insurance policy

issued by the corporate defendant upon the life of her late husband, John W. Heffner, and to recover by way of punitive damage for the wrongful withholding of the amount due her by reason of the fraud of the defendants.

Summons was issued on 19 March, 1938, and was duly served on the defendant L. F. Long on 19 March, 1938, and on the corporate defendant on 22 March, 1938, and a copy of the complaint was delivered to each of the defendants at the time service was made. On 8 April, 1938, the defendants filed with the clerk a written motion for an order "striking, eliminating and holding for naught" certain allegations from the complaint to the effect that the coroner of Catawba County impaneled a jury at the time of the death of John W. Heffner, which examined the body of the deceased and heard testimony, and found that the death of the deceased was caused by the accidental discharge of a pistol and that the verdict and report of coroner was accordingly filed in the office of the clerk, which verdict is now filed and has been so filed in said office since 1 March, 1923, and that the report and verdict of the coroner and the jury were well known to the defendants at the time of said inquest and at the time of the perpetration of the fraud upon the plaintiff by the defendants.

Predicated upon the fact that no answer or demurrer had been filed upon "the 25th day of April, 1938, it being the fourth Monday in said month of April," the plaintiff lodged before the clerk written motion for judgment by default final for double indemnity due to accidental death, with interest, and for judgment by default and inquiry by way of punitive damage for the wrongful and fraudulent withholding of the amount due. This motion for judgment by default was denied by the clerk and plaintiff appealed to the judge.

On 16 May, 1938, "J. A. Rousseau, Judge presiding over and holding regularly the May Term, 1938, of the Superior Court of Catawba County," found as facts (1) that summons in the cause was issued on 19 March, 1938, which was duly served on defendant Long on 19 March, 1938, and on the corporate defendant on 22 March, 1938, and that copies of the complaint were left with the defendants at the time the respective services were made; (2) that on 8 April, 1938, the defendants filed with the clerk of the Superior Court a written motion to strike four several paragraphs of the complaint, and at the same time left with said clerk two copies of the motion, which copies were mailed by the clerk to each of the plaintiff's attorneys of record; (3) that on 25 April, 1938, when attorneys for plaintiff moved before the clerk that he sign default judgment, they each had received a copy of the motion to strike filed by the defendants on 8 April, 1938, which was prior to the expiration of thirty days after service of summons on each of the defendants; (4) that on 25 April, 1938, the clerk entered judgment denying the motion of the

plaintiff for judgment by default; and (5) that plaintiff appealed to the Superior Court, and "upon the foregoing finding of facts and in the exercise of the discretion of the court" the judge ordered and adjudged that the order of the clerk be affirmed and the case remanded to the clerk for further proceedings. To the foregoing judgment the plaintiff reserved exceptions and appealed to the Supreme Court.

The defendants had thirty days after service of summons upon them in which to appear and answer or demur, or thirty days "after the final determination of any other motion required to be made prior to the filing of the answer, . . ." C. S., 509. The motion to strike filed by the defendants was required to be "made before answer or demurrer, or before an extension of time to plead is granted." C. S., 537. The defendants lodged their motion to strike prior to the expiration of the time allowed to appear and answer or demur and were therefore allowed thirty days after the final determination of such motion in which to answer or demur. There has been as yet no final determination of the defendants' motion to strike, and therefore no default for the want of answer or demurrer.

We do not concur with the contention of the plaintiff that she was entitled, under C. S., 914, to have served on her by an officer a notice of the defendants' motion to strike as a condition precedent to its validity. This is especially so, since any reason for such service of notice was rendered nugatory by the finding of the court that each of the attorneys for the plaintiff had had mailed to him and had received a copy of the motion to strike prior to the expiration of the time to answer or demur and prior to the time the motion for judgment by default was lodged.

The judgment below is

Affirmed.

IN RE WILL OF WILLIAM SLADE.

(Filed 2 November, 1938.)

Wills § 29—Court may tax costs against estate in unsuccessful caveat proceedings.

Even though judgment is entered in favor of propounders, the trial court may tax the costs, including an allowance to counsel representing caveators, against the estate upon finding that the filing of the caveat was apt and proper and done in good faith. C. S., 1244; Public Laws of 1937, ch. 143, sec. 1.

APPEAL by the propounder from *Grady, J.*, at May Term, 1938, of CRAVEN. Affirmed.

W. H. Lee and L. I. Moore for caveators, appellees.
Ward & Ward and R. O'Hara for propounder, appellant.

SCHENCK, J. Katherine Jones, as propounder, procured the probate in common form of a paper writing purporting to be the will of William Slade. Augusta Wilson and others filed a caveat. The cause was transferred to the Superior Court, where issues of *devisavit vel non* were answered in favor of the propounder. Whereupon judgment that the paper writing propounded, and every part thereof, was the last will and testament of William Slade was entered. However, upon motion of the caveators, ruling upon which was made by consent at a later time, the trial judge, after finding that the filing of the caveat was "apt and proper" and "done in good faith," "ordered that the costs of the proceeding be taxed against the estate, which costs shall include an allowance of $150.00 to counsel who represented the caveators in the trial." To this order the propounder reserved exception and appealed to the Supreme Court.

The taxing of the costs against the estate is authorized by C. S., 1244, which reads: "Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court: . . . (2) Caveats to wills . . ."

The inclusion of attorneys' fees in the costs is authorized by ch. 143, Public Acts 1937, which reads: "Section 1. That the word 'costs' as the same appears and is used in section twelve hundred and forty-four of the Consolidated Statutes shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow." It will be noted that the statute does not limit the attorneys' fees included to those of the attorneys for the party who prevails.

The judgment below is

Affirmed.

KATHERINE SANDERLIN v. LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE.

(Filed 2 November, 1938.)

1. Insurance § 38—Evidence held insufficient to show death by accidental means within coverage provision of policy.

Plaintiff beneficiary's evidence tended to show that insured died as a result of an accident occurring when the door of the car in which he was riding came open and insured fell or was thrown out of the car. *Held:* The death was not by accident within the coverage of a policy providing

for liability if insured should die by accident occurring by his being struck by an automobile, or by collision or accident to an automobile in which he was riding.

2. Insurance § 13—

An insurance contract must be construed as the parties have made it.

APPEAL by plaintiff from *Grady, J.*, at May Term, 1938, of CRAVEN. Affirmed.

Suit to recover upon an accident insurance policy. At the close of plaintiff's evidence, motion for judgment of nonsuit was allowed. Plaintiff appealed.

M. S. Dunn and R. E. Whitehurst for plaintiff.
Barden & Stith for defendant.

DEVIN, J. The plaintiff was the beneficiary named in a policy of accident insurance issued by the defendant on the life of Bill Sanderlin, Jr., son of plaintiff, aged six years. By the policy the defendant contracted, in consideration of the premium specified, to insure the person named in the policy against the result of bodily injuries received and effected solely by external, violent and accidental means, strictly in the manner and subject to all the provisions and limitations contained in the policy, the pertinent portions of which are as follows: If the insured shall suffer loss of life "by being struck by actually coming in physical contact with the vehicle itself and not by coming in contact with some object loaded or attached thereto, or some object struck and propelled against the person by said vehicle, which is being propelled by steam, . . . gasoline or liquid power, while the insured is walking or standing on a public highway; . . . or by collision of, or by any accident to, any private horse-drawn vehicle, private motor-driven automobile or motor truck inside of which the insured is riding or driving . . .; provided, that in all cases referred to in this paragraph there shall be some external or visible injury to and on the said vehicle of the collision, or accident."

The plaintiff's evidence tended to show that plaintiff and her husband, a daughter aged fifteen years, and the insured, Bill Sanderlin, Jr., were riding in a four-door automobile being driven by plaintiff's husband along the highway near Jacksonville, North Carolina. Plaintiff and her husband were on the front seat and the daughter and the insured were on the rear seat, the daughter being asleep at the time. The automobile was being driven at a speed of between forty and fifty miles per hour. By some means the rear door came open and the insured fell or was thrown out of the car, resulting in his death. Later, a dent or mark was discovered on the bowl of the rear fender.

It is apparent that the unfortunate death of the insured did not occur in any manner against which the defendant had contracted to insure. The injury was not within the terms of the policy. It did not occur by his being struck by an automobile while he was walking or standing on the highway, nor was it occasioned by collision of the automobile in which he was riding, nor by an accident to the automobile. We can only construe the contract as the parties have made it. *Whitaker v. Ins. Co.*, 213 N. C., 376; *Taft v. Casualty Co.*, 211 N. C., 507, 191 S. E., 10; *Gilmore v. Ins. Co.*, 199 N. C., 632, 155 S. E., 566; 14 R. C. L., 931.

The motion for judgment of nonsuit was properly sustained by the learned judge of the Superior Court, and the judgment is

Affirmed.

MARIE SPELL, MINOR, BY HER NEXT FRIEND AND FATHER, A. G. SPELL, v. THE TOWN OF ROSEBORO.

(Filed 2 November, 1938.)

Municipal Corporations § 14—Evidence held insufficient to show that defendant municipality was responsible for alleged defective highway.

Plaintiff instituted this action to recover for injuries sustained in an automobile accident on a highway, alleging that the accident resulted from the negligent failure of defendant municipality to exercise due care to keep the highway in reasonably safe condition. The evidence disclosed that the accident occurred outside the town limits. There was no sufficient evidence to be submitted to the jury that defendant municipality maintained or worked the highway in question or had control or supervision of same. *Held:* Defendant's motion for judgment as in case of nonsuit was properly granted.

APPEAL by plaintiff from *Frizzelle, J.*, at May Term, 1938, of SAMPSON. Affirmed.

This is an action for actionable negligence, brought by plaintiff against defendant, alleging damage. The plaintiff was seriously injured on 18 January, 1936, by reason of an alleged defective highway. There was no bridge across the ditch and the driver of the automobile, as alleged, using due care, ran into the ditch and plaintiff was injured. The defendant denied that it was guilty of negligence, pleaded contributory negligence, and further alleged: "That the same is not within the town limits of Roseboro, has never been maintained, improved or worked, or even recognized as a part or parcel of the system of streets

of said municipality, and for that reason the said defendant is not liable to the plaintiff in any sum whatever."

Richard L. Herring for plaintiff.
E. C. Robinson and W. H. Fisher 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. C. S., 567. The court below granted the motion and in this we can see no error. Under all the evidence we see no duty upon defendant to repair and keep up the bridge where the injury to plaintiff is alleged to have occurred. It was outside the town limits. We think there is no sufficient evidence to be submitted to the jury that the defendant maintained or worked the highway in question or had control or supervision of same. As to the liability of municipal corporations having legislative authority outside an incorporated town or city, see *Berry v. Durham*, 186 N. C., 421; *High Point v. Clark*, 211 N. C., 607.

Affirmed.

STATE v. ED ROBINSON.

(Filed 2 November, 1938.)

1. Criminal Law § 71—Affidavit in pauper appeal must be made by defendant.

The statute, C. S., 4651, requires that in appeals *in forma pauperis* the statutory affidavit must be made by defendant and not by his attorneys, and the requirements of the statute are mandatory and not directory, and must be complied with in order to confer jurisdiction on the Supreme Court.

2. 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*.

3. Criminal Law § 80—Appeal dismissed for failure to file affidavit as required by statute and for failure to file briefs.

This appeal *in forma pauperis* is dismissed on motion of the Attorney-General for failure of defendant to file the affidavit as required by statute and for failure to file briefs, but as defendant was convicted of a capital felony, the motion is allowed only after an inspection of the record and case on appeal fails to disclose error.

STATE *v.* ROBINSON.

APPEAL by defendant from *Warlick, J.,* at May Term, 1938, of IREDELL.

Motion by State to dismiss appeal of defendant.

Attorney-General McMullan and Assistant Attorney-General Bruton 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 of indictment, and judgment of death by asphyxiation. Defendant gave notice of appeal to the Supreme Court.

Thereupon the court below made an order permitting the defendant to appeal *in forma pauperis.* It appears, however, that the affidavit upon which this order was made is that of the attorneys for the defendant, and not of the defendant, as required by statute. C. S., 4651. The requirements of that statute are mandatory and not directory and unless there is a compliance therewith this Court does not acquire jurisdiction. *S. v. Stafford,* 203 N. C., 601, 166 S. E., 734; *S. v. Holland,* 211 N. C., 284, 189 S. E., 761, and cases cited.

The record and case on appeal were duly docketed in this Court, but defendant has not filed brief, which, if this Court had acquired jurisdiction of the appeal, would work 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,* 213 N. C., 427, 196 S. E., 361; *S. v. Brice, ante,* 34, 197 S. E., 690, 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 that defendant failed (1) to file affidavit as required in appeals *in forma pauperis,* C. S., 4651, and (2) to comply with Rule 27 of this Court as to filing briefs. This motion is allowed on the authorities hereinabove cited.

However, as is customary in capital cases, we have examined the record and case on appeal to see if any error appears. The record is regular. The exceptions presented are without merit. The case on appeal reveals competent evidence sufficient to sustain the verdict. The charge of the court below clearly, fully and fairly presented the case to the jury. We find no error.

Judgment affirmed and appeal dismissed.

E. B. FICKLEN TOBACCO COMPANY v. A. J. MAXWELL, COMMISSIONER OF REVENUE FOR THE STATE OF NORTH CAROLINA.

(Filed 9 November, 1938.)

1. Taxation § 1—Statute imposing license tax on scrap tobacco dealers held not discriminatory as delegating taxing power to warehousemen.

Public Laws of 1937, ch. 414, imposing a license tax on dealers in scrap tobacco, defines the term "scrap tobacco" as "any lot of parts of leaves, or lot in which parts of leaves are commingled (1) with whole leaves of tobacco, or (2) parts of leaves of tobacco not permitted . . . to be offered for sale at auction on tobacco warehouse floors," and the definition of "scrap tobacco" thus interpreted in accordance with the legislative intent as gathered from the statute, is the same as the well recognized and general usage of the term within the trade itself, and the statute is not objectionable on the ground that it is vague, discriminatory, or unreasonable, or that it delegates the taxing power to warehouses by making any tobacco which they refuse to permit to be sold at auction on their floors "scrap tobacco."

2. Constitutional Law § 6b—

The presumption is in favor of the constitutionality of a statute, and a statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise.

3. Taxation § 1—

Public Laws of 1937, ch. 414, expressly provides that the license tax therein provided for should be paid by "every person, firm or corporation engaged in buying or selling scrap tobacco," and is, therefore, uniform and equal in its application.

4. Taxation §§ 2a, 2c: Constitutional Law § 4b—

The General Assembly has wide discretion in selecting the objects of taxation, and in classifying business and trades for taxation and allocating to each its proper share of the expenses of Government.

5. Taxation § 8: Constitutional Law § 4b—License tax on scrap tobacco dealers held not excessive as a matter of law.

The amount of a tax levy is largely in the discretion of the General Assembly and the courts may determine that it is excessive as a matter of law only in exceptional and unusual cases, and the tax of $1,000 per county for dealers in scrap tobacco, imposed by ch. 414, Public Laws of 1937, *is held* not excessive as a matter of law.

6. Constitutional Law § 4b—

When the General Assembly has the power to levy a particular tax any collateral motives in levying the tax are not subject to judicial review.

7. Statutes § 3—

Ch. 414, Public Laws of 1937, imposing a license tax on dealers in scrap tobacco, *is held* not vague or uncertain, and objection to its validity on that ground is untenable.

APPEAL by plaintiff E. B. Ficklen Tobacco Company from *Frizzelle, J.*, at Chambers, by consent, July, 1938. From PITT. Affirmed.

Action under Uniform Declaratory Judgment Act (ch. 102, sec. 16, of the Public Laws of 1931) to test the validity of chapter 414, Public Laws of North Carolina—"An act to provide a tax on scrap tobacco or untied tobacco and to license the buyers."

The agreed statement of facts is as follows:

"The plaintiff and the defendant agree that the facts out of which this controversy arose are undisputed and are as follows, to wit:

"1. The General Assembly of North Carolina, at its regular session in 1937, enacted chapter 414 of the Public Laws of 1937, commonly known as the Scrap Tobacco Act, and said act contained, among others, the following provisions: 'Every person, firm or corporation desiring to engage in the business of buying and/or selling scrap or untied tobacco in the State of North Carolina, shall first procure from the Commissioner of Revenue of North Carolina a license so to do, and for that purpose shall file with the said Commissioner of Revenue an application setting forth the name of the county or counties in which such applicant proposes to engage in the said business and the place or places where his, their or its principal office (if any) shall be situated; and shall pay to the said Commissioner of Revenue of North Carolina, to be placed in the General Fund for the use of the State, an annual license tax of $1,000 for each and every county in North Carolina in which the applicant proposes to engage in such business. Every such license issued hereunder shall run from the date thereof and shall expire on the 31st day of May of the next year following its issue. No license shall be issued for less than the full amount of tax prescribed. Any lot of parts of leaves of tobacco, or any lot in which parts of leaves of tobacco are commingled with whole leaves of tobacco, or any other leaf or leaves of tobacco, or parts of leaves of tobacco not permitted, under the rules and regulations of tobacco warehouses, to be offered for sale at auction on tobacco warehouse floors, shall be deemed to be "scrap or untied" tobacco within the meaning and purview of this article.'

"2. The plaintiff E. B. Ficklen Tobacco Company was, prior to, and has been since the passage of the aforesaid act, a corporation duly chartered and organized under the laws of the State of North Carolina, and engaged in the purchase of leaf tobacco.

"3. The plaintiff, in the Fall of 1937, in the usual course of its business, purchased in Pitt County, North Carolina, at various times and places various lots of scrap or untied tobacco, such scrap or untied tobacco consisting of lots of parts of leaves of tobacco or lots in which parts of leaves of tobacco were commingled with whole leaves of tobacco.

"4. That there was no rule or regulation of the Tobacco Warehouses in Pitt County preventing the offering for sale at auction on such

tobacco warehouse floors scrap or untied tobacco at the time the purchases mentioned in section 3 hereof were made, but no scrap or untied tobacco was sold at auction on the tobacco warehouse floors of the tobacco warehouses operating in Pitt County in 1937. That no purchases of scrap or untied tobacco were made by the plaintiff at auction sale on the tobacco warehouse floors in Pitt County in 1937.

"5. Acting under the provisions of the act aforesaid, a license tax of $1,000 was assessed and demanded from the plaintiff by the defendant, acting in his official capacity as Commissioner of Revenue for the State of North Carolina.

"6. On the ..... day of October, 1937, the plaintiff, under written protest, paid to the defendant the sum of $1,000 so assessed and demanded of the plaintiff; and within apt time, to wit, thirty days from the date of payment, made written demand upon the defendant for the return of the $1,000 license tax paid as aforesaid.

"7. The defendant A. J. Maxwell, Commissioner of Revenue, refused and continues to refuse, prior to the commencement of this action, to refund said license tax of $1,000.

"8. That the plaintiff, before commencing said action, waited the statutory time, ninety days, before instituting this action for the recovery of the said $1,000 license tax.

"Upon the foregoing facts the plaintiff and the defendant expressly waive a jury trial and agree that if the court shall be of the opinion that said license tax of $1,000 was properly assessed, demanded and collected, then judgment shall be entered declaring said tax to have been lawfully assessed, demanded and collected, and shall dismiss this action at plaintiff's cost; but if the court shall be of the opinion upon the foregoing facts that the assessment, collection and payment of said tax was not warranted by law or that the provisions of said act levying said tax are unconsitutional, then it shall render judgment in favor of the plaintiff and against the defendant for the recovery of the said $1,000, with interest thereon from the date of the payment of said taxes, and for cost of this action.

"Both the plaintiff and the defendant reserve the right to except to such judgment as may be entered by the court and to appeal therefrom to the Supreme Court. It is agreed that this cause may be heard out of term at Snow Hill, N. C. This May ....., 1938. J. C. Lanier and Albion Dunn, for plaintiff. Harry McMullan, Atty.-General, and T. W. Bruton, Asst. Atty.-General, for defendant."

The judgment of the court below was as follows:

"This cause coming on to be heard before the undersigned judge of the Superior Court at Snow Hill, North Carolina, on Saturday, 2 July, 1938, by consent of attorneys for the plaintiff and defendant, and the

case having been heard upon an agreed statement of facts and stipulation that the same might be heard by the undersigned judge at this time and place; and the case having been fully argued by J. Con Lanier and Albion Dunn, attorneys for the plaintiff, and Harry McMullan, Attorney-General, attorney for the defendant; and the same having been fully considered by the court, and the court being of the opinion that chapter 414, Public Laws of 1937, entitled 'An act to provide a tax on scrap tobacco or other untied tobacco and to license the buyers,' is in all respects constitutional and valid, and that under the agreed statement of facts submitted to the court in this case, the plaintiff was legally assessed with the tax imposed upon it by the defendant and was liable for the same;

"It is now, upon motion of Harry McMullan, Attorney-General, attorney for the defendant, ordered, adjudged and decreed that the plaintiff is not entitled to recover the sum of $1,000, or any part thereof, as claimed and demanded in the complaint. It is therefore ordered, adjudged and decreed that the plaintiff's action be dismissed, that it take nothing thereby, and that the defendant recover of the plaintiff his costs herein. J. Paul Frizzelle, Judge Superior Court."

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

J. C. Lanier and Albion Dunn for plaintiff.

Attorney-General McMullan and Assistant Attorneys-General Bruton, Wettach, and Gregory for defendant.

CLARKSON, J. Is the statutory definition of "scrap or untied" tobacco so phrased that a tax based upon this definition would be unconstitutional? We think not.

Plaintiff appellant attacks the statute as being discriminatory, not uniform, unreasonable, prohibitory, vague, and not a lawful delegation of the taxing power. All of these objections are aimed at an interpretation of the statutory definition which we do not think applicable, to wit, that the mere prohibition by warehouses of the sale of a designated type of tobacco by warehouses thereby renders the prohibited tobacco "scrap or untied" tobacco and one dealing in it subject to the tax. As we interpret the legislative intent of the statute, the statutory definitions of "scrap or untied" tobacco are in fact two, rather than one, and are in effect as follows: "Any lot of parts of leaves of tobacco, or any lot in which parts of leaves of tobacco are commingled with (1) whole leaves of tobacco, or any other leaf or leaves of tobacco, or (2) parts of leaves of tobacco not permitted, under the rules and regulations of tobacco warehouses, to be offered for sale at auction on tobacco warehouse floors."

It is to be noted that both divisions (1) and (2) are objects of the verb phrase "commingled with." As so interpreted, either of the two statutory definitions of "scrap or untied" tobacco requires the presence of parts of leaves of tobacco. After laying down a practical, working definition of "scrap or untied" tobacco ("parts of leaves of tobacco, or . . . parts of leaves of tobacco . . . commingled with whole leaves"), the General Assembly again repeated this definition so as to make clear that this definition should likewise be applied when any part of the mingled tobacco is prohibited from sale by warehouse rules. The apparent intent of the General Assembly in referring specifically to the mingling of parts of leaves with types of tobacco prohibited from sale by warehouses was to make clear that the statute was intended to cover not only scrap and untied tobacco offered for sale in warehouses but also scrap tobacco which warehouses would not permit to be sold on their floors. The classification of scrap or untied tobacco by members of the trade appears to be a well recognized and precise, descriptive term, and the statutory definition as herein interpreted is in accordance with the common and general usage of the term within the trade itself. As so interpreted, there is no delegation of the taxing power to the warehouses; likewise, the interpretation here given the statute answers the charge of uncertainty and vagueness leveled at it by plaintiff.

The same presumption favors the constitutionality of a statute (*Hood, Comr. of Banks, v. Realty, Inc.*, 211 N. C., 582, 591, and cases there cited) and the innocence of a person accused of crime (*S. v. Palmore*, 189 N. C., 538). To the end that the General Assembly may be fully protected in the exercise of its powers as the accredited legislative representative of the people, the strongest degree of proof known to law—"so clear that no reasonable doubt can arise"—is required to overthrow the constitutionality of an act. *Hood, Comr. of Banks, v. Realty, Inc., supra; S. v. Brockwell*, 209 N. C., 209 (212); *Glenn v. Board of Education*, 210 N. C., 525 (529). If bad law, the General Assembly has the power to repeal it—*quo ligatur, eo dissolvitur*. This powerful presumption of constitutionality is sufficient, in our opinion, to withstand the accusation that this statute is discriminatory, unreasonable, prohibitory, and not uniform in its application; the latter objection, it may be well to point out, is met squarely by the words of the statute that it is to apply uniformly and equally to "every person, firm, or corporation" engaged in buying or selling scrap tobacco.

In selecting the objects of taxation, in the classification of businesses and trades for this purpose, and in allocating to each its proper share of the expense of government, the General Assembly necessarily has been given a wide discretion. The continued maintenance of government itself as a great communal activity in behalf of all the citizens of the

State is dependent upon an adequate taxing power. Government exists that the rights of individuals may be protected, that the opportunity may be vouchsafed to every man to carve out his destiny in a free land secure from the pressure of anti-social forces. Levies in taxes are but the fair and reasonable price at which we purchase, as citizens of North Carolina, privileges and opportunities today denied the citizens of a majority of the countries of the civilized world.

The charge that the present tax is discriminatory, unreasonable and prohibitory is difficult to answer completely. However, in view of the strong presumption of constitutionality, the rule that the collateral motives of the Legislature in levying a tax are not subject to judicial review (*McCray v. U. S.*, 195 U. S., 27; *Magnano Co. v. Hamilton*, 292 U. S., 40), and the settled view that the "power of taxation is very largely a matter of legislative discretion" and that "in respect to the method of apportionment as well as the amount it only becomes a judicial question in cases of palpable and gross abuse" (*Felmet v. Canton*, 177 N. C., 52 [54], and numerous cases cited), we are compelled to hold that there is not before us in this case sufficient proof that the instant tax of $1,000 per county annually against "scrap or untied" tobacco dealers is excessive as a matter of law. Taxes which bore heavily upon the taxpayers were upheld in *S. v. Roberson*, 136 N. C., 587; *S. v. Razook*, 179 N. C., 708; and *Express Agency v. Maxwell, Comr. of Revenue*, 199 N. C., 637. Taxation often involves the weighing of social policies and the determination of the respective values to be assigned various conflicting but legitimate business enterprises; under the doctrine of the separation of powers such functions have traditionally been allocated largely to the determination of the legislative branch of government, and, within wide limits, the determination of such matters by the legislative powers is binding upon the courts. Where a tax is levied against a business or enterprise which is clearly subject to taxation, as here, if the amount of the tax is such as to render it onerous, the primary recourse of the taxpayer is to the legislative forum; the power of this Court to deal with such matters is exceptional and unusual rather than general and ordinary.

The 1935 Scrap or Untied Tobacco Act was declared unconstitutional on the ground of vagueness and uncertainty in *S. v. Morrison*, 210 N. C., 117; the 1937 act here considered is free of the fatal shortcomings of the prior act.

After careful consideration, we find no error in the judgment below, and the same is

Affirmed.

REBECCA C. CHAMBERS, ADMINISTRATRIX OF THE ESTATE OF JOHN R. TUCKER, v. DEBORA TUCKER BYERS AND HUSBAND, FRANK BYERS; REBECCA C. CHAMBERS AND HUSBAND, J. C. CHAMBERS; MELVIN L. TUCKER AND WIFE, BESSIE TUCKER; RUFUS CARTER TUCKER AND WIFE, EMMA TUCKER; LILLIE TUCKER BEAVER AND HUSBAND, LEWIS BEAVER; RACHEL ELIZABETH STEVENS AND HUSBAND, JIM STEVENS; PEARL SHARP TUCKER, MATTIE BELL TUCKER, LEE ALFRED TUCKER, ROBAH MacKHILRY TUCKER AND WIFE, MARY TUCKER; WALTER TUCKER REDMOND AND WIFE, MILDRED REDMOND; MANUEL TUCKER REDMOND; CALLIE VAREE REDMOND; EMMIT EUGENE TUCKER AND WIFE, MAY LACKEY TUCKER; WILLIAM JOY BRYANT TUCKER AND WIFE, ETHEL TUCKER; DOLLIE McLELLAN TUCKER AND WIFE, ETHEL TUCKER; CALLIE BELLE GRYDER AND HUSBAND, LUM GRYDER; WILLIAM PRESS LEWIS; ROBERT HARRIS TUCKER AND WIFE, GRACE TUCKER; JOHN WILLIAM LEWIS; SARAH TUCKER; BLANCHE TUCKER DAVIS AND HUSBAND, FRANK DAVIS; BEVARD TUCKER, NEVET TUCKER; ANNIE RACHEL LAMBETH AND HUSBAND, LEE LAMBETH; STANLEY SILAS HAM AND WIFE, EMMA BURGESS HAM; LEE ROME HAM AND WIFE, EDDA HEAD HAM; MARICA LIZZIE LAMBETH AND HUSBAND, EDWARD LAMBETH; ROSA ESTELLE HAM; DORCAS MAY SHAVER AND HUSBAND, ROBERT SHAVER; FRED PARK HAM, AND DOCK DANIEL, HEIRS-AT-LAW (ORIGINAL PARTIES DEFENDANT), AND LUCY BOWERS KNIGHT (ADDITIONAL PARTY DEFENDANT).

(Filed 9 November, 1938.)

1. Wills § 1—

An agreement to adopt a minor and make her his heir, made between the person desiring to adopt the minor and the minor's parents, as the respective parties to the agreement, indicates that the instrument is not intended as a will. Michie's Code, 4131.

2. Adoption § 6—

An agreement to adopt a minor, made between the person desiring to adopt the minor and the minor's parents, as the respective parties to the agreement, is not intended as an "Adoption of Minors" under ch. 2, Michie's Code.

3. Contracts § 1—

Persons *sui juris* may make any contract if it is not contrary to law or public policy.

4. Contracts § 8—

The intent of the parties as gathered from the language used, the subject matter and purpose of the agreement, is controlling in interpreting the contract.

5. Wills § 4: Contracts § 19—Minor may sue on contract to devise made with her parents by person desiring to adopt her.

Intestate made a written agreement with the parents of a minor to adopt the minor and make her his sole heir in consideration of the par-

ents agreeing to the adoption and agreeing not to induce the minor to leave his lawful custody. The adoption was never made, but the minor lived with intestate and his wife as their child, and there was no evidence of repudiation of the contract, but only that intestate failed to fulfill it by executing a will. *Held:* The agreement being in writing, the statute of frauds does not apply, C. S., 988, and the contract to devise is valid and may be enforced by the minor upon her majority as the third person beneficiary.

6. Wills § 6: Trusts § 15—Equity will enforce valid contract to devise by declaring heirs at law trustees for beneficiary.

When a valid, written contract to devise is established, equity will enforce the contract in favor of the beneficiary by declaring the heirs at law trustees for her benefit and decreeing conveyance by them to her, and thus grant specific performance of the contract, and this remedy is not in conflict with the rule that a contract to make a will cannot be specifically enforced and that the courts cannot make a will.

7. Executors and Administrators § 13a—Person claiming sole seizin has right to determination of issue before sale to make assets.

While an administrator is entitled to sell lands of the deceased to make assets to pay debts of the estate when the personalty is insufficient, Michie's Code, 74, when a person claims sole seizin under a contract to devise as against the heirs of intestate, such person is entitled to adjudication of her claim of sole seizin before a sale of the property to make assets is ordered, since she may elect to discharge the debts of the estate and the costs of administration to prevent a sale of the lands.

APPEAL by Lucy Bowers Knight from *Warlick, J.*, at May Term, 1938, of IREDELL. Reversed.

This action was instituted by the plaintiff against the defendants for the sale of a certain tract of land, in Iredell County, N. C., containing 108 acres, more or less, to make assets to pay the debts of her intestate, John R. Tucker.

All of the heirs at law of John R. Tucker were duly made parties defendant. The defendant Lucy Bowers Knight, being in possession of the land and claiming the same, was also made a party defendant. In apt time, the defendant Lucy Bowers Knight filed an answer setting up that she was entitled to the land in fee simple, subject to the debts of John R. Tucker, deceased, under and by virtue of a valid written contract between her father, Charles M. Bowers, and John R. Tucker. Under her first cause of action she claims and alleges that she was entitled to said land under said written contract as the adopted daughter of the said John R. Tucker, and in her second cause of action she claims and alleges that she is entitled to said tract of land under said written contract on the ground that the said John R. Tucker, in writing, contracted and agreed to make her his sole and only heir. None of the defendants except the defendant Lucy Bowers Knight filed an answer.

The plaintiff filed a reply denying the claims of the defendant Lucy Bowers Knight.

"Exhibit A"—"Article of Agreement between Charles Madison Bowers of the (1st) First part and John and Laura Isabelle Tucker of the (2nd) Second part—

"To All Whom it May Concern, Greeting—Know all men by these Presents—That I the said C. M. Bowers, of the (1st) first part, being the father of Lucy Bowers (a minor of the age of 3 yrs., 9 mos. and 16 days) Three years, nine months and sixteen days, do hereby give my full consent to her adoption as their own child and sole and only heir to the said John and Laura Isabelle Tucker of the (2nd) second part:

"And I the said C. M. Bowers of the (1st) first part, do hereby still further agree that the said John and L. Isabelle Tucker of the (2nd) second part shall have full and sole control of that part of the estate owned by (Jessie Watson) deceased, he being the father of Martha Elizabeth Watson deceased and wife of said C. M. Bowers of the (1st) first part, and mother of said Lucy Bowers (the minor herein mentioned) he being of the County of Wilkes and State of North Carolina.

"And I the said C. M. Bowers of the (1st) first part do hereby covenant and agree not to induce or cause to be induced, the said Lucy Bowers (herein mentioned) to leave the lawful custody of the said John and Isabelle Tucker of the (2nd) second part;

"And we the said John and Isabelle Tucker of the (2nd) second part do hereby covenant and agree to adopt the said Lucy Bowers (herein mentioned) as our own child, and that we will well clothe, feed and educate her, providing for all her temporal wants to the best of our ability. And we, the said John and Isabelle Tucker of the (2nd) second part do still further agree to make said Lucy Bowers (herein mentioned) our sole and only heir to what we, the said John and Isabelle Tucker of the (2nd) second part may die possessed of, and that any violation of the above on our part shall make this contract null and void.

"Granting permission to said C. M. Bowers of the (1st) first part to visit her at any time.

"Done this fifth day of March, 1885, one thousand eight hundred and eighty-five. Chas. M. Bowers (Seal).

"A. P. Sharpe—being a Justice of the Peace in and for the said County and State of North Carolina.

"My hand and private seal. A. P. Sharpe J. P. (Seal).

Feb. 5, 1885 Signed J. R. Tucker.

"Attest: A. P. Sharpe

"Witness:"

The judgment of the court below is as follows: "This cause coming on to be heard and being heard before his Honor, Wilson Warlick, Judge

presiding at the May, 1938, Regular Term of the Superior Court of Iredell County, and it appearing to the court that this is an action instituted before the clerk, as by statute required, by the administratrix of the intestate to impound the lands of the deceased to make assets to pay debts, and that all of the blood relationship, collateral and otherwise, of the intestate, were made parties defendant by the administratrix, and that subsequently an amendment to the petition was had and summons was ordered issued for the answering defendant, and that the cause coming on to be heard, after judgment to sell the land had been entered by the clerk of the Superior Court against all the defendants save the defendant Lucy Bowers Knight; and it further appearing to the court that in the trial of the action after reading of the pleadings, the defendant Lucy Bowers Knight, through her counsel, admitting that the liabilities of the estate of the intestate were in excess of the value of the personal property, and such being made to appear, thereupon the defendant Lucy Bowers Knight assumed the laboring oar and began the introduction of testimony, and at the conclusion of the evidence for the defendant Lucy Bowers Knight, and at the time she rested her case, on motion for judgment as of nonsuit being made by the plaintiff, the motion is sustained: It is, therefore, ordered, adjudged and decreed that the cause of action set up in the action by the defendant Lucy Bowers Knight be and the same is hereby nonsuited. Defendant to pay cost of this term and two witnesses at former term. This 1 June, 1938. Wilson Warlick, Judge Presiding."

At the close of defendant's evidence the plaintiff moved for judgment as in case of nonsuit (C. S., 567) as to the cause of action set up by the defendant Lucy Bowers Knight. The court below granted the motion. The defendant Lucy Bowers Knight excepted, assigned error and appealed to the Supreme Court.

W. T. Wilson for plaintiff.
Land & Sowers and Long & Long for defendants.

CLARKSON, J. The question involved: Should the plaintiff's motion to nonsuit the defendant Lucy Bowers Knight and the judgment entered thereupon be overruled? We think so.

The decision of this controversy depends upon the construction of Exhibit "A," *supra*. It will be noted that the paper writing says: "Article of Agreement between Charles Madison Bowers of the (1st) first part and John and Laura Isabelle Tucker of the (2nd) second part." This indicates that there was no intention that the paper writing be a will. N. C. Code, 1935 (Michie), section 4131.

The agreement was not intended as an "Adoption of minors," under chapter 2, N. C. Code, *supra*.

In *Truelove v. Parker,* 191 N. C., 430, upon the record in this case, it is held that neither the father nor the mother of the child was a party to the proceeding within the contemplation of the statute, and that the clerk had no jurisdiction of their person, (consequently) he had no jurisdiction of the subject matter. Since the decision in the *Truelove case, supra,* see change Public Laws 1935, ch. 243.

The parties to the agreement in this case did nothing as required by the Adoption Statute. Persons *sui juris* have a right to contract if it is not contrary to law or public policy. The agreement was in writing, therefore it did not come within the statute of frauds. N. C. Code, *supra,* sec. 988. It is well settled that the intention of the parties to a contract controls its interpretation. In ascertaining and effectuating the intent of the parties, the language used, subject matter and the purpose designed may be considered.

In the case at bar the father of Lucy Bowers Knight contracted and agreed with John R. Tucker in 1885, that he would take this minor child of three years, nine months and sixteen days and provide for her all of her temporal wants and to make her his sole and only heir to all that he died possessed of, and upon this agreement the father, C. M. Bowers, agreed that he should not induce, or cause to be induced, the said Lucy Bowers to leave the lawful custody of the said John and Isabelle Tucker, and in so far as this case is concerned, there is no evidence but that the said C. M. Bowers carried out completely his part of the agreement, and that the said Lucy Bowers carried out her part of the agreement. John R. Tucker in his lifetime never attempted to repudiate this written contract to devise all of his property to Lucy Bowers (Knight)—he just neglected to carry out his contract as to making a will in her favor.

In *Stockard v. Warren,* 175 N. C., 283 (285), it is written: " 'There can be no question that a contract upon a sufficient consideration to devise lands is valid and may be enforced in a court of equity, the decree being so drawn as to declare the parties to whom the land is devised, or, in the event of a failure to devise, the heirs at law to hold such lands in trust for the persons to whom the testator had contracted to devise them.' *Price v. Price,* 133 N. C., 503. To the same purport, *East v. Dolihite,* 72 N. C., 566; *Earnhardt v. Clement,* 137 N. C., 94. 'It is settled by a line of authorities which are practically uniform, that while a court of chancery is without power to compel the execution of a will, and therefore the specific execution of an agreement to make a will can not be enforced, yet if the contract is sufficiently proved and appears to have been binding on the decedent, and the usual conditions relating to specific performance have been complied with, then equity will specifically enforce it by seizing the property which is the subject matter of

the agreement, and fastening a trust on it in favor of the person to whom the decedent agreed to give it by his will.' *Naylor v. Shelton*, Am. Ann. Cases, 1914, A. 394."

We think the agreement definite and certain enough for a court of equity to decree specific performance. *Hager v. Whitener*, 204 N. C., 747. In *Lipe v. Trust Co.*, 207 N. C., 794 (795-6), citing numerous authorities, is the following: "It is established by the decisions in this jurisdiction: That when services are performed under an oral agreement, express or implied, that compensation is to be provided therefor in the will of the party receiving the benefit, and no such provision is made, an action will lie to recover for the breach, or to prevent an unjust enrichment, if need be, on the part of the recipient of such services."

In *Sharkey v. McDermott*, 91 Mo., 647, there was a contract to adopt a child and to make it an heir. The child lived with the parties, from the time it was four, for twenty years. Upon the death of the parties, the contract was upheld in favor of the child against the collateral heirs. Effect was given the contract, not by completing the adoption, but by declaring the collateral heirs trustees and requiring them to convey in accordance with the contract. As was there pointed out, to give effect to such a contract is not making a will for a deceased party; it is merely making "effectual what the parties have themselves agreed upon."

In *Chehak v. Battles*, Iowa—1907, 110 N. W., 330, another contract of adoption was enforced, effect being given to it in the following words: "So, an agreement of adoption may fall short of meeting the statutory requirements and yet be a valid and enforceable contract. The agreement in the case at bar stipulated that plaintiff should 'acquire all the rights of inheritance by law.' This was equivalent to saying she should share in their estate as though their own child, but not as such." Likewise, in *Kofka v. Rosicky*, Nebr.—1894, 59 N. W., 788, a contract of adoption was given effect as to the disposition of property. To the same effect see *Hickox v. Johnson*, Kansas—1923, 213 Pac., 1060, and the note thereto in 27 A. L. R., at p. 1325; also 1 C. J., 1379, s. 27. *Grantham v. Grantham*, 205 N. C., 363, is distinguishable; there the contract was not in writing. *Hager v. Whitener*, 204 N. C., 747, supports the view stated in the instant case.

In *Thayer v. Thayer*, 189 N. C., 502 (508), is the following: "The suit is properly brought. We said in *Parlier v. Miller*, 186 N. C., p. 503: 'We deduce from the authorities that it is well settled that where a contract between two parties is made for the benefit of a third, the latter may sue thereon and recover, although not strictly a privy to the contract.' *Bank v. Assurance Co.*, 188 N. C., p. 753." *Conley v. Cabe*, 198 N. C., 298; N. C. Prac. & Proc. in Civil Cases (McIntosh), p. 193.

In the statement of the case on appeal is the following: "Lucy Bowers Knight filed an answer setting up that she was entitled to the land in

fee simple, subject to the debts of John R. Tucker, deceased." The plaintiff is empowered to sell the land to pay the debts of John R. Tucker. N. C. Code, *supra*, sec. 74.

The answer of the defendant Lucy Bowers Knight raises the issue of equitable sole seizin which must be determined before there can be an order of sale. If the facts are found to be as she alleges, she is entitled to a judgment decreeing specific performance. Thereupon, if she so elects, she may pay to the administrator a sum sufficient to discharge the debts of the estate and the costs of administration and thus discharge the right of the administrator to sell the lands to make assets.

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

Reversed.

G. S. KLUTTZ v. WILLIAM L. ALLISON, CHAS. A. ARMSTRONG AND WIFE, AND L. M. RUSSELL AND WIFE.

(Filed 9 November, 1938.)

1. Vendor and Purchaser § 5—Agreement held an option and not a contract of sale and purchase of real estate.

A real estate broker and a prospective purchaser executed a paper writing in which the broker agreed to deliver deed upon condition that the prospective purchaser pay a stipulated sum to be applied to the purchase price, and pay the balance of the purchase price on a stipulated date. *Held:* The paper writing constituted an option and not a contract of sale and purchase in the absence of a stipulation that the prospective purchaser agreed to pay the balance of the purchase price, and an action will not lie thereon against the prospective purchaser to enforce specific performance, and this result is not altered by the fact that the prospective purchaser signed the writing, or that he subsequently wrote the check to be applied to the purchase price, and a letter to the owners referring to their "timber land transaction" and stating he would not want deed as soon as contemplated, and a later check in part payment which was not cashed, and subsequently, a letter to the broker's attorney stating he had advised the broker he would not buy the land because of exhausted finances, the writings, considered singularly or collectively, being insufficient to show that the prospective purchaser agreed to pay the balance of the purchase price.

2. Frauds, Statute of, §§ 9, 10: Evidence § 39—Parol evidence is incompetent to establish essential element of contract required to be in writing.

Plaintiff introduced in evidence a written agreement to deliver deed to defendant purchaser upon the payment of the purchase price. Plaintiff sought to introduce parol evidence to establish the purchaser's agreement to pay the stipulated purchase price in order to constitute the contract one of sale of purchase, contending that the parol evidence was in

explanation of the writing and not in contradiction thereof. *Held:* Upon the purchaser's plea of the statute of frauds, C. S., 988, parol evidence is incompetent to establish the purchaser's agreement to pay the purchase price, since this is an essential element of a contract of sale and purchase, and an essential element of a contract required to be in writing may not be established by parol.

3. Trial § 25—Allowing defendant to take voluntary nonsuit on cross action held not error.

Plaintiff broker instituted this action on an alleged contract of sale and purchase. Defendant purchaser filed a cross-action alleging fraud inducing him to sign the writing. Upon judgment as of nonsuit on plaintiff's cause of action, defendant purchaser was permitted to take a voluntary nonsuit on his cross action. *Held:* The voluntary nonsuit on the cross action was tantamount to a withdrawal of the charges of fraud and misrepresentation, and plaintiff's contention that he was entitled to have the issue of fraud tried by the jury is untenable.

4. Appeal and Error § 6g—Plaintiff appellant held not prejudiced by alleged error.

Plaintiff assigned as error the court's refusal to submit an issue requested. Under the contract sued on plaintiff would not have been entitled to recover on the issue even had it been answered in the affirmative, and the party which would have been entitled to recover thereunder in the event of an affirmative answer did not appeal. *Held:* The alleged error was not prejudicial to plaintiff appellant.

5. Brokers § 11—Held: Broker was not entitled to commissions on sums paid under option which was never exercised.

Plaintiff broker gave a prospective purchaser an option on the land and the purchaser made payments thereunder to be applied on the purchase price, but finally failed to exercise the option. The broker was entitled under his contract with the vendors to commissions only after the vendors had received payments on the purchase price in a sum greatly in excess of the sums paid by the prospective purchaser. *Held:* Plaintiff broker is not entitled to recover any part of the sums paid by the prospective purchaser, and has no interest in the respective rights of the prospective purchaser and the vendors in regard to a check given by the prospective purchaser to the vendors in partial payment which was not cashed.

6. Costs § 2: Appeal and Error § 37b—

In an action by a broker on an alleged contract of sale and purchase, instituted against both the owners of the land and the prospective purchaser, the taxing of the costs is in the discretion of the trial court, C. S., 1243, which discretion is not reviewable.

APPEAL by the plaintiff from *Ervin, Special Judge,* at July Term, 1938, of MONTGOMERY. Affirmed.

Armfield, Sherrin & Barnhardt for plaintiff, appellant.

John W. Wallace, Hayden Clement, and R. T. Poole for defendant Allison, appellee.

SCHENCK, J. This is an action for specific performance of an alleged contract of sale and purchase of land. The plaintiff alleges that the defendant Allison, on 6 November, 1937, entered into a contract with him, as agent for Allison's codefendants Armstrong and Russell, to purchase 3,520 acres of land of the said Armstrong and Russell for the sum of $57,920, to be paid 30 November, 1937, and that said Allison failed to make said payment and consummate said purchase, notwithstanding plaintiff's willingness and ability, and offer, to deliver deed for said land.

The defendant Allison, while admitting he signed, together with the plaintiff, a certain paper writing dated 6 November, 1937, relative to the land of his codefendants Armstrong and Russell, denies that said paper writing constitutes a contract of sale and purchase of said land and contends that it does nothing more than grant to him an option to purchase the land therein referred to, and pleads the statute of frauds (C. S., 988) in bar of plaintiff's alleged cause of action.

The paper writing relied upon by the plaintiff is in the following words and figures, to wit:

"Statesville, N. C., November 6th, 1937.

"I, Geo. S. Kluttz, party of the first part, having been granted the authority from Chas. A. Armstrong and L. M. Russell to sell the land and timber located in Montgomery County and situated in the fork of Uwharrie & Yadkin Rivers containing 3,520 acres, more or less, for the price of $57,820.00 agree to deliver deed to Wm. L. Allison party of the second part upon the following conditions: 1st. That a check of $5,000.00 be delivered to Geo. S. Kluttz to be applied upon the purchase price and the remainder amounting to $52,820.00 be paid Nov. 30th, 1937. 2nd. Armstrong & Russell to prepare said deed to be delivered on or before the above mentioned date.

G. S. KLUTTZ,
WILLIAM L. ALLISON.

"Witness: J. B. ROACH."

His Honor below adopted the contention of the defendant Allison, and upon his motion lodged at the close of plaintiff's evidence entered a judgment of involuntary nonsuit, to which plaintiff reserved exception. This exception presents the question as to whether the above quoted paper writing constitutes a contract of sale and purchase of land, or merely grants to the defendant Allison an option to purchase land.

The paper writing provides that Kluttz "agrees to deliver a deed" to Allison upon condition "that a check of $5,000.00 be delivered to Geo. S. Kluttz to be applied upon the purchase price and the remainder amounting to $52,820.00 be paid Nov. 30th, 1937." There is nowhere in the

paper writing any agreement upon the part of Allison to pay the balance on 30 November, 1937, or at any other time. The language used constitutes an option and the mere signing of the paper writing by the optionee does not convert it into a contract of sale and purchase in the absence of any words therein to that effect.

However, the plaintiff contends that the paper writing, when read in connection with other writings introduced in evidence, should be construed as a contract of sale and purchase of land. These other writings consist of (1) a check for $5,000.00, dated 8 November, 1937, from William L. Allison payable to Armstrong & Russell, owners of the land and the principals of the plaintiff, (2) a letter dated 14 November, 1937, from Wm. L. Allison to Armstrong in which the sender informs the sendee that the latter need not hurry about ascertaining "the income tax influence" on "our timber land transaction" because he (Allison) would not "want the deed to be made before Jan'y 1st, 1938," (3) a letter dated 22 December, 1937, from Wm. L. Allison to Mr. Frank Armfield, attorney for the plaintiff, in which he explains that he had notified the plaintiff that he would not purchase the land because his finances had been exhausted, and (4) a check, dated 2 December, 1937, for $5,000.00 from Wm. L. Allison payable to Armstrong and Russell, which check was never cashed. We see nothing in these additional writings, when considered singularly, or collectively, with the paper writing dated 6 November, 1937, signed by the plaintiff and defendant Allison, that makes the latter susceptible to being construed as a contract of sale and purchase of land. There are no words therein of agreement to purchase and none that can by implication be construed as such an agreement.

Plaintiff offered certain parol evidence which he contends explains and amplifies the written instrument upon which he relies. This evidence consisted of the testimony of the plaintiff himself and of other witnesses introduced by him tending to show that the parties to the paper writing themselves construed it as a contract of sale and purchase between the plaintiff and the defendant Allison. All of this testimony, upon objection by the defendant, was excluded by the court for "the purpose of showing a contract on the part of the defendant to purchase the real estate in controversy." To the exclusion of this testimony for the purpose of establishing a contract of purchase the plaintiff reserved exceptions, but we are of the opinion, and so hold, that such exceptions are untenable.

In an action for specific performance of an alleged contract of sale and purchase of land wherein the statute of frauds was relied upon by the defendant, *Bynum, J.*, says: "The agreement must adequately express the intent and obligation of the parties. Parol evidence cannot

be received to supply anything which is wanting in the writing to make it the agreement on which the parties rely." *Mayer v. Adrian,* 77 N. C., 83.

"The alleged contract between the plaintiff and the defendant cannot be enforced unless it complies with the statute of frauds. It is a rule of general if not universal application that the memorandum of a contract to convey or to purchase land shall be reasonably certain and definite in its terms, so that the substance and essential elements may be understood from the written agreement itself, unaided by recourse to parol evidence. The written contract must adequately express the intent and obligation of the parties and all the essential elements of the agreement with reasonable certainty, and parol evidence cannot be received to supply anything which is wanting in the writing to make it the agreement on which the parties rely." *Keith v. Bailey,* 185 N. C., 262.

"A contract which the law requires to be in writing can be proved only by the writing itself, not as the *best* but as the *only admissible evidence of its existence.*" *Morrison v. Baker,* 81 N. C., 76.

We are constrained to sustain his Honor's action in allowing the motion of the defendant for judgment of involuntary nonsuit against the plaintiff.

Defendant Allison filed a cross action and counterclaim against the plaintiff Kluttz wherein he alleged that he had been induced to sign the paper writing upon which plaintiff declared and to pay the sum of $5,000 by the fraud of the plaintiff in that plaintiff had misrepresented to him the number of acres included in the land therein described as well as the amount of merchantable timber and crossties thereon, whereby he had been damaged in the said sum of $5,000. Upon the court's entering a judgment of involuntary nonsuit against the plaintiff, the defendant Allison was allowed to take a voluntary nonsuit upon his cross action and counterclaim.

To the action of the court in allowing the defendant Allison to take a voluntary nonsuit the plaintiff reserved exception upon the ground that he was entitled to have the issue of fraud tried by the jury. The voluntary nonsuit was tantamount to the withdrawal of the charges of fraud and misrepresentation and there was left no issue between the defendant Allison and the plaintiff, and we therefore see no error in allowing the voluntary nonsuit by the defendant Allison.

The plaintiff and the defendants Armstrong and Russell tendered the following issue: "In what sum, if any, is the defendant Allison indebted to the defendants Chas. A. Armstrong and L. M. Russell as principals under their contract of 28 August, 1937, and 6 November, 1937, with said G. S. Kluttz, by reason of his, the said Allison's, drawing and sending to said Armstrong and Russell the check of 2 December, 1937, in the

sum of $5,000?" The court declined to submit the issue, to which ruling the plaintiff and defendants Armstrong and Russell excepted. Armstrong and Russell failed to perfect any appeal. There was no prejudicial error in failing to submit the issue in so far as the plaintiff is concerned, since his own evidence shows that he had no interest in any amount paid by Allison until Armstrong and Russell had been paid $45,000, and if the full amount of this check was recovered, the maximum payments made by Allison would be only $10,000. Hence, there was no error prejudicial to the plaintiff in the refusal to submit the issue.

The plaintiff's exception to that portion of the judgment adjudicating that the $5,000 paid to Armstrong and Russell on check of defendant Allison, dated 8 November, 1937, should be retained by them is likewise untenable for the reason that the plaintiff's own evidence shows that it was stipulated that any amount paid to Armstrong and Russell should be forfeited by Kluttz for the benefit of Armstrong and Russell upon the failure of Kluttz to comply with the option of purchase given to him by Armstrong and Russell.

The plaintiff's assignment of error relative to the taxing of the costs in the judgment is untenable, since the case falls under the provisions of C. S., 1243, which places the taxing of the costs in the discretion of the trial judge, which discretion is not reviewable. *Parton v. Boyd*, 104 N. C., 422.

The judgment of the Superior Court is

Affirmed.

J. H. HENLEY v. FLOYD H. HOLT AND MARY ELIZABETH HOLT.

(Filed 9 November, 1938.)

1. Contracts § 22—

While prior negotiations are merged in the contract, evidence of prior negotiations may be competent to show the intent of the parties or the actual contract.

2. Evidence § 24—

Evidence need not bear directly on the question in issue, but is competent if it shows the circumstances surrounding the parties necessary to an understanding of their conduct and motives and the reasonableness of their contentions.

3. Trusts §§ 1b, 7—In an action to establish a parol trust evidence of prior negotiations and conduct of parties is competent.

Plaintiff instituted this action to establish a parol trust, contending that he owned lands subject to a deed of trust, and that after foreclosure it

was agreed by him and defendant, his former tenant, that defendant should buy the property back from the *cestui que trust* who purchased the property at the foreclosure sale, apply a portion of the crop to the payment of taxes and the debt each year, and reconvey to plaintiff when the debt was discharged, in consideration of plaintiff's agreement to sell him a portion of the lands and a certain other tract of land. *Held:* Although the alleged agreement was made after foreclosure, evidence of negotiations prior to foreclosure when it was contemplated that plaintiff should allow the property to be foreclosed and that defendant should purchase at the sale for the benefit of plaintiff, and evidence that defendants, after foreclosure, admitted they held title as trustees under the agreement, made no claim to the land when plaintiff and his surveyor came upon the land to divide same in accordance with the agreement, and other evidence of the conduct of defendants before and after the sale, *is held* competent to show the intention of the parties and the reasonableness of plaintiff's contention, and the exclusion of such evidence from the jury's consideration is prejudicial error.

4. Appeal and Error § 41—

When a new trial is awarded on certain exceptions relating to the exclusion of evidence, other exceptions relating to matters which may not arise on the subsequent hearing need not be considered.

APPEAL by plaintiff from *Williams, J.,* at February Term, 1938, of LEE.

Civil action to establish a parol trust to the end that the defendant be declared trustee for plaintiff as to the title of the Henley home place in Lee County, North Carolina.

Plaintiff owned a tract of land containing 85 acres, more or less, known as the Henley home place in Lee County, subject to the lien of a deed of trust dated 1 July, 1925, and executed by plaintiff and his wife to secure an indebtedness in the sum of $2,000 due to the Atlantic Joint Stock Land Bank.

In 1926 plaintiff rented the said land to the defendant Floyd H. Holt, who has since resided thereon.

Plaintiff defaulted in payment of the said indebtedness. The deed of trust was thereafter foreclosed and the land was sold in May, 1933. The Land Bank became the purchaser, and later in 1933 conveyed the land by deed to the defendants.

Plaintiff alleges that after the foreclosure sale he entered into an agreement with the defendant Floyd H. Holt, by which he, Holt, in his own name but as trustee for the plaintiff, should seek to redeem the said land, and that title should be taken in the name of the defendant Floyd H. Holt, who should hold the same as trustee and, remaining thereon as tenant, pay one-fourth of the crops on the taxes, insurance and the unpaid balance of the indebtedness, and convey the land to plaintiff on demand. The reason assigned for this was his belief that Holt could

secure a more advantageous price than he. The consideration of this trust agreement in accordance with plaintiff's contention was an agreement on his part to convey to the defendant Floyd H. Holt, upon the final discharge of the indebtedness against the property, two tracts of land, 40 acres of the land in question and another tract of 11½ acres, upon payment to him of the proportionate cost of such tracts.

Plaintiff further alleges that the defendant, thereafter in accordance with their agreement, purchased the land from the Land Bank for the sum of $1,800—$300 in cash and the balance secured by mortgage or deed of trust; that the $300 cash payment represented plaintiff's share of the 1933 crops from said land; and that the balance of the indebtedness due to the said Land Bank was refinanced through the Federal Land Bank of Columbia by the defendant Floyd H. Holt, under direction of the plaintiff. Plaintiff alleges that one-fourth of the crops for the years 1934, 1935 and 1936 were sufficient to pay off the indebtedness, and that the defendant now refuses to carry out the trust.

Defendants deny that trust agreement was entered into with the plaintiff, and contend that they purchased the land in question after the foreclosure in their own right, and that plaintiff has no interest in the lands or in the rents therefrom.

Upon the trial several issues were submitted to the jury. Only the first was answered. That issue and the answer thereto are as follows:

"1. Did the defendant Floyd H. Holt agree, at or before receiving the conveyance from the Atlantic Joint Stock Land Bank, to take title to the Henley home place, described in the complaint, in trust for the joint benefit of plaintiff and himself, as alleged in the complaint? Answer: 'No.'"

From judgment declaring defendants to be the owners of the land known as the Henley home place, plaintiff appeals to the Supreme Court and assigns error.

Gavin & Jackson, D. B. King, and K. R. Hoyle for plaintiff, appellant.

D. B. Teague and Varser, McIntyre & Henry for defendant, appellees.

WINBORNE, J. The principal question raised on this appeal is whether the plaintiff was prejudiced on the trial below by the exclusion of proper evidence for the consideration of the jury on the determinative issue. We think so.

Plaintiff seeks to establish a parol trust, alleging that he and defendant Floyd Holt entered into a trust agreement after the foreclosure sale, whereby the land was to be purchased by Holt for the benefit of the plaintiff. Considerable evidence offered by plaintiff tending to show

negotiations and agreements with Holt concerning the purchase of the land, prior to the foreclosure, was excluded because plaintiff had alleged an agreement made after the foreclosure. Plaintiff contends that while the final agreement was concluded after the foreclosure, the negotiations leading to it began long prior thereto, and that he has a right to show these preliminary negotiations and agreements, and to show what was done pursuant thereto, as the basis for the final trust agreement. To this end he asked to be allowed to amend his complaint so as to allege the preliminary negotiations. This the judge, in the exercise of his discretion, refused to permit. C. S., 547; McIntosh, N. C. Prac. & Proc., p. 513. However, the judge did permit the filing of a more restricted amended complaint, and it was upon the latter that the case was tried. *Speas v. Greensboro,* 204 N. C., 239, 167 S. E., 807.

In the course of the trial the judge below excluded plaintiff's evidence tending to show the following: (1) That prior to the foreclosure sale plaintiff and defendant Floyd Holt agreed that plaintiff should consent to a foreclosure, defendant Holt agreeing to bid in the property, to hold title until the purchase price had been paid, and finally to purchase for himself from plaintiff a part of this property; (2) that long after defendants allege they had bought the farm, plaintiff brought a surveyor to the farm to run certain boundary lines and plaintiff and the surveyor discussed with both defendants the proposed survey, neither of defendants then made any claim to any interest in the farm; (3) that when defendant Floyd Holt gave plaintiff the receipt for the down payment of the purchase price, Holt admitted that he held the land as trustee under a parol trust for the benefit of plaintiff; (4) that witness Sykes heard plaintiff and defendant Floyd Holt state the terms of the trust agreement in the presence of each other, and that, on several other occasions, he heard defendant Holt admit that he held title to the farm in trust for plaintiff; and (5) that witness Cole knew the terms of the trust agreement between plaintiff and defendant Holt; that he discussed the trust agreement with representatives of the Land Bank both before and after the foreclosure sale and that they were favorable to the sale of the land to Holt to be held in trust for plaintiff; that he, Cole, had, and was ready to furnish to plaintiff the money demanded by the Land Bank as down payment on the purchase of the farm; that he, Cole, was present at the foreclosure sale ready to bid in the farm for plaintiff and would have done so but for the trust agreement which he then knew existed between plaintiff and defendant Holt.

"Anything which shows the intention or the actual contract of the parties is material, and any evidence which goes to show the real intention of the parties is admissible whether it be by way of conduct or documentary in nature." 34 Cyc., 980, quoted in *Potato Co. v. Jeanette,*

174 N. C., 236, 93 S. E., 795. As stated by *Allen, J.*, in *Bank v. Stack*, 179 N. C., 514, 103 S. E., 6: "It is not required that the evidence should bear directly on the question in issue, but it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions."

In *Potato Co. v. Jeanette, supra*, this Court said: "While negotiations leading to the execution of the contract are merged in it at law, they are competent in equity to show what was the real agreement, for the purpose of correcting the instrument and doing justice." Quoted with approval in *Ollis v. Board of Education*, 210 N. C., 489, 187 S. E., 772. In the case in hand there is no instrument, but the rule applies with equal force to the proof of an oral contract.

We cannot say that this excluded testimony did not prejudice plaintiff's case, as the jury found that there was no trust agreement between plaintiff and defendant Floyd Holt. What the jury would have found had this excluded testimony been admitted is a matter for speculation. We think, however, that plaintiff is entitled to an opportunity to present testimony of this character to the jury.

The exceptions bearing upon the class of excluded testimony cover in the main the subject matter of the 263 assignments of error. We do not deem it necessary to consider other assignments, as the matters to which objection is there made may not recur on another trial.

New trial.

BESSIE ELLIS, ADMINISTRATRIX OF REX ELLIS, DECEASED, v. SINCLAIR REFINING COMPANY AND W. E. ROBERTSON, JR.

(Filed 9 November, 1938.)

1. Negligence §§ 1, 9—Essential elements of actionable negligence.

Actionable negligence is the failure to exercise that degree of care which an ordinarily prudent man, charged with like duty, would exercise under like circumstances, which proximately causes the injury in suit, but it must further appear that such negligent breach of duty was such that a man of ordinary prudence could have foreseen that such a result, or some similar injurious result, was probable under the facts as they then existed.

2. Negligence § 4d—Defendants held not under duty to customer to keep small store room free from inflammable substance, and further were not under duty to foresee that injury to customer might ensue.

The filling station where the accident occurred had a sales room for automobile accessories and cold drinks and a shed for washing and

greasing, and a small store room between these units in which was kept an old electric motor, which emitted sparks when in operation, and banana oil for thinning paint, which were necessary in the conduct of the business. Plaintiff's intestate purchased a Coca-Cola in the sales room and some time thereafter in playing with another person in the filling station, ran into the small store room and slammed the door. Fire broke out, causing intestate's death, and it was ascertained that the jar containing the banana oil had fallen or been knocked from the shelf on which it was stored. *Held:* Even conceding that intestate was a customer at the time of the accident, defendants were not under duty to him to keep the small store room free from the inflammable banana oil and the electric motor, since a customer would not likely come into contact with them, and further, defendants cannot be held to the duty of foreseeing that a customer would rush into the room, slam the door, and in some manner cause the ignition of flames with resulting injury.

APPEAL by plaintiff from *Armstrong, J.*, at July Term, 1938, of RANDOLPH. Affirmed.

This is a civil action to recover damages for the wrongful death of plaintiff's intestate, who caught on fire and was burned while in a small anteroom of a filling station in which was located the motor for the air compressor and storage shelves. The plaintiff's intestate died from the burns received.

The corporate defendant leased the premises in 1930. At the time of the occurrence complained of, 15 May, 1937, the premises were being operated as an automobile service station by the defendant Robertson, but it does not appear, except from certain circumstances relied on by the plaintiff, whether he was operating the same as agent of the corporate defendant or in his own behalf. The building had a main display, or sales room, in which automobile supplies, equipment and cold drinks are kept and offered for sale. Immediately east of said room and as a part of said service station is a wash shed and greasing pit. Between the sales room and the wash shed is a small room in which was installed and kept an electric motor used in charging the air compression machine. The motor was old and, when in operation, would emit sparks. In this small room and immediately over the motor was situated a small shelf upon which there was a fruit jar containing banana oil, an inflammable liquid, used by the defendant as a paint thinner in the prosecution of the business. The small room has two doors, one entering out to the wash shed and the other into the sales room. At the time of the occurrences complained of the wash pit door was locked and bolted and the door leading into the sales room was closed but not locked.

During the day of 15 May, 1937, plaintiff's intestate, a boy of approximately seventeen years of age, went into the sales room for the purpose of purchasing a Coca-Cola. He remained or loitered in and around the premises for some time, pranking and playing with one Victor Harkey.

Harkey had a pistol cartridge. During the play he took a hammer, pointed the bullet at the deceased and made a motion as if to strike the cap of the bullet. Thereupon the deceased ran back into the small motor room and slammed the door. Almost immediately he was heard to hollo, and upon opening the door Harkey discovered that he was on fire. There was evidence that the jar containing banana oil had fallen or been knocked from the shelf but there was no evidence that the motor was in operation at the time, nor is there any evidence as to just what caused the fire. The deceased was familiar with the premises.

Plaintiff offered evidence tending to show that the storage tanks and other equipment are the property of the corporate defendant; that the word "Sinclair" was painted on the building; that billboards advertising the sale of Sinclair Petroleum Products were attached to the posts of the shed and that there were other signs advertising Sinclair oil and gasoline on the premises.

At the conclusion of plaintiff's evidence the court below, on motion of the defendants, entered a judgment dismissing the action as of nonsuit. The plaintiff excepted and appealed.

A. I. Ferree, T. Lynwood Smith, and Moser & Miller for plaintiff, appellant.

J. A. Spence and Smith, Wharton & Hudgins for defendant, appellee, Sinclair Refining Company.

H. M. Robins for defendant, appellee, W. E. Robertson, Jr.

BARNHILL, J. The decisions of this Court are all in accord that in order to establish actionable negligence it must appear: First, that the defendant has failed to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed, proper care being that degree of care which a prudent man should use under like circumstances when charged with a like duty; and, second, that such negligent breach of duty was the proximate cause of the injury. It must not only appear that the negligent act produced the result in continuous sequence, but it must further appear that the negligent act was such that any man of ordinary prudence could have foreseen that such a result, or some similar injurious result, was probable under all the facts as they then existed.

Applying the generally accepted rule governing the establishment of actionable negligence, after a careful examination of the evidence in this cause, we are unable to discover any error in the judgment below.

Conceding that plaintiff's intestate continued to maintain the status of a customer after he purchased and consumed the Coca-Cola and remained in the station in play with the witness Harkey, we cannot con-

ceive that the defendants owed him any duty to keep the small storage room in which he was injured free of a motor or banana oil used in the course of its business. Both the motor and the banana oil or paint thinner were necessary in the conduct of the business of the defendants. They were not stored where a customer would likely come in contact with them.

Even if it is further conceded that it was an act of negligence to store inflammable substances in the same room in which a spark emitting motor was located, to say that the defendants should have foreseen that a customer would rush into the room, slam the door and in some manner cause the ignition of flames which would burn him and cause his injury and death is placing upon the operators of the filling station a degree of prevision not contemplated by the law of negligence.

In principle, *Clark v. Drug Co.*, 204 N. C., 628, 169 S. E., 217, and *Money v. Hotel Co.*, 174 N. C., 508, 93 S. E., 964, are in point.

It is not necessary for us to decide whether the evidence offered is sufficient to charge the corporate defendant with the negligent acts of the defendant Robertson, who was operating the station. In no event is either defendant liable in damages for the unfortunate death of plaintiff's intestate.

The judgment below is

Affirmed.

J. H. LASSITER v. M. L. STELL.

(Filed 9 November, 1938.)

Landlord and Tenant § 3: Ejectment § 6a—In summary ejectment tenant may show that landlord's title had terminated after tenancy was created.

The estoppel of a tenant to deny his landlord's title applies to the landlord's title as of the time the tenancy is created, and does not prevent the tenant from showing that after the tenancy was created the landlord's title had been surrendered, or had expired or been extinguished, and in an action in summary ejectment by a lessee against his sub-lessee, the sub-lessee is entitled to introduce evidence tending to show that prior to the institution of the action the lessee had surrendered his lease and that the sub-lessee's wife had leased the premises directly from the owner for the following year.

APPEAL by defendant from *Sinclair, J.*, at February Term, 1938, of WAKE. New trial.

Jones & Brassfield for plaintiff, appellee.

Little & Wilson for defendant, appellant.

SCHENCK, J. Proceeding in summary ejectment instituted before a justice of the peace under the provisions of C. S., 2365, *et seq.*, and tried in Superior Court upon appeal.

The premises involved is the property of Miss Hattie Clifton. The plaintiff rented the premises from the owner thereof during the year 1937, and sublet it to the defendant for that year. At the expiration of the year 1937 plaintiff demanded possession of the defendant, and upon refusal of defendant to surrender possession instituted this proceeding on 4 January, 1938.

Defendant contended and offered evidence tending to show that the plaintiff gave up his lease of the premises from the owner thereof prior to 1 January, 1938, and that defendant's wife rented the premises from the owner thereof in October, 1937, for the year 1938, after plaintiff had notified defendant that he (plaintiff) was giving up the premises and was going to have nothing more to do therewith, and after the plaintiff had hauled his fences and other property therefrom. His Honor sustained the plaintiff's objection to the introduction of this evidence, upon the theory that the defendant (tenant) was estopped to deny the title of the plaintiff (landlord). His Honor charged the jury that if they found the facts to be as testified by all of the witnesses they would answer the issues in favor of the plaintiff. From judgment for the plaintiff the defendant appealed, assigning as error the sustaining of the objection to the evidence tending to show plaintiff's surrender of his lease and the peremptory instruction in the charge.

While the rule that a tenant is estopped to deny the title of his landlord is too well settled to require citation of authority, this rule applies to the title of the landlord as it existed at the time he entered into the lease with the tenant under which the tenant entered the premises, and does not preclude the tenant from showing that during the tenancy the landlord's title had terminated or had been extinguished, and the former landlord was therefore without authority to maintain a proceeding in summary ejectment against his former tenant. If the plaintiff had given up his lease of the premises from the owner prior to 1 January, 1938, he was without authority to institute this proceeding or maintain it after 1 January, 1938, and it was competent for the defendant to show by the evidence offered that such was the case.

"The estoppel to deny title relates to the title as it existed when the tenancy commenced, and hence does not operate to prevent the tenant from showing that his landlord's title has terminated or expired since the relation began. In other words the estoppel is then at an end. This is true, however, only in a qualified sense. The estoppel is terminated in so far as the landlord is concerned but still exists, while the tenant continues in the possession given him by the original landlord, as

against the person succeeding to the landlord's title, where he is one other than the tenant himself." 35 C. J., p. 1239.

"The right to maintain the action depends upon the existence of a tenancy, and a tenancy once created is presumed to continue so long as the tenant remains in possession. This presumption may be rebutted, however, for the rule which estops a tenant from disputing the title of his landlord does not prevent him from showing that the tenancy has been determined. He is estopped so long as the tenancy continues, but the tenancy being dissolved, the disabilities resulting from his position as a tenant are removed, and the estoppel ceases. 'The tenant,' says Greenleaf, 'may always show that his landlord's title has expired, or that he has sold his interest in the premises, or that it is alienated from him by judgment and operation of law.' 2 Greenleaf Ev., 253." (2 Greenleaf on Evidence [16th Ed.], par. 305, p. 302.) *Wheelock v. Warschauer,* 21 Cal., 309 (317).

In *Lawrence v. Eller,* 169 N. C., 211, *Hoke, J.,* quotes with approval from *Davis v. Williams,* 130 Ala., 530, the following: "2. A tenant is estopped to dispute the title of his landlord, unless his landlord's title has expired or been extinguished, either by operation of law or his own act, after the creation of the tenancy. 3. It is only where there is a change in the condition of the landlord's title for the worse, after a tenant enters into his contract, in the absence of fraud, or mistake of fact, that he is permitted to show the change in the condition of the title."

We are constrained to hold that his Honor erred in excluding the evidence tendered by the defendant tending to show that the plaintiff's title had been surrendered by him and had therefore expired or been extinguished when this proceeding was instituted, and in charging the jury that if they found the facts to be as shown by all the testimony it would be their duty to answer the issues in favor of the plaintiff.

For the error assigned the defendant is entitled to a

New trial.

BETTIE MURPHY, ROBERT MURPHY, LILLIAN MURPHY, AND LUCY MURPHY, v. W. F. TAYLOR, HARRY TAYLOR AND WIFE, THELMA D. TAYLOR, AND R. T. ALLEN, TRUSTEE.

(Filed 9 November, 1938.)

Mortgages § 24—There is no presumption of fraud in transfer of equity of redemption by trustor to cestui que trust.

There is no fiduciary relationship between a trustor and a *cestui que trust* in a deed of trust, and therefore no presumption of fraud arises

from the transfer of the equity of redemption by the trustor to the *cestui que trust*, the rule as between mortgagor and mortgagee not being applicable, since the relation between the parties is not the same, and complaint in an action to set aside a deed from trustor to the *cestui* solely on the ground of presumptive fraud, without allegation that the trustee took any part in the transaction, is demurrable.

APPEAL by plaintiffs from *Grady, J.*, at June Term, 1938, of LENOIR. Affirmed.

Action to set aside a conveyance of land by plaintiffs to defendants, on the ground that the relation between the parties being equivalent to that of mortgagor and mortgagee the deed was presumptively fraudulent, and that it was procured by taking advantage of that relationship. Plaintiffs allege that in 1929 they executed a deed of trust to R. T. Allen, trustee, to secure an indebtedness due defendants Taylor, and being unable to pay the debt when it became due, defendants Taylor threatened foreclosure, and in 1931 procured the execution of a deed to themselves for plaintiffs' equity of redemption in the land. Defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and from judgment dismissing the action, plaintiffs appealed.

J. A. Jones for plaintiffs.
Rouse & Rouse for defendants.

DEVIN, J. The only allegation in the complaint by which the plaintiffs attempt to state a cause of action for the relief sought is that the relation between the plaintiffs and defendants, equivalent to that of mortgagor and mortgagee, constituted the conveyance of the land presumtively fraudulent and cast upon the defendants the burden of showing that the transaction was in all respects fair.

However, the relationship between the parties here is not that of mortgagor and mortgagee, or of trustor and trustee. The transaction was between the plaintiffs, trustors, and the owners of the indebtedness secured by the conveyance of the legal title to a third party trustee. Admittedly, there is no connection or relationship between the defendants and R. T. Allen, the trustee, to whom the deed of trust was executed, other than that created by the instrument, nor is there allegation that the trustee had any part whatever in the transactions leading to the execution of the deed sought to be set aside. Hence, the long established rule by which courts regard transactions between those occupying the relationship of mortgagor and mortgagee (*McLeod v. Bullard*, 84 N. C., 515) is inapplicable.

In *Simpson v. Fry,* 194 N. C., 623, 140 S. E., 295, the question there raised, whether a conveyance of the land in fee by the grantor in a deed of trust is presumed to be fraudulent solely because of the relation between grantor and grantee arising out of the deed of trust, was answered in the negative and a demurrer *ore tenus* was sustained. The Court there said: "There is no fiduciary relation between a creditor and his debtor, by which it can be said that the latter is in the power of the former. . . . Nor does the fact that the debtor has conveyed property to a third person to secure his creditor establish any fiduciary relation between him and such creditor. The grantee in the deed of trust is a trustee for both debtor and the creditor, with respect to the property conveyed. The creditor can exercise no power over his debtor, with respect to said property, because of its conveyance to the trustee, with power to sell upon default of the debtor. The power of the trustee is limited by the stipulations and provisions contained in the deed of trust executed by his grantor; neither in fact nor in law can it be held that there is such a fiduciary relation between a debtor and his creditor, secured in a deed of trust, that the principle upon which *McLeod v. Bullard, supra,* was decided, is applicable to the relation between them." *Simpson v. Fry, supra,* was cited with approval in *Phipps v. Wyatt,* 199 N. C., 727, 155 S. E., 721; *Bunn v. Holliday,* 209 N. C., 351, 183 S. E., 278; *Elkes v. Trustee Corporation,* 209 N. C., 832, 184 S. E., 826; *Hill v. Fertilizer Co.,* 210 N. C., 417, 187 S. E., 577; *Bank v. Hardy,* 211 N. C., 459, 190 S. E., 730; and *Hare v. Weil,* 213 N. C., 484.

The rule stated in *Simpson v. Fry, supra,* was not changed or modified by the decision in *Hinton v. West,* 207 N. C., 708, 178 S. E., 356. In the latter case it was alleged that the conveyance of the land by the trustor to the *cestui que trust* was procured by the trustee or by the trustee and the *cestui que trust* acting together, and taking advantage of their superior position.

In the instant case, there being no presumption in law raised by the relationship of the parties, in order to constitute a cause of action, sufficient other facts must be alleged to show that plaintiffs are entitled to the relief sought. This they have failed to do, and the court below correctly ruled that the demurrer should be sustained.

The judgment is

Affirmed.

W. J. MIDGETT v. JOHN A. NELSON ET AL.

(Filed 9 November, 1938.)

1. Principal and Surety § 4: Indemnity § 2d—Liabilities of obligors on official bonds and indemnity contracts is not enlarged by C. S., 324.

The scope of the liability on an official bond or indemnity agreement is limited by the terms of the agreement executed, there being no provision of law incorporating therein statutory provisions relating to the bond of such official, the effect of C. S., 324, being to maintain the validity of the instrument as far as it goes, notwithstanding the penalty or condition may vary from those prescribed by law, and notwithstanding certain defects and irregularities in conferring the office and accepting the instrument.

2. Indemnity § 2d—Indemnity contract of Assistant Fisheries Commissioner held not to cover liability for tort committed by him colore officii.

Judgment was entered against an Assistant Fisheries Commissioner for false imprisonment committed under color of his office. Defendant surety had executed an indemnity contract covering the official, in which it agreed to indemnify the State against loss of money or other personal property through failure of the persons named to faithfully discharge the duties of their respective offices. The bond was neither in the amount nor "conditioned" as required by C. S., 1870. *Held:* The language of the agreement does not cover plaintiff's claim of damages for false imprisonment committed by the official under color of his office, and defendant surety is not liable thereunder to plaintiff.

3. Principal and Surety § 1: Indemnity § 1—

An agreement executed by a surety to the State, which is not executed by the official therein covered, agreeing to indemnify the State for loss of money or property through failure of the official to faithfully discharge his duties, is an indemnity agreement and not a bond.

APPEAL by defendant, The Great American Indemnity Company, from *Thompson, J.*, at March Term, 1938, of CURRITUCK.

Civil action to recover of Thomas Basnight, Assistant Fisheries Commissioner, and surety on his bond, damages for false imprisonment committed under color of his office.

The case was tried at the March Term, 1937, Currituck Superior Court, and resulted in verdict and judgment for the plaintiff. Damages in the sum of $1,500 were awarded against the Assistant Fisheries Commissioner, and judgment for $1,000, the full amount of the bond, was entered against his surety. The surety alone appealed. A new trial was awarded the surety for error in the admission of evidence, 212 N. C., 41. The case was again tried at the March Term, 1938, Currituck Superior Court, and resulted in the same judgment as originally entered.

The surety again appeals, contending that the terms of the bond are not such as to warrant a recovery against it by the plaintiff.

D. L. Russell and George J. Spence for plaintiff, appellee.
J. Henry LeRoy for defendant Indemnity Company, appellant.

STACY, C. J. The question presently presented is whether the instrument in suit covers liability for torts committed by the Assistant Fisheries Commissioner *colore officii*. *Warren v. Boyd,* 120 N. C., 56, 26 S. E., 700. This question was specifically left open on the former appeal, as the name of the Assistant Commissioner did not then appear in the schedule of the agreement. 212 N. C., 41. The record now discloses that his name does appear therein, and that the amount of the coverage of the bond at the time of plaintiff's injury was $1,000.

By the terms of the bond in suit it is stipulated that The Great American Indemnity Company "does hereby agree to indemnify the State of North Carolina . . . against the loss of money or other personal property through the failure of any of the persons . . . named in the schedule forming a part of this bond . . . faithfully to discharge the duties of their respective offices or employments as described in such schedule, and honestly to account for all money or other personal property that may come into their respective hands by virtue of said offices or employments," etc.

It will be observed that the surety agrees "to indemnify the State of North Carolina . . . against the loss of money or other personal property," and that the bond is not "conditioned" as required by C. S., 1870, "for the faithful performance" of the duties of Assistant Fisheries Commissioner and to account for all moneys received by him in his office. *Brick Co. v. Gentry,* 191 N. C., 636, 132 S. E., 800. Nor is the coverage as much as $2,500, the amount required by the statute. This, however, may be only an irregularity. *S. v. Jones,* 29 N. C., 359. Nevertheless, it is clear that the contract of indemnity, if regarded as an official bond, is so only in a limited sense, and there is no provision of law incorporating the terms of the statute into the contract. *Comrs. v. Magnin,* 86 N. C., 286; *S. v. Jones, supra.*

We do not ascribe to C. S., 324, the effect of introducing into an official bond provisions which are not, but ought to have been inserted in the condition, so as to extend the liabilities of the obligors; but the purpose is to cure certain defects and irregularities in conferring the office and accepting the instrument, and to maintain its validity as an official undertaking, as far as it goes, notwithstanding the penalty or condition may vary from those prescribed by law. *Comrs. v. Magnin, supra.*

The question then arises whether the instrument contains language broad enough to cover the plaintiff's claim. The conclusion is inescapable that it does not. The surety agrees to indemnify the State against loss of money or other personal property, and no more. *Washington v. Trust Co.*, 205 N. C., 382, 171 S. E., 438. The contract is not executed by the Assistant Fisheries Commissioner; nor is it in the form of a bond payable to the State. It is an indemnity agreement between the surety and the State. 14 R. C. L., 44; 31 C. J., 419.

Whether other remedies may be open to the plaintiff is not before us for decision. *Webb v. LeRoy*, 168 N. C., 236, 84 S. E., 257.

Reversed.

E. C. GROCE v. WALTER GROCE ET AL.

(Filed 9 November, 1938.)

1. Process § 5—Averment that defendants are nonresidents is insufficient to support service of summons by publication.

A sheriff's return that after due inquiry defendants "are said to be residents and citizens" of another State, and an averment in the complaint, used as an affidavit, that defendants were residents of such other State, is insufficient to support service of summons by publication, since notwithstanding such nonresidence defendants might be visitors in the State and amenable to process here, and it being required that it appear by proper averment that defendants "cannot, after due diligence, be found in the State," C. S., 484.

2. Judgments §§ 22b, 26—

A judgment entered upon a fatally defective service of summons by publication is void for want of jurisdiction, and defendants' motion in the cause to set same aside should be allowed.

APPEAL by movants, W. J. Groce and Amanda Jane Groce, from *Pless, J.*, at February Term, 1938, of YADKIN.

On 6 April, 1937, E. C. Groce instituted an action against the movants herein in the Superior Court of Yadkin County by (1) issuing summons, (2) filing "complaint and affidavit," (3) obtaining warrant of attachment, and (4) notice of service by publication. On the same day, the sheriff made return on the summons as follows: "Returned not served. After due search and inquiry the defendants Walter Groce and Amanda Jane Groce are said to be residents and citizens of the State of Ind."

The complaint, used as an affidavit, contains the averment that "the defendants and each of them are residents of the County of Henry and State of Indiana."

The defendants filed no answer and made no appearance.

At the December Term, 1937, Yadkin Superior Court, issues were submitted to a jury and answered in favor of the plaintiff, and judgment was entered thereon directing sale of land, etc.

Thereafter, in February, 1938, this action was begun to restrain the sale of the land and to have the judgment vacated. By consent, the matter came on for hearing before *Pless, J.,* upon the return date of the restraining order, at which time the plaintiffs were allowed to treat their complaint as an affidavit and motion in the original cause.

The motion to vacate the judgment in the original action was denied, and from this ruling the movants appealed, assigning errors.

Parks G. Hampton and Don A. Walser for movants, appellants.

F. D. B. Harding and William M. Allen for respondents, appellees.

STACY, C. J. The record contains no averment, by affidavit or otherwise, that the defendants "cannot, after due diligence, be found in the State." *Denton v. Vassiliades,* 212 N. C., 513, 193 S. E., 737. This is an essential requirement to obtain service of summons by publication, C. S., 484, and it must be made to appear "to the satisfaction of the court." *Bethell v. Lee,* 200 N. C., 755, 158 S. E., 493; *Grocery Co. v. Bag Co.,* 142 N. C., 174, 55 S. E., 90; *Wheeler v. Cobb,* 75 N. C., 21. It will not suffice simply to say the defendants are nonresidents of the State. *Davis v. Davis,* 179 N. C., 185, 102 S. E., 270. *Non constat* that they may not be frequent visitors to the State and amenable to process while here. *Hill v. Lindsay,* 210 N. C., 694, 188 S. E., 406.

In *Fowler v. Fowler,* 190 N. C., 536, 130 S. E., 315, it was held that service of summons by publication, on a defective affidavit, was ineffectual to bring the defendants into court. To like effect is the decision in *Denton v. Vassiliades, supra.*

It is the universal holding that unless one named as a defendant has been brought into court in some way sanctioned by law, or makes a voluntary appearance in person or by attorney, a judgment rendered against him is void for want of jurisdiction. *Stevens v. Cecil, ante,* 217; *Downing v. White,* 211 N. C., 40, 188 S. E., 815; *Harrell v. Welstead,* 206 N. C., 817, 175 S. E., 283.

There was error in denying the motion of appellants. *Denton v. Vassiliades, supra.*

Error.

OBERLY & NEWELL LITHOGRAPH CORPORATION v. WATSON CLARK.

(Filed 9 November, 1938.)

Trial § 27—

It is error for the court to direct a verdict in plaintiff's favor on conflicting evidence, since if diverse inferences may reasonably be drawn from the evidence, some favorable to plaintiff and others favorable to defendant, the cause should be submitted to the jury.

APPEAL by defendant from *Olive, Special Judge,* at August Special Term, 1938, of RUTHERFORD.

Civil action to recover for goods sold to and manufactured for "Clark Knitting Mills."

Under date of 21 July, 1936, Frank Roberson, acting for and on behalf of Clark Knitting Mills, gave the plaintiff an order for certain specifically made "box tops," "bands," "labels" and "riders," a part of which was shipped, and the remainder, valued at $460, while manufactured as per instructions, has never been ordered out, but has been tendered for delivery.

There is evidence that the defendant owned the Clark Knitting Mills and was operating the mill in 1936.

The evidence on behalf of the defendant is to the effect that George and Frank Roberson operated the mill; that the defendant loaned them money, and that he, the defendant, neither owned the business nor operated it.

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

Paul Boucher for plaintiff, appellee.
Mack P. Spears and T. J. Edwards for defendant, appellant.

STACY, C. J. The evidence is not all one way. It is conflicting on the issue of defendant's liability. It was error, therefore, for the court to instruct the jury peremptorily in favor of the plaintiff. *Brooks v. Ins. Co.,* 211 N. C., 274, 189 S. E., 787. The rule is, that where the evidence is conflicting, or if diverse inferences may reasonably be drawn therefrom, some favorable to the plaintiffs and others favorable to the defendant, the cause should be submitted to the jury for final determination. *In re West,* 212 N. C., 189, 193 S. E., 134; *Hobbs v. Mann,* 199 N. C., 532, 155 S. E., 163.

For the error, as indicated, a new trial must be awarded. It is so ordered.

New trial.

O. H. DUKE AND NORA B. DUKE v. B. C. SCARBORO AND J. M. TEMPLETON, TRUSTEE FOR B. C. SCARBORO.

(Filed 9 November, 1938.)

Mortgages § 27—

Conflicting evidence on plaintiff's contention that the mortgage note in question was paid by defendant's retention of sums due plaintiff for services rendered and application of such sums to the note by agreement, *held* properly submitted to the jury and sufficient to sustain a verdict in plaintiff's favor.

DEFENDANTS appealed from *Cowper, Special Judge,* at February Civil Term, 1938, of WAKE. No error.

This is an action to remove a cloud from the title to land, supported in brief by the following evidence:

On 29 October, 1931, the plaintiffs executed and delivered to B. C. Scarboro a note in the sum of $350.00, due and payable 1 December, 1932, and executed and delivered a deed of trust on their interest in certain lands situate in Wake County, in which deed the defendant J. M. Templeton was trustee. The plaintiff O. H. Duke was, prior to the execution of the note and for a time thereafter, employed by the defendant Scarboro in hauling tobacco to the warehouse at Oxford, North Carolina. He testifies, in substance, that the defendant Scarboro agreed to credit the amounts due the plaintiff for such hauling upon the note, and promised five or six times to cancel the note on account of such payments, which were sufficient, as plaintiff testifies, to pay off the note in full.

The plaintiff testified that after various attempts to get the note and mortgage canceled, he was forced to bring this suit for the purpose of having the note and mortgage canceled and removing a cloud from the title to his property.

The defendant Scarboro denied that the plaintiff had made him any payment on the paper. He contended that the plaintiff had been paid for the hauling by the customers whose tobacco was hauled.

There was other evidence in support of plaintiff's contention and evidence supporting that of the defendants.

The following issue was submitted to the jury:

"Had the note secured by the deed of trust been paid, as alleged in the complaint?"

The jury answered the issue in the affirmative, and from the judgment in favor of the plaintiffs the defendants appealed.

J. G. Mills and John G. Mills, Jr., for plaintiffs, appellees.

A. J. Templeton and O. M. Marshburn for defendants, appellants.

PER CURIAM. Since there was evidence tending to show that the defendant Scarboro had accepted the service of the plaintiff and had retained the amounts due for such service as payments upon the note, and evidence from which the jury might infer that the note was paid thereby, the issue submitted to the jury was proper, its answer conclusive against the defendants, and the judgment rendered thereupon correct. In this case we find

No error.

MRS. LILLIE MORRIS, ADMINISTRATRIX OF C. OSCAR MORRIS, DECEASED, v. C. M. JOHNSON.

(Filed 9 November, 1938.)

1. Automobiles § 12a—

Evidence of speed in excess of the statutory limits is *prima facie* evidence that the speed is unlawful, and therefore constitutes *prima facie* evidence of negligence. Public Laws of 1935, ch. 311, sec. 2.

2. Automobiles § 18g—

A *prima facie* showing of negligence in operating an automobile at a speed in excess of the statutory limits carries the case to the jury in the absence of evidence establishing contributory negligence as a matter of law.

3. Trial § 24—

Ordinarily, a *prima facie* showing carries the case to the jury for it to say whether or not the necessary facts have been established.

4. Automobiles § 25—Evidence held sufficient for jury under family car doctrine.

Evidence that title to a car was taken in the trade name of defendant's business, but that his wife and daughter habitually used the car, and did not customarily use any other car, and that at the time of the accident in suit defendant's daughter was driving the car with his consent, *is held* sufficient to be submitted to the jury on the issue of defendant's liability for the daughter's negligent driving under the family car doctrine.

APPEAL by plaintiff from *Harris, J.*, at February Term, 1938, of JOHNSTON. Reversed.

Civil action to recover damages for the wrongful death of plaintiff's intestate alleged to have been caused by the negligent operation of an automobile by defendant's daughter.

About 5 p.m., 30 December, 1936, plaintiff's intestate alighted from a truck which stopped on the east shoulder of State Highway No. 22 at Bill's Service Station between Smithfield and Selma. He then walked diagonally in a southwesterly direction across the hard surface road

toward his truck, which was parked west of said highway. Just as he reached the western edge of the paved surface of the road he was struck by an automobile being driven in a southerly direction by defendant's daughter and was carried some distance down the road. He died from the injuries received. One witness testified: "It was going fast, probably sixty or seventy miles per hour, just like the wind." The deceased was carried about 75 feet down the road and the automobile traveled some distance after he was thrown or fell from the front of the car. There is other evidence to like effect.

The evidence likewise discloses that the defendant conducts a laundry under a trade name; that the title to the automobile is in the trade name of the defendant's business; that defendant's wife uses the car for business, shopping, collecting, etc.; that defendant's daughter drives the car with the consent of her mother and that she was operating the car at the time of the accident with the consent of the defendant. Defendant's wife and daughter are not accustomed to driving any other car owned by the defendant.

At the conclusion of plaintiff's evidence, on motion of the defendant, the action was dismissed as of involuntary nonsuit. Plaintiff excepted and appealed.

W. I. Godwin and L. L. Levinson for plaintiff, appellant.
Abell & Shepard for defendant, appellee.

PER CURIAM. Evidence of speed in excess of the statutory limits is *prima facie* evidence "that the speed is not reasonable or prudent and that it is unlawful." Public Laws 1935, ch. 311, sec. 2. It is, therefore, *prima facie* evidence of negligence. *Woods v. Freeman,* 213 N. C., 314. A *prima facie* showing carries the case to the jury for it to say whether or not the crucial and necessary facts have been established; *Woods v. Freeman, supra; Cox v. R. R.,* 149 N. C., 117, 62 S. E., 884; *Brock v. Ins. Co.,* 156 N. C., 112, 72 S. E., 213; unless plaintiff's evidence is such that the conclusion that plaintiff's intestate was guilty of contributory negligence is the only reasonable conclusion to be deduced from the testimony. *Mulford v. Hotel Co.,* 213 N. C., 603. If the record discloses any evidence of contributory negligence it is not of sufficient probative force to require the conclusion as a matter of law that the deceased by his conduct proximately contributed to his injury and death.

There is likewise sufficient evidence that the car driven by defendant's daughter was in use as a family car to require the submission of an appropriate issue thereon.

The judgment below is

Reversed.

MYRTLE W. DRAUGHON AND HUSBAND, ROBERT A. DRAUGHON; MAMIE W. SNIPES AND HUSBAND, R. V. SNIPES; FELTON WARREN AND WIFE, LELON WARREN; CLIFFORD WARREN, SINGLE; LUBIE WARREN, SINGLE; AND WIELIE WARREN, MINOR, BY HIS GENERAL GUARDIAN, SUSAN WARREN, *v.* JOE T. WARREN AND WIFE, BERTHA WARREN; EUNICE WARREN AND HUSBAND, JIM WARREN; JACK WARREN AND WIFE, IVA WARREN; ELSIE WALTERS AND HUSBAND, GATE I. WALTERS; BESSIE TART AND HUSBAND, J. M. TART; MYRTLE W. POPE AND HUSBAND, ALBERT POPE; ASHLEY WARREN AND WIFE, EDNA MAY WARREN; TILGHMAN WARREN, MINOR, BY HIS GENERAL GUARDION, SARAH J. WARREN (ORIGINAL PARTIES DEFENDANT), AND FLOYD DAWSON AND WIFE, NORA BELLE DAWSON; WILBERT DAWSON AND WIFE, LOUISE DAWSON; ELMER D. JACKSON AND HUSBAND, PAUL JACKSON; ELOISE D. HODGE AND HUSBAND, LEONARD HODGE, BOTH MINORS, BY THEIR GENERAL GUARDIAN, MINNIE DAWSON, EARTHY DAWSON, EULIN DAWSON, RETHA DAWSON, VERGA DAWSON, AND DOIL MAE DAWSON, ALL MINORS, BY THEIR GENERAL GUARDIAN, HATTIE BELLE DAWSON; LOIS DAWSON; ARAH DAWSON; EVELYN DAWSON, MINOR; LUTHER DAWSON, MINOR; CLETA DAWSON, JULIUS DAWSON, AND KIMBER DAWSON, ALL MINORS, BY THEIR GENERAL GUARDIAN, H. F. MOBLEY; LESSIE D. WILLIFORD AND HUSBAND, ALTON WILLIFORD; AND IVA W. DIXON AND HUSBAND, THAD DIXON; AND MARGARET DAWSON (ADDITIONAL PARTIES DEFENDANT).

(Filed 9 November, 1938.)

1. Judgments § 23—

A finding, unexcepted to, and supported by evidence, that movants had failed to show a meritorious defense, supports judgment dismissing a motion to set aside an order on the ground of excusable neglect.

2. Insane Persons § 9c—

Neither an order authorizing a guardian to expend certain sums for a certain purpose for the estate of the incompetent, nor an order, entered after the death of the guardian, permitting the transfer of claim for the amount so used by the guardian to a trustee for the benefit of the heirs of the guardian, gives the debt the quality of a judgment against the estate of the incompetent.

3. Limitation of Actions § 7—

The fact that a person against whom a claim is asserted is an incompetent does not prevent the running of the statute of limitations when the incompetent has a guardian against whom the claim may be prosecuted.

APPEAL by certain of the defendants, movants, from *Frizzelle, J.*, at May Term, 1938, of SAMPSON. Affirmed.

This was a special proceedings to sell land for partition. Answer was filed for the defendants other than Sarah J. Warren, trustee, by P. D. Herring, a reputable attorney. Answer was filed by Sarah J. Warren,

trustee, through E. C. Robinson, who is likewise a reputable attorney. In the answers filed it was prayed that the land be sold rather than divided. Pursuant to orders made the land was sold and the sale was confirmed by the clerk, 8 February, 1938.

The defendant administrator and the defendant Sarah J. Warren, trustee, in their answers asserted a claim against the estate of Mary Frances Warren, who died seized and possessed of the land described in the petition, in the sum of $1,531.30. The defendant administrator in his answer prayed the court that a sufficient sum be set apart out of the sale price of said land to pay said claim. The clerk, by order dated 8 October, 1937, adjudged that the orders of the court which were the basis of said claim were void and that the alleged indebtedness was barred both by the three-year and the ten-year statutes of limitations.

The basis of the claim was as follows: H. F. Warren was the general guardian of Mary Frances Warren, a mental incompetent. On 12 April, 1924, he procured an order permitting him to sell to his ward a house to be moved on her land at the price of $750.00, and for an expenditure of $250.00, cost of moving the house. He also expended $571.30 for food, clothing, taxes, etc., in behalf of his ward. Upon the death of H. F. Warren, his administrator, in the settlement of the estate, procured an order permitting him to transfer the claim of the estate of H. F. Warren against Mary Frances Warren to Sarah J. Warren as trustee for the heirs at law of H. F. Warren, so that he might close the estate without pressing the collection of this debt. Sarah J. Warren, trustee, asserted the claim as a judgment against the estate of Mary F. Warren.

On 4 February, 1938, the defendants, heirs at law of H. F. Warren, and including Sarah J. Warren, had served on the plaintiffs and other parties to the action notice of a motion to set aside the judgment of 8 October, 1937. In the motion it is alleged that while defendants were served with summons they were not served with any petition for partition and no supplemental petition; that they had no notice of same; that they had no notice of the alleged hearing 8 October, 1937; that Sarah J. Warren was mentally incapable of employing counsel and answering the petitions herein; and that the answers filed asserting the claim of $1,571.30 were not the pleadings of the movants and they had no notice thereof and no opportunity to present their cause in court.

The clerk, upon hearing, dismissed the motion. On appeal the court below, after hearing, found the facts very fully and adversely to the movants. He found among other things that Sarah J. Warren, trustee and general guardian, had sufficient mental capacity to answer and to defend the action. He further found "that the defendant movants have failed to allege in their notice or motion filed herein on 5 February, 1938, and have failed to show by affidavits or evidence in support

thereof, any facts constituting a meritorious defense or reason for vacating or setting aside said judgment, and have failed to show that upon rehearing the court could render any judgment different from that now objected to." After finding the facts, judgment was entered dismissing the motion and taxing the movants with the costs incident to the notice, motion and hearing. The movants excepted and appealed.

Faircloth & Faircloth for respondents, appellees.
R. L. Godwin for heirs at law of H. F. Warren, movants, appellants.

PER CURIAM. There was no exception to the finding of fact by the court below that the defendants had no meritorious defense and had shown no meritorious reason for vacating or setting aside said judgment. This finding, unexcepted to, is supported by ample evidence and fully sustains the judgment entered.

Likewise, we concur in the opinion of the court below that the debt the movants are attempting to assert is barred by the three-year statute of limitations. Neither the orders authorizing the expenditures by the guardian nor the order permitting the administrator to transfer the claim to a trustee gave the debt the quality of a judgment. Even so, the incompetent had a guardian and the claim could have been prosecuted against the guardian at any time from its creation in 1924 until the time of the death of the incompetent, except for the short period intervening between the death of H. F. Warren, guardian, and the appointment of the successor guardian.

The judgment below is

Affirmed.

OTTO SMITH, BY HIS NEXT FRIEND, JOHN SMITH, v. DILLON SUPPLY COMPANY.

(Filed 9 November, 1938.)

1. Automobiles § 18g—Evidence considered in light most favorable to plaintiff held sufficient to be submitted to the jury.

Plaintiff, a boy 14 years old, was injured when his small wagon and defendant's truck collided. Plaintiff's evidence tended to show that he was traveling on his right side of the street and was hit by the truck as it was being driven on its left side of the street as the driver was "cutting the corner" in driving into the street from an intersection. Plaintiff denied that he had admitted that the left front wheel of his wagon came off, causing his wagon to turn into the line of travel of the truck. Defendant offered evidence contradicting plaintiff's evidence on the material aspects. *Held:* Considering the evidence in the light most favorable to plaintiff, it is sufficient to be submitted to the jury.

2. Appeal and Error § 6f—

Exceptions to the charge not set out in the statement of case on appeal will not be considered. Rule of Practice in the Supreme Court No. 21.

APPEAL by defendant from *Hill, Special Judge,* at First May Term, 1938, of WAKE.

Civil action for recovery of damages for injury to person resulting from alleged actionable negligence.

The undisputed facts are these: Plaintiff, a boy 14 years of age, was injured on 17 March, 1937, in a collision between a small, homemade wagon in which he was riding, and traveling east on West Cabarrus Street in the city of Raleigh, North Carolina, and a truck of defendant, traveling west on said street and operated by defendant's driver who was acting for and in behalf of the defendant, and in the scope of his employment and in the line of his duty. The collision occurred east of the intersection of West Cabarrus Street and South McDowell Street.

Plaintiff alleges, *inter alia,* that his injury is the proximate result of the negligence of defendant in operating its truck on its left of the center of West Cabarrus Street in a negligent and careless manner without keeping a proper lookout and without exercising the care of an ordinarily prudent person, and in failing to exercise due care after the driver discovered, or by the exercise of ordinary care should have discovered, the plaintiff traveling on his right side on said street.

Plaintiff offered evidence tending to show that the collision occurred while his said small wagon was traveling on his right side of the center line of the street, and while the truck of defendant was traveling on its left side of the center line of said street; that the truck entered West Cabarrus Street from the north on South McDowell Street, and proceeded in an easterly direction up West Cabarrus Street; and that in so doing the truck "cut the corner," that is, passed to the left of the center of the intersection, at "about 25 miles per hour, picking up speed to go up that hill," and continued to the left of the center of West Cabarrus Street to the point of the collision, variously estimated from thirty-five feet or more from the intersection.

Defendant denied allegations of negligence and pleaded contributory negligence of plaintiff. Defendant offered evidence tending to show that the truck was traveling on its right side of the street; that the driver saw the plaintiff and his wagon on plaintiff's right side of the street; that after passing the driver the wagon of the plaintiff turned sharply into the left rear wheel of the truck; and that plaintiff admitted that the left front wheel of his wagon came off, causing the wagon to turn into the line of travel of the truck. The plaintiff denied the admission.

The case was submitted to the jury on issues as to negligence, contributory negligence and damage. From judgment on adverse verdict, defendant appeals and assigns error.

Douglass & Douglass and Thos. W. Ruffin for plaintiff, appellee.
Ruark & Ruark for defendant, appellant.

PER CURIAM. Taken in the light most favorable to plaintiff, the evidence disclosed in the case on appeal is sufficient to take the case to the jury. The issues of fact were submitted to the jury, and answered adversely to contention of defendant. There is no error in refusal of motion for judgment as of nonsuit.

Exceptions to the charge not set out in statement of case on appeal will not be considered on appeal. Rule 21 of Rules of Practice in the Supreme Court, 213 N. C., 808. *Paul v. Burton,* 180 N. C., 45, 104 S. E., 37; *Cherry v. R. R.,* 186 N. C., 263, 119 S. E., 361.

No error.

OFFIE HILL ET AL. V. RUTH COLIE ET AL.

(Filed 9 November, 1938.)

1. Wills § 42—

A legacy of "household furniture and tangible property in, around and about or used in connection" with testator's residence is defeated by testator's sale and abandonment of his residence and his failure to establish any other residence.

2. Same—

A devise of real property is defeated by testator's sale of all his real property prior to his death.

3. Same—

In the absence of a residuary clause, personal property of testator undisposed of by any valid legacy must be distributed to testator's next of kin according to the statutes of distribution.

APPEAL by defendants from *Frizzelle, J.,* at April Term, 1938, of LENOIR. Affirmed.

This is a controversy submitted without action under the provisions of Article 25 of the Consolidated Statutes.

The facts upon which the solution of the controversy depends as gleaned from the agreed case are: (1) Albert Hill died in 1936 leaving a last will and testament, the parts thereof pertinent to this appeal reading: "After payment of my debts, I dispose of my estate as follows:

Item I. I bequeath to Dan Colie one mule named 'Emma' and $300.00 in cash. Item II. I bequeath to Ruth Colie all my household furniture and tangible property in, around and about or used in connection with my residence and farm except as under Item I. Item III. I bequeath to Ruth Colie all my land and real property, the same to be hers her natural life and then to go to her children"; (2) the mule referred to in Item I of the will died prior to the death of the testator; (3) on the date of the execution of the will, namely, 10 July, 1926, the testator was the owner of a farm upon which he then resided; (4) during the year 1929 the testator conveyed said farm to George Sutton and thereafter acquired no other land and established no other residence, and owned no land at the time of his death, but did own an automobile acquired after the sale of his farm, certain deposits in the United States Post Office in Kinston, and other personal property; (5) Albert Hill left surviving him no wife nor child, nor issue of any child, and his heirs at law and next of kin are his collateral kin, being, with his executor, the plaintiffs and defendants in this controversy.

It is the contention of the plaintiffs that Dan Colie takes $300.00 in cash under the will of Albert Hill, and that the residue of the estate of Albert Hill, after the payment of his debts, the $300.00 legacy to Dan Colie, and the costs of administration, should be distributed to his next of kin according to the statutes of distribution. It is the contention of the defendants that after the payment of the debts of Albert Hill, the legacy of $300.00 in cash to Dan Colie, and the costs of administration, the residue of the estate of the testator should be paid to Ruth Colie. His Honor adopted the contention of the plaintiffs and entered judgment accordingly, to which the defendants excepted and appealed, assigning error.

John G. Dawson, Sutton & Greene, and Geo. Paul LaRoque for plaintiffs, appellees.

J. A. Jones for defendants, appellants.

PER CURIAM. Any legacy to Ruth Colie was defeated by the sale by the testator of the farm on which he lived and his abandonment of it as his residence prior to his death, and his failure to establish any other residence, in which "household furniture and tangible property in, around and about or used in connection" therewith could exist. Any devise to Ruth Colie was defeated by the sale by the testator of all of his land prior to his death.

The only valid legacy in the will being that of $300.00 in cash to Dan Colie, and there being no residuary clause in the will, his Honor was correct in adjudging that as to the remaining personal property of

his estate Albert Hill died intestate and that the residue after the payment of his debts, the $300.00 in cash to Dan Colie, and the costs of administration, should be distributed to the next of kin of Albert Hill according to the statutes of distribution.

The judgment of the Superior Court is

Affirmed.

N. R. BRIGHT AND MRS. EUGENIA BRIGHT, EXECUTORS OF J. R. BRIGHT, DECEASED, v. GURNEY P. HOOD, COMMISSIONER OF BANKS, AND AS STATUTORY RECEIVER LIQUIDATING THE PAGE TRUST COMPANY.

(Filed 23 November, 1938.)

1. Trial § 22b—

Upon defendant's motion to nonsuit, the evidence which makes for plaintiffs' claim is to be taken in its most favorable light for plaintiffs, and they are entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. Appeal and Error § 2—

The Supreme Court, in its discretion, may determine an appeal on its merits even conceding that the appeal is premature, the rights of appellee not being prejudiced thereby.

3. Trial § 5—

Where the jury finds that defendant is liable for certain chattels as bailee, and it appears that the specific chattels cannot be delivered, the trial court has discretionary power to retain the cause for trial on the issue of the value of the chattels at the time of the breach of the bailment.

4. Banks and Banking § 7e—Deposit of bonds in bank for safekeeping creates relation of bailor and bailee.

When bonds are delivered to a bank, and the bank gives receipts therefor respectively stipulating, first that the receipt must be surrendered when the bond therein described is delivered to the owner or his legal representative, and second, that the bond therein described was received for safekeeping in the bank vault, the transaction constitutes a naked bailment, and does not create the relationship of debtor and creditor between the depositor and the bank.

5. Banks and Banking §§ 7e, 18—In action to recover bonds delivered to a bank as bailee, burden is on the bank to establish defenses.

Plaintiffs, beneficiaries under the will, instituted this action to recover certain bonds of testator, and introduced in evidence receipts given testator by the bank of deposit, which receipts stipulated, respectively, first, that the receipt had to be surrendered when the bond therein described was delivered to the owner or his legal representative, and second, that the bond therein described was received for safekeeping in the bank vault. The evidence further disclosed that the bank of deposit was purchased by another bank, which continued the trust relationship in respect to the bonds deposited, and that later the purchasing bank was taken over for

liquidation by the Commissioner of Banks. *Held:* The transaction constituted a naked bailment, and the burden was properly placed on defendant Commissioner of Banks to prove return of the bonds to the owner prior to his death, relied on as a defense to the action, plaintiffs having introduced evidence of delivery of the bonds to the authorized agent of the original bailee.

6. Limitation of Actions § 5—Cause of action for breach of express trust accrues upon the disavowal or repudiation of the trust.

This action was instituted against the statutory receiver of an insolvent bank to recover certain bonds which had been delivered to the bank for safekeeping. There was evidence that the liquidating agent advised plaintiffs that it was not necessary to file claim and that the bonds would be turned over to them when they were found, that later plaintiffs received a letter from the attorney of the liquidating agent denying the claim for the bonds, and that the action was instituted within three years from the receipt of this letter. *Held:* The action was not barred by the three-year statute, Michie's Code, 441 (4), since under the facts of this case the cause of action did not accrue until the disavowal or repudiation of the trust.

7. Banks and Banking § 18—Under facts of this case, claim against insolvent bank was not barred by failure to institute suit in ninety days.

This action was instituted against the receiver of an insolvent bank to recover bonds which had been delivered to the bank for safekeeping. Plaintiffs' evidence tended to show that the agent of the receiver taking proofs of claims advised plaintiffs, when they filed proofs of claims for deposits, that no claim was necessary for the bonds, and that the bank would turn over the bonds to them when they were found. Defendant contended that the claim was barred for failure to bring suit within ninety days after the time designated for presenting claims, or in ninety days after the claim was presented and disallowed upon notice to plaintiffs. *Held:* In regard to the bonds the bank was a trustee of an express trust, and plaintiffs were not "creditors" or "claimants" within the meaning of the statute, Michie's Code, 218 (c), and therefore the statute is not applicable to the action, and *further*, even conceding the statute is applicable, it would be inequitable and unconscionable for defendant to be allowed to set same up as a defense.

8. Executors and Administrators § 19: Parties § 5—Trial court has discretionary power to allow amendment of parties which does not change cause of action.

Beneficiaries under the residuary clause of a will may maintain an action to recover chattels passing to them under the residuary clause, and when the action is instituted by the beneficiaries as executors and the jury finds that they were not the duly qualified executors of the estate, but the trial court submits issues relating to plaintiffs' right to maintain the action as beneficiaries under the will, the submission of such issues amounts to an amendment to that effect and is within the discretion of the trial court.

9. Banks and Banking §§ 7e, 18—

Evidence of delivery of bonds to a bank for safekeeping, and the conflicting evidence as to the return of the bonds to the owner prior to insolvency of the bank, *held* properly submitted to the jury in plaintiffs' action to recover the bonds.

APPEAL by defendant from *Harris, J.,* and a jury, at March-April Term, 1938, of LEE. No error.

This is an action brought by plaintiffs against the defendant to recover $2,400 of Liberty Bonds. If the bonds for any reason cannot be returned, the value as a priority and trust claim.

The evidence on the part of the plaintiffs was to the effect that they are executors of the last will and testament of J. R. Bright, who deposited with the Bank of Sanford, U. S. Liberty bonds totaling $2,400 in 1917 and 1919. The receipt for same was signed by J. M. Ross, Cashier (by Miss Judith M. Ross) and Ida C. Holmes (now Mrs. W. M. Cade). On the first receipt, dated 5/2/1917, is the following: "Liberty Loan Bonds—This receipt must be surrendered when bond is delivered." Second receipt, dated 8/15/1919: "For safekeeping in bank vault the following (naming the Liberty Bonds). Sealed contents and value unknown. The above property to be delivered only to person named hereon or legal representative upon return of this receipt." On reverse side: "This Bank will give the same care to property left for safekeeping that it does to its own property, but beyond that does not assume responsibility. Bank of Sanford, by I. C. H." The third receipt, dated 3/17/1919, is in similar language but for different bonds. The above were all signed for Bank of Sanford by J. M. Ross and Ida C. Holmes.

J. R. Bright in his lifetime took up some of these Liberty Bonds, leaving $2,400.00, as follows: Liberty Bond for $1,000.00, No. 232974; Liberty Bond for $500.00, No. 31617; Liberty Bond for $500.00, No. 843502; Liberty Bond for $100.00, No. 7292931; Liberty Bond for $100.00, No. 7292936; Liberty Bond for $100.00, No. 7292929; Liberty Bond for $100.00, No. 7292930. The amount herein sued for.

The evidence was to the effect that the Page Trust Company, under deed dated 4 January, 1922, took over the Bank of Sanford's land and choses in action. Following the execution of the deed, the Bank of Sanford did not continue in active business, but the Page Trust Company then occupied the building formerly occupied by the Bank of Sanford. On the day the deed was executed, Miss Judith M. Ross was an employee of the Bank of Sanford and later was an employee of Page Trust Company. There was no period of time between that in which the Bank of Sanford conducted business and the Page Trust Company conducted business. Page Trust Company occupied the identical part of what is known as the Commercial Bank Building in Sanford when it began doing business in Sanford. When it began business, Page Trust Company employed the same employees that were employed by the Bank of Sanford immediately prior thereto. The papers and deposits on hand in the Bank of Sanford at the time of that deed were transferred to Page Trust Company. Miss Judith M. Ross was in the bank as an

employee at the time the Bank of Sanford sold out and she was there at the time Page Trust Company went into receivership. She was continuously in the employment of Page Trust Company. After Gurney P. Hood took over Page Trust Company in May, 1933, Miss Judith M. Ross was there in the bank. The Liberty Bonds are not mentioned in the deed of conveyance.

E. R. Buchan, vice president of the Bank of Sanford, testified, in part: "I know Miss Judith M. Ross very well. She was in the employment of the Bank of Sanford prior to and at the time it was taken over by Page Trust Company. She was cashier at the time of Bank of Sanford. She then continued in the employ of Page Trust Company, and she was assistant cashier and chief bookkeeper of Page Trust Company. . . . During all the time I was connected with Page Trust Company and on through the time until Page Trust Company went into liquidation. After Mr. Hood, the Commissioner of Banks, took over Page Trust Company, she was employed in the work of liquidating the bank. . . . I was familiar with that form of receipt. That is the form that was used by the Bank of Sanford. That was a receipt for papers that were given to the Bank of Sanford for safekeeping, not for deposit, but for safekeeping. . . . Miss Ida Holmes was bookkeeper and teller of the Bank of Sanford. She was accustomed to perform any duties incident to the workings of the bank other than making a loan. (The receipts signed by Judith M. Ross and Ida C. Holmes were identified as in their handwriting.) Mr. Bright was a customer of the Bank of Sanford for many years and from time to time he brought papers in there, valuable papers, for safekeeping, which the bank was in the habit of taking. . . . There was no property that the Bank of Sanford had or owned or had for safekeeping that I remember that did not pass over to the Page Trust Company. There was not anything there left with the Bank of Sanford that Page Trust Company did not take. . . . When Page Trust Company succeeded the Bank of Sanford, the same method of handling matters was pursued with respect to matters that were in the bank for safekeeping."

Mrs. Eugenia Bright testified, in part: "I qualified as executrix, I had transactions with Page Trust Company in regard to bonds of my husband. It was soon after I qualified, about a month or six weeks thereafter, that I saw someone connected with the Page Trust Company about the bonds. I know of my own knowledge of Mr. Bright's having bonds there. I went to Page Trust Company to see Miss Ross and I saw her. When I went there to deposit my insurance, my lawyer in Chatham County had asked me to bring up everything, that he was going to settle up and I asked her about the bonds and she said that 'they would look them up, did I have anything to show for it,' and I told her I did not

know that I would have to have anything, that I thought they were there for safekeeping, and she said, no, they could not do anything about it unless we brought up the numbers or whatever it was and she said though they would try to get them up and would I call again soon, and I told them, yes, I would as soon as I could. I know that my husband, J. R. Bright, had bonds because I used to go with him to the bank for him to get his coupons to get the interest on them, and he always would say that he would have to go and Miss Ross always clipped the coupons and fixed it for him. . . . I was at Page Trust Company with Mr. Bright once or twice after that. He would generally get his interest on the bonds when he went there. He always called on Miss Ross. I never knew him to call on anybody else. She generally fixed it up and she was the one and only one I went to and asked about bonds at that time and she would put me off from time to time, that they would get them up and always promise me she would get them up. She never turned them over to me. They said if I would bring the numbers they would. At the time Mr. Bright died I did not have these receipts. If I had them I didn't know where they were. I found the receipts with the deeds, amongst his deeds, his land deed, and I was not looking for them, I have looked for them so many times I had about given them out, but I found them and I brought them to Sanford and turned them over. I have never received these bonds from Page Trust Company or anybody that I know of. I don't know that I could tell exactly when I found these receipts. I don't remember whether it was 1933 or 1934. It was along then. . . . I went to see Miss Ross about the bonds the first time in about a month or six weeks after my husband died. She said to call back again, she could not produce them right then but she would get them up for me and the next time she said what do you have to show for it, and I told her I did not know I would have to show for it, I thought they were there for safekeeping and I did not have anything to do but call for my bonds, and she said if I would bring the numbers she would get them up. That if I would bring the numbers she would know how to get them up and without the numbers she could not do it."

Numa R. Bright testified, in part: "After Page Trust Company succeeded the Bank of Sanford, these bonds were still there at the same place. Very often, something like twice a year, my father would go there when he would get ready to pay his taxes and he had some insurance and the premiums were very large on it, and he kept those bonds there for the purpose of getting the interest off them to pay his policies, and he would go and get Miss Judith M. Ross to pay his tax and to pay the dividends on his policies. From 4 January, 1922, to the date of my father's death I expect I was in there with my father eight or ten times.

We usually went twice a year. Miss Judith M. Ross waited on us when we were there for that purpose. Ordinarily, he would tell Miss Judith M. Ross his business and she would go back into the vault and get the bonds. He would have the numbers on a little book or strip of paper, and she would go and get the bonds and take the scissors and clip those little coupons off and would drop them in a box and would give him the cash for them. My father died 8 May, 1929. I was at the bank with my father just a short time before he died—the year before, in the fall. Ordinarily, I would bring him to Sanford. On that last visit we went in and got the coupons off the bonds. . . . She said that she could not locate the bonds and asked my mother to bring this identification, the number of the bonds. At that time we did not know that we had the receipts for the bonds. We did not have the receipts with us. We had not found them until the latter part of 1933 or the early part of 1934. . . . I expect we went to the bank to see about these bonds twelve or fifteen times. . . . I remember when Page Trust Company ceased doing business as a bank of deposit. When that happened I got some notices from the bank relative to it and my mother got one, she had a deposit at the bank; my father had one and my little boy had a little savings account and they sent us out three little slips to file proof of claim, I believe they called it. I am not very familiar with that type of work, and I carried them over and filed them and when I turned those three sheets in I think it was Mr. Womack. . . . He was one of the bank officials. He was clerk or teller or whatever you call him in there. . . . That time was right soon after Gurney P. Hood took over the bank—that is, the Page Trust Company. (Q) When you turned that over what occurred? Ans.: This party asked me if that was all and I said we have got some bonds here that we have been trying to locate, will I have to file for them, and he said, No, asked me how they were left, and so forth——. (Objection; overruled; exception.) And I told him they were just left there for safekeeping and he said, 'It is not necessary to file any proof of claim for them. We will turn the bonds over when we find them.' . . . I filed three claims for some deposits. The man with whom I filed the claims said that it wasn't necessary to file anything for the bonds. It was the same man with whom I was directed to file my claim for deposits that told me that. (At that time there was no discussion about the numbers of the bonds or the kind of bonds. He just told me that if they were left there for safekeeping I would not have to file; that when they got the bonds to call in some day and they would get up the bonds and turn them over to me.) (Objection; overruled; exception.) . . . I got the letter from Mr. Hinsdale dated 9 June, 1934. . . . The letter I got from Mr. Hinsdale says, 'I have before me your claim for preference against the Page Trust

Company for $2,400 arising from Liberty Bonds left with the Bank of Sanford for safekeeping.' They are the same bonds that we are suing for in this suit. Mr. Hinsdale says in the letter, 'In the opinion of the liquidating agent, this does not constitute a claim against Page Trust Company. The claim is therefore denied. Yours very truly, S. J. Hinsdale, Liquidating Agent.' . . . Mr. Bright, my father, had other bonds besides these that are included in this suit. This $2,400 there with Page Trust Company for safekeeping. I went with him to Page Trust Company and got two of those bonds. Their denominations were $500.00 each. My father went in and called for Miss Judith M. Ross, and I think she was busy or maybe out for lunch and a young man waited on him there and went and got the bonds and delivered them to him. At that time my father had receipts for his bonds. He was not given any bonds at that time without the surrender of the receipt. He surrendered receipts for them. These receipts that have been introduced in evidence for the bonds described in the complaint were in Mr. Bright's possession at that time."

Mr. W. D. Bright (uncle of N. R. Bright) testified, in part: "Mr. N. R. Bright and us was together and we went in her office and I asked her had she found out about those bonds that she had been in possession of and that was the only—— I don't know but very little about it. Well, Miss Ross said she had not located them, that when Mr. Dyer taken them over she had control of them until he taken them over and then she had no more further use for them. She said she had them in her possession or control of them until he came in. Well, I would know Mr. Dyer whenever I would see him. I think he was in the Page Trust Company bank."

Miss Judith M. Ross testified, in part, for defendant: "I worked for the Bank of Sanford in 1918 and 1919. I was cashier. I knew J. R. Bright, known as John Robert Bright. Mr. Bright had with the Bank of Sanford, for safekeeping, certain bonds. Page Trust Company purchased the assets of the Bank of Sanford in December, 1921. I worked for the Page Trust Company after that in the capacity of bookkeeper. I remember seeing some bonds in the vault there belonging to Mr. Bright after that time. After Page Trust Company took over the Bank of Sanford at different times, Mr. Bright would come to get the coupons clipped and those were the only times I saw them, but I don't recall how often, but occasionally he would come to get the coupons clipped from them and place them back. . . . Mr. Numa Bright never came inside the bank with his father. Mr. Bright would come around on the inside but Numa Bright did not. I never saw Mrs. Bright there with Mr. Bright. Mr. W. P. Dyer came to Page Trust Company in June, I think, 1927. After Mr. Dyer came to Page Trust Company, I saw

Mr. Dyer and Mr. Bright handling a transaction and I think closed out the bonds. There were no more bonds seen after that. I saw them do that. I never saw those bonds in the bank after the transaction I have stated. I saw Mr. Bright and Mr. Dyer have a transaction in the bank after Mr. Dyer came there. I did not see the bonds in the bank at any time after that. I told Mr. Bright just what I am telling you. I told Mr. Bright about this transaction that cleared out the bonds, and I had not seen any bonds since. I told Mr. Numa Bright that. I did not at any time promise Mr. Bright that I would get up the bonds for him after the Liquidating Agent took over the assets of Page Trust Company. It was not customary with the bank to always demand the return of the receipts given out for bonds or for papers left there for safekeeping when the bonds or papers were delivered to the customers. . . . After Mr. Hinsdale took charge, Mr. Numa Bright came there at different times, about these bonds. I know Mr. Gentry Womack. He was one of the persons that they had there in charge of receiving and filing claims. . . . I don't know of my own knowledge how many he got or how many he left. I don't pretend to say how many."

S. J. Hinsdale testified for defendant, in part: "I live in Burlington. I have heard a description of the U. S. Liberty Bonds sued on in this action. At the time, 20 May, 1933, Mr. Hood and I took over the assets of Page Trust Company, we did not have the Liberty Bonds sued on in this action in the assets of Page Trust Company which we took over. I did not make any search at the immediate time we took over the assets, but after Mr. Bright claimed that they were there, I made a search for the bonds among the assets of Page Trust Company, and did not find any one of these bonds. . . . After Mr. Hood, as Commissioner of Banks, and I, as Liquidating Agent, took over the assets and affairs of Page Trust Company, we gave notice to creditors about filing claims. There was a notice published in the paper in each county in which the Page Trust Company did business. This notice was dated 14 October, 1933, notifying all creditors to present their claims on or before 20 January, 1934. . . . I never did see any record of any bonds that were there for safekeeping. I found no such record. . . . I know Mr. Dyer, Jr., I think he lives in Charlotte. I was told not long ago that he was working for the R.F.C. . . . When Bright filed his claim, I did not look through there to see if they were any of the numbers."

The judgment in the court below, which indicates the controversy, is as follows:

"This cause being heard at this term before the undersigned judge presiding and a jury; which jury for its verdict answered the issues submitted to them as follows:

" '1. Are the plaintiffs the duly qualified and acting executors of J. R. Bright, deceased? Ans.: "No."

" '2. If not, are the plaintiffs N. R. Bright and Eugenia Bright individually the residuary legatees under the will of J. R. Bright? Ans.: "Yes."

" '3. Were the bonds described and set out in the complaint a part of the residuary estate of J. R. Bright, deceased? Ans.: "Yes."

" '4. Are the plaintiffs N. R. Bright and Mrs. Eugenia Bright individually entitled to maintain this action for the recovery of said bonds? Ans.: "Yes."

" '5. Did the plaintiffs' testator, J. R. Bright, own and leave with the Page Trust Company in trust to be safely kept and held and returned to the said J. R. Bright the United States Bonds described in the complaint, as alleged in the complaint? Ans.: "Yes."

" '6. If so, were said bonds returned to the said J. R. Bright or the plaintiffs by the Page Trust Company? Ans.: "No."

" '7. Was the Page Trust Company a banking corporation created under the laws of the State of North Carolina with its principal office and place of business in the town of Aberdeen, Moore County, at and prior to 20 May, 1933, and did the defendant on said date take possession of the property and assets of said Page Trust Company for liquidation on account of insolvency and file notice of possession of said assets as provided by law in the office of the clerk of the Superior Court of Moore County, North Carolina, as alleged in the answer? Ans.: "Yes."

" '8. Did the defendant, through his liquidating agent, under the provisions of section 218-c, subsection 10, of the Consolidated Statutes of North Carolina, give notice by advertisement to all creditors and depositors to present their claims to the defendant or his liquidating agent on or before 20 January, 1934, as alleged in the answer? Ans.: "Yes."

" '9. Did the plaintiff present to the defendant or his liquidating agent the claim sued on in this action for allowance on or prior to 20 January, 1934? Ans.: "No."

" '10. Did the plaintiffs present to the defendant or his liquidating agent the claim of the plaintiffs sued on in this action as preferential claim on or about 4 June, 1934, for allowance, and was said claim declined and disallowed and notice thereof given to the plaintiffs on 9 June, 1934, as alleged in the answer? Ans.: "Yes."

" '11. Did the plaintiffs bring any action against the defendant or his liquidating agent for the enforcement of their claim sued on in this action within ninety days from the date the said claim was disallowed by the defendant in this action? Ans.: "No."

" '12. Is the plaintiffs' cause of action barred by the ninety-day statute, as alleged in the answer? Ans.: "No."

" '13. Is the plaintiffs' cause of action barred by the three-year statute of limitations, as alleged in the answer? Ans.: "No."

"'14. Are the plaintiffs entitled to recover the bonds, or the value thereof? Ans.: "Yes."'

"Upon consideration thereof, it is decreed, ordered and adjudged: That plaintiffs N. R. Bright and Eugenia Bright, individually, do have and recover of the defendant the United States Bonds set out and described in the complaint of the par value of $2,400, which bonds bear interest at rate 4¼ per cent per annum.

"And it further appearing from admissions of defendant's counsel and the court finding therefrom that a return of said bonds in kind is now impossible, in the exercise of its discretion the court directs that this cause be retained for trial before a jury hereinafter to be impaneled the following issue: 'What was the value of the bonds described in the complaint on 9 June, 1934?' It is further ordered, adjudged and decreed: That defendant do pay the costs of this action to be taxed by the clerk. W. C. Harris, Judge Presiding."

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.

D. B. King and K. R. Hoyle for plaintiffs.

U. L. Spence for defendant.

CLARKSON, J. At the close of plaintiffs' evidence and at the close of all the evidence, the defendant in the court below made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no error.

The evidence which makes for plaintiffs' claim, or tends to support their cause of action, is to be taken in its most favorable light for the plaintiffs, and they are entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

The plaintiffs contend that the appeal was premature. In the judgment is the following: "And it further appearing from admissions of defendant's counsel and the court finding therefrom that a return of said bonds in kind is now impossible, in the exercise of its discretion the court directs that this cause be retained for trial before a jury hereinafter to be impaneled the following issue: 'What was the value of the bonds described in the complaint on 9 June, 1934?'"

Conceding but not deciding that the appeal was premature, yet we can see no harm or prejudice to plaintiffs in deciding the case on its merits.

In *McAuley v. Sloan,* 173 N. C., 80 (81-2), where the judge tried certain issues and in his discretion reserved others, it was said: "This is a matter which will depend very much upon the circumstances of each

particular case, and in the absence of an abuse of such discretions this Court will not disturb the action of the judge." *Bank v. Evans,* 191 N. C., 535 (538).

The principal questions involved in this case require the determination of the burden of proof in a suit to recover from a bank Liberty Bonds deposited therewith for safekeeping and the application of the statute of limitations to such an action. These were answered in the court below in favor of the plaintiffs, and in this we find no error.

All the evidence was to the effect that the receipts were given for the Liberty Bonds by the Bank of Sanford. One receipt provided that it "must be surrendered when bond is delivered," and another stated that the bond was received for "safekeeping in the bank vault." There was evidence tending to show that the bonds were in the possession of the Page Trust Company after its purchase of the Bank of Sanford. There was further evidence tending to show that no specific claim for these bonds was filed with the liquidating agent because his representative informed one of plaintiffs that, as the bonds were held for safekeeping and were not deposits, it would not be necessary to file a claim. There was evidence, likewise, tending to show that after plaintiffs had qualified as executors of the estate of J. R. Bright, who allegedly deposited the bonds originally, and after the liquidating agent had taken over the assets of Page Trust Company, said liquidating agent, on 9 June, 1934, wrote plaintiffs denying their present claim for Liberty Bonds in the value of $2,400. Thereafter, and within three years after the denial of this claim, the original summons in this action was issued on 20 February, 1937.

The deposit of the Liberty Bonds herein, as found by the jury, constituted a special deposit for safekeeping and embodied a duty to hold and deliver the specific bonds.

In *Corporation Commission v. Trust Co.,* 193 N. C., 696 (699), is the following: "A special deposit is a deposit for safekeeping, to be returned intact on demand—a naked bailment, the bank acquiring no property in the thing deposited and deriving no benefit from its use. The title remains in the depositor, who is a bailor and not a creditor of the bank. *Boyden v. Bank, supra* (65 N. C., 13); 3 R. C. L., 517; 7 C. J., 630." *Edwards v. Culberson,* 111 N. C., 342. See *Bank v. Waggoner,* 185 N. C., 297 (302); *Proctor v. Fertilizer Co.,* 189 N. C., 243; *Wood v. Bank,* 199 N. C., 371; *Cocke v. Hood, Comr.,* 207 N. C., 14 (18); *Speight v. Trust Co.,* 209 N. C., 563.

All the evidence was to the effect that the first receipt was given for the Liberty Bonds by the Bank of Sanford as follows: "This receipt must be surrendered when bond is delivered," also the other receipts for "safekeeping in bank vault." The above property to be delivered "only

to person named hereon or legal representative upon return of this receipt." It was in evidence to the effect that these bonds were in the possession of the Page Trust Company after its purchase from the Bank of Sanford. The court below charged that under the circumstances mentioned the burden of proof as to this phase of the case rested on the defendant in this action. We can see no error in this. *Proctor v. Fertilizer Co.*, 189 N. C., 243 (245); *Furst v. Taylor*, 204 N. C., 603; *Davis v. Dockery*, 209 N. C., 272; *Stephenson v. Honeycutt*, 209 N. C., 701.

In 5 Zollman, on Banks & Banking, sec. 3115, pp. 121-2, we find: "In most, if not all, cases the depositor will have little or no information as to how the loss occurred. Ordinarily, he can only prove that there has been a loss. Therefore, evidence by him of the delivery of the deposit to the cashier, that the cashier had authority to accept it, and that it was not returned to him on his demand places the burden upon the bank to prove that it exercised the proper degree of care in safekeeping the property. The burden of showing the circumstances of the loss, due care, or delivery to the customer or to a successor bank, or that the deposit was made for an illegal purpose, or of establishing a good and valid reason for the nonreturn of the deposit, is on the bank. A demand on the bank for bonds held on special deposit and its refusal to deliver them, with no other explanation than the statement that it has no such bonds in its possession, is *prima facie* evidence of their loss by the bank's negligence. The statement of the bank that it has lost or mislaid the bonds in question will not absolve it."

We do not think that plaintiffs' cause of action is barred by the 3-year statute of limitations J. R. Bright, plaintiffs' testator, died on 8 May, 1929. Plaintiffs qualified as executors on 10 July, 1929. Defendant took over the assets of the Page Trust Company on 20 May, 1933. S. J. Hinsdale, Liquidating Agent of defendant, wrote plaintiffs, on 9 June, 1934, as follows: "I have before me your claim for preference against the Page Trust Company for $2,400 arising from Liberty Bonds left with the Bank of Sanford for safekeeping. In the opinion of the Liquidating Agent this does not constitute a claim against Page Trust Company. The claim is therefor denied." The original summons in the action was issued on 20 February, 1937—within three years of the repudiation or disavowal of the trust.

N. C. Code, 1935 (Michie), sec. 441 (4), is as follows: "Limitations—Within three years an action—(4) For taking, detaining, converting or injuring any goods or chattel, including action for their specific recovery."

5 Zollman, on Banks & Banking, *supra*, part sec. 3116, p. 123, says: "Where a bank receives a special deposit to be surrendered on demand, the statute of limitations begins to run against the right of action for a breach of the contract to return only from the time of demand."

In *Robertson v. Dunn*, 87 N. C., 191 (195), it is written: "We take the distinction to be, that if it is an express trust or agency, a demand is necessary to terminate the trust and set the statute in operation; but if it is only an implied or constructive trust or agency, then no demand is necessary, but the statute is put in motion as soon as the property is taken into possession or the money received." *County Board v. State Board*, 107 N. C., 366.

In *Rouse v. Rouse*, 176 N. C., 171 (173), we find: "It is a general rule that, as between trustee and *cestui que trust*, lapse of time is not a bar to an action, but where the trustee disclaims the trust, to the knowledge of the *cestui que trust*, either expressly or by acts necessarily implying a disclaimer, and the trustee remains in unbroken possession, lapse of time may be relied upon as a defense. *McAden v. Palmer*, 140 N. C., 258; *Williams v. Church*, 1 Ohio St., 478; *Coxe v. Carson*, 169 N. C., 137." This matter is fully set forth by *Barnhill, J.*, in *Teachey v. Gurley, ante*, 288 (293).

Is the plaintiffs' cause of action barred by the ninety days statute, either for failure to bring the suit in ninety days after the time designated for presenting claims, or in ninety days after the claim was presented and disallowed upon notice to plaintiffs? We think not, under the facts and circumstances of this case. N. C. Code, *supra*, sec. 218 (c), *et seq.*

It will be noted that sec. 218 (c), *supra*, says: "Shall forthwith take possession of such bank and all of its assets and business." One of the bank officials was receiving proof of claims from Numa R. Bright, and two other members of the family who filed their claims. The following occurred:

"Q. When you turned that over what occurred? Ans.: This party asked me if that was all and I said we have got some bonds here that we have been trying to locate, will I have to file for them, and he said, no, asked me how they were left, and so forth. (Objection; overruled; exception.) And I told him they were just left there for safekeeping and he said, 'It is not necessary to file any proof of claim for them. We will turn the bonds over when we find them.' . . . I filed three claims for some deposits. The man with whom I filed the claims said that it wasn't necessary to file anything for the bonds. It was the same man with whom I was directed to file my claim for deposits that told me that. At that time there was no discussion about the numbers of the bonds or the kind of bonds. He just told me that if they were left there for safekeeping I would not have to file; that when they got the bonds to call in some day and they would get up the bonds and turn them over to me. (Objection; overruled; exception)."

We think the exceptions cannot be sustained if the statute was applicable. The plaintiffs were lulled into inaction and defendants cannot take advantage of their conduct. In *Glenn v. Farmers' Bank,* 80 N. C., 97 (100), it is said: "The appellant, in the language used by the Court in the last mentioned case, 'was not guilty of willful laches or unreasonable neglect,' he ought not to be concluded by the decree from the assertion of his right, as a creditor, to share in the common fund." *Cecil v. Henderson,* 121 N. C., 244 (247); *Thomas v. Conyers,* 198 N. C., 229; *Bank v. Winder,* 198 N. C., 18.

In construing portions of the New York Act, which are substantially similar to ours, the New York courts have held that a bailor (such as plaintiffs) is not a "creditor" or "claimant" within the meaning of their Banking Acts, and is not required by that law to file a claim before bringing suit. Some of the decisions are as follows:

In re Howell's Will, 237 App. Div., 56, 260 N. Y. Supp., 510, 512: "The petitioner urges that the procedure laid down in the banking law does not apply because the bank held this money as bailee and never acquired title thereto; that the relation of debtor and creditor never existed between the bank and the depositor; that no question of priority of claims is involved here. Respondents insist that this is a reclamation proceeding and not one to determine the validity of a claim against the bank, and that, therefore, the successor trustee is entitled to immediate possession of this trust fund without waiting for the liquidation of the assets of the defunct institution. If the title to the money never rested in the trust company, the court has inherent power to order its delivery to the successor trustee, and the provisions of the banking law have no bearing on the proceeding. . . . The determination of this appeal, therefore, depends upon the nature of the relationship which exists between the bank and the trustee."

In *In re Bank of Cuba,* 198 App. Division, 733, 191 N. Y. Supp., 88, it was held that the New York Banking Law with respect to the presentation of claims of creditors against a bank in liquidation related to the assets of the bank only, and conferred upon the Superintendent of Banks no authority to withhold property to which it had no title and upon which it had no lien; that in that case no title to the drafts in question passed to the bank, but remained in the applicant for a return of draft or its proceeds, and it was erroneous to refuse the relief sought on the grounds that applicant's only remedy was afforded by the provisions of the Banking Law with respect to the presentation and allowance of claims, etc. *Re Vavoudis,* 141 Misc., 823; 252 N. Y. Supp., 779, affirmed; 223 App. Div., 672, 249 N. Y. Supp., 87; *Re McCarthy's Funds,* 139 Misc., 147, 248 N. Y. Supp., 335; *Campbell v. Vining,* 101 Fla., 939.

The defendant cannot maintain the plea of the statute of limitations, either 90 days or 3 years. The language of the receipt is, "Must be surrendered when bond is delivered." Certain bonds "For safekeeping in bank vault," etc. The Bank of Sanford was a trustee of an express trust and its successor likewise, as there was plenary evidence to that effect and the jury so found. The 90-day statute is inapplicable. If it were it would be inequitable and unconscionable for defendant to be allowed to set same up as a defense.

The last clause of the will of J. R. Bright is as follows: "Then all that I have not mentioned is to be Numa Bright & his mother." The Liberty Bonds were not mentioned in the will, therefore they became the property of N. R. and Eugenia Bright, and it was so found by the jury. *Kidder v. Bailey,* 187 N. C., 505. They are entitled to recover for same and the issue so says. Under the facts and circumstances of this case the word "executors" was treated as surplusage. The issue submitted was in the nature of an amendment to that effect. *Bernard v. Shemwell,* 139 N. C., 446 (447); *Trust Co. v. Williams,* 209 N. C., 806 (809); *Morgan v. Turnage Co.,* 213 N. C., 425, 426; *Ins. Co. v. Locker, ante,* 1 (2). On this aspect we see no prejudicial error. We think there was ample evidence to be submitted to the jury on all disputed issues. Miss Judith M. Ross testified: "After Mr. Dyer came to Page Trust Company, I saw Mr. Dyer and Mr. Bright handling a transaction and I think closed out the bonds. There were no more bonds seen after that." The court below left this aspect to the jury for determination. It may be noted that the W. P. Dyer, Jr., spoken of in this testimony was living at the time and was never called as a witness. We see no error in the court below in overruling the motion of defendant for judgment *non obstante veredicto.* We think the court below, in an able and careful charge, explained the law applicable to the facts, and C. S., 564, was fully complied with.

On the entire record we see no prejudicial or reversible error.

No error.

ROY N. MOORE (EMPLOYEE) v. ENGINEERING & SALES COMPANY (EMPLOYER), AND ST. PAUL MERCURY INDEMNITY COMPANY (CARRIER).

(Filed 23 November, 1938.)

1. Master and Servant § 55d—

The Industrial Commission is charged with the duty and has sole jurisdiction to find the facts upon the evidence, and its findings are conclusive on the courts when supported by any competent evidence.

2. Same—

When a conclusion of the Industrial Commission involves mixed questions of law and fact it will be presumed that the question of fact was found in accord with the conclusion, and where there is evidence to support such finding, the statement will be reviewed only in its legal aspect.

3. Master and Servant § 40d—Evidence held sufficient to support findings that hernia resulted from "accident."

The evidence disclosed that claimant was a foreman, but was also required to do manual labor in the prosecution of the employer's business of installing plumbing; that on the job in question other employees had been laid off and claimant ordered to complete the job with but one laborer; that in the prosecution of the work claimant and the other employee were attempting to lift a steel pipe weighing from 400 to 450 pounds when claimant felt a sharp pain in his abdomen; that it was later ascertained that claimant had suffered a hernia, and that prior to that time claimant had been doing the same general type of work, but with different type of materials and had not theretofore lifted pipes of this type or weight. *Held:* The evidence supports the inference that the routine had been interrupted by the discharge of all other employees on the job, resulting in claimant's having to lift weights he had never lifted before, and that therefore claimant's injury resulted from the introduction of unusual conditions constituting an "accident" within the meaning of the Compensation Act, and not from the usual risks and hazards of his occupation. *Neely v. Statesville*, 212 N. C., 365, and *Slade v. Hosiery Mills*, 209 N. C., 823, cited and distinguished. Whether an injury must result from the application of some external force in order to constitute an "accident" within the meaning of the statute, *quære*.

4. Master and Servant § 40c—Evidence held sufficient to support finding that hernia occurred suddenly after the accident.

The evidence disclosed that claimant felt a severe pain in his abdomen while attempting to lift a heavy weight; that the day after the accident a physician examined him and found an enlargement of the left inguinal ring and a bulging of the abdominal wall, but no protrusion necessary to constitute a hernia, but that this physician prescribed the device usually used for hernia; that eighteen days thereafter another physician found hernia according to the strictest medical definition, but that the hernia sac would disappear on cessation of strain. *Held:* The evidence sustains the conclusion that claimant was suffering from a lesion in the vicinity of the left inguinal ring at the time of the examination on the day after the accident, and that at that time the process of protrusion down through the injured channel had set in, and while the time when the actual protrusion of the parts took place cannot be definitely known, the evidence discloses that the lesion occurred at the time of the accident and that actual protrusion occurred shortly thereafter, and justifies the conclusion of the Industrial Commission that the hernia appeared "suddenly" within the meaning of the statute.

APPEAL by defendants from *Olive, Special Judge*, at June Term, 1938, of WAKE. Affirmed.

The plaintiff was an employee of the defendant Engineering & Sales Company, at Wilmington, North Carolina, in the construction of a post office building, engaged in plumbing. He was serving as foreman, although his duties required him to do manual labor. On 13 October, 1936, plaintiff and an employee, Sykes, were working together and were the only ones on the job that day. Plaintiff had been told by a superior, Barnes, to lay off all labor, and for Sykes and plaintiff to "handle the job." In compliance with these orders, plaintiff and Sykes were lifting a four-inch steel pipe which weighed from 400 to 450 pounds, when plaintiff felt a severe pain in the lower abdomen. Plaintiff says that he could not tell whether he slipped or not because of the pain. He immediately went to Dr. McEachern, who, plaintiff says, pronounced it hernia, and bandaged the parts and told him he would have to wear a truss. After his visit to the doctor, plaintiff went immediately to his room and since then has not been able to follow his usual occupation or do any manual labor at all, nor to find any work of the kind that he had been equipped to do before his injury. Plaintiff further testified that he had never had any indication that he was afflicted with hernia before this time, and had no reason to believe that he had hernia; that he had been previously examined by Dr. Cone, who found no hernia, and got an insurance policy which is now in force.

Plaintiff came to Raleigh on 31 October and was examined by Dr. Paul Neal, who found pronounced hernia through the left inguinal ring.

Plaintiff testified that he had been doing the same general type of work but using a different type of material up to that time; that he had not lifted pipes of this type or weight before.

Plaintiff said he had pains in his right side as well as the left, but it was the left side that the doctor bandaged up. The first morning he went to see Dr. McEachern he was hurting so badly he could not tell which side and went to him for an examination. Plaintiff now wears a truss, which the company bought, and has been advised by physicians that he must not do heavy manual labor.

J. P. Sykes testified that he was on the same job with plaintiff. They had laid off some labor there on the job and that increased the work on those remaining there. On 13 October, 1936, witness and plaintiff were picking up a four-inch pipe, 20 or 22 feet in length, and laying it on a platform. Moore, the plaintiff, "grabbed his side" after they got it on the platform and said he had hurt himself. He went out to the doctor, and when witness saw him next he was bandaged up. The weight of the pipe was 400 or 450 pounds.

Dr. Kemp Neal stated he examined the plaintiff on 22 March, 1937, and found at that time he had an inguinal hernia on both sides, the right side being worse than the left. There was a definite bulging at the

external inguinal canal on both sides—came out considerably. Witness did not think plaintiff could do manual labor without danger of jeopardizing his life, in that he might get a strangulation. Witness thought an operation necessary; was of opinion that such hernia as he found existing in plaintiff could be caused by sudden strain or lifting too heavy weight, considering there was a predisposing weakness. When he examined plaintiff in March, witness found a hernia sac on each side but it slipped back; it would come out upon straining but go back into the abdominal cavity. There was a real hernia on the left but it would disappear upon cessation of straining. Witness stated that even with a truss plaintiff would not be able to do the same kind of work or lift weights alleged to have been lifted, because there is a lot of abdominal pressure brought to bear when a person lifts that much weight; that the pressure is tremendous.

On examination by Mr. Lassiter, the witness stated that the opening in the right ring was about a half inch in diameter, neck of the sac, and it came down about a half inch into the scrotum. The left one came just to the external ring and jumped back. From his examination there was no way of telling whether or not the enlargement or hernia on either side had been gradual. Tenderness and discoloration, if they existed, had disappeared when he saw the plaintiff. Witness stated that an enlargement of the inguinal ring has a definite meaning in the medical profession as distinguished from hernia.

Dr. McEachern testified that he, on 13 October, 1936, examined the plaintiff. Plaintiff gave a history of having done some heavy lifting on 12 October, the day previous, and said he developed a severe pain in the lower left part of his abdomen. Witness examined him for abdominal conditions and for hernia. Witness found an enlargement of the left inguinal ring; with a slight bulge in that area, but no actual protrusion. Witness stated that the medical profession generally recognizes a distinction between an enlargement of the inguinal ring and a hernia or rupture. Subsequently, the witness saw the plaintiff on 14, 15, 17, and 22 October, 1936. On two or three of those days the diagnosis and findings were exactly the same as the first day: Normal right and enlarged left. The examination on 13 October, 1936, demonstrated a bulging of his abdominal wall, most marked in the region of his left external inguinal ring. Patient was strapped tightly with a pad over the bulging area and was advised to do no heavy lifting.

Witness stated that the enlargement of an inguinal ring in layman's language is the beginning of a rupture; that in this case there was already noticeable to him, on examining the plaintiff, a noticeable bulge; that after treatment that bulge would have continued to grow if he continued to do heavy lifting or work which increased to the same extent

his intra-abdominal pressure. That he treated the plaintiff by putting on a spring truss and advised an operation. On redirect examination by Mr. Lassiter, witness stated it would have required a subsequent strain to have produced a real hernia on the left side. In witness' opinion, there was in this case a weakening of the external inguinal ring at that point, allowing a bulge, which could not be construed as a hernia; that a hernia, as usually defined in medicine, means an actual protrusion. Witness supposed it might be a question of degree; that it depended on whether you classify a bulge as a protrusion or not.

Dr. Paul Neal testified that he examined the plaintiff on 31 October and found hernia through the left inguinal ring. He further stated that he saw the plaintiff again in March and at that time he had a hernia on both sides. Witness found that the hernia would protrude or slip back according to the degree of abdominal pressure.

Certain stipulations were made by the parties, to which it is not necessary to refer.

Upon the foregoing evidence, the Hearing Commissioner of the Industrial Commission, found that the plaintiff had sustained an injury by accident, arising out of and in the course of his regular employment, resulting in a hernia on 12 October, 1936, while lifting one end of an iron pipe, which hernia appeared suddenly and immediately following the accident, and that the hernia did not exist prior to the accident, for which compensation is claimed, and, thereupon, made an award to the plaintiff; and upon a hearing by the Full Commission, the latter affirmed the findings and conclusions of the Hearing Commissioner, but modified the award because of additional evidence. From the order of the Industrial Commission, the defendants appealed to the Superior Court of Wake County, where the order of the Industrial Commission was affirmed, and from this judgment defendants appealed.

The defendants made three exceptions to the judgment in the Superior Court—the same which they had made to the award of the Commission: First, that the judgment was erroneous in that there was no evidence in the record that the plaintiff sustained "an injury by accident" or that there was "an injury by accident" resulting in hernia, as required by the Workmen's Compensation Act. Second, that the judgment is erroneous for the reason that there is no evidence in the record that there was any hernia or rupture which appeared "suddenly" as required by the statute. Third, that there was error in affirming the award of the Industrial Commission, for the reason that there is no evidence in the record that any hernia or rupture immediately followed any accident, as required by the statute.

Shepherd & Shepherd and Hackler & Allen for plaintiff, appellee.
Bailey & Lassiter for defendants, appellants.

SEAWELL, J. The defendants in this case insist that the facts are not in dispute and, therefore, the findings of the Industrial Commission are propositions of law not conclusive upon the appellate court. There are some stipulations in the record, but we find none covering the vital points of the controversy presented on the appeal. All facts relating to the controversy may be considered disputed until settled by proper authority. The Industrial Commission has been charged with that duty and has been given sole jurisdiction to find the facts upon the evidence, and there is no simpler way to express the limitations upon this Court than to repeat, in the familiar formula, that this Court is bound by the findings of fact made by the Industrial Commission, where there is any competent evidence to support them. *Nissen v. Winston-Salem,* 206 N. C., 888, 893; *Hildebrand v. Furniture Co.,* 212 N. C., 100. Where mixed questions of fact and law are presented to the Commission, and a conclusion stated involving both, it will be presumed that the question of fact was passed upon and found in agreement with the conclusion stated, and where there is evidence to support the finding, the statement will be reviewed only in its legal aspect.

Is there any evidence in the record that the plaintiff sustained the injury complained of as "an injury by accident," as required by the statute?

1. The authority of *Neely v. Statesville,* 212 N. C., 365, and *Slade v. Hosiery Mills,* 209 N. C., 823, in each of which compensation was denied, is invoked as controlling the case at bar. This could be so only to the extent that the cases were on all-fours, since the *Neely case, supra,* and the *Slade case, supra,* merely applied well known principles of law to the circumstances peculiar to those cases. And we think there is a substantial difference between the facts of the case at bar and those passed upon in the cited cases, which make the latter inapplicable here.

In the *Slade case, supra,* the Court said of plaintiff: "He was pursuing the general routine of his employment. Nothing unusual or unexpected took place at the mill. The weather was hot, but not excessively so. The case is free from 'injury by accident,' as this phrase is used in the Workmen's Compensation Act." A similar statement was made in the *Neely case, supra,* after careful analysis.

A close perusal of the evidence in these two cases fully bears out the conclusion at which the court arrived. While we do not attempt a point by point comparison between these cases and the case at bar, there are important differences which, in our opinion, distinguish them at critical points.

In the case at bar the evidence discloses that while the operation of handling and lifting pipes was done in the ordinary manner, and even that the plaintiff had lifted pipes in that way before, two things occurred

which, taken together, were out of the ordinary, and are sufficient, we think, to bring into the transaction the element of unusualness and unexpectedness from which accident might be inferred. In this particular case, by order of a superior, all other employees except plaintiff and Sykes were discharged, and these were left alone to do the heavy lifting. While Sykes had handled that type of pipe and perhaps piping of that weight before, the plaintiff had not. On the contrary, he was required to lift piping of a type and of a weight he had never before lifted, and it may be inferred from the testimony of Sykes that this was caused by the laying off of all other employees, which left them short-handed. From the evidence, his effort to lift the pipe was immediately followed by an injury.

In the case at bar, there is in the foregoing sufficient evidence of the interruption of the routine of work, and the introduction thereby of unusual conditions likely to result in unexpected consequences, and these were of such a character as to justify the Industrial Commission in finding that plaintiff's injury was the result of accident.

2. As a refinement of their objection to the finding of the Commission that the plaintiff suffered an injury by accident, the defendants further urge that whatever injury occurred to the plaintiff must not itself be considered as a part of the accident; that injury by accident, within the meaning of the statute, means injury by an accident the circumstances and conditions of which are complete outside of the body, and the injury must be brought about by the application of some external force.

The present case does not seem to require a discussion of this contention, since we think the evidence justified the Industrial Commission in finding that the injury sustained by the plaintiff was an injury by accident in which the fortuitous and unexpected happenings arose from the changed conditions in which the plaintiff was required to work. But the Court is not prepared to say that there are no conceivable conditions under which the breaking down of body tissues might not become a constituent element of accident under the present statute. We leave that question to be determined when directly presented upon the record.

3. Perhaps because the origin of a particular inguinal hernia is often baffling to the surgeon, and he is sometimes at a loss to know whether it is an old condition or one of recent origin, and perhaps also to give assurance that awards are made only in cases of undoubted merit, the statute requires that to be compensable the hernia must have appeared suddenly. The defendants contend that since the examination of Dr. McEachern on the day after the alleged injury showed only an enlarged left inguinal ring and no actual protrusion through it of any "organ or part," and since it was as much as 18 days later, upon the examination of Dr. Paul

Neal, a hernia was found, the hernia did not appear suddenly as required by the statute, but gradually developed during this period.

We note that Dr. McEachern testified that plaintiff came to him complaining of pain in the lower left quadrant of the abdomen after having lifted a heavy body. His examination showed an enlargement of the inguinal ring and a bulge of the abdominal wall, most marked in that region. He strapped the left side and prescribed the wearing of a truss —a device commonly used to prevent the protrusion of the intestine or other part through the ring. He further advised an operation. Notwithstanding the restraining bandages, 18 days later Dr. Paul Neal found hernia, according to the strictest medical definition—an actual protrusion through the left inguinal ring. Of course, it did not "suddenly" appear at this examination. It had been there some time before —how long we do not know. At a subsequent later examination by Dr. Kemp Neal, as testified by Dr. Kemp Neal, there was a real hernia, but the hernia sac would disappear on cessation of strain. Thus, it appears that a continuous protrusion is not necessary to constitute hernia, at least in its early stages; otherwise, the Industrial Commission might be baffled with the problem "now you have it and now you don't." It is to be noted, too, that Dr. McEachern did not attribute the bulge around the left inguinal ring to inflammation or swelling.

From this evidence it is difficult to avoid the conclusion that plaintiff was at the time he went to Dr. McEachern, the next day after the accident, suffering from a lesion in the vicinity of the left inguinal ring, and the process of protrusion down through the injured inguinal channel had already set in; and Dr. McEachern recognized the necessity of immediately applying the usual device used in cases of hernia. The exact time when the actual protrusion of the parts took place is not definitely known. It was some time in the short period between 13 October and 31 October. The real injury suffered by the plaintiff was the lesion or condition brought about, by reason of which the abdominal walls can no longer retain the viscus, and a statute evidently devised to secure plenary evidence of the existence of hernia should be satisfied with its appearance in the manner indicated in the testimony, and we think the Industrial Commission was justified upon this evidence in concluding that the hernia appeared "suddenly" within the meaning of the statute.

We find no error in the judgment of the court below, and it is

Affirmed.

H. K. SPAIN v. FLORENCE HINES.

(Filed 23 November, 1938.)

1. Mortgages § 31a—

C. S., 437 (3), barring an action to foreclose a mortgage or deed of trust after the lapse of ten years from the maturity of, or the last payment on, the indebtedness when the mortgagee or trustor remains in possession, applies only to actions to foreclose, and the statute must be pleaded.

2. Mortgages § 32e—

C. S., 2589, barring the exercise of the power of sale contained in a mortgage or deed of trust after the lapse of ten years from the maturity of, or last payment on, the indebtedness when the mortgagor or trustor remains in possession, need not be pleaded, but constitutes a direct prohibition of the exercise of the power.

3. Mortgages § 32a—

Foreclosure by exercise of the power of sale is in derogation of the common law and is regarded with jealousy by the courts.

4. Same—

The execution of deed to the successful bidder at the sale is an essential element of foreclosure by exercise of the power of sale, and the right to convey is included in the power of sale, and the exercise of the power is not completed until deed is executed.

5. Mortgages § 32e—

C. S., 2589, must be construed in the light of its purpose to provide as complete a bar to the exercise of the power of sale as is provided by C. S., 437, against foreclosure by action, and the statute must be construed strictly against the exercise of the power and all doubt resolved in favor of the trustor.

6. Same—Each essential step in the exercise of the power of sale must be completed before the bar of the statute.

Since the execution of deed to the successful bidder is an essential step in foreclosure by exercise of the power of sale, the statute, C. S., 2589, bars the execution of the deed to the successful bidder or to his assignee after the expiration of the statutory period when the mortgagor or trustor remains in possession, notwithstanding that the auction sale may have been held prior to the bar of the statute.

7. Mortgages § 42—

Deed of the trustee, in which the last and highest bidder at the sale joins to convey his interest, even if construed as an assignment of the bid, conveys no title when executed after the bar of the ten-year statute, C. S., 2589.

8. Contracts § 8—

Pertinent public statutes in force at the time of the execution of a contract are controlling.

SPAIN *v.* HINES.

APPEAL by defendant from *Grady, J.*, at Spring Term, 1938, of PAMLICO. Reversed.

The plaintiff brought an action in ejectment to recover of the defendant a tract of land of which he alleges he was owner in fee, and of which defendant was in possession.

The plaintiff claimed to derive title through foreclosure of a deed of trust executed by defendant. On the trial he introduced a deed from Z. V. Rawls to Caesar H. Hines and Florence Hines—the latter this defendant—conveying the premises in fee; the deed of trust above mentioned, dated 21 January, 1921, from Caesar Hines and wife, Florence, to W. J. Swan, trustee, to secure a note made to Mrs. H. J. Kennedy, due 16 November, 1921; a record from the Book of Sales of the office of the clerk of the Superior Court showing a foreclosure sale under the deed of trust, made by Swan, trustee, 2 September, 1930, at which H. G. Swan, brother of the trustee, was last and highest bidder at the purchase price of $1,300. Plaintiff then introduced a deed of W. J. Swan, trustee, and H. G. Swan to Gurney P. Hood, Commissioner of Banks, dated 30 April, 1936. This deed purports to be based on the foreclosure sale under the power of sale contained in the original trust deed, and H. G. Swan joins in the deed for the "purpose of conveying any interest he got in the land by virtue of his said bid." (We are using the language of the record, as the deed itself is not given as an exhibit.) There followed a deed of Gurney P. Hood, Commissioner of Banks, to J. W. Cowell, and a deed of Cowell and wife to plaintiff.

W. J. Swan testified for plaintiff that he procured his brother to bid at the sale; and as to the purchase price said: "I never took a note from my brother, Hugh Swan, for the $1,300 purchase price item. I reported it as a note, and Florence Hines refused to vacate the property, and no note was given, but put the note under my inventory never paid. I intended to collect it."

There was evidence relating to the payment or nonpayment of the purchase price by H. G. Swan, and evidence relating to the *bona fides* of the transactions involved in the alleged foreclosure, which are not relevant to this opinion.

The evidence showed that defendant had been in uninterrupted possession of the premises down to the time of trial.

J. C. Dees and R. E. Whitehurst for plaintiff, appellee.

Ward & Ward for defendant, appellant.

SEAWELL, J. It is not necessary for us to examine into the form and legality of the attempted conveyance by W. J. Swan, trustee, and H. G.

Swan, to Gurney P. Hood. If the transaction could be considered formally sufficient, the grantors had no power at that late date to make the conveyance.

No deed to H. G. Swan, the successful bidder at the foreclosure sale, was ever made; and while we do not question the right of a successful bidder to transfer his bid with proper observance of the formalities required in conveying an interest in land, the fact remains that no conveyance was made by the trustee until 30 April, 1936, nearly fifteen years after the due date of the note secured by the deed of trust, and, of course, more than ten years after the said note was subject to the bar of the statute of limitations under C. S., 437.

Consolidated Statutes, 437—the ten-year statute of limitation—applies to actions for foreclosure of a mortgage or deed of trust and not to foreclosure under a power of sale. *Miller v. Coxe,* 133 N. C., 578, 582, 45 S. E., 940; *Cone v. Hyatt,* 132 N. C., 810, 44 S. E., 678.

"437. Ten Years. . . . 3. For the foreclosure of a mortgage, or deed in trust, for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same."

To take benefit under such a statute, it must be pleaded. This is always possible, since the institution of the action provides the forum. There is no such forum provided in which to stop the exercise of the power of sale on a stale claim, and perhaps it was for this reason that Consolidated Statutes, section 2589, was enacted. This reads as follows:

"2589. Real property; power of sale barred when foreclosure barred. —The power of sale of real property contained in any mortgage or deed of trust for the benefit of creditors shall become inoperative, and no person shall execute any such power, when an action to foreclose such mortgage or deed of trust for the benefit of creditors would be barred by the statute of limitations."

This means, of course, that the power referred to in the statute must be exercised within the ten-year period following the maturity of the note, or from the last payment thereon. The evidence here shows no payment or other transaction which would take the note out of the bar of the statute of limitations, counting from its maturity.

Section 2589 is not a mere statute of limitation, and need not be pleaded by a party whose rights may be affected. It simply destroys, by direct prohibition, the authority of any power of sale made in the mortgage contract or conveyance. *Jenkins v. Griffin,* 175 N. C., 184, 95 S. E., 166; *Meadows Co. v. Bryan,* 195 N. C., 398, 142 S. E., 487; *Serls v. Gibbs,* 205 N. C., 246, 171 S. E., 56; *Piano Co. v. Loven,* 207 N. C., 96, 101, 176 S. E., 290.

A comparison of the dates above listed shows that the land was sold at public auction under the power of sale on 2 September, 1930, which was within the ten-year period during which the powers created in the trust deed might be exercised, and bid in for Hugh Swan.

The trustee's deed, as stated, was not executed until about fifteen years after the maturity of the note.

It is contended by the plaintiff that the auction sale which took place inside of the ten-year period was a sufficient exercise of the power of sale to take the case out of the operation of C. S., 2589; or, if not so, Hugh Swan having become the successful bidder, with the right to enforce specific performance, the statute is thereby indefinitely suspended in deference to that right. We cannot accept either proposition as law.

We think we must construe C. S., 2589, in the light of its purpose, which appears to be to give as complete relief against foreclosure by power of sale as has been given against foreclosure by action, in the statute to which it refers—C. S., 437. A further principle of construction which we think applies grows out of the nature of foreclosure under a power of sale and the jealousy with which it is regarded by the courts. It is said to be in derogation of the common law and the statutes relating to it are the subject of strict construction. Wiltsie on Mortgage Foreclosure, 4th Edition, section 833. It is not favored in the law, and its exercise by the mortgagee "will be watched with jealousy." 41 C. J., section 1342, page 924; *Alexander v. Boyd,* 204 N. C., 103, 167 S. E., 462; *Sanderlin v. Cross,* 172 N. C., 234, 90 S. E., 213; *Eubanks v. Becton,* 158 N. C., 230, 75 S. E., 1009; *Fleming v. Barden,* 127 N. C., 214, 37 S. E., 219. It is clear, we think, that where reasonable doubt exists as to the interpretation of the statute in relation to the exercise of such a power, the statute should be strictly construed against such exercise of power and the doubt resolved in favor of the holder of the equitable title.

1. Foreclosure by action at law and foreclosure under power of sale each consist of a series of procedural acts linking into each other and leading to a like result. In foreclosure through the court, the statute definitely picks out the step in the procedure which will bar the running of the statute—the issuing of a summons or commencement of the action. Since the statute with which we are dealing here is, as we have seen, not a statute of limitations which might lend itself conveniently to such particularity, but one which operates on the power generally, it must follow that no act properly included within that power may be performed after the statute has become effective in withdrawing or prohibiting the exercise of the power.

The purpose of foreclosure either by action at law or under a power of sale is to divest the grantor in the instrument, the creator of the

power of sale, of all title to the property conveyed, and transfer the title, both legal and equitable, to the purchaser, in order that the property given in security may be converted into a fund to be applied to the debt. Conveyance is as necessary to complete foreclosure under a power of sale as it is to complete foreclosure by action at law, and all the separate grants of power looking to foreclosure in the power of sale must be included under that label. Such foreclosure is not completed by the auction sale, and the receipt of a successful bid, since this could at most merely give rise to an executory contract of sale, nor is the power of sale then fully exercised.

Interpreting a Massachusetts statute which provided that the right of redemption should continue "until the land has been sold pursuant to the power of sale contained in the mortgage deed," it is said in *Beal v. Attleboro Savings Bank,* 142 N. E., 789, 790 (Mass.): "The words 'sold pursuant to a power of sale' have been construed to mean an executed sale as distinguished from a mere contract of sale. Referring to these words, it was said in *Way v. Mullett,* 143 Mass., 49, 53, 8 N. E., 881, 883, this clause was 'evidently enacted for the purpose of fixing the time when a foreclosure is complete, under the execution of a power of sale in a mortgage.'" Whereupon, the Court concluded: "The auction sale was in effect a mere contract of sale. The sale was not executed until the deed was delivered, when the title passed to the purchaser." Citing *Fall River Savings Bank v. Sullivan,* 131 Mass., 537; *Dennett v. Perkins,* 214 Mass., 449, 101 N. E., 994. We think this is a clear expression of the law in this State.

The designation "power of sale" is aptly applied to that method of foreclosure, since conveyance is essential to its full exercise, and, of course, to foreclosure. So, it has been held that even though the power of sale does not mention conveyance, such conveyance is incident to its exercise. "The power to exercise a conveyance under a sale by virtue of a power of sale will be inferred as a necessary incident, though not expressed in the power of sale." Jones on Mortgages, 8th Edition, section 2431; *Hyman v. Devereux,* 63 N. C., 624. The word "sale" or "sell," as including the power to convey, has been used without question in wills and deeds containing a power almost immemorially—certainly long before this device made its advent in the field of mortgage foreclosure. *Powell v. Wood,* 149 N. C., 235, 239, 62 S. E., 1071. The power of sale referred to in the statute, and the power upon which the statute operates, is not, therefore, merely the power to effect the executory contract or sale by advertising and "selling" at public auction, but the power to transfer the property to the purchaser by observance of the legal steps provided by law, and the prohibition of the statute is not deferred by its partial exercise.

2. For these reasons, we do not think that the position of the plaintiff is made any better if we concede that Hugh Swan, through whom he derives his title, was the successful bidder at the auction sale and at that time in position to demand specific performance. The contract between the parties can neither repeal nor suspend the statute. Pertinent public statutes affecting them must be read into the contracts to which they apply or, at least, such contracts must be understood to have been made in contemplation of the law. *Hood, Comr., v. Simpson,* 206 N. C., 748, 757, 175 S. E., 193; *Alexander v. Boyd, supra; Bateman v. Sterrett,* 201 N. C., 59, 61, 62, 159 S. E., 14.

We conclude that the prohibition in the statute is effective against any attempted conveyance by the mortgagee or trustee after the lapse of ten years from the maturity of the last payment upon the note, notwithstanding that the auction sale was had within this period.

The deed of W. J. Swan to Hood, Commissioner, having been made after the expiration of such period, is therefore void, and plaintiff derived no title therefrom by *mesne* conveyance. Defendant's motion for nonsuit should have been allowed.

The judgment is

Reversed.

GEORGE MURRAY v. NEBEL KNITTING COMPANY AND MARYLAND CASUALTY COMPANY.

(Filed 23 November, 1938.)

Master and Servant § 42—Commission has jurisdiction to review award and alter compensation only upon a "change in condition."

The Industrial Commission is given authority to review an award and end, diminish or increase the compensation previously awarded only when there has been a "change in condition" of the claimant, sec. 46, ch. 120, Public Laws of 1929; Michie's Code, 8081 (bbb), and when an award has been entered for total disability for a certain length of time, and for partial disability thereafter for a total of three hundred weeks, sec. 30, ch. 120, Public Laws of 1929, Michie's Code, 8081 (ll), the Industrial Commission may not, upon a review of the award on claimant's application prior to the payment of the last installment of the award, increase the award of compensation to that allowed for total disability, sec. 29, ch. 120, Public Laws of 1929; Michie's Code, 8081 (kk), upon its finding that claimant was unable to earn any appreciable sum by his labor, when the Commission also finds that at the time of the review of the award claimant's condition was unchanged and that he was at that time only 50 per cent disabled.

APPEAL by claimant from *Hamilton, J.*, at October Term, 1938, of MECKLENBURG. Affirmed.

Wilson H. Price, Sr., for claimant, appellant.
J. F. Flowers and W. C. Ginter for defendants, appellees.

SCHENCK, J. This is a proceeding under the North Carolina Workmen's Compensation Act, chapter 120, Public Laws 1929, and amendments thereto, North Carolina Code of 1935 (Michie), sections 8081 (h), *et seq.* The claimant, George Murray, was injured on 10 July, 1931, by an accident (a fall) arising out of and in the course of his employment by the Nebel Knitting Company, and suffered severe contusions and sprains of the right thigh and sprain of muscles of the lower back. The Maryland Casualty Company is the insurance carrier.

The claimant after proper hearings was awarded compensation by the Commission for total disability for 88 weeks, and for 50 per cent partial disability for 212 weeks, making a total period of 300 weeks. A few weeks before the expiration of the 212 weeks, namely, on 22 March, 1937, the claimant filed a petition to reopen the case and requested the Commission to modify its former awards, and to find that the claimant had been totally disabled since he was first injured and to make an award allowing him full compensation for total disability for an additional 100 weeks. After hearings on 18 May, 1937, and on 25 February, 1938, the hearing Commissioner found the following facts:

"1. The parties to this cause are bound by the provisions of the Workmen's Compensation Act. The Maryland Casualty Company is the insurance carrier.

"2. The agreement entered into by the parties to this cause and referred to in the history of this case, on 25 August, 1931, speaks the truth as to the occurrence of the accident, the average weekly wage, etc., and compensation under this agreement either for total or permanent partial disability has been paid in the amount of about $2,100 and medical and hospital bills in the amount of about $185.00.

"3. The plaintiff has been paid compensation for total disability for a period of 88 weeks. He has been paid compensation for a period of 212 weeks for partial disability, making a total of 300 weeks. Compensation for partial disability for some three to seven weeks, the amount unpaid when the claimant requested his last hearing on 22 March, 1937, has been paid following the hearing at the request of the Commissioner, and without prejudice to the rights of the plaintiff since the defendants admitted owing him the few weeks' balance and since the plaintiff needed the money. (Let's bear in mind that at the time of the last request for

reopening in this case the plaintiff had due him just a few weeks compensation under former awards.)

"4. From the physical point of view based on testimony and reports of doctors who have examined and treated this plaintiff, there has been no change in his physical condition. He is at this time 50 per cent disabled and has been 50 per cent disabled or about 50 per cent disabled during the past several years.

"The plaintiff has made an effort on two occasions to work during the past four or five years. He was unable to do any heavy work and barely able to do the work undertaken. (He tried to cook for a short while and he picked up trash and did yard work for a Charlotte lawyer on one occasion.)

"5. The plaintiff has not been able since he was injured to carry on continuously a substantially gainful occupation. He has not been able to compete in the labor market with men physically sound. He has been handicapped at least to the extent of 50 per cent on account of his physical disability.

"6. The plaintiff has earned only $6.00 at work during the past four or five years.

"7. The plaintiff has not been as industrious in seeking work as was Mr. Smith in *Smith v. Swift & Co.*, 212 N. C., 608.

"8. There is evidence in the record that the plaintiff has been totally disabled except for the few days' work he did immediately following the accident, since he was injured in July, 1931. The greater weight of the evidence, however, from the medical experts persuades us to find that the plaintiff has been no more than 50 per cent disabled since 1 May, 1931."

Upon the foregoing findings, the hearing Commissioner concluded as a matter of law: "Taking into consideration *Smith v. Swift & Co.*, 212 N. C., 608, the plaintiff is again totally disabled in our opinion and we believe sufficient findings have been made to warrant such a conclusion. He hasn't earned any money. He can't compete in the labor market. He has been paid 300 weeks. We believe he is entitled to be paid compensation for total disability for an additional 100 weeks, making the total 400 weeks provided in such cases under the provisions of our act," and entered an award directing the defendants "to pay the plaintiff compensation for total disability beginning when the last payments were made for partial disability and to continue to pay for total disability not to exceed 400 weeks, less the 300 weeks which has already been paid."

Upon appeal by the defendants to it, the Full Commission adopted the findings of fact and conclusions of law of the hearing Commissioner and

affirmed the award made by him. From this action of the Full Commission the defendants appealed to the Superior Court.

Upon the appeal to it, the Superior Court adopted the findings of fact but reversed the conclusions of law of the Full Commission and entered judgment that "the award of the Industrial Commission in this case be vacated and set aside, and an entry or order by the Commission be made in conformity with this judgment," to which judgment the claimant reserved exception and appealed to the Supreme Court.

The question presented by this appeal is whether the case is governed by sec. 29 of ch. 120, Public Laws 1929 (N. C. Code, 1935 [Michie], sec. 8081 [kk]), or by sec. 30 of ch. 120, Public Laws 1929 (N. C. Code, 1935 [Michie], sec. 8081 [ll]).

The former section (sec. 29) reads: "Where the incapacity for work resulting from the injury is *total,* the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total disability, a weekly compensation equal to 60 per centum of his average weekly wages, but not more than eighteen dollars, nor less than seven dollars, a week; and in no case shall the period covered by such compensation be greater than *four hundred weeks,* nor shall the total amount of all compensation exceed six thousand dollars . . ."

The latter section (sec. 30) reads: "Except as otherwise provided in the next section hereafter, where the incapacity for work resulting from the injury is *partial,* the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to 60 per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than eighteen dollars a week, and in no case shall the period covered by such compensation be greater than *three hundred weeks* from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability."

It is apparent from the findings of fact that the claimant was being paid under the provisions of sec. 30, ch. 120, Public Laws 1929, for partial disability, on 22 March, 1937, when he filed his last petition to reopen the case and to increase the compensation previously awarded upon the basis of partial disability to compensation upon the basis of total disability for an additional 100 weeks. The only method by which such a change in the award could be made is that provided by sec. 46, ch. 120, Public Laws 1929 (N. C. Code, 1935 [Michie], sec. 8081 [bbb]), which reads: "Upon its own motion or upon the application of any party in interest on the grounds of a *change in condition,* the Industrial Commission may review any award, and on such review make an

award ending, diminishing, or *increasing* the compensation previously awarded, subject to the maximum or minimum provided in this article, and shall immediately send to the parties a copy of the award. . . ."

It is clear from the statute that before the Commission may review any award, "and on such review make an award . . . increasing the compensation previously awarded," there must exist "a change in condition." From the findings of fact adopted by the Commission, no "change in condition" of the claimant appears, but, on the contrary, it is found that "there has been no change in his physical condition. He is at this time 50 per cent disabled and has been 50 per cent disabled or about 50 per cent disabled during the past several years," and "the greater weight of the evidence, however, from the medical experts persuades us to find that the plaintiff has been no more than 50 per cent disabled since 1 May, 1931" (evidently meant to be 1933).

We therefore hold that his Honor was correct in holding as a matter of law "that the facts found do not establish such 'a change of condition' of the claimant as to justify an award of compensation 'for total disability for an additional one hundred weeks' or for any other time additional, but that the claimant already has been fairly compensated under the provisions of the Workmen's Compensation Act applicable to 'total' and 'partial' incapacity."

There is no conflict in our holding in this case and in the case of *Smith v. Swift & Co.*, 212 N. C., 608. In the *Smith case, supra,* it appeared from the facts found that there had been a change in the condition of Smith in his ability to earn wages since the last award, and therefore the defendants were entitled under the apposite statutes to have the award previously made diminished. In the instant case, while the claimant has earned only $6.00 since his injury, it appears from the findings of fact that there has been no change in his condition nor has he ever been more than 50 per cent disabled since 1 May, 1933.

The judgment of the Superior Court is

Affirmed.

J. P. JENKINS v. CARRIE STRICKLAND AND VULAH MAY.

(Filed 23 November, 1938.)

1. Partition § 3: Betterments § 7—

Upon general principles of equity, recognized even prior to the enactment of C. S., 699-710, a tenant in common making improvements is entitled to have allotted to her in an actual partition the part of the property improved, and its value assessed as if no improvements had been made.

2. Mortgages § 15: Betterments § 5—

Improvements placed on the land by a mortgagor become additional security for the debt, and the mortgage covers all improvements to which the mortgagor would have been entitled had the mortgage not been executed, but not those to which the mortgagor would not have been entitled.

3. Same—Where tenant making improvements owns encumbered and unencumbered interests she is entitled to improvements as to unencumbered interest.

S. owned an undivided one-sixth interest in the *locus in quo* by inheritance as tenant in common with the five other heirs. Three of the other tenants conveyed their interests to her husband, and a fourth conveyed his interest to her and her husband as tenants by the entirety. S. and her husband thereafter mortgaged the two-thirds undivided interest purchased from the other heirs, leaving S.'s share by inheritance and the share of another heir unencumbered. After the death of her husband, S. made improvements on the land. The mortgage was thereafter foreclosed and the property subject thereto purchased at the sale by plaintiff. *Held:* At the time S. made the improvements she owned the share which descended to her unencumbered, and another share by survivorship subject to the mortgage, with dower interest in the interests held by her husband individually, and upon partition of the property she is entitled to have her one-sixth interest by inheritance allotted to her with the improvements and assessed as though the improvements had not been made as against plaintiff, purchaser at the sale, and the remaining heir, but subject, however, to a charge of one-sixth of the value of the improvements in favor of plaintiff, since at the time of making the improvements plaintiff was mortgagor with her husband as to the one-sixth interest held by them by the entirety.

4. Costs § 3—

Where it is determined on appeal to the Supreme Court that claimant is entitled to improvements claimed in partition proceedings, claimant is not to be taxed with the costs of trial in the Superior Court involving her claim. C. S., 1225.

APPEAL by defendant Carrie Strickland from *Thompson, J.*, at September Term, 1938, of FRANKLIN.

Special proceeding for partition of land.

The facts are substantially these: Upon the death of Shemuel McGhee, seized and possessed of the land in question situate in Franklin County, North Carolina, title thereto descended to his six children: C. C. McGhee, Ira McGhee, Fonnie McGhee, H. F. McGhee, and the defendants, Carrie Strickland and Vulah May. C. C. McGhee, Ira McGhee and Fonnie McGhee conveyed their three-sixths undivided interests in said land to H. L. Strickland, the husband of the defendant Carrie Strickland, and H. F. McGhee conveyed his one-sixth undivided interest to H. L. Strickland and wife, Carrie Strickland, as tenants by entirety. The defendants each now own the said interest each inherited as above stated.

On 8 February, 1928, H. L. Strickland and wife, Carrie Strickland, for the purpose of securing a note due to the Citizens and Commercial Bank of Franklinton, North Carolina, executed and delivered a deed of trust to W. L. Lumpkin, trustee, conveying two-thirds undivided interest in the land in question, which two-thirds interest was specifically described as being the shares purchased by H. L. Strickland and wife, Carrie Strickland, from C. C. McGhee, Ira McGhee, Fonnie McGhee and H. F. McGhee, four children of the late Shemuel McGhee. H. L. Strickland died 13 February, 1932, leaving surviving his widow, the defendant, Carrie Strickland, and children as his heirs at law. Thereafter, on 7 May, 1937, at foreclosure sale by W. L. Lumpkin, trustee, under said deed of trust, the plaintiff became the purchaser, and the trustee executed deed to him conveying the said two-thirds undivided interest in said land.

Plaintiff petitions for partition, and that defendant Carrie Strickland account to him for rents for year 1937. The defendant Carrie Strickland, who has been in possession of the land since the death of her husband, avers that she has made valuable improvements upon the land and prays that, upon partition, same should be taken into consideration. Plaintiff denies her right thereto.

The cause was transferred to the civil issue docket for trial, and was tried upon these issues, which were answered by the jury as follows:

"1. Did Mrs. Strickland, the defendant, make any permanent improvements on the land in question subsequent to the death of her husband, H. L. Strickland, on 13 February, 1932, and prior to the mortgage sale to plaintiff on 7 May, 1937? Answer: 'Yes.'

"2. How much, if any, was the value of the property substantially enhanced by such improvements? Answer: '$675.00.'

"3. What is the annual rental value of said property? Answer: '$100.00.'"

Upon verdict, defendant Carrie Strickland tendered judgment adjudging in part that, upon actual partition, she be allotted land of the value of $675, and one-sixth in value of the remaining lands, and that lien thereon be declared in favor of plaintiff in the sum of $110.94 for his share of rents and profits for years 1937 and 1938. The court declined to sign the same. Exception.

Thereupon the said defendant tendered judgment declaring in part that she be allotted land equal to one-sixth in value of the whole tract, and that the part so allotted to her include that part of the land which she has improved, assessing its value as if no improvements had been made. The court declined to sign same. Exception.

The court signed judgment remanding the cause to the clerk of the Superior Court of Franklin County and directing that the said clerk

appoint three commissioners to divide the land among the tenants in common, allotting to plaintiff four-sixths in value as improved and to defendants Carrie Strickland and Vulah May, each, one-sixth in value, and that J. P. Jenkins recover of the defendant Carrie Strickland the sum of $110.94 for rents and profits, and of the defendants the costs incurred in the trial of the cause in the Superior Court. Defendant Carrie Strickland appeals therefrom to the Supreme Court, and assigns error.

White & Malone for plaintiff, appellee.

Edward F. Griffin and Yarborough & Yarborough for defendant, appellant.

WINBORNE, J. (1) Is defendant Carrie Strickland, upon the facts presented in the record on this appeal, entitled to have her share so allotted as to include the part on which she has made improvements, valuing it as if no improvements had been made? (2) Is there error in taxing defendants with cost of trial in Superior Court? These questions are determinative of this appeal, and must be answered in the affirmative.

(1) If one tenant in common makes improvements upon the common property he will be entitled, upon actual partition, to have that part of the property which he has improved allotted and assigned to him, and its value assessed as if no improvements had been made, if this can be done without prejudice to the interests of his cotenants. This equitable principle has been applied and is well established in the decisions of our Court. *Pope v. Whitehead,* 68 N. C., 191; *Collett v. Henderson,* 80 N. C., 337; *Simmons v. Foscue,* 81 N. C., 86; *Cox v. Ward,* 107 N. C., 507, 12 S. E., 379; *Pipkin v. Pipkin,* 120 N. C., 161, 26 S. E., 697; *Holt v. Couch,* 125 N. C., 456, 34 S. E., 703; *Daniel v. Dixon,* 163 N. C., 137, 79 S. E., 425; *Fisher v. Toxaway,* 171 N. C., 547, 88 S. E., 887; *Layton v. Byrd,* 198 N. C., 466, 152 S. E., 161; *Daniel v. Power Co.,* 204 N. C., 274, 168 S. E., 217.

This right was recognized before the enactment of the statute relating to betterments (Public Laws 1871-72, ch. 147; C. S., 699-710), and is not based upon it, but rests upon general principles of equity. *Jones v. Carland,* 55 N. C., 502; *Pope v. Whitehead, supra; Holt v. Couch, supra; Layton v. Byrd, supra.*

While it is conceded that this principle is too well imbedded in our law to admit of debate, appellee contends that it is not here applicable for that at the time the improvements were made by the defendant Carrie Strickland the relationship of mortgagor and mortgagee existed between her and the trustee under whom he claims, and that the right

for claim for betterments is not conceded to mortgagors as against mortgagees. He relies upon the cases of *Wharton v. Moore,* 84 N. C., 479; *Belvin v. Paper Co.,* 123 N. C., 138, 31 S. E., 655; *Layton v. Byrd, supra.*

These cases enunciate the well settled principle that if a mortgagor, or anyone standing in his place, enhances the value of the mortgaged premises by improvements, they become additional security for the debt, and the mortgagor can only claim the surplus, if any, upon the mortgage sale being made, after satisfying the debt. *Brown v. Land Bank,* 213 N. C., 594, 197 S. E., 140.

In *Belvin v. Paper Co., supra,* it is said: "The general rule is that whatever improvements a mortgagor puts upon the mortgaged property inures to the benefit of the mortgagee, or, more clearly speaking, is additional security for the debt. But *this is upon the idea that the mortgagor is at least the equitable owner of the fee in the land;* that he is entitled to the legal as well as equitable title upon the payment of the debt, and that such improvements are *his* and are made for *his* benefit, and that they increase the value of *his* property." (Italics ours.)

The first headnote epitomizes the holding of the Court in the *Belvin case, supra,* in this language: "A mortgagee is entitled to everything conveyed that belonged to the mortgagor at the time, and to any improvements placed upon the property since that time, that the mortgagor would be entitled to if the property had not been mortgaged; but the mortgagee is not entitled to improvements that the mortgagor would not have been entitled to if the property had not been mortgaged."

Applying this principle, what then would have been the right of Carrie Strickland, upon partition proceeding, with respect to the improvements placed by her on the common property, if there were no lien of deed of trust?

In considering this question it is important to note the status of the title after the death of H. L. Strickland when the improvements were made. Upon his death the three-sixths undivided interest which he owned individually descended to his children, *Morton v. Lumber Co.,* 178 N. C., 163, 100 S. E., 322, subject to the right of dower of his widow, Carrie Strickland—all subject to the lien of the deed of trust; and the one-sixth undivided interest held by him and his wife, Carrie Strickland, by entirety, vested in her by survivorship, subject also to the lien of the deed of trust. At that time Carrie Strickland and Vulah May each owned, unencumbered, the one-sixth inherited by them from their father.

If, then, there were no deed of trust, Carrie Strickland, under the well settled equitable principle, would have the right as against the children

of H. L. Strickland and as against Vulah May, her co-owners, to have allotted to her two-sixths of the land, including the part improved, valued as if no improvements had been made. *Pope v. Whitehead, supra,* and other cases above cited. But, there being a deed of trust which affected the one-sixth she acquired by survivorship, and of which she was the equitable owner of the fee, she loses her right to improvements to the extent that the improvements made increased its value. *Wharton v. Moore, supra; Belvin v. Paper Co., supra; Layton v. Byrd, supra.* Yet she is entitled to the benefit of improvements in so far as the other three-sixths covered by the deed of trust and the one-sixth owned by her codefendant are concerned. The improvements increased the value of the whole property. The jury having assessed the value of the improvements at $675, the improved part of the land which defendant Carrie Strickland is entitled to have assigned to her is rightly chargeable in favor of the plaintiff with one-sixth of that amount.

Plaintiff insists, however, that the decision in *Layton v. Byrd, supra,* is conclusive of the case in hand and bars any right of defendant Carrie Strickland to compensation for the improvements. An attentive examination of the facts in that case, however, reveals marked difference from the facts here involved. Byrd, after taking title from R. L. Godwin, H. Fleishman and B. Fleishman, tenants in common, when there was an outstanding deed of trust duly registered against the Godwin interest, made improvements upon the land. Layton bought at the sale under foreclosure of this deed of trust. In partition proceeding Byrd demanded allotment of his interest to include the improved portion valued in its unimproved condition. *Adams, J.,* speaking for the Court, said: "Byrd made the improvements on the land after he had received their deed and had succeeded to their rights. At this time he was the sole owner of the land, subject to the lien of the mortgage. There was no co-owner against whom he could assert the equity on which he now relies. He and the mortgagee were not tenants in common." In the instant case, at the time the improvements were made there were co-owners against whom Carrie Strickland could have asserted her equitable right.

(2) The right asserted by Carrie Strickland for the value of improvements being here sustained, she is not to be taxed with the costs of the trial in Superior Court involving her claim. C. S., 1225.

The judgment below will be modified in accordance with this opinion.

Modified and affirmed.

STATE v. VICTOR KELLER, JESS KELLER, LIZZIE KELLER, JANIE CLINE, CHARLIE COFFEY, AND FATE SUMMERLIN.

(Filed 23 November, 1938.)

1. **Statutes § 5a—**

If the meaning of a statute is in doubt, reference may be had to the title and context as legislative declarations of the purpose of the act.

2. **Robbery § 1b—Defendants threatening use of firearms must have possession of weapons in order to be guilty of "robbery with firearms."**

The purpose and intent of ch. 187, Public Laws of 1929 (C. S., 4267 [a]), is to provide for more severe punishment for the commission of robbery with firearms, and other specified weapons, than is prescribed for common law robbery, and construing the title and context of the statute together to ascertain the legislative intent, *it is held* that possession of firearms or other of the specified weapons is necessary to constitute the offense of "robbery with firearms" under the statute, and it is reversible error for the court to refuse to so instruct the jury in accordance with defendants' prayers for special instructions upon evidence tending to show that defendants sought to make their victim believe they had firearms, and threatened to use same, but that they actually carried no weapon.

APPEAL by defendants Victor Keller, Jess Keller, Lizzie Keller, Janie Cline, and Charlie Coffey, from *Olive, J.*, at August Term, 1938, of CALDWELL.

Criminal action on indictment charging defendants with robbery with firearms of one Montreal Beach. Public Laws 1929, ch. 187; C. S., 4267 (a).

The defendants pleaded not guilty.

The prosecuting witness, Montreal Beach, 80 years of age, testified that on 30 January, 1938, the defendant Victor Keller and one Roy Andrews came into his house late at night; that Keller took him by one arm and said that he had a pistol and would kill him unless he turned over his money. Beach further testified: "I was standing by the little table drawer when they took the $20. . . . He put something against the side of my head, which he said was a pistol, and knocked me two or three times with his fist. . . . I didn't see a pistol. He hit my head and said it was a pistol."

The State's witness, Roy Andrews, who with his wife pleaded guilty, turned State's evidence and implicated other defendants in the alleged robbery, testified: That Victor Keller knocked Beach far enough to open the door, and argued with him but did not have any gun. "He just stuck his finger up to his head."

Verdict: Guilty as to Victor Keller, Jess Keller, Lizzie Keller, Janie Cline and Charlie Coffey. Not guilty as to Summerlin.

Judgment: Imprisonment in the State's Prison at Raleigh at hard labor for terms as follows: As to Victor Keller, of not less than seven nor more than nine years; as to Jess Keller and Charlie Coffey, each, of not less than six nor more than eight years; and as to Lizzie Keller and Janie Cline, each, of not less than five nor more than seven years.

These defendants appeal to Supreme Court, and assign error.

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

Hunter Martin for defendant Victor Keller, appellant.

Hal B. Adams for other defendants, appellants.

WINBORNE, J. Defendants' exceptive assignment is well taken to the refusal of the court below to give in form or in substance this request for instruction: "Before the defendants, or either of them, be found guilty of larceny by the threat of using firearms or other weapons, it would be necessary for it to be found that not only was there a threat of the use of a pistol or weapon of some sort but that actually such pistol or other weapon was at the time in the possession of the defendants or one of them at the time of the threat being made, or at the time the alleged assault and larceny was being consummated."

Defendants are indicted under chapter 187 of Public Laws of 1929, entitled "An act making robbery with firearms or other dangerous weapons, implements or means whereby the life of a person is endangered or threatened, a felony." Sec. 1, in part, reads: "Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another, . . . or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a felony . . ."

Under proper construction of this statute, can a defendant be found guilty thereunder without the presence of "firearms, or other dangerous weapons, implements or means whereby the life of a person is endangered or threatened"? The title and context of the act lead us to say "No."

If the meaning of the statute be in doubt, reference may be had to the title and context as legislative declarations of the purpose of the act. *S. v. Woolard,* 119 N. C., 779, 25 S. E., 719; *Machinery Co. v. Sellers,* 197 N. C., 30, 147 S. E., 674; *Dyer v. Dyer,* 212 N. C., 620, 194 S. E., 278.

In *S. v. Woolard, supra, Clark, J.,* said: ". . . the title is part of the bill when introduced, being placed there by the author, and probably attracts more attention than any other part of the proposed law,

and if it passes into law the title thereof is consequently a legislative declaration of the tenor and object of the act. . . . Consequently, when the meaning of an act is at all doubtful, all the authorities now concur that the title should be considered."

Applying these principles and considering the wording of the title to the act in question, it is manifest that the Legislature had in mind robbery accomplished *with* firearms, or other dangerous weapons, implements or means whereby the life of a person is endangered or threatened. "With" in the connection in which it is employed indicates "causal connection; by or through the means of; through; as, to defend himself *with* a club"—Webster. Defense *with* a club implies the presence of a club. In like manner, robbery *with* firearms of necessity requires as a constituent element the presence of firearms.

This is consonant with the meaning of the clause in sec. 1, which reads: "With the use or threatened use of any firearms." In this connection the word "use" as a noun has the meaning of an "act of employing anything, or state of being employed; application; employment; as, the use of a pen; his machines are in use," and may signify the "method or way of using"—Webster. The words "threatened use" coupled, as they are, with the preceding words clearly indicate the threatened act of employing. Hence, construed contextually the clause "*with* the use or threatened use" of a weapon, requires, in the one instance, or presupposes, in the other, the presence of the weapon with which the act may be executed or threatened.

Then reading together the title and text of the act, the title clearly expresses the intent and purpose of the Legislature to provide for more severe punishment for the commission of robbery with firearms, and other specified weapons, than is prescribed for common law robbery. And in this connection it is well to note that the court failed to charge on the offense of robbery at common law.

As the case goes back for new trial, other exceptions need not be considered.

New trial.

MRS. LOUISE TSCHEILLER v. NATIONAL WEAVING COMPANY, INCORPORATED, AND BANKS McARVER.

(Filed 23 November, 1938.)

1. Master and Servant § 38—

Where it is alleged in the complaint that the corporate defendant employed several hundred employees, including plaintiff, it will be presumed that the parties have accepted the provisions of the Workmen's Compensation Act and are bound thereby. Sec. 4, ch. 120, Public Laws of 1929; Michie's Code, 8081 (k).

2. Master and Servant § 49—

The rights and remedies granted to an employee who has accepted and is bound by the provisions of the Workmen's Compensation Act are exclusive of all other rights and remedies of such employee as against his employer, at common law or otherwise. Ch. 449, Public Laws of 1933; Michie's Code, 8081 (r).

3. Master and Servant § 40a—

An injury by accident resulting from the negligence of a fellow employee, occurring while the injured employee is engaged in his master's business and within the scope of his employment, is, as to the injured employee, an accident arising out of and in the course of his employment.

4. Same—

The purpose of the Workmen's Compensation Act is not to absolve the employer from liability for negligence, but to render him liable for compensation for injuries by accident compensable thereunder regardless of whether the accident is caused by negligence or not.

5. Master and Servant § 49—Complaint held to allege cause within jurisdiction of Industrial Commission, and demurrer was properly sustained.

The complaint alleged that defendant corporation was engaged in the textile manufacturing business, in which it employed several hundred employees, and also in the business of selling sandwiches and cold drinks to its employees for profit, and that less than five employees were employed in selling the food, that the food was sold employees while they were engaged in the performance of their duties in the mill, and that employees were sold books or meal tickets for use in purchasing the food, that plaintiff was injured by eating a spoiled sandwich, and that defendant and its employees engaged in selling the food were negligent in failing to take proper precautions for the preservation and inspection thereof. *Held:* The risks incident to the purchase of the food were not common to the public, but were peculiar to the employees of the company, and defendant employer's motion to dismiss should have been sustained, since the Industrial Commission has exclusive jurisdiction of plaintiff's claim against the employer.

6. Same—Employee may sue negligent fellow employee at common law.

When a complaint alleges injury by accident resulting from the negligence of a fellow employee while the injured employee was engaged in his employer's business and acting within the scope of his employment, the demurrer of the corporate employer should be sustained, but plaintiff's right of action against his fellow employee is at common law, and as to him the Compensation Act has no application, and his motion to dismiss is properly denied.

APPEAL by defendants from *Ervin, Jr., Special Judge,* at March Term, 1938, of GASTON.

Civil action to recover damages resulting from the alleged negligence of the defendants in selling the plaintiff a sandwich unfit for human consumption.

The plaintiff alleges that the corporate defendant is engaged in the business of manufacturing textile products in which said business it employs several hundred people, and that the said corporation at the same time was also engaged in the business of selling sandwiches and cold drinks, in which said business it employed the defendant Banks McArver and not more than two other employees. She further alleges:

"4. That during the month of February, 1937, and for some time prior thereto, the plaintiff was employed by the National Weaving Company, Inc., for the purpose of operating a machine in the textile mill of the National Weaving Company, Inc.; that her hours of work were from 3 o'clock p.m. until 11 p.m.

"5. That the defendant Banks McArver was employed by the National Weaving Company, Inc., for the purpose of selling sandwiches, Coca-Cola, and other cold drinks in the mill of the National Weaving Company, Inc.

"6. That on the date aforesaid, and for some time prior thereto, the National Weaving Company, Inc., prepared, or caused to be prepared, or purchased, sandwiches and cold drinks and kept the said food and drinks in the mill, and through its employee, the defendant Banks McArver, offered the same for sale to its employees.

"7. That the National Weaving Company, Inc., sold to this plaintiff and other employees of the mill a coupon book or meal ticket, and when the sale of food was made, the same was paid for by a coupon attached to the said book or meal ticket; that the National Weaving Company, Inc., was engaged in the sale of the said food for profit; that the relationship between the plaintiff and the defendants with regard to the sale and purchase of food and drinks was that of vendor and vendee.

"8. That on or about the ..... day of February, 1937, at about 6 o'clock p.m., the plaintiff purchased from the defendants a sandwich and immediately ate the same; that shortly thereafter she became sick at the stomach and had a vomiting spell; that notwithstanding her illness, she remained at work through the usual work period; that she was sick during the night and the next day; that she was unable to eat but went back to the mill to work at 3 o'clock and remained there until about 4:30 p.m., at which time plaintiff's condition became such that it was impossible for her to do any further work; that thereafter plaintiff went home and was confined to her bed and suffered injuries as hereinafter set forth.

"9. That the defendants negligently kept the sandwiches in the mill where the temperature was necessarily high and the atmosphere was very humid; that the defendants took no precautions to prevent them from spoiling; that they failed to place them on ice or in a refrigerator or in a suitable place for them, and failed to inspect the said food before it was sold to this plaintiff to determine whether or not it was fit and suitable for human consumption; that the defendants also made no effort

to keep the fresh sandwiches from being mixed with these that had been prepared for some time."

The defendants moved the court below to dismiss this action on the ground that the plaintiff and the defendants, at the time of the alleged injury to the plaintiff, were subject to and operating under the provisions of the North Carolina Workmen's Compensation Act, and that the rights and remedies conferred by said act are exclusive of all other acts and said remedies are binding upon both the plaintiff and the defendants herein. An order was entered denying the motion of the defendants. The defendants excepted and appealed.

Gilbreath & Gilbreath and Wm. H. Abernathy for plaintiff, appellee.
Emery B. Denny for defendants, appellants.

BARNHILL, J. It is alleged in the complaint that the corporate defendant employed several hundred employees, including the plaintiff. The presumption is that the parties to this action have accepted the provisions of the Workmen's Compensation Act and are bound thereby. Public Laws 1929, ch. 120, sec. 4; Michie's N. C. Code of 1935, sec. 8081 (k); *Hanks v. Utilities Co.*, 204 N. C., 155, 167 S. E., 560; *Lee v. American Enka Corp.*, 212 N. C., 455; *Murphy v. American Enka Corp.*, 213 N. C., 218.

The rights and remedies granted to an employee who has accepted and is bound by the provisions of the Workmen's Compensation Act are exclusive of all other rights and remedies of such employee as against his employer, at common law or otherwise. Public Laws 1933, ch. 449; Michie's N. C. Code of 1935, sec. 8081 (r); *Brown v. R. R.*, 202 N. C., 256, 162 S. E., 613; *McNeely v. Asbestos Co.*, 206 N. C., 568, 174 S. E., 509. An injury suffered by an employee while engaged in his master's business within the scope of his employment proximately resulting from the negligence of fellow employees is, as to the employee, an "accident" arising out of and in the course of his employment. It is not the purpose of the Workmen's Compensation Act to exculpate or absolve employers from the consequences of their negligent conduct. The field of cases in which compensation is to be awarded was enlarged by the act so as to include accidents not directly attributable to negligence. *McNeely v. Asbestos Co., supra; Slade v. Hosiery Mills*, 209 N. C., 823, 184 S. E., 844; *Johnson v. Hughes*, 207 N. C., 544, 177 S. E., 632.

When an employer undertakes to sell to his employees during their hours of employment sandwiches or other food or drinks the purchase and consumption thereof by the employee is not such a deviation from the course of his employment as would deprive him of the beneficial effects of the Workmen's Compensation Act. In such instances it is apparent that both the employer and the employee contemplate that such

food or drinks shall be purchased and consumed during the course of employment for the refreshment of the employee. If injury results therefrom to the employee as a proximate result of the negligence of the employer in offering food or drink unfit for use the employee suffers an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act. *Pickard v. Plaid Mills*, 213 N. C., 28.

While it is alleged that the corporate defendant was engaged in the textile manufacturing business and also in the business of selling sandwiches and cold drinks it is not made to appear in the complaint that sandwiches and cold drinks were offered for sale to the general public. Even so, it is specifically alleged that the defendant Banks McArver was employed for the purpose of selling such sandwiches and cold drinks in the mill of the corporate defendant to its employees and that arrangements were made for the employees to purchase coupon books of tickets to be used in the purchase of same. The risk incident to the purchase thereof by employees was not common to the public, but was peculiar to the employees of the company. *Lockey v. Cohen, Goldman & Co.*, 213 N. C., 356. If the plaintiff purchased from another employee of the corporate defendant a sandwich which was unfit for human consumption and proximately sustained injuries by reason thereof, under the circumstances alleged in the complaint, his remedy is under the Workmen's Compensation Act, which is exclusive of all other remedies.

The Industrial Commission has exclusive jurisdiction of plaintiff's claim only against the employer. His right of action against the individual defendant is at common law in the Superior Court. As to him the Workmen's Compensation Act has no application. Public Laws 1933, ch. 449; Michie's N. C. Code of 1935, sec. 8081 (r).

Affirmed as to defendant Banks McArver.

Reversed as to defendant The National Weaving Company, Inc.

W. M. PLYLER, FATHER; MRS. W. M. PLYLER, MOTHER; MARCUS R. PLYLER, DECEASED, EMPLOYEE, v. CHARLOTTE COUNTRY CLUB, EMPLOYER, AND UNITED STATES CASUALTY COMPANY, INSURANCE CARRIER.

(Filed 23 November, 1938.)

1. Master and Servant § 55d—

A finding of the Industrial Commission is conclusive only when supported by competent evidence, and a finding based on evidence part of which is incompetent, and the remainder of which raises a mere conjecture or speculation as to the necessary facts, is insufficient to support an award.

2. Master and Servant § 40a—

In order to support an award of compensation it must appear by competent evidence not only that the injury was received in the course of the employment but also that it arose out of the employment.

3. Master and Servant § 52—

Hearsay evidence is not competent to establish a material fact in a hearing before the Industrial Commission, and testimony of declarations of a caddy prior to his death to the effect that he was caddying at the time of the injury resulting in death, is incompetent as hearsay.

4. Master and Servant § 40c—Evidence held insufficient to show that injury to caddy arose out of his employment.

The competent evidence before the Industrial Commission tended to show that the deceased employee was engaged as a caddy on a golf course at a stipulated fee for each assignment to a player; that on the day in question he was given an assignment and returned therefrom uninjured; that when his father came for him at the close of the day the caddy had suffered an injury to his big toe, which later became infected and caused death. The only competent evidence of a second assignment on the day of the injury was the testimony of the caddy's father that when he called for him at the end of the day he saw him walking a short distance from the caddy house, carrying a bag, and walking as though his foot was injured, and that when he later came to the car his foot was bleeding. *Held:* The evidence leaves in conjecture whether the injury was sustained while the caddy was engaged in his employment or while waiting for a second assignment, and is insufficient to support a finding that the injury arose out of the employment.

APPEAL by plaintiffs from *Armstrong, J.*, at June Term, 1938, of MECKLENBURG. Affirmed.

This is a claim for compensation to the next of kin of Marcus R. Plyler, deceased, under the Workmen's Compensation Act.

The deceased, a boy of twelve years of age, acted as a caddy at the Charlotte Country Club. He received no regular salary but was assigned by the caddy master to a golfer desiring a caddy and received a stipulated fee each time he acted as such. On 24 July, 1937, he was assigned to a golfer in the early afternoon. When he returned to the caddy house about 4:30 he was not injured. The only evidence that he again acted as caddy on that day is the evidence of his father, who testified that he called for the deceased at the Country Club about 8 o'clock p.m.; that he saw the deceased about 75 feet from the caddy house, carrying a bag, walking on the side of his left foot, and that when he came to the car his toe was bleeding some. The brother of the deceased likewise testified that when he came to the car his toe was hurt.

The deceased at some time during the afternoon after his first round received a wound on the upper surface of the large toe of his left foot. It became infected and he subsequently died from septicaemia. Evidence

of statements made by the boy prior to his death that he received the injury while caddying were admitted in evidence over objection of the defendants.

The Commission found that the deceased sustained an injury to his toe while employed as a caddy on the golf course of the Country Club, affirmed the findings of fact and conclusions of law made by the individual Commissioner, and awarded compensation. On appeal to the Superior Court the judge below, being of the opinion that there was no sufficient competent evidence in the record to support the findings of fact of the Commission, entered judgment setting aside the award and dismissing the action. The plaintiffs excepted and appealed.

G. T. Carswell and Joe W. Ervin for plaintiffs, appellants.
Ralph V. Kidd for defendants, appellees.

BARNHILL, J. To sustain an award it must appear that there is some competent evidence tending to show that the injured employee received an injury arising out of and in the course of employment. It must not only appear by competent evidence that the injury was received in the course of the employment, but also that it arose out of the employment as well. Hearsay evidence is not competent to establish either fact. *Brown v. Ice Co.*, 203 N. C., 97, 164 S. E., 631.

The evidence in this case indicates that the deceased was not injured while caddying on his first assignment on the day he was injured. No one saw him go out on his second assignment and the only evidence that he did so is the testimony that he was seen approaching the caddy house with a golf bag about 8 o'clock p.m. It does not appear just how long a time elapsed between the two assignments, or whether he was injured while waiting for the second assignment, or during the course thereof. Whether he was injured while pranking and playing with other caddies during the time he was waiting for his second assignment, or whether he was injured while so engaged upon the golf course, or whether the injury was received while he was about his master's business is, upon the evidence in this cause, a mere matter of conjecture or speculation. To determine this fact one has to guess and surmise. While the evidence raises a suspicion and is sufficient to entitle one to guess that the deceased received an injury arising out of and in the course of his employment, there is no competent evidence to sustain such a finding, and no legal evidence of the material facts at issue. This is perhaps true even if we take in consideration the declarations of the deceased, who merely testified that he was injured while caddying. Such evidence will not support an award. *Denny v. Snow*, 199 N. C., 773, 155 S. E., 874.

The factual situation distinguishes this case from *Morgan v. Cloth Mills,* 207 N. C., 317, 177 S. E., 165. *Brown v. Ice Co., supra,* is in point.

That hearsay evidence is not admissible and has no probative force in the proof of an essential fact at issue is so well established that we need not discuss the same or cite authorities in support thereof.

The judgment below is

Affirmed.

FRANCIS C. CUNNINGHAM, BY HIS NEXT FRIEND, R. D. CUNNINGHAM, v. C. L. HAYNES AND HIS WIFE, MRS. C. L. HAYNES, JOHN ROBERT HAWES AND MRS. MATTIE H. HAWES.

(Filed 23 November, 1938.)

1. Automobiles § 21—Complaint in this action by guest held to state joint negligence on part of both drivers involved in collision.

The complaint alleged that the driver of the car in which plaintiff was riding as a guest was driving in congested traffic on a wet highway at a speed of fifty miles an hour, and drove past the beginning of an intersection of another highway without slackening speed, and that the driver of another car going in the opposite direction on the highway made a left turn without signal or warning into the intersecting highway in front of the car in which plaintiff was riding, and that by reason of excessive speed, the driver of the car in which plaintiff was riding was unable to turn aside or stop his car, and proceeded straight ahead and collided with the other car which had turned directly in his path, and that the collision resulting in injury to plaintiff was caused by the joint and concurrent negligence of the drivers of the cars. *Held:* The complaint states facts constituting joint and concurring negligence on the part of both drivers, and the demurrer of the parties liable for the negligence of the driver of the car in which plaintiff was riding, on the ground that the allegations of the complaint established that the sole proximate cause of the injury was the negligence of the driver of the other car, was properly overruled.

2. Same: Negligence § 6—When the negligence of two persons concurs in producing the injury, both are liable, jointly and severally.

A guest injured in a collision between two automobiles is entitled to recover against either one or both drivers when both are guilty of negligence proximately causing the injury, and the negligence of one will not exonerate the other if his negligence contributes to the result in any degree.

3. Pleadings § 20—

Upon demurrer, the complaint will be liberally construed in favor of the pleader. C. S., 535.

BARNHILL, J., dissents.

CUNNINGHAM *v.* HAYNES.

APPEAL by defendants Haynes from *Olive, Special Judge,* at May Term, 1938, of WAKE. Affirmed.

The plaintiff instituted his action to recover damages for a personal injury alleged to have been caused him by the joint and concurring negligence of the defendants, growing out of a collision between an automobile operated by defendant Haynes and an automobile operated by defendants Hawes. Plaintiff was a passenger in the Haynes automobile. Defendants Haynes demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action as to them for the reason that the allegations of the complaint established that the sole proximate cause of the injury was the negligence of defendants Hawes.

From judgment overruling the demurrer, defendants Haynes appealed.

R. Roy Carter for plaintiff.
A. J. Fletcher for defendants.

DEVIN, J. The question presented by this appeal is whether the complaint sufficiently alleges a cause of action for joint and concurring negligence on the part of the defendants. This requires an examination of the allegations of the complaint with particular reference to the matters challenged by the demurring defendants.

The material facts alleged, upon which the action is based, may be briefly stated as follows:

On Saturday, 7 August, 1937, the plaintiff was a passenger in an automobile which belonged to and was used by defendants Haynes for the convenience and pleasure of the family and which was being driven at the time by the minor son of these defendants, for that purpose, on a trip to the ocean beaches near Wilmington. About six-thirty in the afternoon of that date, while en route southwardly on Highway No. 60, and at a time when it was raining and the pavement wet, and when the highway was congested with Saturday afternoon beach-bound traffic, young Haynes drove the automobile at a fast and reckless rate of speed considering the nature, condition and use of the highway, and at a speed of fifty miles per hour, and at a place where he was approaching the intersection of Highway No. 60 with Highway No. 53. Without slackening his speed he entered into and upon this intersection of principal highways at a speed greater than was reasonable and proper under the circumstances, and, as he was undertaking to traverse the intersection, the defendants Hawes, who were driving their automobile northwardly along Highway No. 60, undertook to make a left turn into Highway No. 53 when the Haynes automobile was in close proximity. The defendants Hawes turned their automobile into the path of the oncoming Haynes automobile without a signal or warning and on a wet pavement.

It is alleged that by reason of the excessive speed of the Haynes automobile, under these circumstances, the driver thereof was unable to turn aside or stop his automobile, and without slowing down or turning aside, proceeded straight ahead and collided with the Hawes automobile, proximately resulting in injury to the plaintiff.

It is further alleged in the complaint that the drivers of both automobiles negligently operated their respective automobiles upon a much used highway and into a principal and congested intersection without keeping a proper lookout, without applying brakes or slowing down, without having their respective automobiles under control, and that both operated their automobiles without due caution and circumspection, and at a speed and in a manner so as to endanger the person of the plaintiff and others upon the highway, and that plaintiff's injury was the proximate result of the negligent acts of both defendants, each concurring and combining with the other.

Giving to the allegations of the complaint that liberal construction required by the statute and the decisions of this Court (C. S., 535; *Blackmore v. Winders,* 144 N. C., 212, 56 S. E., 874; *Cummings v. Dunning,* 210 N. C., 156, 185 S. E., 653), it is apparent that the complaint has alleged facts sufficient to constitute actionable negligence on the part of the demurring defendants. *Lewis v. Hunter,* 212 N. C., 504; *Taylor v. Rierson,* 210 N. C., 185, 185 S. E., 627; *Myers v. Utilities Co.,* 208 N. C., 293, 180 S. E., 694; *West v. Baking Co.,* 208 N. C., 526, 181 S. E., 551.

In *Smith v. Sink,* 210 N. C., 815, 188 S. E., 631, where demurrer by one defendant was interposed on the same ground as that relied on by appellants in the case at bar, it was said: "Where an injury to a third person is proximately caused by the negligence of two persons, to whatever degree each may have contributed to the result, the negligence of the one may not exonerate the other, each being a joint tort-feasor, and the person so injured may maintain his action for damages against either one or both. *White v. Realty Co.,* 182 N. C., 536."

In *Anthony v. Knight,* 211 N. C., 637, 191 S. E., 323, the plaintiff in that case was injured as the result of a collision at a street intersection between the automobile in which she was riding as a passenger and a motor truck. The owners of both vehicles were sued upon allegations of joint and concurring negligence. The owner of the automobile in which plaintiff was riding demurred. This Court said: "Nor can the allegation of negligence, as against defendants Motor Freight Corporation and Barefoot (the driver), that they drove the truck into the intersection of said street without stopping, in violation of an ordinance of the city of Greensboro, and without looking for approaching vehicles, be held to support the necessary conclusion that the negligence of the

driver of the truck constituted a new and intervening cause, breaking the chain of causation and insulating the negligence (unlawful speed) of the demurring defendants. All the facts necessary to render applicable the doctrine of insulated negligence set forth in *Hinnant v. R. R.*, 202 N. C., 489, do not appear on the face of the complaint, nor are they necessarily deducible therefrom. *Vivian v. Transportation Co.*, 196 N. C., 744; *Caddell v. Powell*, 70 Fed. (2nd), 123. Neither does it affirmatively appear that the negligence of the driver of the truck was the sole proximate cause of the injury."

See, also, *Rucker v. Snider Bros.*, 210 N. C., 777, 188 S. E., 405; *S. c.*, 211 N. C., 566.

If it be determined on the trial that the negligence of the defendants Hawes was the sole proximate cause of plaintiff's injury (*Smith v. Sink*, 211 N. C., 725, 192 S. E., 108), the appellants would be relieved of liability therefor, but the complaint on the facts alleged may not be overthrown by a demurrer.

Judgment affirmed.

BARNHILL, J., dissents.

A. E. PARSONS v. JOHN L. ROPER LUMBER COMPANY AND CHARLES LEWIS.

(Filed 23 November, 1938.)

Trespass to Try Title § 3—Held: Plaintiff's evidence failed to show location of land under State grant with sufficient certainty.

In this action to recover damages for trespass in cutting and removing timber, plaintiff introduced in evidence a copy of a State grant and connected himself with it, *prima facie*, but none of the trees called for as marking the beginning or other corners remained, there were no vestiges of marked trees at any point of the survey, and none of the corners were pointed out by person who professed to know them, and the natural objects which served to point out the location of the corners and former landmarks in a general way extended great distances and failed to point out any of the corners with reasonable certainty. *Held:* Plaintiff's evidence of the location of the land claimed by him was insufficient to be submitted to the jury, and defendants' motion to nonsuit should have been allowed.

APPEAL of defendants from *Frizzelle, J.*, at June Term, 1938, of CARTERET. Reversed.

Statement of facts is made in the opinion.

William Dunn and Ward & Ward for plaintiff, appellee.

W. B. Rodman, J. F. Duncan, and L. I. Moore for defendants, appellants.

SEAWELL, J. The plaintiff sued to recover damages of the defendants for trespass in cutting and removing timber from his land.

In an endeavor to show the ownership of the lands in which the alleged trespass was committed, plaintiff's evidence was sufficient, we think, to connect himself, *prima facie,* with the original grant set out in the complaint and introduced in evidence. But his attempt to locate that grant sufficiently well to be of service to him in covering the *locus* of the trespass was not so successful.

The grant reads as follows:

"Thomas Parsons — 640 Acres
Craven County — Dated December 22, 1768

COPY OF GRANT

"311

"THOMAS PARSONS: 640 acres Craven on the So. side of Neuse River and on the Ws. side of Tornigan Bay Beginning at a pine on the So. side of one of the prongs of a Creek called Broad Creek and from thence crossing the head of said Creek into the main dismal So. 55 Ws. 240 po; then So. 35 Et. 340 po; then No. 55 Et. 240 po; to a pine at the marsh above Thomas Nelson's Hammock then down Tornigan Bay No. 10 Et. 200 po; and from thence to the beginning dated 22d December, 1768. Wm. Tryon."

It developed during the trial that none of the trees called for as marking the beginning or other corners remain, and there are no vestiges of marked trees at any point of the survey. There are certain natural objects which serve to point out the location of corners and former landmarks in a general way: A spur of Broad Creek, the Great Dismal, Tornigan's Bay. But these are too remote and the relation too indefinite to mark, with any degree of accuracy, the location or point intended. For instance, Nelson's Hammock is strung along the bay for several hundred yards and is perhaps a mile across the bay from the point in the survey to which it refers. The Great Dismal is a vast area, and the beginning corner may be placed up or down the spur of Broad Creek at will. None of the corners, lines, or points on the survey were pointed out by persons who professed to know them, and the best that can be said is that the polygonal figure representing the survey seems to be so placed

in relation to the spur of Broad Creek, the Great Dismal, the marsh at Tornigan's Bay, and Nelson's Hammock, as to be persuasive of an approximate location.

There was strong insistence on the part of C. T. Parsons, son of the plaintiff, that he had found the proper beginning point by running the last two calls in the deed both ways. But he said he did not know where the beginning was, and as the other calls upon which he depended were not marked, and he did not profess to know them, the information given the surveyor by him must have been arbitrary.

In the opinion of the Court the evidence as to location was insufficient to go to the jury, and since ownership of the lands upon which the trespass was alleged to have been committed was dependent on this, the defendants' motion for nonsuit should have been allowed.

The judgment is

Reversed.

A. W. MADRY v. TOWN OF SCOTLAND NECK.

(Filed 23 November, 1938.)

1. Municipal Corporations § 5—Powers of municipal corporations in general.

A municipal corporation is a creature of the Legislature, and it has only those powers granted in express terms and powers necessarily or fairly implied or incident to the powers expressly granted, and those powers which are essential and indispensable to, and not merely convenient for, the accomplishment of the declared objects of the corporation.

2. Municipal Corporations § 19b—

Even within the exercise of its powers a municipality may not bind itself by contract which incurs a debt, except for necessary expenses, unless by a vote of the majority of its qualified voters. N. C. Constitution, Art. VII, sec. 7.

3. Same: Rewards—Municipality is without power to offer reward for apprehension or conviction of a felon.

A municipal corporation is without authority to offer a reward for the apprehension or conviction of a felon, and its offer of a reward is *ultra vires*, and the person performing the service may not recover from the city, the power to offer a reward not having been expressly granted, nor fairly implied from, nor incident to, the powers expressly granted, nor essential to the accomplishment of the declared objects of the corporation.

4. Municipal Corporations § 19c—

A contract which is *ultra vires* a city is void, and the fact that the other party has performed his part of the contract does not preclude the city from pleading *ultra vires*.

MADRY *v.* SCOTLAND NECK.

APPEAL by defendant from *Burgwyn, Special Judge,* at October Term, 1938, of HALIFAX. Reversed.

Civil action to recover a reward in the sum of $500.00 offered by the defendant to the person furnishing information leading to the arrest and conviction of the murderer of the chief of police of the defendant town.

The defendant demurred *ore tenus* to the complaint on the ground that the complaint does not state a cause of action. The demurrer was overruled, and the defendant excepted and appealed.

George M. Fountain & Son for plaintiff, appellee.
Stuart Smith and Geo. C. Green for defendant, appellant.

BARNHILL, J. The plaintiff alleges that the defendant is a municipal corporation of the State of North Carolina; that its chief of police was murdered 16 February, 1936; that its duly appointed, elected and qualified officers offered a reward of $500.00 to the person who would furnish information leading to the arrest and conviction of the party or parties guilty of the murder; that the plaintiff thereafter furnished information to an officer of Halifax County which led to the arrest of two men, one of whom was duly convicted of the crime; that the plaintiff has duly filed his claim for said reward with the defendant, but that it has neglected and refused to pay same.

The complaint and the demurrer thereto present but one question for determination: May a North Carolina municipality, without express legislative authority, bind itself to pay a reward for information leading to the arrest and conviction of a party who commits a felony within the corporate limits of the town?

A municipality is a creature of the Legislature and it can only exercise (1) the powers granted in express terms; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the accomplishment of the declared objects of the corporation—not simply convenient, but only those which are indispensable, to the accomplishment of the declared objects of the corporation. *Asheville v. Herbert,* 190 N. C., 732, 130 S. E., 861; *S. v. Gulledge,* 208 N. C., 204, 179 S. E., 883. In exercising such powers the municipal corporation's authority to bind itself by contract is limited and it cannot contract any debt, except for necessary expenses, unless by vote of the majority of the qualified voters therein. N. C. Const., Art. VII, sec. 7.

The Legislature has conferred authority upon the Governor of the State to offer rewards under the limitations set out in the statute, C. S., 4554. There is no such express legislative grant of power to towns and cities. The duty to apprehend and prosecute felons is imposed upon county and State officers. No such duty is required of a town, and a

careful examination of the powers conferred upon towns and cities by the statutes of this State leaves us with the conviction that it cannot be said that the power to offer rewards for the apprehension or conviction of felons can necessarily or fairly be implied from, or is incident to, the powers expressly granted. Nor is such power essential to the accomplishment of the declared objects of the corporation.

This is in accord with the general trend of the decisions in other states, the general rule being stated in 23 R. C. L., 1124, as follows: "The authorities very generally agree, however, that municipalities have no power to offer rewards for the apprehension of offenders against the criminal laws of the State, unless a statute or charter provision confers such power, as is sometimes done, but the ordinary general welfare clause of a municipal charter does not have this effect."

"The offer of a reward for the apprehension and conviction of an offender against the criminal law of the State is the exercise of a State power, and is foreign to the objects and purposes of a municipal corporation. It is not an ordinary corporate power, nor incident to it." *Winchester v. Redmond,* 93 Va., 711. Where a municipal corporation offers a reward for a purpose which does not come within the scope of its powers, and the reward is claimed by a person who has fulfilled the conditions of the offer, the contract thereby formed is *ultra vires* and affords no right of action against the corporation. 3 Ann. Cas., 157, Note.

"If a contract is *ultra vires* it is wholly void and (1) no recovery can be had against the municipality; (2) there can be no ratification except by the Legislature; (3) the municipality cannot be estopped to deny the validity of the contract. 3 McQuillin, Municipal Corporations, 2nd Ed., page 817." *Jenkins v. Henderson, ante,* 244. The fact that the other party to the contract has fully performed his part of the contract, or has expended money on the faith thereof, will not preclude the city from pleading *ultra vires. Dawson v. Dawson Waterworks,* 106 Ga., 696, 32 S. E., 907; *Mealy v. Hagerstown,* 92 Md., 741, 48 Atl., 746; *Jenkins v. Henderson, supra.*

As it appears upon the face of the complaint that the plaintiff is seeking to enforce a contract which is *ultra vires* and void the demurrer interposed by the defendant should have been sustained.

The judgment below is

Reversed.

HATTIE McCULLERS v. OMSTER JONES.

(Filed 23 November, 1938.)

Trial § 18—

Where the parties do not waive trial by jury, nor consent that the court find the facts, it is error for the court to enter judgment without the aid of the jury on the controverted issues of fact raised by the pleadings.

APPEAL by defendant from *Cowper, J.*, at February Term, 1938, of WAKE. Error and remanded.

L. Bruce Gunter and T. Lacy Williams for plaintiff.
Wm. B. Oliver and W. I. Rowland for defendant.

DEVIN, J. The plaintiff instituted her action to recover the sum of $100.00 alleged to be due her by the defendant for rent of land. She alleged that she and defendant were tenants in common of the land by virtue of a quitclaim deed executed to them by the heirs of their brother, D. H. Jones, former owner of the land, who died in 1936, and that defendant had agreed to pay her this sum as rent for her share of the land for the year 1937. She further alleged that defendant cultivated the land during 1937 but had failed and refused to pay her the agreed rent. The defendant in his answer alleged that he was sole seized of said land by virtue of a deed executed and delivered to him by D. H. Jones in 1934, that this deed had been lost or mislaid and was not recovered until the fall of 1937, and that any agreement to pay rent on his own land was without consideration and void.

Upon the trial, after a jury had been impaneled to try the issues raised by the pleadings, the plaintiff offered in evidence the quitclaim deed for the land from the heirs of D. H. Jones (dated 8 January, 1937), to plaintiff and defendant, and also the rental agreement for the year 1937, wherein the defendant agreed to pay $100.00 rent for the undivided share of the plaintiff.

The defendant offered in evidence the duly recorded deed from D. H. Jones to himself, dated 16 November, 1934, wherein the land was conveyed for a recited valuable consideration, and offered testimony tending to show delivery of the deed to him by the grantor on the day of its execution.

Thereupon the court, taking the view that the defendant "could not get along on that testimony," and that the only defense to the rental agreement was lack of consideration, entered judgment for the plaintiff for $100.00 and costs, and also adjudged that plaintiff and defendant

were tenants in common as to the land, and ordered that the judgment be recorded on the proper books of record for the registration of deeds.

It is apparent that the learned judge of the Superior Court undertook to decide the matter and to enter judgment without the aid of the jury which had been impaneled to determine the issues raised by the pleadings. There was no waiver of jury trial, nor consent that the judge find the facts. There was therefore error in the judgment and the cause is remanded for proper determination of the issues arising upon the pleadings.

Error and remanded.

E. J. FRANK, ADMINISTRATOR OF THE ESTATE OF LULA GEE FRANK, v. J. C. McINTOSH AND JOHN PAUL McINTOSH.

(Filed 23 November, 1938.)

Automobiles § 24c—Evidence held insufficient to show that driver at the time of and in respect to collision was an agent or servant.

Evidence that a minor purchased a truck upon deferred payments but that title thereto was taken in the father's name so the purchase contract could be executed, that upon the son's payment of the balance of the purchase price the father executed and acknowledged before a notary an assignment of the title, and that the accident in suit occurred thereafter while the son was hauling lumber from his father's land, that the purchaser of the lumber paid the father for the lumber and paid the son for the hauling, *is held* insufficient to be submitted to the jury on the issue of the father's liability under the doctrine of *respondeat superior*, since the evidence fails to show that at the time of and in respect to the collision the son was the agent or servant of the father or about his father's business.

APPEAL by defendant J. C. McIntosh from *Armstrong, J.*, at February, 1938, Regular Term, of MECKLENBURG.

Civil action to recover damages for wrongful death resulting from alleged actionable negligence.

The plaintiff alleges and offered evidence tending to show that Lula Gee Frank, plaintiff's intestate, was fatally injured about seven-thirty on the night of 14 September, 1936, as the proximate result of the negligence of the defendant John Paul McIntosh.

Plaintiff further alleges that the automobile truck which John Paul McIntosh was operating at the time of the injury to said intestate was owned by the defendant J. C. McIntosh, and that John Paul McIntosh was operating it in the furtherance of the business, and as the agent and servant of the defendant J. C. McIntosh.

Defendants denied all material allegations.

The evidence offered by plaintiff in support of these further allegations tended to show substantially these facts: John Paul McIntosh is the 20-year-old son of J. C. McIntosh, and resides in the home of his father. In April, 1936, John Paul bought a 1936 model Ford truck but, being a minor, his father advanced the money to cover the deferred payments and took title in his name, with agreement to hold truck for the son until the money advanced should be repaid. The money was repaid, and on 16 July, 1936, the father executed and acknowledged before a notary public an assignment of the title certificate to the son, but the transfer was not recorded in Raleigh. The son operated the truck for himself.

At the time of the collision in which plaintiff's intestate was fatally injured, John Paul McIntosh was hauling a load of lumber for a Mr. Pegram. The lumber had been manufactured from timber cut from land owned by J. C. McIntosh and his sister. J. C. McIntosh had sold, at the mill, a part of the lumber to Mr. Pegram, who got John Paul McIntosh to haul it. Pegram paid J. C. McIntosh for the lumber and paid John Paul for the hauling. The collision occurred while John Paul was hauling this lumber. J. C. McIntosh had no interest in and received no part of the compensation for the hauling.

Plaintiff offered the tax lists of J. C. McIntosh for the years 1936 and 1937 on which a 1936 model Ford truck was listed. J. C. McIntosh testified, however, on adverse examination that the listing for 1936 was a mistake as the truck was bought after 1 April, 1936, and that the one listed for 1936 and 1937 should have been a 1932 model which he now owns. The evidence further showed that John Paul had not listed the truck for taxation.

Defendant J. C. McIntosh made motion for judgment as of nonsuit at close of plaintiff's evidence, and renewed the motion at the close of all the evidence. Motions denied. Exceptions.

From judgment on adverse verdict defendant J. C. McIntosh appealed to Supreme Court, and assigns error.

A. M. Butler, G. T. Carswell, Joe W. Ervin, and Geo. E. Fields for plaintiff, appellee.

Bock Hurley and McDougle & Ervin for defendant, appellant.

WINBORNE, J. The record fails to show that at the time of and in respect to the collision out of which the death of plaintiff's intestate arose, the defendant John Paul McIntosh, the driver of the truck, was the agent or servant of, or about the business of the defendant J. C. McIntosh. The case does not come within the doctrine of *respondeat*

superior. Therefore, motion of defendant J. C. McIntosh for judgment as of nonsuit should have been allowed on the authority of *Liverman v. Cline,* 212 N. C., 43, 192 S. E., 849, where the doctrine of *respondeat superior* is appropriately stated, and the applicable authorities are assembled.

As to the defendant J. C. McIntosh, the judgment below is

Reversed.

STATE v. BAXTER PARNELL.

(Filed 23 November, 1938.)

1. Criminal Law § 78b—

Defendant is not entitled to consideration of assignments of error to the charge which are not supported by exceptions, but in capital cases the Supreme Court may nevertheless consider the assignments of error.

2. Criminal Law § 83—Motion to affirm allowed in this case, defendant's assignment of error being without merit and no error appearing of record.

On this appeal from conviction of a capital crime, the "case on appeal" was served on the solicitor and then filed in the Supreme Court without agreement of the solicitor or settlement by the judge, before expiration of the time allowed for filing exceptions or countercase, C. S., 643, 644, and before the lapse of sufficient time for it to have been deemed approved under C. S., 643. Assignments of error were attached to the "case on appeal" but were not supported by exceptions. The Supreme Court considered the "case on appeal" as "deemed approved" at the time of hearing the appeal, and considered the assignments of error, since the life of defendant is involved. *Held:* The assignments of error being without merit, and the case appearing to have been tried in strict conformity to the law appertaining to the evidence and the charge, the Attorney-General's motion to affirm is allowed.

3. Criminal Law § 80—

The failure to have a "case on appeal" or proper assignments of error does not perforce work a dismissal of the appeal.

APPEAL by defendant from *Armstrong, J.,* at August Term, 1938, of CABARRUS.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Jane Fink.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

Defendant appeals.

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

R. Furman James and C. M. Lewellyn for defendant.

STACY, C. J. At the August Term, 1938, Cabarrus Superior Court, the defendant herein, Baxter Parnell, was tried upon indictment charging him with the murder of one Jane Fink, which resulted in a conviction of murder in the first degree and sentence of death. From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court and by consent was allowed sixty days within which to make out and serve his statement of case on appeal, and the solicitor was given thirty days thereafter to prepare and file exceptions or countercase. Service of defendant's "case on appeal and assignments of error" was accepted by the solicitor on 1 October, 1938. This was filed in the Supreme Court as the "case on appeal" on 4 October, 1938, without agreement of the solicitor or "settlement" by the judge. C. S., 643 and 644; *S. v. Ray,* 206 N. C., 736, 175 S. E., 109; *Carter v. Bryant,* 199 N. C., 704, 155 S. E., 602. Nor had sufficient time then elapsed for it to be "deemed approved" under the statute. C. S., 643; *S. v. Ray, supra.*

Thereafter, on 19 October, 1938, upon the call of the docket from the Fifteenth District, the district to which the appeal belongs, the Attorney-General lodged a motion to dismiss the appeal for failure to file brief and for imperfections in the record. A counter-motion for time to cure the defects in the transcript, to file brief, etc., was allowed because of illness of counsel which necessitated the appointment of additional counsel to prosecute the appeal. *S. v. Moore,* 210 N. C., 459, 187 S. E., 586.

Five assignments of error, all directed to the charge, are attached to the "case on appeal"—considering it now as "deemed approved"—but these assignments are based on no exceptions. *Rawls v. Lupton,* 193 N. C., 428, 137 S. E., 175. Only exceptive assignments of error are availing on appeal. *In re Beard,* 202 N. C., 661, 163 S. E., 748; *S. v. Freeze,* 170 N. C., 710, 86 S. E., 1000.

Notwithstanding the insufficiency of the assignments of error to raise the questions sought to be presented, as the defendant's life is at stake, we have examined the matters therein pointed out and find them to be without substantial merit. *S. v. Moore,* 210 N. C., 686, 188 S. E., 421. The case seems to have been tried in strict conformity to the law appertaining to the evidence and the charge.

The failure to have a "case on appeal" or proper assignments of error, does not perforce work a dismissal of the appeal. *Parrish v. Hartman,* 212 N. C., 248, 193 S. E., 18; *McMahan v. R. R.,* 203 N. C., 805, 167 S. E., 225; *Roberts v. Bus Co.,* 198 N. C., 779, 153 S. E., 398. *Non*

constat that error may not appear on the face of the record proper. *Edwards v. Perry,* 208 N. C., 252, 179 S. E., 892; *Wallace v. Salisbury,* 147 N. C., 58, 60 S. E., 713.

The motion to affirm will be allowed. *S. v. Dawkins,* 190 N. C., 443, 129 S. E., 814; *McNeill v. R. R.,* 117 N. C., 642, 23 S. E., 268.

Affirmed.

MRS. ZELMA H. DAVIS, WIDOW OF RONE LEE DAVIS, CLAIMANT, v. MECKLENBURG COUNTY, EMPLOYER, AND TRAVELERS INSURANCE COMPANY, CARRIER.

(Filed 23 November, 1938.)

1. Master and Servant § 40f—Evidence held sufficient to support finding that employee was not injured in course of his employment.

The evidence tended to show that the deceased employee was a rural policeman with regular hours of work, but that he was subject to call for duty at any hour, and that he was fatally injured in an accident while going to police headquarters to report for duty prior to the beginning of his regular working day. *Held:* The evidence supports the finding of the Industrial Commission that the accident did not arise out of and in the course of his employment.

2. Master and Servant § 55d—

The finding of the Industrial Commission that the accident in question did not arise out of and in the course of the employee's employment is conclusive on the courts unless under no view of the facts found by the Commission is such conclusion warranted.

APPEAL by claimant from *Cowper, Special Judge,* at Special June Term, 1938, of MECKLENBURG. Affirmed.

This is a claim for compensation under the North Carolina Workmen's Compensation Act, ch. 120, Public Laws 1929, and amendments thereto, N. C. Code of 1935 (Michie), sections 8081 (h), *et seq.*

The hearing Commissioner made an award allowing compensation but upon appeal to it the Full Commission set aside such award and found "as a fact that the plaintiff's deceased did not sustain an injury by accident arising out of nor in the course of his regular employment 9 January, 1937, when he sustained an injury by accident while en route to his employment," and denied compensation.

Upon appeal to it the Superior Court entered judgment affirming the action of the Full Commission, to which judgment the claimant reserved exception and appealed to the Supreme Court.

Fred C. Hunter for claimant, appellant.

Guthrie, Pierce & Blakeney for defendants, appellees.

SCHENCK, J. "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." *Lockey v. Cohen, Goldman & Co.,* 213 N. C., 356.

The evidence is to the effect that on 9 January, 1937, Rone Lee Davis, husband of the claimant, was employed by Mecklenburg County as a rural policeman, and while driving in his own automobile from his residence some seven miles from the city of Charlotte to the police headquarters in the courthouse in said city to report for duty, his automobile collided with a truck on the public highway about 6:45 a.m. and he was almost instantly killed; that the deceased was on regular duty as a rural policeman from 7 a.m. to 3 p.m. each day, and was subject to call at any hour of the day or night and that it was his duty to investigate and make an arrest if necessary in the event of any law violation in his presence as he went to report for or came from his regular 8-hour duty; that he was making no investigation nor arrest at the time of his fatal accident.

We do not concur in the contention that the finding of the Full Commission that the "plaintiff's deceased did not sustain an injury by accident arising out of nor in the course of his regular employment" is unwarranted by the evidence. The Superior Court and this Court are bound by the conclusion of the Commission "unless under no view of the facts found by the Commission such conclusion is warranted."

The judgment of the Superior Court is

Affirmed.

JOHN L. JAMES v. GEORGE W. DENNY, JUSTICE OF THE PEACE.

(Filed 23 November, 1938.)

Penalties § 1—Person convicted is not "party aggrieved" by service of warrant by constable of another township and may not recover penalty under statute providing such remedy to "aggrieved party."

A justice of the peace of Mecklenburg County gave a warrant for service to a constable other than the one chosen for the township in which the justice of the peace resided, contrary to ch. 6, Public-Local Laws of

1933, applicable to Mecklenburg County. Plaintiff was convicted on the warrant in the recorder's court, and thereafter instituted this action against the justice of the peace to recover the penalty as provided in section 3 of the statute. *Held:* The statute provides the remedy to the "aggrieved party," and as plaintiff was convicted on the warrant, he is not in law the "party aggrieved" by the delivery of the warrant for service to a constable of another township, and defendant's motion to nonsuit should have been allowed, an aggrieved party being one who has been injuriously affected by the act complained of, and who thereby suffers an injury to person or property.

APPEAL by defendant from *Armstrong, J.*, at March Term, 1938, of MECKLENBURG. Reversed.

Action to recover the penalty prescribed by chapter 6, Public-Local Laws of 1935, instituted in the court of a justice of the peace. In the Superior Court, upon appeal, the following issue was submitted to the jury:

"Did the defendant George W. Denny, a justice of the peace for Charlotte Township, deliver a warrant or other process to be served in Charlotte Township to a constable other than a constable chosen to serve in the township within which said justice of the peace resides?" Under peremptory instructions from the court the jury answered the issue "Yes," and from judgment on the verdict, defendant appealed.

John James for plaintiff, appellee.
John Newitt for defendant, appellant.

DEVIN, J. By chapter 6, Public-Local Laws of 1933, applicable only to Mecklenburg County, it was made unlawful for any constable to solicit for service any process from a justice of the peace residing in a different township, unless service was to be made in the township for which the constable was chosen. The act further provides:

"Sec. 2. That it shall be unlawful for any justice of the peace to deliver any such process to any constable, other than a constable chosen by and serving the township within which said justice of the peace resides.

"Sec. 3. That any constable or justice of the peace who violates the provisions of this act shall forfeit and pay the sum of one hundred dollars to any aggrieved party who sues for the same."

The uncontradicted evidence offered at the trial tended to show that the defendant Denny, a justice of the peace residing in Charlotte Township, issued a warrant for the plaintiff charging him with violation of certain sanitary rules prescribed by the State Board of Health for the management of barber shops (ch. 119, Public Laws 1929). The warrant was delivered by the defendant to R. C. McNeely, a constable of

Berryhill Township, and by him duly served. The criminal action thus instituted was removed to the city recorder's court, where the plaintiff herein, John L. James, was found guilty and prayer for judgment continued. At the conclusion of this evidence defendant Denny moved for judgment of nonsuit. This was denied, and defendant assigns as error the failure of the court to allow this motion.

The motion should have been allowed. The statute authorizes the penalty only in favor of an aggrieved party. The plaintiff, who was properly convicted of the offense charged in the warrant, is not in law the party aggrieved by the delivery of the warrant for service to a constable of another township. The result to him was the same. Under the evidence in this case, the only person who could have been legally aggrieved was the constable of Charlotte Township, presumably available for the service. *Stone v. R. R.*, 144 N. C., 220, 56 S. E., 932. An aggrieved party is one who has been injuriously affected by the act complained of, one who has thereby suffered an injury to person or property. 3 C. J. S., 350; 1 C. J., 973.

Webster's International Dictionary defines an aggrieved party as one "adversely affected in respect of legal rights."

For the reasons stated, we hold that there was error in denying defendant's motion for judgment of nonsuit.

Judgment reversed.

J. E. ELROD v. D. L. PHILLIPS.

(Filed 30 November, 1938.)

1. Deeds § 16—Findings held to show such fundamental change in character of property around locus in quo as to make restrictive covenants void.

The trial court found facts, under agreement of the parties, tending to establish that the *locus in quo* was on the edge of a development subject to restrictive covenants confining the use of the property to residential purposes; that at the time the development was initiated, about 28 years prior to the institution of the action, the property was valuable only for residential purposes, but that the property abutting the development and contiguous to the *locus in quo* had been built up for business purposes, rendering the *locus in quo* valuable chiefly for business purposes only, and that its use for business purposes would not adversely affect other property in the development. *Held:* The findings support the court's conclusions of law that the change in the fundamental character of the property rendered the enforcement of the restrictive covenants inequitable and that they were void.

2. Same—Change in contiguous property may render restrictions inequitable even though there has been no change in use of property within development.

Where property abutting a development subject to restrictive covenants and contiguous to the *locus in quo* has so changed in fundamental character as to render the enforcement of the restrictions inequitable as to such property, the court may declare the restrictions void, and it is not necessary to sustain such conclusion that the court find that there has been any substantial change in the use of the property within the boundary of the development.

APPEAL by defendant from *Cowper, Special Judge,* at August Special Term, 1938, of MECKLENBURG.

This is an action for specific performance of a contract of lease. The plaintiff is the owner of Lot 9 and a part of Lot 10 in the Crescent Heights Subdivision, a real estate development made by Elizabeth Realty Company in 1909, the *locus in quo* being situated on the northwest corner of Providence Road and Cherokee Road (formerly Vail Avenue). The plaintiff and defendant have entered into a contract wherein the plaintiff agrees to lease the *locus in quo* to the defendant for a term of five years for the purpose of constructing and operating a filling station thereon, and the defendant agrees to pay the plaintiff $150.00 per month rent therefor for said purpose. The plaintiff has tendered to the defendant a lease in accord with said contract, but the defendant has declined and refused to accept same or to pay any rent.

The defendant bases his refusal to comply with the terms of the contract upon the contention that the plaintiff cannot make a valid contract for the rental of the *locus in quo* as a site for the construction and operation of a filling station. There appears in defendant's brief the following: "The defendant concedes that plaintiff is entitled to specific performance of the contract entered into between the parties, and also the contract of lease tendered to the defendant by plaintiff, provided the defendant can use the *locus in quo* for the purposes set forth in the contract, to wit: a gasoline filling station or other lawful business purpose; otherwise defendant denies that he is liable in any manner to the plaintiff by reason of having executed said contract."

The plaintiff alleges and the defendant admits that:

"2. That the plaintiff is the owner in fee simple of a certain lot in the city of Charlotte, located on the northwest corner of Providence Road and Cherokee Road, as shown and described in Book 930, page 153, in the office of the register of deeds for Mecklenburg County, N. C.

"3. That certain restrictions were placed on said lot in 1909, and that said lot was deeded by Elizabeth Realty Company to J. F. Shannon and wife, on 28 May, 1914, as shown by a deed recorded in Book 325, page 203, which said restrictions were as follows:

"(a) The said lot shall never be owned or occupied by any person or persons of the Negro race or with Negro blood.

"(b) That no house shall be built upon the said lot nearer than 25 feet to the line of the said Vail Avenue.

"(c) That the said lot shall be used only for residential purposes.

"(d) That no house built on said lot shall cost less than $2,000, except the necessary outhouses in connection with the main dwelling house.

"4. That after *mesne* conveyances, said property was conveyed to O. J. Thies by deed recorded in Book 468, page 92, and Book 712, page 276, in said office of the Register of Deeds, and that said O. J. Thies and wife executed deed to the said property to S. J. Dunavant and wife, as shown by Book 898, page 297, in said register's office. That by said conveyance O. J. Thies undertook to add the following restrictions to the said *locus in quo:*

"(e) No houses shall be built upon said lots nearer than 15 feet to the line of Lot 11.

"(f) No outbuilding shall be built upon the said lots nearer than 90 feet of the line of Vail Avenue or Cherokee Road, or nearer than 75 feet of the line of Providence Road.

"That said additional restrictions were not in any manner a part of any uniform plan or scheme of development and are invalid, and that said S. J. Dunavant and wife conveyed said lot by deed recorded in Book 930, page 153, of the Mecklenburg Registry, to J. E. Elrod, plaintiff in this action, subject to all restrictions heretofore mentioned."

His Honor entered the following judgment:

"This cause coming on to be heard at the Extra 29 August, 1938, Term of the Superior Court of Mecklenburg County, and a jury trial having been waived by the parties, and it having been agreed that his Honor, Judge G. V. Cowper, holding said court, should hear said cause and decide the issues and questions of fact therein as well as those of law, and said cause having been heard by his Honor without a jury, as agreed by the parties, the court finds upon the evidence as follows:

"QUESTIONS OF FACT.

"1. That the plaintiff J. E. Elrod is the owner of the lot described in the complaint, and that said lot is situated in a subdivision developed by the Elizabeth Realty Company in the year 1909, plat of which appears of record in Map Book 230, page 24, in the Mecklenburg registry; that said restrictions were placed upon the said lot limiting it to use for residential purposes as set out in the complaint and admitted in the answer and that later additional restrictions were added to said lot in deed of

O. J. Thies and wife to S. J. Dunavant and wife; that at the time said land was originally developed, a large part thereof and plaintiff's lot in particular was far beyond the limits of the city of Charlotte and were sparsely settled. That the additional restrictions were no part of any general plan or scheme of any development.

"2. That the *locus in quo,* being at the extreme southern end thereof, is the most distant of any of the lots in the development from the business district of the city of Charlotte and fronts on Providence and Cherokee Roads; that at the time said land was developed, it was fit only for the residential purposes, the *locus in quo* being outside of the city limits and there being no other types of property except a few residences in the vicinity; that no structure of any kind has ever been erected on the plaintiff's lot.

"3. That about the year 1929, because of extensive growth, the city of Charlotte extended its limits and incorporated within its bounds all of said land, including plaintiff's lot and additional territory for more than a mile beyond; that both Providence and Cherokee Roads have been paved and Providence Road is a thoroughfare and a portion of the State Highway leading from Charlotte to Waxhaw; that both of said roads are heavily and constantly traveled both day and night by buses, automobiles and trucks; that directly across the street from the plaintiff's lot is a large gasoline filling station, and continuing therefrom for a distance of approximately half a mile south there is an almost unbroken business district; that on Providence Road north of plaintiff's lot within one block thereof, there is a large gasoline filling station and within two blocks north of the plaintiff's lot there is a large two-story store building, housing a beauty parlor, drug store, grocery store and dance hall; that a fire department substation has been erected within a block and a half east of plaintiff's lot, housing fire trucks, and that within 3 blocks of the *locus in quo* a large super-grocery store is under construction; that within 3 blocks of and adjacent to plaintiff's lot there are 16 places of business, consisting of four large gasoline filling stations, a restaurant roadhouse, drug stores, barber shop, dry cleaning company, grocery stores, meat market, fire department substation, beauty parlor and dance hall, as shown by the plat.

"4. That as a consequence of the influx of business adjacent to and thickly surrounding plaintiff's lot, the value of the *locus in quo* as business property is at least 100 per cent more than its value as residential property; that the said community has, during the past 10 years, undergone a radical, substantial and fundamental change in its character, and there is ample evidence indicating further and more extensive construction of business houses in the said vicinity; that the restrictions placed on plaintiff's lot more than 28 years ago are of no value to the plaintiff

or any other lot owner in the development, but on the contrary constitute a distinct disadvantage on account of the encroachment of business houses surrounding said lot.

"5. That the changes heretofore enumerated in the use of the property in the vicinity of and adjacent to plaintiff's property and the growth and development of the city of Charlotte and the great increase in volume of travel and business and other nonresidential use of property in close proximity to the vicinity in which plaintiff's property is located, have so drastically altered the original nature of the plaintiff's property from its original character that the same is now wholly unfit and unsuitable for residential purposes, and more suitable for business purposes.

"6. That the plaintiff and defendant have entered into a valid, enforceable and binding contract for valuable consideration, whereby the defendant agreed to lease the plaintiff's said lot and pay the monthly rental stipulated therein, as set forth and attached to the plaintiff's complaint and admitted by the answer of the defendant; that the plaintiff has made proper tender of a written lease to the defendant, embodying the terms and agreements heretofore orally agreed to by said parties; that the defendant has refused to accept, be bound by and perform the terms of the said lease and that said contract is one that may be enforced and that the plaintiff is entitled to the specific performance thereof, and that unless said contract is performed by the defendant, the plaintiff will suffer irreparable loss and damage.

"LEGAL CONCLUSIONS.

"1. That because of the substantial changes hereinbefore enumerated which have taken place adjoining and in the vicinity of the *locus in quo*, since restrictions were placed thereon, said property has undergone such radical and fundamental alteration of character as to render it wholly unfit and unsuitable for use for residential purposes and that if the said property be now or further restricted to residential use only, it would work a great hardship upon the plaintiff and be of no consequential benefit to the owners of other property in the vicinity.

"2. That the restrictions placed upon the plaintiff's lot more than 28 years ago and also the more recent restrictions added thereto are detrimental and injurious and a distinct hindrance to the market value of said *locus in quo* and that if said restrictions are permitted to continue, it will retard the advancement and upbuilding of the high class suburban business district in said vicinity and deny the plaintiff the proper use and benefit of his said property.

"3. That the contract of lease entered into between plaintiff and defendant is a valid and binding lease, the same being entered into for

valuable consideration and that specific performance thereof is enforceable by law.

"Now therefore, upon motion of Frank W. Orr, attorney for plaintiff, it is considered, ordered and adjudged:

"1. That the restrictions heretofore existing upon plaintiff's lot as described in the complaint and also appearing of record in the chain of title, be and said restrictions are hereby declared null and void and said lot may be used for any lawful purpose.

"2. That defendant be and he is hereby required to specifically perform the contract of lease described in the complaint.

"3. That the defendant be taxed with the costs of this action.

"This 19 September, 1938."

From the judgment entered the defendant appealed, making "as his only assignment of error the judgment appearing in the record."

Frank W. Orr for plaintiff, appellee.
J. Clyde Stancill for defendant, appellant.

SCHENCK, J. All of the findings of fact by the court are amply sustained by the evidence.

The question presented for our consideration is whether the findings of fact sustain the court's conclusions of law. We have two lines of decisions in this jurisdiction involving the circumstances under which restrictive covenants in deeds for property originally devoted to residential purposes are rendered unenforceable or are enforced. The leading cases where such restrictions were held unenforceable are *Starkey v. Gardner,* 194 N. C., 74, and *Snyder v. Caldwell,* 207 N. C., 626, and the leading cases wherein such restrictions are held enforceable are *Johnston v. Garrett,* 190 N. C., 835, and *McLeskey v. Heinlein,* 200 N. C., 290.

The defendant contends that the court erred in holding that restrictions in the deeds involved in the instant case were unenforceable for the reason that there is no evidence or finding of fact to the effect that there has been any substantial change in the use of the property within the boundary of the subdivision as originally laid out and restricted. While there may be some persuasive reasoning and authority for this contention, it is not compelling and we do not concur with the conclusion that such change is a *sine qua non* to sustain the plaintiff's position. In *Starkey v. Gardner, supra,* it is said: "However, it is equally true that if the character of the community has been changed by the expansion of a city and the spread of industry or other causes resulting in a substantial subversion or fundamental change in the essential character of the property, then, in such cases, equity will not rigidly enforce the

restriction. In *Ward v. Prospect Manor Corp.*, 206 N. W., 856, decided 12 January, 1926, the Supreme Court of Wisconsin said: 'Courts of equity will not enforce such restrictive covenants where the character of the neighborhood has so changed as to make it impossible to accomplish the purpose intended by such covenants. This may result from circumstances over which neither plaintiff nor defendant nor other resident of the community has any control. As in *Rowland v. Miller*, 139 N. Y., 93, 22 L. R. A., 182, 34 N. E., 765, where the erection of a steam railway and the construction of a station rendered the neighborhood, and especially the defendant's property, in front of which the station was erected, unfit for use for residential purposes to which it was intended to confine the restricted area. Such changed conditions may result from the natural growth of the city, bringing industry, smoke, soot, and traffic into such close proximity to the restricted area as to render it undesirable for the purposes to which it is restricted. . . .'"

We are of the opinion, and so hold, that the instant case is governed by *Starkey v. Gardner, supra,* and *Snyder v. Caldwell, supra,* and the judgment of the Superior Court is therefore

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 30 November, 1938.)

1. Execution § 17—Manner of statement of facts relied on by judgment debtor to overcome report of sale made by sheriff and character of evidence establishing them, held not prejudicial.

In this controversy between the judgment debtor and the junior lienor, which bid in the property at the execution sale, as to the amount of the bid, *it is held*, the verdict of the jury upon competent evidence establishing the amount of the bid as contended for by the judgment debtor is conclusive, and the charge of the court in stating the character of evidence necessary to overcome the sheriff's report of sale *is held* not prejudicial upon the junior lienor's objection to the manner in which the facts relied on by the judgment debtor to overcome the report were stated, even though the instruction might have been more aptly given in different form.

2. Trial § 29b—

When the manner in which the court states the evidence is not prejudicial, the instruction will not be held for error even though the instruction might have been more aptly given in different form.

3. Execution § 17—Form of issue as to amount of bid at execution sale held not prejudicial.

In this controversy between the judgment debtor and the purchaser at the execution sale as to the amount of the bid, the form of the issue submitted *is held* not prejudicial, since it presented for the jury's determination the controverted amount of the bid, and the inclusion therein of matters relating to assumption of prior liens by the purchaser are deemed harmless surplusage.

4. Execution § 21—Judgment debtor is entitled as matter of law to have surplus under execution of junior lien applied to senior liens.

The verdict of the jury established that the junior lienor purchasing the property at the execution sale bid an amount sufficient to pay the judgment and the senior liens. *Held:* The judgment debtor is entitled to have the surplus applied to the senior liens as a matter of law, and as to the judgment debtor any agreement between the junior and senior lienors as to the payment of the senior liens and the purchase of the prior judgment is immaterial.

5. Executors and Administrators § 10—Administrator may purchase property at execution sale to protect claim of estate.

Where an estate owns a judgment against lands subject to senior liens, the administrator may protect the interest of the estate by purchasing the property at the execution sale, and may bid more than the amount of the estate's judgment in purchasing the land, in its discretion within reasonable limits in the exercise of good faith, which transaction will be regarded as an investment of funds of the estate in the land and not as creating a debt of the estate, and only the beneficiaries of the estate may object thereto, and the administrator may not attack its own bid as being *ultra vires* in seeking to repudiate the transaction.

APPEAL by defendants from *Rousseau, J.,* at May Term, 1938, of CATAWBA. No error.

One of the defendants, the Consolidated Trust Company, on June 29, 1931, obtained a judgment against the Abernethy Land & Finance Company and others, movants in this proceeding, in the amount of $6,750.00, with interest and costs, which was a first judgment lien on their real estate. Thereafter, on June 6, 1932, the First Security Trust Company, administrator of the John P. Yount Estate, secured judgments against the same plaintiffs on two $10,000 items, with interest and costs, which judgments became the second docketed lien against the property involved in this controversy. There were liens for taxes and street improvement assessments amounting to the sum of $5,680.11.

Desiring to issue an execution on its judgments, the First Security Trust Company, as contended by plaintiffs, approached the holder of the senior judgment—the Consolidated Trust Company—and entered into an arrangement by which the Consolidated Trust Company should refrain from execution on its judgment; and it was agreed that the

latter should be paid all of its claim, according to an agreed schedule, by the First Security Trust Company. In the event the First Security Trust Company should become the last and highest bidder at an execution sale upon its judgment, the latter would turn over to the Consolidated Trust Company the net proceeds, less taxes and expenses of any resale it might be able to make.

Subsequent to this agreement, the First Security Trust Company caused execution to issue, and on the 14th day of January, 1935, the sheriff of Catawba County sold, under such execution, 28 tracts or parcels of land of the Finance Company, judgment debtor, at the courthouse door in Newton, the property first being offered in parcels and then being sold as a whole. Thereupon, the Trust Company credited its judgment with the sum of $16,466.54 and the cost of the execution sale, making a total of $17,059.52.

Subsequently, the Finance Company enjoined further proceedings, on account of the inadequacy of the bid, claiming the property to be worth $75,000; but the restraining order was dissolved and an appeal which had been taken to the Supreme Court was abandoned.

The First Security Trust Company started supplementary proceedings against the Finance Company, J. W. Abernethy and others, and a compromise was reached between the Trust Company, Administrator, and the Finance Company and J. W. Abernethy, under which the Administrator's judgment against the Finance Company and Abernethy were to be canceled and discharged, and in compliance with the terms of this agreement Abernethy conveyed certain lands and paid the Administrator an additional sum of $3,100, whereupon the Administrator, First Security Trust Company, cancelled its judgments.

The First Security Trust Company paid to the Consolidated Trust Company, upon the senior judgment, $4,486.50 on April 23, 1936, and the balance of $4,225.44 during August, 1936; whereupon, the Consolidated Trust Company executed an assignment to the First Security Trust Company, Administrator, transferring, without recourse, any interest it might have in the judgment.

Thereupon, the First Security Trust Company, Administrator, issued execution on the Consolidated Trust Company judgment assigned to it, and the defendants Abernethy, Forest Schrum and Louis Schrum, brought this action to enjoin sale under the execution and to require cancellation of the judgment.

Upon the trial of the cause, there was evidence on the part of the respondent that its bid at the sale of the lands on the Yount judgments was $17,059.52, and there was evidence on the part of the movants that

the bid was $31,000, including assumption of the Consolidated Trust Company judgment and the outstanding taxes and assessments against the property. The jury found for the movants, their verdict being as follows:

"Did the First Security Trust Company, Administrator of the J. P. Yount Estate, bid the sum of Thirty-one Thousand Dollars at the execution sale of Abernethy Land and Finance Company lands, and include in said bid the assumption of the Consolidated Trust Company prior judgment, taxes, and street assessments on said properties? Answer: 'Yes.'"

From the judgment thereupon, the defendants appealed.

W. C. Feimster and Thos. P. Pruitt for plaintiffs, appellees.

W. A. Self and C. Davis Swift for defendants, appellants.

SEAWELL, J. The present controversy came before this Court on appeal by the plaintiffs from the judgment rendered in the Superior Court of Catawba County, dismissing an action to enjoin the execution sale of a judgment rendered in favor of the Consolidated Trust Company which the defendant First Security Trust Company claimed to have purchased. *Finance Co. v. Trust Co.*, 213 N. C., 369. Since it appeared that the controversy was over an execution sale of property of the plaintiffs on a judgment rendered in favor of the First Security Trust Company against them, in which the amount bid at the sale was in question, the court chose to treat the action as a motion in the original cause and remanded it to the court below for appropriate proceeding on such motion.

In remanding the case the Court said: "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 agreement entered into by and between the defendant administrator and the Consolidated Trust Company, we refrain from discussing the other questions at 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."

The verdict of the jury found that the bid of the First Security Trust Company at the auction sale under review was $31,000, thereby supporting the contention of the movants. We think this verdict, upon

evidence which we are constrained to think competent, largely disposes of the whole controversy and reduces the field of legal inquiry.

The respondents objected to the instruction of his Honor relating to the character of the evidence necessary to overcome the report of the sale made by the sheriff, in which the bid was stated to be $17,500. The criticism is aimed at the manner in which his Honor classified the facts which the movants were attempting to establish by such evidence. While perhaps the instruction might have been given more aptly in a different form, we cannot see that it caused substantial prejudice to respondents' cause, and we do not hold it for reversible error.

Respondents also excepted to the issue submitted to the jury and to the refusal to submit more particular and elaborate issues tendered by them. We think, however, that the issue submitted was sufficient to determine the issues raised in the pleadings and evidence, and while it included more than might have been necessary for that purpose, and was somewhat responsive to the wide scope taken in this investigation, some of which we think unnecessary, the additions related merely to matters of legal requirement, in the event that the First Security Trust Company bid $31,000 at the sale, and may be treated as surplusage. We do not find that the respondents were prejudiced by its submission in this form.

We need not inquire too deeply into the character of the transaction between the First Security Trust Company and the Consolidated Trust Company, whereby this respondent claimed to have purchased the Consolidated Trust Company judgment, upon which it proposed to issue execution against the lands of movants. Under the verdict of the jury and applicable law, it became the legal duty of the respondent, First Security Trust Company, to apply the proceeds of the sale, as far as they might be adequate and available, to the Consolidated Trust Company judgment, which was a senior judgment and had a prior lien upon the property sold. It appears from the verdict of the jury and the calculation from undisputed data that the proceeds of the sale were adequate for that purpose.

It appears that whatever agreement was made between the First Security Trust Company and the Consolidated Trust Company with regard to the latter's judgment was carried out after the sale, by the application of funds in the hands of the Security Trust Company, as administrator, to the Consolidated Trust Company's judgment. For the purpose of this proceeding it does not matter whether this was in pursuance of a contract of purchase, whereby the ownership was supposed to vest in the Security Trust Company, or otherwise, since, as we have stated, the law itself imposed the obligation upon the Security Trust Company to apply the proceeds of the sale in its hands in settlement of the judgment.

We do not think that the plea of the respondent Trust Company that it went beyond its authority, as administrator, in bidding more than the amount of its judgment and could not bind the estate by a new contract of that type is tenable.

The purchase of the movants' lands at the execution sale by this respondent cannot be classed as a new contract or creating a new liability upon this estate to be subsequently enforced. In contemplation of law, the application of the funds of the estate might be held to have been made. At any rate, the transaction may be classed as an investment in the land, for the purpose of protecting the assets of the estate.

The respondents admit that the administrator had the right to bid the amount of the judgment and interest—some $27,000 or more—in protecting the assets of the estate, a debt which was then secured by judgment on lands which might have been sacrificed at the sale for want of an adequate bid. Conceding that it had such a right, we do not hold that the amount the administrator could bid at such a sale must be rigidly determined by the amount of the debt due the estate, which he is endeavoring to protect and collect. It must rest upon sound business judgment and prudence, under a discretion which must be exercised in good faith and within reasonable limits, so as not to waste or imperil the assets of the estate or "throw good money after bad."

Schouler on Executors and Administrators, 6th edition, section 2330, holds that it is proper for the administrator to purchase real estate at a foreclosure sale where such a course is necessary to protect a claim of the decedent's estate against the mortgagor. In the case at bar, the estate held a lien on the property which the administrator had reason to believe might be sacrificed at the execution sale because of the existence of smaller prior liens, and its purchase of the land at the execution sale will not now be held *ultra vires.*

But we do not think the administrator can avail itself of that defense on this record. Our understanding of the law is that where an administrator has made an unauthorized investment, beneficiaries of the estate may elect to disaffirm the transaction and hold the administrator liable, or to ratify the act and accept the benefit. 24 C. J., page 72, section 494. There is no suggestion in this case that there has been any such repudiation of the purchase made by the First Security Trust Company, and at present that seems to be a matter which should be left between the administrator and those beneficially interested in the estate.

In the trial and judgment, we find

No error.

K. B. JOHNSON & SONS, INC., v. SOUTHERN RAILWAY COMPANY, A CORPORATION,

and

S. W. JOHNSON v. SOUTHERN RAILWAY COMPANY, A CORPORATION.

(Filed 30 November, 1938.)

1. Railroads § 9—

In an action to recover for damages to an automobile resulting from a collision at a grade crossing, the railroad company's motion to nonsuit is properly allowed in the absence of evidence that plaintiff was the owner of the car.

2. Evidence § 56—

Negative evidence is admissible and carries some probative force for the consideration of the jury that the circumstance in dispute did not occur, but in order to be competent it must be made to appear that the witness would have seen or heard or known of the fact in dispute had it existed.

3. Railroads § 9—

Testimony of a witness that he did not hear the bell or whistle of a locomotive as it approached a grade crossing is some evidence that the proper warning was not given, provided it is made to appear that the witness was in a position to have heard the signal had it been given.

4. Same—Negative evidence that locomotive failed to give proper warning held without probative force under circumstances of this case.

The evidence tended to show that the witnesses, the driver and passenger in an automobile, were both hard of hearing, that they approached the grade crossing with the engine of the car running, that it was raining and cold so that all windows were closed, and that mist continually gathered on the inside and outside of the glass windows and windshield, and that the occupants of the car had their attention centered, to some extent at least, upon keeping the windshield as nearly free of mist as the circumstances would permit. *Held:* Under the circumstances disclosed by the evidence, it does not appear that the witnesses would have heard warning signals of defendant's locomotive had any been given, and therefore their testimony that they did not hear any warning by whistle or bell has no probative force that such signals were not given, and this negative testimony being the only evidence of negligence on the part of the railroad company, its motion to nonsuit was properly allowed.

5. Appeal and Error § 41—

Where it is determined on appeal that the judgment as of nonsuit was proper for want of sufficient evidence of negligence, it is not necessary to decide whether the conduct of plaintiffs constituted contributory negligence as a matter of law.

CLARKSON, J., concurs in result.

APPEAL by plaintiffs from *Olive, Special Judge,* at June Term, 1938, of WAKE. Affirmed.

Civil actions, consolidated by consent, instituted to recover compensation for property damage to the automobile of the corporate plaintiff and for personal injuries to the individual plaintiff, alleged to have been caused by the negligence of the defendant resulting in a collision between an automobile occupied by K. B. Johnson, the driver, president of the corporate plaintiff, and S. W. Johnson, a passenger, and a train of the defendant at an intersection of the defendant's railroad and United States Highway No. 1 just inside the corporate limits in the town of Henderson.

United States Highway No. 1, upon which the car was traveling in a northerly direction, intersects the defendant's railroad at said crossing almost at right angles. There is another highway crossing the railroad at the same point at an acute angle. The point of intersection of the two highways is at or upon the railroad crossing, the said railroad crossing being common to both highways. The railroad at the point where it crosses the hard surface highway is located at the crest of a small incline or knoll and is imbedded in the material of which the hard surface of the highway is made, the top of the rails being approximately level with the surface of the highway, so that at the crossing the railroad cannot be seen. To the east, however, the track and a train thereon can be seen for some distance, as disclosed by the testimony of witnesses.

As the car was crossing the railroad track going in a northerly direction, the train of the defendant going in a westerly direction struck the rear end of the car, damaging same and inflicting personal injuries on the plaintiff S. W. Johnson. At the conclusion of plaintiff's evidence, on motion of the defendant, the action was dismissed and a judgment of involuntary nonsuit entered. The plaintiffs excepted and appealed.

A. J. Fletcher and Douglass & Douglass for plaintiffs, appellants.

W. T. Joyner, H. E. Powers, and Smith, Leach & Anderson for defendant, appellee.

BARNHILL, J. It is alleged that the automobile was the property of the corporate plaintiff. There is no evidence to sustain this allegation. The only evidence of title arises out of the testimony of the witness K. B. Johnson, the driver, who referred to the car a number of times as "my car." This alone is sufficient to sustain the judgment of nonsuit as to the corporate plaintiff.

The only witnesses to the occurrence were K. B. Johnson, the driver of the automobile, and the plaintiff S. W. Johnson, a passenger thereon. Each testified that he did not hear any bell or whistle or other signal. There was no evidence of excessive speed of the train or other act of negligence on the part of the employees of the railroad company. Under

the circumstances of this case was the negative testimony of plaintiffs' witnesses sufficient evidence of the failure of the railroad company to give proper warning of the approach of its train to require the submission of the cause to a jury? This is the only question presented.

The car was of the sedan type. As the weather was cold and it was raining, the glass windows were closed. Mist gathered on the glass windows and windshield, both on the inside and the outside, to such an extent that the occupants of the car had to clear it off every few minutes before the occupants could see. The driver testified: "I could only see, get a clear vision, where the windshield wiper had cleared the water off. The fog would gather on the inside and outside too constantly. I was looking straight ahead and had a clear vision" through the space where the windshield wiper kept the glass clear. The fog or mist on the glass was so thick "we had to wipe off the glass every few minutes, both inside and outside, before we could see." This witness likewise testified: "I wear an electric device as an aid to hearing. I have worn it for two years or more. I was wearing it at the time of the accident; about a year or maybe several years before it. I am somewhat hard of hearing otherwise. I can hear ordinary conversation without it, but it aids me in church and large halls." The plaintiff S. W. Johnson testified that he could not see through the glass at all, that he could not see anything on the outside, and that "my hearing has been impaired all of my life."

K. B. Johnson testified that he did not see any railroad crossing sign as he approached the railroad track, but that he went back and found the railroad sign 200 or more feet back from the crossing; that the lettering on this sign faced a traveler going north towards the Southern Railway; that he found a "slow" sign 12 or 15 feet from the crossing and a railroad cross-arm signal close to the track, about ten feet from the ground, and a square board sign on which the lettering was dim.

Thus it appears that the automobile occupied by the witness was in operation and the engine running; that the car was closed; that the attention of the occupants was to some extent at least centered upon keeping the glass windows and windshield as nearly free of mist as the conditions would permit; and that each of them was hard of hearing. They each testified that under these conditions, as they approached the railroad track, they did not hear a bell ring or a whistle blow.

Negative evidence, meaning testimony that an alleged fact did not exist, although weak, is admissible, if the witness' situation was such that he would have known of it had it existed. *Nelson v. Iverson,* 60 A. D., 442. While the affirmative testimony of a credible witness is ordinarily more reliable than the negative testimony of an equally credible witness, still testimony that a person nearby who could have heard and did not hear the sounding of a whistle or the ringing of a

bell is some evidence that no such signal was given. *Johnson v. R. R.*, 205 N. C., 127, 170 S. E., 120; *Earwood v. R. R.*, 192 N. C., 27, 133 S. E., 180; *Williams v. R. R.*, 187 N. C., 351, 121 S. E., 608; *Perry v. R. R.*, 180 N. C., 290, 104 S. E., 673; *Goff v. R. R.*, 179 N. C., 219, 102 S. E., 320; *Shepard v. R. R.*, 166 N. C., 539, 82 S. E., 872; *Johnson v. R. R.*, 163 N. C., 431, 79 S. E., 690; *Cooper v. R. R.*, 140 N. C., 209, 52 S. E., 932; *Edwards v. R. R.*, 129 N. C., 78, 39 S. E., 730; *Strickland v. R. R.*, 150 N. C., 4, 63 S. E., 161.

In *Johnson v. R. R., supra* (205 N. C., 127), the witness, after testifying that he cut off the engine to his car when he was within 25 or 30 feet of the track, further testified that he could have heard the whistle if it had blown; that the engine of his automobile while running could not keep enough noise to prevent him from hearing it. In *Williams v. R. R., supra*, the evidence showed "that the plaintiff was in a position to have heard the signal, whistle, or bell if it had been sounded or rung, and that she was not engaged in anything that would have distracted her attention." In *Perry v. R. R., supra*, it is said: "The authorities favoring this view (that the failure to stop at a railroad crossing is not contributory negligence as a matter of law) proceed upon the idea that the traveler has the right to rely upon the performance of its duty by the defendant, and that when he looks and listens and neither sees nor hears a train he has the right to act upon the presumption that none is approaching." It is stated in *Strickland v. R. R., supra*, that "he (the witness upon whose testimony the plaintiff relied) states that he crossed the track at 11 o'clock at Shore's crossing, some 400 or 500 yards south from the railroad approach. The train passed a few minutes after he crossed the track. He noticed the train, it was 150 or 200 yards off when he crossed the track. If there was a headlight on it he could not see it. Witness does not say he was looking for a headlight, but was a casual passer, hurrying across the track in front of a rapidly approaching train. When it passed him he was going away from the track, and when he noticed it the train was 200 yards distant. Such negative testimony (of no headlight), standing alone, has scarcely probative force sufficient to establish any fact."

"The entire probative value of the negative fact lies in the circumstance at once to be stated. Such evidence is meaningless, however, if the non-seeing or the non-hearing are equally consistent with the occurrence of the events themselves. Nothing is shown of any value in evidence if at the time of the alleged occurrence of these events the witness was so situated that they well might have occurred and he neither have seen nor heard them." 3 Modern Law of Evidence, sec. 1758. The basic psychological, as well as probative, weakness of negative evidence lies in this: The fact may have taken place in the sight or hearing of a

person who may not have perceived it; or who perceived it falsely because of defective perceptive apparatus, unfavorable surrounding conditions, or the state of mind of the witness; or who, having originally perceived it correctly, has since forgotten it. Wills, Circumstantial Evidence, Sixth Ed., pp. 421-435; Gardner, "The Perception and Memory of Witnesses," 18 Cornell Law Quarterly, 391-409. Testimony of witnesses that they did not hear a locomotive signal at a given time and place is given probative effect according to the surrounding circumstances, and is as "forceful as the opportunities for observation, and the concentration and attention of the witness on what was going on at the time, indicate, when considered with all the circumstances which bear on the credibility of witnesses generally." 1 Jones, Commentaries on Evidence, 2nd Ed., p. 39. Dean Wigmore likewise has recognized the importance of the surrounding circumstances and conditions of perception in admitting negative evidence such as that here considered. He states: "The only requirement is that the witness should have been so situated that in the ordinary course of events he would have heard or seen the fact had it occurred." 1 Evidence, 2nd Ed., p. 1068.

The rights of persons and things ought not to rest, and the law will not permit them to depend, upon the uncertain testimony of a witness who says he did not hear a bell or whistle, unless it is first made to appear that he was in a position to hear and could have heard the signal had one been sounded. The showing that the witness was in a position to hear and would have heard a signal is a prerequisite to the admissibility of negative evidence that the witness did not hear the ringing of a bell or the blowing of a whistle, or other signal, the hearing of which is dependent upon sound vibrations.

While we still adhere to the rule that evidence that a signal was not heard by one who was in a position to and would reasonably have heard the signal if it had been given, while negative in nature, is some evidence to be considered by a jury in determining whether a signal was given, such testimony is competent and admissible only when it is first made to appear that the witness was in a position to hear and could have heard the signal had it been given. In the absence of this preliminary showing the testimony does not possess sufficient probative force to require its submission to a jury.

Under the circumstances outlined by the witnesses for the plaintiffs, we are persuaded that they have failed to show that they were in a position to hear and would have heard the signal of the oncoming train had one been given. As we hold that this negative testimony, under the circumstances, has no probative force, there was no evidence of negligence on the part of the defendant to be submitted to a jury. All railroad grade crossings are more or less dangerous, and the mere

presence of a railroad near or across a public highway is necessarily a disturbing element, but the company is not responsible for such inherent danger unless it unnecessarily causes or increases it by some unlawful act, or wilful or negligent omission of duty. *Edwards v. R. R.*, 129 N. C., 78. There was no error in granting the motion to dismiss as of nonsuit.

As we conclude that there was no evidence of negligence on the part of the defendant it is unnecessary for us now to decide whether the conduct of the driver of the car and of the passenger alike in proceeding on a main highway under circumstances which prevented them from seeing signals erected for the purpose of warning travelers upon the highway that they were approaching a railroad crossing and without looking and listening constitutes contributory negligence on the part of each.

The judgment below is

Affirmed.

CLARKSON, J., concurs in result.

F. B. ROBINSON v. STANDARD TRANSPORTATION COMPANY AND J. J. THOMAS,

and

MRS. VANCE HUDSON v. STANDARD TRANSPORTATION COMPANY AND J. J. THOMAS,

and

RUBY BLACKBURN v. STANDARD TRANSPORTATION COMPANY AND J. J. THOMAS,

and

ALVIN BLACKBURN v. STANDARD TRANSPORTATION COMPANY AND J. J. THOMAS,

and

EARL BLACKBURN v. STANDARD TRANSPORTATION COMPANY AND J. J. THOMAS.

(Filed 30 November, 1938.)

1. Trial § 11—Court may consolidate several actions by different plaintiffs against same defendants when they involve same transaction and defense.

The discretionary power of the trial court to consolidate actions for trial is not limited to actions between the same parties, but extends to actions by one plaintiff against several defendants, or by several plaintiffs

against one defendant when the actions grow out of the same transaction and have a common defense, and the consolidation of the several actions of the five occupants of a car against the driver and owner of the truck involved in the collision will not be held for error, since defendants suffer no prejudice precluding the exercise of the court's discretion.

2. Automobiles §§ 10, 18g—Evidence raising inference that driver was on wrong side of highway held sufficient on issue of negligence.

Plaintiffs' evidence tended to show that the driver of the car in which they were riding was driving in a careful and prudent manner at a moderate rate of speed on the right of the center of the highway at the time of the collision in suit. *Held:* The evidence, considered in the light most favorable to plaintiffs, supports an inference that the truck involved in the collision was not being driven on its right of the center of the highway at the time of the collision, sec. 10, ch. 148, Public Laws of 1927; Michie's Code, 2621 (53), and is sufficient to be submitted to the jury on the issue of negligence notwithstanding defendants' conflicting evidence as to the facts.

3. Trial § 22b—

On a motion to nonsuit, only the evidence favorable to plaintiffs is to be considered.

4. Automobiles § 24c—Evidence held sufficient on issue of respondeat superior.

Evidence tending to show that the driver of a truck was employed by the corporate defendant, and that at the time of the accident was returning after unloading the truck, is sufficient to support an inference that at the time the driver was "about his master's business" and is sufficient to be submitted to the jury on the issue of *respondeat superior*.

5. Automobiles § 24d: Trial § 30—Instruction held for error in failing to explain doctrine of respondeat superior arising upon the evidence.

Plaintiffs sought to recover against the corporate defendant under the doctrine of *respondeat superior* upon evidence tending to show that the driver of the truck at the time of the collision was engaged in the scope of his employment. *Held:* The liability of the corporate defendant arising through the agency of the servant is a substantive feature of the case arising on the evidence, and is not a simple or self-explanatory principle of law, and the failure of the court to instruct the jury on this phase of him and involving his contentions. C. S., 564.

6. Trial § 30—Instruction held for error in failing to refer to individual defendant and treating cause as solely against corporate defendant.

In this action against a corporate defendant and an individual defendant the trial court did not directly refer to the individual defendant anywhere in the charge, and in effect charged the jury as though the corporate defendant were the sole party sued. *Held:* The individual defendant is entitled to a new trial for failure of the charge to declare and explain the law arising upon the evidence as it related individually to him and involving his contentions. C. S., 564.

7. Appeal and Error § 6f—

The exception of the individual defendant to the charge on the ground that it failed to refer to him directly, but treated the cause as though it

were solely against the corporate defendant, is not a "broadside" exception, since it refers to a definite distinguishable feature, sufficiently pointed out, running throughout the charge.

8. Appeal and Error § 41—

When a new trial is awarded upon certain exceptions, other exceptions relating to matters not likely to arise on the subsequent hearing need not be considered.

DEVIN, J., concurring in result.

BARNHILL and WINBORNE, JJ., concurring in concurring opinion.

APPEAL by defendants from *Frizzelle, J.*, at March-April Term, 1938, of SAMPSON. New trial.

The evidence in this case tends to show that the several plaintiffs named were riding in a Plymouth automobile, driven by F. B. Robinson, on State Highway No. 23, two or three miles southwest of Smithfield and in the direction of that town, approaching a bridge across the highway. At this time a truck of the defendant Transportation Company, used in distributing oil, and driven by defendant J. J. Thomas, was coming over the bridge. This truck was of the trailer type. The cars finally collided, either upon the bridge or immediately on the approach thereto.

The exact circumstances attending the collision are in dispute. The plaintiffs' evidence tends to show that as defendant's truck got off just inside the guard rails some part of the rear of the truck struck the back end of plaintiff's car and mashed it into the wall, knocking the housing back in; that the collision with the truck rendered the Plymouth car incapable of guidance and threw it around on the road, and that the left rear wheel came in contact with the truck; that the collision threw plaintiff's car around—the back end of it to the right—and when the car made the turn the right rear wheel struck the post of the guard rail on the left and bent it over; that the car then made a half turn, whirled around again, went up sideways to the guard rail the last time, knocked down several posts, and that the impact was so strong it broke the housing and locked the wheel so it would not turn, throwing the car completely around and heading it the other way. Plaintiffs' evidence indicates that their car was on the right-hand half of the road and that there was plenty of room for the truck to pass on its side.

The evidence for the defendants is to the effect that plaintiff's car was approaching the bridge in a zigzag, while defendant's truck was proceeding at a careful rate of speed across the bridge and on the driver's right-hand side; that plaintiff's car was finally thrown by its own operation partly across the highway in front of defendant's truck, and that in order to avoid a collision the driver of the truck turned the same shortly,

and while the car cleared the front of the truck it came in collision with the rear. There was physical evidence of the markings of the wheel of the approaching Plymouth car introduced in corroboration of the statement of the defendant Thomas.

There is evidence to the effect that the truck in collision, and being driven by the defendant Thomas, belonged to the Standard Transportation Company. The defendant Thomas testified: "I was working for the Standard Transportation Company, and driving the truck that was in this collision on Thanksgiving Day, 1935." . . . "I had taken a load up the road beyond Smithfield—I unloaded in Raleigh that morning."

Upon this evidence the jury found in favor of the plaintiffs on the issues of negligence of the defendants, and contributory negligence of the plaintiffs, and determined the amount of damages to be recovered as to each. From the judgment upon these issues, the defendants appealed.

J. D. Johnson, Jr., and Hackler & Allen for plaintiffs, appellees.
Butler & Butler for defendants, appellants.

SEAWELL, J. (1) The exception to consolidation of the cases for the purpose of trial is without merit. In this State the power of the trial court to consolidate cases for convenience of trial is not confined to cases between the same parties, but extends to cases by the same plaintiff against several defendants and cases by different plaintiffs against the same defendant, where the causes of action grow out of the same transaction and the defense is the same. *Abbitt v. Gregory,* 201 N. C., 577, 593, 594; McIntosh, Practice and Procedure, 536, 539. The liability of the defendants, if any, to the several plaintiffs in this action grew out of the same alleged negligent acts and the defense is the same. There is no apparent prejudice to the defendants in the consolidation of these actions which might interfere with the discretion of the court in making the order.

(2) We think there was evidence to go to the jury on the question of negligence of the defendant Thomas, and, on the principle *respondeat superior,* negligence of his codefendant, the Standard Transportation Company.

It is the practice of this Court to refrain from unnecessary comment on the evidence when the case is sent back for a new trial, but in order that it may be understood we are not forgetful of the conditions upon which negligence may be predicated and that we have given consideration in that respect to the evidence presented, we reproduce here some of the pertinent testimony:

The plaintiff F. B. Robinson testified (R., p. 28): "It had been raining a little bit. I was driving not over 20 miles an hour, had my car under control, and was maintaining a lookout, *and driving on my right-hand side.* There was an embankment on this side of the bridge at Holt's Lake, with guard rails on each side of the road, the posts being about 6 inches square and heavy wire nailed to them."

Mrs. Vance Hudson, a plaintiff, testified (R., p. 44): "Mr. Robinson's car was not zigzagging, he was driving carefully and slowly *on his side of the road.* He was over on his right side of the road over the center line at the time of the collision."

Mrs. Annie Blackburn, witness for the plaintiff, testified (R., p. 45): "Mr. Robinson was driving his car 20 miles an hour, had it under proper control, *and on his right side of the road, immediately before and at the time of the wreck.*"

An inference may be drawn from this evidence, considered in the light most favorable to the plaintiff, that plaintiff's car was driving in its proper lane to the right of the center line of the road; and since there was a collision between it and defendant's truck, a corollary inference may be drawn that the truck was being driven partially to its left of the center line, and encroaching on the lane of oncoming travel.

The defendant J. J. Thomas testified, referring to the oncoming Robinson car: ". . . he got to about fifteen feet of the bridge when his two right-hand wheels ran off the pavement, and when he pulled his car back on the pavement, it turned to the left on the pavement and skidded across the road directly in front of me. At that time I was about half way across the bridge. His car skidded across, and I turned as short as I could to avoid hitting him head-on." . . . "To avoid hitting the car head-on, I undertook to run around it." (R., pp. 49, 50.)

The evidence is contradictory, of course, but that is not for this Court. The effect of this evidence must be judged by the statute and well considered opinions. Section 10, chapter 148, Public Laws of 1927; Michie's Code of 1935, section 2621 (53), reads as follows: "Meeting of vehicles.—Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible." *James v. Coach Co.*, 207 N. C., 742, 178 S. E., 607; *Shirley v. Ayers,* 201 N. C., 51, 53, 158 S. E., 840.

Upon the question of *respondeat superior,* the defendant Thomas testified (R., pp. 49, 51): "I was working for Standard Transportation Company, and driving the truck that was in this accident on Thanksgiving Day, 1935. . . . I had taken a load up the road beyond Smithfield. . . . I unloaded in Raleigh that morning." The evidence shows that Thomas was driving an oil tank car, of the trailer type,

employed in transporting oil for the defendant corporation, and was returning after unloading at Raleigh. We think an inference might be drawn from this evidence that Thomas was at the time "about his master's business."

(3) But, nevertheless, the evidence both with regard to negligence of Thomas and the liability of both Thomas and the Transportation Company therefor, was a question for the jury, and the correctness of the charge to the jury has been challenged by pertinent exceptions, and these questions must be considered.

The defendant Transportation Company complains that the instructions to the jury did not comply with the provisions of Consolidated Statutes, section 564, requiring that the judge "shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon," in that nowhere in the charge was the jury instructed on the doctrine implied in the phrase *respondeat superior,* or the principle of agency on which the law imputes to the master the negligence of the servant.

In this case the Transportation Company could not be held liable for the negligence of Thomas, in the absence of evidence tending to show that the latter was at the time of his negligent act or omission both in the employment of the Transportation Company and in the performance of some service connected with such employment—that is, about his master's business.

There is no admission as to the agency, and in instructing the jury the court cannot assume it to exist. The evidence tending to show the agency is important, and the law applicable to it equally so, and neither is of such a simple nature as to be considered self-explanatory, dispensing with an instruction; *Craig v. Stewart,* 163 N. C., 531, 79 S. E., 1100; *Duckworth v. Orr,* 126 N. C., 674, 677, 36 S. E., 150; or involving a mere subordinate elaboration requiring a prayer for special instruction after substantial compliance with the statute, as in *S. v. Ellis,* 203 N. C., 836, 167 S. E., 67; *Gore v. Wilmington,* 194 N. C., 450, 140 S. E., 71; *Murphy v. Power Co.,* 196 N. C., 484, 146 S. E., 207, and similar cases. The liability of the master, arising through the agency of the servant, is a substantive feature of the case, as to which a proper instruction declaring and explaining the law is mandatory, and the omission of such instruction must be held for reversible error. *Nichols v. Fibre Co.,* 190 N. C., 1; *Headen v. Transportation Co.,* 211 N. C., 639.

(4) The defendant J. J. Thomas also complains that the provisions of the cited section—C. S., 564—were not observed in his behalf, since nowhere in the record is attention called to the fact that he is one of the defendants; and for this reason the evidence in his behalf and the contentions thereupon did not, with certainty, receive the benefit of that

explanation of the law which is required by the statute. He points out that the judge's charge apparently does not seem to concede to him the role of defendant in the case, and entitled to consideration as such, but regards him as an impersonal agency whose only function is to determine the liability of his codefendant, the Transportation Company; with the result that he is held to liability by reason of the use of the plural—"defendants"—in the issue instead of the singular—"defendant"—as employed in the judge's charge.

An examination of the charge discloses that the judge apparently did not refer to Thomas directly as a defendant. The nearest approach to it was in the opening sentences, ". . . that the injuries sustained by the plaintiffs and each of them was proximately caused by the negligence of the defendant in the operation of a truck by one of its employees; and the defendant in this action"—and, other charges in fact, did not refer to him anywhere by name as defendant. In opening the charge, the court stated that the defendant in each of the five cases was the Standard Transportation Company. In recounting the evidence relating to the circumstances of the wreck and injury to the plaintiffs, Thomas is nowhere referred to by name. In such statements of the contentions as are made and of the law of negligence applicable, the charge not only does not mention Thomas as a defendant, but a reasonable inference from the remarks of the judge would be that he is referring to the Transportation Company, which originally he designated as the defendant in the causes.

We think, as a minimum requirement of judicial investigation, the jury should at all times understand who are the parties to the trial and whose rights are being dealt with and settled by their verdict. The constant reference in the judge's charge to "the defendant"—using the singular number—at least tended to divert the minds of the jury from the individual to the corporate defendant, and to deprive him of a fair consideration of the evidence in his behalf and of the benefit of an explanation of the law arising thereon as involved in his contentions, since none of them were stated at all except as those of the Transportation Company, his codefendant. *Messick v. Hickory,* 211 N. C., 531, 535, 191 S. E., 43. In the neglect to declare and explain the law arising upon this evidence as it related individually to Thomas and involving his contentions, we think there was error. *Lea v. Utilities Co.,* 176 N. C., 511, 514; *Jarrett v. Trunk Co.,* 144 N. C., 299; *Williams v. Coach Co.,* 197 N. C., 12 (15), 147 S. E., 435; *S. v. Melton,* 187 N. C., 481, 482.

We do not regard these exceptions as being "broadside," since they refer to definite distinguishable features sufficiently pointed out which run throughout the charge.

Since this case must go back for a new trial, we do not deem it wise to comment on the evidence, as exceptions thereto may not recur on a new trial.

For the errors noted, the defendants are granted a
New trial. Error.

DEVIN, J., concurring in result: An examination of the record of the evidence adduced at the trial leads me to the conclusion that defendants' motion for judgment of nonsuit should have been allowed. The cause of the accident is not made to appear. There is lack of sufficient evidence to show that negligence on the part of the defendants proximately caused plaintiffs' injury. Actionable negligence is not presumed from the mere fact of injury.

BARNHILL and WINBORNE, JJ., concurring in this opinion.

DANIEL J. WOODELL, PLAINTIFF, v. ÆTNA LIFE INSURANCE COMPANY, DEFENDANT.

(Filed 30 November, 1938.)

1. Insurance § 13—Rules for construction of insurance contracts in general.

A policy of insurance will be construed with regard to the main purposes of the contract to guarantee to the insurer the payment of premiums and to secure it against fraud and imposition, and to give insured the protection and benefits for which he pays, and separate clauses will be harmonized with these purposes if possible by any reasonable construction, and literal construction of procedural requirements will not be given when such construction would defeat a primary purpose of the contract and compliance therewith is made impossible through no fault of a party to the contract by a circumstance later transpiring which could not have been contemplated by the parties at the time the contract was executed.

2. Insurance § 34b—Mental incapacity to give notice required excuses failure to give notice of disability.

The policy in suit provided for waiver of premiums and payment of benefits if insured should become totally and permanently disabled. Premiums on the policy were paid subsequent to insured's total disability, and after notice duly given some years after the inception of disability, insurer began paying disability benefits. Insured instituted this action to recover disability benefits accruing from the inception of the disability, and alleged that insured's disability affected his mind so that he was mentally incapable of giving notice thereof, and that notice was given as soon as possible. *Held:* The complaint states a cause of action not-

withstanding a provision of the policy that payment of disability benefits should begin "six months after proof is received," since a literal construction of the procedural requirement would defeat a primary purpose of the contract to provide benefits upon disability and the failure to comply with the provision was due to no fault of insured, but to a circumstance which could not have been in contemplation of the parties at the time the contract was executed.

APPEAL by defendant from *Harris, J.*, at February Term, 1938, of HARNETT. Affirmed.

The plaintiff held a policy of insurance with defendant company, in which it was provided: "Six months after proof is received at the Home Office of the Company, before the sum insured or any installment thereof becomes payable, that the insured has become wholly, continuously and permanently disabled and will for life be unable to perform any work or conduct any business for compensation or profit, or has met with the irrevocable loss of the entire sight of both eyes, or the total and permanent loss by removal or disease of the use of both hands or of both feet, or of such loss of one hand and one foot, all from causes originating after the delivery of this policy, the Company will, if all premiums previously due have been paid, waive the payment of all premiums falling due thereafter during such disability, and if such disability was sustained as above described and before the insured attained the age of sixty years, the Company will pay to the life beneficiary the sum of ten dollars for each thousand dollars of the sum herein described as the sum insured, and will pay the same sum on the same day of every month thereafter during the lifetime and during such disability of the insured.

"Said waiver of premiums and said monthly payments will not affect any other obligations of the Company as herein provided and the sum insured will be due and payable at death or maturity for the same amount and in the same way as if the premiums had been paid in cash.

"The foregoing benefits for disability are conditioned upon the Medical Examiner of the Company being permitted to examine the insured before the acceptance of proof.

"The consideration for the disability provision above described is an additional premium of 89/100ths Dollars, which consideration is included in the premium named in this policy, but will be reduced to ..... and 100ths Dollars after the insured attains the age of sixty years.

"(Note: Upon surrender of this policy at the end of the endowment term after disability payments commence, the Company will issue a supplementary contract providing for the continuance of the required disability payments during the lifetime and during the disability of the insured.)"

The complaint alleges: "7. That the disabled condition of the plaintiff, as he is informed and believes, and therefore alleges, was due to and caused by paralysis agitans, cordio-reno vascular disease and advanced arterio-sclerosis, and as a result of said disease the plaintiff's arteries in the brain became hard and ruptured, thereby causing a general wasting away of the muscles, and pain in head, extreme weakness, loss of speech, loss of use of hands and feet, and continuous tremor of all muscles, all of which occurred in the summer of 1933, about the last of the month of June of said year, and that because of the said diseased and disabled physical condition and suffering, the mental condition of plaintiff was impaired until 15 December, 1936, so that plaintiff was physically and mentally incapable of furnishing or causing to be furnished proof of his disability to defendant."

It is further alleged in the complaint: "That on 15 December, 1936, and again on 3 February, 1937, when furnishing further proofs of his disability as requested by defendant, the plaintiff caused to be furnished to the defendant full, complete and sufficient information to the effect that the physical and mental disability of the plaintiff had rendered it impossible for him to furnish or cause to be furnished proof of his said disability during the latter part of June, 1933, or at any other time prior to 15 December, 1936, and that notwithstanding that the defendant was in possession of such information and medical facts and had its own investigator to observe the plaintiff, it elected to disregard the disability of plaintiff prior to 15 December, 1936, and plaintiff's consequent helplessness and inability to furnish or cause to be furnished proof of his said disability . . ." etc.

It is further alleged that defendant honored the proof of disability as of 15 December, 1936, but declined to recognize it or pay the monthly installments to which the plaintiff was due under the terms of his policy accruing at any time prior to the six months following 15 December, 1936. Plaintiff alleges that by reason of the facts of his complaint, there were due him from the defendant monthly income benefits at $10.20 each, beginning as of 1 January, 1934, to and including 15 May, 1937, and demands payment thereof.

The defendant demurred for that the complaint did not state a cause of action and appealed from the judgment overruling such demurrer.

Dupree & Strickland for plaintiff, appellee.
Murray Allen for defendant, appellant.

SEAWELL, J. While giving due consideration to the able argument of counsel for the defendant to the contrary, we are of the opinion that

this case is controlled by the principles laid down in *Nelson v. Ins. Co.*, 199 N. C., 443, 154 S. E., 752; *Rhyne v. Ins. Co.*, 196 N. C., 717, 147 S. E., 6; *ibid.*, 199 N. C., 419, 154 S. E., 749; and *Rand v. Ins. Co.*, 206 N. C., 760, 174 S. E., 749.

In the *Nelson case, supra,* the clause relating to the furnishing of proof and payment of benefits read as follows: "If . . . the insured shall furnish to the company due proof of an irrevocable loss . . . the company, by endorsement in writing on this contract, will agree to pay . . . (b) commencing immediately from the acceptance by the company of the original proofs of disability . . . a monthly income during the lifetime of the insured," etc. The intervening omitted portions of the clause are not pertinent to the comparison we are here making.

In the statement of fact in the *Rand case, supra,* we find that the company agreed that "if due proof shall be furnished the company," etc., the company would "(1) waive the payment of annual premiums which may fall due under the said policy and under this contract during the continuance of such disability, commencing with the premium due on the anniversary of the policy next succeeding the date of receipt of such due proof. (2) To pay to the insured a monthly income of one per centum of the face amount of the policy during the continuance of such disability, the first income payment to become due on the first day of the calendar month following the date of receipt of such proof." In the case at bar, it is stated that the payment of monthly income benefits shall begin "six months after proof is received."

No distinction we are able to make between the phraseology employed in the case at bar and that employed in the cited cases leads us to the conclusion that any substantial rights of the parties might be made to rest on such distinction, or that a different rule of construction might apply other than that so repeatedly announced by this Court.

In construing contracts of insurance the Court will be inclined to construe its separate parts with a view to its equitable enforcement and the protection of both parties to the contract. Care will be taken to give the various clauses of the policy an interpretation consistent with the main purpose of the contract, which is to guarantee to the Company the payment of its premiums, which are its life, and to secure it against fraud and imposition, and to give the insured that security and those returns for which he pays. A harsh and literal construction of procedural requirements, the effect of which would be to impose impossible conditions upon the insured or to deprive him of the substantial benefits to which he is entitled by reason of the premiums paid, will not be adopted where a different construction might reasonably be applied more consonant with the declared purposes of the contract.

In *Rhyne v. Ins. Co.*, 196 N. C., 717, 719, *Chief Justice Stacy* for the Court, said: "But we are content to place our decision on the broad ground that, notwithstanding the literal meaning of the words used, unless clearly negatived, a stipulation in an insurance policy requiring notice, should be read with an exception reasonably saving the rights of the assured from forfeiture when, due to no fault of his own, he is totally incapacitated from acting in the matter. That which cannot fairly be said to have been in the minds of the parties, at the time of the making of the contract, should be held as excluded from its terms. *Comstock v. Fraternal Accident Association*, 116 Wis., 382, 93 N. W., 22. The primary purpose of all insurance is to insure, or to provide for indemnity, and it should be remembered that, if the letter killeth, the spirit giveth life. *Allgood v. Ins. Co.*, 186 N. C., 415, 119 S. E., 561; *Grabbs v. Ins. Co.*, 125 N. C., 389, 34 S. E., 503."

It is difficult to add anything to this statement which would more clearly set forth the legal principles involved in the case at bar, or better express the policy of this Court in the construction of insurance contracts.

In the light of these decisions, we do not feel compelled to put a construction upon the phrases employed in the policy under consideration which would enable the Insurance Company to profit by the continued receipt of premiums and by the retention of the amounts which it should pay upon losses, by reason of the impossibility of performance on the part of the insured of some stipulation which has no reasonable connection with the merits of his claim.

The clause in the policy under consideration providing that the monthly benefit shall begin six months after proof is received was probably phrased to give the Company a reasonable opportunity to investigate the merits of the claim, and to provide a period of trial during which the permanence of the disability might be tested by experience. At any rate, it cannot be accepted as within the minds of the contracting parties that the plaintiff should forfeit his right to monthly income when, through no fault of his own, it became an impossibility for him to give the notice. *Rand v. Ins. Co., supra.*

In our opinion, the complaint states a cause of action, and the judgment overruling the demurrer is

Affirmed.

STATE v. FRED ADAMS.

(Filed 30 November, 1938.)

1. Rape § 5—

The offense defined by Michie's Code, 4205, is an assault on a female with intent to commit rape, the "intent" to commit this offense being inclusive of an "attempt" to commit it.

2. Rape § 7: Criminal Law § 81c—Admission of evidence will not be held for error when evidence of same import is admitted without objection.

In this prosecution for assault with intent to commit rape, defendant objected to the testimony of a witness that she heard prosecutrix tell the doctor that she had been "attacked and tried to be raped" by the defendant. *Held:* The admission of the evidence cannot be held prejudicial in view of the admission of evidence of the same import without objection and the plenary evidence that defendant attacked prosecutrix.

3. Rape § 9: Criminal Law § 81c—Inadvertent error in instructions which could not mislead the jury will not be held prejudicial error.

In this prosecution for assault with intent to commit rape, an inadvertent instruction that ordinarily the question of intent must not be left to the jury to determine from the facts and circumstances, *is held* not prejudicial in view of the correct instruction immediately following, and the fact that the court submitted the question of intent to the jury under correct instructions.

4. Criminal Law §§ 4b, 43h—

The instruction on the question of intoxication as a defense in precluding the formation of criminal intent comprising an essential element of the crime charged, *held* without error when construed as a whole.

APPEAL by defendant from *Armstrong, J.*, and a jury, at January Term, 1938, of GASTON. No error.

This is a criminal action instituted in the Superior Court of Gaston County, North Carolina, in which the defendant is charged with an assault with intent to commit rape.

The bill of indictment is as follows:

"State of North Carolina—Gaston County.

In the Superior Court, January Term, 1938.

"The jurors for the State upon their oath present, that: Fred Adams, late of the County of Gaston, on 2 December, 1937, with force and arms, at and in the county aforesaid, did unlawfully, wilfully, and feloniously commit an assault upon a female, to wit, one Evelyn Price, with intent to rape, ravish, and carnally know the said Evelyn Price forcibly and against her will, against the form of the statute and in such case made and provided, and against the peace and dignity of the State.

JOHN G. CARPENTER, *Solicitor.*"

The testimony for the State: The prosecutrix, Evelyn Price, testified, in part: That on 2 December she was at home; that the defendant came there late in the afternoon and asked for her brother, and she told him her brother was not at home; that the defendant said he had an engagement to meet her brother there; that he pulled up a chair and sat down; that he attempted to put his arm around her; that she jumped up and told him she was not the hugging kind; that he inquired if she did a little kissing; that a scuffle ensued in the living room and the bedroom; that he threw her down on the floor; that he put his fist in her mouth, and his coat over her, and that he struck her, and beat her, and bit her, and in addition tore some of her undergarments practically off; that the scuffle lasted some 20 or 25 minutes; she testified that she screamed and hollered for some of the neighbors; that she finally got loose and called some of the neighbors; that the defendant ran through the back of the house through a screen door that was locked. She testified that she told her mother and Mr. Williams and Mr. Gunter about what happened. That the defendant was drinking.

Mrs. Price testified: That she is the mother of Evelyn Price; that she had stepped out to the store; that Evelyn's ear was bleeding; that she had a black eye, and her neck and shoulders were swollen, and that the bedroom and living room were torn up.

Tom Ingle testified: That he was going home and he heard Miss Evelyn Price hollo for her mother. That she told him what had happened, and that Miss Evelyn's ear and nose were bleeding and her knees were bruised.

Pete Nivens testified: That he was coming down the street and he heard Miss Price scream; that he went to the door; that she told him what the defendant had done; that he noticed the screen door was broken.

Mr. Williams testified: That he saw Miss Price; that her ear was bleeding, and her neck was swollen, and that Miss Price told him the defendant assaulted her.

Helen Gordon testified: That she saw the defendant run from the back of some of the houses facing on Marietta Street and come out on Fifth Street; that she saw Miss Price, and her ear was bleeding.

Dr. McChesney testified: That he examined Miss Price on 2 December about 7:00 p.m., and found her in a very nervous state and crying; bruised on her knee, and redness of neck and face; and her face was swollen and she had a cut on her right ear.

Mrs. T. E. Royster testified: That she went to the house and found Miss Price crying; that she had a bruise on her knee; that the front room was torn up. Question: "State what you heard Miss Price say?" (Objection; objection overruled.) Ans.: "Miss Price told the doctor she had been attacked and tried to be raped by the defendant."

Albert Nims testified: That he went to the house and saw Miss Price, and that her ear was bleeding.

D. C. Gunter testified: That he lived near the Price residence; that he heard some screaming or some sort of fuss at the Prices; that he supposed it was Miss Price and her brother; that he got his pistol and went to the home of Miss Price, and found her mouth and nose bleeding; that she told him that the defendant had attacked her; that the character of the defendant Fred Adams is good, and that the character of Miss Price is good.

The defendant testified, in part, as follows: That he lived on Sixth Avenue; that he was a married man; that he knew Miss Price; that he did not go to her house on 2 December and attack her; that he was with Joe Price and Joe Long; that he got with them at 3:30 and they drank a pint of white liquor; that they went to Belmont and back to Gastonia; that he went to Snyder's Cafe and drank some beer, and the next thing he knew, he woke up in jail about 11:00 o'clock that night.

The defendant was corroborated by several witnesses. One testified that on 2 December, about 7:30 p.m., he was "limber drunk," and another that he was "limber drunk" and that the only thing he would say when he was taken "would be to grunt."

There was evidence on the part of the State that defendant "was not drunk." There was evidence that the prosecuting witness and defendant's general reputation was good. The jury "came in and returned a verdict of guilty of an assault on a female with attempt to commit rape, as charged in the bill of indictment." The court below pronounced judgment on the defendant as follows: "Judgment of the court is that the defendant be confined in State's Prison at Raleigh, at hard labor and to wear stripes, for a term of not less than one year nor more than three years."

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be set forth in the opinion.

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

Ernest R. Warren for defendant.

CLARKSON, J. N. C. Code, 1935 (Michie), section 4205, is as follows: "Every person convicted of an assault with intent to commit rape upon the body of any female shall be imprisoned in the State's Prison not less than one nor more than fifteen years."

In *S. v. Hewett,* 158 N. C., 627 (629), we find: "Thus we see that practically all definitions of an attempt to commit a crime, when applied

to the particular crime of rape, necessarily imply and include 'an intent' to commit it. There may be offenses when in their application to them there is a distinction between 'attempt' and 'intent,' but that cannot be true as applied to the crime of rape. There is no such criminal offense as an 'attempt to commit rape.' It is embraced and covered by the offense of 'an assault with intent to commit rape,' and punished as such."

Mrs. T. E. Royster testified: "That she went to the house and found Miss Price crying; that she had a bruise on her knee; that the front room was torn up. Q. 'State what you heard Miss Price say?' Ans.: 'Miss Price told the doctor she had been attacked and tried to be raped by the defendant.'" To the above question and answer the defendant excepted and assigned error. From the other evidence in the case we do not think it prejudicial. Mr. Gunter testified "that he went to the home of the prosecutrix and 'found her mouth and nose bleeding;' that she told him that the defendant had attacked her." This testimony was admitted without objection.

The defendant excepted and assigned error to the following part of the charge in brackets: "[So, gentlemen of the jury, whether the ulterior criminal intent existed in the mind of the defendant in this case at the time of the alleged criminal act must of necessity be inferred and found from other facts which in their nature are the subject of specific proofs. It must not, ordinarily, be left to the jury to determine from the facts and circumstances whether or not the ulterior criminal intent existed at the time of the act, if you find the act was committed.] In some cases, gentlemen of the jury, the inference will be irresistible, while in other matters you may have great difficulty in determining whether or not the accused committed the act charged with in the record, which is the criminal purpose. So that means, in this case, gentlemen of the jury, the charge contained in the bill of indictment, the State must satisfy you beyond a reasonable doubt not only that the defendant committed an assault on Miss Evelyn Price, as the court has defined the term assault, but the State must go further and show you beyond a reasonable doubt that the defendant had the intent to carnally know or to have sexual intercourse with her forcibly and against her will, regardless of any resistance she might make. If the State fails to so satisfy you, you will return a verdict of *not guilty* as contained in the first charge—assault with intent to commit rape. It is proper and you may consider all the facts and circumstances in this case to determine whether or not that intent did exist—that is, we won't say, we can't say, that the defendant had that intent but must procure evidence and let the jury consider it and see what happened and let you take into considera-

tion all the facts and circumstances surrounding the case, and say whether or not there was criminal intent or intent to commit rape."

The portion of the charge objected to in connection with the whole charge could not have misled the jury. It could not be held as prejudicial. At most, it was an inadvertence followed by a charge unquestionably correct.

The defendant excepted and assigned error to the following part of the charge in brackets: "If the defendant in this case was under the influence of intoxicating liquor to such an extent that his normal functions of body and mind were so interferred with—that is, if he was in such condition that he could not form an intent to commit rape—that is, if he did not know what he was doing and what he was about and what he was trying to do; if he was so affected by the liquor that he could not form an intent, then he could not be guilty of the charge as contained in the bill of indictment. Now, it wouldn't make any difference, gentlemen of the jury, if a man gets two or three drinks of liquor or gets 'tight' or 'high' or gets nerve to commit an assault that wouldn't be any excuse for committing this or any other crime; but you have got to be in such condition, you don't have any mind; you don't have sufficient mind to form an intent, [so I want you to clearly understand that because a man gets under the influence of whiskey and commits a crime, either such crime as charged in the bill of indictment or any other crime, it wouldn't be an excuse]." Taking the charge as a whole, we think it the law in this jurisdiction.

We do not think the court below invaded the province of the jury by expression of an opinion, but fully complied with N. C. Code, *supra*, sec. 564. We think on the record that defendant's exceptions and assignments of error cannot be sustained—they are too attenuated.

On the whole record, we find no prejudicial or reversible error.

No error.

MRS. ADDIE RAPE, MOTHER; CELESTE RAPE, SISTER; RUTH RAPE, MINOR CHILD; JOHNNIE ALBERT RAPE, MINOR CHILD (BORN AFTER DEATH OF DECEASED); AND MRS. J. A. RAPE, WIDOW OF J. A. RAPE, DECEASED, v. TOWN OF HUNTERSVILLE, SELF-INSURER.

(Filed 30 November, 1938.)

1. Master and Servant § 38—Each municipal corporation is subject to Compensation Act, even though it employs less than five employees.

Each municipal corporation in the State is subject to the Workmen's Compensation Act, even though it employs less than five employees, N. C. Code, 8081 (i) (a), the legislative intent to classify municipal corpora-

tions with the State and its political subdivisions being consonant with reason and being indicated by section 8081 (u), which does not include municipal corporations employing less than five employees in listing employers exempt from the act, and section 8081 (o), which provides that neither the State nor any municipal corporation nor any subdivision of the State, nor employees of the same, shall have the right to reject the provisions of the act, and it being required that these sections be construed *in pari materia* to determine the legislative intent.

2. Same—

The provisions of the Compensation Act relating to employers and employees covered by the act must be given a liberal interpretation.

APPEAL by defendant from *Cowper, Special Judge*, at September Term, 1938, of MECKLENBURG. Affirmed.

The dependents of J. A. Rape, deceased, brought this proceeding against the town of Huntersville, under the Workmen's Compensation Act, to recover an award for the death of Rape, which occurred in the course of employment as police officer of the town.

There is no controversy over the facts that Rape was employed by the town at a salary of $100.00 per month, and that he sustained an injury causing his death by accident, arising out of and in the course of his employment. But the Commission found that the town did not have as many as five employees during the period it was necessary to consider. Holding as a matter of law that the town came under the provisions of the Workmen's Compensation Act, notwithstanding the number of employees was less than five, the hearing Commissioner awarded compensation, in which he was followed by the full Commission; and on appeal to the Superior Court the order of the Industrial Commission was affirmed, and defendant appealed.

The pertinent sections of the statute (see Michie's Code, 1935), are as follows:

"C. S. 8081 (i). (a) The term 'employment' includes employment by the State and all political subdivisions thereof, and all public and *quasi*-public corporations therein and *all private employments in which five or more employees are regularly employed in the same business or establishment* . . .

"(b) 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; as relating to municipal corporations and political subdivisions of the State, the term 'employee' shall include all officers and employees thereof except such as are elected by the people or elected by the council or other governing body of said municipal corporation or

political subdivision, who act in purely administrative capacities, and to serve for a definite term of office.

"C. S. 8081 (o). (a) Neither the State nor any municipal corporation within the State, nor any political subdivision thereof nor any employee of the State or of any such 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 sections 8081 (l), 8081 (m), 8081 (v), 8081 (w), and 8081 (x) shall not apply to them.

"C. S. 8081 (u). (a) This article shall not apply to railroads or railroad employees nor in any way repeal, amend, alter or affect article seven (7) of Chapter sixty-seven (67) of the Code, or any section thereof relating to liability of railroads for injuries to employees; nor, upon the trial of any action in tort for injuries not coming under the provisions of this article, shall any provision herein be placed in evidence or be permitted to be argued to the jury. . . .

"(b) This article shall not apply to casual employees, farm laborers, federal government employees in North Carolina, and domestic servants nor to employees of such persons, nor to any person, firm, or *private corporation* that has regularly in service less than five employees in the same business within this State, unless such employees and their employers voluntarily elect, in the manner hereinafter specified to be bound by this article . . ."

Vann & Milliken for plaintiffs, appellees.

Carswell & Ervin and J. Laurence Jones for defendant, appellant.

SEAWELL, J. The appeal presents a single question: Does the Workmen's Compensation Act apply to a municipal corporation regardless of the number of its employees?

The controversy is over subsection 8081 (i) (a), defining "employment": "The term 'employment' includes employment by the State and all political subdivisions thereof, and all public and *quasi*-public corporations therein and all private employments in which five or more employees are regularly employed in the same business or establishment, except agriculture and domestic service."

Under this subsection, appellant contends that it was the intention of the act to place public and *quasi*-public corporations, including municipal corporations, in a class with private employers, thus making one class, while State and political subdivisions constitute another. This would require municipal corporations to have as many as five regular employees before becoming subject to the act, which requirement does not extend to State and political subdivisions. It admits that this intention, because of the want of proper punctuation, is poorly expressed.

It is argued, however, that such ambiguity is cleared up by reference to subsection 8081 (u), (and particularly its heading), which, as appellant contends, shows that it was the intention of the legislature to exclude from the provisions of the act all corporations of this kind having less than five employees. Plaintiffs also recognize the ambiguity, and resolve it in their favor by reference to the same sections and subsections.

The supposed ambiguity in section 8081 (i) (a) is said to come about because of the want of a comma immediately after the expression "all public and *quasi*-public corporations therein," which might segregate such corporations from private employments, thus making the clause read more favorably to the plaintiffs, or the absence of a comma after "all private employments," which would make the clause read more favorably to the defendant.

As litigant parties might not be satisfied with our disposition of the commas, we would prefer to look to the other parts of the statute for clarification.

The fact that municipal corporations exercise governmental functions and are thus closely similar to the State and its political subdivisions, is persuasive that a like treatment was intended to be given them in the act, and conversely they are so unlike private corporations that a classification with them would seem to be inappropriate.

An analysis of the pertinent sections of the law leads us to conclude that it was the intention of the act to classify municipal corporations as employers with the State and its political subdivisions, rather than with private employers.

Subsection 8081 (u) in dealing with the coverage of the act from the viewpoint of "employers" excepts certain employers from the provisions of the act. We think this subsection should be construed as completely comprehensive as to the employers excepted and those left remaining within the act; otherwise, it would not be reciprocal and complementary, taken in connection with 8081 (i) (a), defining employment. The subsection provides that the act shall not apply (a) to railroads, or . . . (b) "to any person, firm, or private corporation that has regularly in service less than five employees."

The provisions of subsection 8081 (o) are strongly significant of the intention of the Legislature to classify municipal corporations with the State and its political subdivisions throughout the act. This section must be considered in *pari materia* with 8081 (i). *Rice v. Panel Co.*, 199 N. C., 154, 154 S. E., 69. So considered, we think it removes any ambiguity which might exist in the latter section. The subsection provides that: "Neither the State nor any municipal corporation within the State, nor any political subdivision thereof, nor any employee of the State or of any such 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 section 8081 (l), 8081 (m), 8081 (v), 8081 (w), and 8081 (x) shall not apply to them." An examination of these subsections, the privileges of which are denied to the employers thus classed together extends these privileges generally to those employers which are "persons, firms and corporations" engaged in private employment coming within the provisions of the act by reason of the employment of five or more persons.

We think also that those principles of construction which require a liberal interpretation of acts of this nature apply with force to questions concerning their coverage. *Metropolitan Casualty Co. v. Smith* (Texas Civil Appeals), 40 S. W., 2d, 913, 914; *Barbour v. State Hospital,* 213 N. C., 515.

In our opinion, the court below put a proper construction upon the statute, and the judgment, therefore, is

Affirmed.

STATE v. CHIRNER DEE, MAGGIE DEE, AND J. R. STURGIS.

(Filed 30 November, 1938.)

1. **Criminal Law § 41f—Defendant testifying in own behalf is entitled to same credit as any other witness when jury finds him worthy of belief.**

A defendant in a criminal prosecution, at his own request and not otherwise, is a competent witness to testify in his own behalf, but his failure to testify is not subject to comment to his prejudice, and while it is proper for the court to instruct the jury to scrutinize his testimony because of his interest in the verdict, it is error for the court to fail to follow such instruction with a charge that if after such scrutiny the jury finds him worthy of belief they should give his testimony as full credit as they would any other witness. C. S., 1799.

2. **Same: Criminal Law § 81c—Instruction that defendant's testimony should be given same credit as that of any interested witness is error.**

An instruction that the jury should scrutinize defendant's testimony in his own behalf because of his interest in the verdict, but if after doing so they were satisfied he told the truth, they should give his testimony the same weight they would give that of any "interested witness," perforce impeaches the testimony of defendant contrary to the statute, C. S., 1799, and the pertinent decisions, and constitutes prejudicial error.

3. **Criminal Law §§ 73b, 77e—When the solicitor approves defendant's statement it becomes "case on appeal" and is not subject to correction.**

When the solicitor approves defendant's statement of the case it becomes the "case on appeal" and a part of the record, C. S., 643, and is not thereafter subject to correction, and the State's motion for *certiorari* for

correction of the record may not be allowed even when supported by a letter of the trial court supporting the State's contention of a typographical error in the case on appeal, since the rights of the defendants have intervened.

4. Criminal Law § 77d—

The record imports verity, and the Supreme Court is bound thereby.

APPEAL by defendants from *Burgwyn, Special Judge,* at March Term, 1938, of GASTON.

Criminal prosecution tried upon indictments charging the defendants Chirner Dee and J. R. Sturgis with the murder of one Hoke Davis, and the defendant Maggie Dee with being an accessory after the fact of murder.

At the conclusion of all the evidence, upon motion duly made, a verdict of not guilty was entered on the charge against the *feme* defendant.

Verdict on the charge of murder: "Guilty of murder in the first degree as to both defendants."

Judgment: Death by asphyxiation.

The defendants appeal, assigning errors.

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

Ernest R. Warren for defendant Sturgis.

Basil L. Whitener for defendant Dee.

STACY, C. J. The validity of the trial is called in question by numerous exceptions and assignments of error, but consideration of them *seriatim* is pretermitted, as a new trial must be awarded for error in the following instruction:

"The defendants in this case, gentlemen of the jury, have gone upon the stand. This they did not have to do, but this they did do at their election and the law of this State says when a man—that is, the defendant—goes upon the stand, you, the jury, should scan and scrutinize his testimony closely, having in mind his interest in the result of your verdict and his fear of possible conviction and probable punishment thereafter, (but if after having so scanned it, you are satisfied he told you the truth, you should give unto his testimony the same weight you would that of any interested witness)."

Exception is taken by each of the defendants to the concluding expression in parenthesis, which would seem to be well founded. *S. v. Carden,* 207 N. C., 517, 177 S. E., 647; *S. v. Wilcox,* 206 N. C., 691, 175 S. E., 122; *S. v. Rhinehart,* 209 N. C., 150, 183 S. E., 388. *Cf. S. v. Davis,* 209 N. C., 242, 183 S. E., 420; *S. v. Deal,* 207 N. C., 448, 177 S. E., 332.

It is provided by C. S., 1799 that a person charged with the commission of a crime shall, at his own request but not otherwise, be a competent witness to testify in his own behalf upon the trial of the cause, but his failure to claim the privilege and to offer his own testimony is not permitted to become the subject of comment to his prejudice by the solicitor or counsel for the prosecution. *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720; *S. v. Bynum,* 175 N. C., 777, 95 S. E., 101.

And further, the decisions are to the effect that where a defendant in a criminal prosecution testifies in his own behalf, it is error for the trial court to instruct the jury to scrutinize his testimony and to receive it with grains of allowance, because of his interest in the verdict, without adding that if they find the witness worthy of belief, they shall give as full credit to his testimony as to that of any other witness, notwithstanding his interest. *S. v. Ray,* 195 N. C., 619, 143 S. E., 143; *S. v. Green,* 187 N. C., 466, 122 S. E., 178; *S. v. Barnhill,* 186 N. C., 446, 119 S. E., 894; *S. v. Lance,* 166 N. C., 411, 81 S. E., 1092; *S. v. Fogleman,* 164 N. C., 458, 79 S. E., 879; *S. v. Graham,* 133 N. C., 645, 45 S. E., 514; *S. v. Byers,* 100 N. C., 512, 6 S. E., 420.

In *S. v. Green, supra,* the following instruction was approved: "It is the law of North Carolina, gentlemen, that when a defendant, or one interested in the verdict of a jury, testifies, it is the duty of the jury to take his testimony with a grain of allowance and carefully scrutinize and scan it; but if, after such scrutiny, you are satisfied he is telling the truth, then it would be your duty to give his testimony the same credibility that you would give the testimony of a disinterested witness. Credibility, gentlemen of the jury, means worthiness of belief."

In declaring a person charged with the commission of crime to be "a competent witness" we understand the section to mean that he shall occupy the same position as "any other witness"—not simply that of "any interested witness." Such was the holding in *S. v. Efler,* 85 N. C., 585; *S. v. Hawkins,* 115 N. C., 712, 20 S. E., 623; *S. v. Griffin,* 201 N. C., 541, 160 S. E., 826. See *S. v. Edwards,* 211 N. C., 555, 191 S. E., 1; *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643.

The accepted standard for weighing the testimony of a defendant in a criminal prosecution was stated in *S. v. Lee,* 121 N. C., 544, 28 S. E., 552, as follows: "The law regards with suspicion the testimony of near relations, interested parties, and those testifying in their own behalf. It is the province of the jury to consider and decide the weight due to such testimony, and, as a general rule in deciding on the credit of witnesses on both sides, they ought to look to the deportment of the witnesses, their capacity and opportunity to testify in relation to the transaction, and the relation in which the witness stands to the party;

that such evidence must be taken with some degree of allowance and should not be given the weight of the evidence of disinterested witnesses, but the rule does not reject or necessarily impeach it; and if, from the testimony, or from it and the other facts and circumstances in the case, the jury believe that such witnesses have sworn the truth, then they are entitled to as full credit as any other witness."

Manifestly, the instruction as given was calculated to impeach and perforce did cast a shadow upon the testimony of the defendants in contravention of the statute and at variance with the decisions on the subject. *S. v. Wilcox, supra; S. v. Rhinehart, supra.*

It is suggested by the Attorney-General that, in all probability, a typographical error has crept into the transcript and that the word "disinterested" was used where the word "interested" appears. In this he is supported by a letter from the judge who presided at the trial, and upon this letter a motion for *certiorari* to correct the record has been lodged on behalf of the State. The solicitor apparently took a different view of the matter when he agreed to the statement of case on appeal with an exception pointed directly to the expression. But however this may be, the transcript is not now subject to change or correction. *S. v. Moore,* 210 N. C., 686, 188 S. E., 421. It imports verity, and we are bound by it. *S. v. Brown,* 207 N. C., 156, 176 S. E., 260. We must take it as it is. *Abernethy v. Burns,* 210 N. C., 636, 188 S. E., 97. The statute declares it the case on appeal—"it shall be . . . a part of the record." C. S., 643. "The trial judge is without authority to change the appellant's case on appeal, though regarded by him as erroneous, when that case has become the case on appeal. Under C. S., 643, if the case on appeal as served by the appellant be approved by the respondent or appellee, it becomes the case and a part of the record on appeal, and in connection with the record, may alone be considered in determining the rights of the parties interested in the appeal. . . . The appeal must be heard and determined on the agreed case appearing in the record." *Winborne, J.,* in *S. v. Miller, ante,* 317. Again in *S. v. Palmore,* 189 N. C., 538, 127 S. E., 599, *Clarkson, J.,* speaking for the Court, said: "The solicitor must pass on 'case on appeal' for the State, *S. v. Cameron,* 121 N. C., 573, and this Court is bound by the case passed upon, *S. v. Wilson,* 121 N. C., 650. The judge cannot authorize the case on appeal to be served upon any other than the solicitor or counsel acting for him. *S. v. Stevens,* 152 N. C., 840. When appellant's case is served in time, and no exception or counter-case served, it is 'the case.' *S. v. Carlton,* 107 N. C., 956." See *S. v. Moore, supra; S. v. Ray,* 206 N. C., 736, 175 S. E., 109; *S. v. Humphrey,* 186 N. C., 533, 120 S. E., 85.

The judge is permitted to correct his own errors, but not the mistakes of others after the rights of litigants have intervened. "It is only when the judge has settled the case in the exercise of his proper jurisdiction, that upon affidavit of error therein, and a letter from the judge stating that he will correct it if given the opportunity, that this Court will give him such opportunity." *Clark, C. J.,* in *Barber v. Justice,* 138 N. C., 20, 58 S. E., 445. Again in *S. v. Chaffin,* 125 N. C., 660, 34 S. E., 516, it was said: "The case on appeal was agreed upon by the solicitor and counsel for the defendant. Such being the case, there is no ground for action by the judge; . . . nor for a *certiorari* to correct the case by the judge's notes of the evidence on file; nor to permit the judge to correct the case." To like effect are the decisions in *S. v. Thomas,* 184 N. C., 666, 114 S. E., 12; *S. v. Faulkner,* 175 N. C., 787, 95 S. E., 171; *S. v. Cameron,* 121 N. C., 572, 28 S. E., 139; *Slocumb v. Construction Co.,* 142 N. C., 349, 55 S. E., 196; *Boyer v. Teague,* 106 N. C., 571, 11 S. E., 330.

There are other matters appearing on the record, especially the calling of one of the defendants as a witness for the prosecution "otherwise" than "at his own request," C. S., 1799, but as they are not likely to arise on another hearing, further consideration is presently omitted.

For the error as indicated, a new trial must be awarded. It is so ordered.

New trial.

N. C. GUTHRIE v. ANTHONY J. GOCKING, TRADING AS A. J. GOCKING COMPANY, AND J. E. THOMPSON.

(Filed 30 November, 1938.)

1. Automobiles § 10—Ordinarily, driver may assume that another driver approaching on left of highway will turn to right and avoid collision.

When the driver of a car sees another car approaching from the opposite direction on the wrong side of the highway, he may assume that such other driver will turn to his right in time to avoid a collision, but when he sees, or should realize in the exercise of proper care and watchfulness, that such other driver is in a helpless condition or will be unable to avoid hitting his car, he must exercise increased exertion to avoid a collision.

2. Same: Automobiles § 18e—Complaint held insufficient to allege negligence on part of defendant driver in failing to avoid collision.

Plaintiff alleged that he was driving his car on the highway following the car driven by one defendant and owned by the other defendant, that defendant driver saw approaching him from the opposite direction an automobile driven on the wrong side of the highway, which third car

plaintiff could not see because defendant's car was between him and the third car, that defendant driver could have seen that the driver of the third car was in a more or less helpless condition or would be unable to avoid hitting defendant's car, and that defendant driver failed to turn to his right or left to avoid a collision, and that the cars collided and resulted in injury to plaintiff. *Held:* Defendant's demurrer was properly sustained, since ordinarily a driver may assume that a car approaching on the wrong side of the highway will be turned to the right in time to avoid a collision, and since the allegation that defendant driver should have seen that the driver of the third car was helpless or unconscious is a mere conclusion of the pleader unsupported by allegations of fact leading to that conclusion, and since it is not alleged that defendant driver might have turned either to the right or left in safety, or that such action would have saved plaintiff from injury. *Rucker v. Snider Bros.*, 211 N. C., 566, cited and distinguished.

APPEAL by plaintiff from *Hamilton, Special Judge,* at September Extra Civil Term, 1938, of MECKLENBURG. Affirmed.

Action for personal injury to plaintiff caused by a collision between defendants' automobile and the automobile of a third party. It is alleged that the plaintiff, driving an automobile in the rear of defendants' automobile, was injured as a result of the collision, and that this was due to defendants' negligence. Defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, in that it appeared from the facts alleged that the negligence of the third party was the sole proximate cause of plaintiff's injury. The demurrer was sustained and plaintiff appealed.

G. T. Carswell and Joe W. Ervin for plaintiff appellant.
J. Laurence Jones for defendants, appellees.

DEVIN, J. The appeal presents the question whether a cause of action for negligence on the part of the defendants, proximately resulting in plaintiff's injury, has been sufficiently stated in the complaint.

The complaint alleges that the plaintiff, on the occasion referred to, was driving an automobile on the highway between Albemarle and Troy, North Carolina, traveling in an easterly direction, and that his automobile was in the rear and view of defendants' automobile which was proceeding in the same direction; that the automobile of defendant Gocking was being driven by the defendant Thompson, the agent and employee of his codefendant, within the scope of his employment.

The plaintiff sets out the facts upon which he seeks to impose liability upon the defendants in the following language:

"That on or about July 20, 1938, at about 4 o'clock p.m., the automobiles of the plaintiff and the defendant Gocking were being operated in an easterly direction on the North Carolina State Highway between

Albemarle and Troy. That, at said time, the automobile of the defendant Gocking, which was being operated by J. E. Thompson, was approached by a third automobile which was being operated in a westerly direction on said highway. That said third automobile, at said time, was being operated to the left of the center of said highway, directly towards and on the same side of the road as the automobile of the defendants. That, at said time, and until after the collision hereinafter referred to, said third automobile was obscured from the vision of the plaintiff, by reason of the fact that the automobile of the defendants was directly between said third automobile and the plaintiff. That said third automobile continued on the wrong side of said highway to approach the automobile of the defendants in a reckless and careless manner and at an excessive and dangerous rate of speed. That said J. E. Thompson either observed or, in the exercise of ordinary care, could and would have observed that said third automobile was in a somewhat helpless condition or was apparently unable to avoid the automobile of the defendants, or that the driver of the third automobile did not intend to turn from said lane of traffic or was unconscious of the danger, or that the driver of the third automobile would not or could not or was not going to drive said automobile to the right of the center of the road. That, in spite of such knowledge on the part of the said J. E. Thompson, or in spite of the circumstances which should and would, in the exercise of ordinary care, have put said J. E. Thompson on notice of such fact, said J. E. Thompson negligently and carelessly failed to exercise ordinary care to avoid colliding with said third automobile and negligently and carelessly failed to turn the defendants' automobile either to the right or to the left, to avoid a collision with said third automobile, but negligently and carelessly operated the defendants' automobile on said occasion in a reckless and careless manner, at an excessive and dangerous rate of speed under the circumstances, and negligently and carelessly failed to slow down the defendants' said automobile or to change the course thereof, and negligently and carelessly failed to give the plaintiff any sign, signal or warning of any kind or character of the approach of said third automobile, said J. E. Thompson thereby negligently and carelessly causing his said automobile to collide with said third automobile, the negligence of said J. E. Thompson causing said third automobile to be thrown, hurled, and directed with great force and violence into the automobile of the plaintiff, the plaintiff being thereby injured and damaged as hereinafter set forth."

Omitting some of the repeated phrases and adverbs with which the pleader has clothed his allegations, we find the facts of the situation shown by the complaint to be as follows: The plaintiff is driving an

automobile along the highway in rear of defendants' automobile proceeding in the same direction. A third automobile appears on the scene coming rapidly from the opposite direction, meeting the automobile of defendants and plaintiff. The third automobile is being driven on the left side of the highway, that is, on the same side as that of defendants and plaintiff. In that situation the driver of defendants' automobile continued in his own lane of traffic, to the right of the center of the highway.

It is alleged that it could and should have been foreseen that the third automobile was not going to be turned from its unlawful course, and that the driver of defendants' automobile failed to turn either to the right or left to avoid the collision. However, it does not appear what was on the right of the road, and to have turned to his left would have necessitated a violation of the statute requiring drivers of motor vehicles proceeding in opposite directions to pass each other to the right (Acts 1927, ch. 148, sec. 11), and would have involved the hazard of injury to himself or others on his left side of the road, in the other lane of traffic. The driver of defendants' automobile had the right to assume that the driver of the third car would turn to his right and into his proper lane of traffic in time to avoid collision. Referring to a similar situation, in *Shirley v. Ayers,* 201 N. C., 51, 158 S. E., 840, this Court said: "When the driver of one of the automobiles is not observing the rule (C. S. 2621 [53]), as the automobiles approach each other, the other may assume that before the automobiles meet, the driver of the approaching automobile will turn to his right, so that the two automobiles may pass each other in safety." And, in further relation to the duty of the driver who is observing the rule, the opinion in the *Shirley case, supra,* quotes from 2 R. C. L., 1185, as follows: "But when the operator of a motor vehicle has had time to realize, or by the exercise of a proper care and watchfulness should realize, that a person whom he meets is in a somewhat helpless condition, or apparently unable to avoid the approaching machine, he must exercise increased exertion to avoid a collision." *Cory v. Cory,* 205 N. C., 205, 170 S. E., 629; *James v. Coach Co.,* 207 N. C., 742, 178 S. E., 607. The rule requiring reasonable precaution to avoid a collision under the circumstances is stated in 3-4 Huddy Cyclopedia Automobile Law, pages 187, 191.

While it is alleged in the complaint that the driver of defendants' automobile could have "observed that the third automobile was in a somewhat helpless condition or was apparently unable to avoid the automobile of defendants, or that the driver of the third automobile did not intend to turn from said lane of traffic or was unconscious of the danger," there is no fact alleged to indicate helplessness or unconsciousness on the part of the driver of the third automobile, and the allegation

seems rather a conclusion based upon alternative assumptions on the part of the pleader.

It is further alleged in the complaint that until after the collision the third automobile was obscured from the vision of the plaintiff by reason of the fact that defendants' automobile was directly between the third automobile and the plaintiff. From this it would appear that had the defendants' automobile been suddenly turned out of the way of the oncoming third automobile, plaintiff's automobile would have probably received the full impact of the collision.

From an analysis of the factual situation alleged, it does not appear that the driver of defendants' car could reasonably have foreseen that the maintenance of his position on the right side of the highway, in his proper lane of traffic, in the face of the approaching third automobile, would result in injury to the plaintiff in an automobile to the rear. *Balcum v. Johnson,* 177 N. C., 213, 98 S. E., 532; *Burke v. Coach Co.,* 198 N. C., 8, 150 S. E., 636; *Newell v. Darnell,* 209 N. C., 254, 183 S. E., 374; *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108; *Powers v. Sternberg,* 213 N. C., 41; *R. R. v. Kellogg,* 94 U. S., 469.

The plaintiff, however, contends with much force that the facts alleged here are substantially similar to those in *Rucker v. Snider Bros.,* 211 N. C., 566, 191 S. E., 6, where it was stated that a demurrer *ore tenus,* on the same ground as that here asserted, would not lie. An examination of the complaint in that case, as it appears from the record on file, shows that it was there alleged that the plaintiff Rucker was injured as result of a collision between a truck of Snider Bros., and a truck of Maner Motor Transit Company. Plaintiff was in an automobile traveling in same direction and in rear of the Maner truck. The Snider truck was approaching from the opposite direction at a high rate of speed and slightly to the left of the center of the highway. It was alleged that the driver of the Maner truck negligently failed to observe this situation and drove his truck too near the center of the highway, instead of pulling further to the right, causing a collision whereby the Snider truck was deflected further to the left and caused to strike the automobile in which plaintiff Rucker was riding. The *Rucker case* was twice considered by this Court, once on motion for removal to U. S. Court (210 N. C., 778, 188 S. E., 405), and on appeal from motion to strike (211 N. C., 566, 191 S. E., 6). While the facts in the *Rucker case, supra,* are in some respects similar to those in the case at bar, we are constrained to the view that the holding in those cases, on the facts there presented, should not be held controlling here. Nor is this view in conflict with the decisions in *Taylor v. Rierson,* 210 N. C., 185, 185 S. E., 627, and *Cunningham v. Haynes, ante,* 456, where facts distinguishable from those in the instant case were made to appear.

We conclude that the complaint fails to state facts sufficient to constitute a cause of action for negligence on the part of the defendants which proximately caused the injury complained of, and that the demurrer was properly sustained.

Judgment affirmed.

PLANT FOOD COMPANY, A CORPORATION, v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION.

(Filed 30 November, 1938.)

1. Municipal Corporations § 19b—City may contract in regard to detail of administration of governmental power involving no governmental discretion.

While the governing body of a city may not make a contract binding itself or its successor with respect to the exercise of governmental discretion, it may bind itself with respect to proprietary affairs by contract running for a term of years, the distinction being not whether the contract relates to a governmental or proprietary power, but whether in fact the contract deprives the governing body or its successor of a discretion which public policy demands should be left unimpaired, and therefore a city may contract for a period of years in regard to a detail of administration of a governmental power which does not involve the exercise of governmental discretion.

2. Same—City may contract for a term of years for removal of sludge from its sewerage disposal plant.

This action was instituted by plaintiff for breach of a contract by defendant municipality under which plaintiff agreed to remove sludge from the city's sewerage disposal plant and pay the city a stipulated amount per ton removed. The city demurred on the ground that it appeared from the complaint that the contract was executed by the city's previous governing body, and that the contract related to a governmental function of the city and therefore the contract was void as an attempt to bind the city and the successor governing body in regard to a discretionary governmental power. *Held:* The contract related to a detail of administration of a governmental function involving no governmental discretion, but only a business power or business discretion, and the power to make such contract is a necessary incident to the proper administration of the city government, and the demurrer was properly overruled.

3. Same—

Under the contract in question it was agreed that plaintiff should remove sludge from the city's sewerage disposal plant and pay a stipulated sum per ton removed. *Held:* The contract related primarily to a service and not a sale of the sludge, and did not involve a sale of city property within the meaning of C. S., 2688, requiring sale of city property to be made by auction.

PLANT FOOD CO. *v.* CHARLOTTE.

APPEAL by plaintiff from *Cowper, Special Judge,* at September Term, 1938, of MECKLENBURG. Reversed.

The plaintiff alleged in its complaint that it had made a contract with the city of Charlotte covering a period of ten years, under which the city agreed at its own expense to deliver the sludge from its Sugaw Creek disposal plant upon properly constructed and maintained drying beds, to be provided and maintained at the expense of the city; and plaintiff agreed to remove the sludge from the drying beds after it had been conditioned, as specified in the contract, and to pay the city therefor, according to the tonnage in a stated schedule; and that the plaintiff had gone to great expense to put itself in position to carry out its part of the contract. It is alleged that the defendant municipality, without cause, breached its contract with plaintiff in certain particulars set out in the complaint, to the great damage of the plaintiff, which demands damages therefor.

The defendant demurred to the complaint upon the ground that the contract had been entered into by one city administration and a subsequent administration is being sued for its breach, and the contract made with plaintiff, as a matter of law, would not be binding upon the subsequent administration of the city of Charlotte.

Upon the hearing, the demurrer was sustained and plaintiff appealed.

Cochran & McCleneghan and James L. DeLaney for plaintiff, appellant.

J. M. Scarborough and B. M. Boyd for defendant, appellee.

SEAWELL, J. The defendant contends that the contract before us for consideration involves those discretionary powers of the municipal board which must be kept free at all times, to be exercised in the public interest; and since the powers concerned are of that character, they cannot be delegated, suspended, or embarrassed by contract, which would have a binding force upon succeeding boards. The plaintiff contends that the contract involves only the proprietary or business powers of the municipal corporation, and that the service involved is a legitimate subject of contract which might extend over a period of years. We doubt, however, whether a simple classification of that sort is sufficient to determine the question at issue, since there are enough anomalies presented in either case to make it an inaccurate test of the power to make the contract.

It is true, as a rule, that where governmental discretionary powers are involved a board can make no contract which would bind its successors in office with respect to the exercise of the discretion. Amongst the powers generally conceded to be accompanied by such governmental

discretion, and which cannot be suspended or controlled by contract, are usually classed the legislative powers of the governing body—the power to make ordinances and decide upon public questions of a purely governmental character (and under this head must be classed most of the strictly governmental discretionary powers, since the body acts as a whole and usually by ordinance or resolution); the power to lay out and maintain streets, to build bridges and viaducts over which they lead, preserve civil order; to regulate rates (where power to do so is given in the charter); to levy taxes, make assessments, and the like. These are mentioned simply by way of illustration and only roughly indicate the quality of the power we are discussing. "A public function is one which is exercised by virtue of certain attributes of sovereignty delegated to a city for the health and protection of its inhabitants, or the public." *McLeod v. Duluth*, 174 Minn., 184, 218 N. W., 892.

Where governmental powers of this kind are not involved or disadvantageously affected the right to make contracts, otherwise unobjectionable to the law, is one of the most important incidents of municipal government. *Lambeth v. Thomasville,* 179 N. C., 452, 102 S. E., 775. In the administration of its proprietary affairs the commissioners or councilmen of the town may make reasonable contracts binding upon their successors running through a term of years.

The line between powers classified as governmental and those classified as proprietary is none too sharply drawn, and is subject to a change of front as society advances and conceptions of the functions of government are modified under its insistent demands. And it may be said that with respect to the making of contracts the inhibition does not strictly apply where governmental discretion as to the performance of the particular act is no longer necessary.

It is not to be supposed that because the general subject may belong to the field of governmental powers no detail of administration may be carried out by contract, or that such contract must be completed within the term of the contracting council. The true test is whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired. It is obvious that a too rigid adherence to the principle would leave the town council nursing a mere theory, in the possession of an important governmental power without practical means for its exercise, and unable to undertake any important public work, since no concern would equip itself and undertake the project when the incoming administration, the product perhaps of political accident, might repudiate the contract at will during its performance.

We think the principle is subject to a further relaxation. Many details in an enterprise undertaken originally under governmental power

have been held to be subjects of valid contracts, binding upon the successors to the contracting body, on the principle that they have become matters of business power or business discretion. Thus, a contract to keep a street in repair, running for ten years, was not considered offensive to the rule, although the laying out of the street belongs generally to the governmental discretionary power. *Barbour Asphalt Co. v. Louisville,* 123 Ky., 687, 97 S. W., 31. We may be permitted to make the parenthetical observation here that while under our law the laying out and grading of streets belongs to the exercise of a governmental function, the town is, nevertheless, liable for injury sustained through negligence in keeping the sidewalks in repair. *Pickett v. R. R.,* 200 N. C., 750, 158 S. E., 398.

Our attention is called to the case of *Metz v. Asheville,* 150 N. C., 748, 64 S. E., 881, in which recovery was denied for injury and death sustained through pollution of the waters by reason of negligence in the operation of a sewerage plant, on the ground that the commissioners of the town, in the construction and operation of the sewerage plant, were in the performance of a purely governmental function. Under the general powers given to towns and cities to construct and operate sewerage systems, we doubt whether it is necessary to invoke the police power to sustain such authority, and it is difficult to reconcile *Metz v. Asheville, supra,* with *Moser v. Burlington,* 162 N. C., 141, 78 S. W., 74 (compare *Asbury v. Albemarle,* 162 N. C., 247); although we do not attempt to disturb the classification there given. We do, however, express the opinion that cases dealing solely with the liability of municipal corporations for negligence of its servants or agents do not run parallel with cases involving the power to contract, and their application may become misleading.

We think the purposes of this particular contract must determine its validity, rather than the history incidental to the enterprise and the fact that material for the removal of which the city contracted is the so-called "sludge," or product of treatment through the city sewerage. It is there a nuisance or potential nuisance, and its removal falls within the category of similar subjects of contract which have often been sustained by the courts. Such a contract for the removal of garbage is sustained in *Balch v. Utica,* 59 N. Y. S., 513, 168 N. Y., 651, 61 N. E., 1127; see *Roberts v. Gutberlett,* 211 N. Y., 309, 105 N. E., 548. Removal of dead animals: *Louisville v. Wible,* 84 Ky., 290, 1 S. W., 605. See *McBean v. Fresno,* 112 Cal., 159, 44 P., 358; *California Reduction Co. v. Sanitary Reduction Works,* 199 U. S., 306.

We cannot see that any governmental discretionary power of the city was compromised in the making of this contract, and we are of the opinion that it cannot be arbitrarily or capriciously abandoned during its term.

2. The defendant contends that the contract involves a sale of city property which could not be made except by auction, under C. S., 2688. To apply this law to the present case on the theory advanced by the defendant it would be necessary to have an auction for the sale of sludge as it accumulated in sufficient quantities. The product does not appear to be a saleable commodity except as something may be realized from it in the process of removal. In the contract between these parties the removal of the sludge is the prevailing consideration and is sufficiently predominant to characterize the contract as one of service, not of sale. Payment to the defendant was an incidental saving.

For these reasons, we think the complaint states a cause of action and the judgment sustaining the demurrer is

Reversed.

M. S. SOHMER, A. N. SOHMER, AND MISS CHARLOTTE SOHMER v. FELTON BEAUTY SUPPLY COMPANY, INC., IRVING H. RAFF, AND RAFF BEAUTY SUPPLY COMPANY, INC.

(Filed 30 November, 1938.)

Pleadings § 16—Demurrer for misjoinder of parties and causes is properly overruled after allowance of amendment eliminating defect.

Plaintiff instituted this action *ex contractu*, and defendant filed a counterclaim alleging damages against plaintiff for breach of contract not to engage in the same business in the same locality for a period of three years, and that plaintiff and other parties which defendant had joined had conspired together to breach this agreement. The trial court allowed the original defendant to take a voluntary nonsuit against the additional parties, and to amend the answer to allege a counterclaim solely against plaintiff for breach of the contract not to engage in the same business. *Held:* The amendment eliminated the ground upon which the demurrer was interposed, and the overruling of the demurrer was proper, the amended answer being sufficient to state a cause of action under a liberal construction. C. S., 535.

APPEAL by plaintiffs from *Ervin, Special Judge,* at May Extra Civil Term, 1938, of MECKLENBURG. Affirmed.

Plaintiffs appealed from an order of the court below permitting defendant Felton Beauty Supply Company to file an amended answer, and overruling plaintiffs' demurrer thereto.

I. T. Cohen and Brock Barkley for plaintiffs, appellants.

Paul Ginsberg, William Winter and Robinson & Jones for defendant Felton Beauty Supply Co., appellee.

DEVIN, J. The proceedings, out of which the question presented by this appeal arose, were had in the court below in the following order. Plaintiffs instituted their action against defendant Felton Beauty Supply Company to recover the sum of $217.33 alleged to be due them by reason of their return of certain merchandise to the defendant, pursuant to an agreement therefor. The defendant filed an answer denying liability and alleging a counterclaim for damages in the sum of fifty thousand dollars for breach of certain covenants and contracts incident to the purchase of plaintiffs' shares of stock in defendant Felton Beauty Supply Company, whereby plaintiffs had bound themselves not to engage in the beauty supply business in North Carolina, South Carolina, and Georgia for the period of three years, and alleging further that plaintiffs had conspired with Irving H. Raff and Raff Beauty Supply Company to breach these contracts, resulting in damage to the answering defendant, and defendant asked that Irving H. Raff and Raff Beauty Supply Company be made parties defendant (which was done), and that these additional parties and the plaintiffs be enjoined from engaging in said business in the named states. Copies of the contracts alleged to have been breached were attached to the answer.

Plaintiffs demurred to the counterclaim and cross-action set up in the answer on the ground of misjoinder of parties and causes of action and on the ground that the counterclaim was not such a demand as could be set up in this action. Pending the hearing on the demurrer, defendant Felton Beauty Supply Company, by leave of the court, submitted to a judgment of voluntary nonsuit upon its cross-action against Irving H. Raff and Raff Beauty Supply Company, and obtained leave of the court to file an amended answer and counterclaim against the plaintiffs alone, omitting therefrom any statement of cause of action against Raff or Raff Beauty Supply Company.

In its amended answer and counterclaim against plaintiffs, defendant Felton Beauty Supply Company alleged that in consideration of the purchase by defendant of plaintiffs' shares of stock, and the payment of approximately $55,000 therefor, the plaintiffs had contracted and agreed not to engage, for the period of three years, in the Beauty Supply business in North Carolina, South Carolina, and Georgia, and not to divert the patronage of the defendant, and that these agreements, made in the name of W. S. Felton were for the benefit of and were assigned to the corporate defendant. Defendant alleged that plaintiffs breached these contracts and did so through Irving H. Raff and Raff Beauty Supply Company who were their tools and agents for that purpose, causing damage to the defendant in the sum of fifty thousand dollars.

Thereupon, the court below, being of opinion that the amended answer stated a counterclaim against the plaintiffs arising out of breach of

contracts between the plaintiffs and the answering defendant, overruled the demurrer, and the plaintiffs having duly excepted, appealed to this Court.

The appellants' exceptions to the rulings of the court below cannot be sustained. It is apparent that the court, by its order permitting voluntary nonsuit as to Irving H. Raff and Raff Beauty Supply Company and entering judgment dismissing the cross-action as to them, and granting leave to defendant to file amended answer setting up counterclaim for breach of contract against the plaintiffs alone, eliminated the ground upon which the demurrer was interposed. The action of the court, thereafter, in overruling the demurrer on the ground assigned therefor was supported by the decision of this Court on a similar state of facts in *Adams v. Mortgage Co.*, 211 N. C., 745, 191 S. E., 723.

An examination of the allegations in which defendant has stated its counterclaim against plaintiffs leads us to the conclusion that they are not such as, under the liberal procedure authorized by the statute and the decisions of this Court, can be overthrown by a demurrer. C. S., 535; *Blackmore v. Winders*, 144 N. C., 212, 56 S. E., 874; *Leach v. Page*, 211 N. C., 622, 191 S. E., 349.

The judgment of the court below is

Affirmed.

MRS. ADA ROGERS GORMAN v. MRS. FRANCES YORKE AND LEE HORTON.

(Filed 30 November, 1938.)

Judgments § 23—

Ordinarily, the act or neglect of a codefendant or the insurer of such codefendant should not be imputed to the defendant moving to set aside the judgment for surprise and excusable neglect, and should not be considered in determining whether movant had established excusable neglect.

APPEAL by defendant Horton from *Hamilton, Special Judge*, at October Extra Civil Term, 1938, of MECKLENBURG. Error and remanded.

Motion by defendant Horton to set aside default judgment on the ground of inadvertence and excusable neglect. Upon finding of fact by the court that there was no such excusable neglect on the part of the appellant as could justify setting the judgment aside, the motion was denied, and defendant Horton appealed.

Uhlman S. Alexander and Ralph V. Kidd for plaintiff.

Robinson & Jones for defendant Lee Horton.

PER CURIAM. Referring to the matters considered by the court in reaching its conclusion and denying appellant's motion, the court below said: "Upon the argument of the motion to set aside the judgment by default and inquiry, the defendant Lee Horton took the position that any acts or neglect of the Maryland Casualty Company, or the defendant Mrs. Yorke, did not affect his rights under said motion and were not material to be considered by the court in connection therewith. The court ruled, however, that such acts and neglect were material and took such matters in consideration in its finding that there was no excusable neglect, to which defendant Lee Horton duly excepted."

The defendant's exception must be sustained, and the cause remanded for proper findings of fact, eliminating therefrom consideration of acts and negligence of other parties not material to the motion of the appealing defendant.

Error and remanded.

STATE v. MRS. C. B. LOCKEY.

(Filed 30 November, 1938.)

Intoxicating Liquor § 4d—

In a prosecution for possession of intoxicating liquor in violation of the Alcoholic Beverage Control Act, 1937 Supplement to Michie's Code, 3411 (79), the fact of possession does not constitute *prima facie* evidence that the possession was for the purpose of sale, since the statute under which the warrant is drawn does not provide for such *prima facie* rule.

APPEAL by defendant from *Armstrong, J.*, and a jury, at March Criminal Term, 1938, of MECKLENBURG. Reversed.

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

A. A. Tarlton for defendant.

PER CURIAM. The defendant was tried and convicted on a warrant charging the possession of intoxicating liquor for the purpose of sale "in violation of the Alcoholic Beverage Control Act, 1937, Public Laws of N. C." Motions in the court below for judgment of nonsuit were denied. N. C. Code, 1935 (Michie), sec. 4643. An appeal was taken from the judgment upon a verdict of guilty by the jury. We think under the charge in the warrant the evidence was insufficient to be submitted to the jury and the motions for nonsuit should have been sustained.

The defendant was charged with a violation of section 3411 (79), 1937 Supp. to N. C. Code of 1935 (Michie). Although the Turlington Act has not been repealed in its entirety (*S. v. Epps,* 213 N. C., 709), and the rule that possession of intoxicating liquor is *prima facie* evidence of possession for purpose of sale is a statutory rule growing out of the Turlington Act (*S. v. Dowell,* 195 N. C., 523), this *prima facie* rule was not incorporated in the 1937 Alcoholic Beverage Control Act. Nor are the provisions of C. S., 3379, and the recent cases arising thereunder (*S. v. Langley,* 209 N. C., 178; *S. v. Ellis,* 210 N. C., 166; and *S. v. Tate,* 210 N. C., 168) dealing with the *prima facie* character of possession of intoxicating liquor pertinent to the instant case. This is not such a case as *S. v. Moschoures, ante,* 321; there unlawful possession for sale was charged generally, and accordingly the State was not held to strict proof under a particular section. In the instant case the offense charged was the violation of a specific statute and in such a case this Court is powerless to uphold an erroneous conviction under that statute by substituting another statute requiring proof less strong. *S. v. Wilkerson,* 164 N. C., 432 (444); *S. v. Stinnett,* 203 N. C., 829 (832); *S. v. Ferguson,* 191 N. C., 668 (670); *S. v. George,* 188 N. C., 611 (612).

The prohibition of the possession of liquor for the purpose of sale set forth in section 3411 (79), 1937 Supp. to N. C. Code of 1935 (Michie), does not set forth any *prima facie* rule arising from mere possession.

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

Reversed.

MARY B. GORHAM v. THE PACIFIC MUTUAL LIFE INSURANCE COMPANY.

(Filed 14 December, 1938.)

1. Appeal and Error § 8—An appeal will be determined in accordance with the theory of trial in the lower court.

In this action on a policy of accident insurance the trial court ruled, with the acquiescence of both parties, that the evidence was sufficient to be submitted to the jury on the question of accidental death within the coverage clause, but judgment as of nonsuit was entered for insufficiency of evidence that notice and proof of loss was given within the time required. *Held:* On insured's appeal, insurer may not contend that the judgment of nonsuit should be sustained for insufficiency of evidence that the loss was within the coverage of the policy, since an appeal *ex necessitate* follows the theory of trial.

2. Insurance §§ 35a, 40—Provision for immediate notice of death requires exercise of reasonable diligence under the circumstances.

The requirement of an accident policy for "immediate notice" of death of the insured, as well as the statutory requirement, C. S., 6479 (5), is not inflexible, but imposes the duty to exercise reasonable diligence to give the required notice, which should be measured by the beneficiary's ability and opportunity to act in the premises.

3. Same—

The provision of nonliability in an insurance policy upon failure of the beneficiary to give immediate notice of death and proof of loss within ninety days, is not one affecting the coverage of the policy, but is one of forfeiture which is not favored in the law.

4. Same—Evidence held for jury on question of whether, under the circumstances, beneficiary acted with reasonable diligence to give notice.

In this action on an accident policy it appeared that notice of the death of insured was not given insurer until about eighteen months after insured's death. The policy provided for nonliability if notice of death were not given within the stipulated time. Plaintiff beneficiary's evidence was to the effect that upon the death of her husband, the insured, she suffered a physical and mental breakdown, was committed to a hospital for the insane a few weeks thereafter, that she was later released but that she did not regain her sanity until after an operation in April of the following year, and that notice of death was given the first part of the following September. Insurer introduced evidence that during the time of the contended insanity plaintiff executed deeds, qualified as co-executrix of her husband's estate, and with her co-executor, executed proofs of death on life policies payable to the estate. *Held:* The conflicting evidence should be submitted to the jury on the question of whether plaintiff exercised reasonable diligence, measured by her ability and opportunity to act in the matter, in giving insurer the stipulated notice of death.

5. Trials § 24—

If the evidence is conflicting, or if diverse inferences may reasonably be drawn therefrom, some favorable to plaintiff and others favorable to defendant, the case should be submitted to the jury.

6. Trial § 22b—

On motion to nonsuit, the plaintiff is entitled to the benefit of every fact and inference of fact pertaining to the issues involved, which may be reasonably deduced from the evidence.

7. Insurance §§ 35a, 40—

Denial of liability by insurer on grounds other than the failure to give notice and proof of loss constitutes a waiver of notice and proof of loss.

8. Same—

Whether receipt of notice and proof of death by insurer through its agent obviates the necessity of notice and proof of death by the beneficiary, *quære.*

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

DEVIN, J., dissenting.

GORHAM *v.* INSURANCE CO.

APPEAL by plaintiff from *Parker, J.*, at April-May Term, 1938, of NASH.

Civil action to recover on a policy of accident insurance.

Upon receipt of the payment in advance of the first annual premium of $52.50, the defendant, on 6 April, 1921, issued to Louis Rhodes Gorham a $2,500-policy of accident insurance, payable to his wife, plaintiff herein, as beneficiary in case of death of the insured through accidental means, containing, among others, the following provisions:

"The Pacific Mutual Life Insurance Company of California hereby insures Louis Rhodes Gorham . . . against loss of life resulting directly and independently of all other causes, from bodily injury effected during the term of this policy solely through accidental means. . . .

"4. In the event of accidental death immediate notice thereof must be given the company. . . .

"5. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible. . . .

"7. Affirmative proof of loss must be furnished to the company . . . within ninety days after the date of such loss.

"21. This insurance does not cover . . . suicide, sane or insane. . . .

"22. Failure to comply with any of the provisions of this policy shall render invalid any claim under this policy."

It is admitted that all the premiums due on the policy had been paid and that the contract of insurance was in full force and effect on 8 March, 1933, when the insured was found dead in his office as the result of a pistol-shot wound. The bullet had entered the back of his head, a little behind and slightly above his right ear, and was afterwards located just inside and against the skull, near the left eye.

On the trial, the court announced that as plaintiff had shown a violent death, the evidence would appear to be sufficient to warrant the inference of accidental death, rather than suicide, and that in this respect the case would seem to be one for the jury. Counsel on both sides agreed that this was a correct statement of the law applicable to the case.

It is in evidence that on 5 September, 1934, I. T. Valentine, attorney for the plaintiff, addressed a letter to the defendant "making claim on account of accidental death under this policy," and requesting blanks upon which to make formal application for the insurance benefit. The defendant answered on 13 September, 1934, with an equivocal reply; no blanks were furnished; and complete information was asked as to the date and exact cause of insured's death. J. Beach Rhodes, junior vice president and superintendent of the claim department of the defend-

ant company, admitted on cross-examination that he knew the date and what had been stated as the apparent cause of death when this answer was written; that such information came from certified copy of the death certificate of Dr. Gorham, which was received by the defendant as early as 16 June, 1933, and that "we simply made a Yankee answer and asked him for further particulars from his side." He further testified: This death certificate came in from our claim representative in North Carolina. It shows as a cause of death: "Pistol-shot wound of the head entering the parietal region on right side. Apparently self-inflicted. . . . Suicide."

This action was instituted on 25 February, 1935.

In explanation of plaintiff's delay in giving the defendant notice of the death of the insured, there is evidence tending to show that Mrs. Gorham suffered a physical and mental collapse, when informed of the death of her husband and the circumstances surrounding it, and that within a few weeks thereafter it became necessary to commit her to the hospital for the insane at Raleigh, N. C., where she remained in confinement until 19 August, 1933, when, it was found that her being at large would not be injurious to herself or dangerous to the community, she was released on probation. This status continued until 16 May, 1934, when a certificate of discharge was issued by the superintendent of the hospital at the request of some banker in Rocky Mount. According to the testimony of her physician and members of her family she did not recover her sanity or her physical health until after an operation and hospital treatment which she underwent in April, 1935.

Dr. Richard H. Speight testified: "In my opinion at the time I first saw Mrs. Gorham in April, 1933, a month after the death of Dr. Gorham, and until this operation (in April, 1935) her mental and physical condition was not such as to enable her to read a contract or several pages of insurance policy and to comprehend and know what was required of her by the contract of the policy."

Josephine Gorham testified: "From the time of my father's death until the time of mother's operation I would not say she was of a mental condition to transact any business. She was not able to attend to any business. The bank carried on most of her business. I don't think she did any business that amounted to anything of importance. . . . I thought she was insane. . . . Her condition which I have described continued from the time of my father's death until the operation in 1935."

In reply, the defendant offered evidence tending to show that on 21 March, 1933, Mrs. Gorham and the Planters National Bank & Trust Company qualified as co-executors of her husband's estate, and that they have continuously acted as executors ever since. That after Mrs. Gor-

ham's release from the hospital for the insane she carried on numerous business transactions; executed with her co-executor proofs of death on life insurance policies payable to the estate (though the co-executor admits that she neither read nor knew the contents thereof when she signed them); executed divisional deeds with her brothers and sisters in the fall of 1933, etc.

The court being of opinion that the plaintiff's failure to give the defendant "immediate notice" of her husband's death, and that adequate excuse for such failure had not been shown, entered judgment of nonsuit, from which the plaintiff appeals, assigning errors.

L. L. Davenport and W. H. Yarborough for plaintiff, appellant.
Battle & Winslow for defendant, appellee.

STACY, C. J. It is admitted that the policy in suit was in full force and effect on the date of the death of the insured. Recovery is resisted on two grounds: First, suicide; second, failure to give immediate notice of insured's death and furnish proof of loss within ninety days thereafter.

First. It was the opinion of the trial court, concurred in by counsel on both sides at the time, that the evidence of violent death, without more, was sufficient to carry the case to the jury on the issue of accidental death or death through accidental means within the meaning of the policy. *Parker v. Ins. Co.,* 188 N. C., 403, 125 S. E., 6; *Kinsey v. Ins. Co.,* 181 N. C., 478, 106 S. E., 136; *Wharton v. Ins. Co.,* 178 N. C., 135, 100 S. E., 266; *Thaxton v. Ins. Co.,* 143 N. C., 33, 55 S. E., 419; *Harris v. Ins. Co.,* 204 N. C., 385, 168 S. E., 208; *Mehaffey v. Ins. Co.,* 205 N. C., 701, 172 S. E., 331; *Scott v. Ins. Co.,* 208 N. C., 160, 179 S. E., 434.

The defendant now urges a different view, citing *Hill v. Ins. Co.,* 150 N. C., 1, 63 S. E., 124; *N. Y. Life Ins. Co. v. Gamer,* 82 Law Ed., 480; *DeIvecchio v. Bowers,* 80 Law Ed., 163; *Watkins v. Prudential Ins. Co.,* 315 Pa., 497, 95 A. L. R., 869, and particularly *Jefferson Standard L. Ins. Co. v. Clemmer,* 79 F. (2d), 724, 103 A. L. R., 171, and note, in support of its present position; distinguishing, *Hedgecock v. Ins. Co.,* 212 N. C., 638, 194 S. E., 86, and *Spruill v. Ins. Co.,* 120 N. C., 141, 27 S. E., 39, as involving life insurance policies rather than accident contracts of insurance; and suggesting that *Wharton v. Ins. Co., supra,* should be reconsidered as the distinction between life insurance and accident insurance was not then discussed or brought to the attention of the Court in any way. See Cooley's Briefs on Insurance, Vol. 7 (2nd Ed.), 6022; *Moore v. Accident Assurance Corp.,* 173 N. C., 532, 92 S. E., 362; *Rand v. Ins. Co.,* 206 N. C., 760, 174 S. E., 749.

The rule is, that an appeal *ex necessitate* follows the theory of the trial. *Dent v. Mica Co.*, 212 N. C., 241, 193 S. E., 165; *Keith v. Gregg*, 210 N. C., 802, 188 S. E., 849; *In re Parker*, 209 N. C., 693, 184 S. E., 532. Having tried the case upon one theory, the law will not permit the defendant to change its position, or "to swap horses between courts in order to get a better mount in the Supreme Court." *Weil v. Herring*, 207 N. C., 6, 175 S. E., 836; *Holland v. Dulin*, 206 N. C., 211, 173 S. E., 310. "The theory upon which a case is tried must prevail in considering the appeal, and in interpreting a record and in determining the validity of exceptions"—*Brogden, J.*, in *Potts v. Ins. Co.*, 206 N. C., 257, 174 S. E., 123.

But for the ruling of the trial court in respect of the sufficiency of the evidence to carry the case to the jury on the issue of accidental death or death through accidental means, and the ready acquiescence therein by counsel, the plaintiff might have pursued a different course. *Midgett v. Nelson*, 212 N. C., 41, 192 S. E., 854; *Morgan v. Benefit Society*, 167 N. C., 262, 83 S. E., 479. In fact, the ruling of the court in this respect is not challenged by the appeal. The nonsuit, therefore, ought not to be upheld on a ground different from that upon which the judgment was rendered, or on defendant's *volte face* between the trial court and the appellate court. *Lumber Co. v. Perry*, 213 N. C., 533.

Second. We then come to the ground upon which the demurrer to the evidence was sustained. The question is whether the plaintiff has forfeited her rights under the policy by failing to give the defendant "immediate notice" of the death of the insured and furnish proof of loss within ninety days thereafter. The expression "immediate notice," as used in the policy, we apprehend, was intended to impose upon the plaintiff the exercise of reasonable diligence in giving the stipulated notice, which, under the apparent weight of authority, should be measured by her ability and opportunity to act in the premises. *Woodell v. Ins. Co., ante*, 496; *Ball v. Assurance Corp.*, 206 N. C., 90, 172 S. E., 878; *Mewborn v. Assurance Corp.*, 198 N. C., 156, 150 S. E., 887; *Mutual Life Co. v. Johnson*, 293 U. S., 335. Indeed, the fifth paragraph of the policy apparently embodies this idea in the contract. By its terms the requirement of notice is not inflexible. *Ball v. Assurance Corp., supra.* Nor is the statutory requirement less pliable. C. S., 6479, subsec. 5. Moreover, it should be remembered the provision is one of forfeiture, and not one which affects the nature and desirability of the risk. *Mewborn v. Assurance Corp., supra; Rhyne v. Ins. Co.*, 199 N. C., 419, 154 S. E., 749. See *Clifton v. Ins. Co.*, 168 N. C., 499, 84 S. E., 817. Forfeitures are not favored in the law. *Grabbs v. Ins. Co.*, 125 N. C., 389, 34 S. E., 503; *Ins. Co. v. Norton*, 96 U. S., 234.

There is evidence permitting the inference that plaintiff was not capable of acting in the matter. *Rand v. Ins. Co., supra; Nelson v. Ins. Co.*, 199 N. C., 443, 154 S. E., 752; *Rhyne v. Ins. Co.*, 196 N. C., 717, 147 S. E., 6; *Ball v. Assurance Corp., supra; Mewborn v. Assurance Corp., supra.* There is evidence to the contrary. *Thigpen v. Ins. Co.*, 204 N. C., 551, 168 S. E., 845; *Whiteside v. Assurance Society*, 209 N. C., 536, 183 S. E., 754; *Peeler v. Casualty Co.*, 197 N. C., 286, 148 S. E., 261. This makes it a case for the jury under the theory of the trial. *Brooks v. Ins. Co.*, 211 N. C., 274, 189 S. E., 787; *Diamond v. Service Stores, ibid.*, 632, 191 S. E., 358; *Moore v. Ins. Co.*, 193 N. C., 538, 137 S. E., 580. For otherwise to hold as a matter of law that plaintiff's business activities as shown by defendant's evidence, destroy any excuse she may have for not acting in the present matter, would be not only to pass upon the contradictory evidence in the case, but also to suggest the validity of these transactions. *Wadford v. Gillette*, 193 N. C., 413, 137 S. E., 314. Often an insane person is capable of doing many intelligent acts. The rule is, that upon conflicting evidence, or if diverse inferences may reasonably be drawn therefrom, some favorable to the plaintiff and others favorable to the defendant, the case should be submitted to the jury under proper instructions from the court. *Lithograph Corp. v. Clark, ante*, 400; *Hobbs v. Mann*, 199 N. C., 532, 155 S. E., 163.

The risks assumed by the defendant have not been increased, nor its rights jeopardized, by the failure of the plaintiff forthwith to give the defendant notice of the death of the insured. No such claim is made; actual notice is admitted. Whether the plaintiff was capable of giving the stipulated notice is in dispute. The record precludes a forfeiture by nonsuit, or as a matter of law, without the voice of the twelve.

On motion to nonsuit, the plaintiff is entitled to the benefit of every fact and inference of fact pertaining to the issues involved, which may reasonably be deduced from the evidence. *Cole v. R. R.*, 211 N. C., 591, 191 S. E., 353; *Diamond v. Service Stores, supra.*

Third. There is another view of the case which may simplify the questions of notice and proof of loss on the further hearing. For this reason we advert to it now.

It is generally held that "failure to give notice or furnish proofs of loss, or defects in the notice and proofs, are waived by a denial of liability on other grounds," the reason being that a denial of liability on other grounds is generally regarded as tantamount to saying payment would not have been made had notice been given, or proofs of loss furnished, and the law is not disposed to require a vain thing. Cooley's Briefs on Ins., Vol. 7 (2d Ed.), 6019; *Guy v. Ins. Co.*, 207 N. C., 278, 176 S. E., 554; *Misskelley v. Ins. Co.*, 205 N. C., 496, 171 S. E., 862; *Proffitt v. Ins. Co.*, 176 N. C., 680, 97 S. E., 635; *Mercantile Co. v. Ins.*

Co., ibid., 545, 97 S. E., 476; *Moore v. Accident Assurance Corp., supra; Higson v. Ins. Co.*, 152 N. C., 206, 67 S. E., 509; *Gerringer v. Ins. Co.*, 133 N. C., 407, 45 S. E., 773; 14 R. C. L., 1349.

"The preliminary proof of loss or death required by a policy is intended for the security of the insurers in paying the amount insured. If they refuse to pay at all, and base their refusal upon some distinct ground without reference to the want or defect of the preliminary proof, the occasion for it ceases and it will be deemed to be waived. And this can work no prejudice to the insurers, for, in an action on the policy, the plaintiff would be obliged to prove the death of the person whose life was insured, whether the preliminary proofs were exhibited or not"—*Mr. Justice Bradley* in *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S., 696, 28 L. Ed., 866.

In *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 569, it was held that the right of an insurance company to notice of loss is a right which it may waive; and when the insurer denies all liability for the loss and refuses to make payment, and places such denial and refusal upon grounds other than the failure of the insured to give notice of the loss, such denial and refusal avoid the necessity of notice. To like effect are the decisions in *Cobb v. Ins. Co.*, 11 Kan., 93; *California Ins. Co. v. Gracey*, 15 Col., 70; *Phillips v. Protection Ins. Co.*, 14 Mo., 221; *Phoenix Ins. Co. v. Rucker*, 92 Ill., 64; *Newman v. Ins. Co.*, 17 Minn., 98.

Still further as illustrative of the principle may be instanced the following:

Illinois case, *Ins. Co. v. Cary*, 83 Ill., 453: "When an insurance company refuses to pay a loss, placing its refusal upon its nonliability in any event, it cannot insist, in defense of an action, that the preliminary proof was insufficient"—5th syllabus.

Minnesota case, *Ins. Co. v. Taylor*, 5 Minn., 393: "Where an insurance company puts its refusal to pay a loss on another ground, it is a waiver of objections to insufficiency in the proofs of loss required by the policy"—4th syllabus.

The manner in which the Supreme Court of the United States disposed of the question in *Tayloe v. Merchants Fire Ins. Co.*, 50 U. S., 390, gives added force to the rule: "Another objection taken to the recovery is, that the usual preliminary proofs were not furnished, according to the requirement of the seventh article of the conditions annexed to the policies of the company. These are required to be furnished within a reasonable time after the happening of the loss. The fire occurred on the 22d of December, 1844, and the preliminary proofs were not furnished till the 24th of November, 1845. This was, doubtless, too late, and the objection would have been fatal to the right of the complainant, if the production of these proofs were essential to the recovery. But the

answer is, that the ground upon which the company originally placed their resistance to the payment of the loss, and which is still mainly relied on as fatal to the proceedings, operated as a waiver of the necessity for the production of the preliminary proofs."

Speaking to the subject in *Parker v. Ins. Co.*, 143 N. C., 339, 55 S. E., 717, *Walker, J.*, delivering the opinion of the Court, said: "The defendant having denied its liability to the plaintiff on the policy by alleging that there was a violation of the iron-safe clause, whereby the policy became null and void, it cannot now successfully plead the failure of the plaintiff to file proofs of loss and defeat his recovery. It cannot blow hot and cold, so to speak, at one and the same time. When it insists that proofs should have been filed, it asserts, of course, the validity of the policy; for why file proofs of loss under a void policy? There can be no loss under such a policy. This defense, therefore, is inconsistent with that of noncompliance with the iron-safe clause, which implies that the policy is invalid. The one necessarily excludes the other, and in the sense that an election must be made between them. This is a most just and reasonable rule, and we have held, in accordance with it, that a denial of liability by a fire insurance company dispenses with the necessity of filing proofs of loss. *Gerringer v. Ins. Co.*, 133 N. C., 407. If the plaintiff had made the required proof, he would have been met with the denial by the defendant of any liability whatever for the loss. It would be unjust to permit the company thus to trifle with a policyholder. We are not speaking of inconsistent pleas, which are allowable, but of defenses which are in substance opposed to each other."

While the matter was not debated in the trial court and there ruled upon, the plaintiff has insisted on the argument here that the denial of liability on the ground of suicide waives the claim of forfeiture and that the case is one for the jury under the unchallenged ruling that the evidence of violent death, without more, is sufficient to warrant an inference of accidental death, rather than suicide. Hence, it appears that the question of waiver will become an important one on the further hearing. See *Misskelley v. Ins. Co., supra; Thaxton v. Ins. Co., supra; Grabbs v. Ins. Co., supra; Jordan v. Ins. Co.*, 151 N. C., 341, 66 S. E., 206; 14 R. C. L., 1350; Notes, 108 A. L. R., 901; and 22 A. L. R., 424-425.

Nothing was said in *Fulton v. Ins. Co.*, 210 N. C., 394, 186 S. E., 486, or *Whiteside v. Assurance Society*, 209 N. C., 536, 183 S. E., 754, or *Dewease v. Ins. Co.*, 208 N. C., 732, 182 S. E., 447, or *Carter v. Ins. Co., ibid.*, 665, 182 S. E., 106, which militates against the principle of waiver. The discussion by *Schenck, J.*, in *Fulton's case, supra*, is fully accordant therewith. Nor is there any turning from the doctrine of waiver in those cases where it is held that the measure of liability is to be determined by the terms, provisions, and limitations of the contract. *Whita-*

ker v. Ins. Co., 213 N. C., 376, 196 S. E., 338; *McCabe v. Casualty Co.,* 209 N. C., 577, 183 S. E., 743.

Fourth. It is also in evidence that the defendant had notice of the insured's death as early as 16 June, 1933, a certified copy of the death certificate having been sent to the home office of the defendant by its claim representative in North Carolina.

The case of *Omaha Fire Ins. Co. v. Dierks,* 43 Neb., 473, was an action on a fire insurance policy which provided that in case of loss the insured should forthwith give the insurance company written notice thereof. The insured did not himself give such notice, but the insurer soon after the destruction of the insured property by fire received notice in writing thereof from one of its agents residing in the vicinity where the loss occurred, and through whom the insurance was placed, and refused to pay the loss on the ground that the policy at the date of the fire was not in force. It was held that the insurance contract should not be so technically construed as to compel the insured to furnish information to the insurer which it already had. 33 C. J., 8. *Contra: Continental Ins. Co. v. Parkes,* 142 Ala., 650, 39 S., 204; *California Sav. Bank v. Surety Co.,* 87 Fed., 118.

In *Arkansas Burial Society v. Hough,* 104 S. W. (2d), 809, where, as here, the defense was based, not upon want of notice, but failure to give notice, it was said that "no one needs notice of what he already knows" for "when a person knows a thing he has 'notice' thereof."

We do not place our decision upon this ground, however, as it is unnecessary to do so. The circumstance is mentioned only to show the attenuateness of the claim of forfeiture and to point out how the matter has been dealt with in other jurisdictions.

It all comes to this: The policy had been carried for twelve years and was in force at the death of the insured. Plaintiff demands payment. Defendant pleads noncoverage and forfeiture. Plaintiff replies by saying that, in her helplessness, neither the contract nor the law required of her an impossible or vain thing, and she craves the privilege of being heard before a jury. The law will not deny her this right.

As the case is to be tried again, we refrain from discussing the evidence so as not to prejudice either side on the further hearing.

Reversed.

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

DEVIN, J., dissenting: I find myself unable to agree with the result reached in the able opinion written for the Court by the *Chief Justice,* and for the following reasons:

1. A careful examination of all the evidence adduced at the trial leads me to the conclusion that there was no other reasonable hypothesis upon which to account for the death of the insured but that it resulted from a wound self-inflicted. The clear provision of the policy is that: "This insurance does not cover suicide." To my mind it is a manifest case of suicide, which the courts and everybody else should face, notwithstanding technical rules of legal procedure. However, I have no quarrel with the principle of law followed by the Court and sustained by the authorities, that since the insurance is against "death by accidental means," proof of violent death creates the inference of death by accident. This was the view held by the court below.

2. The statute of North Carolina (C. S., 6479), prescribing standard form of policy for accident insurance, authorized the insertion of the following provisions, which appeared in the policy in suit: "Written notice of injury on which claim may be based must be given to the company within twenty days. . . . In the event of accidental death immediate notice thereof must be given to the company." It was also written in the policy: "Failure to comply with any of the provisions of this policy shall render invalid any claim under this policy."

It is uncontroverted that the insured died 8 March, 1933; that on 5 September, 1934, eighteen months later, a letter from an attorney was written the company. In this letter the company was advised of the death of the insured and request made for blanks to make formal application for the insurance benefits. On 25 February, 1935, this suit was instituted. The fact that an agent of the company, in June, 1933, advised the company of the death of insured by suicide, and the receipt by it of a copy of the death certificate showing death by suicide, could not be regarded as notice of claim by the beneficiary under the policy.

The plaintiff's contention that her failure to give notice is attributable to her total incapacity, through no fault of her own, under the rule laid down in *Rhyne v. Ins. Co.*, 196 N. C., 717, 147 S. E., 6, in my opinion is not borne out by the evidence.

The evidence is uncontradicted that she qualified with reasonable promptness as co-executor of her husband's estate, and in March, 1933, she made claim under six life insurance policies (unaffected by suicide), which were paid. She was admitted to the State Hospital 18 May, 1933, under a diagnosis of "drug addictional psychosis," meaning her condition was due to over indulgence of drugs, and not to a mental illness. (Testimony of the superintendent of State Hospital, Dr. Ashby.) On 17 August, 1933, she was paroled and left that institution. At that time "her mental condition was good." Said Dr. Ashby: "In my opinion she was competent to transact ordinary business affairs." Thereafter she transacted business, consulted lawyers, executed deeds, traveled to

New York, and performed many other intelligent acts before attempting to comply with the requirements of the policy to give "immediate notice" of claim, so that the facts might be promptly investigated.

Over against this we have the testimony of plaintiff's daughter, "I thought she was insane." Dr. Speight said: "Her mental and physical condition was not such as to enable her to read a contract of several pages of insurance policy and to comprehend and know what was required of her by the contract of the policy." Who could? This is a far cry from the rule laid down in *Rhyne v. Ins. Co., supra.*

The judge of the Superior Court, Judge Parker, who tried this case with care and reasoned judgment, and heard all the evidence at first hand, made a written statement of his reasons for granting the motion for judgment of nonsuit, and filed it at the time with the court. This statement is printed in the appellee's brief with the consent of the appellant. I quote this statement as follows: "Now in this case the first notification that the defendant had from the beneficiary that she contended that it was an accidental killing, is a letter from Mr. Valentine on 5 September, 1934, that is, lacking a few days being 18 months after the body of Dr. Gorham was found. She says the reason she did not give immediate notice was due to disability and she relies upon the *Rhyne* and *Nelson cases.* The Court says this, that if the beneficiary is prevented by a total incapacity to act in the matter, resulting from no fault of his own, that performance within a reasonable time by the assured after regaining his senses or by his representative after discovering the policy, would suffice. The *Rhyne case,* 196th Report, is the first case that went to our Supreme Court involving that principle of law. In that case Rhyne was insane. He was insane when the suit was brought. In the *Nelson case,* following the *Rhyne case,* Mr. Nelson was suffering from softening of the brain. Of course that was through no fault of their own, insanity and softening of the brain. In this case, the evidence is undisputed that Mrs. Gorham was suffering from no mental diseases. She was addicted to drugs and certainly the taking of drugs is a voluntary act. Dr. Ashby testified she had no trace of insanity. Not a single witness of hers has sworn she was insane. In addition to that, she has presented a number of witnesses who testified that in their opinion Mrs. Gorham was of noncapacity, but the evidence is uncontradicted that Mrs. Gorham, in the fall of 1933, signed several deeds; in 1934, she signed several deeds; she consulted Mr. F. S. Spruill in respect to this particular policy; she consulted Mr. W. S. Wilkinson in respect to accident insurance; she had the body of her husband exhumed and, of course, the purpose of that was this litigation; she carried that body to Duke University, entered into a contract with the doctor she selected to perform a *post mortem,* that he should not divulge

what he found; she has part of the skull taken off; she had the bullet taken out, carried it to New York and to Washington; it is put in the People's Bank in Rocky Mount where I believe they now say part of Dr. Gorham's skull is. Our court has said in the face of facts of that kind the statement of a witness that the person was of noncapacity, is a mere assertion or expression of opinion which has no probative value, which shows that the witness is mistaken, that his opinion is utterly erroneous and does not carry the issue to the jury. In my opinion in this case, the fact that she consulted Mr. Spruill, the fact that she consulted Mr. Wilkinson, and executed those deeds, the fact that she had the body of her husband exhumed, the fact that she attempts to bind the doctor by contract not to divulge what he found, the fact that she carried part of the skull and the bullet to cities in the north, show that the opinion of the witnesses who said she was of noncapacity is a mere assertion or expression of opinion and that she has fatally failed to give immediate notice to this company of loss."

I do not understand the majority opinion to hold as a matter of law that denial of liability by the defendant in its answer on the ground of failure to comply with the terms of the policy with respect to giving the notice of claim, as well as on the ground of suicide, would dispense with the necessity of giving the notice, required by the contract of insurance against accident, and constitute a waiver on the part of the defendant. To do so would render nugatory the provisions contained in the policy with respect thereto, by which the parties have agreed to be bound, and which provisions are inserted in the policy by the sanction of the statute, and would seem to be in conflict with the decisions of this Court in *Dewease v. Ins. Co.*, 208 N. C., 732, 182 S. E., 447; *Whiteside v. Assurance Society*, 209 N. C., 536, 183 S. E., 754; *Fulton v. Ins. Co.*, 210 N. C., 394, 186 S. E., 486.

The distinction between these cases and those cited in the opinion appears in the language quoted in *Misskelley v. Ins. Co.*, 205 N. C., 496 (at page 505), 171 S. E., 862: "The provision in the insurance policy requiring proof of total disability to be furnished within a certain definite time is waived by the company denying liability *within such time* upon other grounds than failure to furnish proof of total disability." *Ins. Co. v. Lewis*, 183 Pac. Rep. (Okla.), 975.

Here the denial was contained in an answer filed (as appears from the record) more than two years after the time for giving "immediate notice" of claim under the terms of the policy had elapsed.

J. A. JACKSON v. J. L. THOMPSON, MRS. CHRISTINE GREEN, MRS. ELIZABETH DAVIDSON AND E. F. YOUNG.

(Filed 14 December, 1938.)

1. Trusts § 15—

The purchase of land with money belonging to others creates a resulting trust for their benefit, entitling them to follow the funds into the land.

2. Trusts § 18d—

Parol evidence is competent to establish a resulting trust.

3. Judgments § 20—Lien of judgment does not attach to lands held by judgment debtor as naked trustee.

The lien of a judgment does not attach to land held by the judgment debtor under an unrecorded deed as a naked trustee or to which he has obtained bond for title with trust funds, nor may the judgment creditor contend that since he lent money for which the judgment was obtained in reliance on the debtor's interest in the land, he is therefore entitled to a lien under the principle of equitable levy, the relation of a judgment creditor to the property being insufficient to defeat the rights of the *cestuis que trustent*.

4. Same: Equity § 2—Judgment creditor held without standing to claim that laches barred cestuis from asserting trust against judgment debtor.

Under the facts and circumstances of this case, plaintiff judgment creditor is held without standing in court to contend that the *cestuis que trustent*, whose money was invested in the land, were estopped by laches from asserting their interest in the land, the matter being between the parties to the trust, and not available to the judgment creditor in his action to subject the lands to the satisfaction of his judgment.

5. Execution § 12—Cestuis held entitled to establish resulting trust by parol in creditor's action to subject the land to the judgment.

Plaintiff instituted this action to subject certain land to the satisfaction of his judgment upon allegation that the judgment debtor was the owner thereof under an unrecorded deed. Upon defendant judgment debtor's allegations that he had invested money belonging to his wife's and children's estates in purchasing the land, they were made parties, and sought to establish their rights as *cestuis* of a resulting trust by parol evidence. *Held:* The parol evidence was competent to establish the resulting trust, and its exclusion was reversible error.

APPEAL by J. L. Thompson, Mrs. Christine Green and Mrs. Elizabeth Davidson from *Sink, J.*, at October Term, 1938, of CUMBERLAND. New trial.

The plaintiff, a judgment creditor of the defendant J. L. Thompson, brought this action to subject certain land, which he alleges to be that of defendant, to the satisfaction of the judgment. The form of the pro-

ceeding is adopted because, as plaintiff alleges, the lands do not stand in the name of defendant on the records, although he is the equitable owner; that he purchased the lands from defendant E. F. Young, and fully paid for them; that Young made him a "good and sufficient deed" therefor, which defendant refuses to put upon record; or that, at any rate, he is entitled to have Young convey the lands to him. The plaintiff demands judgment that this be done; that a receiver be appointed, and that the land be sold to satisfy his judgment.

The defendant J. L. Thompson answers, setting up the defense that the land in question was bought by him at an auction sale had by Young, at which time he paid one-fourth cash and executed notes for the balance, Young giving him a bond for title; that the funds used in the purchase of the lands were proceeds of the sale of certain other lands in Greene County, in which he had no interest, but which were willed to Zilphia Thompson, his wife, during her natural life, and to her children. These children, at the time of the purchase, were William Thompson, Wesley Thompson, Elizabeth Thompson, Christine Thompson, and J. L. Thompson, Jr., since deceased. He alleges that William and Wesley were provided for by other investments in land, and this land represents the investment of the funds of Christine and Elizabeth, and was bought for them; that the sale of the Greene County lands was made under an order of court in a proceeding for sale and reinvestment, and the schedule of payment of the purchase price of the lands bought of Young was made to fit the terms on which he had sold the Greene County lands; that he had not applied for a deed because there was a small balance due on one of the notes. In an amendment to the pleading he sets up that the proceeding for sale and reinvestment was inadvertently nonsuited by Judge Daniels at September Term, 1918, of Harnett Superior Court, between the time of sale and report of the Commissioner, and defendant asks that this order be set aside, and the proceeding treated as still pending, in order that the rights of the parties may still receive such further protection as may be necessary.

It appearing that Christine Green and Elizabeth Davidson (the "Christine" and "Elizabeth" referred to above) were necessary parties, they were joined as parties defendant and filed pleading in agreement with the answer and defense of their father and codefendant Thompson.

The defendant Young answered alleging that he had sold the defendant the lands, receiving one-fourth cash and three notes which had been fully satisfied, and had executed to defendant Thompson a deed for the land.

The plaintiff replied to the various answers, denying the essential allegations, pointing out the incompleteness of the proceedings for sale and reinvestment, the want of authority for the reinvestment, and lack

of report and confirmation thereof; and alleged laches on the part of the defendants Christine Green and Elizabeth Davidson in not compelling a report and account and securing a deed for the lands until, as alleged, a period of eight years had elapsed after they became of age. Plaintiff claims they are now estopped, because of such laches, to obtain any order; and that they had paid no taxes upon the lands, claimed no interest in them, and were now estopped to assert any.

On the trial of the cause the defendants sought to show the interest of Christine Green and Elizabeth Davidson in the lands in question, and to show that the said lands had been purchased by funds belonging to them, by the testimony of J. L. Thompson.

Several questions were addressed to him, the answers to which were excluded, and the record indicates that if he had been permitted to do so he would have testified substantially as follows: (a) That the total amount the lands in Greene County brought was $15,341.45, plus $500.00 paid to the Auction Company; (b) that he bought 248 acres of land on Raleigh Road in Cumberland County from E. F. Young in 1918, on which there is a small part due on the last note; (c) that he got the money from the Greene County land through R. L. Godwin, commissioner; (d) that the land belonged to his wife's and children's estate; (e) that he had bought the land for his two daughters, Elizabeth and Christine (defendants in this case), as trustee for them; and (f) that it was their land; that they had given to the two boys, who had passed the age of 21, $2,800 worth of land in Dunn, and that the 248 acres were for his daughters; that he had prior to this time invested $8,000 of the Greene County funds in the W. L. Hudson place for his wife and five children, Elizabeth, Christine, William, Wesley, and John L., Jr., the latter of whom died in 1924; that the lands in Dunn were purchased with a part of the Greene County fund; that witness had no personal interest in the land, but used part of the money derived from the sale of the land in Greene County to buy these 248 acres of land in Cumberland County from E. F. Young; that the bond for title was in his name because the girls were under age and could not sign notes for the deferred payments, and that he had not called for the deed because of a small balance owed on the last note.

All of this evidence was excluded and is covered by defendant's exceptions 1 to 5.

The following issues were submitted to the jury: "(1) Is the defendant E. F. Young the holder of the paper title to the lands described in the complaint? (2) If so, is the defendant J. L. Thompson, individually, entitled to have made to him, by his codefendant E. F. Young, a deed for said lands? (3) What amount, if any, is the plaintiff entitled to recover of the defendant J. L. Thompson?" To each of the two first

issues the jury answered "Yes" and to the third issue answered "$3,500, with costs and interest, as alleged." Thereupon, a judgment was entered requiring E. F. Young to execute to J. L. Thompson "a good and sufficient deed" to the lands in question, and adjudging that "the title estate and interest of J. L. Thompson in the above described lands be and the same is hereby condemned and foreclosed"; and the judgment proceeds to appoint Commissioners to sell the land and make a report to the court.

From the judgment the defendants appealed.

J. R. Young and I. R. Williams for plaintiff, appellee.
R. L. Godwin and Robert H. Dye for defendants, appellants.

SEAWELL, J. The exclusion of the testimony of J. L. Thompson seems to proceed on the theory that the defendants must succeed in their claim of ownership of the land only by virtue of an order of the court, carried out in accordance with strict legal procedure, authorizing the sale of the Greene County lands and the reinvestment of the fund under another order of the court, with the report duly made and confirmed; and that parol evidence is incompetent to establish the facts. This is contrary to the uniform decisions of the Court covering the matter. Nothing else appearing, the use of the money of Christine Green and Elizabeth Davidson in the purchase of the lands herein sought to be charged with the lien of the judgment would create a resulting trust for their benefit in J. L. Thompson, the purchaser, if he received a deed in his own name, and they may follow the funds into the land with appropriate testimony. *Tire Co. v. Lester,* 190 N. C., 411, 130 S. E., 45; *Minton v. Lumber Co.,* 210 N. C., 422, 187 S. E., 568; *Ins. Co. v. Dial,* 209 N. C., 339. The principle is so familiar that we refrain from quotation.

Naturally the facts giving rise to such a resulting trust nearly always rest in parol. In North Carolina such resulting trusts are known as parol trusts: *Gorrell v. Alspaugh,* 120 N. C., 362, 27 S. E., 85, 87; and are, of course, subject to parol proof. *Furniture Co. v. Cole,* 207 N. C., 840, 178 S. E., 579; *Ins. Co. v. Dial, supra; Hendren v. Hendren,* 153 N. C., 505, 69 S. E., 506.

In this case there is a controversy as to whether a deed had been actually made to Thompson—the plaintiff claiming that it had, and the defendant claiming that only a bond for title had been made. The acceptance of either theory would not materially vary the application of the principle of law involved.

The plea that the judgment creditor had loaned to the defendant Thompson, upon the "strength of his holdings," that is, in consideration of his financial worth, as including the property in question, and there-

fore, has a legal right to subject the property to the lien of the judgment as against the rights of the defendants Christine Green and Elizabeth Davidson to establish a parol trust, has no merit. There was no recorded deed to the judgment debtor which might have gone into an estimate of defendant's solvency; and even if there had been the relation of a mere judgment creditor toward the property of his debtor is not of such a character as to affect or defeat the rights of *cestuis que trustent.*

The reason for the rule is thus stated in *Guaranty State Bank v. Pratt* (Okla.), 180 P., 376, 378: "A judgment creditor is in a very different position from one who has bought and paid, or who has loaned money on the face of the recorded title, and he is not a *bona fide* purchaser, for the reason that he has parted with nothing to acquire his lien, and when the real title prevails over the apparent title he is in no worse position than he was before he acquired his lien, and for that reason equity does not regard the judgment creditor, but assists those who have invested in, and therefore, have a substantial interest in, the real estate." See, also, *J. I. Case Threshing Machine Co. v. Walton Trust Co.,* 39 Okla., 748, 136 P., 769.

A judgment taken upon an individual debt against the holder of a mere legal title held in trust for another has no lien upon the land so held. The lien of a judgment is no more than that which is provided by the statute, and is effective only against "the real property in the county where the same is docketed of every person against whom any such judgment is rendered"; C. S., 614; and in case of the effective assertion of a parol trust there was no property interest of Thompson in this land to which lien might attach, and none to which the lien might be extended on the principle of equitable levy.

Upon the circumstances of this case the relation between the plaintiff, as judgment creditor, and the defendant J. L. Thompson, as judgment debtor, gives the plaintiff no standing to urge the lapse of time and the laches of the defendants, Christine Green and Elizabeth Davidson, in not bringing their affairs to an earlier settlement and not having accounts filed and approved and proper conveyance of the lands made to them. There is no allegation, and certainly no evidence, that the alleged trustee has either denied the trust or refused to execute it; and if he had the matter would still be between the parties to the trust.

The defendants were denied the right to prove their case in the only way available to them, and in the way universally approved by the court. *Wise v. Raynor,* 200 N. C., 567, 157 S. E., 853; *Tire Co. v. Lester, supra; Gay v. Hunt,* 5 N. C., 141; *Furniture Co. v. Cole, supra.* In the exclusion of the evidence offered in the testimony of the defendant J. L. Thompson, and that of the corroborating witness, there was error, entitling the defendants to a new trial.

New trial.

BLADEN COUNTY v. O. P. BREECE AND WIFE, MARY J. BREECE, E. U. BREECE AND WIFE, LUCY D. BREECE; THEODORE CLARK, JOHN CLARK, K. M. HARDISON, ROY PURDY, AND J. S. LILES.

(Filed 14 December, 1938.)

1. **Judicial Sales § 3: Taxation § 40b—Judicial sale not held on a Monday or on one of first three days of a term of court is void.**

In an action to foreclose land for delinquent taxes, order was issued appointing a commissioner to sell the lands and directing the sale might be had "on any day except Sunday." The commissioner sold the land on a Tuesday of a week during which there was no term of the Superior Court in the county. *Held:* The sale was void as a matter of law. C. S., 690; Public Laws of 1931, ch. 23.

2. **Judicial Sales § 6: Taxation § 42—Where record shows judicial sale was had on day other than permitted by law, purchasers have notice.**

The order of sale of land to satisfy delinquent taxes provided that the sale might be had on any day except Sunday. The report of sale showed the sale was had on 25 June, 1936, which was Tuesday of a week during which no term of Superior Court was held in the county. *Held:* The order of sale was no authority to sell on any day other than those specified in the statute, and the sale was void, C. S., 690, and the purchaser at the sale and *mesne* purchasers from him are chargeable with notice of the fatal defect, since they were under duty to look to the proceeding to see that the court had jurisdiction of the parties and subject matter, and that the judgment on its face authorized the sale. Validating provisions of Public Laws of 1931, ch. 23, *held* inapplicable, since they relate only to sales theretofore made, and Public Laws of 1937, ch. 26, *held* inapplicable, since the action was then pending.

APPEAL by plaintiff and defendants J. S. Liles, K. M. Hardison, John Clark, Theodore Clark, and Roy Purdy from *Sinclair, J.*, at August Term, 1938, of BLADEN.

Civil action to enforce tax lien upon real estate, C. S., 7990, in which there is motion to set aside order of sale and subsequent acts, orders and decrees and deeds.

Facts, substantially these, appear upon the face of the record: The action relates to the lien of delinquent taxes for the years 1929 to 1933, both inclusive, against 780 acres Whitted land in Bladen County, owned by the defendants O. P. Breece and E. U. Breece, who, with the wife of each, were duly served with summons and copy of complaint, but failed to answer. On 25 May, 1936, the clerk of Superior Court of Bladen County rendered an interlocutory judgment of foreclosure condemning the land in question to be sold for the purpose of satisfying the tax liens, appointing a commissioner to sell the lands and directing that *"said sale may be had on any day except Sunday."* Pursuant thereto the commis-

sioner advertised the lands to be sold "at public auction for cash at the courthouse door in Elizabethtown, North Carolina, on *Thursday the 25th day of June, 1936, at or about 12 o'clock noon,*" when and where the land was offered for sale and J. S. Liles became the last and highest bidder therefor at $1,022.15. On the day of sale commissioner reported to the clerk that "he advertised the property described in the complaint as provided in said order and according to law, and offered the same for sale on the 25th day of June, 1936." The clerk, by the decree entered 16 July, 1936, confirmed the sale and ordered and directed the commissioner upon payment of the purchase money to execute and deliver to J. S. Liles, purchaser, a deed in fee simple for said land. The order was executed and the transaction closed that day.

Thereafter, on 31 August, 1936, the defendants made motion in the cause to set aside the interlocutory judgment of 25 May, 1936, and all acts, orders and proceedings subsequent thereto including the purported sale of the land, the report and confirmation thereof, and the commissioner's deed to J. S. Liles and to vacate and recall writ of assistance issued thereunder, for "irregularity, mistake, inadvertence and excusable neglect." The clerk denied the motion. On appeal by defendants to the Superior Court, it was made to appear to the court at the subsequent May Term that J. S. Liles had executed a deed for the lands to K. M. Hardison, who in turn had executed deeds to Theodore Clark, John Clark and Roy Purdy for parts thereof. Whereupon, by order duly entered, J. S. Liles, K. M. Hardison, Theodore Clark, John Clark and Roy Purdy were made parties defendant, and served with notice to show cause why said motion should not be granted. The plaintiff was served with like notice.

Defendants J. S. Liles and K. M. Hardison file affidavit and assert that each of the grantees in the said several deeds is a purchaser for value.

Upon the hearing, after reciting facts of record with respect to the order of sale and the date on which the sale was had, and after reciting further that "It further appearing to the court that no term of the Superior Court was scheduled to be held or was held in Bladen County during the week in which said property was sold and that said sale was not held on Monday or during the first three days of any term of the Superior Court of Bladen County, and that the order directing said sale did not designate any other place or time, which defect appeared in the face of the record and on account of which the said sale was irregular and void," the court below adjudged that the said interlocutory judgment of foreclosure of 25 May, 1936, "in so far as it condemns the land in question to be sold for the nonpayment of taxes and appointing a commissioner for that purpose is not modified or disturbed by this decree,

but so much thereof as directs that said commissioner shall sell said land on any day except Sunday is hereby set aside and vacated, and the sale made pursuant to said judgment, the report and confirmation thereof and deed executed by the commissioner for said land to J. S. Liles are set aside and hereby declared null, void and of no effect," and further "ordered and directed that the clerk of the Superior Court of Bladen County shall present this decree to the register of deeds of Bladen County, who shall make an entry upon the face of each of said deeds that the same has been declared void and of no effect by this decree, and upon the cross-index of said decree shall enter the word 'canceled' with a reference to the book and page on which the reference is made upon the face of the deed; and this cause is remanded to the clerk of the Superior Court of Bladen County."

From this judgment the plaintiff and defendants J. S. Liles, K. M. Hardison, Theodore Clark, John Clark and Roy Purdy appeal to the Supreme Court and assign error.

Leon D. Smith and H. H. Clark for plaintiff, appellant.
Clark & Clark for defendants, appellees.

WINBORNE, J. This appeal presents these determinative questions: (1) Is a judicial sale of real property ordered to be held "on any day except Sunday" and not held on Monday or on one of the first three days of a term of Superior Court of the county, void as a matter of law? (2) If so, are purchasers at such sale and subsequent grantees charged with notice thereof? An affirmative answer to each is firmly established in the law in this State.

Statutes, relating to and specifying dates and places of sales of real property under execution and under order of court, varying from time to time through more than a hundred years, culminate in the reënactment of C. S., 690, by Public Laws 1931, ch. 23, which is so far as pertinent to case in hand, reads: "All sales of real property sold under order of court shall be sold at the courthouse in the county in which all or any part of the property is situate on any Monday in any month or during the first three days of any term of the Superior Court of said county, unless in the order directing such sale some other place and time are designated and then it shall be sold as directed in such order on any day except Sunday, after advertising as required by law."

These statutes have been the subject of a long line of decisions of this Court. These are to the effect that a sale of real property under execution or under order of court on a day and at a place other than one prescribed by the statute is void; and that deed founded thereon is inoperative and void. McIntosh, N. C. Prac. & Proc., page 848, sec. 730.

Mordecai v. Speight, 14 N. C., 428; *Avery v. Ross,* 15 N. C., 554; *S. v. Rives,* 27 N. C., 297; *Brooks v. Ratcliff,* 33 N. C., 321; *Briggs v. Brickell,* 68 N. C., 239; *Wade v. Saunders,* 70 N. C., 270; *Mayers v. Carter,* 87 N. C., 146; *Dula v. Seagle,* 98 N. C., 458, 4 S. E., 549; *Wortham v. Basket,* 99 N. C., 70, 5 S. E., 401; *Loudermilk v. Corpening,* 101 N. C., 649, 8 S. E., 177; *Johnston County v. Smith,* 203 N. C., 255, 165 S. E., 707.

In *Wortham v. Basket, supra, Merrimon, J.,* said: "It is the just purpose of the statute . . . regulating sales of real property under execution or by order of court, that they shall be made at prescribed times and places so that all persons may know when and where to attend to purchase such property to be sold. The time and place of such sales are fixed by law and everyone takes notice of this. . . . There are other minor details prescribed by the statute, . . . but the time and place are established by it, and a due observance of them is essential to the validity of the sale, and, also, the deed executed by the sheriff to the purchaser in pursuance of it. So that such a sale made at a place or time, not prescribed by law, and a deed of the sheriff executed in pursuance thereof are inoperative and void, unless in possible cases when the execution debtor by his assent in good faith at the time of sale waives the statutory requirements."

In *Loudermilk v. Corpening, supra,* considering a sheriff's deed, the Court stated: "We are of opinion that it was inoperative and void on the ground that the sale of the sheriff upon which it was founded was not a lawful one, it having been made on a day other than a day prescribed by the statute prevailing at the time it was made on which the sale of real estate under execution might be made. . . . It is settled that a sale of real estate made on any day other than as prescribed by the statute in a case like this is absolutely void."

In *Johnston County v. Smith, supra,* an action to foreclose tax sale certificate, wherein there was order of resale after advertising "as provided by statute," the Court held that a sale on Wednesday, 15 June, 1932, which was not "during the first three days of any term of the Superior Court of said county" when there was no order designating some other time, is void. The opinion therein written by *Clarkson, J.,* concludes that "under facts and circumstances of this case, we think the purchaser must take cognizance of the statute, and the pretended sale was ineffectual to pass title for the reasons given." The statute there considered is the statute applicable here.

In the absence of fraud or the knowledge of fraud, one who purchases at a judicial sale, or who purchased from one who purchased at such sale is required to look to the proceeding to see if the court had jurisdiction of the parties and of the subject matter of the proceeding, and that the

judgment on its face authorizes the sale. *Graham v. Floyd, ante,* 77, 197 S. E., 873, and cases cited, including *Millsaps v. Estes,* 137 N. C., 536, 50 S. E., 227; 70 L. R. A., 170, 107 Amer. St. Rep., 496.

In the instant case the defect appears upon the face of the record. The order discloses direction that "said sale may be had on any day except Sunday" without designating a day. It is, therefore, no authority to sell on any day other than those specified in the statute. The report of sale shows that it was held on 25 June, 1936. That day was Thursday—a day not named in the statute. With notice of these facts the purchaser, and those claiming title under him, are chargeable.

It is not here necessary to consider the validating provisions of C. S., 690, as contained in Public Laws 1931, ch. 23, and as contained in Public Laws 1937, ch. 26. The former relates to sales theretofore made. The latter does not affect then pending litigation. This action was then pending.

The judgment below is

Affirmed.

H. GRADY SINK AND WIFE, STELLA SINK, v. THE CITY OF LEXINGTON AND LEXINGTON UTILITY COMMISSION, CONSISTING OF B. C. PHILPOT, CHAIRMAN, C. M. PEELER, SECRETARY, AND R. B. ROBBINS, TREASURER.

(Filed 14 December, 1938.)

1. Evidence § 28—

A fact may be proved by circumstantial evidence.

2. Municipal Corporations § 15: Waters and Water Courses § 2—Evidence held for jury on question of infringement of riparian rights.

The male plaintiff testified to the effect that prior to the construction of defendant municipality's water system dam, his property was valuable farm land, that after the construction of the dam water backed up in a stream draining plaintiff's land so that it did not drain the land as before, resulting in the deposit of quantities of silt, and that his drainage ditches that were several feet deep where they emptied into the stream fill with water to about the top, and that the land had become wet and soggy and ruined for agricultural purposes. *Held:* The evidence is sufficient to be submitted to the jury on the question of defendant municipality's wrongful operation of the dam resulting in an invasion of plaintiffs' riparian right to have the stream flow past the land in its natural quantity and in its accustomed channel subject to the rights of other proprietors to a reasonable use of the water.

APPEAL by plaintiffs from *Olive, Special Judge,* at Special April Term, 1938, of DAVIDSON. Reversed.

This is an action brought by plaintiffs against defendants for damages for injury to plaintiffs' land by rendering it unfit for cultivation.

The plaintiff H. Grady Sink (husband of Stella Sink) owns about 65.75 acres of land and a home thereon in Davidson County, N. C. The defendants City of Lexington and Lexington Utility Commission (see ch. 22, Private Laws of 1935), under legislative powers, maintains a water system and furnishes the inhabitants of the city of Lexington with water for pay. During the latter part of 1935 and the first part of 1936 the defendants constructed a dam across Leonard's Creek and impounded the waters therein, which said impounded waters cover approximately 65 acres of its land. The back water of the lake reaches to within 600 feet of plaintiffs' land, which is above the lake—10.6 acres of plaintiffs' corn and meadow land, etc., it is alleged by plaintiffs is destroyed for farming purposes.

Grady Sink, the plaintiff, testified, in part: "I cultivated about two or two and a half acres of that land in corn previous to the building of the dam, and mowed around 6 or 6½ in hay, and pastured the rest of it. That bottom in reference to fertility for hay and other crops was as good as you could find anywhere. I think I grew as good corn there as anybody ever grew on land, and my meadow was good, and I had good crops every year. I never missed mowing two crops of hay off of it since I have had it until since the lake has been impounded. . . . Just previous to the building of the dam I would say I raised 70 to 75 bushels of corn per acre. I would assume the average hay crop there just previous to the building of the dam, in the bottom to be something like four tons to the acre—be two tons a crop. I cut that hay twice per year. With reference to the difference in the condition of my bottom land now and just previous to the building of this dam by the city, at that time I could mow every foot of it and cultivate it, and at the present time it is impossible to do it. As to how it is now, all this that has been pointed out here is standing in water, lots of it knee deep, and the rest of it you would mire down in it if you would get out in it. It has always been so it could easily be drained of water, have never known it to be otherwise, except since the water has been impounded in the lake, and at the present time you cannot do it. The water is too high to drain it. I quit cultivating my bottom, on account of the condition of the water being in there that I have just described, last year. The fall crop was the last crop, the fall of 1937. . . . I would say the difference in the depth of the creek in the middle of my bottom now and immediately before the dam was built is about 2½ feet. With reference to the depth of the creek as it comes through the southern portion of my land now as compared with immediately before the dam was built, I think as much as 3½ feet piled up there. . . . As to the condition of that land now

as compared with immediately before the dam was built, it is much wetter than it was—soggy and wet. There are no ditches on it. Before the dam was built it was naturally dry there. My ditches leading across my property into Leonard's Creek immediately before the dam was built, right at the creek were 5 feet deep. With reference to where the ditches were that were 5 feet deep that came into Leonard's Creek, this ditch here (indicating) came all the way right in around here, and right into the creek; and right down at the creek when it was cleaned out you could just barely see out of it. That is the way it was, and now it is filled up to the top just about. The blind ditches, the water is covered up over them now, and used to they would drain the water from back up in there and they can't now. The sand and silt has filled up a whole lot. When the water from Leonard's Creek that drains through my place hits the back waters of the lake, it naturally stops, and the silt and sand stops, too. It continually fills up. It keeps just piling up on top of it."

Notice of claim was duly presented to the city of Lexington (ch. 70, Private Laws 1933). The plaintiffs introduced several witnesses who corroborated H. Grady Sink's testimony. The defendants denied liability. Judgment of nonsuit was rendered for defendants and plaintiffs excepted, assigned error and appealed to the Supreme Court.

Don A. Walser and J. F. Spruill for plaintiffs.
P. V. Critcher and Phillips & Bower for defendants.

CLARKSON, J. At the close of plaintiffs' evidence, the defendants made a motion in the court below for judgment as in case of nonsuit (C. S., 567). The motion was granted and in this we think there was error. We think the evidence was sufficient to be submitted to the jury. It is well settled that a fact can be proved by direct and circumstantial evidence.

In *Smith v. Morganton,* 187 N. C., 801 (802-3), it is said: "Farnham says that a comprehensive statement of the rights of a riparian owner is that he has a right to have the stream remain in place and to flow as nature directs, and to make such use of the flowing water as he can make without materially interfering with the equal rights of the owners above and below him on the stream. Furthermore, the right to have a natural water course continue its physical existence upon one's property is as much property as is the right to have the hills and forests remain in place, and while there is no property right in any particular particle of water or in all of them put together, a riparian proprietor has the right of their flow past his lands for ordinary domestic, manufacturing, and other lawful purposes, without injurious or prejudicial interference by an upper proprietor. Waters and Water Rights, secs. 461, 462. This

doctrine finds support in our decisions which hold that a riparian proprietor is entitled to the natural flow of a stream running through or along his land in its accustomed channel, undiminished in quantity and unimpaired in quality, except as may be occasioned by the reasonable use of the water by other like proprietors," citing numerous authorities.

We think *Teseneer v. Mills Co.*, 209 N. C., 615, similar to the present case, nor is *Dunlap v. Light Co.*, 212 N. C., 814, contrary.

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

Reversed.

Z. V. CRUTCHFIELD v. JONES FOSTER.

(Filed 14 December, 1938.)

1. Attorney and Client § 10—Ordinarily, court may not fix amount of attorney's fee or impose same as a lien upon the client's land.

The court is without power to impose a lien on the land to secure an attorney's fee allowed by the court in the action involving title to the land, in the absence of agreement between the attorney and client, or intervention on the part of the attorney giving the client an opportunity to be heard on the attorney's claim.

2. Execution § 5—Order for sale held void, and execution on the order for sale by commissioner held void.

Judgment was entered in an action involving realty which provided that the attorney responsible for the recovery of the land should have a lien thereon in a stipulated amount, and that if the sum were not paid the property should be advertised and sold as provided by law for foreclosure of other liens. Thereafter, execution in the attorney's favor was issued on the judgment and the land bought at the execution sale by plaintiff. *Held:* Plaintiff's deed is a nullity, since the order imposing the lien in the attorney's favor was not only void, but the order, even if valid, did not authorize the clerk to issue execution thereon, and it further appearing that the sheriff undertook to sell in addition to the land described in the order another tract of land also.

APPEAL by defendant from *Bivens, J.*, at February Term, 1938, of DAVIDSON. Reversed.

This is an action in common law ejectment instituted by plaintiff to recover of the defendant possession of the two tracts of land described in the complaint. The plaintiff alleges that he acquired title thereto under deed dated 19 August, 1935, from the sheriff of Davidson County pursuant to a sale under execution. The defendant denied the material allegations of the complaint and alleged in further defense: "That the deed under which the plaintiff claims title to the property referred to in

the complaint was made to him without authority of law and conveys no legal title to him, for that it appears from the entry on Minute Docket No. 28, pages 494-496, in the action entitled, 'Lula Walker *v.* Jones Foster, Robert DeLapp and Geneva DeLapp,' in the office of the clerk of Superior Court for Davidson County, that the judge made as a part of the judgment an order as follows, 'It further appearing to the court that C. T. Kennedy, attorney for Jones Foster in this action, is responsible for the recovery by the said Jones Foster of a tract of land fronting approximately fifty-five (55) feet by two hundred feet depth on Church Street, it being that portion of the property owned by Cordelia Foster, less the part which Lula Walker has a lien on under and by virtue of this judgment, it is ordered that the said C. T. Kennedy have a lien on said property of Jones Foster as sole heir at law of Cordelia Foster to the extent of seventy-five [dollars] ($75.00) and if said Jones Foster fails to pay said lien within 60 days the said property shall be advertised and sold as provided by law for the foreclosure of other liens.' "

The court below signed judgment for the plaintiff and the defendant excepted and appealed.

Douglas C. Crutchfield and L. Roy Hughes for plaintiff, appellee.
McCrary & DeLapp for defendant, appellant.

BARNHILL, J. The defendant alleges and contends that the judgment pleaded by him under which his land was sold by the sheriff and purchased by the plaintiff is an attempt to impose a lien on his property for the security of an attorney's fee and is a nullity. No issues were submitted to a jury. The cause was apparently disposed of by the court below as upon a motion for judgment upon the pleadings, which admits the matters set up in defense, but challenges the sufficiency thereof to bar plaintiff's recovery. *Barnes v. Trust Co.*, 194 N. C., 371, 139 S. E., 689; *Pridgen v. Pridgen*, 190 N. C., 102, 129 S. E., 419; *Churchwell v. Trust Co.*, 181 N. C., 21, 105 S. E., 889; *Oldham v. Ross, post*, 696.

The common law rule, which applies in this State, is stated in 2 R. C. L., page 1077, as follows: "The weight of authority is to the effect that, in the absence of statute, the charging lien of an attorney for compensation for professional services does not attach to the land involved in the litigation in which such services were rendered. This rule applies in cases where the attorney has successfully prosecuted a suit in equity to establish title to land; where he has recovered land in an action of ejectment; and where he has successfully defended the right and title to land against an unjust claim or an unwarranted attempt to subject it to an alleged lien or liability." In *Midgett v. Vann*, 158 N. C., 130, the Court says that: "Counsel fees in favor of the successful party were abolished

by statute in 1871. In many states attorneys' fees are allowed the successful litigant, but it is not so in this State and in some others, nor in the Federal Court. *R. R. v. Elliott,* 184 U. S., 530; *Hyman v. Devereux,* 65 N. C., 589; *Stringfield v. Hirsh,* 94 Tenn., 425. The opinion in this latter case is an elaborate discussion of the subject and gives the states where attorneys' fees are recoverable and those where they are not, placing North Carolina in the last-named list. See *Donlan v. Trust Co.,* 139 N. C., 212." In *Mordecai v. Devereux,* 74 N. C., 673, it is said: "The question is decided. *Patterson v. Miller,* 72 N. C., 516. This Court has never interfered between attorney and client in making allowances for professional services, and we are not inclined at this late day to assume the power to do so." *Ellington v. Ellington,* 204 N. C., 785, 168 S. E., 672; *Roe v. Journigan,* 181 N. C., 180, 106 S. E., 680.

In holding that the court is without authority to impose a lien upon lands to secure an attorney's fee allowed by the court, we are not inadvertent to the decision in *Casket Co. v. Wheeler,* 182 N. C., 459, 109 S. E., 378, where it appeared that there had been an equitable assignment of a part of the recovery to the attorney and where it further appeared that a petition in the cause was filed by the attorney and the client was given a full opportunity to be heard. In the case under consideration it does not appear that there was any agreement between attorney and client, or that the attorney intervened in the cause, giving his client an opportunity to be heard on the attorney's claim. Apparently the court fixed the fee and imposed a lien without notice.

Even if it be conceded that the court had power to impose a lien upon the land of the defendant in favor of his attorney, as the pleaded judgment attempts to do, plaintiff's deed is a nullity. The judgment provides that "if said Jones Foster fails to pay said lien within 60 days the said property shall be advertised and sold as provided by law for the foreclosure of other liens." Under this judgment there was no authority in the clerk to issue execution thereon, or in the sheriff to sell said property under execution. Furthermore, the judgment undertakes to impose a lien only upon one lot 55 feet by 200 feet. In addition thereto the sheriff undertook to sell another tract containing 1½ acres.

The judgment set out in the defendant's further answer is void in so far as it undertakes to fix the fee of counsel for the defendant in that cause and to impose the same as a lien upon defendant's property, and the plaintiff's deed executed to him by the sheriff pursuant to a sale under an execution issued on said judgment conveys no title to the land therein described.

The judgment below is

Reversed.

MARGARET RUSHING BERWER, AND MARGARET RUSHING BERWER, GUARDIAN OF WALTER A. RUSHING AND WILLIAM A. RUSHING, MINORS, v. THE UNION CENTRAL LIFE INSURANCE COMPANY.

(Filed 14 December, 1938.)

1. Fraud § 1—Definition of actionable fraud.

The elements of actionable fraud are a definite and specific representation which is materially false, made with knowledge of its falsity or in culpable ignorance of its truth, and with intent that it should be relied on, and which is reasonably relied on by the other party to his deception and damage.

2. Same—

The remedies for actionable fraud apply to contracts and sales of both real and personal property.

3. Fraud § 11: Cancellation of Instruments § 12—Evidence of actionable fraud held insufficient to be submitted to the jury.

Deed to the grantee under whom plaintiffs claim described the land therein conveyed by metes and bounds and recited that the first tract contained "100.1 acres" and the second tract "4 acres, more or less," and contained in all "104.1 acres, more or less." Plaintiffs alleged there was a shortage of 43.1 acres, and introduced evidence that the person arranging the sale represented that there was valuable timber on the tract conveyed, that the timber would bring enough to pay the balance of the purchase price, and that a map and survey had been made. The evidence disclosed that the tract conveyed did in fact include timbered lands without certainty as to the quantity of land and of the timber, and there was no evidence of any representation as to the number of acres in the boundary, nor evidence that the map and survey had not been made, nor what the map, if made, showed with respect to the acreage or with reference to the timbered lands. *Held:* The evidence was insufficient to be submitted to the jury on the issue of actionable fraud.

4. Fraud § 3—

A representation that timber on the lands conveyed was just about enough to pay the balance of the purchase price of the lands is not only indefinite, but is an expression of opinion, and does not constitute a misrepresentation in law.

CLARKSON, J., dissents.

APPEAL by plaintiffs from *Hamilton, Special Judge,* at February Term, 1938, of COLUMBUS.

Civil action for recovery of purchase money paid by reason of alleged actionable fraud, and to enjoin sale of land under deed of trust.

These are substantially the uncontroverted facts: On 30 September, 1927, for recited consideration of $3,000, defendant conveyed to Walter Frederick Rushing, by warranty deed, two tracts of land in Columbus

County, North Carolina, specifically described, the first tract "containing 100.1 acres," and the second "4 acres, more or less—containing in all 104.1 acres, more or less." In the deed there is no other reference to the acreage. Rushing paid $800 in cash, and evidenced the balance by ten promissory notes, each in the sum of $298.91, secured by a deed of trust of even date therewith conveying the said lands.

Walter Frederick Rushing died 24 November, 1927, leaving as his only heirs at law his widow, Margaret Rushing, now Margaret Rushing Berwer, and two minor children, Walter F. Rushing and William A. Rushing, for whom Margaret Rushing Berwer is the duly appointed and acting guardian. Margaret Rushing Berwer is also the duly appointed administratrix of the said Walter F. Rushing, deceased.

Three notes due prior to October, 1931, have been paid. Plaintiff Margaret Rushing Berwer testified that one note was paid by her, and two were paid out of money of her children and coplaintiffs. Under the power of sale contained in the deed, defendant caused the land to be advertised for sale on 26 July, 1933. Whereupon plaintiffs instituted this action to enjoin the sale, to cancel the said deed of trust and notes and for recovery of purchase money, taxes and other expenses paid, less rents for which plaintiffs shall account.

Plaintiffs allege in substance that the defendant, through its agent, falsely, fraudulently and knowingly represented to Walter F. Rushing: (1) That the said tracts of land contained 104.1 acres and that same had been surveyed and the lines and boundaries checked and a plat made of the land, when in fact no such survey had been made and there was a shortage of 43.1 acres in the acreage; (2) that in showing to Walter F. Rushing the lands offered to and bought by him, defendant, by its agent, pointed out as a part of the tracts well timbered "land lying about northwardly of Millican Branch Run and about southwardly of Whiteville-Clarkton Road," stating that said timbered land would about pay for all of the land; (3) that said representations were made for the purpose of inducing the said Rushing to buy; (4) that relying upon them, he purchased the land; (5) that they kept the payments up until they discovered and notified defendant of the shortage in acreage and that the deed did not embrace all the land said Walter F. Rushing had purchased; and (6) that they refused to make further payments until defendant adjusted the shortage, which it refused to do, but instead it caused the lands to be advertised for sale under the power contained in the deed of trust. Defendant denied material allegations.

Plaintiff offered evidence tending to show that: Mrs. Margaret Rushing Berwer, until she was fourteen years old, lived in Columbus County about a mile from the farm in question and that her family still lives there. Prior to the purchase of the farm, she and her husband, Walter

Frederick Rushing, came from Florence, South Carolina, for a day, went into the Waccamaw Bank & Trust Company and deposited $800, and while in the bank inquired of Mr. Coburn, the cashier, "if they had any farms for sale." He told them that he did, and after they talked it over, he made an engagement to take them out to show them the farm. They went with him through the farm on the Clarkton and Whiteville highway. Mrs. Berwer testified: "He showed us the farm. We went down a road in the field, and over to the right of this . . . were shown quite a bit of timber . . . located on the right of the road on the south side . . . going in, north of Millican Branch. Mr. Coburn made the statement that there was just about enough timber there to finish paying for the place. We asked him if everything would be all right to go ahead. Mr. Coburn stated that Mr. Pierce had made a map and a plat of the land, that the place had been recently surveyed and a map made." She further testified that after the conversation with Mr. Coburn they went back to Florence, and in consequence of information received by wire, came down and, with no one present except Mr. Coburn, signed the papers in the bank and deed was delivered to them. No others talked to them or showed them the land. Mrs. Rosa High, mother of Mrs. Berwer, testified that "back in 1927, while they were negotiating this deal for the land Mr. Coburn came to my house one night and told me and my daughter to come up and fix up the papers, that they could turn it now and make a good deal. It was about bedtime when he come. I wired my daughter the next day."

Plaintiff further offered evidence tending to show: That by following the calls in the deed a survey failed to tie up; that the small tract lies within and at the southeast corner of the larger tract; that some of the land included in the boundary of this tract lies north of Millican Branch. E. M. Eutsler, surveyor, as witness for plaintiff, testified that he had surveyed the land and made a map of it, but had not calculated the acreage; that "the line was just out in the woods far enough to be well out in the woods"; and that the reasonable market value of the timbered land *as he saw it* was about ten dollars per acre, top price. Forney Gore, also a surveyor, testified: "I made a map in 1929 of this property. I don't say that it is accurate. My map shows 65 acres in the tract." He further testified that there is "quite a lot of timber on the land north of Millican Branch and south of the line indicated by the figures 16 and 15."

Counsel for Mrs. Berwer asked her this question: "Do you know of your own knowledge why your husband purchased the land?" Objection sustained; exception. She would have answered, "Because, when Mr. Coburn pointed out this land, when we saw the timber land, we relied on his word."

From judgment as of nonsuit at the close of plaintiffs' evidence, plaintiffs appeal to the Supreme Court and assign error.

S. J. Bennett for plaintiffs, appellants.
D. L. Carlton and Powell & Lewis for defendant, appellee.

WINBORNE, J. Conceding, but not deciding, that the plaintiffs are the real parties in interest and can maintain this action, C. S., 446, we are of opinion that the evidence offered by the plaintiffs is not sufficient to establish all of the essential elements of actionable fraud. This is decisive of the case. Motion for judgment as of nonsuit was properly granted.

"The essential elements of actionable fraud or deceit are the representation, its falsity, *scienter*, deception, and injury. The representation must be definite and specific; it must be materially false; it must be made with knowledge of its falsity or in culpable ignorance of its truth; it must be made with fraudulent intent; it must be reasonably relied on by the other party; and he must be deceived and caused to suffer loss." *Adams, J.*, in *Electric Co. v. Morrison*, 194 N. C., 316, 139 S. E., 455; *Gatlin v. Harrell*, 108 N. C., 485, 13 S. E., 190; *Cash Register Co. v. Townsend*, 137 N. C., 652, 50 S. E., 306; *May v. Loomis*, 140 N. C., 350, 52 S. E., 728; *Tarault v. Seip*, 158 N. C., 363, 74 S. E., 3; *Peyton v. Griffin*, 195 N. C., 685, 143 S. E., 525; *Plotkin v. Bond Co.*, 204 N. C., 508, 168 S. E., 820; *Ghormley v. Hyatt*, 208 N. C., 478, 181 S. E., 242; *Petty v. Ins. Co.*, 210 N. C., 500, 187 S. E., 816.

The principle applies to contracts and sales of both real and personal property. *May v. Loomis, supra; Tarault v. Seip, supra; Evans v. Davis*, 186 N. C., 41, 118 S. E., 845.

In the present case there is no evidence that Coburn made any representation, false or otherwise, as to the number of acres in the boundary. Nor is there evidence that the land had not been surveyed and the lines and boundaries checked and plat made. While there is evidence that Coburn said that Mr. Pierce had made a map, there is no evidence that this statement was not true, nor is there any evidence as to what that map, if made, showed with respect to the acreage or with reference to the timbered land. All the evidence shows that the boundary includes timbered land north of the Millican Branch, but there is lack of certainty as to the quantity of land and of the timber. The statement of Coburn that there was just about enough timber there to finish paying for the land is not only indefinite, but an expression of opinion, and is not regarded as fraudulent.

In *Cash Register Co. v. Townsend, supra, Brown, J.*, says: ". . . Commendatory expressions or exaggerated statements as to value or

prospects, or the like, as where a seller puffs up the value and quality of his goods or holds out flattering prospects of gain, are not regarded as fraudulent in law. It is the duty of the purchaser to investigate the values of such expressions of commendation. He cannot safely rely upon them. If he does, he cannot treat it as fraud, either for the purpose of maintaining an action of deceit or for the purpose of rescinding a contract at law or in equity. *Saunders v. Hatterman,* 24 N. C., 32, 14 A. & E. (2 Ed.), 34, and cases cited. Kerr on Fraud and Mistake, at page 83, says: 'A misrepresentation to be material should be in respect of an ascertainable fact as distinguished from a mere matter of opinion. A representation which merely amounts to a statement of opinion goes for nothing, though it may not be true, for a man is not justified in placing reliance on it.' "

For full discussion of the applicable principles to factual situations similar to those here involved, see the opinions in cases of *Gatling v. Harrell, supra; Tarault v. Seip, supra;* and *Peyton v. Griffin, supra.*

It is pertinent to say also that there is of record a lack of sufficient evidence of agency to hold defendant liable for any representations of Coburn.

Holding that there is no evidence of fraud, it is unnecessary to consider the exception to evidence.

The judgment below is

Affirmed.

CLARKSON, J., dissents.

STATE v. L. H. LUEDERS.

(Filed 14 December, 1938.)

1. Criminal Law § 21—

In the trial in the Superior Court, either originally or *de novo* upon appeal, it is necessary for defendant to enter a plea to the indictment or charge, since in the absence of a plea there is nothing for the jury to determine.

2. Criminal Law § 52a: Constitutional Law § 27—

A verdict may not be rendered on an agreed statement of facts in a criminal prosecution, the verdict not being a special verdict. Whether the agreed statement of facts signed only by counsel constitutes admissions binding on defendant, not decided.

3. Appeal and Error § 40g—

The Supreme Court will not venture advisory opinions on constitutional questions, and may not decide a constitutional question unless the question is properly presented.

4. Same—

The Supreme Court will not decide a constitutional question, even when properly presented, when the appeal may be properly determined on a question of less moment.

5. Statutes § 5b—

In considering the constitutionality of a statute, every presumption is to be indulged in favor of its validity.

6. Same—

When a statute is fairly susceptible of two constructions, one constitutional and the other not, the former will be adopted under the rule of favorable construction.

7. Constitutional Law § 6b—

The courts may determine the constitutionality of a statute only in the exercise of the judicial power vested in them by the Constitution, but when a constitutional question is properly presented, the courts have the power and the duty to declare and enforce the supreme law and reject a legislative act in conflict therewith.

8. Constitutional Law § 4a—

The Constitution is the supreme law, binding on, and unalterable by, the law-making body, and an act of the Legislature in conflict therewith is not merely impolitic but void.

APPEAL by defendant from *Phillips, J.*, at September Term, 1938, of GUILFORD.

Criminal prosecution tried upon warrant charging the defendant with "practicing photography without a license and without being registered with the State Board of Photographic Examiners," in violation of ch. 155, Public Laws 1935.

The case was originally tried in the municipal court of the city of Greensboro, where the defendant was found guilty and sentenced "to the county jail for a term of..... suspended..... pay costs." From this judgment, an appeal was taken to the Superior Court of Guilford County.

In the Superior Court, the solicitor and counsel for defendant agreed upon certain facts, and the jury rendered the following verdict:

"Upon the foregoing statement of agreed facts, the jury for its verdict finds the defendant guilty."

From judgment imposing a fine of $10.00 and the costs, the defendant appeals, excepting "to the verdict and signing of the judgment."

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

Norman Block and W. Clary Holt for defendant.

STACY, C. J. The purpose of this appeal, frankly avowed, is to obtain a reconsideration of the decision in *S. v. Lawrence,* 213 N. C., 674, and to test again the constitutionality of ch. 155, Public Laws 1935.

There are certain irregularities appearing on the face of the record which preclude a consideration of the constitutional question. *S. v. Smith,* 211 N. C., 206, 189 S. E., 509.

In the first place, the defendant entered no plea in the Superior Court, where, on appeal, the cause was to be tried *de novo.* In fact, it does not appear whether he was present when the case was heard. In the absence of a plea to the indictment or charge, there was nothing for the jury to determine. See *S. v. Camby,* 209 N. C., 50, 182 S. E., 715.

Speaking to a similar situation in *S. v. Cunningham,* 94 N. C., 824, *Ashe, J.,* delivering the opinion of the Court, said: "There is manifest error in the judgment of the Superior Court. First, for the reason that there was no plea filed by the defendant, and therefore no issue to be submitted to the jury, and consequently the verdict returned by them was a nullity; and it must follow, as a necessary consequence, that no judgment could be pronounced upon such a verdict." See *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. Walters,* 208 N. C., 391, 180 S. E., 664; *S. v. Stewart,* 89 N. C., 563.

Secondly, the verdict of the jury was rendered on an agreed statement of facts, and the defendant excepts to the verdict. Whether these "agreed facts," signed only by counsel, may properly be regarded as admissions binding on the defendant, we need not now determine. See *S. v. Grier,* 209 N. C., 298, 183 S. E., 272; *S. v. Butler,* 151 N. C., 672, 65 S. E., 993; *Turner v. Livestock Co.,* 179 N. C., 457, 102 S. E., 849; *S. v. Foster,* 130 N. C., 666, 41 S. E., 284; *Dick v. United States,* 40 F. (2d), 609, 70 A. L. R., 90, and note; Weeks on Attorneys, 393; Wharton's Cr. Evidence, Vol. 2, 1109. There is no contention that the verdict is a special one. *S. v. Hill,* 209 N. C., 53, 182 S. E., 716; *S. v. Allen,* 166 N. C., 265, 80 S. E., 1075.

It is not the custom of appellate courts to decide constitutional questions except in the exercise of judicial power properly invoked. *S. v. Smith, supra; S. v. Williams,* 209 N. C., 57, 182 S. E., 711; *In re Parker, ibid.,* 693, 184 S. E., 532. Indeed, it is only in such cases, *i.e.,* in cases calling for the exercise of judicial power—the power to say, not what the law ought to be, but what it is—that the courts may render harmless invalid acts of the General Assembly. *Wood v. Braswell,* 192 N. C., 588, 135 S. E., 529; *Moore v. Bell,* 191 N. C., 305, 131 S. E., 724. For this reason, they never anticipate questions of constitutional law in advance of the necessity of deciding them, nor venture advisory opinions on constitutional questions. *S. v. Corpening,* 191 N. C., 751, 133 S. E., 14; *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481. It is only when

the courts are exercising the judicial power vested in them by the Constitution that they are authorized to declare acts of the General Assembly in contravention of the organic law. *Moore v. Bell, supra; Adkins v. Children's Hospital,* 261 U. S., 525. And further, 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 determined. *Reed v. Madison County,* 213 N. C., 145, 195 S. E., 620. "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 Pickham* in *Burton v. U. S.,* 196 U. S., 283.

This policy of refraining from deciding constitutional questions, even when properly presented, if there be also present some other ground upon which the case may be made to turn, is predicated on the following considerations:

1. In considering the constitutionality of a statute, every presumption is to be indulged in favor of its validity. *S. v. Revis,* 193 N. C., 192, 136 S. E., 346; *Sutton v. Phillips,* 116 N. C., 502, 21 S. E., 968; *S. v. Manuel,* 20 N. C., 144.

2. If the act of assembly be fairly susceptible of two interpretations, one constitutional and the other not, in keeping with the rule of favorable construction, the former will be adopted and the latter rejected. *S. v. Casey,* 201 N. C., 620, 161 S. E., 81; *S. v. Yarboro,* 194 N. C., 498, 140 S. E., 216; *S. v. Revis, supra; Hopkins Fed. S. & L. Assn. v. Cleary,* 296 U. S., 315, 80 Law Ed., 251.

3. The courts will not determine a constitutional question, even when properly presented, if there be also present some other ground upon which the case may be made to turn. *Reed v. Madison County, supra; In re Parker, supra; S. v. Ellis,* 210 N. C., 166, 185 S. E., 663.

4. The courts will not declare an act of the General Assembly unconstitutional even when clearly so, except in a case properly calling for the determination of its validity. *Newman v. Comrs. of Vance,* 208 N. C., 675, 182 S. E., 453; *Wood v. Braswell, supra; S. v. Corpening, supra; Person v. Doughton, supra.*

5. It is only in the exercise of the judicial power vested in the courts by the Constitution that they are authorized to render harmless invalid acts of the General Assembly. *Wood v. Braswell, supra; Moore v. Bell, supra.*

It is one of the attributes of the American system that its organic charter is binding on, and unalterable by, the law-making body. The Constitution, or the law "according to which the community hath agreed to be governed," is above the government as well as the governed, and enforceable against both. Hence, an act of the Legislature in conflict with the organic law is not simply impolitic but void. To search out

and find this conflict, where such exists, is the function of an independent judiciary, but this it does only in cases properly presenting the question. 11 Am. Jur., 712. The reason for this arises out of the delicacy of the task. To oblige a government to control itself is a matter of no small moment. But from the authority vested in the courts to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law and to reject that of an inferior act of legislation which, transcending the Constitution, is of no effect and binding on no one. *Adkins v. Children's Hospital, supra;* 11 Am. Jur., 713.

The cause will be remanded for trial according to the usual course and practice in such cases.

Error and remanded.

L. L. MORRIS, ADMINISTRATOR OF LEROY MORRIS, C. P. MEDLIN AND MILDRED MEDLIN, BY HER NEXT FRIEND, C. P. MEDLIN, v. BEATY SERVICE COMPANY AND L. J. PREVATTE.

(Filed 14 December, 1938.)

1. Evidence § 19—

A person who has not testified may not be impeached by cross-examination.

2. Evidence § 29: Automobiles § 18f—Conviction of criminal offense is irrelevant in civil action arising out of same transaction.

Appealing defendant's exception to testimony of its driver on examination by plaintiffs that he had been convicted of manslaughter in a prosecution growing out of the collision for which damages are sought in the civil action, is sustained, the evidence being irrelevant and immaterial.

3. Appeal and Error § 39d—Admission of evidence held prejudicial.

Error in admitting evidence that defendant's driver had been convicted of manslaughter growing out of the same collision for which damages in the civil action are sought, cannot be held harmless, since the evidence constitutes a challenge to the jury that they ratify and affirm the action of the jury in the criminal prosecution.

4. Appeal and Error § 41—

When a new trial is awarded on certain exceptions, other exceptions relating to questions not likely to arise on the subsequent hearing need not be considered.

APPEAL by the corporate defendant from *Harding, J.*, at May Term, 1938, of UNION. New trial.

Vann & Milliken for plaintiffs, appellees.

J. Laurence Jones, E. O. Ayscue, and H. L. Taylor for defendant, appellant.

SCHENCK, J. There were three actions instituted by the three above named plaintiffs, respectively, against the defendants. The defendant L. J. Prevatte was never served with process in any of the actions. The three cases were, by consent, consolidated for the purpose of trial. From a judgment based on a verdict adverse to it, the corporate defendant appealed, assigning error.

The actions were to recover damages for the death of the intestate of one of the plaintiffs and for personal injuries to the other plaintiffs alleged to have been proximately caused by the negligence of the defendants. The corporate defendant, while admitting that the death of LeRoy Morris and injuries to C. P. Medlin and Mildred Medlin were caused by a collision between a heavy motor tractor with trailer attached belonging to it and a Dodge automobile in which the said intestate and plaintiffs were riding, denies that said death and injuries were proximately caused by its negligence, and contends that the sole proximate cause of said collision was the negligence of its codefendant Prevatte.

The record divulges that near the close of the evidence the corporate defendant tendered to the plaintiffs for the purpose of cross-examination one Hanson Sadler, who was the driver of its motor tractor on the occasion of the alleged collision, but who had not up to the time he was tendered been examined as a witness. Whereupon, over objections, exceptions and motions to strike duly made by the plaintiffs, the court allowed the following examination of Hanson Sadler:

"Q. You were convicted of manslaughter for killing LeRoy Morris in this accident, weren't you? A. 'Yes, sir.'

"Q. How long did the judge sentence you to? A. 'Sentenced me to two to four years.'

"Q. How long did you serve?

"Q. Mr. Taylor represented you, didn't he? A. 'Yes, sir.'"

We are constrained to sustain the exceptions reserved to this evidence, which constituted all of the testimony of Hanson Sadler. Hanson Sadler had not been before examined as a witness and therefore it was not competent to impeach him. *S. v. Cox,* 151 N. C., 698.

In the *Cox case, supra,* the defendant tendered to the State one Pliny Cox, son of the defendant, who had been subpœnaed and sworn on behalf of the defendant. Whereupon the State identified a letter by the tendered witness, and *Manning, J.,* for the Court, in an opinion awarding the defendant a new trial, says: "The letter could not be used to impeach the witness, Pliny Cox, because he had given in no testimony. In *Bracegirdle v. Bailey,* 1 F. & F., 536, *Byles, J.,* said: 'Inasmuch as he has proved nothing, you cannot cross-examine him to discredit him.' In *Toole v. Nichol,* 43 Ala., 406 (419), the Court said: 'The purpose of cross-examination is to sift the testimony of a witness, and to try his

integrity. When he has not been examined in chief, there can be no necessity for this.' In *Ellmaker v. Buckley,* 16 S. & R., 72, the Court uses this strong language: 'It would be palpably absurd when applied to a person who has given no evidence at all.' "

The evidence complained of was clearly irrelevant and immaterial to the issues which the jury were trying.

It cannot be maintained that the admission of the testimony of Hanson Sadler was harmless error, as it strongly presented to the jury sitting in the trial of the case the fact that the driver of the defendant's motor tractor had been tried and convicted of a criminal charge growing out of the collision that they were then investigating, and constituted a challenge that they ratify and affirm the action of the other jury.

Since we hold that there must be a new trial for the error assigned, it becomes supererogatory for us to discuss the other exceptions in the record, as the questions arising therefrom are not apt to arise again.

New trial.

STATE v. EUGENE ENGLISH.

(Filed 14 December, 1938.)

1. Larceny § 7—Circumstantial evidence of guilt of larceny held insufficient to be submitted to the jury.

Evidence tending to show that defendant's truck was used to haul away stolen pipe from the scene of the larceny and that the pipe was found on the truck shortly thereafter, that defendant waited several days after discovering the police had the truck in their possession without claiming it and without reporting its loss, and that defendant could not be found at home for several days after the truck had been seized, without evidence that defendant was in possession of the truck at the time the pipe was found loaded thereon, or on the previous night when the crime was committed, *is held* insufficient to be submitted to the jury on the charge of larceny.

2. Larceny § 5—

The presumption of guilt from recent possession of stolen property does not apply when the evidence tends to show merely that stolen property was found loaded on a truck belonging to defendant shortly after the crime.

3. Criminal Law § 32a—Sufficiency of circumstantial evidence to take case to the jury.

In order for circumstantial evidence to be sufficient to take the case to the jury, all the circumstances must be consistent with each other and with the hypothesis of guilt, and must exclude any reasonable hypothesis except that of guilt, and be inexplicable on the theory of innocence, considering the evidence in the light most favorable to the State.

STATE *v.* ENGLISH.

APPEAL by defendant from *Bivens, J.*, at August Term, 1938, of UNION. Reversed.

Criminal prosecution tried upon a bill of indictment charging the defendant with the crime of larceny. A second count in the bill charged the crime of receiving stolen property knowing at the time that it was stolen.

The evidence for the State tends to show that the caretaker at the Condor Mine, near Waxhaw, in Union County, early in the morning missed six joints of iron pipe and expansion joint. It was six-inch pipe and 120 feet was missing; it had been disconnected by using a pair of chain tongs; the expansion joint was broken. There were automobile tire tracks which were traced to the road leading toward Charlotte; that shortly thereafter the defendant's truck was found parked on a street in Charlotte near Schwartz's Junk Shop; it was loaded with the missing pipe; the pipe was identified and the car tires had the same tread as the tires the tracks of which were found near the mine; that the defendant was seen early that morning at the railroad flagman's station near Schwartz's Junk Yard and within about one-fourth of a block from where the car was parked; and that the officers went to the home of the defendant on several occasions that day and on several occasions shortly thereafter and did not find him at home; that he later gave bond for the car, claiming it as his own; that a pair of chain tongs belonging to J. T. Love was found on the truck; and that these tongs had been loaned to three unidentified colored boys on or about 27 June.

The defendant admitted that he owned the car and offered evidence tending to show that on the night before he delivered it to one Fred Phillips, an automobile mechanic, for repairs; that he went fishing on the night the pipe was taken in company with others and did not return until the next morning; that upon his return he stopped by the railroad watchman's booth and gave him some of the fish he had caught, but did not see his car parked on the street.

The court overruled the defendant's motion for judgment as of nonsuit duly entered when the State rested and renewed at the conclusion of all the evidence. The jury returned a verdict of guilty of larceny. Judgment was pronounced on the verdict and the defendant excepted and appealed.

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

J. F. Flowers for defendant, appellant.

BARNHILL, J. We are of the opinion that there is no sufficient evidence of the crime charged to be submitted to a jury and that the

defendant's motion to dismiss as of nonsuit should have been allowed. There is no evidence that the defendant was in possession of the truck at the time the pipe was found loaded thereon or on the preceding night except such constructive possession as arises from the fact that he was the owner of the car. *S. v. Simms,* 208 N. C., 459, 181 S. E., 269. The presumption that arises from the possession of stolen property does not exist against the defendant.

That the defendant owned the truck and that he waited several days after discovering that the police had it in their possession without claiming it and without reporting its loss, which he admits he discovered during the day the pipe was found, and the further fact that he could not be found at home for several days after his truck had been seized by the officers, may raise in the mind of the average person a strong suspicion that the defendant is the offending party. This, however, is not sufficient. The evidence is wholly circumstantial. To convict upon this type of evidence all the circumstances proved must be consistent with each other, consistent with the hypothesis that accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent and with every other rational hypothesis except that of guilt. Only when the evidence considered in the light most favorable to the State excludes any reasonable hypothesis except that of guilt and the circumstances are inexplicable on the theory of innocence is a conviction warranted. *S. v. Madden,* 212 N. C., 56, 192 S. E., 859, and cases there cited. When the circumstances taken together are as compatible with innocence as with guilt there arises a reasonable doubt and it is the duty of the jury to adopt the hypothesis of innocence even though that of guilt is the more probable. *S. v. Madden, supra.*

The circumstantial evidence offered against the defendant, viewed in the light most favorable to the State, is insufficient to support his conviction. The motion to dismiss should have been allowed.

Reversed.

MRS. JOHN BECK v. LEXINGTON COCA-COLA BOTTLING COMPANY.

(Filed 14 December, 1938.)

1. Pleadings § 26—

When a bill of particulars is ordered and furnished, the evidence offered at the trial must be confined to items therein specified.

2. Food § 15—

When plaintiff, in compliance with order of court, furnishes a bill of particulars as to other occasions when deleterious substances were found

in drinks bottled by defendant, it is prejudicial error to admit over objection evidence of "other occurrences" at variance with the bill of particulars.

3. Appeal and Error § 41—

When a new trial is awarded on appeal, other exceptions relating to matters not likely to occur on the subsequent hearing need not be considered.

4. Food § 14—Complaint in this action to recover for injuries from deleterious substances in bottled drink held sufficient as against demurrer.

The complaint in this action alleging injury to plaintiff resulting from deleterious substances in a soft drink which had been bottled by defendant, that defendant was negligent in regard thereto, and that deleterious substances had been found in other drinks bottled by defendant at about the same time, *is held* sufficient to state a cause of action.

APPEAL by defendant from *Olive, Special Judge,* at April Term, 1938, of DAVIDSON.

Civil action to recover damages for injuries resulting from alleged actionable negligence.

Plaintiff alleges that on or about 18 July, 1937, she and her husband purchased from J. W. Martin, proprietor of Hill Side Inn, near Lexington, two bottles of Coca-Cola which had been bottled, sold and delivered by the defendant to said Martin for market; that she drank from one of the bottles and, as a result of drinking therefrom, she became violently sick and suffered injury; that she discovered in the bottom of the bottle "a badly decomposed bottle cap, made of metal, mucilage and cork with paint on the top thereof; that same had corroded and . . . had saturated the contents of said bottle with poisonous deleterious matter"; that her injuries "were due to the negligence and want of care on the part of the defendant" in manner specifically set forth; and that on other occasions about the same time, both before and since, the defendant negligently "permitted foreign substance, dangerous and insanitary, to be bottled and sold at its plant without proper inspection, and negligently placed upon the market among its retail dealers in Lexington and vicinity . . ."

Defendant denied the material allegations of plaintiff.

Upon motion of defendant and on order of the court, C. S., 534, plaintiff filed a bill of particulars as to the instances before and since 18 July, 1937, in which she contends that defendant negligently bottled and placed upon the market drinks containing deleterious substances.

On the trial below there was verdict for plaintiff. From judgment thereon, defendant appeals to the Supreme Court and assigns error.

S. E. Raper and Phillips & Bower for plaintiff, appellee.

Don A. Walser for defendant, appellant.

WINBORNE, J. Is it proper to admit evidence at variance with the bill of particulars filed? The uniform decisions of this Court say "No."

When a bill of particulars is ordered and furnished, the evidence offered at the trial must be confined to items therein specified. *S. v. Wadford,* 194 N. C., 336, 139 S. E., 608; *Gore v. Wilmington,* 194 N. C., 450, 140 S. E., 71; *Ham v. Norwood,* 196 N. C., 762, 147 S. E., 291; *Gruber v. Ewbanks,* 199 N. C., 335, 154 S. E., 318; *S. v. Lea,* 203 N. C., 13, 164 S. E., 737; *S. v. Everhardt,* 203 N. C., 610, 166 S. E., 738; *Pemberton v. Greensboro,* 205 N. C., 599, 172 S. E., 196; *Savage v. Currin,* 207 N. C., 222, 176 S. E., 569; *S. v. Williams,* 211 N. C., 569, 190 S. E., 898.

Over the objection of defendant, the trial court admitted evidence of "other occurrences" which varied from the bill of particulars filed by plaintiff—especially with respect to the Stella Yount purchase. In this there is prejudicial error.

As there must be a new trial, other exceptions need not now be considered as the matters to which objection is taken may not then recur.

Demurrer, *ore tenus,* made in this Court by defendant is overruled. When liberally construed, the complaint alleges facts sufficient to constitute a cause of action.

For error specified, let there be a

New trial.

STATE v. GEORGE HUGGINS.

(Filed 14 December, 1938.)

Automobiles § 32e—Evidence held sufficient to be submitted to jury on issue of culpable negligence in operation of automobile.

The evidence tended to show that defendant operated an automobile on a State Highway at an excessive speed, and struck two pedestrians who were standing on the edge of a ditch beside the highway in the light of a filling station so that they could have been seen for a distance of forty to one hundred yards, resulting in the death of one of the pedestrians, that the highway at the scene of the accident was straight, and that after striking the pedestrians, the automobile ran a total distance of seventy steps with its right wheels in the ditch before getting back on the highway and stopping. *Held:* The evidence permits the inference that the automobile was being operated by defendant recklessly and in willful or wanton disregard of the rights and safety of others, and in a manner likely to endanger the life of the deceased, and was properly submitted to the jury in this manslaughter prosecution on the issue of culpable negligence.

STATE *v.* HUGGINS.

APPEAL by defendant from *Sinclair, J.,* at April Term, 1938, of ROBESON. No error.

Defendant was convicted of involuntary manslaughter, resulting from negligent operation of an automobile.

From judgment imposing prison sentence, defendant appealed.

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

F. Ertel Carlyle and McLean & Stacy for defendant.

DEVIN, J. Defendant's principal assignment of error is based on the denial by the court below of his motion for judgment as of nonsuit.

The evidence tended to show that the deceased, in company with two other men, was standing near a gasoline filling station on the highway near St. Pauls, North Carolina. The highway was forty feet wide and straight. It was after dark and the filling station was lighted, the lights shining out into the road. The three men were "standing in the edge of the drain ditch," or as another witness expressed it, "on the edge of the highway on the slant of the ditch," when, without warning, they were struck by an automobile that went by running very fast, and the deceased was killed and another person standing by him was seriously injured. It was testified that the automobile, after striking the other person and the deceased, ran a total distance of seventy steps in the drain ditch before getting back on the highway. No other vehicle was passing and no other person was on the highway at the time. The lights from the filling station were sufficiently bright to light the road and to reveal the presence of the men on the side of the highway from a distance of forty to one hundred yards. There was evidence that the automobile was being driven on this occasion by the defendant.

Considering this evidence, under the established rule, in the light most favorable to the State, it is apparent that there was sufficient evidence to be submitted to the jury that the death of the deceased proximately resulted from the culpable negligence of the defendant. The clearly observable position of the deceased on the edge of the drain ditch, in the light from the adjacent filling station, at the time he was struck and killed by the speeding automobile, and the unslackened continuance of the automobile with the right wheels in the ditch, without stopping, for a considerable distance, would seem to permit the inference that the automobile was being operated by the defendant recklessly and in willful or wanton disregard of the rights and safety of others, and in a manner likely to endanger the life of the deceased.

In *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669, it was said: "The degree of negligence necessary to be shown on an indictment for man-

slaughter, where an unintentional killing is established, is such recklessness or carelessness as is incompatible with a proper regard for human life. *S. v. Gash,* 177 N. C., 595; *S. v. McIver,* 175 N. C., 761; *S. v. Tankersley,* 172 N. C., 955. The negligence must be something more than is required on the trial of an issue in a civil action, but it is sufficient to carry the case to the jury in a criminal prosecution where it reasonably appeared that death or great bodily harm was likely to occur. *S. v. Gray,* 180 N. C., 697. A want of due care or a failure to observe the rule of the prudent man, which proximately produces an injury, will render one liable for damages in a civil action, while culpable negligence, under the criminal law, is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. *S. v. Goetz,* 83 Conn., 437, 30 L. R. A. (N. S.), 458." *S. v. Durham,* 201 N. C., 724, 161 S. E., 398; *S. v. Cope,* 204 N. C., 28, 167 S. E., 456.

The exception to the judge's charge cannot be sustained. Considered in its entirety, the charge seems to have stated the applicable rules of law substantially in accord with the decisions of this Court.

In the trial we find

No error.

ELIZABETH DUKE, BY HER NEXT FRIEND, HAYWOOD DUKE, v. CRIPPLED CHILDREN'S COMMISSION, INC.

(Filed 14 December, 1938.)

1. Negligence § 18—

In an action for negligent injury, evidence that defendant has liability insurance, or "has made arrangements to pay all judgments that might be rendered against it on account of negligence," is ordinarily incompetent.

2. Pleadings § 29: Hospitals § 6—Held: Allegations should have been stricken out, since evidence in support thereof is incompetent.

In this action to recover for alleged negligent treatment received by plaintiff while a patient in defendant hospital, the complaint alleged that a recovery would not impair trust property held by defendant for charitable purposes and that defendant had special arrangements to pay all judgments rendered against it on account of negligence. The complaint did not allege that defendant is claiming immunity by reason of being a charitable institution, or even that defendant is a charitable institution. *Held:* Evidence in support of the allegations in regard to arrangements for payment of tort liability would not be competent, and the allegations should have been stricken out on motion aptly made as being irrelevant, immaterial and prejudicial. C. S., 537.

DUKE *v.* CHILDREN'S COM.

APPEAL by the defendant from *Hill, Special Judge,* at September Term, 1938, of GUILFORD.

Frazier & Frazier for plaintiff, appellee.
Smith, Wharton & Hudgins for defendant, appellant.

SCHENCK, J. The plaintiff, a minor suing by her next friend, alleges that while a patient in a children's hospital maintained and operated by the defendant she was injured by the negligence of the defendant and its agents.

Paragraph 13 of the complaint is as follows: "13. That the plaintiff is informed, believes and alleges that a recovery in this suit will not impair or diminish the trust properly in the hands of said corporation donated for charitable uses, and said plaintiff is informed, believes and alleges that the defendant has made special arrangements to pay any and all judgments that might be rendered against it on account of its negligence or the negligence of its servants and agents."

Before time for answering expired the defendant lodged motion that paragraph 13 "be stricken from said complaint for that and in that the same constitutes improper pleading, is immaterial, irrelevant and prejudicial." C. S., 537.

The motion was denied and defendant reserved exception and appealed to the Supreme Court, assigning as error the denial by the court of its motion to strike.

It has been repeatedly held by this Court that in an action for damages for a personal injury evidence that the defendant's liability for the act complained of has been insured by a third person, is ordinarily incompetent. *Lytton v. Mfg. Co.,* 157 N. C., 331; *Luttrell v. Hardin,* 193 N. C., 266 (269), and cases there cited; *Scott v. Bryan,* 210 N. C., 478, and cases there cited.

By the same token that evidence that the defendant is insured in a casualty company is incompetent, evidence that "the defendant has made special arrangements to pay any and all judgments that might be rendered against it on account of its negligence or the negligence of its servants and agents" is incompetent—both are "entirely foreign to the issues raised by the pleadings." *Lytton v. Mfg. Co., supra,* and other cases cited.

Inasmuch as evidence in support of the allegation in paragraph 13 of the complaint would be inadmissible, it follows, under the decisions of this Court, that such allegations in the complaint should be stricken as irrelevant, immaterial and prejudicial. "It is readily conceded that nothing ought to be in a complaint, or remain there over objection, which is not competent to be shown on the hearing. C. S., 506; 21 R. C. L.,

452." *Pemberton v. Greensboro,* 203 N. C., 514. "On a motion to strike out, the test of relevancy of a pleading is the right of the pleader to present the facts to which the allegation relates in the evidence upon the trial." *Trust Co. v. Dunlop, ante,* 196.

It should be noted that the complaint does not allege that the defendant is claiming any immunity from liability for its torts by reason of its being a charitable institution—nor even that the defendant is a charitable institution.

The order of the Superior Court denying the motion of the defendant is

Reversed.

RALPH WILLIAMS, BY HIS NEXT FRIEND, MRS. ALMA WILLIAMS, v. MRS. J. K. HUNT.

(Filed 14 December, 1938.)

1. Automobiles § 18h: Trial § 30—

Where there is no evidence that the accident in suit occurred in a business district it is error for the court, in its instructions to the jury, to read the statutory speed restrictions applicable to business districts.

2. Trial § 29b—Applicability of statute is question of law for the court.

Whether a given statute is applicable to the controversy is a question of law for the court, and an instruction that the applicability of the statute was a matter for the jury is error, it being the function of the court to tell the jury what facts must exist to make the statute applicable as a matter of law.

APPEAL by defendant from *Olive, Special Judge,* at June Term, 1938, of WAKE. New trial.

Douglass & Douglass and Thos. W. Ruffin for plaintiff, appellee.

Smith, Leach & Anderson and Gavin & Jackson for defendant, appellant.

SCHENCK, J. This is an action to recover damages for personal injuries to the plaintiff alleged to have been proximately caused by the negligence of the defendant.

The plaintiff, a minor twelve years of age, contends that he was standing on the dirt shoulder of U. S. Highway No. 1 within one or two feet of the cement pavement and that the defendant drove her automobile on said highway at an unlawful rate of speed and failed to keep a proper

lookout and ran her said automobile upon and against the plaintiff, thereby causing his injuries.

The defendant denies that she was driving her automobile on said highway at an unlawful rate of speed or that she failed to keep a proper lookout, and contends that as she was passing the plaintiff her car was on the right side of the cement pavement and the plaintiff was standing on the dirt shoulder thereof, and that he ran or fell into the right side of her automobile, and was injured.

The defendant reserved exception to the following excerpt from the charge of the court:

"Gentlemen, the court will read certain statutes regarding the operation of automobiles that you can apply to the evidence in this case and as to whether or not you think they apply in this case is a matter for you. 'No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. 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: Twenty miles per hour in any business district.' "

There is neither allegation nor evidence that the defendant's car struck the plaintiff while in a business district. The only mention of a business district is by the plaintiff's witness Morgan, who testified: "The place where the boy was struck was in the town of Apex. The business section of Apex was in sight. He was hit in the residential section."

This exception must be sustained. *Farrow v. White,* 212 N. C., 376.

It would likewise seem that his Honor was in error when he told the jury "as to whether or not you think they (the statutes read) apply in this case is a matter for you." The question as to whether the statutes apply is rather a question of law for the court than a question of fact for the jury. It is the function of the court to tell the jury what facts must exist to make the statutes applicable as a matter of law, and for the jury to say whether they find that such facts exist. The act from which the court read, namely, Public Laws 1927, chapter 148, as amended by Public Laws 1935, chapter 311, prescribes the meaning of "Business District." The court failed to instruct the jury in accord therewith.

For the error assigned there must be a

New trial.

STATE v. J. H. JULIAN.

(Filed 14 December, 1938.)

1. Statutes § 8—When statute does not define the act prohibited, the deficiency may not be supplied by judicial interpretation.

Ch. 86, sec. 11, Public Laws of 1937, providing that "Any person, . . . not being duly licensed to engage in tile contracting in this State as provided for in this act, . . . shall be guilty of a misdemeanor," fails to define the acts prohibited, the doing of which should constitute a misdemeanor, and the fatal deficiency may not be supplied by judicial interpolation of words to constitute a criminal offense.

2. Criminal Law § 56—

When the statute under which defendant is charged fails to define a criminal offense, defendant's motion in arrest of judgment in the Supreme Court must be allowed.

APPEAL by defendant from *Phillips, J.*, at August Term, 1938, of GUILFORD. Judgment arrested.

The defendant was charged with violation of certain provisions of chapter 86, Public Laws of 1937, creating a licensing board for tile contractors. The jury returned verdict of guilty, and from judgment in accord therewith defendant appealed.

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

T. J. Gold and J. F. Flowers, amici curiæ.

Walser & Wright for defendant.

DEVIN, J. The defendant entered in this Court motion in arrest of judgment, on the ground that the statute under which defendant was tried fails to set out a criminal offense. *S. v. Lumber Co.*, 109 N. C., 860, 13 S. E., 719; Rule 21.

The material portion of the statute under which the criminal charge against the defendant was laid is as follows: "Sec. 11. Any person, firm or corporation not being duly licensed to engage in tile contracting in this State as provided for in this act, . . . shall be guilty of misdemeanor."

It is apparent that the acts, the doing of which shall constitute a misdemeanor, are not set out. No criminal offense is stated.

It is contended, however, that in the interpretation of the statute, and the ascertainment of the legislative intent, words should be supplied to define the acts to be prohibited, but the court has no power to determine what acts or omissions, if any, the General Assembly intended to make

unlawful, in the absence of an expression of the legislative will in the language used. Nor was anything said in *S. v. Humphrey,* 210 N. C., 406, 186 S. E., 473, which may be held as authority for the interpolation of words to constitute a criminal offense when none is set out in the statute. The defendant cannot be held to answer a criminal charge when no certain act is made unlawful. The motion in arrest of judgment must be allowed.

This disposition of the case renders it unnecessary to consider on this record the question debated as to the constitutionality of the act and the validity of certain of its provisions. *In re Parker,* 209 N. C., 693, 184 S. E., 532; *S. v. Ellis,* 210 N. C., 166, 185 S. E., 663; *Ex parte Levitt,* 302 U. S., 633. *S. v. Lueders, ante,* 558.

Judgment arrested.

STATE v. BAT DEJOURNETTE, KATE DEJOURNETTE AND ELMER WILLIAMS.

(Filed 14 December, 1938.)

1. Criminal Law § 77d—

The Supreme Court can judicially know only what appears from the record.

2. Criminal Law § 81b—

When it cannot be determined from the record that the instructions excepted to are prejudicial, the record failing to show how the homicide occurred or what the evidence was, the exceptions cannot be sustained, appellant having failed to show reversible error.

APPEAL by defendant Bat DeJournette from *Pless, J.,* at May Term, 1938, of GUILFORD.

Criminal prosecution, tried upon indictment charging Bat DeJournette, his wife, Kate DeJournette, and Elmer Williams with the murder of one Garland Mangum.

Upon the call of the case for trial, Elmer Williams tendered a plea of "guilty of accessory before the fact to murder in the first degree," which plea was accepted by the State. The defendants Bat DeJournette and Kate DeJournette pleaded not guilty, and were tried by a jury.

Verdict: Bat DeJournette, "guilty of murder in the first degree as charged in the bill of indictment"; Kate DeJournette, "guilty accessory after the fact of murder in the first degree."

Judgment as to Bat DeJournette: Death by asphyxiation.

The defendant Bat DeJournette appeals, assigning errors.

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

Spencer B. Adams and Brooks, McLendon & Holderness for defendant, appellant.

STACY, C. J. The transcript consists of the record proper, the charge of the court, and a number of exceptions to the charge. This is agreed to as the case on appeal. *S. v. Dee, ante,* 509. Nothing else appears on the record. *S. v. Ross,* 193 N. C., 25, 136 S. E., 193.

With no knowledge of how the homicide occurred or what the evidence was—and this is a matter we can know judicially only from the record—we cannot say the instructions complained of are prejudicial or hurtful, even if theoretically they appear to be slightly erroneous in some particulars.

No reversible error having been shown, the verdict and judgment will be upheld.

No error.

MRS. KATHERINE ELIZABETH SAMMONS v. STEVE FASUL, TRADING AND DOING BUSINESS AS STEVE'S RESTAURANT, AND AUSTIN S. GODWIN.

(Filed 14 December, 1938.)

1. Innkeepers § 4—

Complaint alleging unprovoked, lascivious assault by customer in restaurant on plaintiff waitress *held* not to state cause of action against defendant proprietor.

2. Assaults § 3—

Complaint alleging unprovoked, lascivious assault by customer in restaurant on plaintiff waitress *held* to state cause of action against the customer.

APPEAL by defendants from *Sink, J.,* at Regular October Term, 1938, of CUMBERLAND. Reversed as to Steve Fasul; affirmed as to Austin S. Godwin.

This is an action brought by plaintiff against defendants alleging that she was hired by Steve Fasul to serve as a waitress in defendant Steve Fasul's restaurant, and he was negligent in not using due care to provide for her a safe place to work. That while working in the restaurant plaintiff alleges: "That on the night of July 3, 1938, while this plaintiff was engaged in her employment as aforesaid, she was called upon to serve a table whereat the defendant Austin S. Godwin and others were seated; that as she was serving said table in the regular course of her

employment, the defendant Austin S. Godwin, who was in an intoxicated condition, in an insulting, lascivious and horrible manner asked this plaintiff, 'Have you anything else good you wish to give away?'; that this plaintiff became highly insulted and offended by the improper remark of the defendant Austin S. Godwin but, nevertheless, she continued about her duties and ignored said remark, whereupon the defendant Austin S. Godwin repeated the remark and so that there should be no mistake in the insulting import of his words, he reached out and placed his hand upon the thigh or buttock of this plaintiff and pinched or squeezed her in an insulting manner. That the act of the defendant Austin S. Godwin was an assault upon the person of this plaintiff, who is a respectable married woman living with her husband and five-year-old daughter. That when the defendant Austin S. Godwin insulted and assaulted this plaintiff as hereinbefore alleged, she became greatly embarrassed and mortified to such an extent that she lost control of her self-possession, and with an utter disregard of the consequences and without thought for her future employment with the defendant Steve Fasul, she then and there slapped the defendant Austin S. Godwin and left the vicinity of the booth occupied by said defendant." Plaintiff alleged damage.

In the court below the defendants demurred to the complaint. The court below overruled the demurrer and defendants assigned error and appealed to the Supreme Court.

MacRae & MacRae for plaintiff.
H. C. Blackwell for defendants.

PER CURIAM. As to Steve Fasul we think the demurrer should have been sustained. The facts alleged in the complaint as to him do not constitute a cause of action. As to Austin S. Godwin, the facts do constitute a cause of action.

Reversed as to Steve Fasul.

Affirmed as to Austin S. Godwin.

STATE v. LUCIEN EPPS AND MATTHEW EPPS.

(Filed 14 December, 1938.)

Larceny § 7: Receiving Stolen Goods § 6—

Circumstantial evidence of appealing defendants' guilt of larceny and receiving fertilizer of a certain brand *held* to raise only a strong suspicion of guilt, and was insufficient to be submitted to the jury.

STATE *v.* EPPS.

APPEAL by defendants from *Sinclair, J.*, at April Term, 1938, of ROBESON. Reversed.

The defendants were indicted, with Neill Goins, for larceny and receiving of a number of bags of fertilizer, the property of J. B. McCallum. All three were convicted of the offenses charged, and Lucien Epps and Matthew Epps appealed.

The evidence was to the effect that McCallum had bought about 800 bags of fertilizer, the larger part of which he had distributed to several farms. Eight bags of the fertilizer sent to a farm, on which a tenant named Jordan was manager, were missing. Fertilizer was also missed from another farm.

Jordan testified that the fertilizer was 4-7-5, and identified bags exhibited to him as being similar to those in which the fertilizer was packed. The bags had "cotton fertilizer" written on them and had the same brand. The fertilizer was kept under a shed, about thirty yards from the road.

On the morning of 1 May witness discovered eight sacks were gone. Officers tracked an automobile, from the imprint of its tires on the road, to the premises of Will Goins, a defendant, and found a car having tires similar to those making the imprints they had followed parked in Goins' yard, and it was identified as Goins' car.

At some point on the route there was evidence that the Goins car had stopped. There were marks from which witnesses inferred the load had been transferred, partly at least, to another car. An attempt to trace the tracks of another car as possibly the one to which the fertilizer was transferred failed.

About a week afterward a witness for the State went to the home of Matthew Epps, and saw Matthew putting out fertilizer. He had ten bags in the field. It was branded as made by the Maxton Oil & Fertilizer Company—"MOFCO"—and was 4-7-5 fertilizer. The fertilizer was being put on the farm of Lucien Epps by his son Matthew. Procuring a search warrant, witness later searched the premises, found one bag of MOFCO on the porch, with a small amount of fertilizer in it. In the loft of the house were found eight fertilizer bags that had been washed. These were exhibited in court, and were branded 4-7-5 MOFCO. Matthew said he got the fertilizer from his father, Lucien Epps. Lucien, in turn, stated that he got it from W. L. Biggs, at Johns Station; said he might have gotten some from McRae Company, at Maxton.

Biggs testified he sold fertilizer to Lucien Epps, but not of that brand.

J. G. Purcell, of the McRae Company, said his company gave orders to the Oil Company to supply its customers, but had given none for the defendants. He gave a list of these orders, in which the names of none of the defendants appear.

There was further evidence of a like nature in an apparent attempt to trace all the fertilizer sold under this brand, so as to exclude the possibility that defendants had come by the fertilizer in a legitimate way.

The defendants moved for judgment of nonsuit, which was denied. From the judgment upon the verdict, Lucien Epps and Matthew Epps appealed.

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

J. E. Carpenter for defendants, appellants.

PER CURIAM. The evidence does no more than raise a strong suspicion of guilt as to appellants and is insufficient to go to the jury. The motion for nonsuit should have been allowed, and the judgment is

Reversed.

STATE v. JAMES CRAYTON.

(Filed 14 December, 1938.)

Automobiles § 31: Criminal Law § 56—Speed in excess of statutory maximum is merely prima facie evidence that speed is unlawful.

A warrant charging merely that defendant operated his automobile at a designated speed in excess of the maximum prescribed by statute and the applicable municipal ordinance, charges no criminal offense, and defendant's motion in arrest of judgment should be allowed, since under the provisions of the statutes such speed constitutes merely *prima facie* evidence that the speed is unlawful. Public Laws of 1935, ch. 311, sec. 2 (a), (b), (g).

APPEAL by defendant from *Phillips, J.*, at August Criminal Term, 1938, of GUILFORD. Reversed.

The defendant was tried and convicted in the municipal court of the city of Greensboro under a warrant which charged that the defendant "within the corporate limits of the city of Greensboro, within one mile of the corporate limits of the city of Greensboro, did unlawfully, willfully operate an automobile on Church Street at a rate of 45 miles per hour, against the statute in such case made and provided, and against the peace and dignity of the State and in violation of city ordinance, section ....." From judgment pronounced thereon the defendant appealed to the Superior Court. On the trial below the jury returned a verdict of "guilty."

Upon the coming in of the verdict defendant moved for arrest of judgment for that the warrant did not sufficiently charge the defendant with the commission of any criminal offense. The motion was denied and the defendant excepted. Judgment was pronounced on the verdict and the defendant excepted and appealed.

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

O. W. Duke for defendant, appellant.

PER CURIAM. The warrant charges the defendant with no criminal offense. It merely charges the commission of an act which, if established, constitutes *prima facie* evidence of an offense. Public Laws 1935, ch. 311, sec. 2 (a), (b). The ordinance of the city of Greensboro offered in evidence as it relates to this case has no effect other than to increase the *prima facie* speed limit within the corporate limits of Greensboro on the streets designated to thirty miles per hour. Public Laws 1935, ch. 311, sec. 2, subsec. (g).

There was error in the refusal of the court to grant the defendant's motion in arrest of judgment.

Reversed.

G. W. SCOTT, ADMINISTRATOR OF MARY RUTH SCOTT, DECEASED, v. SWIFT & COMPANY AND K. M. BARNES, R. R. PITTMAN AND H. C. PITTMAN, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF R. R. BARNES COMPANY,

and

MILDRED SCOTT, BY HER NEXT FRIEND, G. W. SCOTT, v. SWIFT & COMPANY AND K. M. BARNES, R. R. PITTMAN AND H. C. PITTMAN, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF R. R. BARNES COMPANY,

and

G. W. SCOTT v. SWIFT & COMPANY AND K. M. BARNES, R. R. PITTMAN, AND H. C. PITTMAN, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF R. R. BARNES COMPANY,

and

MRS. OPHELIA SCOTT v. SWIFT & COMPANY AND K. M. BARNES, R. R. PITTMAN AND H. C. PITTMAN, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF R. R. BARNES COMPANY.

(Filed 14 December, 1938.)

Appeal and Error § 38—

The burden is on appellant to make error clearly appear, as the presumption is against him.

SCOTT *v.* SWIFT & CO.

APPEAL by defendant Swift & Company from *Spears, J.*, and a jury, at May Term, 1938, of ROBESON. No error.

This is a civil action brought by plaintiffs against defendant Swift & Company for actionable negligence to recover damages for selling (through R. R. Barnes Company) poisonous, unwholesome and deleterious sausage for human consumption, the eating of which caused plaintiffs to become violently ill and causing the death of Mary Ruth Scott.

The allegation was that the illness and death were proximately caused by the eating and consuming of the unwholesome and poisonous sausage negligently canned and placed on the market by the defendant. The defendant denied the material allegations of the complaint. The actions were consolidated for trial. A dismissal was suffered against the Barnes Company.

The jury returned a verdict in favor of each of the plaintiffs. The court below rendered judgment on the verdict in favor of each of the plaintiffs. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

W. S. Britt, J. C. King, and McLean & Stacy for plaintiffs.
Varser, McIntyre & Henry for Swift & Company.

PER CURIAM. At the close of plaintiffs' evidence and at the close of all the evidence the defendant Swift & Company made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no error.

After reading the record and briefs and hearing the able arguments of the litigants, we can see no prejudicial or reversible error. It is well settled in this jurisdiction that error will not be presumed, it must be affirmatively established. The appellant is required to show error and he must make it appear plainly, as the presumption is against him. The case was tried under well settled law in matters of this kind. There is no new or novel proposition of law involved.

In the judgment of the court below, we find

No error.

BANK OF NORTHAMPTON v. TOWN OF JACKSON AND MARYLAND CASUALTY COMPANY.

(Filed 4 January, 1939.)

1. Assignments § 1—

All ordinary business contracts are assignable unless assignment is expressly prohibited by statute or is in contravention of public policy.

2. Same—

A contract for money to become due in the future may be assigned.

3. Assignments § 7—

Whether a subsequent assignee who first gives notice to, and has the assignment accepted by, the debtor is entitled to priority over the prior assignee, must be determined upon the facts of each particular case and by the terms of the contracts to which the parties have agreed.

4. Same—Under facts of this case, second assignee, who first gave notice to debtor, held entitled to priority over first assignee.

A construction company, in its application for a surety bond for municipal construction, agreed that upon default on the construction contract, or default on any other contract upon which the surety was liable, all payments due or to become due under the construction contract should be paid the surety. Subsequently, the construction company assigned to a bank money due or to become due under the construction contract as security for a loan which was used in the construction work. The bank gave the town notice of the assignment, and the town accepted same, and inquiry by the bank failed to disclose the prior assignment to the surety. The construction contract in question was completed without default. This controversy is between the bank and the surety over the funds in the town's hands due the construction company after payment of all other claims. The surety claimed under its assignment upon the occurrence of a loss on another contract in an undetermined amount more than six months after the assignment to the bank. *Held:* Under the facts of this case, the bank, which first gave notice to, and procured acceptance of its assignment by, the town, is entitled to preference. The fact that the surety was not given notice of the assignment to the bank *held* immaterial, since the construction contract in question having been completed without default or loss, no right of subrogation nor claim on account of default and loss could accrue to the surety. It further appeared that the contract between the town and the construction company precluded assignment of sums due or to become due thereunder without the town's consent.

5. Assignments § 1—Contract in this case held to preclude assignment of money to become due thereunder without approval of debtor.

The contract between the municipality and the contractor for municipal construction provided that no right to any money or orders due or to become due under the contract should be asserted against the city by reason of any assignment of the contract, or any part thereof, unless such assignment should have been authorized by the written consent of the city. *Held:* The provision is sufficiently broad to cover assignment

of the proceeds of the contract as well as assignment of any part of the contract for purposes of subcontracting, and the contract being the basis of all rights of the respective parties, such provision is binding on the surety notwithstanding prior agreements between the surety and the contractor in the application for the surety bond with respect to assignment of the proceeds of the contract to the surety.

APPEAL by defendant Maryland Casualty Company from *Burgwyn, J.*, at October Term, 1938, of HALIFAX. Affirmed.

This was an action to recover a fund in the hands of defendant town of Jackson, claimed by defendant Maryland Casualty Company, heard upon agreed statement of facts, the material portions of which were incorporated in the judgment as follows:

"1. That (on the 9th day of March, 1936) the Town of Jackson entered into a contract with Lackawanna Construction Company for the construction of a water and sewerage system in the Town of Jackson.

"2. That the Maryland Casualty Company became the surety upon a performance bond required by Lackawanna Construction Company and in the application for the bond of suretyship it took an assignment from Lackawanna Construction Company of all sums due or to become due under said contract in the event there was a default on the Jackson job or any other job on which the Maryland Casualty Company was surety; that neither the Maryland Casualty Company nor the Lackawanna Construction Company ever gave notice to the Town of Jackson that it had such an assignment.

"3. That on the 25th day of January, 1937, the Lackawanna Construction Company applied to the Bank of Northampton for a loan of $5,000, the proceeds of which were to be used in the construction of said water and sewerage system. The Bank of Northampton thereupon went to the proper Town authorities and made inquiry as to whether the Lackawanna Construction Company had made any other or prior assignment of funds due or to become due it under said contract, and also made inquiry of said Lackawanna Construction Company and was informed by the Town that it knew of none, and by the Lackawanna Construction Company that there was none. The Town then consented to the assignment of funds due and to become due to Lackawanna Construction Company by the Lackawanna Construction Company to the Bank of Northampton and agreed that it would pay to the Bank of Northampton all funds due or to become due the Lackawanna Construction Company under the contract herein referred to. The Bank of Northampton then made the loan.

"4. The Lackawanna Construction Company in due season completed its contract with the Town of Jackson, the same being duly approved by the engineer of the Town of Jackson and was accepted by the Town of Jackson.

"5. That Maryland Casualty Company, codefendant herein of the Town of Jackson, has not suffered and will not suffer any loss by reason of its contract of suretyship and all parties furnishing labor, material or work on the Jackson job who have provable claims against said job have been paid either by the Lackawanna Construction Company or funds were turned over to Maryland Casualty Company sufficient to take care of same, leaving a surplus of $5,600.00, which is the subject of this action.

"It is, therefore, ordered, considered and adjudged that the plaintiff recover of the Town of Jackson the sum of $5,000.00 with interest from the 22nd day of September, 1937, together with the costs of this action.

"It is further ordered, considered and adjudged that the Maryland Casualty Company is not entitled to any part of the funds now held by the Town of Jackson, except that which remains after the payment of the sum of $5,000.00 with interest and the costs herein and after this has been done the Maryland Casualty Company is entitled to the surplus and the same is hereby awarded to it."

The agreement entered into by the contractor for the assignment to the Casualty Company of sums to become due under the contract, contained in the application for surety bond made at the time of the execution of the contract in March, 1936, referred to in the judgment, was in the following words:

"In the event of claim or default under the bond herein applied for, or in the event the undersigned shall fail to fulfill any of the obligations assumed under the said contract and bond, or in the event of claim or default in connection with any other former or subsequent bonds executed for us at our instance and request, all payments due or to become due under the contract covered by the bond herein applied for, shall be paid to the company, and this covenant shall operate as an assignment thereof and the residue, if any, after reimbursing the company aforesaid, shall be paid to the undersigned after all liability of the company has ceased to exist under the said bonds, and the company shall at its option be subrogated to all rights, properties and interest of the undersigned in said contract."

The assignment by the contractor to plaintiff bank of sums due and to become due under the contract, as security for a loan of $5,000 for the purpose of carrying out the contract, was made after notice to and with the consent of the town and was dated 25 January, 1937. No notice of this assignment was given the Casualty Company.

It was also agreed "that on or about 11 April, 1936, the Lackawanna Construction Company entered into two certain contracts with the Town of River Junction, Florida, for the construction of a water and sanitary sewerage system, and that the Maryland Casualty Company became

surety for the faithful performance of said contracts. . . . It is further agreed that on 11 August, 1937, the Lackawanna Construction Company defaulted in its contracts with the Town of River Junction, Florida, and the Maryland Casualty Company has assumed to finish the work under said contracts and will suffer a loss on that account."

From judgment decreeing payment of the fund of $5,000 and interest to plaintiff bank, defendant Casualty Company appealed.

Gay & Midyette and Geo. C. Green for plaintiff, appellee.

Carr, James & LeGrand for defendant Maryland Casualty Company, appellant.

DEVIN, J. Two parties claim the fund remaining in the hands of the town of Jackson after the completion of the contract for the installation of a water and sewerage system. One of those parties is the plaintiff Bank of Northampton, claiming by virtue of an assignment to it by the contractor of sums due and to become due under the contract, as security for a loan for the purpose of carrying out the contract, made after notice to and with express consent of the town. The other party is the defendant Casualty Company, which claims by virtue of an agreement by the contractor to assign sums to become due under the contract, the agreement being contained in the original application by the contractor for the execution by the Casualty Company of its surety bond for the faithful performance of its contract. No notice of this agreement to assign was given to the town or the plaintiff. The contract has been fully performed and all claims thereunder have been paid, but it is contended the agreement to assign contained in the contractor's application for bond covered not only any loss that might accrue under this contract, but also losses resulting from another contract of the contractor upon which the appellant was surety.

The decision of the court is sought for the determination of the question as to which of these two parties is entitled to preference. The trial court ruled in favor of the plaintiff bank, and the appeal of the defendant Casualty Company brings this ruling here for review.

The assignment to the defendant, as contained in the clause in the application for bond, provided, in terms, that, in the event of default or failure of the contractor to fulfill any obligation under the contract, or in the event of default in any other or subsequent bond executed by the Casualty Company for the contractor, all payments due or to become due under the contract should be paid to the company, and that this covenant should operate as an assignment.

The principle is firmly established in this jurisdiction that, unless expressly prohibited by statute or in contravention of some principle of

public policy, all ordinary business contracts are assignable, and that a contract for money to become due in the future may be assigned. *Chemical Co. v. McNair,* 139 N. C., 326, 51 S. E., 949; *Trust Co. v. Williams,* 201 N. C., 464, 160 S. E., 484; *Fertilizer Works v. Newbern,* 210 N. C., 9, 185 S. E., 471. "The assignee of a part of a debt acquires in equity a right of action against the assignor." *Trust Co. v. Construction Co.,* 191 N. C., 664.

Assuming that the agreement contained in the application made by the contractor to the Casualty Company to become surety on the contractor's bond constituted an equitable assignment of sums thereafter to become due under the contract, this was without notice to the town. It further appears that thereafter the contractor executed an assignment of moneys due or to become due under the contract to the plaintiff bank as security for a loan for the purpose of securing money to carry out and complete the contract, and that this was done with notice to and by the express consent of the town.

As affecting the right of priority between successive assignees, the question whether the fact that the subsequent assignee was the first to give notice of the assignment to the debtor entitles him to preference has been variously decided by the courts of other jurisdictions, and different results have been reached, in the application of conflicting equitable principles to the facts, in determining whether the assignee first in point of time is prior in point of right, or whether the assignment is to be considered as imperfect until consummated by notice to the debtor.

In 4 Am. Jur., 313, it is said: "According to the weight of authority the assignee who first gives notice of his claim to the debtor is preferred, . . . unless he takes a later assignment with notice of the previous one." In *Graham Paper Co. v. Pembroke,* 44 L. R. A., 632 (Cal.), authorities are cited in support of the general proposition that, as between successive assignees of a chose in action, he will have the preference who first gives notice to the debtor, even if he be a subsequent assignee, provided that at the time of taking it he had no notice of prior assignment. And in the note in 31 A. L. R., 876, it is said the weight of authority supports this view. In the annotations under *Haverstick v. Sheirich,* 76 A. L. R., 917, many authorities on the question of priorities between sureties on contractors' bond and assignees of money to become due under the contract are assembled, and the holdings in different jurisdictions noted. It is not deemed necessary here to analyze or distinguish these conflicting decisions.

While the exact question here presented does not appear to have been considered by this Court, it would seem from the holding and the authorities cited in *Bank v. McCanless,* 199 N. C., 360, 154 S. E., 621,

and *Wallston v. Braswell,* 54 N. C., 137, that effect would be given to the fact of notice to and acceptance of assignment by the debtor. However, each case must be considered in the light of the facts upon which it is based, and measured by the terms of the contracts by which the parties have agreed to be bound. *Ellis v. Amason,* 17 N. C., 273; *Ponton v. Griffin,* 72 N. C., 362; *Chemical Co. v. McNair,* 139 N. C., 326, 51 S. E., 949.

In this case, however, there are three outstanding facts which tend to support the judgment of the court below in holding the equity of the plaintiff superior to that of Casualty Company:

1. The contractor completed its contract with the town, and the Casualty Company, surety, has not and will not suffer any loss by reason of its suretyship on this contract. And the fund in suit is the surplus remaining in the hands of the town after payment of all claims thereunder.

2. The money loaned the contractor by the bank, secured by assignment of funds due and to become due by the town under the contract, was for the purpose of enabling the contractor to complete the contract, thus to that extent inuring to the benefit of the surety on the contractors' bond.

3. The claim now made for the fund by the Casualty Company is based upon a loss, undetermined in amount, sustained by it by reason of its suretyship on a contract in the State of Florida, which occurred more than six months after the assignment to the plaintiff by the contractor in order to secure a loan for the purpose of enabling it to complete its contract with the town of Jackson.

The plaintiff exercised proper caution and acted after full inquiry in taking the assignment from the contractor, and neither at that time nor at any time thereafter was there default on this contract, or any liability imposed on the surety therefor, and the fact that six months therefrom the Casualty Company suffered a loss on another contract in Florida ought not to deprive the plaintiff of its right to this fund.

The fact that the surety company was not given notice of the assignment to the plaintiff should not be held determinative, under the facts of this case, since neither the right of subrogation (*Mfg. Co. v. Blaylock,* 192 N. C., 407, 135 S. E., 136; *Prairie State National Bank v. U. S.,* 164 U. S., 227), nor claim on account of default and loss, could accrue to the surety upon a contract completed by the contractor without loss or liability. The construction regulations of the Public Works Administration relative to notice to the surety were not incorporated in the contract and that Federal agency has now no interest in the disposition of the surplus fund.

In further support of the view that under the facts agreed the plaintiff was entitled to priority, it may be noted that in the contract between the Construction Company and the town of Jackson, under the caption, "Contract Not to Be Transferred," it was provided, among other things, "No right, under this contract, to any money or orders due or to become due hereunder, shall be asserted against the city or any department, officer or officers thereof, by reason of any so-called assignment, in law or equity, of this contract or any part thereof, of any money or orders payable thereunder unless such assignment shall have been authorized by the written consent of the city." While appellant construes this section to refer only to an assignment of the operative features of the contract, we think a fair construction of the phraseology employed makes it apply also to an assignment of the proceeds of the contract as distinguished from the assignment of portions thereof for purposes of subcontracting. So that it would seem that any previous agreement between the Construction Company and defendant Casualty Company in the application for bond must be subordinated to the terms of the contract between the Construction Company and the town of Jackson which brought into being any rights which the Construction Company might have, and that these rights were necessarily impressed with whatever quality or condition was given to them in the contract concurrently with their creation.

The appellant relies upon *Lacy v. Casualty Co.,* 32 Fed. (2nd), 48, where upon facts somewhat similar a different result was reached. There the surety on two contracts for state highway construction, upon the insolvency of the contractor, took over the contracts and completed one project at a loss and the other at a profit. It was held that the rights of the surety were superior to those of the contractor's assignee, in the one instance on the principle of subrogation, and in the other by reason of prior assignment to the surety. The decision in the *Lacy case, supra,* followed the ruling in *Salem Trust Co. v. Manufacturers Finance Co.,* 264 U. S., 182. In the last named case as between two assignees, where the later had made no inquiry of the debtor until after taking its assignment, it was held, as a matter of general law, that the first assignee should be preferred, under the maxim, "He who is first in time is best in right," the Court declining to follow the English rule. There it was said: "While there are contingencies which entitle the second to prevail over the first assignee, we hold that mere priority of notice to the debtor by a second assignee who lent his money to the assignor, without making any inquiry of the debtor, is not sufficient to subordinate the first assignment to the second." Also, the case of *Bank v. U. S. Fidelity & Guaranty Co.,* 9 Fed. (2nd), 326, cited by appellant,

tends to support its view as to the effect of the failure to give notice of plaintiff's assignment to the surety, based upon the facts recited in that case.

However, we are not inclined to apply the doctrine of those and other similar cases to the facts in this case, but rather to adhere to the principle stated in the cited decisions of this Court, in accord with the English rule stated in *Dearle v. Hall,* 10 Eng. Rul. Cas., 478, as affording a better reasoned approach to a just and equitable disposition of the fund here in litigation.

The recent case of *In re Wallace: Jennings v. Howard,* 212 N. C., 490, related to the assignment of a judgment by a judgment creditor to successive assignees, and it was there decided that it was not necessary to the validity of an assignment of the judgment that the assignment be recorded on the judgment docket.

A careful consideration of all the facts agreed to by the parties leads us to the conclusion that they fully support the ruling of the court below, and that the judgment must be affirmed.

Judgment affirmed.

ETHEL K. MALEY, WIDOW; SARAH, WILLIS, WELDON AND ERNEST MALEY, CHILDREN OF R. P. MALEY, DECEASED, v. THOMASVILLE FURNITURE COMPANY, EMPLOYER; AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER.

(Filed 4 January, 1939.)

1. Master and Servant § 52b—Industrial Commission may reconsider evidence taken before hearing Commissioner.

It is the duty of the hearing Commissioner, in the first instance, to hear evidence and find facts, and make or decline an award, and upon demand for a hearing before the full Commission, to make a report of the proceedings to it, and the hearing before the full Commission is not entirely *de novo,* and it is competent for the full Commission to reconsider evidence taken before the hearing Commissioner without hearing the witnesses again *viva voce.*

2. Same—

Objection to the admission of incompetent evidence should be made before the hearing Commissioner, and objection taken for the first time at the hearing before the full Commission on appeal is too late. Sec. 59, ch. 120, Public Laws of 1929.

3. Master and Servant § 52a—Courts will give liberal treatment to rules of procedure adopted by Industrial Commission.

Procedure before the Industrial Commission need not necessarily conform strictly to judicial procedure in courts of law unless the statute so

requires or the court of last resort shall consider such procedure indispensable to the preservation of the essentials of justice and the principles of due process of law, and procedure adopted by the Commission with respect to the reception and consideration of evidence will be given liberal treatment by the courts, since section 54 of the act empowers the Commission to make rules for carrying out the provisions of the act, and requires processes and procedure to be summary and simple.

4. Master and Servant § 55g—

The findings and award of the Industrial Commission will not be disturbed on appeal because of the admission of hearsay evidence if there is sufficient competent evidence to sustain the findings.

5. Master and Servant §§ 52b, 55g—Hearsay evidence admitted without objection may be considered in corroboration of other evidence.

In this case there was sufficient competent circumstantial evidence to support the finding of the Industrial Commission that the injury in suit arose out of and in the course of the deceased employee's employment. Hearsay evidence of declarations of the employee tending to show that the injury was received while he was engaged in the performance of his duties was admitted without timely objection. *Held:* The hearsay evidence may be accepted as some corroboration or explanation of the circumstantial evidence.

6. Evidence § 41—

The general rule excluding hearsay evidence is based upon the incompetency of such evidence and not its irrelevancy, since such evidence has probative force.

7. Master and Servant § 40e—Circumstantial evidence held to support finding that accident arose out of and in course of employment.

The evidence disclosed that the employee was employed to run a trim saw and handled rough plank which he fed to the saw, that he was seen in front of his running saw with a freshly bleeding place on his arm, that the next day another witness saw him with a red inflamed place on his arm that had been cut or bruised, and that the employee died from blood poisoning resulting from cutting or bruising a pimple or early boil on his arm. *Held:* Taking into consideration, as matters of common knowledge, the dangerous character of the machine and the likelihood of such injury resulting from the occupation, the circumstantial evidence raises more than a conjecture as to the cause of the injury, and is sufficient to support the finding of the Industrial Commission that the injury resulted from an accident arising out of the employee's employment and in the performance of his duty

APPEAL by defendants from *Olive, Special Judge,* at June, 1938, Term, of DAVIDSON. Affirmed.

This is an action brought by the widow and children of R. P. Maley, deceased, as dependents, against the Thomasville Furniture Company, employer, and Liberty Mutual Insurance Company, carrier, to have an award made for the death of Maley, while employed in the plant of the defendant furniture company, 10 November, 1937.

On that day Maley was employed in the plant and running a trim saw. While the saw was running he was found by another employee standing at the machine with the sleeve of his right arm rolled up and a place upon his arm freshly bleeding. Maley asked the witness for alcohol, which he gave him, to put on his arm. Witness did not see him get hurt. At the time when he saw Maley the saw was running and he was there working.

On the next day, as testified to by another witness: "On the outside of his arm was some sort of a red inflamed place that was bruised. He had it painted with iodine. This was on Thursday, if I am not mistaken, Thursday morning, near dinner-time, and you could see something had happened to it. I don't know whether he cut it or snagged it or what. It looked more like to me it had been lanced." This witness further testified that he saw upon the arm a cut place about half as big as a dime; that it was generally thought he left work on account of flu.

This witness was permitted to testify, over objection of the defendants, that Maley was injured on Wednesday before he went home. Paul H. Gallimore testified that he was working at the Thomasville Furniture Company on 10 November and saw Mr. Maley that day. Over objection of the defendants he was permitted to say that Maley told him he had hurt his arm. He testified: "What I saw of his right arm looked kind of like a pimple, maybe a little larger. He had it painted with iodine or mercurochrome, I won't say which." Further, over objection of defendants, this witness was permitted to say that Maley told him he had bruised his arm on the machine at the plant.

T. W. Maley, a brother of deceased, testified as to the dependents and, further, that he had seen the arm the day after Maley was hurt and that there was a round looking place, some people might call it a boil; a red place, as large as the top of a teacup, with a hole in the center of it somewhat bigger than a pea. This witness was permitted to state that his brother told him he had knocked the top out on the machine; that he was reaching and just gouged the whole thing out.

(No motion was made to strike the above answer before Commissioner Dorsett, but before the hearing by the full Commission the defendants moved to strike out this answer.)

The following question was addressed to this witness: "Question: You mean the cut place, he cut it on the machine?" To which the witness answered: "Yes, sir." To this evidence, also, no objection was made before Commissioner Dorsett, but before the hearing by the full Commission defendants filed objection to this question. The witness was then permitted to state that Maley told him that he was injured by the automatic trim saw while he was working, and that the injury occurred the day before.

To none of these questions and answers did the defendants except before the hearing Commissioner Dorsett, but before the hearing by the full Commission defendants filed objection to these questions and asked that they be stricken out, upon which the Commission made no formal ruling.

This witness further testified that he saw Maley's arm every day after Thursday; that on Sunday it began to look more inflamed and the doctor ordered certain treatment.

Dr. Sherrill testified that he was called to see the deceased and that he had a pimple on his arm which he had bumped. Over objection, he was permitted to say that the deceased told him he had bumped it in the plant on the Wednesday preceding, bumped it against the machine in the plant, while he was working.

He explained by "pimple" he meant a furnucle, early boil, beginning boil. Witness, without further objection, was permitted to say that he got the impression from Maley that he had a boil and bumped it on the machine. This witness gave it as his opinion that the man died from a blood stream infection, that is, a septicaemia or blood poisoning, which arose from his infection in this arm. He further testified that striking, cutting, or bruising a boil or pimple had the effect of breaking down resistance to infection and of allowing breaking of tissues and permitting infection to enter the blood stream. Maley died Thursday night, 25 November.

At the first hearing before Commissioner Dorsett, the witness was permitted to say that Maley gave him a history of his case and explained that he was hurt in the manner testified to. Defendants made no objection to the introduction of this testimony before the first hearing Commissioner, but before the hearing by the full Commission filed objections to these questions and asked that the answers be stricken out.

There was further medical testimony with regard to the cause of the death of deceased, and the defendants filed numerous exceptions to the expert testimony. There was evidence with regard to the earnings of Maley and as to his dependents. On this evidence the hearing Commissioner found that the deceased was injured by accident arising out of his employment and while performing his duty. The full Commission, on review, adopted the findings of fact and conclusions of law of hearing Commissioner Dorsett and affirmed the award, and upon appeal to the Superior Court the award was sustained and defendants appealed to this Court, assigning as errors the admission of the testimony to which it had objected at the full Commission hearing and errors covered by numerous exceptions to the medical testimony, and the findings of fact and making the award upon incompetent evidence.

J. F. Spruill and Emmett C. Willis for plaintiffs, appellees.
Lovelace & Kirkman for defendants, appellants.

SEAWELL, J. The appeal of defendants is based on exceptions to the admission of evidence which they contend is hearsay and incompetent, and which, if excluded, would, as they contend, leave no competent evidence upon which the Commission's findings of fact and award could be legally based; and to the findings of fact and the award. *Reed v. Lavender Bros.*, 206 N. C., 898, 172 S. E., 877; *Perdue v. State Board of Equalization*, 205 N. C., 730, 172 S. E., 396. Plaintiffs contend that competent evidence relating to the accident and injury existed, and that this may be corroborated, supplemented, or explained by hearsay evidence under the practice in this jurisdiction and, generally, wherever Compensation Acts similar to ours are in force, citing *Brown v. Ice Co.*, 203 N. C., 97, 164 S. E., 631; *Johnson v. Bagging Co.*, 203 N. C., 579, 166 S. E., 586; *Carlton v. Bernhardt-Seagle Co.*, 210 N. C., 655, 188 S. E., 77.

The defendants, however, failed to protect themselves against the introduction of the incompetent testimony of which they complain by proper objection and exception at the first hearing.

The hearing Commissioner, in the first instance, has been charged with the duty of hearing evidence and finding facts and making or declining an award; and subsequently, in case of demand for a hearing before the full Commission, he must make a report of the proceedings to that body. In *Singleton v. Laundry Co.*, 213 N. C., 32, 34, 195 S. E., 34, the Commission, in the performance of its functions, has been said to act in somewhat the capacity of a referee, except that its findings of fact, when supported by evidence, are conclusive. We think this principle can be extended to the duties and functions of the hearing Commissioner in the first instance with respect to the taking and transmission of evidence to the full board. The hearing before the full Commission is not entirely *de novo*. Section 59, chapter 120, Public Laws of 1929—the Workmen's Compensation Act—provides that in case a demand is made for a hearing before the full Commission the Commission "shall review the award, and if good ground be shown therefor, *reconsider the evidence*, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award." Under this section it is competent for the full Commission to reconsider the evidence taken before the hearing Commissioner without hearing the witnesses again *viva voce* and give it such consideration as they may deem proper. Therefore, objection to the evidence should have been made when it was first offered, and we think that a subsequent formal objection to the evidence filed before the full Commission, accompanied by motion to strike, comes too late. In

this particular case, practically all of the objections to the hearsay evidence were raised in this way.

The matter of reception and consideration of evidence before the Industrial Commission and in this Court upon review must be affected to some extent by the nature of the body before which it is offered and the manner in which the statute requires that body to perform its duties.

The Industrial Commission is an administrative board, with *quasi*-judicial functions. The manner in which it transacts its business is a proper subject of statutory regulation and need not necessarily conform to court procedure except where the statute so requires, or where, in harmony with the statute, or where it fails to speak, the Court of last resort, in order to preserve the essentials of justice and the principles of due process of law, shall consider rules similar to those observed in strictly judicial investigations in courts of law to be indispensable or proper. Section 54 of the Workmen's Compensation Act empowers the Commission to make rules for carrying out the provisions of the act, and requires processes and procedure to be summary and simple. Section 58 provides: "The Commission, or any of its members, shall hear the parties at issue, or their representatives and witnesses, and shall determine the dispute in a summary manner." Under these conditions we might expect a liberal treatment by the courts of the procedure adopted by the Commission with respect to the reception and consideration of evidence upon a claim in "dispute." This is so obviously the intention of the statute that in one jurisdiction, at least, under a statute practically identical with ours, the Court has permitted the introduction of hearsay evidence freely, depending rather on the sound judgment and wise discretion of the Commission to save the practice from abuse than upon the requirement of strict legal proof admissible in a court of law. *American Furniture Co. v. Graves* (Va.), 126 S. E., 213. While few courts have taken this extreme position, the decisions throughout the country are all marked with varying degrees of relaxation of the strict rules of evidence as applied to investigations of this kind. A recognized authority on the subject, Schneider's Workmen Compensation Law, at page 1757, expresses the matter as follows:

"The well founded common law rule excluding hearsay evidence is not followed so strictly in compensation procedure, though the courts will not permit an award to stand which is based on hearsay evidence uncorroborated by facts and circumstances of other evidence."

The further statement appears on page 1820:

"Where hearsay evidence has been admitted, an award will not be reversed where competent evidence on the same issue has been received but hearsay evidence uncorroborated by circumstantial evidence will not sustain an appeal."

We are much enlightened as to the manner in which evidence should be received and considered before administrative boards, from the following excerpt, written by *Chief Justice Hughes,* in *Consolidated Edison Company of New York, et al., v. National Labor Relations Board et al.,* and *International Brotherhood of Electrical Workers, etc., v. National Labor Relations Board et al.,* handed down 5 December, 1938, found in Advance Sheets, United States Supreme Court, p. 11:

"The companies urge that the board received 'remote hearsay' and 'mere rumor.' The statute provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling.' The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. *Interstate Commerce Commission v. Baird,* 194 U. S., 25, 44; *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.,* 227 U. S., 88, 93; *United States v. Abilene & Southern Ry. Co.,* 265 U. S., 274, 288; *Tagg Bros. & Moorhead v. United States,* 280 U. S., 420, 442. But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

Our Court has been inclined to regard examination before the Commission in the light of a judicial investigation only *sub modo.* In appropriate cases it has undertaken to say what is and what is not competent evidence in that forum. *Brown v. Ice Co., supra; Johnson v. Bagging Co., supra; Perdue v. State Board of Equalization, supra.* In this connection it may be proper to say that the second headnote in *Brown v. Ice Co., supra,* is not sustained by the text of the opinion.

It does not follow that the Court has paid no deference to the administrative character of the Industrial Commission and the summary manner in which they are required by the statute to conduct their hearing. The decisions substantially recognize a modification of the strict requirements of judicial proof, to the extent that the findings and award will not be disturbed because of the presence in the case of hearsay testimony when there is other competent evidence, of sufficient probative force, upon which to base the findings. *Cabe v. Parker-Graham-Sexton, Inc.,* 202 N. C., 176, 162 S. E., 223; *Johnson v. Bagging Co., supra.* The conservative attitude of this Court on the subject, intended to promote the highest degree of justice to both sides of the controversy, is not compromised by accepting the hearsay evidence found in this case as some corroboration or explanation of the circumstantial evidence relating to the accident and injury. The hearsay evidence must be consid-

ered as in the case without objection. The principle on which hearsay evidence is excluded by rules of evidence relates to its competency, not to its relevancy. That it has probative force is unquestioned and there are numerous exceptions to the rule of exclusion.

But the circumstantial evidence relating to the injury, it seems to us, is of sufficient probative force to sustain the conclusion that deceased was injured by accident arising out of his employment and in the performance of his duty. In passing upon this evidence we must take into consideration matters of common knowledge; the character of the machine at which deceased was working, as being of a dangerous character and likely at one time or another to inflict injury upon one who operates it; the handling of rough plank upon a table, and feeding the same to the saw; and like matters within common experience. Of course, the deceased might have been stricken by an object from some other source while standing at his table and operating the saw, but for this also the defendants would have been ordinarily liable; or the deceased might have inflicted the injury upon himself, inadvertently or purposely, without reference to the duties of employment; but his injury from the operation of the machine is so much more probable as to take first place in such an analysis. Under these circumstances the deceased was found standing at his table, the saw in motion, with an injury upon his arm from which fresh blood was running. The cause of the injury is more than conjectural.

This case is easily distinguishable from *Plyler v. Country Club, ante,* 453, since in that case the evidence does not warrant an inference that deceased was injured while actually performing the duties of his employment as caddy; while in the case at bar Maley was found at his post of duty, his arm freshly bleeding, and surrounded by the physical conditions and circumstances calculated to bring about such an injury.

We think the evidence sufficient to sustain the findings of fact and support the award, and the judgment is

Affirmed.

CAROLINA TRANSPORTATION AND DISTRIBUTING COMPANY AND WOLFE & CRANE COMPANY v. AMERICAN ALLIANCE INSURANCE COMPANY.

(Filed 4 January, 1939.)

1. Insurance § 50—When action nonsuited is instituted within time limit of policy, action instituted within one year thereafter is not barred.

The policy of carrier liability insurance in suit provided that no action on any claim thereunder should be maintained unless instituted within

one year of the loss. Within one year of the loss action was instituted by the shipper against the carrier and the insurer, which action was nonsuited as to the insurer. This action was instituted by the carrier and shipper against the insurer within one year of the judgment as of nonsuit to recover for the same loss. *Held:* Under the provisions of C. S., 415, permitting the institution of actions within one year after nonsuit, the present action is not barred by the policy provision.

2. *Limitation of Actions* § 11—C. S., 415, applies to limitations generally.

C. S., 415, providing that when an action instituted within the time prescribed is nonsuited, plaintiff may bring another action within one year after such nonsuit, applies to limitations generally, including a contractual limitation in a policy of liability insurance, and not solely to limitations which are strictly statutes of limitation.

3. Same—

Dismissal or nonsuit as to one defendant for misjoinder of parties and causes is a nonsuit within the provisions of C. S., 415, permitting plaintiff to institute another action within one year of nonsuit when the original action is instituted within the time prescribed.

4. Insurance § 48—

Anyone for whose benefit an insurance policy is issued, covering the legal liability of the insured, as distinguished from a mere indemnity contract, may maintain an action directly against the insurer.

5. Insurance § 50—Judgment against insured in action to which insurer is a party is conclusive on insurer.

A shipper instituted action against the carrier and the insurance company insuring the carrier against legal liability, to recover for a loss *in transitu*, both defendants having been served with summons. Insurer obtained dismissal as to it for misjoinder of parties and causes, and judgment by default was entered against the carrier for the loss sustained, but was not paid because of insolvency of the carrier. This action was instituted by the carrier and shipper against the insurer to recover for the same loss. *Held:* The judgment against the carrier in the action to which the insurer was a party and which it had opportunity to defend, is conclusive on the insurer, and it may not set up independent defenses such as the negligence of the carrier in failing to protect the cargo after the wreck of the truck transporting same, and upon pleadings admitting the above facts, judgment that the shipper is entitled to recover of the insurer, and retaining the action for ascertainment of the amount of the recovery by the jury, is not error.

APPEAL by defendant from *Phillips, J.*, at August Term, 1938, of GUILFORD. Affirmed.

Roberson, Haworth & Reese for plaintiff, appellee.
Smith, Wharton & Hudgins for defendant, appellant.

SCHENCK, J. An action was first instituted in the municipal court of the city of High Point by the Wolfe & Crane Company against the Carolina Transportation & Distributing Company and the American

Alliance Insurance Company upon an insurance policy issued by said insurance company to cover the legal liability of said transportation and distributing company as a carrier for the loss of a shipment of rugs from Philadelphia, Pa., and Trenton, N. J., to High Point, N. C. The loss occurred on 21 November, 1931, while the policy was in effect, and the action was instituted on 5 May, 1932. On 6 February, 1935, upon motion of the insurance company, the action was dismissed by the municipal court for misjoinder of parties defendant, and upon appeal to the Superior Court the order of dismissal was affirmed on 30 August, 1935. The insurance company did not defend the action against the transportation and distributing company, and judgment was obtained on 7 March, 1933, against said company for $3,197.10 with interest. The present action was instituted in the municipal court of High Point on 3 March, 1936, by the present plaintiffs on the above mentioned policy of insurance against said insurance company to recover for the loss of the aforesaid shipment of rugs. The present action and the original action are substantially the same, both being predicated upon loss of the same cargo covered by the same policy of insurance.

The aforesaid policy of insurance contains, *inter alia*, the following provision: "No suit or action for the recovery of any claim arising under this policy shall be maintainable in any court, unless such suit or action shall have been commenced within one year from the date of the happening of the loss out of which said claim arose."

The refusal of the municipal court to dismiss the action, and the affirmation of such ruling by the Superior Court, for the reason that the present action was not commenced within one year from the date of the happening of the loss out of which the claim arose, is made the basis of appellant's exceptive assignment of error No. 1.

We are of the opinion, and so hold, that said assignment cannot be sustained. The loss occurred on 21 November, 1931. The original action was instituted on 5 May, 1932, within a year of the loss. The action was finally dismissed or nonsuited as to the insurance company for misjoinder on 30 August, 1935. The present action was instituted on 3 March, 1936, within a year of the nonsuit. C. S., 415, reads: "If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, . . . the plaintiff . . . may commence a new action within one year after such nonsuit."

"This statute, Code, sec. 166 (C. S., 415), contains no exception of cases under section 1498, or of *any other cases* where the time prescribed for bringing the original action might not be strictly a statute of limitation. We know no cause why the privilege to commence a new action within a year after nonsuit should not apply equally to all cases of nonsuit. The statute makes no distinction, and there is cer-

tainly none in the reason of the thing, which is the same as to that class of cases as in any others." *Meekins v. R. R.*, 131 N. C., 1.

"Nonsuit is the name of a judgment given against the plaintiff when he is unable to prove a case, or when he refuses or neglects to proceed to the trial of a cause at issue and leaves this issue undetermined. It is provided by statute that if an action is commenced within the time prescribed therefor and the plaintiff is nonsuited he may commence a new action within one year after such nonsuit. . . ." *Cooper v. Crisco,* 201 N. C., 739, and cases there cited.

This action was heard by the municipal court of the city of High Point on 16 January, 1937, on motion of plaintiff for judgment on the pleadings and on motion of defendant to dismiss the action, and the court found the facts from the allegations and admissions in the pleadings, and overruled defendant's motion to dismiss, and adjudged that the plaintiff recover of the defendant $3,197.10 with interest. Upon appeal to the Superior Court this judgment was affirmed in so far as it overruled the motion to dismiss and in so far as it held that the plaintiff was entitled to recover, but directed that the case be remanded that the municipal court might submit to a jury an issue as to the amount of the recovery, and upon appeal from the judgment of the Superior Court to the Supreme Court, the appeal was dismissed as premature. *Distributing Co. v. Ins. Co.*, 212 N. C., 665.

On 5 April, 1938, the case came on for hearing before the municipal court, upon the issue as to the amount of the recovery, or the amount of indebtedness of the defendant to plaintiff. The plaintiff introduced in evidence the judgment for $3,197.10 against the Carolina Transportation & Distributing Company in favor of the Wolfe & Crane Company. No other evidence was introduced. The court directed that the issue be answered in the sum of $3,197.10 with interest. Upon the answering of the issue as instructed, the court signed judgment that the plaintiff recover of the defendant the sum of $3,197.10 with interest, from which judgment the defendant appealed to the Superior Court, assigning errors.

The judgment was entered in the Superior Court affirming the judgment of the municipal court, and appeal therefrom to the Supreme Court was perfected by the defendant insurance company.

Appellant's assignments of error 2 to 11 are to the overruling by the judge of the Superior Court of defendant's exceptions to facts found by the municipal court, and to the holding by the Superior Court that the plaintiff was entitled to relief prayed for and granting judgment on the pleadings, with only the amount of the recovery to be ascertained by the jury.

The findings of fact, upon which the judgment of the municipal court that the plaintiff recover of the defendant is predicated, are based upon and fully sustained by admissions in the pleadings. They are substantially as follows: (1) Wolfe & Crane Company, plaintiff, is engaged in the business of selling rugs in Philadelphia, Pa., and Trenton, N. J., and maintains a show room in High Point, N. C.; (2) the Carolina Transportation & Distributing Company was engaged in trucking business and hauled freight from various points to High Point; (3) the American Alliance Insurance Company is engaged in general casualty, liability, and marine insurance business, doing business in North Carolina; (4) on 1 October, 1931, the said insurance company issued to said transportation and distributing company an insurance policy covering the legal liability of the latter as a common carrier; (5) on 20 November, 1931, Wolfe & Crane Company delivered to the Carolina Transportation & Distributing Company a shipment of merchandise (rugs) of the value of $3,197.10 at Philadelphia and Trenton to be carried to High Point; (6) while carrying said shipment through the state of Maryland, the truck upon which the cargo was loaded was wrecked on 21 November, 1931, and the driver of the truck was compelled to leave it to receive medical aid, but before leaving the truck he notified the home office of the transportation and distributing company in High Point of the wreck; that before the cargo could be salvaged and protected, it was removed by parties unknown; (7) the Carolina Transportation & Distributing Company exhibited to Wolfe & Crane Company copy of the insurance policy issued to it by the American Alliance Insurance Company, which copy had been furnished the transportation and distributing company by the insurance company for the purpose of being shown to prospective shippers; (8) on 5 May, 1932, Wolfe & Crane Company instituted an action against the Carolina Transportation & Distributing Company and the American Alliance Insurance Company for loss sustained by it on account of the loss of the shipment; that the service of summons was made upon both defendants; (9) the American Alliance Insurance Company filed answer, but the Carolina Transportation & Distributing Company did not make appearance; (10) on 7 March, 1933, Wolfe & Crane Company obtained judgment by default against the Carolina Transportation & Distributing Company for $3,197.10 with interest, which judgment is unpaid; and said transportation and distributing company is insolvent; (11) on 6 February, 1935, the municipal court of the city of High Point, on motion of the insurance company, dismissed the action instituted on 5 May, 1932, against the American Alliance Insurance Company on the ground of misjoinder of parties; that appeal from said judgment of dismissal was taken to the Superior Court, where on 30 August, 1935, the said

judgment was affirmed; (12) on 3 March, 1936, the present action was instituted by the plaintiff, as owner of the lost shipment, against the American Alliance Insurance Company on the insurance policy issued by it to the Carolina Transportation & Distributing Company, covering its legal liability as a common carrier.

The judgment of the municipal court was modified and affirmed on appeal to the Superior Court, and the case was remanded to the municipal court that the issue of indebtedness might be answered by a jury. At a subsequent hearing in the municipal court, this issue was submitted to the jury and answered in the sum of $3,197.10. The only evidence submitted to the jury being the default judgment obtained 7 March, 1933, by Wolfe & Crane Company against the Carolina Transportation & Distributing Company.

We are of the opinion that the facts found by the municipal court, together with the answer of the jury to the issue, support the judgment of that court, and the exceptions to the judgment of the Superior Court affirming the judgment of the municipal court are untenable.

It seems to be settled law that anyone for whose benefit an insurance policy is issued, covering the legal liability of the insured, may maintain an action directly against the insurer for any loss suffered.

"As a general rule, the owner of goods insured by a warehouseman, bailee, or carrier as held in trust, or on commission, or under any contract of similar import, may, as the real party in interest, or the party for whose benefit the policy was taken, maintain an action thereon directly against the insurer." Couch's Cyclopedia of Insurance Law, sec. 2060.

"This policy, however, is not one of mere indemnity against loss, but covers the legal liability of the assured (see 36 C. J., 1096), and is for the benefit of owners of the cargo as well as of the carrier. . . . under the clause covering the carrier's legal liability, the owners of cargo may recover for loss which they have sustained, and for which the carrier is liable." *Sorenson v. Ins. Co.*, 20 F. (2d), 640.

Under a policy covering the legal liability of a carrier, in an action by the owner of the cargo for the loss thereof against the carrier of which the insurer had notice and an opportunity to defend, a judgment secured by the owner of the cargo against the carrier is conclusive as to the insurer. *Ins. Co. v. Ry. Co.*, 291 Fed., 358.

The Wolfe & Crane Company, being one for whose benefit the policy in suit was issued, is a proper party to maintain an action against the American Alliance Insurance Company, which issued the policy; and the said insurance company, having been a party to the original action in which judgment by default was rendered against the insured transportation and distributing company, and having elected not to defend

the action against the insured but to content itself with procuring a dismissal of the action as to it, cannot now set up independent defenses, such as negligence on the part of the insured in failing to protect the cargo after the wreck of the truck, as the only question open for determination was the amount of the indebtedness of the insured to the plaintiff, the owner of the lost cargo, for whose protection the policy in suit was issued. *R. R. v. Lassiter & Co.*, 208 N. C., 209.

We have examined all of the assignments of error made by the appellant, and are left with the impression that no reversible error has been committed in either the municipal court or the Superior Court.

Judgment affirmed.

R. L. SMITH AND WIFE, NELLIE SMITH; E. B. SMITH AND WIFE, ORA LEE SMITH; C. A. SMITH AND WIFE, CONNIE SMITH; PHOEBE BLAIR PARKER AND HUSBAND, C. M. PARKER; M. E. SMITH AND WIFE, LORENE SMITH; AND JESSIE SMITH (UNMARRIED), HEIRS AT LAW OF CORNELIUS A. SMITH, v. R. T. JOYCE.

(Filed 4 January, 1939.)

1. Frauds, Statute of, § 2a—Sufficiency of memorandum to take contract of sale of realty out of statute of frauds.

Although a memorandum sufficient to take a contract of sale of realty out of the statute of frauds need not be formal and may consist of several papers properly connected together, it must embody the terms of the contract, the names of the parties, and a description of the land to be conveyed, at least with sufficient definiteness to be aided by parol. C. S., 988.

2. Same—Writings relied on held insufficient memoranda to take case out of statute of frauds.

Plaintiffs instituted this action to recover the purchase price of lands alleged to have been bid off by defendant at an auction sale. Defendant pleaded the statute of frauds. C. S., 988. Plaintiff introduced in evidence the printed advertisement of sale, locating the land as lying between three cities, and stating it had been divided in three tracts; writing on the back of one of the advertisements signed by the auctioneer stating "tract No. 3," the number of acres, the price per acre, and defendant's name; writing on another separate piece of paper stating "tract No. 3 . . . bought by" defendant, and the number of acres and price per acre; and writing on a third separate piece of paper stating the names of the parties; and deed to defendant for the third tract, prepared sometime after the sale. *Held:* None of the separate writings contained internal reference to other papers so as to properly connect them therewith, and neither the printed advertisement nor the writing on the back thereof contained any sufficient description of the land, and the deed, later prepared, was not connected with, contained no reference

to, and was not referred to in, any other of the papers, and the memoranda are insufficient to show the essential elements of a contract so as to take the case out of the statute of frauds.

3. Frauds, Statute of, § 2b—

An auctioneer's authority to sign a memorandum of sale as agent of the purchaser is ordinarily limited to the time of sale, and his signature for the purchaser two or three days after the sale and after the purchaser had repudiated the sale, does not bind the purchaser.

4. Same—

An attorney for the vendors at an auction sale, who is not employed by the auctioneer nor requested by him to act, but who is present, voluntarily gathering memoranda for use in preparing deeds, is not in law an agent of the purchaser for the purpose of signing a memorandum of sale.

APPEAL by defendant from *Harding, J.*, at March Term, 1938, of FORSYTH. Reversed.

This action was instituted in the Forsyth county court to recover the purchase price of land alleged to have been bid off by the defendant at an auction sale. Among other defenses the defendant pleaded the statute of frauds.

From judgment on the verdict in favor of plaintiffs, defendant appealed to the Superior Court and, from judgment in the Superior Court overruling his assignments of error and affirming the judgment of the county court, the defendant appealed to the Supreme Court.

Elledge & Wells for plaintiffs, appellees.

Hastings & Booe, Fred Morris, and Peyton B. Abbott for defendant, appellant.

DEVIN, J.. The appellant's principal assignment of error relates to the denial of his motion for judgment of nonsuit duly entered in the trial court. Having preserved his exception on appeal to the Superior Court, he now presents that question for decision by this Court. The motion for judgment of nonsuit was interposed on the ground that the plaintiffs' evidence failed to show a valid contract for the purchase of the land enforceable under the statute of frauds upon which specific performance could be decreed.

The statute of frauds (29 Ch. II, c. 3), as adopted in this State and brought forward in section 988 of the Consolidated Statutes, provides that all contracts to sell or convey land shall be void "unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized."

The evidence relied upon by the plaintiffs as constituting a sufficient memorandum under the statute consisted of several paper writings:

(1) Printed advertisement of sale by the heirs of C. A. Smith of land "located in the triangle between Winston-Salem, Greensboro and High Point. The heirs have divided this valuable land into three tracts and will offer same for sale on Saturday, October 17th, at 2 o'clock P. M. The home tract contains 64.59 acres and a large dwelling house. Another tract contains 56.22 acres with dwelling and out-buildings. Another tract contains 56.42 acres. Terms, 5% cash on day of sale and balance on delivery of deed." The advertisement contained no other description of these several tracts. (2) Deed from the Smith heirs to R. T. Joyce for the third tract, 56.22 acres, described by metes and bounds, and duly acknowledged. This deed was prepared some time after the sale for the purpose of tender to the defendant before suit. (3) Writing on the back of the printed notice of sale, "tract #3, 56.22 acres, $55.00 per acre. R. T. Joice. Oct. 17, 1936. W. A. Smith, Auctioneer." (4) Writing on a separate sheet of paper, "Tract #3, or Clint Smith tract. Bought by R. T. Joyce at $55.00 per acre. 56.22 acres." (5) Writing on another separate sheet of paper, "R. L. Smith and others (the plaintiffs herein) to R. T. Joyce, tract #3."

In order to constitute an enforceable contract within the statute of frauds, the written memorandum, though it may be informal, must be sufficiently definite to show the essential elements of a valid contract. It must embody the terms of the contract, names of vendor and vendee, and a description of the land to be conveyed, at least sufficiently definite to be aided by parol. *Gwathmey v. Cason,* 74 N. C., 5; *Hall v. Misenheimer,* 137 N. C., 183, 49 S. E., 104; *Timber Co. v. Yarborough,* 179 N. C., 335, 102 S. E., 630; *Keith v. Bailey,* 185 N. C., 262, 116 S. E., 729. The memorandum need not be contained in a single document but may consist of several papers properly connected together. As was said in *Mayer v. Adrian,* 77 N. C., 83: "It (the memorandum) may be one or many pieces of paper, provided the several pieces are so connected physically or by internal reference that there can be no uncertainty as to their meaning and effect when taken together. But this connection cannot be shown by extrinsic evidence." *Simpson v. Lumber Co.,* 193 N. C., 454, 137 S. E., 311.

It is apparent that the separate papers offered by the plaintiffs as a compliance with the requirements of the statute are insufficient for that purpose. Neither the printed advertisement of sale nor the writing on the back thereof contains any description of the land, for the purchase of which the defendant is sought to be charged. No map was attached to or connected therewith or referred to therein. The other separate sheets of paper are not in themselves sufficient to show the essential elements of a contract. They were not physically connected, nor do they contain internal reference to other writings, so as to constitute a

valid and sufficient memorandum within the meaning of the statute as interpreted by this Court in the decisions cited. The deed, subsequently prepared and tendered before the institution of the action, was not connected with, nor did it refer to or contain reference to any other paper in evidence.

"In order to charge a party upon such a contract (to purchase land), it must appear that there is a writing containing expressly or by implication all the material terms of the alleged agreement which has been signed by the party to be charged or by his agent lawfully authorized." *Keith v. Bailey, supra; Burriss v. Starr,* 165 N. C., 657, 81 S. E., 929; 25 R. C. L., 680.

In *Ringer v. Holtzclaw,* 112 Mo., 522, it is said: "All the authorities are agreed that the memorandum must state the contract with reasonable certainty so that its essential terms can be ascertained from the writing itself without resort to parol evidence."

The papers offered as constituting a written memorandum of the contract necessary to its validity, must be held insufficient for that purpose on the further ground that they are not signed by the defendant or by any other person "by him thereto lawfully authorized."

While admitting there is no evidence that the defendant personally signed any of the papers offered in evidence in connection with the alleged contract of purchase, or that he expressly authorized any other person to do so for him, the plaintiffs contend that upon the principle of constructive or implied agency the defendant is bound by the fact that the auctioneer at the sale wrote defendant's name, in connection with the recital of number of acres and price per acre, on the back of the printed advertisement of the sale.

The law seems to be well settled that the auctioneer at a sale is, at the time and for that purpose, the agent of both seller and buyer, and that when the auctioneer writes down at the time the name of the buyer on the paper writing showing the price bid for property therein described, it is a sufficient memorandum within the meaning of the statute of frauds upon which payment of the purchase price may be enforced. *Cherry v. Long,* 61 N. C., 466; *Gwathmey v. Cason,* 74 N. C., 5; *Proctor v. Finley,* 119 N. C., 536, 26 S. E., 128; *Love v. Harris,* 156 N. C., 88, 72 S. E., 150; *Flowe v. Hartwick,* 167 N. C., 448, 83 S. E., 841; *Woodruff v. Trust Co.,* 173 N. C., 546, 92 S. E., 496.

But the facts here do not warrant the application of the principle stated in the cited cases. Here the auctioneer testified: "I signed the memorandum (written on the back of the printed advertisement of sale) two or three days after the sale." As this witness' own signature appears on this paper, it is not clear whether he referred to writing his own name on the paper or that of the defendant. But assuming that

the auctioneer wrote the name "R. T. Joice" on the paper writing referred to, the plaintiffs' evidence showed this was done several days after the sale, and that in the meantime the defendant, on the morning following the sale, had repudiated the purchase, on the ground of misrepresentation of the character of the tract of land on which he had bid, and had notified the sellers that he declined to complete the purchase. After notice of defendant's repudiation of the bid, and two or three days after the sale, one of the plaintiffs took the quoted memorandum written on the back of the advertisement to the auctioneer, and the latter signed it then and dated it back to the day of sale.

Upon this evidence we are unable to hold that the constructive agency of the auctioneer continued two or three days after the sale, and after notice of the withdrawal of defendant's offer to purchase. The agency of the auctioneer, implied by law for the purpose of the sale only, and uncoupled with an interest, had terminated and had been revoked before the defendant's name was written on the paper offered in evidence.

The act of an agent after the termination of an agency for a particular purpose and notice of the revocation of his agency, is ordinarily not binding on the principal, unless the facts afford the basis for the application of some other principle of law not presently presented. 2 Am. Jur., 50; 2 C. J. S., 1152; 21 R. C. L., 822. Here the auctioneer could only be considered in law the agent of the purchaser at the time and for the purpose of the sale, and his agency could not be extended beyond a reasonable time for the completion of that particular act, nor after notice to him and to the seller of the withdrawal of the offer of purchase. While not deciding the question, it was said in *Gwathmey v. Cason,* 74 N. C., 5: "There are decided authorities that the signature (by the auctioneer) must be strictly contemporaneous with the sale."

In 5 Am. Jur., 467, it is said: "The majority of the courts which have passed on the subject hold or assume that between the fall of the hammer and the signing of the memorandum, the auctioneer's authority to sign a memorandum may be revoked by either the seller or the purchaser."

"The law, therefore, when it allows him (the auctioneer) to act in the nearly unprecedented relation of agent for both parties, imposes a qualification not applied to the usual cases of agency, and requires that the single act which, almost from necessity, he is authorized to perform for the buyer, shall be done at the time of the sale, and before the termination of the proceedings." *Horton v. McCarty,* 53 Me., 394.

"The dual character of his agency ceases at that time and an entry by him in his sales book at a subsequent period does not bind the purchaser." 5 Am. Jur., 468. "An auctioneer's agency for the purchaser ends with the sale, while that for the seller may continue thereafter."

7 C. J. S., 1249. "The power of the auctioneer and of his clerk to sign a memorandum may be revoked by a buyer or seller at any time before the power is exercised." Am. Law Inst., Restatement Contracts, sec. 212 (2).

In *White v. Dahlquist Mfg. Co.*, 179 Mass., 427, it was said: "While the power of the auctioneer to strike the bargain imports authority to make his work effectual by signing the memorandum necessary to bind the parties, it also implies that the act shall be substantially contemporaneous with the sale and as a part of it. In such a case the agency of the auctioneer is substantially ended with the auction, and his authority to bind either party by a memorandum would not extend beyond that time. Such an authority must be exercised contemporaneously with the sale."

In the annotations under *Love v. Harris, supra,* reported in American Annotated cases 1912 D, at page 1065, numerous cases are cited in support of the statement that "the implied authority of the auctioneer to sign the name of the purchaser extends only to a signing at the time of the sale."

From 25 R. C. L., 604, we quote: "The rule that the memorandum must be made contemporaneously with the sale is undoubtedly the rule when its sufficiency to bind the purchaser is involved," and in *Dunham v. Hartman,* 153 Mo., 625, it was said: "If there was an implied agency, that agency was revoked by the defendant's (buyer's) repudiation of the transaction. Certainly, the agent could not act in spite of his principal, and do for him what he refused to do for himself."

Nor is plaintiffs' case helped by the fact that on a separate sheet of paper were written the words, "tract #3—or Clint Smith tract. Bought by R. T. Joyce at $55.00 per acre—56.22 acres." The evidence shows these words were written by the witness James W. Manuel. The plaintiffs, however, urge the view that Manuel was the auctioneer's clerk and that by virtue of his relation to the auctioneer the same rule applies to him as the auctioneer (citing *Cherry v. Long,* 61 N. C., 466), and that in this instance the writing was done at the time of the sale.

In the case cited, *Cherry v. Long, supra,* the facts are stated in the opinion by *Pearson, C. J.,* as follows: "At a public sale of land a tract is bid off by the defendant; the auctioneer says, 'Put it down to James S. Long,' whereupon the clerk enters on his sale list in the presence of Long, 'Rayner tract to James S. Long at $40 per acre.'" In that case, the other elements of the contract sufficiently appearing in the memorandum, it was held that the evidence was sufficient to show a compliance with the statute.

Here, however, the evidence does not support plaintiffs' contention based on the *Cherry case.* The auctioneer testified he did not have any-

thing to do with employing Mr. Manuel, though he knew he was keeping a record of the sales. Mr. Manuel, who is an attorney at law, testified that he had no request or suggestion from the auctioneer or the plaintiffs that he act as clerk, and that his doing so was a voluntary act on his part, and that he was employed to prepare the deeds. He testified: "I was there at the sale as attorney for the Smith heirs, having been employed theretofore in preparing the advertisement, and that is the reason I was there. I was there representing just the heirs and nobody else."

Unquestionably, Mr. Manuel was not employed or requested to act by the auctioneer, and was merely present as attorney for the plaintiffs, making memoranda and gathering data in that capacity for the purpose of drawing the deeds. It appears that the other separate sheet of paper contained only the names of the parties, and that the undelivered deed was written by Manuel some time after the sale.

Upon this evidence we cannot hold that, when the witness Manuel, the attorney for the plaintiffs, wrote the name of R. T. Joyce on the separate sheet of paper in connection with the reference to 56.22 acres and the price per acre, he was in law the agent of the defendant, and that this constituted the signing of a memorandum by one "lawfully authorized" to act for the defendant, within the meaning of the statute. *Howell v. Shewell*, 96 Ga., 454; *Burton v. Jones*, 147 Tenn., 624; 28 A. L. R., 1111.

It follows that the plaintiffs have failed to offer evidence of the execution by the defendant of a written memorandum of the contract to purchase the land in accordance with the requirements of the statute, sufficient to warrant submission of the case to the jury, and that defendant's motion for judgment of nonsuit should have been allowed.

The judgment of the Superior Court overruling defendant's assignment of error and affirming the judgment of the Forsyth county court must be reversed, and the cause remanded for entry of judgment in accord with this opinion.

Reversed.

HUGH DUNCAN HARVELL, BY HIS NEXT FRIEND, DUNCAN A. HARVELL, v. CITY OF WILMINGTON AND ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 4 January, 1939.)

1. Railroad § 7—Held: Evidence showed that railroad was not liable for condition existing at junction of dead end street and railroad property.

The evidence disclosed that there was a perpendicular concrete retaining wall between a dead end street and railroad property, which wall was about five feet above the level of the railroad property; that subse-

quently the city improved the street by paving it with Belgium block, and that when the improvements were finished the retaining wall was left about one foot above the level of the street without barricade or warning device. *Held:* The evidence discloses that the city and not the railroad company is responsible for the alleged dangerous condition existing at the junction of the dead end street and the railroad property, and the railroad company's motion to nonsuit was properly granted in an action by a guest in a car to recover for injuries sustained when the driver of the car drove over the retaining wall onto the railroad property.

2. Municipal Corporations § 14—Evidence held sufficient on issue of city's negligence in manner of maintaining terminus of dead end street.

The evidence tended to show that there was a perpendicular retaining wall between the end of a dead end street and railroad property, which wall was about five feet above the level of the railroad property and one foot above the level of the street; that sand, leaves, and other debris had washed down grade along the street against the retaining wall so that the concealed wall appeared to be on a level, and that there was no barricade or warning device to protect the traveling public against the hazard of the five-foot drop to the railroad property. *Held:* In a guest's action to recover for injuries sustained when the driver of the car ran over the retaining wall onto the railroad property, the evidence is sufficient to be submitted to the jury on the question of the city's negligence in the manner in which it maintained the terminus of the dead end street.

3. Same—

A city is under the same duty to maintain the terminus of a dead end street in a reasonably safe condition as it is to maintain any other portion of its streets.

4. Automobiles § 21—

Where the negligence of the driver is not imputable to a guest in the car, the guest is entitled to recover of defendant if its negligence is the proximate cause of the injury or one of the proximate causes thereof, and the negligence of the driver will not exculpate defendant unless such negligence is the sole proximate cause of the injury.

5. Negligence §§ 6, 7—

When defendant's negligence is one of the proximate causes of plaintiff's injury, defendant is liable notwithstanding negligence on the part of a third person, since negligence on the part of a third person must be the sole proximate cause of the injury in order to insulate defendant's negligence.

6. Negligence § 20—Charge held for error in failing to instruct jury in regard to concurrent negligence arising on the evidence.

This action was instituted against defendant city by a guest in a car to recover for injuries sustained when the driver of the car drove same over a retaining wall at the end of a dead end street onto private property some five feet below. There was evidence of negligence on the part of the driver, and evidence of negligence on the part of defendant city in the manner in which it maintained the terminus of the street. The court instructed the jury to the effect that if the negligence of the driver of the car was the sole proximate cause of the injury, defendant city

would not be liable, and as to plaintiff's contention that the negligence of the city was the sole proximate cause of the injury. *Held:* The charge must be held for error for failure of the court to instruct the jury in regard to the law of concurrent negligence, even in the absence of a special prayer, since it constitutes a part of the law of the case. C. S., 564.

7. Appeal and Error § 39b—Failure to charge law of concurrent negligence held not cured by verdict that injury was not result of defendant's negligence.

Failure of the court to instruct the jury on the law in regard to concurrent negligence arising on the evidence is not cured by a verdict that plaintiff was not injured by negligence of defendant, since the jury was forced to decide whether the negligence of defendant or that of the third person was the sole proximate cause of the injury, without opportunity of finding whether defendant's negligence was one of the proximate, concurrent causes.

APPEAL by plaintiff from *Cranmer, J.*, at February Term, 1938, of NEW HANOVER.

This is a civil action to recover damages for personal injuries which the plaintiff alleges were proximately caused by the negligence of the defendants.

Second Street in the city of Wilmington comes to a dead end at the edge of the property of the defendant railroad company. At this point there is a concrete perpendicular retaining wall about five feet above the level of the railroad property and about one foot above the level of Second Street as it now exists.

On the night of 30 January, 1937, the plaintiff was a passenger on a car owned and operated by his father. The driver, thinking that he was on Third Street, which leads out of Wilmington in the direction of plaintiff's home, drove down Second Street and over the embankment on to the railroad property. As a result thereof, plaintiff sustained certain personal injuries. There is evidence that at the time plaintiff's father, the owner and operator of the car, was under the influence of intoxicating liquors.

At the conclusion of the evidence the court entered judgment of nonsuit as to the defendant railroad company and submitted appropriate issues to the jury on the plaintiff's cause of action against the defendant city. The jury having answered the issue of negligence in the negative, judgment was entered that the plaintiff recover nothing. The plaintiff excepted and appealed.

E. K. Bryan for plaintiff, appellant.

Wm. B. Campbell and Alan A. Marshall for defendant City of Wilmington, appellee.

Thos. W. Davis, V. E. Phelps, and J. O. Carr for Atlantic Coast Line Railroad Company, appellee.

BARNHILL, J. Second Street in the city of Wilmington extends north and south and Campbell Street extends east and west. The boundary line of the railroad property runs from southeast to northwest and intersects Second Street south of the point where Campbell Street extended would intersect said street, the point where said streets would intersect if extended being on the railroad property. Thus, Second Street terminates in a dead end at the northeasterly boundary line of the railroad property.

The evidence fails to disclose with any degree of certainty whether the retaining wall at the end of Second Street is on railroad property. It does not disclose with any considerable degree of certainty the party who constructed the wall. It does show, however, that there is a cold storage plant on the north side of Second Street adjacent to the railroad property and that the wall was built at the same time the cold storage plant was constructed, seemingly as an extension of the foundation wall of the cold storage plant building. It further discloses that this retaining wall was constructed in 1912 and that at that time Second Street from Red Cross Street north had not been paved; that this section of Second Street sloped downward toward the railroad property; and that rain water had washed away the surface of this portion of Second Street to the extent that at the boundary of the railroad property it was practically on a level. It further discloses that thereafter the city improved this section of Second Street and paved it with Belgium blocks. As a part of this improvement the surface was filled in and leveled so that the Belgium block pavement was about one foot below the top of the retaining wall. It appears, therefore, that if the condition existing at the north end of Second Street created a dangerous situation and evidenced a want of due care, this situation was created by the city and not by the defendant railroad company. The duty to take such measures as were necessary to protect the traveling public against any danger that might exist due to the fact that the wall was only one foot above the surface of the improved street rested upon the city and not upon the defendant railroad company. We are of the opinion, therefore, that there was no error in the judgment of the court dismissing this action as of nonsuit as against the defendant railroad company.

There is evidence that Second Street as improved from Red Cross Street to the retaining wall is down grade. It further appears that sand, leaves and other debris had been washed down against the retaining wall and accumulated to such an extent that the existence of the wall was concealed and the street appeared to be on a level. The plaintiff further offered evidence tending to show that there was no barrier erected at or near the retaining wall to protect the traveling public against the hazard caused by the sudden drop in level between Second

Street and the railroad property, and that the city did not maintain or keep any light or other device at said point to warn the traveling public thereof.

On the night the plaintiff was injured his father, the operator of the car, drove northwardly on Second Street over the retaining wall on to the railroad property, the car going across the first tracks of the railroad and stopping on the second tracks. The defendant offered evidence tending to show that at the time the driver of the car was under the influence of liquor to such an extent that he did not know what he was about; that he was warned that he was off his course and was approaching the end of Second Street, but that he was unable to stop his car due to his drunken condition and the careless and indifferent method of operation of the car.

If the conditions existing at the north terminus of Second Street are as the plaintiff's evidence would indicate the city was negligent in the manner in which it maintained the same. *Willis v. New Bern,* 191 N. C., 507, 132 S. E., 286, is directly in point. What is there said about the duty of a city in maintaining the terminus of a street in a reasonably safe condition might well be repeated here. In that case, *Brogden, J.,* speaking for the Court, in part says: "It is essential to the public safety that the terminus of a street shall be kept in as reasonably safe condition as any other portion thereof, for the manifest reason that it would be obviously futile to charge municipal authorities with the duty of keeping a street in a reasonably safe condition and yet permit it to terminate abruptly in an unsafe and dangerous manner. It would be a ruthless doctrine to allow a public highway to be improved for its entire length and thereby invite a traveler thereon, and, after being lulled into a sense of safety, to be suddenly put to death by an unguarded embankment, precipice, or other dangerous defect, when such defect was known or could have been discovered by the exercise of reasonable diligence, and when, of course, the traveler was using due care for his own safety." We adopt with approval the further statements of this distinguished former Associate Justice of this Court pertaining to the duty of a city in respect to the terminus of a street without further quotation therefrom. In support thereof, we refer to the cases he cites. See also *Michaux v. Rocky Mount,* 193 N. C., 550, 137 S. E., 663, and *Pickett v. R. R.,* 200 N. C., 750, 158 S. E., 398.

The court below, in its charge, fully instructed the jury upon the law and the evidence in respect to the plaintiff's contention that the negligence of the city was the sole proximate cause of his injury. It likewise fully instructed the jury upon the contention of the defendant that the drunken condition of the operator of the car and his failure to exercise due care and caution was the sole proximate cause of plaintiff's

injury, constituting an efficient intervening act of negligence which insulated the negligence on the part of the defendant and exculpated it from any liability for plaintiff's injuries.

The plaintiff, in apt time, excepted to the charge for that it does not comply with the mandatory provision of C. S., 564, in that the court failed to declare and explain in a plain and correct manner the law arising upon the evidence, in that the court did not declare and explain the law under the doctrine of concurrent negligence and apply such law to the facts in this case.

We are of the opinion that this exception must be sustained. There is evidence of negligence on the part of the defendant city and there is likewise evidence of negligence on the part of the driver, whose negligence is not attributable to the plaintiff. *Albritton v. Hill,* 190 N. C., 429, 130 S. E., 5. The question of proximate cause was for the jury.

Where, in this type of cases, there is evidence of negligence on the part of the defendant and likewise evidence of negligence of a third party, which negligence is not attributable to the plaintiff, the defendant is liable if its negligent act constituted one of two proximate causes of the injury. If the defendant's negligence contributed to plaintiff's injury as one of the proximate causes thereof the defendant is liable notwithstanding the negligence of the third party. *Albritton v. Hill, supra.* If the negligence of the owner and driver of the car was the sole and only proximate cause of plaintiff's injury the defendant would not be liable; for, in that event, the defendant's negligence would not have been one of the proximate causes of the plaintiff's injury. *Bagwell v. R. R.,* 167 N. C., 615, 83 S. E., 814; *Evans v. Construction Co.,* 194 N. C., 31, 138 S. E., 411. If, however, the negligence of the city concurring with the negligence of the third party constituted the proximate cause of plaintiff's injury it would be liable, because the defendant cannot be excused from liability unless the total causal negligence or proximate cause be attributable to another or others. When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, it is liable. *Evans v. Construction Co., supra; Wood v. Public Service Corporation,* 174 N. C., 697, and cases there cited; *Albritton v. Hill, supra; Hanes v. Utilities Co.,* 191 N. C., 13, 131 S. E., 402.

The law of concurrent negligence, as thus stated, is applicable to the conflicting evidence in this case. The plaintiff has a right to rely thereon, and it was the duty of the court to apply this doctrine of the law to the evidence and to declare and explain the law of concurrent negligence as it applied to the evidence without any special prayer. It is part of the law of the case.

The fact that the jury found by its verdict that the plaintiff was not injured by the negligence of the defendant city does not render the

failure of the court to charge on the doctrine of concurrent negligence immaterial or harmless. The jury was given the choice of finding either that the negligence of the city, if they found such existed, was the sole proximate cause of plaintiff's injury, or that the negligence of the driver, if such was established, was the sole proximate cause. The jury was not given an opportunity to consider the evidence under the law which permitted it to find that the negligence, if any, of the city was only one of the proximate causes of plaintiff's injury and that such negligence, concurring with that of the driver, constituted the efficient proximate cause of plaintiff's injury. The evidence in this case is such as entitles the plaintiff to have this view of the law stated and explained and applied to the evidence by the judge in the trial of his cause.

Affirmed as to defendant Railroad Company.

New trial as to defendant City of Wilmington.

W. J. CRAWFORD v. J. C. CRAWFORD.

(Filed 4 January, 1939.)

1. Estoppel § 3—Plaintiff held estopped by petition and judgment in partition from asserting parol trust against co-heir.

Plaintiff's undivided interest in the *locus in quo* was sold under execution, and defendant, one of the co-heirs of the property, purchased same at the sale. Plaintiff instituted this action to set up a parol trust in the land upon allegations that his co-heir agreed to purchase his interest at the sale and reconvey same to plaintiff upon the payment of the amount of the bid with interest. Subsequent to the alleged agreement, plaintiff joined with all the other heirs in a petition for partition of the tract containing the *locus in quo* and another tract also inherited by the parties, setting out the respective interest of the heirs in the lands, and partition was made in accordance therewith, and confirmation entered which declared that the partition should "be binding among and between the said petitioners, their heirs and assigns." In said proceedings plaintiff's interest was set out without claim to the interest sold under execution and without assertion of the parol trust sought to be established in this action. *Held:* The rights of plaintiff and defendant among themselves were brought directly in issue in the partition proceedings, and the petition and judgment therein estops plaintiff from asserting the alleged parol trust.

2. Partition § 10—

While partition does not create title nor affect the rights of persons not parties thereto, it determines the respective rights of the parties as among themselves, and as among themselves it operates as an estoppel against an assertion of title at variance with the judgment therein.

3. Trial § 22b—

In an action to establish a parol trust, defendant's evidence of the record in subsequent partition proceedings between the parties is properly considered upon defendant's motion to nonsuit on the ground of estoppel, since defendant's evidence is not in conflict with plaintiff's evidence, but is in explanation thereof.

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

APPEAL by defendant from *Sinclair, J.*, at July Civil Term, 1938, of ROBESON.

Civil action to engraft a parol trust upon deed absolute upon its face.

The uncontroverted facts are these: Plaintiff and defendant, brothers, are two of nine children of Mary E. Crawford and her husband, J. W. Crawford, both now deceased. Upon the death of Mary E. Crawford, intestate, in the year 1916, seized and possessed of two tracts of land in Robeson County, one containing 180 acres and the other 48.4 acres, the title descended to her children subject to estate by curtesy of her husband, J. W. Crawford, all of whom survived her.

Prior to October, 1922, plaintiff became indebted to J. W. Crawford, who obtained a judgment against him in the sum of $500, as alleged by plaintiff, upon which execution was issued, and plaintiff's undivided interest in the 180 acres tract was sold, the defendant becoming the purchaser thereof for $500, and on 6 November, 1922, Sheriff's deed therefor was executed and delivered to the defendant.

Following the death of J. W. Crawford, 14 July, 1936, and pursuant to written agreement of the nine children, including plaintiff, dated 30 October, 1936, to become parties to proceeding in Superior Court "for the purpose of dividing" said two tracts of land, and, under date 12 November, 1936, an *ex parte* petition for partition verified by defendant J. C. Crawford was filed. The petition alleges "that petitioners are tenants in common and are in possession of" the said two tracts of land; that the interests of the petitioners in said land are as follows: (a) J. C. Crawford owns a one-ninth undivided interest in the second tract containing 48.4 acres and a one-third undivided interest in the first tract containing 180 acres . . . (h) W. J. Crawford owns one-ninth undivided interest in the second tract containing 48.4 acres above described, but owns no interest in the first tract containing 180 acres, having conveyed his interest in said tract to J. C. Crawford . . ." By order dated 16 November, 1936, commissioners were appointed "to divide the lands described in said petition into nine (9) shares and to allot to each of the petitioners his or her share in severalty" in accordance with the interests set out in the petition. The commissioners divided and allotted the lands as directed—allotting to J. C. Crawford tract #3, containing 64.237 acres, and to W. J. Crawford tract #6, con-

taining 5.129 acres, being his interest in the 48.4 acres tract, report of which was filed 13 February, 1937. No objection having been filed, the report was confirmed. The decree of confirmation, dated 15 March, 1937, declares that it "shall be binding among and between the said petitioners, their heirs and assigns." The undisputed evidence shows that as soon as the land was divided, plaintiff took possession of that portion allotted to him.

Plaintiff alleges and offered evidence tending to show that defendant purchased plaintiff's undivided interest in the 180 acres tract at said execution sale in 1922 under parol agreement to purchase, pay for, take title to and hold same for plaintiff, and to reconvey same to plaintiff upon payment of the purchase price; and that, though he has paid to Guy Crawford, a brother, at direction of defendant, all the principal and part of the interest, and stands ready, able, and willing to pay such balance as may be justly due upon being informed by defendant the amount thereof, his demand for conveyance is refused by defendant.

Defendant denies the alleged agreement, denies that he authorized plaintiff to pay for him any amount to Guy Crawford, and offered evidence tending to support such denial.

Plaintiff further alleges: "That prior to the institution of this action, the heirs at law of the said Mary E. Crawford instituted a partition proceeding in the Superior Court of Robeson County, North Carolina, for the purpose of having the shares owned by each of the children of the said Mary E. Crawford, allotted to them, and in said partition proceeding the interest of the plaintiff, W. J. Crawford, in the lands above described, has been allotted to the defendant, John C. Crawford, and he is now holding the same as his property, which is a one-ninth interest in the whole tract of land above described. Reference to said partition proceeding and the allotment made by the commissioners is hereby referred to for a full and complete description of the interest of this plaintiff."

To this last allegation, defendant merely avers that only such lands as belonged to him were allotted to him in said proceeding.

On the trial below, motion of defendant for judgment as of nonsuit at the close of plaintiff's evidence was denied. Exception. Thereupon, in addition to oral testimony, defendant introduced the original record in the said partition proceeding. At the close of all the evidence, defendant renewed his motion for judgment as of nonsuit, which was overruled. Exception.

The case was submitted upon this issue: "Does the defendant hold title to a one-ninth interest in the Crawford home place described in the complaint, in trust for the use and benefit of the plaintiff, as alleged?"—to which the jury answered, "Yes."

From adverse judgment, defendant appeals to Supreme Court, and assigns error.

W. E. Lynch for plaintiff, appellee.
McLean & Stacy and Varser, McIntyre & Henry for defendant, appellant.

WINBORNE, J. The only question presented on this appeal: Is plaintiff estopped by the decree of the partition proceeding to claim interest in land in question under alleged parol agreement with defendant?

Appellant presents this question on exception to refusal of motions for judgment as of nonsuit, and on exceptive assignments to these portions of the charge of the court: (1) "There has been offered in evidence a partition proceeding. I instruct you, as a matter of law, that if you find as contended for by the plaintiff, that his brother John bought the land for him at his request, with the oral understanding, he would be permitted to redeem it by paying him the purchase price and interest, and he had paid the purchase price and interest, most of it, that then the fact of partition proceeding was afterwards, to which Jim was one of the parties, would not divest his equitable estate in the land and his right to have it reconveyed as a matter of law."

(2) "But if you find he held this land in trust for his brother under a parol contract, I charge you the fact there was a partition proceeding afterwards would not divest his brother Jim's equitable right in the land and the right to have it returned to him afterwards."

Defendant's exceptions are well taken. We are of opinion that, on the facts presented on this record, the plaintiff is estopped by the allegations in petition, and by decree in the partition proceedings, to now set up claim contrary to the interest therein set forth.

Plaintiff in his complaint here invites reference to said proceeding "for a full and complete description of the interest of this plaintiff" in the land in question. The allegation there is that J. C. Crawford owns "one-third undivided interest in the first tract containing 180 acres," and that W. J. Crawford "owns no interest" therein, "having conveyed his interest in said tract to J. C. Crawford." The decree of partition is to like effect. The commissioners acted in accordance therewith and their report is duly confirmed by the court.

The rights of plaintiff and defendant *inter sese* are brought directly in issue in the partition proceeding, and they are bound thereby. *Baugert v. Blades,* 117 N. C., 221, 23 S. E., 179; *McKimmon v. Caulk,* 170 N. C., 54, 86 S. E., 809.

Referring to definition of estoppel, *Pearson, J.,* in *Armfield v. Moore,* 44 N. C., 157, said: "The meaning of which is, that when a fact has

been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed; . . . in other words, his mouth is shut, and he shall not say, that is not true which he had before in a solemn manner asserted to be the truth." This is cited with approval in *Hardison v. Everett,* 192 N. C., 371, 135 S. E., 288; *Distributing Co. v. Carraway,* 196 N. C., 58, 144 S. E., 535; *Rand v. Gillette,* 199 N. C., 462, 154 S. E., 746.

In *Distributing Co. v. Carraway, supra, Stacy, C. J.,* speaking for the Court, said: "A claim made or position taken in a former action or judicial proceeding estops the party making such claim to take a conflicting position or to make an inconsistent claim in a subsequent action or judicial proceeding to the prejudice of his adversary, where the parties are the same and the same questions are involved."

The effect of judgments in partition proceedings has been the subject of discussion and for decision in many cases in this Court.

In *Stewart v. Mizell,* 43 N. C., 242, *Ruffin, C. J.,* said: "A judgment at law, in partition, is conclusive, in respect to the thing in which parties had an estate in common, and also in respect to the share to which each was entitled, and to the parcel allotted to each as his share in severalty." *Ivey v. McKinnon,* 84 N. C., 652; *Turpin v. Kelly,* 85 N. C., 399; *Grantham v. Kennedy,* 91 N. C., 148.

In *Buchanan v. Harrington,* 152 N. C., 333, 67 S. E., 747, *Manning, J.,* quoting from 30 Cyc. 310, says in part: " 'The truth is, that a judgment in partition is as conclusive as any other. It does not create or manufacture a title, nor divest the title of any one not actually or constructively a party to the suit; but it operates by way of estoppel; it prevents any of the parties from relitigating any of the issues presented for decision, and the decision of which necessarily entered into the judgment, and it divests all titles held by any of the parties at the institution of the suit.' " *Bank v. Leverette,* 187 N. C., 743, 123 S. E., 68.

In *McKimmon v. Caulk, supra, Allen, J.,* said: "The primary purpose of partition proceedings is to sever the unity of possession, but the parties may put the title in issue, and when they do so, and the title is adjudicated, the judgment is conclusive and binding." *Buchanan v. Harrington, supra; Wallace v. Phillips,* 195 N. C., 665, 143 S. E., 244.

While the partition proceeding is evidence introduced by 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, where it is said: "In considering the last motion, the defendant's evidence, unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with plaintiff's evidence, it may be used to

explain or make clear that which has been offered by plaintiff," citing *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769. See also *Hare v. Weil,* 213 N. C., 484, 196 S. E., 869; *Sellars v. Bank, ante,* 300, 199 S. E., 266.

There is error in the refusal to sustain motion for judgment as of nonsuit, and the judgment below is

Reversed.

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

J. G. LANDRETH AND WIFE, CARRIE LANDRETH, v. FRED MORRIS, ADMINISTRATOR OF THE ESTATE OF GEORGE W. LANDRETH.

(Filed 4 January, 1939.)

1. Evidence § 46: Executors and Administrators § 15d—

In an action to recover upon *quantum meruit* for personal services rendered deceased, it is competent for witnesses to testify from their knowledge of living conditions and observations of services of the character alleged to have been rendered deceased, as to the value of such services in the community.

2. Executors and Administrators § 15d—

The presumption that personal services rendered by a child to his parent are gratuitous arises from the relationship in a typical unbroken family, or one which has been reunited in the same relationships, and the presumption is necessarily affected by evidence that the respective moral and legal obligations of its members are different from that which gives rise to the rule.

3. Same—Evidence held insufficient to support presumption that services rendered by child to parent were gratuitous as matter of law.

The evidence, considered in the light most favorable to plaintiffs, tended to show that the male plaintiff had attained his majority, married, and moved away from the home place, that his father, the intestate, had sold practically all his personal effects and gone to live with a daughter and son-in-law; that thereafter plaintiffs moved back to the home place, bringing their furniture, stock, and farm implements; that some two weeks thereafter intestate moved back to the home place and lived with them the balance of his life; that the male plaintiff paid rent to intestate for the land in much the same manner as he would to a stranger; that during the latter part of his life intestate was in very poor health, and that plaintiffs gave him the constant and onerous care and attention required by his condition. *Held:* The evidence does not justify the application of the presumption that the services were rendered gratuitously as a matter of law, and the question was properly submitted to the jury.

4. Same—

The presumption that services rendered by a child to his parent are gratuitous does not apply to the relationship between a father-in-law and daughter-in-law.

APPEAL by defendant from *Hill, Special Judge,* at May Term, 1938, of FORSYTH. No error.

The plaintiffs sued the defendant, administrator of the estate of George W. Landreth, to recover for services alleged to have been rendered the deceased Landreth by them during the last years of his life. The plaintiffs are the son and daughter-in-law of the intestate, Landreth.

The evidence is to the effect that the plaintiffs were married in 1926, and had been living away from the Landreth home place. That place had been vacant for some time. Meanwhile, the father was living with a son-in-law, Frank Taylor, at another place. Taylor had been away from the George Landreth place for about three years before plaintiffs moved there.

The plaintiff Landreth moved to his father's old place with his wife and children in 1926; and in about two weeks thereafter the father moved in with them and lived there for about ten years, dying in the spring of 1937.

There were seven brothers and sisters besides plaintiff. None of them lived in the house with plaintiff and his father during the last five years of the latter's life, all living at a distance from eight to ten miles away, visiting him at infrequent intervals.

The plaintiff and his wife took care of the father, George Landreth, who, during the latter part of his life, was in very poor health, much of the time bedridden. During the latter part of his life he was unable to control his bodily functions and had to be cared for in much the same manner as an infant.

Mrs. Landreth testified that after their marriage she and her husband lived at her father's place a while, and later at the Hester place. Mr. George W. Landreth was not living at his home place when her husband and herself moved there in December, 1926, but did move there about two weeks afterwards; that she and her husband did farm work, raising tobacco, wheat, corn, vegetables of all kinds; cultivated sixty-three acres. In 1932, Mr. Landreth was taken sick and was under the care of a doctor. From 1936 until February, 1937, the intestate was practically helpless; during a large part of that time and prior thereto intestate was bedridden and required much attention.

Other witnesses testified to the bad health of the intestate and the necessity for special attention, and to the fact that he was unable to

perform any work; and to his physical condition, which required constant attention to keep intestate, his bed, and surroundings in a sanitary condition; and to the attention given by plaintiffs.

T. A. Martin testified that during the year 1934 he measured the tobacco crop about the first of August, 1934, and that the intestate told him about the "terms that him and Gurthie (plaintiff) had in regard to the tobacco crop. He said he got one-third of the tobacco." He saw the deceased in 1934, 1935, and 1936, when he measured the tobacco crop; that he heard this plaintiff say in the presence of the intestate that he (plaintiff) furnished the stock to cultivate the tobacco; that the customary allowance to a landowner in the cultivation of a crop in that community where he furnished only the land was one-third, and that the intestate, G. W. Landreth, told witness that he got one-third of the tobacco crop. Mr. George Landreth told witness that they "all ate the bread and the only part he taken was out of the tobacco."

There was further evidence that the Landreth place was vacant for a while until Gurthie Landreth, the plaintiff, moved there.

P. G. Landreth, a brother of intestate, testified that during the last three years of his brother's life his condition was very bad; that he was unable to do anything, and was in bed practically all the time. During this time witness visited his brother, found his room kept "nice and clean and sanitary"; that his brother said the kind of attention he was getting was good, extra good. The witness stated that decedent said to him: "'I am not going to be here very much longer,' and he says, 'I am lots of trouble to Carrie and Gurthie, but,' he says, 'I can't help it.' He says, 'I haven't got any will, I don't believe in making a will, but,' he says, 'when I am dead and gone I hope the children will all get together and do what's right for them, you understand, come to some agreement without going to the courts.' He said, 'I hope it won't go to the courts.' He said, 'I want them well paid, but,' he said, 'if it does go to the courthouse I am not worrying about that. I know 12 men will give them justice.'"

"During this conversation, Carrie came in there while we were talking, but I don't know whether she paid any attention to it or not."

There was other testimony as to the condition of the intestate, the service rendered him by the plaintiffs, and the value thereof.

The defendant offered testimony as to the financial condition of the intestate, amongst other things his deposits at the bank. There is evidence to the effect that interests on these deposits were paid to Gurthie Landreth, the plaintiff. Other witnesses for the defendant testified as to the condition of the intestate and the fact that his health was varied, at times bad and at times better, and that there were times "when he could get about and times probably he could not."

One witness testified to having heard Gurthie speak about having quit paying rent, the last time in the spring after his father died. Witness did not know whether or not he did pay rent for the last year to the administrator, but that plaintiff did say that he paid rent up to the time he spoke to him about it, had been paying rent out of the tobacco all the time, but not out of the grain.

There was further evidence to the effect that the intestate had sold all of his personal belongings except some trunks and a "half bed," bed covering, and a few other personal articles, upon moving away from the old place, and that these were moved into the old Landreth home place already occupied by plaintiffs about two weeks after they got there.

Overruling the defendant's motion for nonsuit, the trial judge submitted the evidence to the jury on appropriate issues, which were answered in favor of the plaintiffs; and from judgment upon the verdict of the jury, the defendant appealed.

Elledge & Wells for plaintiffs, appellees.
Ingle, Rucker & Ingle for defendant, appellant.

SEAWELL, J. Noting the exceptions to the evidence brought forward in the brief, we are of the opinion that the testimony of witnesses, with only the common experience derived from a familiarity with living conditions and observation of the services of the character alleged to have been performed for the intestate, was competent as to the value of those services in the community in which they lived. The defendant's exception to admission of this evidence is without merit.

The defendant relies upon the evidence tending to show the existence of family unity and the relation of the plaintiffs to the intestate as rebutting the presumption of an implied promise to pay for the services rendered by plaintiffs, and replacing it with the presumption that the services were gratuitously rendered. *Winkler v. Killian,* 141 N. C., 575, 579, 54 S. E., 540.

In the cited case it is said, quoting *Ruffin, J.,* in *Williams v. Barnes,* 14 N. C., 348: "It cannot be possible that the head of a harmonious household must drive each member off as he shall arrive at age, or be bound to pay him wages or for occasional services, unless he shows that it was agreed that he should not pay."

The opinion quotes further, with approval, from *Dodson v. McAdams,* 96 N. C., 149, 154: ". . . This rule is founded in large measure upon the supposition that the father clothes, feeds, educates, and supports the child, and that the latter labors and does appropriate service for the father and his family in return for such fatherly care and domestic comfort and advantage. The family relation and the nature of

the service rebut the ordinary presumption that arises when labor is done for a party at his request, express or implied, of a promise on his part to pay for it." Further analyzing *Winkler v. Killian, supra,* we find the following: "In *Young v. Herman,* 97 N. C., 280, it is held: '(1) When a child after arrival at full age continues to reside with and serve the parent, the presumption is that the service is gratuitous. (2) But this presumption may be rebutted by proof of facts and circumstances which show that such was not the intention of the parties, and raise a promise by the parent to pay as much as the labor of the child is reasonably worth.' Again, in *Callahan v. Wood,* 118 N. C., 752, quoted in this case, we find: 'We do not put our decision entirely on the kinship relation, *but also on the one-family relation established and maintained by the parties.*' "

The presumption arising out of the family unity and the relation of the members of the family to each other must necessarily yield to evidence indicating that the *modus vivendi* of the family is different from that which gives rise to the rule. The presumption is affected by the family vicissitudes and those changes in the composition and relationships of the group which are apt to come when it contains adult members who have their own separate responsibilities, both moral and legal. The "unity" of which the presumption speaks means more than living in the same house and eating off the same table. It signifies that reciprocity of service which might be expected of a typical unbroken family, or one which has been reunited in the same relationships.

In the case at bar the evidence, taken in its most favorable light for the plaintiffs, shows that young Landreth, one of the plaintiffs, had attained the age of twenty-one years, married, and moved away, entirely breaking his connection with the family, and assuming other paramount duties and obligations to his own separately established family. The intestate had sold all of his personal effects except a "half bed," some trunks, and a gun, and had gone to live with a son-in-law. Seven children lived at various distances, from eight to ten miles, and these visited him infrequently. Not a vestige of family organization remained. The plaintiff Gurthie Landreth and his wife moved to the old place, carrying their furniture, stock, and farm implements, under a rental agreement which intestate might have made with a stranger; and the evidence, although conflicting, will support the finding that the rents were paid up to the time of intestate's death. The facts of this case are not consistent with the philosophy which is said in *Winkler v. Killian, supra,* to underlie the presumption of gratuitous service.

As to the *feme* plaintiff, the daughter-in-law, we note the rule that in this State the fact of "family unity," of itself, is not sufficient to give rise to the presumption of gratuitous service; there must also be a cer-

tain relationship between the parties from which it may be supposed the services were referable to some moral or legal duty which the servitor recognizes as impelling. When the law goes outside the law for a rule of civil conduct based on those moral considerations which society imposes on its members as both commendable and compelling, it must be content with what it finds. It cannot be said that usage in this State recognizes the moral responsibility of a daughter-in-law, or a son-in-law, to such an extent as to raise a presumption of gratuitous service arising out of that relation. The presumption is adopted in *Callahan v. Wood, supra,* repudiated in *Dunn v. Currie,* 141 N. C., 123, 53 S. E., 533; ignored in *Henderson v. McLain,* 146 N. C., 329, 59 S. E., 873; and denied in *Nesbitt v. Donoho,* 198 N. C., 147, 150 S. E., 875. In that state of the law we see no reason to apply to the *feme* plaintiff, by whom the major part of the service was rendered, a rule which smacks more of the story of Ruth and Naomi than it does of the common law.

The presumption of gratuitous service is too precariously seated on the evidence in this case to justify its application as a matter of law. The circumstances under which the family relations were resumed, if at all, and what these relations were, and what significance might be attached to them, were matters for the jury.

We see no reason to disturb the verdict. Upon the record we find

No error.

EARL E. ROBERSON v. CAROLINA TAXI SERVICE, INC.; EDDIE BINE AND A. W. SIMON (ORIGINAL PARTIES DEFENDANT); AND PAUL BURTON (ADDITIONAL PARTY DEFENDANT).

(Filed 4 January, 1939.)

1. Automobiles § 16—Riding on running board held not contributory negligence as matter of law in action against driver of other car.

The evidence tended to show that plaintiff was riding on the left running board of an automobile, the running board being twelve or fourteen inches wide and plaintiff's body being ten inches thick, so that no part of plaintiff's body extended beyond the side of the running board; that a car coming from the opposite direction, driven with its left wheels over the center line of the highway, struck the car on which plaintiff was riding, which was being driven on its right side of the highway, causing the injury in suit, and that the accident occurred on a clear night in the absence of heavy traffic, where the center line of the highway was plainly visible. *Held:* Plaintiff's position on the running board does not conclusively establish contributory negligence as a matter of law, since, even conceding that such position constituted negligence, whether injury from the negligent operation of the other car, or in other like manner, should

have been foreseen and therefore whether such negligence was a proximate cause of the injury, is for the determination of the jury. The danger ordinarily to be apprehended from such position is that of falling or being thrown therefrom in the operation of the car by the driver thereof.

2. Same—Object of statute prohibiting loading of passenger vehicles beyond left fenders is the safety of other vehicles on the highway.

The statute prohibiting the extension of any part of the load of a passenger vehicle beyond the line of the fenders on the left side of such vehicle, Public Laws of 1937, ch. 407, sec. 80 (b), imposes a duty for the safety of other vehicles on the highway, and is not conclusive on the question of contributory negligence of a passenger riding on the running board, with none of his body extending beyond the line of the fenders, who is injured by the negligent operation of another vehicle.

3. Negligence § 9—

One of the elements of proximate cause is that the injury be one which, in the exercise of reasonable foresight, could have been anticipated as likely to occur under all the circumstances as they appeared and were known at the time.

APPEAL by defendants Carolina Taxi Service, Incorporated, and Eddie Bine, from *Johnston, J.*, at September Term, 1938, of FORSYTH. No error.

Action for damages for personal injury alleged to have been caused by the negligence of the defendants in the operation of a taxicab. The Carolina Taxi Service, Inc., was the owner of the taxicab which was then being operated for it by the defendant Bine.

The pertinent portions of the evidence offered by the plaintiff may be briefly summarized as follows:

On the occasion alleged, 31 May, 1937, about 1:30 a.m., plaintiff, a young man twenty-four years of age, was riding on the running board of an automobile being driven by Paul Burton on the highway just east of the city of Winston-Salem. The automobile was filled with young men and young women, friends of plaintiff. They were driving out to a filling station for barbecue and soft drinks, and plaintiff was invited to accompany them. There were eleven in the automobile, seven inside and two on each running board. The plaintiff was on the left running board immediately behind a young man named Criner. The glass in the automobile was lowered and plaintiff was holding on with his hands to the upright and the roof, "his arm around the post." The running board on which he was standing was twelve or fourteen inches wide. Plaintiff's body was about "ten inches thick at the thickest point." The automobile was being driven in its proper lane of traffic at the rate of thirty-five to forty miles per hour. The lights were burning, the night

was clear, and there was no other traffic. The highway was straight and the pavement eighteen feet wide, with the center line plainly marked.

At this point the automobile met defendants' taxicab being driven by defendant Bine, proceeding in the opposite direction, westwardly toward the city, at a speed of forty-five or fifty miles per hour. There were two lights on the taxicab, one headlight and one "fog light" on the left side of the windshield. Just before meeting the automobile the taxi was driven on its left side of the center of the highway, fifteen or eighteen inches over the center line, and it struck the left side of the automobile on which plaintiff was riding, and he and Criner were injured.

Defendants offered no evidence. At the close of the evidence judgment of nonsuit was entered as to defendants A. W. Simon and Paul Burton. The usual issues of negligence, contributory negligence and damage were submitted to the jury as to defendants Carolina Taxi Service, Inc., and Eddie Bine, and verdict returned in favor of plaintiff. From judgment on the verdict, defendants appealed.

John C. Wallace and H. H. Leake for plaintiff, appellee.
Fred S. Hutchins and H. Bryce Parker for defendants, appellants.

DEVIN, J. Appellants challenge the correctness of the result below chiefly on the ground that the plaintiff's evidence conclusively showed such contributory negligence on his part that their motion for judgment of nonsuit should have been allowed. They urge that by reason of the fact that plaintiff voluntarily took a position of danger on the running board of a moving automobile he was, as a matter of law, barred of recovery for an injury to which, it is contended, his own negligence thus proximately contributed.

This presents the question whether the mere fact that the plaintiff was standing on the running board of an automobile when he was injured by being struck by another motor vehicle negligently driven, conclusively establishes, as a matter of law, contributory negligence on his part, so as to entitle the defendants to a judgment of nonsuit on that ground.

A case in some respects similar was considered by this Court in *Graham v. Charlotte,* 186 N. C., 649, 120 S. E., 466. In that case the plaintiff rode on the side of a truck, with his feet hanging over the bed of the truck on which he was seated and extending beyond the line of the wheels six or eight inches. In this situation plaintiff was injured by his foot coming in contact with a post at entrance of a bridge in the city of Charlotte. There was a city ordinance which provided that "no person when riding shall allow any part of his body to protrude beyond the limits of any vehicle." It was held that the question of proximate cause was one

for the jury. It will be noted in the instant case the testimony showed that no part of the plaintiff's body extended beyond the side of the running board or the line of the fenders.

In *Kuykendall v. Coach Co.*, 196 N. C., 423, 145 S. E., 770, the plaintiff was riding on the left front fender with his feet on the bumper. The car struck a tar-kiln in the street and plaintiff was injured. The evidence showed that the driver was prevented from seeing the tar-kiln by reason of the position of the plaintiff. The Court said: "It was not negligence, as a matter of law, in plaintiff riding on the fender if he had express or implied permission, especially when the trailer or car was crowded." It was held, however, that the plaintiff having put himself in a place that obstructed the driver's view, this was the proximate cause of the injury, and nonsuit was proper.

In *Wagner v. R. R.*, 147 N. C., 315, 61 S. E., 171, the plaintiff, a passenger, was riding on the platform of the coach, and, on account of mistaken direction from a member of the train crew, stepped off, at night, when the train was over a trestle, and was injured. Plaintiff recovered in the court below, but a new trial was awarded for errors committed in the trial. However, in that case there was a statute (C. S., 3509) relieving a railroad from liability "in case any passenger shall be injured while on the platform of a car," and the applicability of the statute to the facts in that case was discussed in the opinion.

Attention in this case is called to the statute (Acts 1937, ch. 407, sec. 80 [b]) that "no passenger type vehicle shall be operated on any highway with a load carried thereon extending beyond the line of the fenders on the left side of such vehicle." But that statute obviously imposes a duty on the operator of the vehicle with respect to others, and in this case the evidence shows none of plaintiff's body extended beyond the line of the fenders.

The general rule as to the contributory negligence of one riding on the running board of an automobile is stated in Huddy Ency. Auto Law (9th Ed.), Vols. 5-6, section 139, as follows: "An occupant of a motor vehicle may be guilty of contributory negligence if he assumes a position of unnecessary danger. But in the absence of any prohibitory regulation, whether an occupant is negligent in riding in a certain position is a question for the jury."

"It is conceivable that one may take such a position on a running board of a moving automobile as to be reasonably safe from outside traffic, yet if he permits his body to extend over and beyond the outer edges of the running board and the fenders, he exposes himself to the added risk of being struck by other cars. In other words, the position may or may not be dangerous, and the question of negligence in each case must be determined according to the circumstances." *Fidelity Union Casualty Co., Inc., v. Carpenter,* 12 La. App., 321, 125 So., 504.

In *Hamilton v. Harrison,* 126 Kan., 188, the plaintiff was injured while riding on the running board of an automobile as result of collision with another automobile. It was said in that case: "Plaintiff could not be said to have been guilty of contributory negligence as a matter of law because he did not anticipate the likelihood of being knocked off the running board by some reckless driver, nor because he did not anticipate that he was more likely to be injured by riding in that position than if he had ridden elsewhere in the automobile. . . . Whether it was negligence for him to ride on the running board under the circumstances was properly left to the jury under an appropriate instruction." To the same effect is the holding in *Coyne v. Maniatty,* 235 Mass., 181, 126 N. E., 377; *Anderson v. Detroit Motorbus Co.,* 239 Mich., 390, 214 N. W., 172; *Elliott v. Coreil,* 158 Sou. (La.), 698.

In *Lettieri v. Blaisden,* 101 Pa. Super. Ct., 423, where a person riding on the running board of a moving automobile was injured by another car whose driver and owner was alleged to be negligent, it was held that although the injured person would have been guilty of contributory negligence as a matter of law if he had been injured by the negligence of the driver of the car on which he was riding, this rule did not apply when his injury was caused by a collision with another car, and the plaintiff was entitled to have the question of his alleged contributory negligence submitted to the jury.

In *Oakman v. Ogilvie,* 185 S. C., 118, 193 S. E., 920, it was said: "In a large number of cases, where the action was by one injured while riding on the running board of a motor vehicle, against one other than the owner or driver thereof, the question of the contributory negligence of such plaintiff has been held to be for the jury to determine under the facts therein appearing."

In *Bauer v. Calic,* 166 Md., 387, 171 Atl., 713, where the plaintiff was injured while riding on the running board of a truck, the court said: "We are of the opinion that the plaintiff was not guilty of contributory negligence as a matter of law, and the question was properly submitted to the jury for its determination."

We quote the following from the note in 104 A. L. R., at page 326: "In the majority of the cases included herein, where the action was by one injured while riding on the running board of a motor vehicle, against one other than the owner or driver thereof, the question of the contributory negligence of such plaintiff has been held to be for the jury to determine." Cases from Alabama, California, Georgia, Kentucky, Pennsylvania, Rhode Island, and Texas are cited in support of the text. See, also, *Vandell v. Sanders,* 85 N. H., 143, 155 Atl., 193, and cases collected in the annotation under this case in 80 A. L. R., 553.

If it be conceded that one who rides on the running board of an automobile is chargeable in law with voluntarily taking a position fraught with some degree of danger, the danger ordinarily to be apprehended, however, is that of falling or being thrown from the automobile while it is in motion, and it cannot be held as a matter of law that injury to a person so riding, by reason of being struck by another automobile negligently driven, was the natural and probable consequence of his position, which in the exercise of due care he should have foreseen. While the plaintiff was exposed to injury from external violence, negligently or willfully applied, as would be the case to some extent with anyone who travels, it does not necessarily follow that he could reasonably have anticipated injury in the manner, or in a similar manner, to that in which he was injured. Whether the plaintiff's position on the automobile was the proximate cause of his injury is a question for the determination of the jury. One of the elements of proximate cause applicable here is that the injury was one which by reasonable foresight the plaintiff could have anticipated as likely to occur, under all the circumstances as they appeared and were known at the time.

"It is generally held that in order to warrant a finding that negligence is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligence or wrongful act and that it ought to have been foreseen in the light of the attending circumstances." *R. R. v. Kellogg,* 94 U. S., 469.

"The law requires reasonable foresight and, when the result complained of is not reasonably foreseeable in the exercise of due care, the party whose conduct is under investigation is not answerable therefor." *Newell v. Darnell,* 209 N. C., 254, 183 S. E., 374.

"What is proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of circumstances of fact attending it." *R. R. v. Kellogg, supra.*

Considering the evidence in the light most favorable for the plaintiff, we conclude that appellants' motion for judgment of nonsuit was properly denied. The instructions of the trial court to the jury on the issues submitted were free from error. After a careful examination of appellants' other assignments of error, based upon exceptions noted to the rulings of the court during the trial, we find no substantial or prejudicial error, sufficient to warrant the setting aside of the verdict and judgment. In the trial we find

No error.

MARY W. KISTLER, TRUSTEE FOR MRS. JOHN N. WILSON; J. M. AND ANNIE PEGRAM; MRS. W. M. MILLS; MRS. MARGARET M. FERGUSON; F. C. ODELL, TRUSTEE FOR ELIZABETH BYRD; LAURA D. WORTH; LINA E. WORTH; ARCHIE S. WORTH; MRS. FRANK R. BROWN; T. D. DUPUY, TRUSTEE FOR MRS. J. A. TAYLOR; MRS. MARY R. GRIMSLEY; MARY B. EDWARDS, AND ALL OTHER CREDITORS, *v.* WILMINGTON DEVELOPMENT COMPANY; J. W. BRAWLEY AND WIFE, MARGARET L. BRAWLEY; F. C. BOYLES; GEORGE T. PENNY; J. E. LATHAM AND C. L. WEILL, RECEIVERS OF GEORGE T. PENNY; DAVID J. WHITE, EXECUTOR OF DAVID WHITE, DECEASED; L. M. HAM, JR., W. W. HAM, AND KATE W. HAM, EXECUTORS OF THE LAST WILL AND TESTAMENT OF L. M. HAM, DECEASED.

(Filed 4 January, 1939.)

1. Mortgages § 17—

Ordinarily, after default the holder of the indebtedness is entitled to possession of the property until the debt is paid or until foreclosure, subject to the duty of crediting the debt with a reasonable rental for the time he is in possession.

2. Receivers § 14—Held: Under order confirming agreement of parties, rents collected by mortgagee were not chargeable with receivership costs.

Pending the hearing of a petition of a mortgage creditor for segregation and application of rentals from the mortgaged property, the receivers and petitioner agreed that the net rents should be paid petitioner and that petitioner should not assert any claim against the estate for deficiency after foreclosure. Upon the hearing the court found that the mortgage debts were in default and that they greatly exceeded the value of the property, affirmed the agreement, dissolved the order restraining foreclosure, and directed that the net rentals, after payment of operating expenses, fire insurance, taxes, "and other items chargeable thereto," should be paid petitioner. Thereafter net rentals were paid to petitioner to a certain date. This hearing was had on motion of petitioner to require compliance with said order as to rentals from said date to date of foreclosure, the receivers claiming for the first time that such rentals were chargeable pro rata with costs of receivership. *Held:* The order confirming the agreement did not charge the rentals with any part of the costs of receivership, the term "and other items chargeable thereto" referring solely to items of operating costs, an order entered upon hearing of the motion that the rentals were chargeable pro rata with costs of receivership, either as construing the prior order as including such charge, or as superimposing an additional charge against the fund, is error, the prior order constituting *res judicata* as to the application of the fund.

APPEAL by Life Insurance Company of Virginia, petitioner and movant, from *Phillips, J.*, at August-September Term, 1938, of GUILFORD. Reversed.

Civil action in which receivers were appointed to liquidate the assets of the corporate defendant and in which the secured creditors were restrained from selling under foreclosure or otherwise interfering in any manner with the possession of the receivers.

The petitioner and movant is a secured creditor under two deeds of trust. Each series of notes held by it is in substantial arrears.

In the order appointing receivers the receivers were authorized to permit secured creditors to collect the rent from the property to the extent of overdue interest on the indebtedness. Subsequent to a petition by the movant, praying that the receivers be required to segregate rental income derived from the properties upon which they held security, the movant and the receivers entered into an agreement for the segregation of such rents.

The trustees in the deeds of trust on 8 April, 1937, filed a petition for the dissolution of the restraining order against foreclosure. On 28 April, 1937, the movant filed a supplemental petition renewing its motion to require the receivers to segregate the rents to be applied as set forth in its former petition and further praying for the dissolution of the restraining order against foreclosure.

The pending petitions and motions came on to be heard before Armstrong, J., 21 May, 1937. In its order the court found as a fact "that following the filing of the original petition of the Life Insurance Company of Virginia on January 8, 1934, the receivers in this cause and the said petitioner entered into an arrangement for the segregation of the rentals from said properties in the manner prayed for in the original petition, and that the receivers have paid all of the net income derived from said properties to the Life Insurance Company of Virginia up to September 4, 1936." The court further found that the amount due the Life Insurance Company of Virginia under one of the deeds of trust was, as of 15 April, 1937, $58,628.39, and that the amount due under the other trust deed as of said date was $54,467.23, and that the indebtedness under each of the deeds of trust greatly exceeded the value of the respective security and that the receivers have no equity in the property and that the same does not constitute an asset from which any benefits could be derived for the estate or the creditors thereof. The court further found that the Life Insurance Company of Virginia in consideration of the granting of its motion agreed that it would waive any claim against the estate of the Wilmington Development Company which might arise by reason of any deficiency in the event the security did not bring at public sale the full amount of its indebtedness. It now appears that the deficiency was more than $30,000.

The court thereupon entered an order: (1) Dissolving the order restraining foreclosure sale. (2) Ratifying, confirming and approving the

agreement between the movant and the receivers for the segregation of rents and directing the receivers "to pay over to the Life Insurance Company of Virginia all net rentals which they now have on hand, or may hereafter accumulate as long as said properties shall be in their charge and possession, after the payment of necessary operating expenses, fire insurance premiums, taxes on said real estate, and other items properly chargeable thereto." Determination of the respective rights of the parties under the chattel deed of trust executed as additional security was reserved without prejudice.

Pursuant to notice served on the receivers by the movant, motion by the Life Insurance Company of Virginia to require the receivers to comply with the order of Armstrong, J., came on to be heard before Phillips, J., at the August-September Term, 1938. Upon the hearing the court found certain facts, including the finding: (1) That the balance of net rentals from said properties which accumulated prior to 4 September, 1936, was paid to the movant; (2) that the net balance of rents accumulated since 4 September, 1936, is now held by the receiver and amounts to slightly more than $7,000; (3) that the amount due the movant on its indebtedness after applying the proceeds of the security, including rents, thereto is approximately $30,000; (4) that prior to and during the receivership the mortgaged realty was in the actual control and management of a real estate agency, which has been paid for its services and which has accounted for the amounts of rents collected, after charging costs of repairs, taxes, commissions, etc.; (5) that the receivers have been paid $6,400 for their services and their attorneys have been paid $600, all of which was paid from general funds, and no part of which has been charged specifically against the fund derived from rents; and (6) "That all claims of secured and unsecured creditors have been satisfied by compromise except as to this matter in controversy and that the total amount now in the hands of the receivers is approximately $10,000."

Thereupon, after finding that the expenses of receivership are items properly chargeable against the property and the rents collected thereon, the court entered an order denying the motion of the Life Insurance Company of Virginia and ordering the receivers, pursuant to the order of Armstrong, J., to charge against the net rents collected all of the items referred to in the order and the pro rata part of receivership expenses. The movant, Life Insurance Company of Virginia, excepted and appealed.

Hobgood & Ward and Eugene G. Shaw for the Life Insurance Company of Virginia, appellant.

Sapp & Sapp for Roger W. Harrison and T. D. Dupuy, Receivers of Wilmington Development Company, appellee.

BARNHILL, J. There is but one question presented on this appeal: Was there error in the order of Phillips, J., in directing the pro rata part of receivership expenses to be charged against the fund now in the hands of receivers derived from rents collected on the mortgaged property?

Ordinarily the owner of the indebtedness under a deed of trust which is in default is entitled to the possession of the mortgaged property until the debt is paid or until foreclosure, subject to the duty of crediting the indebtedness with a reasonable rental for the property during the time the mortgage creditor is in possession. In this instance the movant, mortgage creditor, was deprived of this right by an order of the court. It thereupon entered into an agreement with the receivers under the terms of which the net rentals after deducting rental agency commissions, cost of repairs, taxes, insurance and other expenses directly incident to the management and control of the property, were to be segregated and paid to the movant. This agreement was later ratified and approved in the order of Armstrong, J. That there was no real misunderstanding as to the exact terms of this agreement and the order of Armstrong, J., is apparent. The receivers, under their interpretation of the agreement and the order, paid over to the movant the net rentals accruing up to 4 September, 1936. They did not then deduct, or claim the right to deduct, any part of the cost of the receivership. They correctly interpreted the language "and other items properly chargeable thereto" in the order of Armstrong, J., to mean other items of expense similar to those enumerated.

A careful reading of the judgment entered by Phillips, J., leads us to the conclusion that he also placed this interpretation upon the order of Armstrong, J., rather than the interpretation that "and other items properly chargeable thereto," included a ratable part of the receivership expenses as now contended by the receivers. He ordered "that the receiver herein, pursuant to the order of Frank M. Armstrong, Judge presiding, signed the 21st day of May, 1937, charge against the net rents collected *all of the items referred to in the order* and the pro rata part of receivership expenses. *The items referred to in the order* included all items properly chargeable thereto and, as theretofore correctly interpreted by the parties, referred to items of expense in connection with the management and control of the property. The order of Phillips, J., simply superimposes an additional charge against this fund.

If, however, the court below, in ordering the pro rata part of receivership expenses to be charged against the special fund in the hands of receivers, proceeded upon the theory that expenses of receivership were embraced within the general clause "and other items properly chargeable thereto" in the order of Armstrong, J., the court was in error. We

are of the opinion that this general term in the former order relates back to and must be interpreted in connection with the specific items of expense enumerated in the order. It necessarily means other like expenses or other expenses incurred in the management of the property. Thus the parties themselves interpreted the order over a period of years.

Without debating whether the movant would be entitled in any event to the net rentals without deduction of any part of the receivership expenses, we are of the opinion that the order of Armstrong, J., based as it was upon the consideration that the movant would waive all claim for deficiency against the receivership estate, which order was entered without exception, is final and conclusive as to the matters now in controversy. The matter of the rights of the movant as to the rents derived from said property having been submitted to and adjudicated by Armstrong, J., no other Superior Court judge possessed the power and authority to review such order and to enlarge the number of items to be charged against the gross rent before the payment of any part thereof to the movant. When the cause came on to be heard before the court below it was *res judicata* except as to the motion of the movant to require the receivers to comply with the former order. The movant was entitled to an order as prayed requiring the receivers to comply with the order of Armstrong, J.

This cause is remanded to the end that an order may be entered requiring the receivers to forthwith pay to the movant the net amount of rents now in their hands without deduction of any part of the receivership expenses.

Reversed.

T. G. SESSIONS ET AL. v. COLUMBUS COUNTY.

(Filed 4 January, 1939.)

1. Taxation § 3b—Election on bond issue under Art. V, sec. 4, is required to be carried only by majority of voters voting therein.

When a proposed bond issue is in excess of two-thirds of the amount by which the issuing county reduced its outstanding indebtedness during the prior fiscal year, the question must be submitted to a vote and issuance approved by a majority of the voters who shall vote thereon regardless of the purpose of the bonds, unless the purpose is within the specific exceptions enumerated in Art. V, sec. 4.

2. Taxation § 4—

Bonds for expenses other than necessary expenses must be approved by a majority of the qualified voters of the taxing unit proposing to issue the bonds, and not merely a majority on the voters voting in the election. Art. VII, sec. 7.

3. Same—

A county may levy taxes for necessary expenses within the limitation fixed in Art. V, sec. 6, without a vote or special legislative approval.

4. Same: Taxation § 3a—

A county may levy taxes for necessary expenses in excess of the limitation fixed in Art. V, sec. 6, without a vote when the levy is also for a special purpose with the special approval of the Legislature.

5. Same—

A county may not levy a tax for a purpose other than a necessary expense, whether special or general, either within or in excess of the limitation fixed by Art. V, sec. 6, except by a vote of the people under special legislative authority. Art. VII, sec. 7.

6. Taxation § 4—Art. V, sec. 4, and Art. VII, sec. 7, are not in conflict, and in apposite instances both are applicable.

A proposed bond issue which is not only in excess of the amount by which the county reduced its outstanding indebtedness during the prior fiscal year, but also for a purpose other than a necessary expense, must be approved not only by the majority of voters voting in the election under the provisions of Art. V, sec. 4, but also by a majority of the qualified voters of the county under the provisions of Art. VII, sec. 7, there being no conflict between the constitutional provisions, and both being applicable.

7. Constitutional Law § 3—

Reconciliation between germane constitutional provisions is a postulate of constitutional as well as statutory construction.

8. Taxation § 4—

Finding and conclusion of trial court that hospital is not a necessary expense of defendant county affirmed on authority of *Palmer v. Haywood County*, 212 N. C., 284.

9. Taxation § 38a—

The requirement of the County Finance Act, ch. 81, sec. 20, Public Laws of 1927, that actions to restrain issuance of bonds by counties must be instituted within 30 days of the first publication of notice of the adoption of the bond resolution, does not apply when the proposed bond issue contravenes the Constitution.

10. Statutes § 5b—

Statutory requirements, in all events, must be made to square with the provisions of the organic law, or else disregarded.

APPEAL by defendant from *Cranmer, J.*, at November Term, 1938, of COLUMBUS.

Civil action to restrain the issuance of certain proposed bonds.

The facts are these:

1. On 23 August, 1938, the board of commissioners of Columbus County, at a regular public meeting, adopted the following resolution:

"RESOLUTION AUTHORIZING $55,000 COUNTY HOSPITAL BONDS.

"Whereas, it is deemed advisable to construct a County Hospital, and it is expected that the county will receive a grant from the Federal Emergency Administration of Public Works, for paying a portion of the costs thereof; and

"Whereas, it is necessary to issue bonds to pay the balance of such cost:

"Now, therefore, be it ordered by the Board of Commissioners of the County of Columbus:

"Section 1. That the County of Columbus issue its bonds pursuant to law of the State controlling said bond issue, in an amount not to exceed $55,000, for the purpose of constructing a County Hospital.

"Section 2. That a tax sufficient to pay the principal and interest of said bonds shall be annually levied and collected.

"Section 3. That a statement of the debt of the said county has been filed with the clerk and is open to public inspection.

"Section 4. That this resolution shall take effect when approved by the voters of the County of Columbus at an election as provided by law."

2. Pursuant to the above resolution, a special election was duly held in Columbus County on 26 September, 1938, and out of the total number of 14,900 registered and qualified voters eligible to vote therein, 2,831 cast their ballots in favor of the resolution, and 1,007 voted against it.

3. Thereafter, on 28 September, the board of commissioners declared that said resolution had been duly approved as provided in section 4 thereof and caused the results to be published in the *News Reporter* on the following day. They propose to issue the bonds in accordance with said resolution and for the purpose designated.

4. It is admitted that the amount of the proposed bonds is in excess of two-thirds of the amount by which the outstanding indebtedness of the county was reduced during the preceding fiscal year ending 30 June, 1938.

5. This suit was instituted 30 November to restrain the issuance of said proposed bonds.

From the evidence submitted, the court found (1) that the proposed hospital was not a necessary expense of the county within the meaning of Art. VII, sec. 7, of the Constitution, and (2) that the resolution submitted to the voters of the county in the special election was not carried by a majority of the qualified voters registered therein; whereupon the prayer of the plaintiff was granted and the proposed issuance of the bonds restrained.

The defendant appeals, assigning errors.

Joe W. Brown for plaintiff, appellee.
Greer & Greer for defendant, appellant.

STACY, C. J. It is conceded that as the amount of the proposed bonds is in excess of two-thirds of the amount by which the outstanding indebtedness of the county was reduced during the preceding fiscal year ending 30 June, 1938, the bonds in question may not be issued under Art. V, sec. 4, of the Constitution without a vote of the people and unless "approved by a majority of those who shall vote thereon." *Gill v. Charlotte,* 213 N. C., 160, 195 S. E., 368. It is further conceded that in the circumstances this approval was necessary regardless of the purpose for which the bonds were to be used, unless the purpose was: (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 fifty per centum of such taxes; (3) to supply a casual deficit; (4) to suppress riots or insurrections, or to repel invasions. *Hallyburton v. Board of Education,* 213 N. C., 9, 195 S. E., 21.

The defendant alleges, and the plaintiff admits, that the requirements of Art. V, sec. 4, of the Constitution have been met in the instant case. They join issue on whether Art. VII, sec. 7, which requires a favorable "vote of the majority of the qualified voters," except for necessary expenses, is also applicable. We think it is. *Hallyburton v. Board of Education, supra.*

It is provided by Art. VII, sec. 7, of the Constitution that "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit . . . except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

It is further provided in Art. V, sec. 6, of the Constitution that "The total of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars value of the property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly."

It is established by the authoritative decisions interpreting these sections:

1. That within the limitations fixed in 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. *Glenn v. Comrs.,* 201 N. C., 233, 159 S. E., 439.

2. That for a special purpose and with the special approval of the General Assembly the county commissioners of the several counties may exceed the limitations set out in Article V, section 6, without a vote of the people: Provided, the special purpose so approved by the General

Assembly is for a necessary expense of the county. *R. R. v. Lenoir County,* 200 N. C., 494, 157 S. E., 610.

3. That for a purpose other than a necessary expense, whether special or general, a tax may not be levied by the commissioners of any county, either within or in excess of the limitations fixed in Article V, section 6, except by a vote of the people under special legislative authority. *R. R. v. Comrs.,* 148 N. C., 220, 61 S. E., 690.

Summing up the decisions in *Henderson v. Wilmington,* 191 N. C., 269, 132 S. E., 25, *Adams, J.,* speaking for the Court, said: "(1) That for necessary expenses the municipal authorities may levy a tax up to the constitutional limitation without a vote of the people and without legislative permission; (2) that for necessary expenses they may exceed the constitutional limitation by legislative authority, without a vote of the people; (3) that for purposes other than necessary expenses a tax cannot be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority," citing *Herring v. Dixon,* 122 N. C., 420; *Tate v. Comrs., ibid.,* 812.

There is no conflict between Art. V, sec. 4, and Art. VII, sec. 7, of the Constitution. *Twining v. Wilmington, post,* 655. Both must stand and each be given its proper significance and meaning. Reconciliation is a postulate of constitutional as well as of statutory construction. *Parvin v. Comrs.,* 177 N. C., 508, 99 S. E., 432. This harmonization is clearly recognized in the County Finance Act, ch. 81, Public Laws 1927, sec. 22, where it is provided: "If a bond order provides for the issuance of bonds for a purpose other than the payment of necessary expenses of the county, the approval of the qualified voters of the county, as required by the Constitution of North Carolina, shall be necessary in order to make the order operative. If, however, the bonds are to be issued for necessary expenses, the affirmative vote of the majority of the voters voting on the bond order shall be sufficient to make it operative, in all cases where the order is required by this act to be submitted to the voters."

The finding and conclusion of the trial court that the hospital here proposed is not a necessary expense of the county within the meaning of Art. VII, sec. 7, of the Constitution is directly supported by what was said in *Palmer v. Haywood County,* 212 N. C., 284, 193 S. E., 668; *Burleson v. Spruce Pine,* 200 N. C., 30, 156 S. E., 241; *Nash v. Monroe,* 198 N. C., 306, 151 S. E., 634; and *Armstrong v. Comrs.,* 185 N. C., 405, 117 S. E., 388. The ruling must be affirmed on authority of these cases. It is admitted that the resolution did not receive a favorable vote of a majority of the qualified voters.

The recital in the resolution adopted by the commissioners is, that "it is deemed advisable to construct a County Hospital," not that it is neces-

sary or essential. It is further observed that the resolution is silent on whether it is to be approved by a majority of the votes cast or by a majority of the qualified voters. Doubtless a more intelligent expression would have been made, had the electorate known with certainty whether the vote was to be against the registration. *Hill v. Skinner,* 169 N. C., 405, 86 S. E., 351; *Rigsbee v. Durham,* 98 N. C., 81, 3 S. E., 749.

It is further contended by the defendant that the action should be dismissed under section 20 of the County Finance Act, ch. 81, Public Laws 1927, because not brought within thirty days after the first publication of notice of the adoption of the bond resolution. The first publication was on 29 September, and this action was instituted on 30 November following. *Jones v. Alamance County,* 212 N. C., 603, 194 S. E., 109; *Kirby v. Comrs. of Person,* 198 N. C., 440, 152 S. E., 165. This section has reference to orders adopted under valid authority of the County Finance Act, and does not extend to matters in conflict with the Constitution. Statutory requirements, in all events, must be made to square with the provisions of the organic law, or else disregarded. *Perry v. Comrs.,* 183 N. C., 387, 112 S. E., 6.

In the absence of any showing of reversible error, the judgment will be Affirmed.

STATE v. LIGE HALL AND LONNIE PRESNELL.

(Filed 4 January, 1939.)

1. Rape § 8—Evidence held sufficient to be submitted to the jury and justify verdict of carnal knowledge of female child under 16.

The evidence in this prosecution of defendants for rape and for carnally knowing a female child over twelve years of age and under sixteen years of age, who had never before had sexual intercourse with any person, C. S., 4209, *is held* sufficient, considered in the light most favorable to the State, to be submitted to the jury and sustain the verdict of guilty as to both defendants on the second count, notwithstanding discrepancies in the testimony of the principal witness, a deaf and dumb girl testifying through an interpreter, her testimony on the main features of the case being clear, direct and consistent.

2. Criminal Law §§ 57, 82—

A motion for new trial for misconduct or prejudice of the jury in a criminal case must be made in the court below at the proper time, and cannot be considered when made for the first time in the Supreme Court upon appeal.

3. Rape § 6: Indictment § 8—

A charge of rape and a charge of carnally knowing a female person between the ages of 12 and 16 years, C. S., 4209, may be properly joined

in separate counts in one indictment, C. S., 4622, and it is not error for the trial court to refuse to make the State elect between the counts.

4. Indictment § 22: Rape § 10—

The offenses of rape and carnal knowledge of a female between the ages of 12 and 16 are such that the jury may find defendants guilty of the lesser crime. C. S., 4640.

5. Rape §§ 1, 8: Criminal Law § 81c—

On charges of rape and carnal knowledge of a female between the ages of 12 and 16 years, the State is not required to point out evidence of consent in order to sustain a conviction of the lesser crime, and such conviction upon sufficient evidence, even in the absence of evidence of consent, is favorable to defendants and they may not complain.

6. Rape § 1: Criminal Law § 8b—

Two defendants may be properly convicted of carnal knowledge of a female child between the ages of 12 and 16 years who had never before had sexual intercourse with any other person upon evidence showing that the defendant who first had intercourse was aided and abetted by the other in the preparation for the crime.

APPEAL of defendants from *Pless, J.*, at August Term, 1938, of YANCEY. No error.

The defendants were tried under an indictment containing two counts —one for rape and one for carnally knowing a female child over twelve years of age and under sixteen years of age, who had never before had sexual intercourse with any person. C. S., 4209. The jury found them guilty on the second count.

The evidence pertinent to the exceptions brought up on the appeal may be summarized as follows:

Kathleen Robinson, a deaf and dumb girl of the age of fourteen years, residing in or near Burnsville, was walking along the highway leading to the center of town about dusk of a July evening. The defendant Hall, with a companion, Sam English, was riding in the same direction in Hall's automobile. The car stopped, English opened the door, and the girl got in. Later, English and the girl got out and Hall went off and returned with a different car. The three of them rode to a filling station, and leaving there the car slid into a ditch. English and the dumb girl stood by while the car was pulled out of the ditch. At another filling station Presnell joined them. They then drove to town, where English left the girl with the defendants.

The defendant Hall carried the girl to a cafe, where they had sandwiches. Here he was observed trying to put his arm around the girl. It was in evidence that Hall and Presnell had been drinking. Thereafter, they were seen at various places. About 10:30 o'clock, a witness testified, Hall came into his shop to get a check cashed and said he had a woman out in the car and was in a hurry.

Defendants testified that they drove to Presnell's grandfather's, where Presnell roomed; that they tried to get the girl to write her name to find out where she lived, but without success. Hall testified that he brought her back to Burnsville and put her out near the depot.

Kathleen Robinson, the dumb girl, through an interpreter, testified that Hall and Presnell carried her to a house in the country and to a room, took off all her clothing, both defendants participating, and placed her on a bed, where first the defendant Hall had full sexual intercourse with her, Presnell meantime retiring from the room, and when this act had been accomplished Presnell returned and had sexual intercourse with her. She stated that her hands were forcibly held behind her and that she tried to scream but was unable to do so. She testified she had not had sexual intercourse with any man before.

She was unable to identify clearly the house to which she was carried, although she made two attempts to do so, and pointed out at each place some similarity to the place to which she had been carried. Occupants of these houses testified that she had not been there.

Mrs. Mary Robinson, the mother of Kathleen, testified that the girl was fourteen years old and had been deaf and dumb all her life; that she had been going to the Deaf and Dumb School at Morganton for five years. She testified that her daughter left the house about 7:20 in the evening, making motions to show that she was going to town. She had been going to revival meetings for a week and had been accustomed to go to the meeting by herself, but the mother would go and come back with her. She came back at 2:10 in the morning. Witness saw a car at Clyde Bailey's store and saw her daughter turn the corner at the depot, walking pretty fast. When she got to the house she didn't see anybody at the car but heard some men talking and the car stood there about a minute before it left. When she asked her daughter where she had been the girl simply said: "Away and away." "She was dirty as could be and worried to death; seemed lifeless. She went to bed in a few minutes and got up the next morning, ate breakfast, and went back to bed. She made a statement sometime afterward." The girl showed the mother that it was a car that took her off, and what kind of a car it was; showed that she had drunk whiskey, Coca-Cola or something out of a bottle; told her how they treated her, about being put to bed and her clothes taken off, and about their having intercourse with her. She took her daughter to the doctor for an examination. Witness exhibited the clothing her daughter had on at the time she left the house and stated at that time the clothing had been laundered clean. Witness stated that her daughter had not been out of the house late at night before, only just long enough to go to church and come back.

There was considerable evidence with regard to the movements of Hall, Presnell, English, and the girl prior to leaving town.

The defendants admitted being in the car with the girl and carrying her to a place near the home of Presnell's grandfather, but denied abusing her in any way. Both stated that Hall returned from Presnell's grandfather's alone with the girl, and Hall stated that he had put her out at the depot some time around 11:30 o'clock.

Hall and Presnell are both married men.

Dr. W. B. Robertson testified that he had made a physical examination of the girl and gave it as his opinion that she had had sexual intercourse shortly prior to that time.

On the trial below counsel for the defendants, in apt time, moved the court to require the solicitor to make an election between the first and second count in the submission of the case to the jury, which the court declined to do, and defendants excepted.

There were exceptions to the admission and exclusion of evidence.

At the conclusion of the State's evidence, and at the conclusion of all the evidence, defendants moved for judgment as of nonsuit, which was overruled.

The defendants excepted to the charge to the jury as not complying with C. S., 564, in properly stating the evidence and the law applicable thereto. From the judgment upon the verdict, the defendants appealed.

Defendants in this Court moved for a new trial for misconduct of jurors.

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

Charles Hutchins, Briggs & Adkins, and Watson, Fouts & Watson for defendants, appellants.

SEAWELL, J. On the motion for nonsuit, we think the evidence was sufficient to go to the jury and fully justified the verdict. It is true that there were discrepancies in the testimony of the principal witness, such as came, no doubt, from her infirmity, but as to the main features of the case her testimony was clear, direct, and consistent; and looking upon it in its most favorable light to the State, the motion for nonsuit was properly overruled. *S. v. Eubanks,* 209 N. C., 758, 184 S. E., 839; *S. v. Ammons,* 204 N. C., 753, 169 S. E., 631.

A motion for new trial for misconduct or prejudice of the jury in a criminal case cannot be entertained in this Court when made here for the first time. That is a motion which must be made in the court below at the proper time, according to the practice of the court.

The charge of rape and that of carnally knowing a female person between the ages of twelve and sixteen years, under C. S., 4209; ch. 140, sec. 1, Public Laws of 1923, were properly joined in separate counts in

one indictment, since they are related in character and grew out of the same transaction; C. S., 4622; and are properly left to the jury under the general plea of not guilty, without any requirement on the part of the State to make an election. *S. v. Smith,* 201 N. C., 494, 497, 160 S. E., 577. Under the evidence in the case at bar the jury might, with propriety, find the defendants guilty on the second count.

These offenses are of such a nature as to come within the provisions of C. S., 4640, permitting the jury to find the defendants guilty of the lesser crime, if they do not deem the evidence sufficient to warrant a conviction on the first.

Again, in a case of this sort the State is not forced to undergo the embarrassment of inconsistency in pointing out evidence of consent to sustain the conviction for the lesser crime. Even if there were no evidence from which consent could be inferred, when the jury has convicted the defendants of the lesser offense, when they should have been convicted of a graver crime, while the verdict is plainly improper; *S. v. Smith, supra; S. v. Cox,* 201 N. C., 357, 361, 160 S. E., 538; the verdict is favorable to defendants and they cannot complain. *S. v. Walls,* 211 N. C., 487, 495, 191 S. E., 232; *S. v. Smith, supra; S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605; *S. v. Allen,* 186 N. C., 302, 119 S. E., 504.

This case is unique, perhaps, in the prosecution for offenses against this statute, since both defendants have been tried and convicted under the same charge of having carnal knowledge of a female child over twelve and under sixteen years of age, who has not previously had sexual intercourse with any person. C. S., 4209. This dumb girl unhesitatingly pointed out Hall as the first person who had intercourse with her and Presnell as the one who abused her immediately afterwards, both defendants having taken off her clothing and both defendants replacing it after their purpose was accomplished. Each defendant, under the evidence, aided and abetted the other in the crime committed, and both could be considered as actually present at the time of the commission, since both participated in the preparation for the crime. *S. v. Hart,* 186 N. C., 582, 120 S. E., 345.

An interesting question, unnecessary to the decision of this case, arises as to whether, under the evidence in this case, Presnell could plead the act of Hall, with consent of the girl, in his own defense against the charge of carnally knowing the girl, since he aided and abetted Hall in his crime and participated therein. *S. v. Porter,* 188 N. C., 804, 125 S. E., 615.

We have examined all the exceptions in the case and find no reversible error.

No error.

MRS. N. J. WATKINS v. THE CITY OF RALEIGH.

(Filed 4 January, 1939.)

1. Municipal Corporations § 14—Nonsuit held proper in this action against city to recover for injuries sustained in fall on sidewalk.

The evidence tended to show that plaintiff was injured when her foot caught in a hole in the finishing surface of the sidewalk, causing her to fall to her injury, that the accident occurred in the morning of a clear day, that there was sufficient space on either side of the hole for walking, and that although shadows were cast on the sidewalk by trees between the sidewalk and curb, she could have clearly seen the hole had she looked. *Held:* Defendant municipality's motion to nonsuit was properly granted, if not upon the question of negligence, then upon the ground of contributory negligence.

2. Same—

A municipality is not an insurer of the safety of its streets and sidewalks, and may not be held negligent for slight inequalities or depressions or other immaterial obstructions constituting mere inconvenience to travel.

3. Same—

A pedestrian is required to use due care for his own safety, the care required being commensurate with the danger or appearance thereof, and is guilty of contributory negligence in failing to see and avoid defects which are visible and obvious and discoverable in the exercise of due care.

CLARKSON, SCHENCK, and SEAWELL, JJ., dissent.

APPEAL by plaintiff from *Spears, J.*, at Second April Term, 1938, of WAKE.

Civil action to recover damages for injuries resulting from alleged actionable negligence.

Defendant denies material allegations of complaint, and pleads contributory negligence of plaintiff.

The evidence offered by plaintiff tends to show that: On the morning of 9 May, 1936, at about 10:30 o'clock, while walking in a westerly direction along the sidewalk on the north side of Hillsboro Street between Dawson and Harrington Streets in the city of Raleigh, North Carolina, she stepped in a hole in the concrete and fell and, in consequence, suffered personal injury. The hole is described as being approximately two and a half feet wide, three feet long and two inches or more deep, the edges of it being broken, jagged and sharp and the bottom consisting of slick, jagged and sharp rock. The hole was there in 1932, and has since been there continuously. Plaintiff had walked along the sidewalk in October, 1935; but, she testified, that at that time

she did not see the hole. There is a row of trees between the sidewalk and curbing of the street. At the time plaintiff fell the trees were in full foliage, casting shadows on the sidewalk.

Plaintiff testified, in part: "It was a perfectly fair day. . . . As I hit the ground I saw just a hole in front of me. . . . When I got up I looked to see what caused me to fall, and there was a hole in the cement sidewalk. I was walking west, my back toward the Capitol, just as carefully as I ever walked. I wasn't looking for nothing, as far as I thought everything was all right. I was walking in my usual careful gait. The sidewalk looked perfectly smooth all the way down as far as I could see, just like shadows across the oak trees, you could see the shadows across the sidewalk all along. . . . And when I did get up I looked back to see and I was in a great big hole. . . . The picture is a perfect representation at the very day I fell. . . . My foot stepped on something hard and slipped and my heel caught against something, one of those sharp rocks and it just throwed me right down. I never had any knowledge or intimation that there was any such place as that in the sidewalk prior to the time I was hurt. I never had heard of it."

On cross-examination plaintiff further testified: ". . . The hole was not all the way across the sidewalk. . . . I should say there is plenty of room for a person to pass on either side. I can't say where I was looking at the time, but I was walking in perfect confidence, never crossed my mind there was anything wrong. I did not look for a hole. I was just walking along. . . . There was nothing at all obstructing my view of the sidewalk, nothing in the world to keep me from seeing it. . . . The sidewalk was no darker than it is when the sun is shining and the leaves are along there, shady, . . . shadows all along from the leaves of the trees. . . . If I had been a distance from it and seen it I evidently would have thought it was shadows on the sidewalk. I didn't see it but after I got off from it I looked back and I couldn't tell no more than if it had been shadows. When I got down ready to cross Harrington Street I stopped and looked back and it looked just like a shadow then. I did not try to look at it anywhere nearer than Harrington Street except when I got up. . . . Q. How did the shadows look before you got there? A. I didn't notice them no more than just seeing the trees and the leaves on the trees and the sidewalk getting shady. . . . Q. If you looked as far as from here to that door could you have seen it? A. I certainly could. I could see it now. . . ."

N. J. Watkins, husband of plaintiff, testified: ". . . I have seen the place where she fell on the sidewalk. . . . The first time I saw it after she fell was the next morning. . . . The first time I saw it

was some time back in the winter prior to the time she fell. . . . There is nothing at all to keep you from seeing it in the daytime. . . . There is no obstruction anywhere and it is practically apparent in the middle of the sidewalk. There is a space on both sides of it between the hole and the edge of the sidewalk. . . ."

Mrs. M. C. Bryan, who lives at the Woman's Club on Hillsboro Street, near the point of the accident, testified: ". . . The appearance of the hole as you approach it is that there are shadows, of course, always on the sidewalk and it would appear to look like a shadow if you were not looking at it very closely because the sidewalk is covered with shadows all along there. . . . Q. If you are looking from a distance of ten feet away could you tell it was a hole or shadow? A. If you are looking at the sidewalk you could. If you were walking along not paying attention to the sidewalk you would probably step into it. . . . If you are attentive and looking where you are walking you could see it. Q. You can tell some distance away from it? A. You could if you looked down."

For purposes of illustration, plaintiff identified and introduced in evidence a picture as "a perfect representation of the hole into which I fell." There it plainly appears that the hole is merely a broken place in the finishing surface of the sidewalk. The outlines of the hole are plainly visible and its surface is darker than the surrounding surface.

Upon motion of defendant, judgment as of nonsuit was entered at the close of plaintiff's evidence. Plaintiff appeals therefrom to the Supreme Court, and assigns error.

Douglass & Douglass and R. L. McMillan for plaintiff, appellant.
Clem B. Holding for defendant, appellee.

WINBORNE, J. Taking the evidence shown on this record in the light most favorable to plaintiff, the judgment as of nonsuit was properly granted.

As in *Houston v. Monroe,* 213 N. C., 788, 197 S. E., 571, we hold that demurrer to the evidence was sustainable "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. A city is not an insurer of the safety of its streets and sidewalks. *Fitzgerald v. Concord,* 140 N. C., 110, 52 S. E., 309; *Oliver v. Raleigh,* 212 N. C., 465, 193 S. E., 853; *Ferguson v. Asheville,* 213 N. C., 569, 197 S. E., 146.

The same principle upon which *Houston v. Monroe, supra,* rests is applicable here, and 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."

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. *Russell v. Monroe,* 116 N. C., 721, 21 S. E., 550; *Rollins v. Winston-Salem,* 176 N. C., 411, 97 S. E., 211; *Ferguson v. Asheville, supra.* He is guilty of contributory negligence if by reason of his failure to exercise such care he fails to discover and avoid a defect which is visible and obvious. *Pinnix v. Durham,* 130 N. C., 360, 41 S. E., 932; *Ferguson v. Asheville, supra.*

In the instant case the accident happened in the broad daylight of a "perfectly fair day." At the time and place there was nothing to obscure plaintiff's view of the sidewalk. The sun, shining through the leaves of the trees, was casting shadows on the sidewalk. Plaintiff did not notice the shadows any more than seeing the trees, and the sidewalk getting shady. All the evidence shows that if she had looked she could have seen it. She doesn't know where she was looking at the time. There was sufficient space on each side of the hole for walking.

Under all the circumstances, however unfortunate and regrettable the occurrence, the city is not liable.

The judgment below is

Affirmed.

CLARKSON, SCHENCK, and SEAWELL, JJ., dissent.

J. C. FULLER v. VIRGINIA & CAROLINA SOUTHERN RAILROAD COMPANY.

(Filed 4 January, 1939.)

1. Carriers § 10—Evidence held sufficient to overrule nonsuit in action to recover for injury to mules in transit.

Evidence tending to show that mules were delivered to a carrier in sound, healthy condition from sanitary pens and lots free from disease, that there was undue delay in feeding and watering the animals in transit, that the carrier did not give the animals the period of rest which it contracted to allow them, and that the animals arrived in a diseased condition, with expert testimony that the disease from which they were suffering was such as might be caused, or caused to develop actively by treatment similar to that given the animals, is sufficient to shift the burden of going forward with the evidence to defendant carrier and take the case to the jury, and judgment of nonsuit entered at the close of plaintiff's evidence is error.

2. Same—Presumption of negligence from delivery of goods in damaged condition applies to livestock with modification.

The general rule that delivery of goods by a carrier in a damaged condition raises a rebuttable presumption of negligence on the part of the carrier is applicable to shipments of livestock with the modification that the carrier is not presumptively liable for injuries growing out of the natural propensities and innate viciousness of the animals in the absence of proof of negligence, and such presumption, being sufficient in itself to take the case to the jury, shifts the burden of going forward with the evidence upon the carrier.

3. Evidence § 6—

The shifting of the burden of going forward with the evidence upon plaintiff's making out a *prima facie* case is not a shift in the burden of proof, but merely subjects defendant to the risk of nonpersuasion.

APPEAL by plaintiff from *Spears, J.*, at February Term, 1938, of ROBESON. Reversed.

This is a civil action to recover damages for the death of ten mules, and disease to others, alleged to have been caused by the negligence of the carrier. The action was brought under the Carmack Act (U. S. C. A., Tit. 49, sec. 20, par. 11), making the delivering carrier answerable for damages to property in transit. It was admitted that the mules were shipped from National Stockyards, Illinois, to Atlanta for feeding and watering, then were reloaded and shipped to Lumberton, North Carolina. There were two carloads of twenty-four mules each.

Plaintiff's evidence tended to show that all the mules were free from disease and in good condition when delivered to the railroad at National Stockyards, Illinois. It was testified as to the condition of the mules

in both shipments: "Those 48 mules . . . were all in sound and good health and in fine shape. You would not see any two carloads of mules that would leave St. Louis in better condition when they left. . . . Health and soundness was absolutely good without any defects or anything in them." The barns and pens, from which they were shipped about the middle of August, 1936, were in good sanitary condition and there was no sickness among the animals there at the time or immediately preceding the time of shipment. "There was no disease of any kind prevalent at the horse and mule barns at that time, our barns were in fine shape. The health condition at that time was good. We had no sick mules of any kind at that time. . . ." The assistant state verterinarian for Illinois testified: "During the period from the first of July, 1936, to the first of October, 1936, including the month of August, we had no contagious or infectious diseases at the barns at the stockyards. I saw these 48 mules in the barns of Mr. Sparks there before they were shipped, I just saw them in the pens and as far as I could tell, they all looked in good physical condition." The mules were bought individually at National Stockyards, but were shipped in the two cars over the same route, were unloaded for food and water at the same point, and had the same disease at the end of the journey. Plaintiff's barns, where the mules were finally unloaded, were in excellent sanitary condition, and the evidence tended to show that no disease was contracted there. Plaintiff testified: "Before these mules arrived we scrubbed out the troughs, swept down the walls, disinfected with cresodip. We did that before we got in either carload. We scrubbed the troughs out and turned them over and left them for a few days to dry, and before I put water in them we disinfected them and washed them out with clear water after they dried. We did that before we give them water out of the trough." There was much evidence of a similar character as to the care given these mules upon arrival. The mules were sick when they arrived and the condition grew worse. The mules in the first carload appeared "droopy and tired," "jaded," and "didn't eat" when they arrived. Next morning they were in "bad condition," "looked sick," and the following morning two died. They were very sick when the veterinarian arrived that day. On the same day the second car arrived; in that car one was already sick and another nervous and wild. The sick one died that night and the nervous one two days later. Ten mules died within two days after the arrival of the second car, three from the first carload and seven from the second. Although a waiver of feeding and watering for 36 hours, as permitted by law, was signed by plaintiff, the first carload had no food or water for 43½ hours before reaching Atlanta; also, carriers disregarded the agreement to allow the mules an extra 24 hours for rest, feed, and watering at Atlanta. The

disease affecting the mules was hemorrhagic septicaemia, or generalized blood poisoning, with secondary enteritis, or inflammation of the small intestines. Septicaemia, it appears, may be contracted from infected quarters, feed racks and watering troughs, and long periods without food and water may cause an active case to develop. A qualified expert testified: "If the germ of septicaemia is in the animal and that animal is transported from St. Louis to Lumberton, say twelve to fifteen hundred miles in crowded cars, twenty-four to the car, and necessarily requiring that they remain on the cars for a considerable distance, and if this lowers the resistance of the animal and the germ is in him, that would cause the germ to become active. In this particular type we were dealing with a very virulent type, like a mass infection." Among the causes of enteritis given were "changes of feed, lowered resistance and changes of feed, improper feeding, that is, omissions of feed and water. . . ."

At the close of plaintiff's evidence motion for judgment of nonsuit was made and allowed. From judgment dismissing the action, plaintiff appealed.

D. H. Fuller and McKinnon, Nance & Seawell for plaintiff.
McLean & Stacy for defendant.

DEVIN, J. A single determinative question is presented: Was the evidence offered sufficient to take the case to the jury as to the negligence of the railroad in the transportation of the mules in question? This question must be answered in the affirmative.

The pertinent evidence is summarized briefly above. Evidence that the mules were delivered to the carrier in sound, healthy condition from sanitary pens and from lots which were free from disease, that there was undue delay in feeding and watering the animals in transit, that the carrier did not give the animals the period of rest which it contracted to allow them, and that the animals arrived in a diseased condition, such a disease being one which may be caused, or cause to develop actively, by treatment similar to that given the animals in question, is sufficient to shift—not the burden of proof—but the burden of going forward (the risk of nonpersuasion) to the defendant. In *Edgerton v. R. R.*, 203 N. C., 281, 283, and in *Farming Co. v. R. R.*, 189 N. C., 63, 67, the following charge was approved: "The rule being that when stock in a damaged condition, not caused by natural causes, or by the innate or vicious nature of the stock, is found in the possession of the carrier, the presumption is that the carrier in whose possession the stock is found in such damaged condition, and not due to the natural causes or innate viciousness of the stock, is responsible for the injury sustained. That

is, not the burden is shifted from plaintiff to the defendant, but the finding of the stock in the damaged condition, not due to natural causes or innate viciousness of the animals, if found in the possession of the carrier, is enough evidence to go to the jury, from which evidence the jury may or may not find by the greater weight of evidence that the damage to the stock was caused by the negligence of the carrier in whose possession it is found." To the same effect see *Hinkle v. R. R.,* 126 N. C., 932. We think this rule is equally applicable to stock delivered in a sickened and diseased condition, where the evidence tends to show that the treatment accorded the animals is such, in the opinion of experts, to produce the diseased condition actually found in the animals. *Farming Co. v. R. R., supra.* Plaintiff's evidence in the instant case goes further than the requirements of this rule. Here a qualified expert, upon a hypothetical question, gave it as his opinion that the mules contracted the disease after leaving St. Louis while en route to Lumberton in the custody and possession of the carriers. In *Farming Co. v. R. R., supra,* 67, where the facts were similar to those in the instant case, the following charge was approved; "The railroad companies are responsible only for such sickness, whether resulting in death or not, as was due to the carelessness and negligence of the defendants or one of them, or unless such negligence materially contributed thereto." There, it was likewise pointed out, when there is no dispute as to the contract of carriage, receipt of the stock, and death of the stock, "the loss is presumed to have been attributable to the defendant's negligence. *Everett v. R. R.,* 138 N. C., 68; *Hosiery Co. v. Express Co.,* 184 N. C., 478." *Farming Co. v. R. R., supra,* at p. 67, quoting from *Livestock Co. v. Davis,* 188 N. C., at p. 221. As stated by Elliott (Railroads, 3rd Ed., Vol. 4, p. 832), ". . . the prevailing rule . . . is that when the animals are shown to have been delivered to the carrier in good condition, and to have been lost or injured on the way, the burden of proof then rests upon the carrier to show that the loss or injury was not caused by its own negligence." The English rule, as stated by Hutchinson (Carriers, 3rd Ed., Vol. 1, p. 347), is that "the carriers of live animals incur the responsibilities of common carriers (insurer) as to such freight; but that, at the same time, where an injury has happened to them, it is competent for the carrier to show that it occurred through the 'proper vice' of the animal and not from any negligence on his part." The same author adds, "And in this country, with greater unanimity, the duty and liability of the common carrier as to such freight have been defined with exactly the same limitations."

The general rule as to goods damaged in transit is that such damage is presumed to have resulted from the carrier's negligence. *Holmes v. R. R.,* 186 N. C., 58; *Peele & Copeland v. R. R.,* 149 N. C., 390;

Everett v. R. R., 138 N. C., 68; *Parker v. R. R.*, 133 N. C., 335; *Hosiery Co. v. R. R.*, 131 N. C., 238; *Mitchell v. R. R.*, 124 N. C., 236. As to the carriage of livestock, this rule does not disappear. As to livestock this rebuttable presumption of negligence has merely been modified in keeping with the character and nature of animate goods and the peculiar dangers to which such freight is subjected. The carrier is not presumptively liable for injuries growing out of the natural propensities and innate viciousness of the animals, in the absence of proof of negligence, but, with that exception borne in mind, the presumption of negligence arising from delivery in a damaged condition is equally applicable to shipments of animals and, being sufficient in itself to take the case to the jury, casts the burden of going forward with evidence (the risk of nonpersuasion) upon the defendant carrier. *Osborne v. R. R.*, 175 N. C., 594; *Teeter v. Express Co.*, 172 N. C., 616; *Schloss v. R. R.*, 171 N. C., 350; *Mewborn v. R. R.*, 170 N. C., 205; *Holton v. R. R.*, 165 N. C., 155; *Jones v. R. R.*, 148 N. C., 580; *C. & O. R. R. v. Mfg. Co.*, 270 U. S., 416. As to the difference between burden of proof and burden of going forward, see *Speas v. Bank*, 188 N. C., 528. Aided as he was by this rule, plaintiff's evidence was sufficient to require the submission of the case to the jury. In the granting of the motion for judgment as of nonsuit there was error.

Reversed.

STATE v. HOMER MYERS.

(Filed 4 January, 1939.)

1. Homicide §§ 2, 25—

Evidence that one defendant killed deceased while attempting to rob him, and that during the commission of the crime appealing defendant waited in an automobile a short distance off to speed his codefendant away when he had completed the robbery, is sufficient to overrule appealing defendant's motion to nonsuit in a prosecution for murder.

2. Criminal Law § 48b: Constitutional Law § 28—Evidence admitted against one defendant only may not be considered against the other without giving him opportunity to cross-examine witnesses in regard thereto.

Evidence of acts and declarations of one defendant was admitted in evidence against him alone, the court instructing the jury that it should not be considered against the appealing defendant. Later evidence tending to establish a conspiracy between defendants was introduced. The court gave no intimation it would change its instructions as to the restricted evidence until the charge, when the court instructed the jury that evidence of acts and declarations of his codefendant prior to the commission of the crime might be considered against appealing defendant.

Held: Appealing defendant was entitled to be informed that the evidence restricted in its admission would be admitted against him in time to give him opportunity to cross-examine the witnesses in regard thereto and conduct his defense in accord therewith, and he is entitled to a new trial for the denial of this right.

APPEAL by the defendant from *Bivens, J.*, at June Term, 1938, of GUILFORD. New trial.

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

Geo. A. Younce and Adam Younce for defendant, appellant.

SCHENCK, J. The appellant, Homer Myers, was tried with a codefendant, Jerry Clark, upon a bill of indictment charging them with the murder of one O. D. (Dock) Bovender. The jury returned a verdict of guilty of murder in the second degree as to each of the defendants. From judgment of imprisonment in Central Prison, the defendant Myers appealed, assigning errors. The codefendant Clark did not perfect an appeal.

The State offered evidence tending to show that the fatal shot that killed the deceased was fired from a pistol in the hands of Clark while on the porch of the residence of the deceased, in an attempt to rob the deceased in the early morning of Sunday, 5 June, 1938; and that during the struggle between the deceased and Clark the appellant Myers was in an automobile a short distance off waiting to speed Clark away when he had completed the robbery.

The State offered, as a witness, Mrs. Bovender, wife of the deceased, who testified that in the late afternoon of Saturday, 4 June, 1938, preceding the early morning of the Sunday on which her husband was shot, Clark, the codefendant of the appellant, came to the home of her and the deceased on Walker Avenue and inquired as to whether the deceased lived there, stating that he had some business with him. The State also offered several witnesses who lived on Walker Avenue, who testified that the codefendant Clark, on the Saturday afternoon preceding the morning of the shooting, came to their homes and inquired where Bovender, the deceased, lived.

As to all of this testimony, as it was given, the court entered the instruction: Gentlemen of the jury, do not consider this evidence against the defendant Myers, but consider it only against the defendant Clark.

The State also offered evidence tending to show that on Wednesday evening preceding the shooting on Sunday morning the codefendant Clark phoned "a girl friend" in Winston-Salem, and told her to come to Greensboro on the bus, and that Clark met her on the nine o'clock bus

in Greensboro; and further, on Saturday evening preceding the morning of the shooting, Clark phoned the "girl friend" that he would not come to Winston-Salem that night but would come the following Sunday.

The court likewise instructed the jury not to consider this evidence against the appellant Myers and to consider it only against the codefendant Clark.

Subsequently, the State offered as a witness one Jean Helms, who testified that she lived in Winston-Salem and that she received the phone messages from Clark on Wednesday and Saturday preceding the night of the shooting on the morning of Sunday, 5 June, and that she came to Greensboro on the bus on the Wednesday night and returned Friday morning. This witness further testified that some time before this she had heard the appellant Myers and codefendant Clark discussing robbing Bovender.

When the State had produced its evidence and rested its case, the defendants moved for a judgment of nonsuit, the motion was refused and defendants excepted, and announced that they would introduce no evidence and again moved for judgment of nonsuit, which motion was refused and defendants excepted. C. S., 4643. In the refusal to grant the motions for judgment of nonsuit we see no error.

The court gave no intimation that it would change its instructions as to certain evidence being competent as to codefendant Clark and not competent as to appellant Myers, and the original rulings and instructions remain in the record.

The argument followed the close of the evidence, and the charge followed the argument, wherein the court instructed the jury, *inter alia*, "During the course and progress of this trial, gentlemen of the jury, certain evidence was offered in your hearing to which objection was made by counsel for defendants in this case and the court ruled upon those objections and instructed you how to consider the evidence. The court again instructs you, gentlemen of the jury, that any act or declaration of either of these defendants made before the hour of death—strike that out—shooting of Mr. Bovender, if the State has satisfied you beyond a reasonable doubt that a conspiracy existed, are competent against each of those defendants but no act or declaration by either of these defendants after the execution of the common design, if the State has satisfied you beyond a reasonable doubt that they had a common design in robbing Mr. Bovender and he lost his life thereby, any act or declaration thereafter by either of the defendants would not be competent against the other defendant, but would only be competent against the defendant who did the act or made the declaration."

The quoted portion of the charge is made the basis of an exceptive assignment of error, and we are constrained to hold that such assignment should be sustained.

When the court instructed the jury not to consider certain evidence against the appellant, he was foreclosed from cross-examining the witnesses relative to the subject matter thereof, and may likewise have been influenced thereby to refrain from offering evidence in rebuttal thereof.

When the evidence tending to establish a conspiracy had been offered and thereby had rendered the theretofore incompetent evidence competent against the appellant, he was then entitled to have been informed that such evidence would be admitted against him, so as to enable him to conduct his defense in accord therewith. This could not be done after the charge had been delivered to the jury wherein the first intimation of a change in the ruling on the competency of the evidence involved was given. *S. v. Love,* 187 N. C., 32.

For the error assigned there must be a

New trial.

W. G. TWINING, 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 COSTS THEREOF, v. CITY OF WILMINGTON, NORTH CAROLINA.

(Filed 4 January, 1939.)

1. Taxation § 4—

Bonds for the purpose of building and equipping a municipal auditorium are not for a necessary municipal expense.

2. Same—

The finding of the court below that in this case bonds for the purpose of acquiring lands and establishing public parks and playgrounds, and equipping same, are not for a necessary municipal expense, is approved.

3. Same—

Bonds for the purpose of erecting and equipping a municipal building to be used in part as a public library, are not for a necessary municipal expense.

4. Same—

The finding of the trial court that in this case bonds for the purpose of acquiring lands and erecting suitable buildings thereon for recreation and athletic purposes, are not for a necessary municipal expense, is approved.

5. Same—

Bonds for other than necessary purposes must be approved by a majority of the qualified voters of the taxing unit. Art. VII, sec. 7.

6. Taxation § 3b—

Bonds in excess of two-thirds of the amount by which the taxing unit decreased its outstanding debt during the prior fiscal year may be issued upon the approval of a majority of those voting, Art. V, sec. 4., unless for other than a necessary purpose.

7. Taxation §§ 3b, 4—

The people of the State, in their Constitution, may place what restrictions they please upon the creation of public debt, and in doing so, to distinguish between debts different in kind and necessity.

8. Same—Art. VII, sec. 7, and Art. V, sec. 4, are not in conflict, and in apposite instances both are applicable.

Art. VII, sec. 7, and Art. V, sec. 4, of the State Constitution are not in conflict, and bonds for other than necessary expenses which are also in excess of two-thirds of the amount by which the taxing unit decreased its outstanding indebtedness during the prior fiscal year, must be approved not only by a majority of those voting in the election under the provisions of Art. V, sec. 4, but also by a majority of the qualified voters of the taxing unit under the requirement of Art. VII, sec. 7, although but one referendum is required.

9. Taxation § 4—

When municipal bonds for purposes other than the payment of necessary municipal expenses are proposed to be issued under the Municipal Finance Act, it is required by C. S., 2948, that they be approved by a majority of the qualified voters.

APPEAL of defendant from *Cranmer, J.*, at November Term, 1938, of NEW HANOVER. Affirmed.

The city of Wilmington, planning to issue bonds for certain projects, adopted four several ordinances, under the Municipal Finance Act of 1917, relating respectively to the building and equipping of a Municipal Auditorium; the acquisition of lands and establishing of public parks and playgrounds, and equipping the same; the erection and equipping of a Municipal Building to be used in part as a public library; the acquisition of lands and erection thereon of suitable buildings for recreational and athletic purposes. The aggregate amount of bonds was not to exceed $135,000, allocated in detail to the projects respectively; and as to each resolution the bond issue provided the levying of a tax to pay the principal and interest.

Pursuant to the requirements of the act, a special bond election was held on Tuesday, 30 August, 1938, at which time each of the projects above named were approved by a majority of those voting but not by a majority of the qualified voters, as provided in Article VII, section 7, of the Constitution of North Carolina, and by section 2948 of the Consolidated Statutes (Michie's Code of 1935).

The plaintiff, a taxpayer of the city of Wilmington, brought this action in his own behalf and in behalf of other taxpayers similarly

situated, to enjoin further proceedings, and especially the issuing of the contemplated bonds, upon the ground that such issue was not approved by the majority of the qualified voters of the city.

The city of Wilmington had not retired a sufficient amount of its indebtedness during the preceding fiscal year to permit the bond issue, under the provisions of Article V, section 4, of the Constitution, limiting such bond issue to two-thirds of the amount of debt so retired.

Upon the hearing the judge below found, under the facts stated in the record, that none of the projects proposed constituted a necessary purpose, and none had been approved at the election by a majority of the qualified voters and, therefore, enjoined the issue of the bonds. From this judgment the defendant appealed.

W. F. Jones for plaintiff, appellee.
W. B. Campbell and Alan A. Marshall for defendant, appellant.

SEAWELL, J. 1. We approve of the findings of Judge Cranmer that none of the projects mentioned was a necessary purpose.

2. If the provisions of Article VII, section 7, of the Constitution still apply, the issue of the bonds is without authority, since none of the proposals were approved by a majority of the qualified voters at the election. That may be true, also, by application of the statute, under which the proceeding leading to the bond issue was had.

Article VII, section 7, of the Constitution is as follows: "7. No debt or loan except by a majority of voters.—No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, *unless by a vote of the majority of the qualified voters therein.*"

The pertinent part of Article V, section 4, of the Constitution is as follows: ". . . 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.*"

To summarize, for the creation of debt for unnecessary purposes, Article VII, section 7, of the Constitution requires the approval of a

majority of the qualified voters; to overcome the restriction placed upon the creation of debt by Article V, section 4 (which was necessary in this case), it is only necessary to have the approval of a majority of those voting.

These sections of the Constitution are not in conflict. It was competent for the people of the State, in their Constitution, to place what emphasis they pleased upon restrictions in the creation of debt, and in doing so to distinguish between debts differing in kind and necessity, and we see no indication in the adoption of the amendment to Article V, section 4, that there was any intention on their part to modify the measure of restraint expressed in the more rigid requirements of Article VII, section 7, as a condition precedent to the contraction of debt for an unnecessary purpose. One referendum only is required, but when the proposal is to issue bonds for a purpose which cannot be classed as necessary, it must be approved by a majority of the qualified voters, as required in Article VII, section 7, although a majority of those voting is sufficient to satisfy the requirements of Article V, section 4, as to the particular restriction imposed therein.

We may say further that the city has undertaken the issue of the bonds under the Municipal Finance Act of 1917—C. S., 2936, *et seq.*—and is bound by its provisions. Section 2948 requires that where the bond ordinance provides for the issuance of bonds for a purpose other than the payment of necessary expenses of the municipality, the approval of a majority of the qualified voters is necessary to make the ordinance operative. *Hemric v. Comrs. of Yadkin County,* 206 N. C., 845, 175 S. E., 168.

Upon this reasoning, the judgment of the court below, restraining the issuance of the bonds, is

Affirmed.

STATE v. CHARLIE MOORE.

(Filed 4 January, 1939.)

1. Homicide § 27f—

When presented by the evidence, it is error for the court to fail to charge the law of self-defense in case of nonfelonious assault, and defendant's exception to a charge solely on the law of self-defense in case of a felonious assault must be sustained.

2. Same—Charge held susceptible to construction that reasonableness of apprehension should be determined from facts as of time of trial.

A charge on the law of self-defense that a person may use such force "only as it is necessary, or as reasonably appears to be necessary," *is held* for error as being susceptible of the construction that the reasonableness

of the apprehension to act should be determined from the facts and circumstances as they appeared at the time of trial, and not as the facts and circumstances appeared to defendant at the time of the homicide, and the charge being susceptible of such construction, it must be assumed that the jury so understood it.

3. Criminal Law § 81d—

When a new trial is awarded on certain exceptions, other exceptions relating to matters which may not recur on another trial need not be determined.

APPEAL by defendant from *Phillips, J.*, at May Term, 1938, of FORSYTH.

Criminal action on indictment charging defendant with the murder in the first degree of one Nathaniel Adams.

Defendant pleaded not guilty and relied upon the plea of self-defense.

At the time of the homicide defendant operated the Charlie Moore Cafe at the corner of Ogburn and 11th Streets in Winston-Salem. The main entrance to the cafe is on Ogburn Street. There is a side door into the kitchen from 11th Street. The kitchen is separated from the cafe by partition wall, in which there is a connecting doorway.

Between 9 and 10 o'clock on Sunday night, 1 May, 1938, Nathaniel Adams was shot and killed by a pistol in the hands of the defendant, at or near the said side door.

The State offered evidence tending to show: That after the deceased and Henry Wallie each drank a bottle of beer in Felder's Cafe they started on 11th Street for home, and after crossing the street went into Charlie Moore's Cafe to get a match; that at that time a little girl, Estella Rice, was in the cafe, and defendant and his daughter, Eva May Moore, were in the kitchen; that deceased asked the little girl for a match, and she replied that they had penny and nickel boxes to sell but none to give away; that then defendant came to the partition door and said: "Yes, I'm tired of you fellows out in the street running in here asking for a match—get out of here, both of you"; that they both went out to the front porch, where deceased cursed and said: "This man is a sorry man that wouldn't give a man a match," and called him a vilely vulgar name; that Henry Wallie said: "That man told us to get off of his place; let's go"; that they turned around the corner and started walking on the sidewalk down 11th Street; that defendant met them at the side door with a pistol in his hand; that deceased then went out into the street; that defendant asked, "Negro, what's that you say?"; that deceased repeated the vile name which he had applied to defendant when on the front porch; that defendant said, "You had better get on away from here before I kill you"; that deceased replied: "You have got your pistol, go ahead and shoot it"; that thereupon defendant shot once

into the ground near where deceased was standing and then a second shot into the air; that deceased was then going away from him, 50 or 60 feet from the cafe, but wheeled around and said: "You done shot at me, go ahead and kill me"; that then defendant shot a third time and deceased wheeled and fell in the street with a bullet wound in his left breast, from which he died almost instantly; and that at the time of the third shot defendant was on the ground, but went into the building, put up his pistol and "came back to the door smoking a cigar."

On the contrary, the defendant, after introducing similar testimony with respect to the deceased asking for a match and his cursing on the front porch, offered further testimony tending to show: That after deceased and Henry Wallie left the front door, a noise was heard at the back or side door and on going there the defendant saw deceased and Henry Wallie and ordered them away, but that they refused to go; that deceased continued to curse defendant, using vile and opprobrious language; that defendant went to his safe in the corner of the kitchen, got his pistol, returned to the door and shot twice in rapid succession to scare the men away; that he then returned to the safe and put up the pistol and came out into the front part of the cafe; that again hearing noise at the back or side door, defendant, followed by his daughter and the other girl, returned to the kitchen and, on seeing that deceased had the screen door open, defendant a second time went to the safe, got his pistol and went to the door; that deceased started away but Henry Wallie told him to go in there and drag out the defendant, calling him by a vulgar name, "and we will kill him. If he kills you, I will kill him"; that thereupon the deceased turned and started toward the defendant, who shot him; and that deceased was then from six to thirteen feet from the door, but fell much farther away.

Eva May Moore and Estella Rice, testifying for the defendant, stated that they saw nothing in the hands of either deceased or Henry Wallie. Defendant did not go upon the stand.

Verdict: Guilty of murder in the second degree.

Judgment: Confinement in the State's Central Prison at hard labor, to wear stripes, for a period of not less than 27 years, nor more than 30 years.

Defendant appealed to the Supreme Court and assigns error.

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

Richmond Rucker for defendant, appellant.

WINBORNE, J. On authority of *S. v. Bryant,* 213 N. C., 752, 197 S. E., 530, and on the factual situation appearing on this record, de-

fendant's exceptions present prejudicial error in two aspects: (1) Here as there, after stating the principle of law with respect to the right of a man, who without fault himself is murderously assaulted, to stand his ground and fight in self-defense, the court charged that: "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 purpose, with intent to kill or inflict bodily harm, and that he took life of the deceased only when it was necessary or apparently so to protect himself." Exception by defendant is well taken to the failure of the court, as it was its duty to do, 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 was made.

(2) Here as there, under authorities there cited, the following charge is held to be erroneous: "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 it is necessary, or as reasonably appears to be necessary to repel the attack and save himself from death or great bodily harm, and the death of his assailant ensues, it is justifiable and excusable homicide."

In *S. v. Bryant, supra,* it is stated that the error is in the clause "as reasonably appears to be necessary." The reasonableness of the apprehension of 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 being in the present tense might have been understood by the jury to mean as the facts and circumstances appeared at the time of the trial, and being susceptible of that construction it is assumed that the jury so understood.

The authorities on both questions are quoted and cited in *S. v. Bryant, supra.*

It is fair to the learned judge, who tried this as well as the *Bryant case, supra,* to say that the opinion in the *Bryant case, supra,* was handed down after the charge in this case was delivered.

Other exceptions may have merit in them, but as the errors assigned may not recur on another trial, we deem it unnecessary to discuss them here.

Let there be a

New trial.

HOMER C. HOLLOWAY v. NINA NEIGHBORS HOLLOWAY.

(Filed 4 January, 1939.)

1. Divorce § 11—Right to alimony pendente lite in action under C. S., 1666.

On a motion for alimony *pendente lite* and for counsel fees in an action instituted by a wife against her husband under C. S., 1666, or in her cross action in a suit instituted by her husband, whether she is entitled to alimony is a question of law upon the facts found, and the court must find the facts upon request.

2. Same—Right to alimony pendente lite in action under C. S., 1667.

On motion for alimony *pendente lite* and counsel fees made in an action instituted by the wife against her husband under C. S., 1667, the judge is not required to find the facts as a basis for an award of alimony unless the adultery of the wife is pleaded in bar, though the better practice is to do so.

3. Same—Right to alimony pendente lite under the common law.

In an action for divorce instituted by the husband, the wife is entitled to an allowance for support *pendente lite* and counsel fees on her motion therefor under the common law without setting up a cross action, which right is given her as a matter of justice to enable her to defend her name and marital rights, and her right to such allowance will not be denied unless she answers and defends in bad faith.

4. Same—Finding held sufficient to support allowance of temporary subsistence under the common law.

A finding that the wife has denied under oath the charge of adultery against her in the complaint in her husband's action for divorce, and that such denial is made in good faith; that the wife is unable financially to properly defend the action; and that the husband is financially able, *is held* sufficient to support an allowance of temporary support, expense money and counsel fees to the wife under the common law.

5. Same—On motion for allowance under common law, court must hear evidence of husband on question of good faith of wife's defense.

On this motion for allowance to the wife for temporary support and counsel fees under the common law in the husband's action for divorce, the court found that the wife's denial of the charge of adultery was made in good faith and that she was financially unable to properly defend the action, and granted her motion, and refused to hear affidavits offered by the husband for the purpose of showing that she was guilty of adulterous conduct. *Held:* The husband's evidence related directly upon the question of good faith, and it was error for the court to enter the order without hearing and considering such evidence.

APPEAL by plaintiff from *Williams, J.*, in Chambers, 1 April, 1938. From ORANGE. Error.

This is an action for divorce instituted by the plaintiff against the defendant on the grounds of adultery.

The plaintiff makes the necessary allegations of marriage and residence and alleges acts of adultery on the part of the defendant. The defendant, answering, denies the allegation of adultery, and alleges that notwithstanding the plaintiff had knowledge of the facts upon which he bases his allegation that the defendant committed adultery in July or August, 1936, he continued thereafter to live with the defendant, thereby condoning any alleged misconduct on the part of the defendant. The defendant further in her answer prays that she be allowed alimony *pendente lite* and reasonable counsel fees. Notice was served on the plaintiff to appear before Williams, J., and show cause why alimony *pendente lite* and counsel fees prayed in the answer should not be allowed.

The motion came on to be heard before Williams, J., in chambers in Durham, N. C., at which time the plaintiff submitted a number of affidavits which he contends establish the alleged adultery of the defendant. The court found "that the defendant had denied under oath the adultery charged against her in the complaint; that such, her denial, is made in good faith; that the court declines to hear and pass upon affidavits as to the truth or falsity of the charge of adultery; that defendant is unable financially to employ counsel to bring to the court the witnesses necessary for her proper defense and properly defend this action; that plaintiff, her husband, is solvent and amply able to pay, etc." Thereupon, judgment was entered allowing alimony *pendente lite* and counsel fees. Plaintiff excepted and appealed.

Graham & Eskridge and L. J. Phipps for plaintiff, appellant.
Wm. H. Murdock for defendant, appellee.

BARNHILL, J. In determining the question presented on this appeal it may be well to briefly review the instances in which a wife is entitled to alimony *pendente lite* and counsel fees and the law in respect thereto: (1) On a motion for alimony *pendente lite* and counsel fees in an action instituted by a wife against her husband under the provisions of C. S., 1666, whether the wife is entitled to alimony is a question of law upon the facts found, and the court below must find the facts, upon request. *Moore v. Moore,* 130 N. C., 333, 41 S. E., 943; *McManus v. McManus,* 191 N. C., 740, 133 S. E., 9; *Caudle v. Caudle,* 206 N. C., 484, 174 S. E., 304. The wife is entitled to an allowance on proper showing when she, as defendant, sets up a cross action in a suit instituted by the husband. *Webber v. Webber,* 79 N. C., 572. (2) On motion for alimony *pendente lite* and counsel fees made in an action instituted by

the wife against her husband under provisions of C. S., 1667, the judge is not required to find the facts as a basis for an award of alimony unless the adultery of the wife is pleaded in bar, though the better practice would be to do so. *Price v. Price,* 188 N. C., 640, 125 S. E., 264, and cases there cited. This section as first enacted, ch. 193, Public Laws 1872, made no provision for alimony *pendente lite.* This provision was made by amendment to the act by ch. 24, Public Laws 1919. It was further amended in 1923 to allow the husband to plead the adultery of the wife in bar of her right to alimony by ch. 52, Public Laws 1923. (3) On motion for alimony *pendente lite* and counsel fees by the wife, defendant in an action for divorce instituted by the husband, the wife, without setting up a cross action, is entitled to an allowance for support *pendente lite* and counsel fees under the common law. It was first held in *Reeves v. Reeves,* 82 N. C., 348, that when the wife as defendant did not set up any cross action in her answer she is not entitled to this relief. This decision was based upon the theory that the Act of 1852, making provision for alimony *pendente lite,* repealed the common law. This decision was expressly overruled in *Medlin v. Medlin,* 175 N. C., 529, 95 S. E., 857. Quoting from Bishop on Marriage and Divorce, sec. 976, it is there said: "Natural justice and the policy of the law alike demand that in any litigation between the husband and the wife they shall have equal facilities for presenting their case before the tribunal. This requires that they shall have equal command of funds, so that if she is without means, the law having tested the acquisitions of the two in him, he shall be compelled to furnish them to her to an extent rendering her his equal in the suit. This doctrine is a part of the same whence proceeds temporary alimony. And so the English courts have from the earliest times to the present held without the aid of an act of Parliament, and nearly all of our own have accepted the doctrine as of common law."

In this latter type of suit a finding "that defendant has denied, under oath, the adultery charge against her in the complaint; that such (her denial) is made in good faith; that defendant is unable financially to employ counsel or to bring to the court the witnesses necessary for her proper defense; that plaintiff, her husband, is solvent and amply able to pay, etc.," is a sufficient finding to support the allowance of temporary support, expense money and counsel fees. *Medlin v. Medlin, supra.*

Following the decision in *Medlin v. Medlin, supra,* this Court proceeds upon the theory that it would be manifestly unfair to permit a husband to maintain an action which might well stigmatize his wife with foul imputation or deprive her of her marital rights without at the same time requiring him to furnish the necessary funds to enable her to so defend the action as to bring about a fair investigation of the charges

and a just determination of the issues. Unless he does so the court will withhold its aid from him. Unless she answers and defends in bad faith she will not be deprived of the support due her from her husband until a jury has determined the issues adversely to her in a trial in which she has had a fair opportunity, and reasonable means with which, to defend herself.

The defendant's motion comes within the third class of cases above enumerated. The findings of the judge, under the decisions, are amply sufficient to sustain the order. The vice in the order rests in the fact that in determining that the wife answered in good faith the court refused to hear or consider evidence offered by the plaintiff. The affidavits tendered by the plaintiff were offered for the purpose of showing that the defendant was guilty of adulterous conduct. This evidence directly bears upon the question of good faith and should have been heard and considered by the court. While the court might well hesitate to find the issue of adultery against the wife without the aid of a jury and thus deprive her of her common law right to support except upon clear and convincing evidence, it should nevertheless consider any evidence bearing on the question of good faith tendered by the plaintiff and determine the question of good faith only after a full and fair consideration of the evidence offered.

It was error for the court below to decline to consider the evidence tendered by the plaintiff. This entitles the plaintiff to a rehearing upon the motion.

Error.

MRS. J. T. PLOTT, ADMINISTRATRIX OF J. T. PLOTT, v. M. J. MICHAEL AND CHOPAX TEXTILE COMPANY, INC.

(Filed 4 January, 1939.)

1. Process § 7d—Affidavits held insufficient to show that person upon whom process was served was "local agent" of foreign corporation.

Affidavits in this action by a resident plaintiff on a cause of action arising in this State, showed that service of process was had on the nonresident defendant corporation by service on its traveling soliciting agent in this State, that the agent was not authorized to, and actually did not, receive or collect money for the corporate defendant, that he was a subordinate employee taking orders for goods of the corporate defendant from persons designated by it, at fixed prices, with little discretion vested in him, and exercising no control or management over the corporate functions. *Held:* The agent was not a "local agent" for the purpose of service of summons within the meaning of C. S., 483 (1), and service upon him as agent of the corporate defendant was properly stricken out.

2. Process § 7b—Affidavits held not to show that nonresident corporation had "property" in this State for purpose of service under C. S., 1137.

Plaintiff's affidavits showing that the property of the nonresident defendant corporation in this State consisted of samples, order blanks and stationery furnished its soliciting agent, are insufficient to show that the corporate defendant had property in this State for the purpose of service of process on it by service on the Secretary of State under the provisions of C. S., 1137.

3. Same—Affidavits held not to show that nonresident corporation was doing business in this State for purpose of service under C. S., 1137.

Plaintiff's affidavits tended to show that the nonresident defendant corporation employed a traveling soliciting agent who took orders in this State, which were forwarded to its home office in another state, there to be approved or rejected. *Held:* The contracts of sale were made in the state in which defendant maintained its home office, since the last act essential to a meeting of the minds was done therein, and the evidence fails to show that the defendant corporation was doing business in this State for the purpose of service of process on it by service on the Secretary of State under C. S., 1137.

APPEAL by plaintiff from *Grady, J.*, at August Term, 1938, of GUILFORD. Affirmed.

Smith, Wharton & Hudgins and Welch Jordan for plaintiff, appellant.
Sapp & Sapp for Chopax Textile Company, appellee.

SCHENCK, J. This is an action to recover damages for the wrongful death of the plaintiff's intestate, alleged to have been caused by the negligent operation of an automobile by the defendant Michael, while in the employment of the defendant Chopax Textile Company, Inc.

The first summons was issued on 24 February, 1938, to the sheriff of Mecklenburg County and was served on the corporate defendant "by reading and delivering a copy of the within summons, together with a copy of the complaint to . . . M. J. Michael, as agent and employee of the defendant Chopax Textile Company, Inc." On 11 March, 1938, the corporate defendant, under special appearance, moved to strike out and set aside the service.

The second summons was issued on 17 March, 1938, to the sheriff of Wake County and was served on the corporate defendant "by reading and delivering a copy to Thad Eure, Secretary of State of the State of North Carolina, as statutory process agent under C. S., 1137, for said Chopax Textile Company, Inc." On 29 March, 1938, the corporate defendant, under special appearance, moved to strike out and set aside this service.

From judgment allowing the motions of the corporate defendant to strike out said services of summons the plaintiff appealed, assigning errors.

The appeal presents two questions: First, Was the service upon W. J. Michael as agent and employee of the Chopax Textile Company, Inc., by the sheriff of Mecklenburg County valid as to the corporate defendant under C. S., 483? And second, Was the service upon Thad Eure, Secretary of State, as process agent, valid as to the Chopax Textile Company, Inc., under C. S., 1137? We will discuss the questions in the order stated.

First: C. S., 483, reads: "The summons shall be served by delivering a copy thereof in the following cases:

"1. If the action is against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof. Any person receiving or collecting money in this State for a corporation of this or any other state or government is a local agent for the purpose of this section. Such service can be made in respect to a foreign corporation only when it has property, or the cause of action arose, or the plaintiff resides, in this State, or when it can be made personally within the State upon the president, treasurer or secretary thereof."

It is admitted that the plaintiff resides in the State of North Carolina and that the cause of action alleged arose therein, and that the corporate defendant is a foreign corporation. The plaintiff contends that M. J. Michael is a "local agent" of the corporate defendant, as that term is used in the statute. The defendant contends that M. J. Michael is not a "local agent" as contemplated by the statute.

The affidavits upon which the case was heard divulge that Michael was not authorized to, and actually did not, receive or collect money for the corporate defendant. He was a subordinate employee, taking orders for the goods of the corporate defendant, from those designated by it at prices fixed by it, with little discretion vested in him, and exercising no control or management over the corporate functions of the corporate defendant. He was only a traveling soliciting agent and did not fall within the holding of *Whitehurst v. Kerr,* 153 N. C., 76.

The instant case is distinguishable from *Mauney v. Luzier's, Inc.,* 212 N. C., 634, in that in the *Mauney case, supra,* the agent upon whom service was made received and collected money for the defendant foreign corporation, thereby bringing such agent within the specific provision of the statute.

"In order to subject a foreign corporation to service of process within a state, the business done by it therein must be of such a nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is, by its duly authorized officers or agents, present within the state or district where service is attempted." 2nd Syllabus of *Tobacco Co. v. Tobacco Co.,* 246 U. S., 79 (62 Law Ed., 587), and cases there cited.

We therefore hold that his Honor was correct when he adjudged that the service upon Michael as agent of the corporate defendant be stricken out.

Second: C. S., 1137, reads: "Every corporation having property or doing business in this State, whether incorporated under its laws or not, shall have an officer or agent in this State upon whom process in all actions or proceedings against it can be served. A corporation failing to comply with the provisions of this section is liable to a forfeiture of its charter, or to the revocation of its license to do business in this State. In the latter event, process in an action or proceeding against the corporation may be served upon the Secretary of State by leaving a true copy thereof with him, and he shall mail the copy to the president, secretary or other officer of the corporation upon whom, if residing in this State, service could be made. . . ."

It appears that Chopax Textile Company, Inc., is a foreign corporation, being domiciled in the State of New York, and that it has failed to designate an officer or agent in this State upon whom process in actions against it may be served. The plaintiff contends that the corporate defendant had property in and was doing business in North Carolina, and is therefore subject to the statute; and the corporate defendant contends that it neither had property in nor was doing business in North Carolina, and consequently was not amenable to the statute.

The only property which the corporate defendant had in this State, as divulged by the affidavits upon which the case was heard, was the samples, order blanks and stationery furnished its soliciting agent, Michael. We concur with his Honor that this "property" of inconsequential value is insufficient to meet the requirements of the statute.

The only evidence of the corporate defendant doing business in this State was that tending to show that Michael solicited orders for its products in this State and took such orders, which were forwarded to the home office of the corporate defendant in New York to be approved or rejected there. This procedure made the contracts of sale and purchase New York contracts and the business done was therefore done in New York, not in North Carolina.

"Moreover, it is a generally accepted principle that 'the test of the place of a contract is as to the place at which the last act was done by either of the parties essential to a meeting of minds. Until this act was done there was no contract, and upon its being done at a given place, the contract became existent at the place where the act was done. Until then there was no contract.' Wharton Conflict of Laws (3rd Ed.), sec. 422 (a); *C. I. T. Corporation v. Sanderson,* 43 Fed., 2d, 985." *Bundy v. Commercial Credit Co.,* 200 N. C., 511 (515).

Since the Chopax Textile Company, Inc., had no property in, and did no business in North Carolina, we hold that his Honor was correct when he adjudged that the service upon Thad Eure, as Secretary of State, as process agent, be stricken out.

The judgment of the Superior Court is

Affirmed.

ALEACE MARSH, BY HER NEXT FRIEND, RUFUS W. REYNOLDS, v. W. C. BYRD, INDIVIDUALLY AND TRADING AS DANIEL TAXI SERVICE COMPANY, AND W. O. BUIE.

(Filed 4 January, 1939.)

1. Automobiles §§ 12e, 18g—Failure to stop before entering through street intersection held to take case to jury on question of proximate cause.

Plaintiff's evidence tended to show that she was a passenger for hire in a taxi operated by defendant, that defendant drove the taxi into a through street intersection, which was partially obscured, at a speed of thirty miles per hour in violation of a valid municipal ordinance requiring vehicles to stop before entering the intersection from the side street, that the intersection was plainly marked with several stop and danger signs, and that a car from the right traveling along the through street struck the taxi on its right side not quite half-way across the intersection, resulting in the injuries to plaintiff. *Held:* The violation of the safety ordinance was negligence *per se*, and the evidence of such violation, with other evidence in the case, is sufficient to take the case to the jury, the question of proximate cause being for its determination.

2. Automobiles § 9c—

The violation of a statute or a town ordinance enacted for the safe use of the highways or streets is negligence *per se*.

APPEAL by plaintiff from *Phillips, J.*, at August, 1938, Term, of GUILFORD. Reversed.

This action was brought for the recovery of damages for an injury to Aleace Marsh, alleged to have been caused by the negligence of the defendant in an automobile collision in the city of Greensboro.

Prior to the trial a judgment of voluntary nonsuit was taken as to W. O. Buie.

After proper identification and verification, the plaintiff introduced an ordinance of the city of Greensboro, with special attention to Article 6, section 4, subdivision B, which reads as follows:

"A vehicle traveling on any street hereinafter enumerated shall be brought to a complete stop before entering or crossing the intersection thereof with any street as hereafter listed, to wit (b) Arlington Street, at the intersection with East Lee Street."

The collision occurred at the intersection of Arlington and East Lee streets. Aleace Marsh, the plaintiff, testified that she was now twenty-one years old but was a minor when the case was first started; that she employed the defendant Byrd, who operates the Daniel Taxi Service Company, to take her home. At the time of the collision the taxicab was traveling south on Arlington Street and on the right-hand side. The cars collided on the right-hand side of Arlington Street, not quite half-way across its intersection with East Lee Street. At the time of entering the intersection the Byrd car was traveling about thirty miles an hour. When the cars collided the right side of the taxi was struck by Sidney Herbin, who was operating the other car, traveling east along Lee Street. It knocked plaintiff up against the inside of the car and her chin was severely cut and her ear also. Plaintiff testified that she was awfully sore; that her clothing was soaked with blood; that she did not know who took her to the hospital. There she was treated, and later, when her ear started bleeding again, Dr. Smith fixed it. She paid the taxi driver twenty-five cents for her fare.

She further testified that the driver of the taxi did not slow up when he entered the intersection. The Herbin car struck the side of Byrd's car, near the back, where plaintiff was sitting.

F. B. Money, a traffic officer of the city, testified that on the occasion of the wreck he was called to the intersection of Arlington and East Lee streets to investigate the same, and found the defendant Byrd there when he arrived about ten o'clock in the day. He then described the position of the wrecked cars in the intersection. The Byrd car was headed south, slightly east at this point, and the Buie, or Herbin, car was headed northeast. The Byrd car was in the southeast corner of the intersection. The Buie car was damaged on the front mostly to the right. The width of the street traveling east on East Lee Street is 30 feet, and after crossing Arlington Street it narrows to 27 feet. Arlington Street is 30 feet all the way through. There were signs at the intersection; there was a danger reflector, red, marked "Danger," on Arlington Street before entering Lee Street. The sign is four feet high. There is a large brick house on the southeast corner, and a two-story frame house on the southwest corner, and a two-story frame house on the northwest. On the northeast there is a one-story frame house. There is also a sign painted on Arlington Street. The sign is "STOP" and is approximately 4 feet across the body of the letters, and is about 7 feet high. It is put down in white letters on the pavement, about 15 feet back from the curb. The danger sign already referred to is on the right-hand side of the street; it is a red reflector with letters written over the top, "Danger." It is about 22 to 24 inches long, and is erected on a concrete base approximately 3 to 4 feet high. It is just over the curb

and sidewalk and is about 8 feet from the north curb line of Lee Street. The reflector points north on Arlington Street, so that you would face it if you were traveling south on Arlington Street. As you approach this intersection you have to get as close as 8 feet from the curb line in order to see 200 feet up Lee Street. The intersection was obstructed on either side, so that you could not see 200 feet down Lee Street until you were 8 feet from the intersection going south on Arlington.

There was evidence with regard to the nature and extent of plaintiff's injury and as to other features of the case.

At the conclusion of plaintiff's evidence the defendant moved for judgment of nonsuit, which was allowed, and plaintiff appealed.

W. Henry Hunter and James E. Coltrane for plaintiff, appellant.
Sapp & Sapp for defendant, appellee.

SEAWELL, J. The evidence taken in its most favorable light to the plaintiff—*Smith v. Sink,* 211 N. C., 725, 192 S. E., 108; *Woods v. Freeman,* 213 N. C., 314—discloses that the defendant, carrying plaintiff as a passenger for hire in a taxicab, drove southward out of Arlington Street at its intersection with East Lee Street at thirty miles an hour, disregarding the danger signs placed at the intersection of the streets, including the "STOP" sign written across Arlington Street in letters four feet across and seven feet high and a reflector sign three or four feet high to the right of the street with the word "DANGER" appearing thereon. The view to the right, as well as in other directions on Lee Street, was partially obscured by the buildings around the intersection and the building on the corner of the street to the driver's right. The taxicab was struck by a car coming from the driver's right, headed northeast. The driver ignored an ordinance of the city of Greensboro, which we think was enacted under a valid power, requiring a vehicle traveling on Arlington Street to be brought to a complete stop before crossing the intersection with East Lee Street.

Violation of this town ordinance, enacted for the safe use of the streets, is evidence of negligence. *Sebastian v. Motor Lines,* 213 N. C., 773. This evidence, with that relating to proximate cause, was for the jury. Other evidence, which we do not consider it necessary to discuss formally, was sufficient to carry the case to the jury.

The judgment of nonsuit is

Reversed.

W. S. SWAIM ET AL. v. HIGH POINT, ETC., RAILROAD COMPANY.

(Filed 4 January, 1939.)

Railroads § 9—Evidence of driver's contributory negligence held to bar recovery by him for injuries received in crossing accident.

Uncontradicted evidence that plaintiff saw the headlight of defendant's locomotive as it approached the crossing, mistook it for another automobile, and testimony by him that he nevertheless drove the automobile in front of the on-coming locomotive on a clear night, resulting in the injury in suit, *is held* to show contributory negligence barring recovery as a matter of law in plaintiff's failure to ascertain before driving on the crossing whether the headlight was that of a locomotive or a car, and defendant's motion to nonsuit should have been granted, even conceding that there may have been evidence of negligence on the part of the railroad company.

APPEAL by defendant from *Hill, Special Judge,* at September Term, 1938, of GUILFORD.

Civil action to recover damages for injuries to plaintiff and his automobile alleged to have been caused by the negligence of the defendant.

On Sunday night, 22 November, 1936, the plaintiff W. S. Swaim and H. R. Allred were riding around in plaintiff's Chevrolet sedan near Thomasville when they experienced some car trouble—"The muffler came loose, sounded like it had a cut-out." Plaintiff says he was "afraid to drive it on the road because the State patrolman might get us because it made such a noise." They started across the railroad in search of a mechanic and were struck by defendant's train at Cedar Lodge Crossing between Thomasville and Denton.

There is evidence that plaintiff's view was obstructed by a barn or fertilizer warehouse near the crossing. Plaintiff testifies that he saw the headlight of the engine before reaching the barn, but as he "did not hear any whistle" he "figured that there was another car coming down the dirt road." He further says: "I knew the road all right. . . . I had been across the railroad track before. . . . I was driving. . . . I had nothing to drink before the accident except one bottle of beer. . . . There was no sign, no whistle, no bell. . . . I looked to see if the train was coming. I was driving about 10 or 15 miles an hour when the train hit me. . . . The wreck occurred at approximately 11:30 p.m."

H. R. Allred testifies: "I had nothing to drink that night except a bottle of beer. . . . I drove some and Swaim some. . . . He was driving at the time of the accident. . . . I wouldn't say I was and I wouldn't say I wasn't sitting under the steering wheel after the accident."

Four witnesses for the defendant testify that Allred was sitting under the steering wheel and Swaim at his right on the off-seat when they were taken from the automobile following the accident. The defendant's evidence also tends to show the train was running on schedule time and reached Cedar Lodge Crossing at 12:40 a.m., 23 November. The headlight of the engine was in general and approved use. It was lighted. The crossing signal was given. There were "Railroad" signs on the highway. The night was clear.

Plaintiff was taken to the hospital but released before morning. He lost no wages on account of his injuries, which were not permanent.

W. G. Byerly, a police officer, testifies: "I went to the hospital and noticed Swaim's condition. He was well under the influence of intoxicants. I smelled it on his breath. His general reputation is bad for drinking."

An empty half-pint bottle which contained the odor of alcohol was found in plaintiff's car after the accident.

The jury returned a verdict in favor of the plaintiff, assessing his personal injuries at $300 and damages to his car at $250. From judgment thereon, the defendant appeals, relying principally upon its exception to the court's refusal to dismiss the action as in case of nonsuit.

Silas B. Casey and Walser & Wright for plaintiff, appellee.
Lovelace & Kirkman for defendant, appellant.

STACY, C. J. This is a case of sharp contradictions. The parties do not agree (1) as to when or how the plaintiff's automobile reached Cedar Lodge Crossing; (2) whether the plaintiff or his companion was driving it at the time; (3) whether they were drunk or sober; and, (4) whether they heard or could have heard the whistle signal of the locomotive. *Johnson v. R. R., ante,* 484.

Conceding, without deciding, that there may be evidence of negligence on the part of the defendant, it is also in evidence, without contradiction, that plaintiff saw the headlight of the locomotive as it approached the crossing, and he says he "figured that there was another car coming down the dirt road." We think it must be held as a matter of law that one who knowingly drives an automobile upon a railroad crossing in the clear nighttime immediately in front of an on-coming locomotive with its headlight shining, which he sees, and does not take the precaution to ascertain whether it is the headlight of a locomotive on the track or an automobile on a dirt road, falls short of the requirement of a reasonably prudent man. Such, in effect, was the holding in *Holton v. R. R.*, 188 N. C., 277, 124 S. E., 307. This bars a recovery. *Royster v. R. R.*, 147 N. C., 347, 61 S. E., 179; *Coley v. R. R.*, 213 N. C., 213, 195 S. E.,

392; *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598; *Coleman v. R. R.*, 153 N. C., 322, 69 S. E., 251. See *Meacham v. R. R.*, 213 N. C., 609.

The case of *Preddy v. Britt*, 212 N. C., 719, 194 S. E., 494, is distinguishable by reason of a different fact situation. So, also, are the cases cited by the plaintiff.

On the record, it would seem that the exception to the court's refusal to dismiss the action as in case of nonsuit is well taken.

Reversed.

NATHAN GILMORE v. IMPERIAL LIFE INSURANCE COMPANY.

(Filed 4 January, 1939.)

1. Insurance § 38—

Injury sustained when insured was run over by a passenger train *held* not covered by provision of accident policy providing indemnity for injuries sustained by accident while insured is traveling in a railroad passenger car as a passenger therein.

2. Appeal and Error § 12—

There is no authority for granting an appeal *in forma pauperis* without proper, supporting affidavit, and an affidavit which fails to aver that appellant is advised by counsel learned in the law that there is error of law in the judgment appealed from, is fatally defective. C. S., 649.

3. Appeal and Error § 31a—

The affidavit required in pauper appeals is jurisdictional, and when the affidavit is fatally defective the Supreme Court acquires no jurisdiction and the appeal must be dismissed.

APPEAL by plaintiff from *Sinclair, J.*, at September Term, 1938, of CUMBERLAND.

Civil action to recover on a policy of accident insurance.

The policy in suit provides for indemnity in a number of instances and in case of insured's death by accident resulting from collision with or accident to "any railroad passenger car, . . . provided said passenger car . . . is being operated or driven, at the time by one regularly employed for that purpose, and inside of which the insured is legally traveling . . . as passenger."

The plaintiff was run over and seriously injured by a train of the Southern Railway System in the city of High Point on the night of 24 April, 1938, his right arm being severed above the wrist. Plaintiff was not a passenger on the train at the time.

The trial court, being of opinion that plaintiff's injury was not covered by the terms of the policy in suit, entered judgment of nonsuit, from which the plaintiff appeals, assigning error.

John H. Cook for plaintiff, appellant.
Bullard & Bullard for defendant, appellee.

STACY, C. J. The interpretation of the policy in suit, as announced in the court below, that plaintiff's injury is not within its terms, finds support in the following cases: *Whitaker v. Ins. Co.*, 213 N. C., 376, 196 S. E., 328; *Headen v. Ins. Co.*, 206 N. C., 860, 175 S. E., 282; *Gilmore v. Ins. Co.*, 199 N. C., 632, 155 S. E., 565; *Jolley v. Ins. Co.*, 199 N. C., 269, 154 S. E., 400; *R. R. v. Casualty Co.*, 145 N. C., 114, 58 S. E., 906. The nonsuit would seem to be correct.

But for another reason, the appeal must be dismissed. The Court is without jurisdiction to entertain it. The attempted appeal is *in forma pauperis*, and the supporting affidavit is defective, in that, it does not contain the averment, required by C. S., 649, that appellant "is advised by counsel learned in the law that there is error of law in the decision of the Superior Court in said action." This is a jurisdictional requirement. *Lupton v. Hawkins*, 210 N. C., 658, 188 S. E., 110; *Powell v. Moore*, 204 N. C., 654, 169 S. E., 281; *Hanna v. Timberlake*, 203 N. C., 556, 166 S. E., 733; *McIntire v. McIntire, ibid.*, 631, 166 S. E., 732; *Riggan v. Harrison, ibid.*, 191, 165 S. E., 358; *Honeycutt v. Watkins*, 151 N. C., 652, 65 S. E., 762.

There is no authority for granting an appeal *in forma pauperis* without proper, supporting affidavit. *Lupton v. Hawkins, supra.*

Appeal dismissed.

STATE v. FRANK CLEGG.

(Filed 4 January, 1939.)

1. Assault § 8: Constitutional Law § 26—

A charge of assault with a deadly weapon with intent to kill, resulting in serious injury, is a charge of a felony, C. S., 4214, and defendant may not be put to answer thereon but by indictment. Art. I, sec. 12.

2. Constitutional Law § 26: Indictment § 15—

A warrant may not be amended so as to charge a different offense, and when a defendant is charged in a warrant with a felony, the Superior Court may not permit an amendment to the warrant so as to charge a misdemeanor, and put defendant to trial thereon over his objection without a bill of indictment, or waiver of bill for a misdemeanor.

STATE *v.* CLEGG.

APPEAL by defendant from *Williams, J.*, at October-November Term, 1938, of LEE. Error and remanded.

The defendant was arrested upon a warrant issued from the county court of Lee County, charging that he "did unlawfully and willfully and feloniously assault Simon Steele with a deadly weapon, to wit, a knife, inflicting serious damage, with intent to kill the said Simon Steele, against the form of the statute in such cases made and provided." Plea, not guilty.

In the county court the only entry was "Court adjudges defendant guilty of assault with deadly weapon, inflicting serious damage." Sentence of 60 days on the roads was imposed. Defendant appealed to the Superior Court.

In the Superior Court the defendant was tried on the original warrant and without a bill of indictment. After the jury was impaneled defendant moved to dismiss the warrant and quash the proceedings because the warrant charged a felony and no bill of indictment had been returned by the grand jury. Pending the motion, the court, over objection by the defendant, permitted the solicitor to amend the warrant by striking out the words "feloniously" and "with intent to kill the said Simon Steele," and thereupon denied defendant's motion, to which he excepted. There was verdict of guilty of assault with deadly weapon, and from judgment imposing sentence of imprisonment from sixteen to twenty-four months defendant appealed to the Supreme Court.

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

D. B. King and K. R. Hoyle for defendant.

DEVIN, J. Since the warrant charged the commission of a felony under the statute (C. S., 4214), the defendant could not be put to answer but by indictment. Constitution, Art. I, sec. 12; *S. v. Hyman,* 164 N. C., 411, 79 S. E., 284; *S. v. Rawls,* 203 N. C., 436, 166 S. E., 332. A similar question to the one raised by this appeal was recently considered by this Court in *S. v. Sanderson,* 213 N. C., 381, 196 S. E., 324. In that case the warrant issued by the county court, charging the defendant with "operating a whiskey still," was there amended to read "this being a second offense for manufacturing whiskey," a felony under the statute (C. S., 3409). On this warrant preliminary hearing was waived and the defendant bound over to the Superior Court. In the Superior Court, at October Term, 1936, bill of indictment was returned, and at January Term, 1937, *"nol. pros."* was entered by the solicitor, and the cause remanded to the county court for trial upon the warrant. Thereafter the defendant was tried in the county court on the warrant,

and from conviction and sentence appealed to the Superior Court. In the Superior Court, over objection, defendant was tried on the warrant, convicted and sentenced. On his appeal to this Court, it was said, *Stacy, C. J.*, speaking for the Court: "The defendant has been tried upon a warrant charging him with a felony. . . . For this offense trial may be had only upon a bill of indictment found by a grand jury."

In the case at bar, after this defendant had been put to trial in the Superior Court on the original warrant without a bill of indictment and over his objection, the solicitor was permitted to amend the warrant by striking therefrom the words in which the charge of felony under the statute were contained, thereby changing the offense charged from a felony to a misdemeanor. There was no waiver by defendant of bill for a misdemeanor. While amendments to process and pleading, under our procedure, in both civil and criminal causes, are liberally allowed (C. S., 547; C. S., 1500; Rule 12), this does not imply that the court has power to change the nature of the offense intended to be charged so as to charge a different offense in substance from that at first intended. *S. v. Vaughan,* 91 N. C., 532; *S. v. Crook,* 91 N. C., 536; *S. v. Norman,* 110 N. C., 484, 14 S. E., 968; *S. v. Wernwag,* 116 N. C., 1061, 21 S. E., 683; *S. v. Taylor,* 118 N. C., 1262, 24 S. E., 526; *S. v. Myrick,* 202 N. C., 688, 163 S. E., 803. "A warrant cannot be amended so as to charge a different offense." *S. v. Goff,* 205 N. C., 545 (550), 172 S. E., 407.

Neither of the cases cited by the State sustains the action of the court below in permitting the amendments objected to. In *S. v. Davis,* 111 N. C., 729, 16 S. E., 540, the warrant charged an offense cognizable both under a town ordinance and a State statute, and it was held permissible to try defendant for violation of the State law, and to treat the charge of violation of the town ordinance (alleged to be void) as surplusage. In *S. v. Poythress,* 174 N. C., 809 (1917), 93 S. E., 919, the warrant charged the defendant with engaging in the sale of spirituous liquors, with possession of such liquors for the purpose of sale, and with receipt at one time of more than one quart of whiskey. The name of the defendant did not appear in the affidavit but did appear in the warrant. Amendments were permitted in the Superior Court to add counts to the warrant charging sale to particular persons on certain dates. The same course was pursued in *S. v. Holt,* 195 N. C., 240, 141 S. E., 585.

In *S. v. Mills,* 181 N. C., 530, 106 S. E., 677, will be found citation of numerous cases relating to the power of the Superior Court to permit amendments of warrants. None of these cases, however, may be held to authorize the judge of the Superior Court to permit, over the objection of the defendant, an amendment to a warrant charging a felony so

as to change the offense to a misdemeanor, and put the defendant to trial without a bill of indictment, or waiver of bill for a misdemeanor.

The defendant's objection to the amending of the warrant as permitted in this case seems to have been well taken, and the court below was in error in ruling the defendant to trial without a bill of indictment duly found. The cause is remanded with directions that the verdict and judgment be set aside, and that upon the warrant issued the defendant be held under bond pending action by the grand jury, or until the case is disposed of according to law.

Error and remanded.

W. P. HAIRSTON v. KESWICK CORPORATION, MARYLAND CASUALTY COMPANY AND RECONSTRUCTION FINANCE CORPORATION, AND CENTRAL INVESTMENT CORPORATION (ORIGINAL PARTIES DEFENDANT): AND CAROLINA BOND CORPORATION (ADDITIONAL PARTY DEFENDANT).

(Filed 4 January, 1939.)

Mortgages § 30d—Mortgagor seeking to restrain foreclosure on ground of usury must first tender amount legally due.

The equitable maxim that "He who seeks equity must do equity" requires that a mortgagor claiming that the mortgage debt is tainted with usury, and seeking to restrain foreclosure until the debt may be stripped of its usury, must first tender the amount legally due according to his own contentions, and a mere averment that he is ready, able and willing to pay the amount legally due is insufficient.

APPEAL by defendants from *Phillips, J.*, at November Term, 1938, of FORSYTH. Reversed.

Plaintiff brought this action in the county court of Forsyth County to restrain the defendants from foreclosing a deed of trust executed to secure an indebtedness of the plaintiff to the Carolina Mortgage Company until such time as the amount legally owed by the plaintiff could be ascertained.

The plaintiff complained that he had executed to the Carolina Mortgage Company mortgages securing loans aggregating about $11,000 in principal money, and that by retention of principal money, under guise of various fees, charges, and bonuses, grossly usurious interest charges were exacted from plaintiff, and that representatives of the mortgagees falsely represented to the plaintiff that he owed a balance of $6,450 on account of said loan; that plaintiff, in order to save his properties from sacrifice, procured a loan from the Building and Loan Association and paid to the Carolina Mortgage Company the sum of $5,500, and executed

and delivered to it his promissory note for $950.00, secured by a deed of trust on real property in Winston-Salem, in full settlement of the amount demanded by the Mortgage Company. The plaintiff recites that he had no knowledge of the grossly usurious interest and charges that had been reserved by the Mortgage Company until the execution and delivery of the note; that an audit of the account involved in the loan disclosed that plaintiff owed the Mortgage Company only $5,787.52 at the time he paid the sum of $5,500 and, therefore, the plaintiff owed now only the sum of $287.50 instead of the $950.00 evidenced by the promissory note which he made and delivered to the defendants. Plaintiff further alleges that the defendants have threatened to foreclose the deed of trust securing the $950.00, including usury, with interest thereon at six per cent, and demands that defendants be restrained from such foreclosure.

Upon the hearing in the county court, the injunction was continued to the hearing, and a complaint setting up substantially the cause of action above set out was filed and answer was made by the defendants denying the material allegations thereof.

The matter was further heard in the county court, upon a notice to the defendants to show cause why the restraining order should not be continued to the final hearing, and at the 14 November, 1938, Term of the said county court the injunction was continued until the hearing of the issues arising on the pleadings.

From this order of the county court the defendants appealed to the Superior Court, and the matter was there heard by Judge Phillips, who affirmed the order of the county court, and the defendants appealed.

Ingle, Rucker & Ingle for plaintiff, appellee.

W. G. Mordecai and Ratcliff, Hudson & Ferrell for defendants, appellants.

SEAWELL, J. One of the best known and most often reiterated maxims of equity is: "He who seeks equity must do equity." It is a mandatory application of the "Golden Rule" in the field of law administration, and has been said to express the fundamental principle of equity jurisprudence. In the application of the underlying principle to this case it means that the plaintiff, who has pleaded usury in his debt to the defendants and has asked the court to enjoin the foreclosure of the mortgage securing the indebtedness until that debt may be stripped of its usury, must first tender to the defendants the amount legally due them before he can obtain the equitable relief demanded. *Buchanan v. Mortgage Co.*, 213 N. C., 247, 195 S. E., 787; *Wilson v. Trust Co.*, 200 N. C., 788, 158 S. E., 479; *Mortgage Corp. v. Wilson*, 205 N. C., 493, 171 S. E., 783.

In this case plaintiff merely avers that he is ready, willing, and able to pay the defendants the amount legally due, but makes no tender.

The case is so thoroughly covered by the opinion in *Buchanan v. Mortgage Co., supra,* and cases there cited, that we deem further analysis and citation supererogatory.

The judgment is

Reversed.

W. B. CAMPBELL AND WILMINGTON SAVINGS & TRUST COMPANY, EXECUTORS OF J. O. REILLY; LONDON ASSURANCE CORPORATION, THE CAROLINA INSURANCE COMPANY, AMERICAN EAGLE FIRE INSURANCE COMPANY, HANOVER FIRE INSURANCE COMPANY, CONNECTICUT FIRE INSURANCE COMPANY AND FIREMEN'S FUND INSURANCE COMPANY, v. PEOPLES SAVINGS BANK & TRUST COMPANY.

(Filed 4 January, 1939.)

1. Trial § 19—

The competency and admissibility of the evidence is for the court to determine; the weight of the testimony and the credibility of the witness is for the jury.

2. Pleadings § 28—Judgment on the pleadings may not be rendered when material allegations are denied on information and belief.

When the facts are admitted, judgment may be rendered thereon by the court without the intervention of a jury, but when defendant denies the right of plaintiff to recover, judgment on the pleadings may not be rendered in favor of plaintiff, and denial of material allegations of the complaint upon information and belief is sufficient denial to put plaintiff to proof.

3. Jury § 5: Trial § 26—Case must be submitted to the jury even though plaintiff's evidence is sufficient to warrant directed verdict.

When defendant denies material allegations of the complaint upon information and belief, in the language of C. S., 519, judgment may not be rendered in plaintiff's favor without the intervention of a jury, even conceding plaintiff's evidence is sufficient to warrant a directed verdict, the weight of the testimony and the credibility of the witnesses being for the determination of the jury.

4. Evidence § 36—

A carbon copy of an alleged agreement offered as a duplicate original, without proper identification, and without adequate explanation of the failure to produce the original, is not properly in evidence.

5. Pleadings § 7—

Allegations in the answer that defendant "denies that it has any knowledge or information thereof sufficient to form a belief" is not an admission of the facts alleged in the complaint, but puts plaintiff to proof. C. S., 519.

6. Jury § 5—

The right to trial by jury is a substantial right.

APPEAL by defendant from *Cranmer, J.*, at April Term, 1938, of NEW HANOVER. New trial.

Civil action instituted by plaintiffs, insurance companies, against the defendant to recover deposit balance in the defendant bank in the name of "J. O. Reilly, insurance account." The plaintiffs, executors of J. O. Reilly, admit they have no interest in said account.

The plaintiffs, insurance companies, hereinafter referred to as plaintiffs, offered evidence tending to show that J. O. Reilly was their agent in Wilmington, N. C.; that his accounts with the plaintiffs became involved and as a consequence thereof the plaintiffs required him to deposit all premiums collected in bank in a separate account, and that he was not permitted to withdraw therefrom any amount except by remittance to plaintiffs, other than a stipulated sum for expenses and his commissions; that thereafter premiums collected were deposited in the designated account; that there is now a balance in said account of $287.81; and that the defendant bank had appropriated said balance and applied the same to the personal indebtedness of J. O. Reilly, deceased.

At the conclusion of the plaintiffs' evidence defendant announced it would offer no testimony and tendered an issue to be submitted to the jury. The court declined to submit the issue tendered, and, on motion of plaintiffs, entered judgment for plaintiffs in the amount of said deposit, with interest and costs. The defendant excepted and appealed.

E. K. Bryan for plaintiffs, appellees.
Carr, James & LeGrand for defendant, appellant.

BARNHILL, J. It is well established in this jurisdiction that the competency and admissibility of the evidence is for the court to determine, and that the weight of the testimony and the credibility of the witnesses is for the jury. When the facts are admitted judgment may be rendered thereon by the court without the intervention of a jury. When, however, the credibility of the witnesses and the weight and sufficiency of the evidence is challenged by denial or by conflicting testimony the cause must be submitted to a jury. If the defendant denies the right of the plaintiffs to recover, the evidence must be submitted to a jury even though it is of such nature as to warrant a directed verdict. *Woodland v. Southgate*, 186 N. C., 116, 118 S. E., 898; *Bank v. Stone*, 213 N. C., 598; *McCullers v. Jones, ante*, 464.

Only a carbon copy of the alleged written contract between the plaintiffs and J. O. Reilly was before the court and jury. This carbon copy was offered without proper identification as a duplicate original and without adequate explanation of the failure of the plaintiffs to produce the original. It was not properly in evidence. The other evidence of

the plaintiffs tending to establish their cause of action consisted largely of the testimony of witnesses and of facts and circumstances testified to by them. If it be conceded that this evidence, if believed, would warrant but one reasonable inference, this did not deprive the defendant of its right to have the credibility of such evidence determined by the jury under proper instructions. *Woodland v. Southgate, supra; Bank v. Stone, supra.*

It is apparent that the court below was led to withdraw the case from the jury and to sign judgment for the plaintiffs upon the apprehension that his ruling that the defendant's answer did not deny the allegations contained in the second, fourth, fifth, sixth, seventh, eighth, eleventh and twelfth paragraphs of plaintiffs' complaint was correct. In answer to each of these paragraphs the defendant alleged: "This defendant denies that it has any knowledge or information thereof sufficient to form a belief." This answer is in exact accord with the pertinent statute. C. S., 519. *Bank v. Charlotte,* 75 N. C., 45; *Brinson v. Morris,* 192 N. C., 214, 134 S. E., 453. Therefore, the facts alleged by the plaintiffs are not admitted, but, on the other hand, the defendant has adequately raised the issue as to the weight of the evidence and the credibility of the witnesses.

On this record it was error for the court to render judgment in favor of the plaintiffs without first having submitted the evidence to a jury upon appropriate issues. The failure to submit the cause to a jury deprived the defendants of a substantial right. *Bank v. Stone, supra.*

As the case must be remanded for a new trial we have refrained, in so far as possible, from discussing the evidence in the case.

New trial.

STATE v. ROBERT WILLIAMS, ALIAS ROBERT McNAIR.

(Filed 4 January, 1939.)

1. Criminal Law § 52c—Peremptory instruction held for error, defendant not having admitted he committed the crime charged.

Under his plea of "not guilty," defendant interposed the defense that if the crime were committed at all, it was committed by some person other than defendant, and the defense that if committed by defendant he was insane at the time. Defendant introduced evidence of insanity. *Held:* The introduction of evidence of insanity did not admit the truth of the State's evidence on the question of identity, and a peremptory instruction to the effect that the jury should find defendant guilty unless they accepted his plea of insanity is error.

2. Criminal Law § 17—Plea of "not guilty" held to put in issue question of identity as well as that of insanity.

Defendant pleaded "not guilty" and contended that if the crime were committed at all, it was committed by some person other than defendant, and that if committed by defendant he was insane at the time. *Held:* The plea put in issue the question of identity as well as that of sanity, and the introduction of evidence of insanity by defendant is not an admission of the truth of the State's evidence.

3. Criminal Law § 52c—

The trial court may not direct a verdict for the prosecution in a criminal action when there is no admission or presumption calling for explanation or reply on the part of the defendant.

APPEAL by defendant from *Sinclair, J.*, at August Term, 1938, of CUMBERLAND.

Criminal prosecution tried upon indictment charging the defendant with rape.

The defense interposed under a plea of "not guilty" was, first, that if the crime were committed at all, it was committed by some one other than the defendant, and, second, if committed by the defendant, he was insane at the time.

Verdict: "Guilty of rape in the manner and form as charged in the bill of indictment."

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

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

John H. Cook and Harry Binder Stein for the defendant.

STACY, C. J. The following excerpt taken from the charge forms the basis of one of the defendant's exceptive assignments of error:

"As I told you, gentlemen of the jury, it is your duty to convict this man either of rape or of assault with intent to commit rape, as you find the facts to be from the evidence and under the charge of the court, unless you find from the evidence that he did not have sufficient mental capacity to know the difference between right and wrong at the time of the alleged assault. If you find at that time he did not know the difference between right and wrong, you would return a verdict of 'not guilty.' "

The jury had been recalled for further instructions and this was the court's final charge. It is peremptory in character. It seems that the exception is well taken. *S. v. Lawson,* 209 N. C., 59, 182 S. E., 692; *S. v. Singleton,* 183 N. C., 738, 110 S. E., 846.

It is true, the defendant offered evidence of his insanity, but he did not admit the truth of the State's evidence. His plea of "not guilty" put at issue the question of identity as well as that of the commission of the crime.

It is held for law with us that the trial court may not direct a verdict for the prosecution in a criminal action, where there is no admission or presumption calling for explanation or reply on the part of the defendant. *S. v. Ellis,* 210 N. C., 166, 185 S. E., 663; *S. v. Hill,* 141 N. C., 769, 53 S. E., 311; *S. v. Riley,* 113 N. C., 648, 18 S. E., 168.

For error in the charge, as indicated, a new trial must be awarded. It is so ordered.

New trial.

IN RE LILLIAN B. SHUTT, ADMINISTRATRIX.

(Filed 4 January, 1939.)

1. Executors and Administrators § 19: Courts § 2c—Unchallenged ruling that clerk was without jurisdiction held to terminate proceeding.

The clerk appointed a referee to hear claims against the estate of a deceased under C. S., 99, and thereafter approved the report of the referee. On appeal, the Superior Court ruled that the clerk had no authority in the premises. *Held:* The unchallenged ruling vacated the supposed reference, and ended the matter, and the further ruling of the court that the referee's report was binding on other grounds is a nullity notwithstanding the broad jurisdiction of the Superior Court under C. S., 637.

2. Executors and Administrators § 19—

Deceased's widow filed claims with herself as administratrix of the estate, which claims she denied as administratrix solely as a matter of propriety. *Held:* No proper predicate for the determination of the claims was laid.

APPEAL by Lillian B. Shutt from *Phillips, J.,* at June Term, 1938, of FORSYTH.

Proceeding to determine validity of claims against the estate of Henry D. Shutt, deceased.

Lillian B. Shutt, widow of Henry D. Shutt, deceased, filed three claims with herself as administratrix of her husband's estate, which in her representative capacity she did not care to accept; wherefore, as administratrix, she petitioned the clerk of the Superior Court to appoint a referee to hear the merits of the claims and to report his findings together with his conclusions of law to the clerk. This was done.

The referee heard the claimant, contesting heirs, and the administratrix, and reported his findings of fact together with his conclusions of law to the clerk. Claimant filed exceptions thereto.

The clerk ruled that the proceeding was under C. S., 99, and as the "findings of the arbitrator have not been impeached for fraud or collusion," the report of the referee was approved.

From this judgment, the claimant appealed to the Superior Court.

The judge held that the clerk was without jurisdiction to appoint a referee under C. S., 99, but that the conduct of the claimant, as individual and administratrix, amounted to an agreement to arbitrate the matter, which had not been impeached for fraud or collusion, and the report of the referee was therefore binding.

Claimant appeals, assigning errors.

Ingle, Rucker & Ingle for appellant.
Parrish & Deal for appellees.

STACY, C. J. The proceeding has at least the merit of novelty. The clerk thought he was acting under C. S., 99. The judge held that the clerk had no authority in the premises, if indeed the proceeding may properly be styled a judicial one, which may be doubted. This ruling, which is unchallenged, vacated the supposed reference and put an end to the matter, notwithstanding the broad jurisdiction of the Superior Court under C. S., 637. The administratrix expressed no doubt as to the justness of the claims presented, but simply said as a matter of propriety she was in no position to admit them. This falls short of a proper predicate for the determination of the claims.

We were informed on the argument that claimant has lately resigned as administratrix of her husband's estate and that another has been appointed in her stead. The new representative has not been made a party to this proceeding. No doubt the matter will now be adjusted in some approved way.

Proceeding dismissed.

STATE v. J. E. ALVERSON AND CHARLIE BRACK.

(Filed 4 January, 1939.)

1. Criminal Law §§ 41d, 53c—Charge on question of consideration jury should give evidence impeaching character of witnesses held erroneous.

While evidence elicited on cross-examination tending to impeach the character of witnesses, including defendants as witnesses in their own behalf, should be considered by the jury as a circumstance bearing upon

the credibility of their testimony, an instruction that the law is that a person of good character is more apt to testify correctly than a person of bad character is error.

2. Criminal Law § 81c—

An erroneous instruction as to the consideration the jury should give to evidence impeaching the character of witnesses is not cured by the fact that the charge referred as much to the testimony of the State's witnesses as to that of defendants, since there can be no "balancing of errors" between the State and the defendants.

3. Same—

Where evidence impeaching the character of witnesses is a material aspect of the case, an erroneous charge in respect thereto cannot be held harmless.

APPEAL by defendants from *Sinclair, J.*, at September Term, 1938, of ROBESON. New trial.

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

McKinnon, Nance & Seawell for defendants, appellants.

SCHENCK, J. The defendants were tried upon a bill of indictment charging them (1) with breaking and entering a pressing club building occupied by C. E. Locklear wherein valuable property was kept, with the intent to steal said property, (2) with the larceny of said property, and (3) with receiving said property knowing it to have been stolen. The jury returned a verdict as to both defendants of "guilty as charged." From judgment of imprisonment in the State's Prison, the defendants appealed, assigning error.

The following excerpt from the charge of the court is made the basis of an exceptive assignment of error: "There has been some character evidence offered in the case, gentlemen. You will consider character evidence along together with all the other evidence, part and parcel of it; character evidence has as much weight or as little weight as you find it entitled to, evidence admitted to help you weigh the credibility of the witnesses upon whose character it is offered, the law being that a person of good character being more apt to testify correctly than a person of bad character. However, in the final analysis it is for you to say what the facts are, taking character evidence along with all the other evidence, and then say as men of common sense and reason and experience what you honestly believe the truth to be. That is all you are doing, is seeking the truth."

We are constrained to hold the instruction that "the law being that a person of good character being more apt to testify correctly than a per-

son of bad character" is error. While the jury should consider the character of witnesses when they come to weigh their testimony as a circumstance bearing upon its credibility, still we apprehend his Honor imposed a burden and cast a shadow upon the testimony of the defendants, who were witnesses in their own behalf and whose character had been impeached on cross-examination, which is not warranted when he used the expression "the law being that a person of good character being more apt to testify correctly than a person of bad character." The evidence tending to show the good or bad character of the witness is simply evidence to be considered with all the other evidence in passing upon the credibility of the witness whose testimony is being investigated. There is no law that a person of good character is more apt to testify correctly than a person of bad character.

It was held by us for error when the court charged the jury that "the law presumes that when a man is being tried for a crime, that he is laboring under a natural temptation to testify to whatever he thinks may clear himself of the charge." *S. v. Carden,* 207 N. C., 517; *S. v. Wilcox,* 206 N. C., 691. While, as was said in *Carden's case, supra,* the law requires the testimony of the defendant to be scrutinized in the light of his interest in the verdict we cannot agree that "the law presumes" that the defendant is under a temptation to testify to whatever he thinks will clear him of the charge, so, as in the instant case, the law requires the testimony of any witness to be weighed in the light of his character, we do not agree that the law is that a man of good character is more apt to tell the truth than a man of bad character.

The fact that his Honor's charge referred as much to the testimony of the State's witnesses as to that of the defendants as witnesses in their own behalf does not cure the error, as there can be no "balancing of errors" between the State and the defendants.

The charge assailed by the exception went to the very heart of the case. The State relied largely upon the testimony of one Marie Simms to connect the defendants with the alleged crime. No witness identified the defendants as being present at the scene of the crime, but the witness Simms testified the defendants told her that they were the perpetrators thereof. The defendants denied so telling Marie Simms and offered evidence of an alibi. Both the witness Simms and the defendants as witnesses in their own behalf were impeached by cross-examination. No character witnesses were called by either party. Hence, the instruction assailed was error harmful to all parties.

For the error assigned, there must be a

New trial.

JAY B. DOUGLASS ET AL. v. A. F. STEVENS.

(Filed 4 January, 1939.)

Wills § 35—Absolute restraint on alienation annexed to grant or devise of fee is void.

A devise of a vested remainder in fee in named beneficiaries with the condition that "they shall in no wise either sell or mortgage said property for a period of not less than 50 years" gives the beneficiaries immediate power of alienation upon obtaining deed from the life tenant, an absolute restraint on alienation, for any length of time, annexed to a grant or devise in fee, being void.

APPEAL by defendant from *Olive, Special Judge,* at October Term, 1938, of FORSYTH.

Controversy without action submitted on an agreed statement of facts.

Plaintiffs, being under contract to convey a certain tract of land to the defendant, duly executed and tendered therefor a deed sufficient in form to invest the defendant with a fee simple title, and demanded payment of the purchase price as agreed, but the defendant declines to accept the deed and refuses to make payment of the purchase price on the ground that the title offered is defective.

It was agreed that if, in the opinion of the court, under the facts submitted, plaintiffs were able to convey a good and indefeasible fee simple title to the land in question, judgment should accordingly be entered for the plaintiffs, otherwise for the defendant.

The court, being of opinion that the deed tendered was sufficient to convey a full and complete fee simple title to the lands in question, gave judgment for the plaintiffs, from which the defendant appeals, assigning error.

Manly, Hendren & Womble and L. K. Martin for plaintiffs, appellees.
Webster & Little for defendant, appellant.

STACY, C. J. On the hearing, the title offered was properly made to depend upon the construction of the following limitation in the will of Jay Barnette Douglass:

"Upon the death of my wife I will that these two stores become the property of our two children Jay Barnette Douglass, Jr., and Adelaide C. Douglass, with the condition that they shall in no wise either sell or mortgage said property for a period of not less than 50 years."

It is conceded that if the plaintiffs, children of the testator, take a fee in the lands devised to them under the above clause in their father's will with immediate power of alienation, the deed tendered is sufficient,

and the judgment in favor of the plaintiffs is correct, but the defendant questions the immediate power of alienation because of the annexed condition "that they shall in no wise either sell or mortgage said property for a period of not less than 50 years."

It is further conceded that the plaintiffs take a vested remainder interest in fee to the lands in question under their father's will, *Barbee v. Thompson,* 194 N. C., 411, 139 S. E., 838, and the case states that they have acquired the life interest of their mother by deed duly registered. Hence, under the uniform holding with us that an absolute restraint on alienation, for any length of time, annexed to a grant or devise in fee, is void, the condition subsequent attempting to limit plaintiffs' right to sell or mortgage the devised premises must be regarded as inoperative and of no effect. *Barco v. Owens,* 212 N. C., 30, 192 S. E., 862.

The case at bar is not distinguishable from *Williams v. Sealy,* 201 N. C., 372, 160 S. E., 452.

The judgment decreeing specific performance will be upheld.

Affirmed.

GROVER MANHEIM, BY HIS NEXT FRIEND, L. W. MANHEIM, v. BLUE BIRD TAXI CORPORATION AND W. C. CARNELL.

(Filed 4 January, 1939.)

1. Automobiles § 18g—

Evidence tending to show taxi was being driven at excessive speed along street and hit plaintiff pedestrian, who was crossing the street at an intersection, *held* sufficient to be submitted to the jury on the issue of negligence.

2. Automobiles §§ 18c, 18g—Conflicting evidence as to whether minor used due care in crossing street held to raise issue for jury.

Plaintiff's evidence tended to show that he, a minor nine years of age, paused, looked up and down the street before attempting to cross the street at an intersection, saw no cars approaching, and had gone over half way across the street when he was struck by a taxi which was being driven at an excessive speed. Defendants' evidence was to the effect that plaintiff failed to pause, look or listen and ran headlong into the path of the approaching taxi. *Held:* The conflicting evidence raises questions of fact which were properly submitted to the jury on the issue of whether plaintiff used due care for his own safety in the light of his age, intelligence, and capacity.

3. Negligence § 19b—

A nonsuit on the ground of contributory negligence may not be granted unless the evidence is so clear on that issue that reasonable minds could draw no other inference.

4. Negligence § 11—

A person must exercise for his own safety that care which a reasonably prudent person would have exercised under the circumstances, which rule is constant, although the degree of care may vary with the exigencies of the occasion.

5. Negligence § 12—

Whether a minor exercises due care for his own safety must be determined in the light of his intelligence, age, and capacity.

APPEAL by the corporate defendant from *Bivens, J.*, at March Term, 1938, of GUILFORD. No error.

Leonidas Herbin and Frazier & Frazier for plaintiff, appellee.
Jas. MacClamroch and A. C. Davis for defendant, appellant.

SCHENCK, J. This is an action to recover damages for personal injury alleged to have been suffered by the plaintiff through the negligence of the defendants. The defendants' motions for judgment as in case of nonsuit were denied, the usual issues of negligence, contributory negligence and damage were submitted and answered in favor of the plaintiff, and from judgment predicated upon the verdict, the corporate defendant appealed, assigning errors.

The assignment of error most seriously pressed on appeal is that to the refusal of the court to allow motion for judgment as in case of nonsuit lodged when plaintiff had rested his case and renewed at the close of all the evidence. C. S., 567. In determining whether the court erred in refusing to allow this motion we must give the evidence such construction as is most favorable to the plaintiff. Given this interpretation, the evidence tends to establish the following facts:

The plaintiff was a minor about nine years of age. The appellant, through its agent, W. C. Carnell, was operating a taxicab on North Elm Street in the city of Greensboro on 19 June, 1937. About 10:40 a.m. on said date the plaintiff attempted to cross North Elm Street at the intersection of Bishop Street with North Elm Street, and when he had gotten about two feet beyond the center line of North Elm Street he was struck and injured by the taxicab of the appellant proceeding in a southern direction on said street. There were cars parked on both sides of North Elm Street, and the distance between the cars on one side of the street to the cars on the other side thereof was about 35 feet. The plaintiff came from behind a car on the east side of the street, paused, and looked up and down the street, north and south, and saw no car approaching from either direction, and then proceeded across the street and was struck by the appellant's taxicab when he had proceeded about 19½ feet across the street, which took him about two feet beyond the center line of the street. The plaintiff did not see the taxicab before he

was struck. The taxicab was being driven from 40 to 45 miles per hour, and left skid marks on the street about 43 feet long when it was stopped. The intersection of North Elm Street and Bishop Street is in a business section of the city of Greensboro and the traffic on North Elm Street in this location is heavy.

The appellant does not seriously contend that there was insufficient evidence to be submitted to the jury upon the first issue involving the actionable negligence of the defendant, but does seriously contend that the evidence establishes the contributory negligence of the plaintiff. While the appellant's evidence tends to show that the plaintiff failed to pause, look and listen, before crossing North Elm Street and ran headlong into the path of the approaching taxicab which was being operated at a lawful rate of speed, this evidence is in direct conflict with the evidence of the plaintiff, and questions of fact are thereby raised, and it was proper for the court, under such circumstances, to submit these questions to the jury under the issue involving the contributory negligence of the plaintiff.

"It is a familiar rule that a judgment of involuntary nonsuit on the ground of contributory negligence of the plaintiff cannot be rendered unless the evidence is so clear on that issue that reasonable minds could draw no other inference. *Pearson v. Luther,* 212 N. C., 412, 193 S. E., 739; *Mulford v. Hotel Co.,* 213 N. C., 603; *Corum v. Tobacco Co.,* 205 N. C., 213, 171 S. E., 78. This rule has nothing to do with the credibility of witnesses. It applies equally to the testimony of the plaintiff as to that of other witnesses; *Tomberlin v. Bachtel,* 211 N. C., 265, 268, 189 S. E., 769; *Matthews v. Cheatham,* 210 N. C., 592, 188 S. E., 87; *Smith v. Coach Line,* 191 N. C., 589, 591, 132 S. E., 567; and he is entitled also to the benefit of the rule that upon the motion to nonsuit the evidence must be considered in the light most favorable to the plaintiff. *Cole v. R. R.,* 211 N. C., 591, 191 S. E., 353; *Lynch v. Telephone Co.,* 204 N. C., 252, 167 S. E., 847; *Gilbert v. Wright,* 195 N. C., 165, 141 S. E., 577." *Cole v. Koonce, ante,* 188.

In determining whether the plaintiff failed to use the degree of care required of him, that is whether he breached the rule which held him to that degree of care which a reasonably prudent person would have exercised under the circumstances, which rule is constant, although the degree of care may be varied by the exigencies of the occasion, *Diamond v. Service Stores,* 211 N. C., 632; *Small v. Utilities Co.,* 200 N. C., 719, a question of fact was presented to be answered by the jury in the light of the intelligence, age and capacity of the plaintiff. *Alexander v. Statesville,* 165 N. C., 527.

We have examined the other exceptive assignments of error in the record and find no prejudicial error.

No error.

MRS. VELNA HEDRICK, WIDOW OF J. T. HEDRICK, DECEASED. VELNA HEDRICK, E. L. HEDRICK AND BESSIE ALMA CROWELL, EXECUTORS OF THE WILL OF J. T. HEDRICK, DECEASED; BESSIE ALMA CROWELL; E. L. HEDRICK; VELNA HEDRICK; MRS. CHARLES FRITTS; MRS. SAM N. BECK; MRS. DENNIS SNIDER, MRS. C. H. SWING AND A. M. CROWELL *v.* JONES T. HEDRICK AND WIFE, VEOLA HEDRICK; MARTHA CRAIG HEDRICK, AGE 10; JOAN REID HEDRICK, AGE 4 MONTHS; A. M. CROWELL, JR., AGE 14; GILES CROWELL, AGE 11; AND ANNA MARTHA CROWELL, AGE 9.

(Filed 4 January, 1939.)

Executors and Administrators § 12b—Will held not to authorize executors to sell realty or personalty without court order.

The will in question provided that the estate, both real and personal, should "be held intact, if possible and advisable in the opinion of the executors," with provision for division of the income therefrom between testator's children in proportion to the number of grandchildren of whom they are the parents, with further provision for final distribution of the corpus of the estate when the youngest grandchild should attain the age of twenty-one. *Held:* Construing the will as a whole from its four corners, it did not empower the executors to sell either realty or personalty without sanction and approval of the court.

APPEAL by plaintiffs from *Olive, Special Judge,* at June Term, 1938, of DAVIDSON. Affirmed.

Action for the construction of certain provisions of the will of J. T. Hedrick. From a judgment adverse to their contentions, the plaintiffs appealed.

W. O. Burgin and P. V. Critcher for plaintiffs, appellants.
McCrary & DeLapp for defendants, appellees.

DEVIN, J. The action presents for judicial interpretation and construction the following paragraphs of the will of the decedent, J. T. Hedrick.

"THIRD: My will and desire is that all my estate, both real and personal be held intact, if possible and advisable in the opinion of the executors and operated under the supervision of the executors, and that the income therefrom be divided between my daughter, Mrs. Bessie Alma Crowell, and my son, Jones Hedrick, in proportion to the number of my grandchildren, of which they are the parents, after all expenses have been paid each year and subject to the next succeeding section.

"FOURTH: My will and desire is that no part of the corpus of my estate be divided until a grandchild reaches the age of 21, at which time my executors will advance to him or her such amount as they may think

wise. After all of my grandchildren shall have reached the age of 21, then equal division can be made, deducting any amount that may have been paid to any of the said grandchildren before reaching the age of 21, or subsequent thereto, if my executors think best. However, my estate is to be settled and divided as above directed when my youngest grandchild shall become 25 years of age."

The plaintiffs ask the court to hold that under the provisions of these items of the will, the executors have the right to sell real estate, if necessary, for the purpose of paying debts, or have the right to convey any part of the real estate, when in the opinion of the executors it is advisable to sell. The defendants, on the other hand, contend that there is no authority given to the executors to sell either real or personal property without the sanction and approval of the court, and that no sales can be lawfully made without proper order of the court, made after due notice to all parties, in proper proceeding for that purpose.

The court below ruled that the executors could not make a sale or final disposition of the property in their discretion, except upon an order or judgment of the proper court of this State, in an action or proceeding for that purpose, wherein all the beneficiaries under the will have been made parties and given an opportunity to be heard.

An examination of the third and fourth items of the will, for the construction of which this action was instituted, leads us to the conclusion that the court below has correctly interpreted the will of the testator, and that the judgment appealed from should be upheld. *Skinner v. Wood,* 76 N. C., 109. It was said in *Richardson v. Cheek,* 212 N. C., 510, 193 S. E., 705 (*Stacy, C. J.,* speaking for the Court): "The guiding star in the interpretation of wills, to which all rules must bend, unless contrary to some rule of law or public policy, is the intent of the testator, and this is to be ascertained from the four corners of the will." *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356; *Hampton v. West,* 212 N. C., 315, 193 S. E., 290. There was nothing said in *Felton v. Felton,* 213 N. C., 194, which may be held in conflict with the ruling in this case.

Judgment confirmed.

J. P. WILLIAMSON ET AL. v. CITY OF HIGH POINT ET AL.

(Filed 4 January, 1939.)

1. Contempt of Court § 5—

Upon the hearing of an order to show cause why defendant should not be held in contempt for violation of a decree of court, the sole question before the court is whether the decree has been violated, and the court correctly disregards defendant's prayer for modification of the decree.

2. Contempt of Court § 2b—Finding that defendant's second undertaking was materially different from one restrained held to support order discharging rule for contempt.

Final decree was entered restraining a municipality from constructing "the proposed power plant and electric system" described in the complaint, or doing any act in furtherance thereof, the basis of the decree being that the proposed plant was *ultra vires* the city. Thereafter the council of the city passed a resolution authorizing the construction of a power plant on the same site as originally proposed, and this contempt proceeding was instituted. Defendant alleged and the court found that the second proposed plant differed materially from the first in "purpose of construction, productive capacity, and important physical features." *Held:* The allegations and findings of dissimilarity between the two undertakings supports the action of the court in discharging the rule for contempt.

APPEAL by intervening plaintiff, Duke Power Company, from *Bivens, J.*, at May Term, 1938, of GUILFORD.

Proceeding in civil contempt for violation of injunction.

The facts are these:

1. Final judgment on the certificate and opinion of the Supreme Court (reported in 213 N. C., 96) was entered at the February Term, 1938, Guilford Superior Court, permanently enjoining and restraining the defendants "from constructing the proposed power plant and electric system described in the intervening plaintiff's complaint filed herein, and from issuing the proposed bonds or doing any other act or thing in furtherance of the construction of said power plant and electric system."

2. Thereafter, on 27 April, 1938, the council of the city of High Point passed a resolution authorizing the construction of a hydroelectric light and power plant by the city of High Point on the same site as originally proposed, but differing materially in respect of "purpose of construction, productive capacity, and important physical features," from the proposed power plant and electric system described in the intervening plaintiff's complaint filed herein.

3. On the same day, the plaintiff, J. P. Williamson, deeming said resolution to be in violation of the injunction and final decree entered herein, called the matter to the attention of the court by affidavit "for such action as the court may deem proper in the premises."

4. Upon this affidavit, a rule to show cause was entered and duly served on the defendants.

5. The defendants answered, denied any violation of the injunction, and alleged that the resolution of 27 April, 1938, authorizing the construction of an electric light and power plant for the defendant city "is for a new and altogether different project from the one referred to in said final decree." They asked that the rule be discharged and that "the

decree of the Superior Court entered at the February 7, 1938, Term of court be modified so as to reflect the true facts as they now exist."

6. To this answer, the intervening plaintiff replied, denied the power of the court to hear the matters set out by the defendants, and prayed for an appropriate order to enforce the decree previously entered.

The court found the facts as contended for by the defendants, adjudged each of the defendants not guilty of contempt, and dismissed the writ.

The intervening plaintiff, Duke Power Company, appeals, assigning errors.

Roberson, Haworth & Reese, W. B. McGuire, Jr., and W. S. O'B. Robinson, Jr., for intervening plaintiff, appellant.

G. H. Jones and Roy L. Deal for defendants, appellees.

STACY, C. J. The position of appellant that the court was without authority to modify the decree entered at the February Term is correct. *Yerys v. Ins. Co.*, 210 N. C., 442, 187 S. E., 583; *Southerland v. R. R.*, 148 N. C., 442, 62 S. E., 517; 32 C. J., 506. The basis for the final decree was, that the original undertaking "goes far beyond the powers conferred by the Revenue Bond Act of 1935, and is *ultra vires.*" But as we understand the record, the defendants' prayer to this effect was disregarded, and rightly so.

The sole question before the Court was whether the final decree entered at the February Term has been violated. *Bacon v. Onset Bay Grove Assn.*, 286 Mass., 487, 190 N. E., 713; *Barrone v. Moseley*, 144 Ky., 294, 137 S. W., 1048. The allegation and finding of dissimilarity between the two undertakings appears sufficient to support the action of the court in discharging the rule for contempt. This is the only question presented by the appeal.

Adequate cause for disturbing the judgment and entering one in favor of appellant has not been made to appear on the present record.

Affirmed.

STATE v. KING SOLOMON STOVALL.

(Filed 4 January, 1939.)

Criminal Law § 80—

When defendant convicted of a capital crime fails to make out and serve his statement of case on appeal within the time allowed, the motion of the Attorney-General to docket and dismiss under Rule 17 will be allowed, and the judgment affirmed when the record is free from apparent error.

OLDHAM *v.* ROSS.

APPEAL by defendant from *Spears, J.*, at July Term, 1938, of GRANVILLE.

Criminal prosecution tried upon indictment charging the defendant with the murder of one R. T. Moore.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

Defendant appeals.

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

STACY, C. J. At the July Term, 1938, Granville Superior Court, the defendant herein, King Solomon Stovall, was tried upon indictment charging him with the murder of one R. T. Moore, which resulted in a conviction of murder in the first degree and sentence of death. From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court and was allowed until 30 September following to make out and serve his statement of case on appeal, and the solicitor was given until 1 November to prepare and file exceptions or countercase. The clerk certifies "that the said King Solomon Stovall has not filed in this office any statement of his case on appeal, and I am informed by his counsel that he does not intend to do so," and the time for serving statement of case has expired. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455; *S. v. Brown,* 206 N. C., 747, 175 S. E., 116. No bond was required, as the defendant was granted the privilege of appealing *in forma pauperis. S. v. Stafford,* 203 N. C., 601, 166 S. E., 734.

As the record is free from apparent error, the motion of the Attorney-General to docket and dismiss the appeal under Rule 17 will be allowed. *S. v. Moore,* 210 N. C., 686, 188 S. E., 421; *S. c., ibid.,* 459, 187 S. E., 586.

Judgment affirmed; appeal dismissed.

BARBARA ANN OLDHAM, BY HER NEXT FRIEND, RUFUS W. REYNOLDS, v. J. FRANK ROSS AND ANNIE V. ROSS, ADMINISTRATORS OF THE ESTATE OF JULIUS F. ROSS, DECEASED.

(Filed 4 January, 1939.)

1. Pleadings § 28—

Ordinarily a motion for judgment on the pleadings is interposed by the party seeking affirmative relief, in which case it admits facts alleged in defense and challenges the sufficiency of such facts to constitute a defense.

2. Same—

Judgment on the pleadings cannot be rendered against the party seeking affirmative relief when the allegations upon which the prayer for relief is based are denied, since such judgment must be based upon facts established by failure of specific denial or by specific admissions.

APPEAL by plaintiff from *Phillips, J.,* at October Term, 1938, of GUILFORD. Reversed.

This is a civil action to recover damages for breach of contract alleged to have been made by defendants' intestate to devise property to plaintiff.

The material allegations of the complaint requiring consideration are in substance as follows: That the parents of the plaintiff cultivated the lands of the defendants' intestate on a half share basis, and rendered various services to the deceased, who was aged and infirm; that the deceased fell and broke his arm and was removed to the home of plaintiff's parents for treatment; that he developed a severe attack of pneumonia, during which time they nursed and cared for him; that upon his recovery the deceased returned to his home, and, in about two months thereafter, approached plaintiff's parents, expressed appreciation for their care, service, and attention, and requested that he be allowed to come and live with them and have them to continue to look after him; that he stated that he had considerable property, and that if plaintiff's parents would permit him to remove to their home and they would look after him they would be well compensated for the services they had theretofore and would thereafter render, and stated that after they had been fully compensated he would leave such property as he might have remaining to the plaintiff; that in consequence of such promises, plaintiff's parents took the deceased into their home and rendered to him such services as were incident to the care and attention of an aged and infirm person who was incapable of looking after himself; and that the deceased died without fulfilling his promise to devise his property to the plaintiff.

Each and every allegation in the complaint relating to the alleged contract or promises, and relating to the services rendered, is denied in the answer.

After filing answer, in which the material allegations are denied, the defendants moved for judgment on the pleadings. Upon the hearing of the motion judgment was entered allowing the motion and decreeing that the plaintiff have and recover nothing of the defendants. Plaintiff excepted and appealed.

W. Henry Hunter and Harry Rockwell for plaintiff, appellant.

Douglas & Douglas, T. J. Hill, and York & Boyd for defendants, appellees.

PER CURIAM. It is not specifically alleged in the complaint that the alleged agreement made by defendants' intestate was or was not in writing and that the complaint does not sufficiently state a cause of action is not challenged by demurrer, the accepted method of raising this issue of law. C. S., 511. A motion for judgment on the pleadings is one ordinarily interposed by the litigant seeking affirmative relief. When so interposed it admits the facts alleged in defense and challenges the sufficiency of such facts to constitute a defense. *Barnes v. Trust Co.,* 194 N. C., 371, 139 S. E., 689; *Pridgen v. Pridgen,* 190 N. C., 102, 129 S. E., 419; *Churchwell v. Trust Co.,* 181 N. C., 21, 105 S. E., 889. Judgment cannot be rendered upon the pleadings against the party seeking affirmative relief when the allegations upon which the prayer for relief is based are denied. Every fact necessary to be established as a basis for the judgment asked must be admitted either by a failure to deny specific allegations or by specific admissions of the facts. Here the defendants specifically denied both the contract and the rendition of services. See *Alston v. Hill,* 165 N. C., 255, 81 S. E., 291; *Dix-Downing v. White,* 206 N. C., 567.

The judgment below is

Reversed.

CAROLINA MORTGAGE COMPANY, TRUSTEE, v. COMMONWEALTH BOND AND MORTGAGE COMPANY, L. V. HUGGINS AND W. W. EDWARDS, TRUSTEE FOR THE FIDELITY SECURITY COMPANY, INTERVENER.

(Filed 4 January, 1939.)

Parties § 9—

Discretionary order refusing appellant's motion to be allowed to intervene after judgment had been rendered in the cause *held* fully justified by the record.

APPEAL by intervener, B. W. Harris, from *Spears, J.,* at October Term, 1938, of ORANGE. Affirmed.

The Carolina Mortgage Company, Trustee, brought an action against the Commonwealth Bond and Mortgage Company and L. V. Huggins to recover for rents alleged to have been collected on property in Chapel Hill, North Carolina, which rents were alleged to be in the hands of L. V. Huggins, a collector for The Fidelity Security Company, when the action was instituted. Since demand for rents were made upon him from two conflicting sources, Huggins was permitted to pay the entire amount into the office of the Clerk of the Superior Court, to be held pending the final determination of the action. After issue had been

joined between the plaintiff and the defendant Commonwealth Bond and Mortgage Company by filing proper pleadings, W. W. Edwards, a judgment creditor of B. W. Harris, intervened and claimed the rent money. This action was heard at June Term, 1938, of Orange Superior Court, before a judge and a jury, and B. W. Harris, intervener and appellant in the present case, testified as a witness for W. W. Edwards, Trustee for The Fidelity Security Company, the first intervener, in substance, that he had authorized the collection of the rent by The Fidelity Security Company and its application to a debt due that company, under the circumstances set out in the record.

At the hearing, the presiding judge dismissed the claim of Edwards by judgment of nonsuit, and entered judgment directing a distribution of the funds. Edwards gave notice of appeal, but did not perfect the same, and it was subsequently dismissed by an order of Judge Spears at the August Term, 1938.

In June, 1938, the appellant, B. W. Harris, filed a motion before the clerk of the Superior Court of Orange County, claiming the rent money and asking to be allowed to intervene. The original plaintiff and defendant resisted the motion, and the same was dismissed, and upon appeal therefrom the order of the clerk of the Superior Court dismissing the motion was affirmed. The present appeal is from this motion.

W. G. Mordecai and Hedrick & Hall for Carolina Mortgage Company, trustee.

Henry Bane for Commonwealth Bond and Mortgage Company.

Bennett & McDonald and W. S. Lockhart for B. W. Harris, intervener.

PER CURIAM. An examination of the record discloses that appellant testified in the original cause that he had authorized the collection of the rent by the defendant corporation for application upon a debt due that corporation. The appellant claims that there were certain conditions involved in this agreement, non-compliance with which left appellant free to prosecute his present claim.

The discretion exercised by the presiding judge in refusing the motion of appellant to be allowed to intervene, after judgment had been rendered in the cause, is fully justified by the record, and the judgment is

Affirmed.

STATE v. CLARENCE HEAD.

(Filed 4 January, 1939.)

Homicide § 25—Evidence held sufficient to support verdict of involuntary manslaughter.

A witness for the State testified to the effect that defendant pointed his gun at deceased, that the gun fired, inflicting the fatal injuries. Defendant testified that he raised his gun to unload same, that the gun went off for some unknown reason, and that he had no intention of shooting deceased. C. S., 4216 makes it unlawful to point any gun or pistol at any person, either in fun or otherwise, whether the gun be loaded or unloaded. *Held:* Considering the evidence in the light most favorable to the State, it is sufficient to take the case to the jury and sustain a verdict of involuntary manslaughter.

APPEAL by defendant from *Hill, Special Judge,* at August Term, 1938, of ALEXANDER.

Criminal action on indictment charging defendant with the murder of one Glady Lackey.

Upon the call of the case for trial, the solicitor announced that he would not ask for a verdict of murder in the first degree, but would ask for verdict of murder in second degree or manslaughter, as the evidence justified.

The uncontroverted facts are substantially these: On 9 October, 1937, Glady Lackey, age 18 years, son of Robey Lackey and his wife, Stella Lackey, was shot and killed by a gun in the hands of defendant, aged 37 years, his first cousin. The shooting occurred on the back porch of the home of Robey Lackey, where Glady and his mother were standing, the defendant being on the ground. Robey Lackey and Glady Lackey and defendant were and at all times prior thereto had been good friends.

The State offered as an eye witness Mrs. Stella Lackey, who testified in substance that: She sent Glady to the barn for some eggs. When he returned and was in the act of delivering the eggs to her, defendant, who was standing on the ground with his single-barreled gun under his right arm, barrel pointing down, raised the gun, pointing the barrel towards Glady, and then the gun fired, the load striking Glady in his left side under the arm. She said: "He fell and I said to Head, 'Run for a doctor,' and he started. That is all I can tell. My son died in about five minutes." On cross-examination she testified: "When I went out on the porch to get the eggs, immediately before the shot was fired, Head said, 'Howdy.' That is all he said before the shot was fired. Immediately after the shot he said it was an accident, and when I said go for a doctor, he started off."

Defendant, in his own behalf, testified that he lives at Hanes, near Winston-Salem. On the morning of 9 October, 1937, he, with his wife and two children, drove to the home of his father. From there he went up on the mountain, squirrel hunting. In returning he went to the home of his uncle, Robey Lackey. As he passed the barn he saw Glady, the deceased, and walked and talked with him going to the house. On arriving at the house, "I stopped on the ground at the back porch, Glady going up on the porch. Stella Lackey, his mother, come out and I said, 'Good morning.' I was carrying a single-barrel shotgun, breach loaded with a hammer, under my right arm with the barrel pointing towards the ground. . . . When I said 'Good morning' I aimed to unload the gun, and I raised the barrel with my left hand to take the shell out of it, and for some unknown reason it went off . . . I had no intention of shooting Glady Lackey . . ." On cross-examination, he testified: "It, the gun, fell from my hand when it went off . . . I do not know whether the gun was cocked or not."

Verdict: Guilty of involuntary manslaughter, with a recommendation of mercy.

Judgment: Confinement in common jail of Alexander County for four months, to be assigned to work in and about the county jail. Judgment suspended upon condition that defendant pay into the office of the clerk of Superior Court for the benefit of Robey Lackey the sum of $397, to reimburse the latter for funeral and burial expenses incurred in the death of Glady Lackey, and upon the further condition that defendant pay the costs of the action to be taxed.

Defendant appealed to Supreme Court and assigns error.

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

Lewis & Lewis for defendant, appellant.

PER CURIAM. The only question presented on this appeal is whether there is sufficient evidence, taken in the light most favorable to the State, as we must consider it, to take the case to the jury. In this State it is unlawful for any person to "point any gun or pistol at any person, either in fun or otherwise, whether the gun be loaded or not loaded." C. S., 4216. In keeping with uniform decision of this Court, the evidence in this respect carries the case to the jury. The defendant has had the benefit of a full and fair charge as to the law.

Defendant does not except to form of judgment.

In the trial below we find

No error.

HANES FUNERAL HOME, INC., v. JAMES T. SPENCER AND MRS. C. C. ZIMMERMAN, GUARDIAN OF MRS. PATTIE B. RIDDICK.

(Filed 4 January, 1939.)

1. Appeal and Error § 37e—

The findings of fact of the court under agreement of the parties are as conclusive as the verdict of the jury.

2. Frauds, Statute of, § 5—

Evidence in the record on this appeal *held* sufficient to support finding that contract of defendant's ward, entered into while competent and before appointment of guardian, to pay expenses for the funeral of the wife of a close friend, is an original promise which is not required to be in writing within the statute of frauds. C. S., 987.

APPEAL by defendant, Guardian, from *Hill, Special Judge,* at September 1938, Civil Term, of GUILFORD.

Civil action instituted in the municipal court of the city of Greensboro to recover on contract for funeral expenses.

Plaintiff, in its amended complaint, alleges, and offered evidence tending to show that on 26 March, 1935, Mrs. Pattie B. Riddick purchased from it, and agreed to pay for certain articles, services, and cash advances amounting to $740.66 for the funeral of the wife of her close relative, defendant, James T. Spencer. Plaintiff also alleges that, while the contract was made with Mrs. Pattie B. Riddick, the defendant James T. Spencer is liable as a matter of law.

Defendant, Guardian, appointed 1 January, 1936, denies liability, and avers that the account is not the obligation of Mrs. Pattie B. Riddick, and that her promise to pay therefor is not in writing as required by the Statute of Frauds, C. S., 987, which she pleads in bar of plaintiff's right to recover.

From judgment against defendants in said municipal court, defendant, Guardian, appealed to the Superior Court of Guilford County. There the parties, having waived jury trial and consented that the judge should hear the evidence, find the facts, and render judgment, C. S., 568, the court finds, *inter alia,* "the facts to be as alleged in plaintiff's amended complaint; and, without limiting the generality, that Mrs. Pattie B. Riddick, the defendant's ward, on March 26, 1935, while competent, and before the appointment of a guardian, entered into an original, express contract with the plaintiff for the purchase of the articles, services, and advances set out in said amended complaint, and that the said articles, services, and advances were duly delivered, rendered, and paid by the plaintiff; that the said Mrs. Pattie B. Riddick agreed to pay the plaintiff the prices charged therefor; . . ."

From judgment for plaintiff, the defendant, Guardian, appeals and assigns error.

York & Boyd for plaintiff, appellee.
R. O. Everett for defendant, appellant.

PER CURIAM. The findings of fact by the judge, when there is evidence to support them, are as conclusive as the verdict of a jury. *Matthews v. Fry,* 143 N. C., 384, 55 S. E., 787.

There is abundant evidence in the record on this appeal to support the findings of the judge.

The general rule is that if the promise to pay is an original undertaking, it need not be in writing.

The judgment below is

Affirmed.

A. H. RITTER v. I. F. CHANDLER AND C. T. CROCKER.

(Filed 4 January, 1939.)

1. Vendor and Purchaser § 6—

Where an option does not specify the time within which the right to buy may be exercised, the right must be exercised within a reasonable time.

2. Vendor and Purchaser § 23—

Conceding that delivery of notes by the purchaser constituted an acceptance of the option and waived tender of the purchase price, the purchaser *is held* estopped by his laches in waiting more than ten years after the execution of the contract to demand specific performance.

3. Specific Performance § 3—

Long delay, accompanied by acts inconsistent with a purpose of performing a contract, will, if not waived by the seller, preclude the buyer from specific performance of the contract.

APPEAL by plaintiff from *Cowper, Special Judge,* at September Term, 1938, of MOORE.

Civil action for specific performance of alleged contract to convey real property.

Plaintiff alleges that on 8 October, 1926, defendant entered into a contract, which is registered in the deed records of Moore County, and offered in evidence, to lease to plaintiff a filling station and lot in question at specified monthly rental, with "the right and privilege and option of buying same at the price of $1,000" and with provision that

if plaintiff decided to buy, the monthly rentals should be credited on the purchase price. No time is stated for the beginning and termination of the lease, nor as to the period within which the option must be exercised. On the date of the contract, plaintiff delivered to defendant Chandler notes for $1,000, which have not been returned.

Plaintiff went into possession of the property but rented it to one DeWitt Short on 18 October, 1926, and requested that he pay rent to defendant Chandler. Short stayed there two or three years. Then, defendant Chandler rented to another and to several others in succession from time to time, all of whom paid rent to him. This continued until Chandler sold the property to his co-defendant, Crocker, a short time before this action was instituted on 23 September, 1937. Plaintiff had nothing to do with the renting to any of the tenants other than Short. He testifies "they were changing there one time pretty fast. *Every time I passed there Mr. Chandler would have a new man there.*" Chandler built a house on the property while the tenant Parsons lived there. Plaintiff further testified: "I never paid Mr. Chandler anything and I did not ask him to make me a deed until I brought this suit. That is the first notice that I gave Mr. Chandler that I wanted a deed."

Defendant alleges that plaintiff abandoned the lease and option and surrendered the property, and pleads the three and ten years statutes of limitations, C. S., 441, 437, in bar of plaintiff's alleged cause of action.

From judgment as of nonsuit at close of plaintiff's evidence, plaintiff appeals.

Seawell & Seawell for plaintiff, appellant.
U. L. Spence for defendant, appellee.

PER CURIAM. Plaintiff seeks the specific performance of an unilateral contract or option to sell. No time being specified within which the right to buy may be exercised, that it must be exercised within a reasonable time is not subject to controversy. The evidence fails to show any effort on the part of plaintiff to exercise the right to take advantage of defendant's offer to sell until the institution of this action, and then there is no evidence of tender of the purchase price. But, if it be conceded that the delivery of notes on 6 October, 1926, constitutes an acceptance of offer to sell, and a waiver of tender, the delay of more than ten years to seek to enforce specific performance is such laches as will defeat the right thereto. "When in a contract . . . no time is specified within which a performance is to be made, the party to the contract who wishes to enforce a specific performance must come forward within a reasonable time to demand it" *Nash, C. J.*, in *Francis*

v. Love, 56 N. C., 321. In that case a delay of six years was held to bar specific performance.

Long delay, accompanied by acts inconsistent with a purpose of performing a contract, will, if not waived by the seller, preclude the buyer from specific performance of the contract. *Holden v. Purefoy,* 108 N. C., 163, 12 S. E., 848; *Beattie v. R. R.,* 108 N. C., 425, 12 S. E., 913; *May v. Getty,* 140 N. C., 310, 53 S. E., 75.

Here, as was said in *Francis v. Love, supra,* we are of opinion that "the plaintiff has laid by too long, and that he has not preferred his claim within reasonable time."

The judgment below is

Affirmed.

STATE v. HUGH CARTER CREWS.

(Filed 4 January, 1939.)

Automobiles § 31—Sentence for reckless driving held for error in exceeding maximum sentence fixed by the statute.

On his plea of guilty of reckless driving, defendant was sentenced to twelve months in jail to be assigned to work on the public roads. Defendant's exception to the judgment must be sustained, and the case is remanded for sentence in accord with the statute which prescribes a maximum imprisonment of ninety days or a fine, or both. Section 60, ch. 148, Public Laws of 1927, N. C. Code, 2621 (102).

APPEAL by defendant from *Sink, J.,* at September Term, 1938, of FORSYTH. Error and remanded.

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

Boyer & Julian for defendant, appellant.

PER CURIAM. The record reads: "The defendant comes into open court and through his counsel waives the finding of the bill of indictment and enters a plea of guilty of reckless driving. Judgment of the court is that the defendant be confined in the common jail of Forsyth County for a term of twelve (12) months and is assigned to work on the public roads of North Carolina under the supervision of the State Highway and Public Works Commission." To the judgment pronounced, the defendant reserved exception and appealed. The exception must be sustained. Section 60, chapter 148, Public Acts 1927 (N. C. Code of 1935 [Michie], sec. 2621 [102]), reads: "Every person con-

victed of reckless driving under section 3 of this act shall be punished by imprisonment in the county or municipal jail for a period of not less than five days nor more than ninety days, or by fine of not less than twenty-five dollars nor more than five hundred dollars, or by both such fine and imprisonment . . ." The sentence of twelve months imprisonment exceeds the maximum limit of ninety days imprisonment fixed by the statute for conviction of reckless driving, of which offense the defendant pleaded guilty.

The case is remanded to the Superior Court of Forsyth County that the sentence passed upon the defendant may be set aside and punishment in accordance with the statute imposed. *S. v. Crowell,* 116 N. C., 1053; *S. v. Smith,* 174 N. C., 804; *S. v. Taylor,* 124 N. C., 803, and cases there cited.

Error and remanded.

ERNEST F. BOHANNON, JR., v. MAUDE BOHANNON TROTMAN AND HUSBAND, J. C. TROTMAN; JOHN FRANKLIN TROTMAN; LAURA ELIZABETH TROTMAN; MARION JACKSON TROTMAN; MARY CAMILLE TROTMAN; WILLIAM CECIL TROTMAN; ERNEST F. BOHANNON, SR.; WACHOVIA BANK & TRUST COMPANY, EXECUTOR AND TRUSTEE OF THE ESTATE OF F. M. BOHANNON, DECEASED; WACHOVIA BANK & TRUST COMPANY, EXECUTOR AND TRUSTEE OF THE ESTATE OF LAURA WEBB BOHANNON, DECEASED, AND J. C. TROTMAN AND WACHOVIA BANK & TRUST COMPANY AS GENERAL GUARDIANS OF LAURA ELIZABETH TROTMAN, MARION JACKSON TROTMAN AND MARY CAMILLE TROTMAN, AND THE UNBORN ISSUE OF WILLIAM CECIL TROTMAN, AND ALL OTHER PERSONS NOT IN ESSE WHO MIGHT QUALIFY AS NEXT OF KIN OF WILLIAM CECIL TROTMAN, SO AS TO HAVE OR TAKE ANY INTEREST UNDER THE WILL OF LAURA WEBB BOHANNON, AND ALL UNBORN CHILDREN OF MAUDE BOHANNON TROTMAN, AND ALL UNBORN ISSUE OF UNBORN CHILDREN OF MAUDE BOHANNON TROTMAN, AND ALL UNBORN ISSUE OF JOHN FRANKLIN TROTMAN, AND ALL UNBORN ISSUE OF LAURA ELIZABETH TROTMAN, AND ALL UNBORN ISSUE OF MARION JACKSON TROTMAN, AND ALL UNBORN ISSUE OF MARY CAMILLE TROTMAN.

(Filed 1 February, 1939.)

1. Judgments §§ 17d, 26—Court has jurisdiction to hear cause prior to expiration of time to file answer when right to file answer is waived.

The right to file answer may be waived, and when one of the defendants in an action to determine the validity of a family agreement for the distribution of the estates in litigation waives his right to file answer by writing verified before a notary public, the court may proceed to hear the cause upon agreement of the parties prior to the expiration of time for filing answer, all the other parties having any interest in the estates

having filed pleadings and being properly represented by counsel. In the instant case, the defendant failing to file answer had been committed as an inebriate and was represented by guardian *ad litem*, who filed answer, and said defendant waived his right to defend personally.

2. Wills § 47: Trusts § 17—Where third persons wrongfully prevent testator from devising property for plaintiff's benefit, plaintiff may impress the estate with a trust even as against innocent beneficiaries.

Where third persons wrongfully interfere with the fixed intent of testator to devise and bequeath property for plaintiff's benefit, and induce testator to alter such fixed intent and leave plaintiff nothing, plaintiff may impress the estate with a trust in his favor, even as against innocent beneficiaries of testator, since such beneficiaries, though innocent, would not have received the property but for the wrongful act of the third persons, and therefore receive the property under the obligation of restitution.

3. Executors and Administrators § 24—Decree approving family agreement for distribution of estate affirmed in this case.

Plaintiff instituted an action against his aunt and grandmother, alleging that they wrongfully induced his grandfather to alter his fixed intent to devise and bequeath property for plaintiff's benefit. Thereafter, the complaint was amended to allege a cause of action against his grandfather's estate to impress same with a resulting trust, and the executors and all the beneficiaries, vested and contingent, *in esse* and unborn, of his grandfather's and grandmother's estates were made parties and were properly represented by counsel, and plaintiff and all the beneficiaries of the estates entered into a family agreement under which plaintiff was to receive a certain sum from his grandfather's estate and certain other property of the estate should be set aside in trust for him. The court found that the litigation involved risk to all the parties and to the trusts set up by the wills, that the peace and dignity of the family would be preserved under the family agreement, and that approval of the agreement would be to the best interests of all the parties, and entered judgment approving same. *Held:* The findings of fact were supported by plenary competent evidence, and the decree was properly entered on the findings in the inherent equity jurisdiction of the court to grant such relief upon the facts.

APPEAL by defendants from *Olive, Special Judge,* at October Term, 1938, of FORSYTH. Affirmed.

"This cause coming on to be heard before the undersigned judge presiding at the October, 1938, Term of Forsyth County Superior Court, and all the parties being represented in this hearing by counsel, and, in open court, having waived any right that they might otherwise have to have any of the matters involved in this action tried by a jury, and having agreed that the matter should be heard, both as to the law and the facts, by the undersigned judge, which agreement made in open court is hereby ordered to be entered in the minutes, and the court having heard the pleadings herein and the records in the case, and having heard

evidence, and having made a full investigation of the facts, hereby makes the following findings of fact:

"1. That F. M. Bohannon, late of Forsyth County, North Carolina, died on the 25th day of December, 1929, leaving a last will and testament, a copy of which is attached to the complaint in this action as Exhibit A, and which is hereby referred to and made a part of this finding of fact as fully as if set out herein in full. Said will has been duly probated and Wachovia Bank & Trust Company has heretofore duly qualified as executor and trustee under said will; that it has performed all its duties as executor under said will, and has its final account as executor, but continues to hold the residue of the estate of F. M. Bohannon passing to it as trustee in said capacity as trustee under said will in accordance with the terms thereof.

"2. That Laura Webb Bohannon, widow of F. M. Bohannon, died a resident of Forsyth County, North Carolina, on the 17th day of June, 1933, leaving a last will, a copy of which is attached to the complaint herein as Exhibit B, and which is hereby referred to and made a part of this finding of fact as fully as if set out herein in full. Said will has been duly probated and Wachovia Bank & Trust Company has heretofore duly qualified as executor and trustee under said will; that it has performed all its duties as executor under said will, and has filed its final account as executor, but continues to hold the residue of the estate of Laura Webb Bohannon passing to it as trustee in said capacity as trustee under said will in accordance with the terms thereof.

"3. This action involves a proposed settlement of a certain civil action originally instituted in the Superior Court of Mecklenburg County, North Carolina, by Ernest F. Bohannon, Jr., as plaintiff, against Wachovia Bank & Trust Company, Executor and Trustee of the Estate of Laura Webb Bohannon and Maude Bohannon Trotman, which civil action has heretofore been considered by the Supreme Court upon a question as to the sufficiency of the plaintiff's cause of action, the decision therein being reported in 210 N. C., 679. After the decision of the Supreme Court in said cause, the said action was removed from Mecklenburg County to Forsyth County for trial and thereafter the plaintiff therein filed an amended complaint and obtained an order making the children of Maude Bohannon Trotman, hereinafter referred to, and Wachovia Bank & Trust Company, as trustee of the estate of F. M. Bohannon, parties defendant. The entire record in said civil action has been introduced in evidence in this cause, and the allegations of the complaint and the amended complaint therein are all before the court, and said record is hereby referred to for a full statement of the causes of action alleged in said civil action. Said civil action and the proposed settlement thereof involve questions as to the distribution of the estate of F. M. Bohannon

and a cause of action for damages against the estate of Laura Webb Bohannon, growing out of alleged interference, by Laura Webb Bohannon and Maude Bohannon Trotman, with an intended disposition of the property of F. M. Bohannon, it being alleged that but for said wrongful interference the said F. M. Bohannon would have given a one-fifth interest in all his property to Ernest F. Bohannon, Jr. The property of F. M. Bohannon involved in the litigation and a one-fifth of the value of which is claimed by Ernest F. Bohannon, Jr., includes property which was transferred by F. M. Bohannon in his lifetime to a trustee for certain of the defendants, and also includes the residue of his estate passing under his will to the Wachovia Bank & Trust Company as trustee for certain of the defendants.

"4. All persons, both those *in esse* and those not *in esse*, who have, or might have, any interest or claim in any of the property of the trust estate of F. M. Bohannon, or in the *inter vivos* trusts created by him, or in any of the property of the trust estate of Laura Webb Bohannon, have been duly made parties to this action, and all parties *in esse* have been duly served with summons and a copy of the complaint; all parties *in esse* but not *sui juris*, are duly represented herein either by duly appointed, qualified and acting general guardians, or by duly appointed guardians *ad litem;* all guardians and guardians *ad litem* have been duly served with summons and copy of the complaint and have filed answer in behalf of their respective wards; all persons not *in esse* who have, or might have, any interest in the matters involved in this action are likewise properly before the court, being represented by duly appointed guardians *ad litem* who have filed answers in their behalf; that the interests of the estates of F. M. Bohannon and Laura Webb Bohannon, and of all persons who might be entitled to any interest under their respective wills, are further represented by Wachovia Bank & Trust Company as trustee under each of said wills; that said Wachovia Bank & Trust Company has filed an answer in its capacity as trustee under each of said wills and is represented in the action and at this hearing by separate counsel in each of said capacities; the court holds that all parties in interest are duly and properly before the court in such a manner as to be bound by the decree of the court, and are properly represented in the action and at this hearing. Ernest F. Bohannon, Sr., has been duly served with summons and a copy of the complaint and has filed in writing express waiver of his right to file an answer, and has filed a consent to the settlement provided for in the contract, a copy of which is attached to the complaint as Exhibit 'G.'

"5. The defendants Maude Bohannon Trotman and Ernest F. Bohannon, Sr., are the only children of F. M. Bohannon and Laura Webb Bohannon; that Ernest F. Bohannon, Jr., is the only child of Ernest F.

Bohannon, Sr., and the only children of Maude Bohannon Trotman are the defendants John Franklin Trotman, Laura Elizabeth Trotman, Marion Jackson Trotman, Mary Camille Trotman and William Cecil Trotman; that the defendant J. C. Trotman is the husband of the defendant Maude Bohannon Trotman. That no child of Maude Bohannon Trotman has died leaving issue.

"6. That J. C. Trotman and Wachovia Bank & Trust Company are the duly appointed, qualified and acting general guardians of each of the defendants Laura Elizabeth Trotman, Marion Jackson Trotman and Mary Camille Trotman, all of whom are minors; that the defendant William Cecil Trotman is a minor without general or testamentary guardian, and that Edward S. Heefner, Jr., has been duly appointed as guardian *ad litem,* and is duly representing said minor in this action; that Calvin Graves, Jr., has been duly appointed as guardian *ad litem,* and is duly representing Ernest F. Bohannon, Sr.; that Gaither Jenkins has been duly appointed as guardian *ad litem,* and is duly representing all unborn children of Maude Bohannon Trotman and all unborn issue of unborn children of Maude Bohannon Trotman and all unborn issue of John Franklin Trotman, Laura Elizabeth Trotman, Marion Jackson Trotman, and of Mary Camille Trotman.

"7. That Wachovia Bank & Trust Company is a corporation organized under the laws of North Carolina, and is duly authorized to act as executor, trustee and guardian.

"8. That prior to the death of F. M. Bohannon, he had established for the benefit of John Franklin Trotman, Laura Elizabeth Trotman, Marion Jackson Trotman and Mary Camille Trotman, who are all the children of Maude Bohannon Trotman born prior to the death of F. M. Bohannon, certain trusts, there being a separate trust for each of said children, and the funds here in said trusts at the time of the death of said F. M. Bohannon aggregated $761,519.95.

"9. That, in addition to the property contained in the trusts set out in the preceding finding, F. M. Bohannon left at his death the property shown on Exhibit 'C,' attached to the complaint herein, which had an inventory value of $1,532,625.62, and included all the property passing under the will; that the person entitled to the *corpus* of the residue of said estate now in the hands of Wachovia Bank & Trust Company as trustee under the terms of said will are John Franklin Trotman, Laura Elizabeth Trotman, Marion Jackson Trotman, Mary Camille Trotman, William Cecil Trotman and any other child or children who may be born to Maude Bohannon Trotman. In the event of the death of any of said Trotman children prior to the death of their mother, Maude Bohannon Trotman, or the death of Ernest F. Bohannon, Sr., the interest of such deceased child would pass to its issue then living. A

correct statement of the assets now held by said Wachovia Bank & Trust Company as trustee under the will of F. M. Bohannon, deceased, is attached to the complaint herein as Exhibit 'D,' which exhibit is hereby referred to and made a part of this finding of fact as fully as if set out herein in full and the court finds that the reasonable value of said assets shown on said exhibit at the present time is approximately $982,708.47.

"10. That Laura Webb Bohannon, widow of F. M. Bohannon, dissented from his will and thereby became entitled to a year's allowance, dower in the real estate, and one-third interest in the personal property of his estate; that the Wachovia Bank & Trust Company, as executor of the estate of F. M. Bohannon, duly delivered and transferred to the said Laura Webb Bohannon her one-third interest in the personal property, made settlement with her for her year's allowance in cash, and in settlement of her dower interest in the real estate conveyed to her a life estate in the home place at No. 960 W. Fifth Street, in Winston-Salem, N. C., and a one-third undivided interest in fee simple in two tracts of land known as the main factory, leaf house and storage shed, property situated on Patterson Avenue, Fifth and Chestnut streets. Said executor has also paid all debts and funeral expenses, and all estate, inheritance, succession, transfer and other taxes levied and imposed upon the estate, or any part thereof, as provided in the first item of the will of F. M. Bohannon, deceased, and that the estate of F. M. Bohannon now in the hands of said Wachovia Bank & Trust Company is held by it in trust, pursuant to the terms of said will, copy of which is hereto attached, marked Exhibit A.

"11. That a correct statement of the assets now held by Wachovia Bank & Trust Company as trustee of the estate of Laura Webb Bohannon is attached to the complaint in this action as Exhibit 'F' and is hereby referred to and made a part of this finding of fact as fully as if set out herein in full, and the court finds as a fact that the reasonable present value of the assets shown on said exhibit is $190,000.00.

"12. That the debts, taxes and costs of administration of the estate of Laura Webb Bohannon have been paid and all specific bequests have been duly delivered to the beneficiaries, and that the assets of said estate now in the hands of the trustee thereof, and referred to in the preceding finding of fact, are now held by said trustee under the terms and provisions of Item IV of the will of the said Laura Webb Bohannon.

"13. That the five Trotman children share in the two estates of F. M. Bohannon and Laura Webb Bohannon when taken together with substantial equality, the failure of William C. Trotman, born after the death of F. M. Bohannon, to participate in the *inter vivos* trusts established by F. M. Bohannon, being substantially equalized by the will of Laura Webb Bohannon.

"14. That the plaintiff Ernest F. Bohannon, Jr., was utterly excluded from any participation in the *inter vivos* trusts established by F. M. Bohannon, and also from any participation whatever either in the estate of his grandfather, F. M. Bohannon, or in the estate of his grandmother, Laura Webb Bohannon. In the action instituted by the said Ernest F. Bohannon, Jr., in the Superior Court of Mecklenburg County, and thereafter removed to Forsyth County, which action has been referred to in a preceding finding of fact, it is alleged that the said exclusion of Ernest F. Bohannon, Jr., was the result of wrongful acts on the part of Laura Webb Bohannon and Maude Bohannon Trotman, and that but for said wrongful acts said Ernest F. Bohannon, Jr., would have been given a one-fifth interest in the *inter vivos* trusts and a one-fifth interest in the estate of F. M. Bohannon, deceased. In the original complaint in said action, the relief sought was damages against the estate of Laura Webb Bohannon and Maude Bohannon Trotman in the amount of $393,184.39. In the amended complaint it is alleged that the remedy at law against the original defendants in said action is inadequate and that the plaintiff therein is entitled to relief of a legal or equitable nature against the estate of F. M. Bohannon and the persons participating therein under his will.

"15. That the plaintiff Ernest F. Bohannon, Jr., and the defendants Maude Bohannon Trotman and J. C. Trotman and John Franklin Trotman, and J. C. Trotman as one of the guardians, respectively, of Laura Elizabeth Trotman, Marion Jackson Trotman, and Mary Camille Trotman, have entered into a written contract dated September 30, 1938, a copy of which is attached to the complaint herein as Exhibit 'G,' and which is hereby referred to for all the terms thereof, and is made a part of this finding of fact as fully as if set out herein in full, and that this action has been instituted by the plaintiff herein as contemplated by said contract for the purpose of obtaining an adjudication of the court as to the validity of said contract, and in order that all fiduciaries may be properly advised and instructed by the court as to the validity thereof and their duties in regard thereto.

"16. That if said contract is approved, it will result in a final and complete settlement of the pending litigation between the parties and of all controversies in reference to distribution of the estate of F. M. Bohannon and Laura Webb Bohannon, and all controversies among the parties in reference to the *inter vivos* trusts created by F. M. Bohannon for certain of the defendants. That the approval and consummation of said settlement would also result in a permanent healing of the breach heretofore existing in the family relations and between the different branches of the family as more fully set out in a subsequent finding of fact, and would tend to preserve and protect the peace, honor and dignity of the family.

"17. That the absolute elimination of E. F. Bohannon, Jr., from any participation whatever in his grandfather's estate resulted in a bitter and far-reaching breach in the family relations between the Trotman and Bohannon branches of the family, and that this breach, instead of healing, had a tendency to widen as time went on, culminating in the family lawsuit referred to in the preceding findings of fact herein. Since the institution of said action, however, and since the decision of the Supreme Court therein, there has been a change in the family relationship and the feelings of the respective members of the family toward each other, and if the original cause of the breach of the family relations as referred to in the preceding paragraph hereof can be removed and the pending litigation settled upon a basis which all the parties consider fair and reasonable, peaceful and friendly family relations among all members of both branches of the family can be permanently reëstablished. On the other hand, if the said litigation is allowed to remain pending and is not settled except by a trial, it will act as a constant barrier to the establishment of family peace. If said action were to go to trial, it would plunge the family into litigation which would doubtless extend over a number of years and be attended with an enormous amount of expense, uncertainty and risk, as well as unfavorable publicity; that it would seriously jeopardize the trusts established by F. M. Bohannon, both in his lifetime and by the terms of his will; that it would tend to expose to the public gaze intimate family affairs which should be kept within the family circle, and that it would tend to destroy the peace, honor and dignity of the family resulting in embarrassment and humiliation to the various members thereof; that it would inevitably renew the breach of the family relations and would render any further reconciliation impossible.

"18. That the contract of settlement entered into between the plaintiff herein and all the members of the Trotman family who are *sui juris* was agreed upon after long, careful and painstaking consideration on the part of all the parties thereto, and that said parties have taken into consideration all the facts and circumstances in connection therewith, and have sincerely sought to arrive at such an agreement as would put an end to family litigation and dissension and would reëstablish peace and concord.

"19. The court finds as a fact that settlement under the terms of the contract attached to the complaint marked Exhibit 'G' is for the best interests of all the parties, including the present, prospective and contingent beneficiaries of the trust under the will of F. M. Bohannon, and that it is for the best interests of Laura Elizabeth Trotman, Marion Jackson Trotman and Mary Camille Trotman, and of all the other infants who are parties to this action, and their unborn issue.

"19-A. The court finds as a fact that settlement on the basis provided for in the contract attached to the complaint as Exhibit 'G' is for the best interests of all the present, prospective and contingent beneficiaries of the trust established under the will of Laura Webb Bohannon and is for the best interest of the infant, William Cecil Trotman, and his unborn issue.

"20. The court finds that the said settlement will prevent dissipation and waste and will more nearly accomplish the primary objects and effectuate the real intention of the creators of said trusts than could be accomplished by a rejection of said settlement and a relegation of the parties to bitter family strife and long-drawn-out litigation.

"21. The court finds as a fact that it is for the best interest of all parties concerned, and that it is the most equitable way to make said settlement, for the settlement to be made from the estate of F. M. Bohannon as provided for in said contract, and the court further finds that said settlement in said manner will more nearly effectuate the primary intentions of F. M. Bohannon and Laura Webb Bohannon than a settlement made in any other manner or from any other source.

"22. The plaintiff, in good faith, claims the right in the pending action to recover from the assets of the estates of F. M. Bohannon and Laura Webb Bohannon or from the persons who received said assets, the total sum of $393,184.39, or property of that value. Under the terms of said family settlement, plaintiff is to receive outright from the estate of F. M. Bohannon cash and property which the court finds to have a value approximately of $90,645.44. In addition thereto there is to be set up from the income and *corpus* of said estate a trust fund of cash and property of the aggregate value of $100,000 for the benefit of said Ernest F. Bohannon, Jr., and his wife, issue and next of kin. In consideration therefor the plaintiff is to release and give up all claims involved in the pending action, and all claims in, or against, the estates of F. M. Bohannon and Laura Webb Bohannon, or any other party or parties to this action. The court finds that said claims of the plaintiff are reasonably worth the value of the property to be received by him and the property to be set up in trust in said family settlement and said settlement constitutes a reasonable and equitable settlement of the conflicting claims involved.

"23. The court finds as facts that the disputes involved in the pending litigation are *bona fide* disputes, the parties thereto making adverse contentions in good faith; that a determination of the rights of the parties by carrying said litigation to a conclusion would involve long and expensive litigation and a determination of difficult and doubtful questions of fact and of law; that there would be conflicting testimony and the result of a trial in the Superior Court would be uncertain. Regardless of the

outcome of the trial in the Superior Court, there would doubtless be an appeal by the losing party to the Supreme Court, with the possibility of other trials before the litigation was finally concluded. The final outcome of said litigation would be doubtful and would be attended with risk on the part of all parties. That leaving the parties to work out their rights in said litigation would not only permanently impair the honor and dignity of the family and result in permanent family discord, but it would also seriously jeopardize the trusts involved, and that the court can more nearly carry out the primary intentions of the creators of said trusts and better preserve and safeguard said trusts by approving the family settlement than by leaving the parties to obtain an adjudication of their rights by litigation.

"It is, therefore, upon the foregoing findings of fact and upon the record, concluded as matters of law, and adjudged by the court as follows:

"(1) The court holds that, in its equity jurisdiction, looking to the interests of the family as a whole, and exercising the power of courts of equity to approve family settlements, and thereby preserve family ties and the honor and dignity of the family, the court has the power in this case to approve the settlement agreed upon by certain of the parties and to bind all parties not *sui juris* and those not *in esse.*

"(2) That the contract of settlement, copy of which is attached to the complaint herein as Exhibit 'G,' is hereby approved by the court, and is adjudged to be legally binding upon the parties thereto, and is hereby made legally binding upon all other parties in interest, including trustees, guardians, guardians *ad litem,* minors and unborn persons in interest.

"(3) That Wachovia Bank & Trust Company, as trustee of the estate of F. M. Bohannon, deceased, is hereby advised and instructed that it is the duty and it is hereby ordered and directed, as such trustee, to carry out and perform the terms of said contract and, in accordance therewith, to pay and deliver to the plaintiff herein the cash and property directed to be paid and delivered to him by the said contract, and to set up the new trust fund as provided for in the said contract, a copy of which is attached to the complaint herein as Exhibit 'G'; and said Exhibit 'G' attached to the complaint herein is hereby incorporated in, and made a part of, this decree as fully as if set out herein, in full; and it is ordered that said Exhibit 'G' shall be included as a part of any certified copy of this decree which may be used for recording in the office of the register of deeds of any county in which any real estate affected hereby is located. It is hereby adjudged by the court that said Exhibit 'G' shall constitute the trust instrument under which the said new trust shall be set up and administered, and the said trust instrument was intended by the parties

to this action to constitute and set up an irrevocable trust and that such trust is hereby adjudged to be irrevocable.

"(4) That this decree operate and it is hereby declared to operate as a conveyance from the Wachovia Bank & Trust Company, as trustee under the will of F. M. Bohannon, and from all other parties to this action who may have any legal or equitable title therein, to Wachovia Bank & Trust Company, as trustee under the contract containing the trust provisions, a copy of which is attached to the complaint marked Exhibit 'G' of a 19.4 per cent undivided interest in all the real estate held by Wachovia Bank & Trust Company as trustee under the will of F. M. Bohannon or owned by said trust estate of F. M. Bohannon on the date of this decree, and in the event of the sale of any of said real estate between this date and the date of distribution, then said Wachovia Bank & Trust Company shall transfer to itself as trustee under the contract marked Exhibit 'G' 19.4 per cent of the consideration that may be received for any such real estate so sold.

"(5) It is further ordered, adjudged and decreed that the Wachovia Bank & Trust Company, as trustee under the will of F. M. Bohannon, shall, at the time the trust which is established under the contract marked Exhibit 'G' is set up, execute and deliver to Wachovia Bank & Trust Company, as trustee under said contract, a deed conveying title in fee simple to 19.4 per cent undivided interest in the real estate held by it as trustee under the will of F. M. Bohannon upon the date of this decree, or, in the event of an appeal to the Supreme Court, and an affirmance of this decree, as of the date the decision of the Supreme Court is filed in the Superior Court.

"(6) The court further advises and instructs all fiduciaries who are parties to this action, whether in their own right or in a representative capacity, that it is their duty and they are hereby ordered and directed as such fiduciaries to recognize the contract of settlement hereinbefore referred to as valid and binding.

"(7) The costs of this action, including the fees of all guardians *ad litem,* when approved by the court, shall be paid by Wachovia Bank & Trust Company, trustee of the estate of F. M. Bohannon, from the assets of the estate of F. M. Bohannon in the hands of said trustee, and the said trustee shall likewise pay the costs of the action instituted in the Superior Court of Mecklenburg County, N. C., and hereinbefore referred to and now pending in the Superior Court of Forsyth County, and a proper judgment shall be entered in said cause dismissing said action upon the carrying out of the contract of settlement in accordance with this decree.

"(8) This action is held open until the trust hereinbefore referred to is fully established under the contract, Exhibit 'G,' and for such period

thereafter as may be deemed proper for the purpose of supervising the setting up and establishing the said trust, and for the purpose of adjusting in this action any rights or equities that may arise between Ernest F. Bohannon, Jr., and the other beneficiaries of the trust provided for in Exhibit 'G' attached to the complaint, in connection with the settlement herein approved and the establishing of said trust.

"This 26 day of October, 1938. Hubert E. Olive, Judge Presiding."

Wachovia Bank & Trust Company, executor and trustee of the estate of F. M. Bohannon, groups its exceptions and assigns error as follows:

"1. In that the court overruled its objection to the hearing of the case at the October Term since no answer had been filed by Ernest F. Bohannon, Sr., and the time for answering had not expired, to which this defendant excepted.

"2. In that the court found as a fact that the settlement under the terms of the contract attached to the complaint marked Exhibit 'G' is for the best interests of all the parties.

"3. In that the court entered judgment directing Wachovia Bank & Trust Company as trustee of the estate of F. M. Bohannon to carry out and perform the terms of the contract attached to the complaint as Exhibit 'G,' and to pay and deliver to the plaintiff cash and properties as therein directed and to set up the new trusts as provided in said contract.

"4. In that the Court signed and entered the judgment set out in the record."

Edward S. Heefner, Jr., guardian *ad litem* for William Cecil Trotman and the unborn issue of William Cecil Trotman and all other persons not *in esse* who might qualify as next of kin of William Cecil Trotman, so as to have or take any interest under the will of Laura Webb Bohannon, groups his exceptions and assigns error as follows: "In that the court signed and entered the judgment set out in the record."

Gaither Jenkins, gurdian *ad litem* for all unborn children of Maude Bohannon Trotman, and all unborn issue of unborn children of Maude Bohannon Trotman, and all unborn issue of John Franklin Trotman, and all unborn issue of Laura Elizabeth Trotman, and all unborn issue of Marion Jackson Trotman, and all unborn issue of Mary Camille Trotman, groups his exceptions and assigns error as follows: "In that the court signed and entered the judgment set out in the record."

Robinson & Jones for Ernest F. Bohannon, Jr.

Parrish & Deal for Mrs. Maude Bohannon Trotman, J. C. Trotman and John Franklin Trotman, and J. C. Trotman, as one of the co-guardians of Laura Elizabeth Trotman, Marion Jackson Trotman and Mary Camille Trotman.

Manly, Hendren & Womble for Wachovia Bank & Trust Company, general guardian of Laura Elizabeth Trotman, Marion Jackson Trotman and Mary Camille Trotman, and Wachovia Bank & Trust Company, Executor and Trustee of the Estate of F. M. Bohannon.

Gaither Jenkins, guardian ad litem for all unborn children of Maude Bohannon Trotman et al.

Edward S. Heefner, Jr., guardian ad litem for William Cecil Trotman et al.

Calvin Graves, Jr., guardian ad litem for Ernest F. Bohannon, Sr.

CLARKSON, J. The following exception and assignment of error made by defendant Wachovia Bank & Trust Company, executor and trustee of the estate of F. M. Bohannon, cannot be sustained: "(1) That the court overruled its objection to the hearing of the case at the October Term since no answer had been filed by Ernest F. Bohannon, Sr., and the time for answering had not expired, to which this defendant excepted. . . . At the time of the hearing, Ernest F. Bohannon, Sr., had not filed an answer and that thirty days had not elapsed since service upon him of the summons and complaint." In its brief it states: "The statutory time for answering, however, has now expired, and it may be admitted that the record in the clerk's office does not show either an answer or demurrer filed by Ernest F. Bohannon, Sr."

On the record, we find that "Upon proper evidence, the clerk of the Superior Court of Forsyth County found: 'That the defendant Ernest F. Bohannon, Sr., has been committed as an inebriate, and that, although there has been no order depriving him of his legal status, except an order of commitment, it is proper that he be represented by a guardian *ad litem* in this proceeding in addition to defending himself personally, if he desires to do so.' Consequently, a guardian *ad litem* was appointed for him, and this guardian filed an answer on his behalf. . . . The matter also was taken up with him personally, and he expressly waived the right to file an answer, and stated that he was in favor of the settlement, this consent and waiver being verified before a notary public." The right to file an answer is a privilege which may be waived.

In *Beebe v. Beebe Co.*, 46 Atl., 168 (170-171), the defendant waived the time for filing answer and a judgment was taken before the statutory time had expired. In approving this procedure, the Court said: "Section 105 of the Practice Act allows the defendant 30 days after the filing of the declaration within which to plead thereto. But this provision was enacted in the interest of the defendant, and he may waive it, and put himself in default at any time; and, when so in default, either by his own acknowledgment of the justness of the plaintiff's claim, and waiver of time to plead, a judgment by default for a want of a plea may

be entered against him. *Hoguet v. Wallace,* 28 N. J. Law, 524. Proper practice requires that the admission by the defendant of the justice of the plaintiff's claim, and his waiver of time to plead to the latter's declaration, should be in writing, and filed in the clerk's office."

The following exception and assignment of error made by defendant Wachovia Bank & Trust Company, executor and trustee of the estate of F. M. Bohannon, cannot be sustained: "(2) In that the court found as a fact that the settlement under the terms of the contract attached to the complaint marked Exhibit 'G' is for the best interests of all the parties." This is the main controversy in this case. We think there was sufficient competent evidence to support the findings of fact, and the conclusions of law thereon are fully sustained by the authorities in this jurisdiction.

The settlement was based mainly on a decision of this Court, *Bohannon v. Trust Co.,* 210 N. C., 679, where it was held: "Plaintiff alleged that his grandfather had formed a fixed intention to settle a large part of his estate on plaintiff, that defendants conspired together to deprive plaintiff of his share of the estate, and by false and fraudulent representations induced his grandfather to abandon his intention to leave plaintiff a large part of his property, and that but for such false and fraudulent representations plaintiff's grandfather would have carried out his previous intention and would have devised for the benefit of plaintiff a large part of the estate. *Held:* The facts alleged are sufficient to constitute a cause of action against defendants, the cause being analogous to the right of action for wrongful interference with contractual rights by a third person."

The amended complaint stated a cause of action against the beneficiaries of the F. M. Bohannon estate.

It is contended by plaintiff: "(1) If Maude Bohannon Trotman and Laura Webb Bohannon (the two original defendants) had obtained the property themselves as devisees under the F. M. Bohannon will, they would have been declared constructive trustees for the benefit of the plaintiff. (2) If the property in the hands of the wrongdoers would thus have been subject to a constructive trust, it is likewise subject to such a trust in the hands of the donees of said property. Dealing with these propositions in the order stated: (1) If the original defendants had themselves, as devisees, obtained property which, but for their wrong, would have gone to the plaintiff, they would have been declared constructively trustees under *Sumner v. Staton,* 151 N. C., 198." *Teachey v. Gurley, ante,* 288; *Chambers v. Byers, ante,* 373; 2 Pomeroy's Equity Jurisprudence (3rd Ed.), sections 912 and 913. (2) "Inasmuch as the beneficiaries under the will of F. M. Bohannon are donees, the property in their hands is subject to the same constructive trusts as if it were in the hands of the original wrongdoers." 3 Bogart, Trusts & Trustees, sec. 473. We think these contentions of plaintiff correct.

In *Ruhe v. Ruhe,* 77 Atl. P., 800 (Court of Appeals, Md.), it is thus stated: "It is also settled that property obtained by one through the fraudulent practices of a third person will be held under a constructive trust for the person defrauded, though the person who received the benefit is innocent of collusion. If such person accepts the property, he adopts the means by which it was procured, or, as *Lord Chief Justice Wilmot* said: 'Let the hand receiving the gift be ever so chaste; yet if it comes through a polluted channel, the obligation of restitution will follow it.' 1 Perry on Trusts, sec. 211. While the allegations of this bill may not be sufficient to create a resulting trust, as urged by the appellee, there can be no doubt that they are sufficiently certain and definite to gratify the requirements of law as to the creation of a valid trust that will be enforced by a court of equity." *Saar v. Weeks,* 178 Pac., 819; *Bank v. Crowder,* 194 N. C., 312.

There was plenary evidence to support the facts found by the court below. The conclusions of law are fully sustained by the authorities in this and other courts in the exercise of its equitable jurisdiction approving family settlements made like the present.

In *Price v. Price,* 133 N. C., 494 (504), it is written: "The principles by which courts of equity are governed in sustaining and enforcing such contracts as to the one set out in this record are well settled and strongly stated by *Lord Hardwicke* in the case of *Stapilton v. Stapilton,* 1 Atl., 2 (2 White & Tudor's L. C., 1675, star p. 824). In speaking of a contract made for the purpose of settling a family controversy he says: 'It was to save the honor of the father and his family, and was a reasonable agreement; and, therefore, if it is possible for a court of equity to decree a performance of it, it ought to be done. . . . And, considering the consequence of setting aside this agreement, a court of equity will be glad to lay hold of any just ground to carry it into execution, and to establish the peace of a family.'" *Reynolds v. Reynolds,* 208 N. C., 578 (622).

In *Armstrong v. Polakavetz,* 191 N. C., 731 (734-5), we find: "In 5 R. C. L., p. 878, it is said: 'It is the duty of courts rather to encourage than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims; and the nature or extent of the rights of each should not be nicely scrutinized. Courts should, so far as they can do so legally and properly, support agreements which have for their object the amicable settlement of doubtful rights of parties; the consideration of each agreement is not only valuable, but highly meritorious. They are encouraged because they promote peace, and when there is no fraud, and the parties meet on equal terms and adjust their differences, the court will not overlook the compromise, but will hold the parties concluded by the settlement. Courts of equity, like courts of law, do not discountenance compromises of doubtful claims, much less of suits ac-

tually instituted for litigating such claims. Such rule would tend to defeat and discourage all compromise. Equity favors amicable adjustments, and will not disturb them unless its jurisdiction is invoked in favor of one without knowledge at the time by satisfactory evidence of deception, fraud or mistake.' This has always been the policy of this State borne out by numerous authorities. *Sutton v. Robeson,* 31 N. C., 380; *Williams v. Alexander,* 39 N. C., 207; *Mayo v. Gardner,* 49 N. C., 359; *Barnawell v. Threadgill,* 56 N. C., 58; *York v. Westall,* 143 N. C., 276; *Peyton v. Shoe Co.,* 167 N. C., 280. In *Beck v. Wilkins-Ricks Co.,* 186 N. C., 214, it is said: 'In *Mayo v. Gardner,* 49 N. C., 359, this Court, by *Chief Justice Nash,* says: *"In re Lucy,* 21 Eng. Law and Eq. Rep., 199, it was decided that, to sustain a compromise, it was sufficient if the parties thought, at the time of entering into it, that there was a *bona fide* (or real) question between them, though in fact there was no such question." The law favors the settlement of disputes, as was said in that case. It is stated in 9 Cyc., 345, that "the compromise of a disputed claim may uphold a promise, although the demand was unfounded," citing numerous cases in the notes to sustain the text.' " *Trust Co. v. Nicholson,* 162 N. C., 257.

In *Tise v. Hicks,* 191 N. C., 609 (613-614), we find: "Family settlements, such as that made by these brothers and sisters, when fairly made, and when they do not prejudice the rights of creditors, are favorites of the law. They are made by members of a family, after the death of the father or mother, when the ties of family affection are strong and sacred, and before they are weakened by separation of brother and sisters, which is inevitable. They are made in recognition of facts and circumstances known, often, only to those who have lived in the sacred family circle, and which a just family pride would not expose to those who neither understand nor appreciate them. They proceed from a desire on the part of all who participate in them to adjust property rights, not upon strict legal principles, however just, but upon such terms as will prevent possible family dissensions, and will tend to strengthen the ties of family affection. The law ought to, and does respect such settlements; it does not require that they shall be made in accord with strict rules of law; nor will they be set aside because of objections based upon mere technicalities. *Judge Gaston,* speaking of an agreement similar to that involved in this action, says, in *Bailey v. Wilson,* 21 N. C., 182, 'The agreement was confessedly entered into for the purpose of quieting disputes between the children of the same father, in relation to the disposition of his property; it is apparently equal; it is not denied to be fair, and was deliberately assented to as a proper and just family arrangement. Such arrangements are upheld by considerations affecting the interest of all parties, often far more weighty than any consideration simply pecu-

niary.' 11 R. C. L., 29, sec. 15; 18 C. J., 891, sec. 159; *Moore v. Gregory* (Va.), 131 S. E., 692." 65 C. J., pp. 683-4; 69 C. J., at p. 1274; *In re Reynolds,* 206 N. C., 276; *Reynolds v. Reynolds,* 208 N. C., 254; *Reynolds v. Reynolds,* 208 N. C., 578 (620-624); *Bank v. Alexander,* 188 N. C., 667 (671); *Spencer v. McCleneghan,* 202 N. C., 662 (671); *Raleigh v. Trustees,* 206 N. C., 485; *Martin v. Comrs. of Wake,* 208 N. C., 354; *Trust Co. v. Wade,* 211 N. C., 27; *Cutter v. Trust Co.,* 213 N. C., 686; 2 Pomeroy Equity (4th Ed.), sec. 850.

In the brief of defendants Mrs. Maude Bohannon Trotman, J. C. Trotman and John Franklin Trotman, and J. C. Trotman as one of the co-guardians of Laura Elizabeth Trotman, Marion Jackson Trotman and Mary Camille Trotman, respectively, is the following: "Counsel for the above named defendants, therefore, contend that the judgment of the Superior Court should be affirmed. In conclusion, they hope that they will be pardoned for stating to the court that it is the very sincere wish of the members of the Trotman family that the settlement be finally approved by the Supreme Court."

In the brief of Calvin Graves, Jr., guardian *ad litem* for Ernest F. Bohannon, Sr., is the following: "Calvin Graves, Jr., guardian *ad litem* for Ernest F. Bohannon, Sr., adopts the propositions of law set forth in the brief of Ernest F. Bohannon, Jr., plaintiff, and also adopts the argument in the brief of counsel for Mrs. Maude Bohannon Trotman, J. C. Trotman and John Franklin Trotman, and J. C. Trotman as one of the co-guardians of Laura Elizabeth Trotman, Marion Jackson Trotman and Mary Camille Trotman. Counsel for the above named defendant, therefore, respectfully argues and contends that the judgment of the Superior Court should be affirmed."

The case is a moving picture of distressing circumstances which we need not emphasize. The father and mother of the minor, trust beneficiaries, agree to the family settlement and think it is for the best interest of all parties that the litigation which is with their blood kin be compromised and adjusted and the family differences be ended forever. That the property rights affected by the adjustment is nothing in comparison to the benefit of ending a serious family feud, which might continue on and on through the generations to come. From the exigencies that are continually arising in the human family, from very necessity a power must exist somewhere to grant relief in such cases of dire need. Under our system of jurisprudence it is vested in the courts of equity. The court below, after a full hearing, has entered a decree approving this settlement.

From a careful review of the record and briefs, we think the judgment of the court below must be

Affirmed.

L. E. O'BRIANT, MAYE H. O'BRIANT, EARLE J. O'BRIANT, JESSIE O'BRIANT, R. D. O'BRIANT, AND NEFFIE O'BRIANT BRADSHER v. MRS. E. FRANK LEE, CLAUDE V. JONES, TRUSTEE, MRS. E. FRANK LEE, GUARDIAN, AND VICTOR S. BRYANT, TRUSTEE FOR ELSIE LOIS LEE.

(Filed 1 February, 1939.)

1. Mortgages § 2—Equity will declare absolute deed and contemporaneous contract to reconvey a mortgage when transaction is to secure debt.

An absolute deed and a contemporaneous contract by the grantee to reconvey upon the payment of a designated sum within a stipulated time will be declared in equity a mortgage if it appears upon the face of the instruments that there was a debt existing between the parties, either antecedent or presently created, unless a contrary intent plainly appears upon the face of the instruments, or when the relationship of debtor and creditor does not appear from the instruments, if it appears by evidence *dehors* the instruments that in fact the transaction was between debtor and creditor and was intended by the parties to secure the debt.

2. Same: Evidence § 40—Evidence dehors the instruments is competent in determining whether deed and contract to reconvey constitute equitable mortgage.

In an action to have an absolute deed and a contemporaneous contract by the grantee to reconvey declared in equity a mortgage when it does not appear from the face of the instruments that the relation of debtor and creditor existed between the parties, parol and extrinsic evidence *dehors* the instrument tending to show the consideration for the deed, prior negotiations between the parties, continued possession by the grantor, and the conduct of the parties before, at, and after the execution of the instruments, is competent, not for the purpose of contradicting the writings, but to show the entire contract, such circumstances being competent in determining whether in fact the transaction was intended by the parties to secure a debt.

3. Same—In action to establish equitable mortgage, existence of debt between the parties may be established by parol.

In an action to have an absolute deed and a contract to reconvey declared an equitable mortgage, it is not necessary that it appear upon the face of the instruments that the grantor in the deed is personally obligated to pay the sum stated for the reconveyance or be obligated to redeem within the time stipulated, since the existence of the debt may be shown by parol from the nature, facts and circumstances of the transaction tending to establish this conclusion by fair and just implication.

4. Appeal and Error § 50—Decision that plaintiffs are not entitled to judgment on the pleadings but that issue of fact was raised for jury precludes judgment of nonsuit on subsequent hearing.

Where, in an action to have an absolute deed and a contemporaneous contract by the grantee to reconvey declared in equity a mortgage, it is determined on appeal that judgment refusing plaintiffs' motion for judgment on the pleadings was correctly entered, but that an issue of fact

was raised for the determination of the jury, the decision becomes the law of the case, and on the subsequent hearing it is error for the court to refuse to submit the issue to the jury and enter judgment for defendant.

STACY, C. J., dissenting.

WINBORNE, J., concurs in dissent.

APPEAL by plaintiffs from *Ervin, Jr., Special Judge,* at September Term, 1938, of DURHAM.

This is an action to have a deed from plaintiffs to defendant and a contract of reconveyance from defendant to plaintiffs delivered contemporaneously construed as and adjudged to be in equity a mortgage; for the redemption of said mortgage; and for an accounting. The case was here on a prior appeal at the Spring Term, 1938, and is reported in 212 N. C., 793. The facts, including an exact copy of the instrument executed by the defendant, are there set forth. Since the former appeal the complaint has been amended to allege "That the relationship of debtor and creditor did and does now exist between the plaintiffs and the defendant."

When the case came on for trial below a jury was impaneled and evidence was offered by the plaintiffs. During the examination of the plaintiff, Lex O'Briant, the jury was excused and the plaintiffs were permitted to continue with the examination for the purpose of allowing the record to show what the witness would have testified if permitted to do so. This evidence is substantially as recited in the former appeal. The evidence was excluded over plaintiffs' exception. Other similar testimony was likewise excluded. The plaintiffs rested, and upon motion by the defendant for judgment upon the record, the court, being of the opinion that there is no issue of fact to be submitted to the jury upon the record and being of the opinion that upon the record and upon the admitted paper writings in controversy the plaintiffs are not entitled to the relief sought in the complaint, rendered judgment dismissing the plaintiffs' action and granting defendant judgment in the sum of $250.00 against plaintiffs. The plaintiffs excepted and appealed.

Bennett & McDonald and Guthrie & Guthrie for plaintiffs, appellants.

Brooks, McLendon & Holderness and Hedrick & Hall for defendant, appellee.

BARNHILL, J. After this cause was remanded for a new trial on the former appeal, on motion of plaintiffs, Claude V. Jones, Trustee, Mrs. E. Frank Lee, Guardian, and Victor S. Bryant, Trustee for Elsie Lois

Lee, were made additional parties defendant and the complaint was amended accordingly. Immediately after the impaneling of the jury the defendants stipulated in open court that the additional parties defendant claim no right or interest in the real estate involved in this controversy superior to the rights of Mrs. E. Frank Lee and that such rights as they may have are subject and subordinate to the terms, provisions, and conditions of any contract which may be finally established in this action between the plaintiffs and the defendant Mrs. E. Frank Lee, individually. Thus, it appears that Mrs. E. Frank Lee is the only real defendant party in interest on this appeal.

The plaintiffs admit that they executed and delivered to the defendant a paper writing which is a deed absolute in form and that contemporaneously therewith, and as a part of the same transaction, they received from the defendant a paper writing in which the defendant bound herself, under the conditions therein stipulated, to reconvey the property to the plaintiffs on or before 2 December, 1934. Is parol proof of the facts and circumstances surrounding the transaction, tending to show the real intent of the parties, and that the relationship of debtor and creditor existed, competent for the purpose of showing that the two instruments construed together constitute a mortgage? This is the one question presented.

"The principle that equity looks beneath the external form in determining questions connected with mortgage has frequently been applied to a particular mode of dealing with real property. Where land is conveyed by an absolute deed, and an instrument is given back as a part of the same transaction, not containing the condition ordinarily inserted in mortgages, but being an agreement that the grantee will reconvey the premises if the grantor shall pay a certain sum of money at or before a specified time, the two taken together may be what on their face they purport to be—a mere sale with a contract of repurchase, or they may constitute a mortgage. In the first case, where the transaction is merely a sale and a contract of repurchase, the agreement must be fulfilled according to its terms. . . . In the second case, if the transaction be a mortgage, all the qualities and incidents of a mortgage attach, whatever be its external form, and whatever be the collateral stipulations, the maxim, once a mortgage, always a mortgage, applies to this condition of fact with a special emphasis." Sec. 1194, 3 Pom. Eq. Jur., 4th Ed. "Whether any particular transaction does thus amount to a mortgage or to a sale with a contract to repurchase must, to a large extent, depend upon its own special circumstances; for the question finally turns, in all cases, upon the real intention of the parties as shown upon the face of the writings, or as disclosed by extrinsic evidence. A general criterion, however, has been established by an

overwhelming concensus of authorities, which furnishes a sufficient test in the great majority of cases; and whenever the application of this test still leaves a doubt, the American courts, from obvious motives of policy, have generally leaned in favor of the mortgage. This criterion is the continued existence of a debt or liability between the parties, so that the conveyance is in reality intended as a security for the debt or indemnity against the liability. If there is an indebtedness or liability between the parties, either a debt existing prior to the conveyance, or a debt arising from a loan made at the time of the conveyance, or from any other cause, and this debt is still left subsistent, not being discharged or satisfied by the conveyance, but the grantor is regarded as still owing and bound to pay at some future time, so that the payment stipulated for in the agreement to reconvey is in reality the payment of this existing debt, then the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulation they may have inserted in the instruments. . . . The writings may show on their face that the relation of debtor and creditor still continues, and that its existence and consequences are contemplated by the parties; or they may entirely fail to show any such fact, and may consist simply of an absolute conveyance and of a naked agreement to reconvey. . . . In the latter case extrinsic parol evidence is always admissible to show the real situation of the parties, the existence of a debt, their intention to secure payment of that debt, and the actual character of the instruments as constituting a mortgage." Sec. 1195, 3 Pom. Eq. Jur., 4th Ed.

"From the controlling principle that a conveyance is a mortgage irrespective of its form, if designed to secure the performance of an obligation, it results that a deed, though absolute in form and unqualified by any accompanying agreement for a reconveyance of the property or a defeasance, must be construed to be a mortgage subject to redemption where it is made manifest from a consideration of all surrounding facts and circumstances that the parties thereto intended the conveyance to operate by way of security and in no other mode." 19 R. C. L., sec. 29, page 261. (This doctrine has been adopted with limitations by this Court.) "Since an instrument, irrespective of its form, is a mortgage if intended as security, it follows that a deed with a provision for a reconveyance or a defeasance of the estate on the performance of certain conditions, whether the provision is made in the deed itself or in an accompanying instrument, is a mortgage if intended to secure the performance of the conditions stipulated, even though it is in form a conditional sale or conveyance of some other character. In this connection it is important to note that the deed and the provision for reconveyance do not of themselves constitute a mortgage although

the rule is sometimes loosely so stated. On the contrary, it is absolutely essential that at the inception of the transaction the deed be intended to operate by way of security." 19 R. C. L., sec. 34, page 265.

"Very frequently no expressions are used in either the deed proper or the stipulation for reconveyance which indicate either that the transaction was intended to operate as a mortgage or that the relationship of debtor and creditor existed between the parties after the conveyance." In such instances, "According to one view the transaction is presumed as a matter of law to be a mortgage. . . . Elsewhere, however, the transaction is presumed as a matter of fact to be a mortgage, evidence being admissible to rebut that presumption. In other jurisdictions the transaction is regarded *prima facie* as what it purports to be, a conditional sale, this view having the support of the weight of authority." 19 R. C. L., sec. 37, page 267.

"Regardless of the view that they may entertain as to the presumptive character of a deed with a stipulation for reconveyance, or as to the standard of proof necessary to establish the instrument or instruments to constitute a mortgage, the authorities are agreed that where the evidence leaves the state of the transaction in doubt, a court will hold a deed with a provision for reconveyance to be a mortgage rather than a conditional sale. This rule is based on the consideration that, generally speaking, the purpose of justice will be more effectually subserved if the transaction is declared to be a mortgage than if it is held to be a conditional sale, for as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by them to avail themselves of the advantage of their superiority, in order to obtain inequitable advantages." 19 R. C. L., sec. 39, page 269.

"When the grantor in an absolute deed at the same time takes back from the grantee a written contract giving the former a certain length of time in which to redeem the premises by paying the amount of the debt, or the consideration for the deed, and binding the latter to reconvey on such redemption, the two papers together constitute a mortgage. And the effect of the transaction is not altered by the fact that the contract specifically limits the time for redemption, and makes the time an essential element in the right to redeem. But if the contract leaves it entirely optional with the grantor to redeem or not, and does not bind him to effect a redemption according to the agreement, it is rather to be held a conditional sale than a mortgage." 41 C. J., sec. 81 (3), page 321.

The foregoing textbook statements of the law are supported by a wealth of authority cited in the texts. Likewise, a full monograph on the whole subject may be found in L. R. A., 1916B, page 27, Et. Seq.

The decisions of the various American courts are there gathered and cited. On the particular questions here presented citations may be found on pp. 126-135, pp. 213-236, and pp. 240-243. Likewise, a citation and summary of the later decisions may be found in the annotations in 79 A. L. R., page 937.

In *Conway v. Alexander*, 3 U. S. Law Ed., 321, the leading case on the subject of the distinction between mortgages and conditional sales, the Court laid down the rule followed since then in most of the states, that the intention of the parties governed as to whether they were entering into an absolute sale with a right of repurchase in the grantor, or whether the conveyance was given as a security. It was further held that, in order for the transaction to be a mortgage, there must be a debt continuing to exist in favor of the grantee subsequent to the conveyance. *Marshall, C. J.*, there made the following oft-quoted statement: "To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the court of chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale. And as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority, in order to obtain inequitable advantages. For this reason the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages, but as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money or an actual sale."

Parks v. Mulledy, 79 A. L. R., 934, is a case in which there was a deed absolute with a contract to reconvey. It is there said: "The intention of the parties at the time an agreement to execute a deed is consummated is determinative of whether the title is irrevocably transferred, or the conveyance is merely a security for the payment of a debt or the performance of an obligation." *Clinton v. Utah Construction Co.*, 40 Idaho 659, 237 Pac., 427. In *Hoover v. Bouffleur*, 133 Pac., 602 (Wash.), the plaintiff, being in need of a loan of money with which to pay installments due on a mortgage, applied to the defendant for the necessary accommodation. The defendant refused to make the loan on the security of the mortgaged property, but offered to buy it

for the amount of the proposed loan ($250.00) and to give the plaintiff an option to repurchase within three months for $325.00. Thereupon, the plaintiff conveyed the property to the defendant by a deed absolute, and took back an option as agreed. The transaction was held to constitute a mortgage, in view of the fact the amount advanced was grossly inadequate consideration for an absolute conveyance, notwithstanding the previous refusal of the defendant to make a loan. *Sherrer v. Harris,* 13 S. W., 730 (Ark.), is to the same effect.

The real character of the transaction and the true intention of the parties may be inquired into, and shall govern, notwithstanding they may have adopted the form of an absolute conveyance and bond for resale. And if such transaction was really a loan, and these instruments were executed to secure it, it is a mortgage; and once a mortgage it so continues. *Bishop v. Williams,* 18 Ill., 105; *Sears v. Dixon,* 33 Cal., 326.

The rule regards the circumstance of the parties and executes their real intention, and prevents either of the parties to the instrument committing a fraud on the other by claiming it as an absolute conveyance, notwithstanding it was given and accepted as security. In other words, the real transaction is permitted to be proved. *Cabrera v. American Colonial Bank,* 214 U. S., 224, 53 L. Ed., 974. The real intention of the parties controls.

In North Carolina we have decisions to like effect. In *Streator v. Jones,* 10 N. C., 423, the plaintiff was seeking to show that a deed absolute was executed and delivered as security for a loan. In holding that parol evidence was competent, it is there said: "Can it be said that the deed embraces the whole contract or can it be said that the deed contradicts that part of the contract which provided for redemption? It has never been considered that a defeasance and an absolute conveyance will not stand together. It seems to me that in such case the execution of the deed is a part execution only of the contract, and that the residue of the contract remains executory."

Poindexter v. McCannon, 16 N. C., 373, is a case in which a bill of sale was executed for a slave. There was an indorsement on the bill of sale providing that if the plaintiff paid the defendant $400.00 within twelve months of the date the bill of sale should be void. *Ruffin, J.,* speaking for the Court, said: "A mortgage and a conditional sale are nearly allied to each other, and it is frequently difficult to say whether a particular transaction is the one or the other. The difference between them is that the former is a security for a debt and the latter is a purchase for a price paid, or to be paid, to become absolute on a particular event, or a purchase, accompanied by an agreement to resell upon particular terms. It is the latter kind that runs so nearly into a mort-

gage; for as needy and distressed men are those who are commonly drawn into such contracts, and the very anxiety to get their estates again, which produces a stipulation to that effect, denotes either that it was favorite property, which the party did not intend to part from conclusively, or that the price was so inadequate as to make it material, in point of interest, that they should have the power to reclaim. Courts lean towards considering them mortgages. But there is no rule of law that a sale shall not be made conditionally. In each case the only difficulty is to ascertain the character of the transaction. When it is once determined to be a mortgage, all the consequences of account, redemption, and the like, follow, notwithstanding any stipulation to the contrary; for the power of redemption is not lost by any hard conditions, nor shall it be fettered to any point of time not according to the course of the Court." Referring to the particular contract under consideration it is further said: "It is, however, susceptible of variation by the acts of the parties, and the circumstances attending the transaction, which show it to be the one or the other. I do not mean that it can be contradicted by the testimony of witnesses to show either that the bargain was different from that expressed or that it was meant to be, unless there be fraud. But I mean that the parties' acts and their dealings are material to show the intent."

Gillis v. Martin, 17 N. C., 470, is a case in which there was a deed absolute and a memorandum from the grantee whereby he stipulated that if the land was sold within two years he would refund to the bargainor the excess received over the purchase money and interest, together with the costs of repairs. *Ruffin, C. J.*, says: "The character of the conveyance is to be determined by the intention of the parties, and if that, however ascertained, was that it should operate as a security, the Court so regards it, and the debtor will be entitled to redeem." Parol evidence was permitted to show the intent and to establish the instruments as a mortgage. See also *Howlett v. Thompson*, 36 N. C., 369, in which it was held that evidence of the great disproportion between the value of the land and the sum paid for it is strong evidence that the deed was given as security merely. *Blackwell v. Overby*, 41 N. C., 38, is to like effect. *Mason v. Hearne*, 45 N. C., 88, involved a deed absolute and a memorandum from the grantee in which he bound himself to reconvey if the grantor repaid the purchase money by a day certain. It was held that the instruments disclosed an intent that they should operate as a mortgage. In *Steele v. Black*, 56 N. C., 427, there was a deed absolute and the grantee admitted that she had agreed to execute a bond to reconvey if the money was repaid. The syllabus, which correctly digests the case, is as follows: "The fact that the bargainor in an absolute deed remained in possession of the land con-

veyed for more than a year after the sale, using it as his own, is *dehors* the declarations of the defendant and is inconsistent with the idea of a purchase; and if, in addition, it be proved that the seller was hard pressed for money, that the money advanced was not more than half the value of the premises, and that the defendant agreed to execute a bond to reconvey and refused to do it, a sufficient case is made out to entitle the plaintiff to a reconveyance on the payment of the sum advanced with interest." It is said: "The pretext set up by the answer, that the plaintiff was willing to sell his land absolutely at half price to avoid the exposure of a public sale, after it had been levied on and advertised, is too flimsy to be entitled to notice." In *Robinson v. Willoughby,* 65 N. C., 520, it is held that to determine whether a transaction is a mortgage or a defeasible purchase, it will be regarded as the former, if at the time of the supposed sale the vendor is indebted to the vendee, and continues to be such, with a right to reconveyance upon the payment of such indebtedness.

In *Waters v. Crabtree,* 105 N. C., 394, it is held that a deed, absolute upon its face, may be treated as a mortgage, when it was agreed, at the time of its execution, that such would be its purpose. It was further held, however, that there was not sufficient evidence of the contemporaneous agreement.

Watkins v. Williams, 123 N. C., 170, involved a deed absolute and a contract to reconvey. There was evidence that the plaintiff solicited the defendant to take up a mortgage on land and hold it. The defendant objected to having the mortgage transferred to him, and suggested a deed to him. This was agreed to. The deed was executed and the defendant contemporaneously executed a contract to reconvey. Parol evidence was admitted to show the intent, and in discussing the case the Court said: "Since *Streator v. Jones,* 10 N. C., 423, two principles have been established and uniformly followed, when bills are preferred to convert a deed absolute on its face into a mortgage or security for debt: (1) It must appear that the clause of redemption was omitted through ignorance, mistake, fraud, or undue advantage; (2) The intention must be established, not by simple declaration of the parties, but by proof of facts and circumstances *dehors* the deed inconsistent with the idea of an absolute purchase; otherwise, the solemnity of deeds would always be exposed to the 'slippery memory of witnesses.' *Kelly v. Bryan,* 41 N. C., 283.

"The plaintiff makes no attempt to shelter himself under the first proposition, but he insists, and we think has shown that he is protected by the second proposition.

"Again, where, upon the face of a transaction it is doubtful whether the parties intended to make a mortgage or a conditional sale, courts

of equity are inclined to consider it a mortgage, because, by means of conditional sales, oppression is frequently exercised over the needy. *Poindexter v. McCannon*, 16 N. C., 377; 3 Pom. Eq. Jur., sec. 1195.

"The oral evidence not only sustains the writings, but shows the facts, understanding and circumstances, so fully that our conclusion seems to be irresistible."

The Court, in *Porter v. White*, 128 N. C., 42, cites *Watkins v. Williams, supra; Robinson v. Willoughby, supra*, and the above noted cases with approval. See also *Sandlin v. Kearney*, 154 N. C., 596. In *Perry v. Surety Company*, 190 N. C., 284, the foregoing and many other cases are cited with approval, and it holds that a deed absolute on its face, construed together with a contract to save the defendant harmless on account of any default of plaintiff for whom the defendant was surety, constituted a mortgage.

Thus, it appears that parol evidence is competent, not for the purpose of contradicting the deed, but to show the consideration of the deed and to establish the whole contract, and show that the agreement to reconvey is in fact a defeasance clause separate and apart from the deed. After all, the real question is: What was the consideration for the deed? This may be shown by parol, especially when it is not set out in the instrument, as here. If, in fact, it was a sum advanced as a loan to be repaid with interest and usury as contended by plaintiff, no principle of equity or good morals would permit the defendant now to insist upon the strict letter of the "bond" and claim the land free of any right of redemption.

The borrower is servant to the lender. Prov., 22-7. Creditors are sometimes diligent to discover means and methods to circumvent the safeguards the law provides to protect the debtor against oppression. Courts of equity, therefore, will carefully examine any transaction between debtor and creditor, where there is a possibility of oppression, to the end that justice may be done to him whose circumstances of need place him in a position to be imposed upon by an unscrupulous creditor. A Shylock can no longer demand his pound of flesh.

Pennsylvania courts hold that all such transactions are mortgages. Other courts hold that if the transaction originated in an application for a loan it presents such an opportunity for oppression that this fact alone will give the instruments the quality of a mortgage. We are content to hold that when it does not affirmatively appear on the face of the instruments that they were intended as security, and such fact cannot fairly be inferred therefrom, the actual intent of the parties at the time is the controlling criterion in determining the true nature and effect of the instruments; and that, in establishing this intent, the

debtor has the right to prove by evidence *dehors* the instruments that the transaction was in fact between debtor and creditor for the security of a loan.

If there was a debt, either antecedent or presently created, the instrument must be construed to constitute a mortgage, unless a contrary intent clearly appears upon the face of the instruments. If this fact does not appear, then the continued possession of the property by the grantor; the inadequacy of the consideration; that the negotiations originated out of an application for a loan; the circumstances surrounding the transaction; and the conduct of the parties before, at, and after the time of the execution of the instruments are some of the circumstances to be considered.

But the contention is here made that there is no reciprocal obligation resting on the grantors to redeem; that it is entirely optional with them as to whether they shall exercise the right to repurchase within the time stipulated; that it does not appear upon the face of the papers that there is any personal obligation on the part of the grantors to pay the amount of the alleged loan and interest. This is not essential. Evidence of the indebtedness is not required to be in writing. It may be proven by parol. Furthermore, such obligation would only enable the mortgagee to look to the mortgagor for any deficiency remaining after the application of the proceeds of sale of the premises to the payment of the sum secured. In the cases where the question has arisen whether the transaction was one of purchase or of security and the instruments disclosed a debt in the amount of the alleged purchase price and no other sum is paid it has been held that this fact determines conclusively the character of the transaction as a mortgage. *Horne v. Keteltas,* 46 N. Y., 605; *Hickos v. Lowe,* 10 Cal., 197; *Brant v. Robertson,* 16 Mo., 129. See also numerous authorities cited in notes on pages 392-394, L. R. A., 1916B.

There may be no independent evidence of the debt—no bond, bill, or note taken for its payment: It may rest wholely on implication from the nature, facts, and circumstances of the transaction; it is sufficient that its evidence is the fair, just implication. . . . Indeed, when the purpose of the creditor is to avoid the appearance of a mortgage (as here alleged), it is not to be expected that he would defeat it by the introduction of an express covenant for the payment of the money or any other independent security disclosing its existence. *Mobile Bldg. & Loan Assn. v. Robertson,* 65 Ala., 388.

Without regard to what is here said it was the duty of the court below to submit the cause to a jury. It was so determined on the former appeal. The law as there declared in this respect is the law of this case. It was then said by *Connor, J.,* speaking for the Court: "It

does not appear on the face of the pleadings in this action that the relation of creditor and debtors existed between the defendant and the plaintiffs at the date of the delivery of the deed executed by the plaintiffs, conveying the land described in the complaint to the defendant, and of the contract executed by the defendant by which she agreed, at the option of the plaintiffs, to reconvey to them the said land, upon their payment to her of certain sums of money, in accordance with the terms and provisions of said contract, nor does it so appear on the face of the deed and contract, which are by reference made a part of the pleadings, and which for the purposes of this action must be construed as if they were one instrument. The allegation to that effect in the complaint is denied in the answer. An issue of fact is thus raised on the pleadings for the jury."

The judgment below is

Reversed.

STACY, C. J., dissenting: The disposition about to be made of this case is not warranted by the record. Much of the law discussed is inapplicable.

In the first place, the question of nonsuit was not and could not have been presented on the former appeal as the plaintiffs were then appealing from a judgment rendered on a verdict, and a new trial was awarded for error in the charge. All that was there said about an issue of fact for the jury was addressed to the motion for judgment on the pleadings; and hence it cannot be the "law of the case" on the present appeal which is from a judgment of nonsuit. It is a far cry from allegation to proof.

Secondly, it is the law of the case that plaintiffs are not entitled to judgment on the pleadings, as this question was directly presented and decided. 212 N. C., 801.

It is not alleged, and cannot be as the fact is otherwise, that the relation of creditor and debtor existed between the parties at the time of the execution and delivery of the instruments here in question, and plaintiffs admitted upon the hearing, in open court, "that they are not seeking any relief on the grounds of fraud, mutual mistake, and are not seeking to reform the instruments mentioned in the pleadings upon the grounds of ignorance, mistake, fraud, or undue influence," or other like matter. (R., p. 20.) Any suggestion of oppression or overreaching was specifically disclaimed, and the plaintiffs were careful to refrain from any characterization. This narrowed the case to a question of law. See *Perry v. Surety Co.*, 190 N. C., 284, 129 S. E., 721; *Williamson v. Rabon*, 177 N. C., 302, 98 S. E., 830; *Ray v. Patterson*, 165 N. C., 512, 81 S. E., 773; *Porter v. White*, 128 N. C., 42, 38 S. E., 24; *Watkins*

v. Williams, 123 N. C., 170, 31 S. E., 388. The admission accords with the pleadings and is binding on the plaintiffs. *S. v. Lueders, ante,* 558.

There is neither allegation nor proof sufficient to invoke the principle often referred to in this jurisdiction as the "doctrine of *McLeod v. Bullard,*" 84 N. C., 515, approved on rehearing, 86 N. C., 210, upon which the case was argued, and apparently has been decided. *Harrelson v. Cox,* 207 N. C., 651, 178 S. E., 361; *Murphy v. Taylor, ante,* 393. The law imputes a wrong or legal fraud only to prevent some imposition. *Hinton v. West,* 207 N. C., 708, 178 S. E., 551; *S. c.,* 210 N. C., 712, 188 S. E., 410. Where all oppression is disclaimed, as here, there is no occasion for any imputation. The decision in *Robinson v. Willoughby,* 65 N. C., 520, is inapposite.

The parties were strangers. They voluntarily entered into the agreements and had them reduced to writing by eminent counsel who were familiar with our decisions. See Annotation L. R. A., 1916B, p. 101. The instruments are plain and unambiguous. *Potato Co. v. Jenette,* 172 N. C., 1, 89 S. E., 791. They speak for themselves. *Cole v. Fibre Co.,* 200 N. C., 484, 157 S. E., 857. The case presents only a question of law for the court. *Patton v. Lumber Co.,* 179 N. C., 103, 101 S. E., 613; *Mining Co. v. Smelting Co.,* 122 N. C., 542, 29 S. E., 940.

Speaking to the subject in *Young v. Jeffreys,* 20 N. C., 357, *Gaston, J.,* delivering the opinion of the Court, said: "The *effect* of a contract is a question of law. Where a contract is wholly in writing, and the intention of the framers is, by law, to be collected from the document itself, there the entire construction of the contract, that is, the ascertainment of the intention of the parties as well as the effect of that intention, is a pure question of law." And in *Festerman v. Parker,* 32 N. C., 477, *Nash, J.,* remarked that "if there be no dispute as to the terms, and *they* be precise and explicit, it is for the court to declare their effect." See *Spragins v. White,* 108 N. C., 449, 13 S. E., 171.

To abandon these principles on the facts of the present record would be, not only to impair the sanctity of contracts, but also to jar the practice of drafting legal instruments by counsel. *Cf., Smith v. Land Bank,* 212 N. C., 79, 192 S. E., 866. The plaintiffs concede that the transactions were *bona fide.* They suggest nothing else. It is certain they have proved nothing else. Both sides were represented by counsel, and what was done was done under the advice of counsel. Everything was open and aboveboard. There was nothing concealed, strange or hidden. The action is to recover on the instruments as written, notwithstanding the expiration of plaintiffs' option. The plaintiffs say, in law and in equity, they constitute a mortgage. The defendant says not. The allegation of the amended complaint is "that the two instruments

taken together constitute in law and equity a conveyance of said property as a security for the payment of a debt." The denial of this central allegation raises no issue of fact. It is either true or not true as a matter of law. What is there for a jury to determine? *Perry v. Surety Co., supra.* The case is unlike *Streator v. Jones,* 10 N. C., 423, and cases following, *e.g., Newbern v. Newbern,* 178 N. C., 3, 100 S. E., 77, where it was alleged that the writing did not contain the whole agreement. Here, both sides are predicating their case on the written word, yet the Court says its meaning is for the jury. This is new law in North Carolina.

If there be any imposition in the instant case, it has come from the plaintiffs and this costly litigation. At no time has the situation been of the defendant's seeking, and she is not now denying to the plaintiffs any right which they have. With disarming candor she comes into court and says: "Here is the memorial of our understanding and what we did. It contains the whole agreement. If it does not mean what it says, then let the court tell us what it means. But let there be no charge of mistake or fraud, for none has been committed. We were strangers, all *sui juris,* and acted upon the advice of counsel." Recognizing the soundness of this position and that the facts would support no other, the plaintiffs, in open court, accepted the gauge of battle as thus stated by the defendant, and there is no occasion for the Court to abdicate its functions. What was said in *Potato Co. v. Jenette, supra,* is very much in point.

Relying on the fairness of the contract, the sanctity of the written word and the stability of our decisions, the defendant has paid $7,000 for the property in question, plus $2,816.47 in back taxes, and after the expiration of plaintiffs' option, she executed a deed of trust on the property to secure a loan of $8,000. Evidently counsel who examined the title at the time of this loan thought it was good.

The plaintiffs did not elect to exercise their option within the year as they had a right to do. If they have lost anything by this neglect, it is attributable to their own default and not to the defendant's.

The case should be decided on the record, from which the majority opinion departs. My vote is for an affirmance, it having heretofore been determined that plaintiffs are not entitled to judgment on the pleadings.

WINBORNE, J., concurs in this dissent.

MRS. W. M. HODGES v. CITY OF CHARLOTTE (ORIGINAL PARTY DEFENDANT), AND HERMAN BLACK (ADDITIONAL PARTY DEFENDANT).

(Filed 1 February, 1939.)

1. Municipal Corporations § 12—Ordinarily, city is not liable for torts committed in discharge of governmental function.

A municipality is not liable for torts committed by its officers and agents in the exercise of its police power or its judicial, discretionary, or legislative authority, in the absence of statutory provisions subjecting it to liability, but it may be held liable for torts committed by its officers and agents in the exercise of its corporate character.

2. Same—Maintenance of traffic signals by municipality is in exercise of discretionary governmental function.

The installation and maintenance of traffic lights by a municipality under authority of statute, C. S., 2787 (11), (31), is in the interest of the public safety in the exercise of the police power, and is a discretionary governmental function, the signals being in effect a substitute for a policeman in regulating traffic in the use of the streets, and the city may not be held liable for a tort committed by its agent while discharging his duty in the maintenance of the traffic signals.

3. Same—Repair of municipal traffic signal is in discharge of governmental function.

The evidence disclosed that the individual defendant was employed in the traffic signal division of defendant municipality, that while driving a car used exclusively by his division of the city government, to repair a municipal traffic signal, in response to a call from the police department, he struck and injured plaintiff. *Held:* Defendant municipality's motion to nonsuit was properly granted, since its employee was engaged in the discharge of a duty necessarily incident to the governmental function of maintaining the traffic light, and plaintiff's contention that even though the installation and maintenance of a traffic light signal may be a governmental function, repairing the system is a proprietary or corporate function, is untenable.

4. Same—Evidence held to disclose that city employee was engaged solely in discharge of duty incident to governmental function of the city.

The evidence disclosed that defendant municipality's employee was on his way to install a bulb in a traffic light at the time of the injury to plaintiff. The employee testified that had he seen a defect in the street while so engaged he would have felt it his duty to report same to the proper city department under general directions of the city manager. *Held:* The evidence discloses that at the time of injury the employee was engaged solely in performing a specific duty incident to a governmental function of the city, and plaintiff's contention that he was engaged also in inspecting the streets for the repair department is untenable, since a city employee may be engaged at one time in a governmental function and at another time in a private or corporate function of the city.

BARNHILL, J., concurring.

CLARKSON, J., dissenting.

APPEAL by plaintiff from *Armstrong, J.*, at 2 May, 1938, Regular Term of MECKLENBURG.

Civil action for recovery of damages resulting from alleged actionable negligence.

Plaintiff alleges that on the morning of 18 December, 1934, while she was walking across E. Trade Street in the city of Charlotte, immediately west of the intersection of that street with Myers Street, she was stricken and injured by an automobile truck of the city of Charlotte negligently operated, by the defendant Herman Black, in the manner specified and in furtherance of the business of the city of Charlotte, but not in the exercise of a governmental function.

Defendants admit that the plaintiff was stricken by the truck of the defendant city of Charlotte, while being operated by defendant Black, but aver that the truck was being operated in the exercise of a governmental function. The defendant Herman Black, who was not served with summons until 25 March, 1938, pleads the three-year statute of limitation.

With respect to the operation and purpose of operating the truck, plaintiff offered testimony of defendant Black on adverse examination in substance as follows: Black was an employee of the city in the traffic signal division . . . engaged in fixing signal lights and installing traffic signs and in the general maintenance of the safety zones. In that department there were four employees, three permanent and one temporary. All their work is in connection with signal lights, traffic signs and the maintenance of white lines. They work every day testing signal lights that are reported out of fix. There are approximately sixty signal lights in the city. These are not permanent fixtures. They are not changed at any specified times. They last for years, but the devices that run and control them get out of order.

The city truck which Black was operating on the occasion in question is used when fixing signal lights and to carry equipment to where the employees in the traffic signal division are at work. The truck is not used for any other purposes. It is used in all time service only by the employees of that department.

On the morning in question the desk sergeant of the city police department, from which calls were made to the traffic signal division, telephoned to Black, at his home, and where he kept the truck at that time, to go to College and Trade Streets to fix a light. In response to the call Black was on his way from his home to the point named, when the plaintiff was injured. He was going to do a specific job, to install a bulb in the traffic light at College and Trade Streets which regulated traffic in that part of the city. This was his sole duty at the time.

If, however, while on this trip, Black had seen a defective place in the street or in connection with the waterworks which he thought needed

repairs, he would have considered it his duty to report the defect to the department having supervision of the streets or of the waterworks, as the case might be. A letter from the city manager so directed generally. The traffic signal division is a separate department of the city government.

From judgment as of nonsuit, plaintiff appeals to Supreme Court and assigns error.

G. T. Carswell and Joe W. Ervin for plaintiff, appellant.
J. M. Scarborough and B. M. Boyd for defendants, appellees.

WINBORNE, J. The plaintiff, in brief filed in this Court, admits that, upon the plea of statute of limitations, the action is barred as to defendant Black, and that judgment as of nonsuit in so far as it relates to him is proper. But, as to defendant city of Charlotte, plaintiff presses challenge to correctness of judgment as of nonsuit.

The plaintiff contends that the defendant city, acting through its employee and codefendant Black, in the operation of the truck in question on a mission to repair a traffic light, was engaged in a private or proprietary function. On the other hand, the defendant city contends that while so acting and at the time and on the mission in question it was engaged in the exercise of a governmental function.

It is conceded that, if the contention of the city be correct, there is no error in the judgment below.

The decisions of this Court uniformly hold that, in the absence of some statute which subjects them to liability therefor, cities, when acting in their corporate character, or in the exercise of powers for their own advantage, may be liable for the negligent acts of their officers and agents; but when acting in the exercise of police power, or judicial, discretionary, or legislative authority, conferred by their charters or by statute, and when discharging a duty imposed solely for the public benefit, they are not liable for the tortious acts of their officers or agents. *Hill v. Charlotte,* 72 N. C., 55; *McIlhenny v. Wilmington,* 127 N. C., 146, 37 S. E., 187; *Harrington v. Greenville,* 159 N. C., 632, 75 S. E., 849; *Snider v. High Point,* 168 N. C., 608, 85 S. E., 15; *James v. Charlotte,* 183 N. C., 630, 112 S. E., 423; *Cathey v. Charlotte,* 197 N. C., 309, 148 S. E., 426; *Broome v. Charlotte,* 208 N. C., 729, 182 S. E., 325; *Lewis v. Hunter,* 212 N. C., 504, 193 S. E., 814, and numerous other cases.

This determinative question, therefore, arises: Is the installing and maintaining of traffic light signal system in and by a city, in the exercise of governmental function, or in proprietary or corporate capacity? We are of opinion that it is in the exercise of a discretionary governmental function.

A traffic light signal system is in the interest of safety to the users of the streets and is installed solely for the public benefit. It is in effect the substituting of a signal for a policeman in regulating traffic in the use of streets. While the cities are not required to install such system, there is statutory authority for the exercise of such police power. C. S., 2787 (11) and (31), Public Laws 1917, chapter 136, sub-chapter V, sec. 1 (k) (ee), Public Laws 1919, chapter 296.

In the instant case the traffic light system is subject to the supervision of the police department. In 43 C. J., 964, Municipal Corporations, sec. 1745, it is said: "The police regulations of a city are not made and enforced in the interest of the city in its corporate capacity, but in the interest of the public."

The question has been the subject of judicial consideration in other jurisdictions. In *Parsons v. City of New York,* 289 N. Y. S., 198, 248 App. Div., 825, affirmed 273 N. Y., 547, 7 N. E. (2d), 685, under the provision of the city charter making it mandatory duty of police to regulate traffic, the Court said: "Signal lights are an incidental part of traffic regulation. The allegation of the complaint, admitted by failure to deny in the answer, that the city maintained the light involved in this action, necessarily means maintained through the police. Regulation of traffic, and therefore the proper maintenance of signal lights used in that connection, is the performance of a governmental duty, for neglect of the police in the exercise of which the city is not liable."

In *Cleveland v. Town of Lancaster,* 267 N. Y. S., 673, 239 App. Div., 263, affirmed 264 N. Y., 568, 191 N. E., 568, it is stated: "The town boards were also authorized by statute to enact ordinances, rules and regulations relating to peace and good order generally. . . . The erection of the traffic signals was an appropriate exercise of this power. . . . It was in effect an exercise of the police power; the substituting of a signal for a policeman."

In *Dorminey v. City of Montgomery,* 232 Ala., 47, 166 So., 689, *Knight, J.,* said: "Traffic signal lights serve the purpose, and were so designed, to regulate the use of the streets, where installed. There is no duty enjoined by statute upon a municipality to install such signals, and, if installed, it is done in the exercise of a discretionary power, possessed by the municipality to conserve the safety of the public using the streets. . . . We are of the opinion that the city, in installing the signal lights to warn and direct the traveling public, was exercising a governmental function, under its police power. . . ."

Again, in *Auslander v. City of St. Louis,* 332 Mo., 145, 56 S. W. (2d), 778, it is said: "There is a difference, however, between the physical condition of the street and its use by the public. The keeping of a street in a condition reasonably safe for travel thereon has reference to its

physical condition, and is a different matter than the regulation of traffic on such street. The one relates to the corporate or proprietary powers of the city, while the other relates to its governmental or police powers. . . .

"This Court held in *Ex parte Cavanaugh,* 313 Mo., 375, 380, 280 S. W., 51, that the establishment of 'automatic signals and one-way streets' is among the things which the city of St. Louis may provide as a police regulation for the safety and convenience of its inhabitants."

Plaintiff further contends that even though the installation and maintenance of a traffic light signal system may be in the exercise of a governmental function, the repairing of the system is in a proprietary or corporate capacity. An almost identical question arose in the case of *Lewis v. Hunter, supra.* There the car in question was owned by the city of Kinston and used exclusively in the service of its police department. But at the time of the alleged accident the car was being operated on the streets of the city by its employee, a radio mechanic, who was then repairing and testing the police radio installed in the car. Speaking to the question, *Schenck, J.,* wrote: "While it is true the driver of the car was not a policeman, he was employed by the hour by the city to keep in proper repair and condition the radio on said automobile, and it was the function of the city in the exercise of its police power to maintain the radio, and in the performance of the work for which he was employed Spear was performing duties incident to the police power of the city, whether he was engaged in repairing or testing the radio or whether in returning the automobile to the police garage after such repairing or testing, and anything that he did for the city with the automobile in the scope of his employment was done as an incident to the police power of the city—a purely governmental function."

Likewise, in the case in hand, Black was performing duties incident to the police power of the city in going to repair the traffic light, and the use of the truck in scope of his employment was an incident to the police power, a governmental function.

Plaintiff further contends that, in view of the evidence that if the defendant Black had seen a defect in the streets or water system, he would have felt it his duty under general directions of the city manager to report the defect to the proper department, it may reasonably be inferred that he was engaged at the time of the injury to plaintiff in the performance of two duties: First, in the repair of a traffic signal light; and, secondly, in the inspection of city streets for the repair department. The evidence negatives this contention. Black was going to do a specific job, to install a bulb in the traffic light at College and Trade Streets which regulates traffic in that part of the city. *This was his sole duty at the time.*

In 43 C. J., 966, it is stated: "The same officer may at one time act in discharge of duties as a police officer of the State, and at another time as the servant of the municipality in carrying out its private powers, and if the act complained of is done in the former capacity no liability is incurred by the municipality."

The judgment below is

Affirmed.

BARNHILL, J., concurring: It has always been the prevailing rule that governmental subdivisions are not liable in damages for the torts of their servants and employees committed in the course of their employment in furtherance of the governmental functions of such subdivisions. This doctrine has been uniformly followed by all the courts of this country and of England. The majority opinion is in entire accord with this time-honored principle of law and is supported by all the authorities.

It is stated in the dissenting opinion that it is not advocated that this long established immunity of governmental units should be abolished and it is recognized therein that whether it should be abolished presents a question of policy for the legislative and not for the judicial branch of the government. Yet it is advocated that the doctrine be modified by judicial decree, which clearly would be an invasion of the prerogatives of the Legislature.

The exception to the prevailing doctrine—recognized in the dissenting opinion as well as in the majority opinion—which imposes liability upon a city or town for damages resulting from the failure to exercise ordinary care in keeping its streets and sidewalks in a reasonably safe condition for the purposes for which they are intended was created by judicial decision. We should be careful not to enlarge or extend this exception without legislative sanction.

The case at bar does not come within the existing exception. While defendant's employee was charged with certain duties relating to the condition of the streets of the city, at the time the plaintiff was injured the employee was actually engaged in discharging duties which related to public safety and were purely governmental. It matters not, therefore, to which particular department he was attached.

A traffic light is an automatic traffic guide, designed to protect and safeguard the general public. It, to a large extent, serves the purpose of a police or traffic officer. Had the employee at the time of the accident been on his way to relieve or lend assistance to a traffic officer there could be no real question as to nonliability. I can see no sound reason why the same rule should not apply where the employee was on his way to repair a traffic light which was used to serve the same purpose which otherwise would have been served by a traffic officer. The

maintenance of such lights has no relation to and in nowise affects the condition of the streets. Proof of its absence would not show or tend to show that the streets and sidewalks were in a condition of bad repair. And surely the city should not be penalized because it adopted this more economical—and some think more effective—method of controlling traffic, and thus reducing the general cost to the taxpayer, as suggested in the dissent.

The doctrine of "The immunity of the Sovereign" has remained in force with the full approval of the people, who have at all times had the right to modify or abolish it through the action of their chosen legislative representatives. The lawmaking body has already relaxed the rule to the extent of making the Workmen's Compensation Act applicable to municipalities. Whether there should be any further modification is for the Legislature. Until and unless it acts this Court should steadfastly adhere to the law as it now exists.

CLARKSON, J., dissenting: Judicial candor compels me to register a dissent from the views of my brothers. Municipal immunity from responsibility for the negligent acts of its employees is a doctrine which should ever remain carefully circumscribed, as it constitutes an exception to the general rule that the master is liable for the damage done by the servant. When the servant of a citizen or a private corporation, negligently kills or injures, the employer is answerable in damages. What I now say is not urged in the interest of removing long established immunity; such questions of policy are for the legislative, not the judicial, forum. My insistence is upon this, and this alone, that in a doubtful and border-line case such as the instant case, the rule of immunity should be construed against the municipality and in favor of the injured citizen. When old legal formulæ must be rewritten to cover some difficult feature of a particular case, courts should ever remember that the law—even government itself—is made for man, not man for the law. In those rare cases in which within the periphery of the law, a free choice is left to the courts, the choice should ever be made on the side of humanity and the relief of the broken and the dying. The opinion of the majority in the instant case is a further extension, in a border-line case, of a rule which often, if not generally, operates with peculiar harshness and cruelty. Here, in my opinion, if the doctrine of immunity, interpreted strictly, is applied to the facts of this case, this case would fall outside the limits of that immunity and an injured citizen would be permitted to present her cause to a jury.

The facts in the instant case are simple; it is the interpretation of those facts which is difficult. The city employee who drove the city truck at the time of the injury to plaintiff was a maintenance man. He

was "engaged in fixing signal lights and installing traffic signs and the maintenance of the white lines." It was also his duty to "paint the signs and set the poles in the holes in the concrete and mark off people's driveways and install signs." He also had a continuing duty, under instructions of the city manager, to report "defective conditions of the street," "holes in the street and defective water meters." The employee testified: "On this particular morning that I went to fix this light at the corner of College and Trade Streets, of course, if I had found any defective place along the street I traveled over that I thought was bad enough that somebody might get hurt, I would have considered it my duty to report it to the various departments it would fall in." His principal duties, accordingly, dealt with the maintenance and repair of various traffic devices and traffic control aids, along with a general duty of street inspection. Most, if not all, of these devices and aids were mechanical substitutes for policemen, established in the interest of economy and efficiency as a means of saving money for the city. The employee was largely busied with electrical repairs and painting. He was not employed by the police department. The traffic signal division was a separate department; he could as well have been attached to the street maintenance force or the street lighting force. Rarely—and certainly not in this case—is there a necessary and imperative connection between the duties of an electrician-sign painter and the governmental functions of a police department. The majority opinion is based upon the assumption that the employee was a police officer. The work in which the employee was engaged was not so much the discharge of a police function as it was the maintenance of mechanical substitutes for traffic officers, which is quite a different matter. In maintaining these mechanical aids and devices, the city was acting primarily in its corporate capacity for the financial benefit and general advantage of the citizen-members of the corporation. In such a situation cities may not claim the immunity of the sovereign.

"When a function is undertaken by a municipality in its private or proprietary capacity for the profit, benefit or advantage of the corporation (or of the people who compose it, rather than for that of the public at large), it is liable for the negligence of its employees to the same extent and under the same conditions as a private corporation." 19 R. C. L., 1109, "Mun. Corp.," paragraph 391.

North Carolina has long followed the view to the effect that a city or town in the exercise of its private or corporate powers is liable in damages for the negligence of its officers, agents, and employees. *Broome v. Charlotte,* 208 N. C., 729; *Hamilton v. Rocky Mount,* 199 N. C., 504. On this point McQuillan, in his extensive work on Municipal Corporations, declares: "When acting in its proprietary capacity . . . the

incorporated city or town, in the absence of some special exemption, is subject to all of the liabilities and usually entitled to all of the rights, immunities and benefits of the private law. The borderline between the public or governmental and the private or *quasi*-private or proprietary side of the municipal corporation in some instances is quite difficult to discern." 6 Mun. Corp., p. 1012. It is just at this borderline that I insist that doubts should be resolved against the city and in favor of the injured citizen. Where the function discharged is for private benefit or pecuniary profit, and damage results from negligence, the municipality is liable to the same extent that a private corporation or individual would be liable. *Goodwin v. Reidsville,* 160 N. C., 411; *Moffitt v. Asheville,* 103 N. C., 237; *Meares v. Wilmington,* 31 N. C., 73; 6 McQuillan, Mun. Corp., p. 1041. To the extent that municipal corporations exercise powers not essentially governmental in character, "voluntarily assumed powers intended for the private advantage and benefit of the locality and its inhabitants, there seems to be no sufficient reason why they should be relieved from that liability to suit the measure of actual damage to which an individual or private corporation exercising the same powers for purposes essentially private would be liable." *Stayton, J.,* in *Galveston v. Posnainsky,* 62 Tex., 118, 50 Am. Rep., 517, quoted with approval in 6 McQuillan, Mun. Corp., p. 1043.

The mere fact that the city employee in the instant case usually received his calls to repair signal lights—as he received the call which he was answering in the instant case—from the police department, is not determinative. It does not affirmatively appear whether he was an employee of the department of safety or of the department of public works. It is the character of the actual function which determines its governmental character. For example, a city is liable in tort in the operation of a municipal garage even though the chief of police has charge of it. *City v. Foster* (Okla.), 247 Pac., 80.

A further reason for resolving the doubt here in favor of the injured plaintiff is that the defense of a city that it was engaged in a governmental function is an affirmative defense and the burden is upon the city to show that the activity engaged in was essentially governmental in nature. *Jones v. Sioux City,* 185 Iowa, 1178, 170 N. W., 445. When it is taken into consideration here that the employee not only had the duty to repair the signal light but also in going to the signal light had the continuing duty to observe and report street defects, it is clear that he was at the time of the injury discharging two functions, one of which may be considered governmental and the other of which is plainly ministerial. In such a case, it may be argued that since both a ministerial and a governmental function is involved, the city is not relieved from liability. See *Cone v. Detroit,* 191 Mich., 198, 157 N. W., 417.

Even if it be granted that the installation of traffic signal lights is a governmental function, it does not necessarily follow that the maintenance and repair of such lights is likewise a governmental function. This very distinction is recognized generally as to streets; although the original construction of the streets is a governmental function, their maintenance is a corporate or ministerial duty. 6 McQuillan, Mun. Corp., p. 1053; as to the North Carolina accord with this view, see the cases cited above.

It cannot be said that the maintenance of traffic signals along the streets is any more in the interest of the general public than the maintenance of the streets themselves along which the signals are installed. The signals are established to regulate the use of the streets and are useless but for the part they play in regulating traffic along the streets. So long as the maintenance of the streets is regarded a corporate function, the maintenance of traffic lights should, by the same standard, be treated as a corporate function. Similar reasoning might have been applied to the maintenance of police radio cars in *Lewis v. Hunter,* 212 N. C., 504. However, it seems to me that the instant case is one calling for the expression of the limits of the rule laid down in that case, and to the extent that the doctrine of that case is regarded as determinative of this case. I am unwilling to follow the majority in the further extension of the rule as to municipal immunity from tort liability.

The doctrine of municipal immunity "is undergoing essential modification, and certain judicial decisions and writers have faith in its abolition. . . ." 6 McQuillan, Mun. Corp., p. 1042; "Objections to the Governmental or Proprietary Text," Murray Seasongood, 22 Va. Law Rev., June, 1936. "Concerning the denial of municipal liability for negligence in the performance of public or governmental function, it has been said that 'the theory is the survival of the medieval idea that the sovereign power can do no wrong. Reasons for its existence are based upon theories discarded and exploded in every other realm dealing with the relationship of citizens to government and government to citizens.' The doctrine has been seriously questioned and condemned by eminent jurists and distinguished legal authors." McQuillan, Mun. Corp., p. 1054, quoting from *McNaught, J.,* in *Baty v. City of Binghamton,* 252 N. Y. S., 263, 265-6; 141 Mis. Rep., 127.

In the words of *McNaught, J.,* in *Baty v. Binghamton, supra:* "The doctrine of nonliability of municipal corporations, even in the exercise of governmental functions, has been seriously questioned and condemned. Eminent jurists and distinguished legal authors have criticized the doctrine in unsparing terms. Reasons for immunity in one case and liability in the other have been clearly shown not to be satisfactory. The United States Supreme Court has said: 'We must not be understood

as conceding the correctness of the doctrine by which a municipal corporation, as to the discharge of its administrative duties, is treated as having two distinct capacities, the one private or corporate, and the other governmental or sovereign, in which latter it may inflict a direct and positive wrong upon the person or property of a citizen without power in the courts to afford redress for such wrong.' *Workman v. City of New York*, 179 U. S., 552, 574; 21 S. Ct., 212, 220; 45 L. Ed., 314."

Professor Borchard has made it clear that the modern tendency is against the rule of nonliability as to municipal corporations. "Government Liability in Tort," 34 Yale Law Journal, 528. The late *Justice Cordoza* wrote, "The line of demarcation (between corporate and governmental functions) . . . has at best a dubious correspondence with any dividing line of justice. The distinction has been questioned by the Supreme Court of the United States. It has been rejected recently in Ohio." Law and Literature, p. 57, citing *Workman v. City of New York, supra,* and *Fowler v. City of Cleveland,* 100 Ohio St., 158, 126 N. E., 72. More recently Professor Barnett has demonstrated that the recently attempted distinction between the so-called "public" and "private" functions of municipal corporations did not exist at English common law, that the distinction was made in the *Dartmouth College case* only for the protection of contract obligations and was forcibly grafted upon municipal tort law in *Bailey v. City of New York* (1842) in holding the city liable. He criticizes the distinction as being reactionary and unfortunate in that it limited the liability of municipal corporations to one class of functions in contradiction to the prevailing view which logically applied the general principle of tort liability to all corporations alike. "The Foundations of the Distinction Between Public and Private Functions in Respect to the Common Law Tort Liability of Municipal Corporations," James D. Barnett, 16 Oregon Law Review, April, 1937, p. 250.

The problem is essentially a social one of distributing the social and economic effects of injury or death so that it may be borne in the most desirable manner. Under the traditional rule of immunity the loss falls heavily upon the individual, often an individual or family who is poorly prepared to withstand the economic shock of serious illness or death. In an enlightened age the social policy of permitting such a loss to lie where it has fallen may well be questioned. So long as government exists as a group society, one of its primary aims must be the distribution of losses to the end that the plight of the unfortunate individual may be made less severe by the aid of the group which exists for the protection of the individuals within that group.

The social and legal reasons for challenging a further extension of the doctrine of municipal immunity from tort liability in the instant

case, in my opinion, are compelling. In the first place, the facts of this case are such that, on the facts alone, it may well be held to be beyond the scope of the rule of nonliability. In the second place, there is at least doubt as to the applicability of the nonliability doctrine to the facts of this case, and in such a situation the law resolves the doubts against the immunity and in favor of the injured citizen. Finally, the doctrine of nonliability has been so sharply challenged both as to its legal and historical soundness and as to its social desirability, that, in my opinion, the rule should not be extended further, but should be limited sharply to those fact situations which are clearly covered by the prior pronouncements of this Court.

No government stands above the moral code. What is simple justice between men should be justice between governments and men. A law cannot hope for permanence which rests largely upon the superior force of the sovereign; law should represent the group consciousness of the right, the fused good will of the individuals within the group. A sovereignty born of the common welfare means, more than anything else, the ability to secure the assent of the individuals within the group. There is nothing sacred or essential in the doctrine of municipal nonliability for torts. The State and municipalities can function as surely, and perhaps with greater precision in the meting out of exact justice among its people, if the doctrine of nonliability is strictly interpreted and applied as the exception rather than the general rule.

MRS. AGNES BRYANT v. MRS. HOWARD REEDY.

(Filed 1 February, 1939.)

1. Libel and Slander § 12—It is not required that testimony be in exact words of allegations, it being sufficient if they are same in substance.

Where a bill of particulars in an action for slander alleges defendant spoke of and concerning plaintiff certain words to designated persons, which words amounted to a charge of incontinency, testimony by the witnesses of statements made by defendant charging in effect that plaintiff had been guilty of illicit sexual intercourse, is competent although not in the exact words alleged in the bill of particulars, it being sufficient if the testimony is confined in substance to the bill of particulars. Michie's N. C. Code, 2432.

2. Libel and Slander §§ 2, 12—Words charging innocent woman with incontinency are actionable per se, permitting recovery for mental suffering.

Words charging an innocent woman with conduct amounting to incontinency are actionable *per se*, N. C. Code, 2432, and the law will presume

damages in such cases which naturally, proximately and necessarily result therefrom, including mental suffering, humiliation and embarrassment, and testimony of such mental suffering, humiliation and embarrassment is competent without specific allegation thereof.

3. Libel and Slander § 9—

When the defendant in an action for slander denies the allegations of plaintiff as to the slander charges *in toto*, and tenders no issue as to justification or mitigation, the exclusion of evidence of justification and mitigation is not error, it being required that such evidence be supported by proper plea. N. C. Code, 542.

4. Appeal and Error § 39d—Exclusion of evidence held not prejudicial when same evidence is elicited on cross-examination.

In this action for slander, the court excluded a paper writing signed by plaintiff acknowledging payment of a judgment obtained against another person for injury to her reputation through slanderous remarks of the same nature which defendant was alleged to have made. On cross-examination of plaintiff and another witness, defendant brought out in evidence the settlement of the prior action for slander, and the evidence was set forth in the charge and defendant's contention thereon clearly given. *Held:* The exclusion of the paper writing, if error, was not prejudicial.

5. Trial § 36: Appeal and Error § 39c—

Exceptions to disconnected portions of the charge will not be sustained when the charge is free from error when construed contextually as a whole.

6. Trial § 34—

Inadvertent misstatement of the testimony of witnesses must be brought to the court's attention at the time so that the true evidence may be given the jury.

7. Trial § 29c—

The charge of the court on the burden of proof and the illustration of same by analogy to a scale *held* without error.

8. Trial § 29b—

The charge of the court, after stating the evidence, in the manner in which the jury was instructed that the recollection of the evidence was for them *held* without error.

9. Trial § 36—

Exceptions to the statement of contentions in the charge will not be sustained when appellant failed to bring the matter to the court's attention at the time.

10. Libel and Slander § 14—

In this action for slander for words actionable *per se*, the court's charge on the issue of compensatory damages, defining implied malice, actual and compensatory damages, and properly placing the burden of proof on the issue on plaintiff, *held* without error.

11. Same: Damages § 7—Instruction on issue of punitive damages held without error.

In this action for slander for words actionable *per se*, the charge of the court on the issue of punitive damages, instructing the jury that defendant must have had actual malice or a reckless or wanton indifference to plaintiff's rights in order to sustain an award of punitive damages, and that the award of punitive damage and the amount thereof was solely in the sound discretion of the jury subject to the limitation that they must not be excessively disproportionate to the circumstances of contumely and indignity present in the case, *held* without error.

12. Damages § 11—

Evidence of the reputed wealth of defendant is competent on the issue of punitive damages.

13. Libel and Slander § 7—

Admission of testimony of a police officer as to slanderous statements made to him by defendant *held* not error in the absence of a plea of privilege, especially in view of the fact that defendant denied making the statements and the overwhelming testimony of other witnesses as to slanderous remarks of the same nature made to them by defendant.

APPEAL by defendant from *Spears, J.*, at May Term, 1938, of ROBESON. No error.

This is an action for slander brought by plaintiff against defendant, and prayer for actual and punitive damages. The plaintiff alleges, and the evidence is to the effect, that she is an innocent and virtuous woman and is a lady of good character.

The evidence, in substance, is to the effect that at the time this action was instituted, 23 June, 1936, she was working for George Kheiralla, who operates a grocery store in the town of Rowland, and that she has worked for him for several years. Many witnesses offered by the plaintiff showed that her general reputation was good. The plaintiff offered as a witness, J. H. Carper, who testified that he had been a rural policeman in Robeson County for about fourteen years, a police officer in the town of Rowland, and at the time he testified, was an assistant tax collector in Robeson County; that on or about 15 March, 1936, he was called to the home of the defendant and she told him, in substance, that the plaintiff, Mrs. Bryant, was the cause of all the trouble between George Kheiralla and his wife, and that "he was keeping her there as his woman, and his wife was not satisfied and she was breaking up their home."

J. B. Bullock, who at the time was chief of police in the town of Rowland, testified substantially to the same thing that J. H. Carper testified to.

Mrs. C. B. Carper, who lives in the town of Rowland, testified that she had known Mrs. Bryant and Mrs. Reedy for a number of years, and

that about 15 April, 1936, she had a conversation with Mrs. Reedy and Mrs. Reedy told her that she had seen Mrs. Bryant up there a good many times, and that Mrs. Bryant had run Mrs. Kheiralla away from home, and that George Kheiralla was keeping Mrs. Bryant there as his wife," and that she was nothing but an old prostitute woman for George Kheiralla," . . . "She told me this a good many times and that she did not want any such woman as that living next to her."

G. T. Cox testified that he was sixty-two years of age, had known both the plaintiff and defendant since 1920. Sometime early in May he was passing Mrs. Reedy's home and had a conversation with her in regard to Mrs. Bryant, and that she told him that, "If you will get that prostitute woman out of this store, why everything will be settled. Get rid of Agnes Bryant and everything will quiet off and be all right."

I. Blum testified that he runs a business in the town of Rowland and is acquainted with the plaintiff and the defendant, and that on or about the latter part of April or first of May, 1936, Mrs. Reedy came to his store and talked with him about Mrs. Bryant. "She said something about Mrs. Bryant ought to be feathered and tarred, that she was living with George Kheiralla, breaking up their home and living with him as man and wife."

Mrs. Bryant, the plaintiff, testified that since the above statements were made about and concerning her, that she had been humiliated and damaged. She has stopped going to church, her name has been taken off the church circle, that numbers of people in the town of Rowland and community whom she formerly considered her friends, now refuse to speak to her. . . . That she was very much embarrassed to walk the streets or go in a crowd of people because she feels that she has been slandered and ridiculed, and feels very much humiliated. She testified that she was working at the same place, because she knew she could not get a job at any other place.

The defendant denied that she had ever made any statements intending to slander Mrs. Bryant, and denied what plaintiff's witnesses testified to. In her answer she says, in part: "That if plaintiff has sustained any injury or damage to her reputation or standing in the community, which is denied, then such injury and damage was sustained prior to the institution of this action, and prior to the alleged utterance of the defamatory remarks contained in the complaint which were attributed to the defendant. . . . This defendant specifically denies that she has at any time spoken of and concerning the plaintiff any slanderous, derogatory, false, untruthful or defamatory words; but that any statements made by this defendant with respect to the said plaintiff which the said plaintiff might have construed to amount to a charge of incontinency, were not made with any malicious, wilful or wanton

intent, but were made in good faith, and upon reputable and reliable information and were the truth, and this defendant pleads and relies upon the truth thereof in justification of said statements."

Many witnesses testified that the general reputation of defendant was good.

All the witnesses communicated the remarks made to them to Mrs. Bryant before the institution of the present suit.

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

"1. Did the defendant speak of and concerning the plaintiff the words in substance, as alleged in the complaint? Answer: 'Yes.'

"2. What compensatory damages, if any, is the plaintiff entitled to recover of the defendant? Answer: '$1,000.'

"3. What punitive damages, if any, is the plaintiff entitled to recover of the defendant? Answer: '$750.00.'"

Judgment was rendered by the court below on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

W. E. Lynch, W. S. Britt, and J. C. King for plaintiff.

F. L. Adams, F. Ertel Carlyle, H. A. McKinnon, and F. D. Hackett for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the conclusion of all the evidence, the defendant made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no error. We think the evidence plenary to be submitted to the jury.

The questions presented by defendant: "1. Did the court commit error in the admission of evidence, particularly with reference to: (a) the slanderous words alleged to have been spoken by the defendant; (b) the evidence as to the effect of the alleged slanderous words upon the plaintiff mentally and as to her humiliation and embarrassment?" We think not.

N. C. Code, 1935 (Michie), sec. 2432, is as follows: "Whereas doubts have arisen whether actions of slander can be maintained against persons who may attempt, in a wanton and malicious manner, to destroy the reputation of innocent and unprotected women, whose very existence in society depends upon the unsullied purity of their character, therefore any words written or spoken of a woman, which may amount to a charge of incontinency, shall be actionable."

Section 4230 is as follows: "If any person shall attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman by words, written or spoken, which amounts to a charge of incontinency, every person so offending shall be guilty of a misdemeanor."

"Incontinency means want of restraint in regard to sexual indulgence, and imports according to our statute, definitive, illicit, sexual intercourse." *Lucas v. Nichols*, 52 N. C., 32 (35).

There is nothing more truthful than what is written in Proverbs (part verse 8, chapter 18): "The words of a talebearer are as wounds." We think that the damage shall include injury to the feelings, mental suffering endured in consequence and the humiliation and embarrassment which is a consequence of the wrong done.

The 2nd question presented by defendant: "Did the court commit error in refusing to permit the defendant to offer evidence in mitigation of damages?" We think not under the facts and circumstances of this case.

N. C. Code, *supra*, sec. 542, in part, is as follows: "The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances."

A plea of justification or of mitigation is a prerequisite to the allowance of evidence of the truth of the charge. Without it such evidence is incompetent. *Upchurch v. Robertson*, 127 N. C., 127 (128); *Dickerson v. Dail*, 159 N. C., 541; *Burris v. Bush*, 170 N. C., 394. When the defendant pleads the general issue, he may not introduce evidence in justification or mitigation. *Upchurch v. Robertson, supra; Elmore v. R. R.*, 189 N. C., 658 (673).

It will be noted that defendant denied the allegations of plaintiff as to the slander charges *in toto*. No issue was submitted or tendered by defendant that she relied on the plea of the truth of the matter charged by plaintiff as defamatory. Defendant offered to introduce in evidence paper writing identified by the plaintiff and which purports to be an acknowledgement of payment of judgment rendered in the action of Mrs. Agnes Bryant against Mrs. Mary Kheiralla, which was excluded. Exception and assignment of error was made by defendant. We do not think it can be sustained. If competent, the exclusion was not prejudicial.

Plaintiff's witness, G. T. Cox, was asked by defendant on cross-examination about this matter, and he testified, in part: "I witnessed the settlement of the lawsuit where Mrs. Bryant had sued Mrs. Kheiralla, and that suit charged Mrs. Kheiralla with slandering Mrs. Bryant, and that suit charged Mrs. Kheiralla with calling Mrs. Bryant the same kind of names I was telling the jury that Mrs. Reedy called her."

Defendant, in her cross-examination of plaintiff, brought out the same. "I brought the suit against Mrs. Kheiralla before I brought the suit against Mrs. Reedy, and in the case against Mrs. Kheiralla I charged her with destroying my reputation by slandering me and alleging that I was intimate with her husband. . . . After I brought the suit against Mrs. Kheiralla I agreed to a consent judgment and accepted a consent judgment in the sum of $2,500. That was done on October 27, 1936. I don't know how much I have collected on that judgment. I have received in settlement of that judgment against Mrs. Kheiralla around $250.00. I cancelled the judgment against Mrs. Kheiralla and I gave Mrs. Kheiralla a full receipt showing that the judgment had been paid."

In the charge of the court below, this evidence was set forth and this whole aspect stated so clearly that the jury could not have been misled.

It is well settled in this jurisdiction that the erroneous exclusion of evidence on direct examination is held not to be prejudicial when it appears that on cross-examination the witness was asked substantially the same question and gave substantially the same answer. *Cook v. Mebane*, 191 N. C., 1 (7); *Willis v. New Bern*, 191 N. C., 507 (514); *S. v. Shipman*, 202 N. C., 518 (534); *Smithfield Mills, Inc. v. Stevens*, 204 N. C., 382 (385).

(3). Did the trial judge commit error in his charge to the jury? We think not. The many exceptions taken to the charge disconnectedly are not borne out when the charge is taken as a whole. The court below gave, and summarized carefully, the testimony of all the witnesses. If incorrect the matter, like contentions, should have been at the time called to the attention of the court, so that the true evidence be given the jury. The burden of proof on all the issues was properly placed on plaintiff and the scale illustration given by the court below illustrates same. The recollection of the evidence was for the jury of twelve and not for the court or attorneys, and we see no error in the way this was stated.

In *Beck v. Bottling Co., ante*, 566 (568), it is stated: "When a bill of particulars is ordered and furnished, the evidence offered at the trial must be confined to items therein specified." We think this was done in substance.

The court below charged the jury: "The term 'in substance' as used in this first issue, means words that convey in effect the same meaning, though not necessarily used in the same form on the same words, but words that convey in effect the same meaning, the essence of the same words is indispensable though they do not have to be in the exact form as set forth in the complaint. The same words must have been used.

The use of words with similar meaning or equivalent words is not sufficient to justify you in finding that they are in substance the words alleged in the complaint, which I said plaintiff does not have to satisfy you from the evidence and by its greater weight the defendant spoke of and concerning her the exact words set forth in the complaint, but must satisfy you from the evidence and by its greater weight the defendant spoke of her in words in substance, words that would in effect convey the same meaning. . . . Now, as I have heretofore instructed you, it does not require the plaintiff to prove to you from the evidence and its greater weight that these witnesses testified to the exact words set forth in the complaint; it does require that plaintiff offer evidence to satisfy you from the evidence and its greater weight that the defendant spoke to and concerning her the words in substance as alleged in the complaint, words that would in effect convey the same meaning." The issue as framed, using the words "in substance" was not objected to by defendant. The evidence indicates that it was "in substance" confined to the bill of particulars which was prayed for by defendant and allowed by order of the court and set forth in the amended complaint.

In *Hamilton v. Nance,* 159 N. C., 56 (57-8), speaking to the subject, we find: "In an action to recover damages for slander the plaintiff is not required to prove the utterance of the exact words set out in the complaint, but must prove the words in substance, and his Honor should have so instructed the jury. . . . It is generally held that proof of the words in substance is sufficient. 18 A. and E. Enc. L., 1078; 13 Ency. Pl. and Pr., 63; 25 Cyc., 484; *Pegram v. Stoltz,* 67 N. C., 148."

Some five creditable and reputable witnesses testified to almost the identical language as set forth in plaintiff's amended complaint, and these statements, made by defendant, amounts to a charge of incontinency. An examination of the record will show that the defendant made the positive statement that Mrs. Bryant "was nothing but an old prostitute woman for George Kheiralla" and "was living with him as man and wife."

A great many of the exceptions and assignments of error are to contentions as made by the court below. If incorrect, they should have been called to the attention of the court at the time. *Acceptance Corp. v. Edwards,* 213 N. C., 736 (742).

The court charged, in part: "It is a question of fact for you. If the plaintiff has satisfied you from the evidence and by its greater weight that the defendant spoke of and concerning the plaintiff the words and statements alleged in the complaint, it would be your duty to answer the first issue 'Yes.' If you are not so satisfied it would be your duty to answer it 'No.' If you answer the first issue 'Yes,' it is your duty to proceed to consider the second issue. If you answer the first issue 'No,' that ends

the case, and you would not proceed to consider the second and third issues. The second issue reads as follows: 'What compensatory damages, if any, is the plaintiff entitled to recover of the defendant?' The burden of this issue is upon the plaintiff to satisfy you from the evidence and by its greater weight what compensatory damages, if any, is she entitled to recover of the defendant. Slander is a defamation, made by word of mouth, which tends to injure or to disgrace the person about whom the words are spoken. In order to constitute slander, the words must not only be false but must be malicious, and malicious does not always mean actual malice, but the law may imply malice from the words spoken, and the court charges you when words are spoken about a woman that amount to a charge of incontinency, such words are actionable *per se,* that is within themselves, and the law implies malice, not necessarily ill will, but acts intentionally and wrongfully done by one person to another without just cause or excuse." N. C. Code, *supra,* sec. 2432.

In *Hamilton v. Nance, supra,* at p. 59, it is stated: "The correct issues in actions to recover damages for slander where the words alleged are actionable *per se* and in which justification is not pleaded and privilege is not claimed, are: (1) Did the defendant speak of and concerning the plaintiff the words in substance alleged in the complaint? (2) If so, what damage is the plaintiff entitled to recover? If the first issue is answered 'No,' the case is at an end. If answered 'Yes,' the law, in the absence of justification, says that the charge is false and malicious, and it is then the duty of the jury to award compensatory damages, and they may, in addition, award punitive damages if there is actual malice, which may be inferred by the jury in some cases from the circumstances. *Stanford v. Grocery Co.,* 143 N. C., 419."

The court below charged the jury on the second issue: "Plaintiff contends she has suffered actual damages. The burden of this issue is on the plaintiff to satisfy you from the evidence and by its greater weight what actual or compensatory damages, if any, she is entitled to recover from the defendant. What do we mean by the words actual or compensatory damages? Actual or compensatory damages are not necessarily restricted to the actual pecuniary loss, if any, caused by the defendant's wrong, but embraces fair and just compensation for the injury sustained, including actual loss, if any, of time and money, physical inconvenience, humiliation suffered and endured, which would fairly be considered as the reasonable and probable result of the wrong done to the plaintiff by the defendant. The court lays down the following rule as the measure of damages on the issue in this case: The plaintiff, if entitled to recover any actual or compensatory damages, may recover what you, the jury, may decide or find to be a fair, just and reasonable

compensation for the injuries sustained by the plaintiff, including actual loss of time and money, if any, and physical inconvenience and humiliation suffered and endured, which would fairly be considered as the proximate result of the wrongful acts and conduct of the defendant. Applying this rule to the measure of damages on this issue, if you come to consider this issue, the court further charges you that your answer to this issue would be such amount as the plaintiff may satisfy you from the evidence, and by its greater weight, that she has been damaged as the proximate result of the wrongful acts and conduct of the defendant."

In the case of *Barringer v. Deal,* 164 N. C., 246 (248), the Court, quoting headnote in *Fields v. Bynum,* 156 N. C., 413 (414), said: "When general damages are sought in an action of slander for words spoken which are actionable *per se,* compensatory damages may be awarded which embrace compensation for those injuries which the law will presume must naturally, proximately and necessarily result, including injury to the feelings and mental suffering endured in consequence; and it is not incumbent upon the plaintiff to introduce evidence that he has suffered special damage in such instances." *Osborn v. Leach,* 135 N. C., 628; *Gattis v. Kilgo,* 140 N. C., 106.

Walker, J., in *Baker v. Winslow,* 184 N. C., 1 (4, 5, 6), speaking to the subject, says (we quote copiously): "The defendant's first exception, as stated in the record and his brief, was taken to that part of the charge of the court as to the damages, the particular ground of the objection being that the court, in its instructions, permitted the jury to include in the damages, those of the plaintiff's mental anguish or suffering. The charge is clearly sustained by the authorities. In *Fields v. Bynum,* 156 N. C., 413, it being an action for slander, we held that general damages included actual or compensatory damages, and embrace compensation for those injuries which the law will presume must naturally, proximately, and necessarily result from the utterance of words which are actionable *per se,* such as the charge made in this case. Such damages include injury to the feelings and mental suffering endured in consequence. General damages need not be pleaded or proved. 18 A. & E., 1081, 1082, 1083, and cases cited in notes. That case was approved in *Barringer v. Deal,* 164 N. C., 246, which also was an action for slander. In our case the verdict finds that the words, which in law are actionable *per se,* were uttered by the defendant, and that they were false. The law, therefore, implies malice, which entitles the plaintiff to actual or compensatory damages. Malice, in this connection, and within the scope of the issues, does not necessarily mean personal ill-will, but a wrongful act, knowingly and intentionally done the plaintiff without just cause or excuse, and the law implies this kind of malice in actions for slander when the words falsely spoken of and concerning the plaintiff are action-

able *per se*. But punitive or exemplary damages also may be awarded, in the sound discretion of the jury, and within reasonable limits, but the right to punitive damages does not attach, however, as a conclusion of law, because the jury have found the issue of malice in such action against the defendant. The right under certain circumstances to recover damages of this character is well established with us. But they are not to be allowed unless there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation in the act which causes the injury. *Holmes v. R. R.*, 94 N. C., 318. They are not to be included in the damages by the jury as a matter of course simply because of the slander, but only when there are some features of aggravation, as when the wrong is done willfully, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights. *Ammons v. R. R.*, 140 N. C., 200 (concurring opinion by *Justice Hoke*); *Stanford v. Grocery Co.*, 143 N. C., 419, 427. The rule as to compensatory damages is also stated there. As said by the *Chief Justice* in *Osborn v. Leach*, 135 N. C., 628: 'Where the facts and nature of the action so warrant, actual damages include pecuniary loss, physical pain, and mental suffering.' And again: 'Compensatory damages include all other damages than punitive, thus embracing not only special damages as direct pecuniary loss, but injury to feelings, mental anguish, etc.,' citing 18 A. & E. (2 Ed.), 1082; Hale on Damages, pp. 99, 106. And, as directly pertinent to the charge upon this question to which exception was taken, we may conveniently and appropriately refer now to the *Holmes case, supra*, where it was held that if there is rudeness or insult or 'aggravating circumstances calculated to humiliate or disgrace the plaintiff, or party injured, punitive damages may be added to those which are merely actual or compensatory.' *Rose v. R. R.*, 106 N. C., 170; *Knowles v. R. R.*, 102 N. C., 66. Other cases to the same effect upon the questions of compensatory and vindictive or punitive damages in actions, and especially in slander, are *Hamilton v. Nance*, 159 N. C., 56," etc.

The court below charged: "The third issue reads: 'What punitive damages, if any, is plaintiff entitled to recover of the defendant?' The burden of this issue is upon the plaintiff to satisfy you from the evidence and by its greater weight what punitive damages, if any, she should recover of the defendant. Punitive, vindictive or exemplary damages, sometimes called smart money, is allowed in cases where the injury is inflicted in a malicious, wanton and reckless manner. The defendant's conduct must have been actual, malicious or wanton, displaying a spirit of mischief toward the plaintiff or of reckless and criminal indifference to her rights. When these elements are present, damages commensurate with the injury may be allowed by way of

punishment to the defendant, but such damages are awarded on the ground of public policy for example's sake, and not because the plaintiff has the right to the money, but it goes to her merely because it is assessed in her suit. Both the awarding of punitive damages and the amount to be allowed, if any, rest in the sound discretion of the jury. However, the amount of punitive damages, if any, while resting in the sound discretion of the jury, may not be excessively disproportionate to the circumstances of contumely and indignity present in the case. Compensatory damages are based upon injuries suffered by the plaintiff, while punitive damages are awarded upon the wrongs intended by the defendant. If the defendant was not actuated by actual malice the plaintiff would not be entitled to recover any punitive damages."

In *Ford v. McAnally,* 182 N. C., 419 (421-2), citing a wealth of authorities, is the following: "Punitive damages, sometimes called smart money, are allowed in cases where the injury is inflicted in a malicious, wanton and reckless manner. The defendant's conduct must have been actually malicious or wanton, displaying a spirit of mischief towards the plaintiff, or of reckless and criminal indifference to his rights. When these elements are present, damages commensurate with the injury may be allowed by way of punishment to the defendant. But these damages are awarded on the grounds of public policy, for example's sake, and not because the plaintiff has a right to the money, but it goes to him merely because it is assessed in his suit. Both the awarding of punitive damages and the amount to be allowed, if any, rests in the sound discretion of the jury. . . . However, the amount of punitive damages, while resting in the sound discretion of the jury, may not be excessively disproportionate to the circumstances of contumely and indignity present in each particular case." *Cotton v. Fisheries Product Co.,* 181 N. C., 151.

On this aspect of punitive damages, the evidence of the reputed wealth of the defendant is competent. *Tucker v. Winders,* 130 N. C., 147; *Carmichael v. Tel. Co.,* 162 N. C., 333.

We do not think there was error in permitting the witness Carper, a policeman, to testify as to statements made to him by defendant under the facts and circumstances of this case. The defendant denied she made them. No plea of privilege is set up in the answer. Then, again, we see no prejudicial error as the evidence on the part of plaintiff was overwhelming as to defendant's charge of incontinency. *Hartsfield v. Hines,* 200 N. C., 356, is not applicable.

The subject of slander and libel has frequently been written upon recently in this jurisdiction. *Elmore v. R. R., supra; Stevenson v. Northington,* 204 N. C., 690; *Oates v. Trust Co.,* 205 N. C., 14; *Broadway v. Cope,* 208 N. C., 85; *Ringgold v. Land,* 212 N. C., 369 (371);

Flake v. News Co., 212 N. C., 780. We see no error in the charge on nominal damages.

From a careful review of the exceptions and assignments of error made by defendant, we can find no prejudicial or reversible error in the record. The court below tried the case in an able and careful manner, plumbing the decisions of this Court. The jury by their verdict has found that the foul and damaging words spoken of the plaintiff by the defendant, affecting her virtue, were false and malicious. Perhaps there is nothing more heinous than false charges affecting the character or reputation of a person, especially the virtue and honor of a woman. Some people in an earlier and more sensitive era vindicated their good names by personal conflict. Now a more peaceful method is through the courts.

"A good name is rather to be chosen than great riches."

The courts should respond quickly to protect a good name.

In the record we find

No error.

W. M. PINNIX AND J. L. PINNIX, TRUSTEE, v. MARYLAND CASUALTY COMPANY; RECONSTRUCTION FINANCE CORPORATION; CENTRAL INVESTMENT COMPANY AND KESWICK CORPORATION (ORIGINAL PARTIES DEFENDANT); AND CAROLINA DEBENTURE CORPORATION (ADDITIONAL PARTY DEFENDANT).

(Filed 1 February, 1939.)

1. Mortgages § 30g—

A junior mortgagee is entitled to enjoin foreclosure under a prior mortgage on the same land until a *bona fide* controversy as to the amount due under the senior lien can be determined.

2. Usury § 1—Usury does not render note void, but only subjects it to the penalties prescribed by statute.

A note otherwise valid is not rendered void either as to principal or interest by the taint of usury, but is subject only to the penalties and forfeitures of the statute, one of which is the forfeiture of all interest when usury is properly pleaded and proven. C. S., 2306. *Ector v. Osborne*, 179 N. C., 667, cited and approved.

3. Usury § 9a—

Usury must be pleaded.

4. Mortgages §§ 30d, 30g—Junior mortgagee enjoining foreclosure of prior mortgage must pay amount of debt plus legal interest.

Since C. S., 2306, does not render interest on a usurious note void but only subjects the note to the penalties provided by statute, and the policy of our law fixing the legal rate of interest and providing that no more

shall be taken, is declared by C. S., 2305, a junior mortgagee enjoining the sale under a senior lien until a *bona fide* controversy as to the amount due under the senior lien might be determined in order that it might pay off the senior lien and be subrogated to the rights of the senior mortgagee, is entitled to have the senior debt stripped of usury and the amount of the debt ascertained at the amount advanced plus interest thereon at the legal rate of six per cent, this being the relief to which the mortgagor would be entitled, and equity requiring that the same rule should be applicable to the junior lienor.

5. Same—Junior lienor enjoining foreclosure of prior mortgage on ground of usury should tender amount due with legal interest.

A junior mortgagee enjoining foreclosure under a prior mortgage on the same lands upon the plea of usury should tender the amount due plus interest at the legal rate, this being required of the mortgagor seeking the same relief under the maxim "He who seeks equity must do equity," and the maxim being equally applicable to the junior lienor and equity requiring that the same rule should be equally applicable to both.

6. Same—N. C. Code, 442 (3), is inapplicable to suit by junior lienor to restrain foreclosure under prior mortgage on same land.

Since a junior lienor seeking to enjoin foreclosure under a prior mortgage on the same land until a *bona fide* controversy as to the amount due under the prior debt is settled, is not entitled to invoke the forfeiture of all interest, but is required to tender the principal of the debt plus legal interest, a decree continuing the injunction to the final hearing is not error notwithstanding defendants' plea of the two-year statute of limitations for the forfeiture of interest, N. C. Code, 442 (3), even if it be conceded that an action for forfeiture of the interest is barred by the statute.

APPEAL by defendants from *Phillips, J.*, at November Term, 1938, of FORSYTH. Affirmed.

The plaintiffs, beneficiary and trustee under a junior mortgage or deed of trust, brought this action to restrain the foreclosure of a senior mortgage having a lien on the same lands, and to have ascertained the amount due on the note secured by the senior mortgage, to the end that it might be paid in protection of plaintiffs' security, and plaintiffs subrogated to the rights of the senior mortgagee.

The controversy as to the amount due arises on the following facts and contentions:

On 15 April, 1927, John M. Pinnix and Madye Leak Pinnix borrowed $10,000 from the Carolina Mortgage Company, and secured the note representing the loan by a deed of trust on certain real property in Kernersville, Forsyth County. The plaintiffs allege that $500.00 of the principal was retained by the Mortgage Company as a bonus or condition of making the loan, or an additional charge of making the loan, and that the Mortgage Company made other unlawful and usurious charges in addition to the lawful six per cent.

Subsequently, on 1 July, 1931, the said John M. Pinnix and Madye Leak Pinnix executed to the Carolina Mortgage Company a new note secured on the same property, and representing the balance of indebtedness, due 1 July, 1936. The plaintiffs allege that the execution of this note and mortgage securing it was not voluntary, but made under circumstances of oppression and duress which made it impossible for the makers to assert their rights with regard to the usury; that the note and mortgage include and bring forward the usury involved in the first transaction, with additional usury of its own.

On 27 June, 1932, the said John M. Pinnix and Madye Leak Pinnix obtained a loan from W. M. Pinnix and made a note to him securing the same on the real estate theretofore conveyed to the Carolina Mortgage Company in security for the loan above mentioned.

The defendant Keswick Corporation, as substitute trustee, advertised and sold the property under the second deed of trust above described on 20 May, 1938, and the Central Investment Company became the highest bidder. On 30 May plaintiffs brought this action, setting up in their pleading substantially the facts and contentions above set out and demanding that the legal amount of the debt be ascertained, with forfeiture of all interest, which amount they stand ready to pay.

The defendants deny usury, aver that the second note was made voluntarily and contains no usurious consideration, and plead the statute of limitations—C. S., 442 (3)—against any claim of usury the plaintiffs may assert.

On the hearing in the county court, the injunction was continued to the hearing, and on appeal of defendants to the Superior Court of Forsyth County the order of the county court was affirmed. From this judgment defendants appealed.

Ingle, Rucker & Ingle for plaintiffs, appellees.

W. G. Mordecai and Ratcliff, Hudson & Ferrell for defendants, appellants.

SEAWELL, J. 1. The plaintiffs, representing a junior mortgage or deed of trust, brought this suit to restrain the foreclosure of a senior mortgage or deed of trust upon the same land until the amount due on the senior mortgage might be ascertained and plaintiffs given an opportunity to pay said amount and be subrogated to the rights of the senior mortgagee. They claim that the note secured by the senior mortgage represents a considerable amount of usury, and demand that the senior claim shall be purged of usury, all interest thereon forfeited, and the amount claimed by defendants reduced to that extent.

The defendants, pointing out that the plaintiffs do not contend for any reduction of defendants' claim except for the aforementioned usury and

consequent forfeiture of all interest, say that the item in controversy is thus segregated and relates to usury only, and since they have pleaded the statute of limitations, which upon the record they conceive to be applicable, the matter has become one of law to be settled without a jury, and the court below should have dissolved the injunction.

The statute pleaded became effective 1 April, 1931, and reads as follows:

"442 (3). The forfeiture of all interest for usury: *Provided, however,* this section shall not apply to the counties of Cherokee and Clay."

The defendants' note became due 1 July, 1936. This action was brought 30 May, 1938.

There is considerable controversy between counsel as to the beginning point or time when the statute begins to run, if applicable at all. It is conceded that a difference in the application of the statute might follow accordingly as we might adopt the theory that the junior mortgagee stood in the shoes of the debtor with reference to his right to plead usury or, on the other hand, might plead it as a right independent from that of the debtor.

We might say here that if we adopt the first view, it would be easy to arrive at the conclusion that the action is barred, since a comparison of the dates above set out shows that the debtor's cause of action, if he had any, accrued more than two years before this action was brought; if we adopt the latter view, it would reasonably follow that the plaintiffs' cause of action, if they had any, is not barred. They had no cause of action until they came into relation with the subject by taking the second mortgage; but defendants' mortgage was not then due and did not become due until 1 July, 1936. Since usury does not accelerate the payment of the principal, plaintiffs could not have compelled the defendants to accept payment before their note became due; and we do not understand how the plaintiffs could have prosecuted an action, the mere purpose of which would be to declare a status and, so to speak, put it on ice, so that plaintiffs might use it when occasion arose. We might, therefore, arrive at the conclusion that plaintiffs' cause of action is not barred.

But we do not think it advisable to pursue an academic discussion of this question, since we think the junior mortgagee has heretofore been permitted to exercise a privilege to which he is not in equity entitled. It seems clear, too, that much of the difficulty in applying the statute of limitations invoked in this case arises from the confusion thus produced.

2. The right of a junior mortgagee to resort to injunction to stay a foreclosure proceeding under a senior mortgage having a lien upon the same land, until a *bona fide* controversy as to the amount due on the

senior mortgage has been ascertained, is not questioned. When that controversy is narrowed down to a question of usury in the senior mortgage debt, the courts which have passed upon usury statutes similar to ours are not agreed as to whether the junior mortgagee should be let in at all to raise the question of usury.

We think, on examination of the authorities, our own decisions, as well as those of other jurisdictions having similar laws, will lead to the conclusion that our present discrimination between the mortgagor and the junior mortgagee with respect to the conditions under which they may be let in to raise the question of usury is not sufficiently supported.

Basing their reasoning on the ground that the usury laws are enacted for the benefit of the borrower and are personal to him, and those in privity with him, a great number of jurisdictions refuse to allow the junior mortgagee to raise the question at all; others, while permitting this question to be raised by the junior mortgagee upon other grounds, notably that of public policy, do not give him the benefit of the statute creating penalties and forfeitures, but permit him to come in only upon the tender of the legal amount due, with the lawful rate of interest. Our own courts, while demanding of the mortgagor, and those in privity with him, a tender of the principal amount due, with six per cent interest thereon as a condition precedent of raising the question of usury, permit the junior mortgagee to attack the senior mortgage without any tender, and secure a forfeiture of all interest. *Broadhurst v. Brooks,* 184 N. C., 123, 113 S. E., 576.

It is not contended anywhere that there is any privity between the junior mortgagee and the borrower or mortgagor in the senior mortgage; but an examination of the North Carolina authorities will show that this rule is seated upon the theory that C. S., 2306, which in most other jurisdictions is considered to raise a right personal to the borrower, makes the promise to pay interest in a note tainted with usury absolutely void for all purposes and incapable of any effect anywhere it is encountered. *Ward v. Sugg,* 113 N. C., 489, 18 S. E., 717; *Ripple v. Mortgage Corp.,* 193 N. C., 424, 137 S. E., 156; *Bank v. Jones,* 205 N. C., 648, 650, 172 S. E., 185. It must be said that the two last cited cases merely follow *Ward v. Sugg, supra,* as a precedent; and none of them deal with the rights of the junior mortgagee, but the theory on which *Ward v. Sugg, supra,* was decided is the sole support for the privilege accorded the junior mortgagee in *Broadhurst v. Brooks, supra,* of demanding forfeiture of all interest.

The premise to this conclusion that C. S., 2306, makes any promise to pay money utterly and unconditionally void and of no effect under any circumstances where the transaction is tainted with usury is not tenable; and the position that any part of C. S., 2306, can be borrowed

to aid the junior mortgagee in the matter of usury in a contract to which he is a stranger is so thoroughly against the weight of authority as to challenge the further usefulness and justice of the rule.

At the threshold of this discussion we must remember that our statute, C. S., 2306, is copied from the National Banking Act (with additions immaterial to this consideration), and has gone into the laws of very many states of the Union in exactly the same form. Its application to the junior mortgagee in *Broadhurst v. Brooks, supra,* and our own cases following this line of reasoning, is somewhat peculiar to our State.

The question presented in *Ward v. Sugg, supra; Ripple v. Mortgage Corp., supra,* and *Pugh v. Scarboro,* 200 N. C., 59, at p. 62, 156 S. E., 149, was whether the question of usury in a note might be raised against an innocent holder without notice, and these cases hold that this can be done. As stated, the conclusion rests upon an elaborate discussion in *Ward v. Sugg, supra,* in which the decision by a divided Court was based upon the theory that the usury made the promise to pay interest absolutely and unconditionally void and of no effect for any purpose wherever encountered. Since the protection afforded an innocent purchaser of a note, who has no notice of a defect therein, is an equitable provision of law, and the holder has a better security against the payee and endorser—*Ward v. Sugg, supra*—it is obvious that the decision of such a matter might have rested upon the ground of superior equity; but we are not here interested in that question. The point is that the holding in *Ward v. Sugg, supra,* must have entered into and became the dominant consideration in *Broadhurst v. Brooks, supra,* and similar cases, since therein the right of the junior mortgagee to demand a forfeiture of all interest was based upon the provisions of C. S., 2306. *Broadhurst v. Brooks, supra.*

The doctrine was repudiated in *Ector v. Osborne,* 179 N. C., 667, 670, 103 S. E., 388, and a vigorous dissent defending the principle was filed by *Clark, C. J.,* who later wrote the short opinion in *Broadhurst v. Brooks, supra.*

To get at the root of the matter, we turn now to an analysis of *Ward v. Sugg, supra,* where the theory seems to have originated.

In this case, speaking of a note given for usurious interest, *Justice Clark,* speaking for the Court, says:

"The question whether it is valid in his hands is not an open one in this State. Such note is held to be void into whatever hands it may pass. *Ruffin v. Armstrong,* 9 N. C., 411; *Collier v. Nevill,* 14 N. C., 30." (Such was, of course, the law by statute at that time, but not in 1893, when this opinion was rendered.)

"When the statute makes a note void it is void into whosesoever hands it may come, but when the statute merely declares it illegal the note is

good in the hands of an innocent holder. *Glenn v. Bank*, 70 N. C., 191, 206. Hence, it was argued strenuously that the authorities above cited were good under our former statute, which made the contract void, but that the present statute merely makes the contract illegal. It does not seem so to us. The former statute (Rev. Code, ch. 114; Rev. Stat., ch. 117) denounced the contract as void as to the whole debt, principal and interest. The present statute (The Code, sec. 3836) makes it void, not as to principal, but as to the interest only. It provides that 'the taking, receiving, reserving or charging a rate of interest greater than he is allowed . . . *shall be deemed a forfeiture* of the entire interest . . . which has been agreed to be paid,' with a further provision that, if such interest has been paid, double the amount can be recovered back by the debtor. The only difference between the two acts is that formerly the whole note was *forfeited* and of no avail, and now only the stipulation as to the interest is *ipso facto* deemed forfeited and void.

"In two cases this Court—and by most eminent judges—has expressly held that the words, 'deemed a forfeiture,' in the Act of 1876-7 (now The Code, sec. 3836) *makes void* the agreement as to interest. If any attention is to be paid to the doctrine of *stare decisis*, the precedents in our own Court do not leave this open to debate."

In *Ector v. Osborne, supra*, a different opinion was reached as to the effect of C. S., 2306, and a vigorous dissent along the same line was made by the writer of the foregoing opinion.

Close observation of the above quotation from *Ward v. Sugg, supra*, will show that the opinion twice interchanges the term "void" with the expression "deemed a forfeiture," as if they were synonymous.

We can reach no intelligent result by a mere troweling together of terms to which we have arbitrarily assigned the meaning most suitable to our purpose. *Cole v. Fibre Co.*, 200 N. C., 484, 489. The conclusion is forced when, in an endeavor to support it, we must resort to the spirit of the law when the letter fails, to the letter when the spirit is weak, and to precedent when both fail.

Ector v. Osborne, supra, as in the case at bar, involved an action for the recovery of a note representing usurious interest. It represents a later pronouncement by the Court and is directly contrary to the holding in *Ward v. Sugg, supra*, although the latter case is followed in *Ripple v. Mortgage Corp., supra*, and *Pugh v. Scarboro, supra*. These merely follow precedent, and it is worthy of note that in each of them the party pleading usury was the maker of the note, and the party demanding the enforcement of the note was, of course, a *privy* of the payee. The decisions need not have been placed upon the ground that the forfeiture of the statute rendered the promise utterly void anywhere it was encoun-

tered—a position directly contrary to *Ector v. Osborne, supra,* and entirely repudiated in *Ghormley v. Hyatt,* 208 N. C., 478, 181 S. E., 242.

The discussion in *Ward v. Sugg, supra,* hinged on the difference between "void" and "voidable" as applied to the provision in C. S., 2306, forfeiting interest. The opinion *arguendo* seems to conceive that if the statute makes the interest or promise to pay it "void," this provision is available to anybody, anywhere, at any time, and on any occasion—that the promise is utterly ineffective for any purpose; and while the word "void" is not mentioned anywhere at all in the statute, it is made the subject of sharp controversy between the main and dissenting opinions. The word "void" is notoriously one of the trickiest in legal terminology, and it would be rash to assign to it any intrinsic meaning apart from a consideration, not merely from its context, but the whole subject which has called it into use. It seldom implies a present nullity, but most often prospectively refers to a final condition which exists after the invalidity is disclosed and judicially declared—in the sense of "voidable." But we need not discuss the term further, since it does not appear in the statute at all and the term used there has an entirely different significance. We merely discuss it because it was, as we think, one of the factors leading to the peculiar result in *Broadhurst v. Brooks, supra.*

A note promising to pay money, regular upon its face and meeting the requirements of the Negotiable Instruments Law, and not containing a patent defect, is not void because of the taint of usury, but is only subject to the penalties and forfeitures of the statute, one of which is the forfeiture of all interest, which takes place when usury is pleaded and the plea supported by proof. It has been repeatedly stated that in order to be available the statute must be pleaded. *Ector v. Osborne, supra; Dixon v. Osborne,* 204 N. C., 480, 168 S. E., 683.

We shall not discuss the propriety of permitting the junior mortgagee to raise the question of usury in a senior mortgage. Perhaps section 2305, fixing the legal rate of interest and providing that no more shall be taken, is sufficient, since it is really the statute which declares the policy of the State with regard to usury. *Polikoff v. Service Co.,* 205 N. C., 631, 172 S. E., 536; *Hackney v. Hood, Comr.,* 203 N. C., 486, 166 S. E., 323.

"Since usury laws are enacted for the protection of needy borrowers, and not to punish extortion in money lenders, the defense of usury is purely personal to the borrower, or those in privity with him, and is not available to a stranger to the transaction. This is true whether the statutes declare the contract void in whole or only to the extent of the usury, or whether a penalty is given for the taking." 66 C. J., page 251; see authorities under note 90.

"The policy of the Legislature in adopting statutes of usury is the protection of borrowers against the oppressive exactions of lenders. It does not tend to the promotion of that policy that persons other than the victims of the usury should have the benefit of such statutes, and accordingly, as a general rule, usury is considered to be a ground of relief available only to the debtor or to the one in legal privity with him.

"To allow a stranger to interpose the defense of usury to a contract with which the maker is in all respects satisfied, and by the terms of which he desires to abide, and upon which he is liable for a deficiency judgment, would be exceedingly unfair to a debtor who desires to perform his contract, because he made it, or because he may deem it to be advantageous so to do. So long as the inclination to profit from man's adversity or necessity exists, a law limiting the rate of interest that the lender may charge the borrower for the use of money will continue to be wholesome and beneficial to society; but common experience suggests many instances in which the borrower may not desire to invoke the protection of the law enacted for his especial benefit." 27 R. C. L., page 281; *Stuart Court Realty Corp. v. Gillespie,* 59 A. L. R., page 342.

Referring to the minority rule admitting junior mortgagees to plead usury and explain its rationale, where the usurious excess is void, we find in 27 R. C. L., page 284, the following:

"The just rights of the senior creditor are protected, *as he can still recover his debt and as high a rate of interest as in the judgment of the law he ought to demand,* and therefore there can be little, if any, wrong to him in allowing a junior creditor to protect the fund in which he is interested for the payment of his debts, by making the defense of usury." See note to *Stuart Court Realty Corp. v. Gillespie, supra; Carter v. Dennison* (1848), 7 Gill. (Md.), 157.

"A borrower is not, however, compelled to plead usury, and *as the defense is personal to him,* it may be waived." "The statutes of usury *being enacted for the benefit of the borrower,* he is at liberty to waive his right to claim such benefit and pay his usurious debt, if he sees fit to do so." *Ector v. Osborne, supra.* Approved in *Ghormley v. Hyatt, supra; Dixon v. Osborne,* 204 N. C., 480, 485, 168 S. E., 683. In all these opinions the reference is to C. S., 2306.

"It results from a just interpretation of the legislation that the right to complain is a personal one belonging to the borrower and his representatives; no other party is entitled to relief, defensive or affirmative." Pomeroy Equity Jurisprudence, 4th Ed., section 937. See authorities cited.

Further confusion and contradictory statements as to the principles upon which a court of equity will administer relief in usury cases both

as to the borrower and those in privity with him, and as to the junior mortgagee who pleads usury, should not continue.

3. Apart from these considerations, there is a want of equality at the threshold of equity as between the borrower, who as actor seeks to raise the question of usury in a mortgage debt, and the junior mortgagee who comes into equity for the same purpose. This inequality between the two at the threshold of equity is sharply illustrated in *Broadhurst v. Brooks, supra,* in which the mortgagor or borrower is required to tender the principal amount due, with six per cent interest, under the maxim: "He who seeks equity must do equity," and the junior mortgagee, a total stranger to the usurious contract and seeking the same remedy through equity, need make no tender and may require a forfeiture of all interest. *Wilson v. Trust Co.,* 200 N. C., 788, 158 S. E., 479. The more favorable position accorded the junior mortgagee is stated in *Wilson v. Trust Co., supra,* to arise from the fact that he is under no legal or moral obligation to pay the debt; but surely this is no good reason when the junior mortgagee not only elects to pay the debt for his own security, but demands subrogation against the borrower. Both are seeking equity by the same route, and however the junior mortgagee may be related to the usury laws, the same equitable principle should be applied to him. Conceding that there is some discretion in the equity court as to the conditions upon which persons may seek equity, it is not equity at all unless the rule applies uniformly to all comers.

The discrimination cannot be explained by reference to any rule of equity. It cannot rest upon the principle that the borrower does not come into court with clean hands because of his participation in the usurious contract, since he is not *in pari delicto.* Pomeroy Equity Jurisprudence, 4th Ed., section 937; *Bank v. Lutterloh,* 81 N. C., 144. If actor, "the doors of the court will be shut against him *in limine.*" Pomeroy Equity Jurisprudence, 4th Ed., section 398. And the Court cannot take the middle ground that the mortgagor is to be penalized *pro tanto* and then admitted, without inventing a new legal gadget. The maxim, "He who seeks equity must do equity," expresses a very different principle, broader in its scope, and considered "the source of every doctrine and rule of equity jurisdiction." Pomeroy. No man comes into court so clean-handed as to escape the maxim, "He who seeks equity must do equity."

This is no equitable basis for a discrimination against the mortgagor and in favor of the junior mortgagee in this proceeding. Coming into the situation by the narrowest sort of a margin and against well reasoned authority, the junior mortgagee, when pleading usury in a senior mortgage, should be held to the same rule, at least, which applies to the borrower, who raises the same question in the same way.

We, therefore, conclude that former rulings of the court holding to the contrary should be revised, and that the junior mortgagee seeking equitable relief against foreclosure of a senior mortgage because of usury should be required to tender, or at least, offer to pay, the principal sum due, with legal interest thereon at six per cent.

Since these plaintiffs began their action in good faith, under the rule laid down in *Broadhurst v. Brooks, supra,* and other cases following this precedent, they will not be required to make tender; but they will be permitted only to purge the debt of its usury and have it stripped down to the principal sum advanced, with legal interest thereon at the rate of six per cent.

This, however, does not conclude the controversy between the parties, but only modifies the extent of the possible relief; and the judgment of the court below continuing the injunction to the hearing is

Affirmed.

H. L. TAYLOR v. THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA.

(Filed 1 February, 1939.)

Judgments § 34—Plaintiff held barred by judgment of State of California in action in which he appeared by class representation under its laws.

The Insurance Commissioner of the State of California, the State of defendant insurance company's domicile, instituted proceedings against the company upon finding that its non-cancellable disability income policies were unprofitable and had impaired its reserves, in which proceeding notice was duly published and all interested persons given opportunity to appear. Policyholders of all classes of policies, including holders of non-cancellable, disability income policies, appeared and represented all other policyholders similarly situated. Judgment of the State of California was entered approving the Insurance Commissioner's plan of rehabilitation under which policyholders of the old company would be allowed to exchange their policies for policies in the new company upon certain conditions, or to sue for breach of contract and be paid out of the assets of the old company not transferred to the new company. This judgment was affirmed by decision of the Supreme Court of the United States. *Held:* The laws of the State of California provide for virtual or class representation, Code of Civil Procedure of California, secs. 382, 1057, and plaintiff is bound by the orders and decrees entered in the proceeding in that State, and is barred thereby from maintaining an action in the courts of this State to recover premiums paid on a non-cancellable disability policy issued by defendant insurer, even though plaintiff was not a party to the proceedings in the State of California by actual service of process, or by substituted service of process by attachment of property, or by personal appearance in the proceeding in that State.

APPEAL by plaintiff from *Olive, Special Judge,* at 14 February, 1938, Extra Civil Term of MECKLENBURG.

Civil action to recover premiums paid on non-cancellable income policy of insurance alleged to have been breached by defendant.

Defendant's motion for judgment as in case of nonsuit at the close of plaintiff's evidence was overruled. But, upon renewal thereof at the close of all the evidence, the motion was allowed. From judgment in accordance therewith plaintiff appeals to the Supreme Court and assigns error.

H. L. Taylor for plaintiff, appellant.
Thomas, Lumpkin & Cain and C. W. Tillett for defendant, appellee.

WINBORNE, J. This appeal was argued at the Spring Term, 1938, of this Court, but was carried over to the Fall Term, 1938, for decision, pending decision of the Supreme Court of the United States in the case of *Neblett et al., Interveners, Petitioners, v. Carpenter, Jr., et al.,* Adv. Ops., 83 L. Ed., 193, involving the validity of judgment of the Supreme Court of California, which is pleaded by defendant herein as bar to the action.

The Supreme Court of the United States in opinion therein having affirmed that judgment, one question, determinative of this appeal, remains for consideration: Is the plaintiff entitled to maintain this action in North Carolina for the recovery of premiums paid upon a non-cancellable disability policy breached by authority of law duly decreed by the Superior Court of Los Angeles County, California, in a proceeding instituted by Insurance Commission of that State under the insurance laws of that State, for rehabilitation of defendant insurance corporation, in which proceeding other policyholders of the same class appeared on behalf of themselves and all others similarly situated, and to which plaintiff was not a party by actual service of process, or by substituted service of process by attachment of property, or by personal appearance?

Review of the authorities leads us to say that the answer is "No." We deem it expedient for proper understanding of the question and the conclusion reached to state the facts somewhat in detail.

The uncontroverted facts are these: On 4 September, 1931, the defendant, a corporation, organized under the laws of California, engaged in the business of writing life and health and accident insurance, in consideration of annual premium of $228, issued to the plaintiff a disability insurance policy known as non-cancellable income policy providing, among other things, for monthly benefits of $400 during disability, which "consists of continuous, necessary and total loss of business time."

The plaintiff paid four additional annual premiums thereon, but did not pay the premium due 4 September, 1936, of which notice was given. Upon receiving information as to proposed rehabilitation of the company in California, plaintiff declined to pay that premium and on 3 August, 1936, and on several dates thereafter, demanded refund of all premiums, to wit, $1,140, theretofore paid, which was refused.

Plaintiff alleges, among other things, that prior to 22 July, 1936, defendant sought to rescind the contract of insurance, to repudiate liability thereunder and to enter into some scheme or plan for avoiding the payment of the amount contracted to be paid under said policy, and by rescinding the same to deprive plaintiff of benefits, retaining all premiums paid; and that on 29 December, 1936, plaintiff received from defendant copy of an alleged rehabilitation and reinsurance agreement purporting to be an agreement entered into between defendant and the Insurance Commissioner of the State of California, to which plaintiff was not a party, in which agreement it is specifically provided that the insurance contract issued by defendant to plaintiff is repudiated, and that the terms thereof will not be observed by the defendant.

Defendant denies these allegations of the plaintiff, and avers that all things done in, about, and concerning its property, assets and affairs since 22 July, 1936, having to do with the reorganization and affecting the rights of the plaintiff under said policy have been done pursuant to the order of the Commissioner of Insurance of the State of California and orders of the Superior Court of Los Angeles County in said State, a court of record and of general jurisdiction, clothed with and exercising, among other things, general equity jurisdiction, duly entered in that certain proceeding therein pending entitled "Samuel L. Carpenter, Insurance Commissioner of the State of California, Petitioner, *v.* The Pacific Mutual Life Insurance Company, a Corporation, Respondent," pursuant to the laws of said State and in the exercise of its equity jurisdiction, which orders are specifically and in detail pleaded in bar of plaintiff's right to maintain this action.

In reply, plaintiff alleged, on information and belief: That prior to and at the time of the institution of the action mentioned in the answer defendant was solvent and a going insurance company with ample and sufficient funds to meet its obligations as and when same became due and payable; that defendant conceived the idea of repudiating the non-cancellable policies for that it appeared that same were not as profitable as other business written by the defendant; that acting by and in concert with its officers, directors and stockholders, defendant, with intent to cheat and defraud the holders of non-cancellable policies, caused the said alleged proceeding to be instituted in the said Superior Court of California, seeking a reorganization with the view of repudiating said

non-cancellable policies and forfeiting the premiums paid thereon, and for the purpose upon the part of the said officers, directors or stockholders of defendant to escape personal liability under the laws of California, by transferring the assets of defendant to a new corporation, which assumed no liability for or under said non-cancellable policy; that plaintiff is a nonresident of the State of California, and is a resident of North Carolina; that no process issuing from the Superior Court of California for Los Angeles County has been served upon him; that he had no property in California subject to attachment or execution; that he has not personally appeared or authorized anyone to personally appear for him in said proceeding; and that the court was without jurisdiction to hear and determine any matter, *in rem* or *in personam*, concerning the plaintiff; and that said decrees and agreements had in said proceeding are null and void.

On the trial below plaintiff offered no evidence in support of any of said allegations except those relating to lack of service of process, actual and constructive, and of his personal appearance in the proceeding in California. He offered evidence tending to show that he had received by mail notice informing him of the pendency and purpose of the proceeding in California, of the date and place set for hearing at which he and all interested persons might appear and be heard, of the filing with the Insurance Commissioner of each State in which the defendant did business a copy of the proposed rehabilitation and reinsurance plan and agreement submitted to the court by the Insurance Commissioner for its consideration, and of the order approving the said agreement.

Defendant offered evidence tending to show these facts: For many years it has been engaged, on a nation-wide scale, in the business of writing life, health and accident insurance. Since 1918 it has issued non-cancellable health and accident policies. Immediately prior to 22 July, 1936, the company was doing business in forty-two states and the District of Columbia. It had approximately 225,000 life insurance policyholders with life insurance outstanding in excess of $600,000,000, and approximately 48,000 non-cancellable policyholders. In the western half of North Carolina it had approximately 1,500 life policyholders with insurance amounting to approximately $4,000,000, 450 non-cancellable policyholders, and 170 commercial accident policyholders.

The Insurance Commissioner of the State of California, upon facts revealed through a triennial examination, completed immediately prior to 22 July, 1936, and conducted by him in coöperation with Insurance Commissioners of the States of Ohio, Washington, Texas, Virginia, and Louisiana, in accordance with custom among the members of the National Association of Insurance Commissioners, instituted the proceedings in the Superior Court of Los Angeles County. Exemplified

copies of petitions and orders entered therein were here introduced in evidence, portraying these facts succinctly stated, in part, in the said opinion of the Supreme Court of the United States: "The Insurance Commissioner of California determined that, while the life and general health and accident business was in sound condition, there was an overall deficit in reserves due to the unprofitable nature of outstanding noncancellable health and accident risks, with the result that the company was insolvent within the meaning of the Code. July 22, 1936, the Superior Court of Los Angeles County, on his application, appointed him conservator. On the same day he applied for and obtained an order which appointed him liquidator of the company. On the same day, as conservator, he petitioned for authority to rehabilitate the company and submitted a plan embodying an agreement, to be executed by the company and himself as Commissioner, with a new corporation, which he would form, all of whose capital stock he would purchase with the assets of the company, and to which he would transfer most of the assets, retaining the stock of the new company and certain other assets of the old. The new company was to assume the policies and obligations of the old company to the extent provided in the agreement. Policyholders were to have the option of taking insurance from the new company or proving their claims for breach of their contracts, provision for payment being made by covenants of the new company and the retained assets of the old. The court approved the plan and authorized the execution and performance of the agreement.

"Shortly afterwards it was discovered that the judge who acted in the cause was probably disqualified by ownership of a policy issued by the company. August 11, 1936, another judge entered an order, which, after adverting to the possible disqualification of the judge who made the earlier orders, ratified, approved, and confirmed the order appointing the Commissioner conservator and, on the basis of the petition filed on July 22, independently, and as an original order, appointed the Commissioner conservator, invested him with title to all the company's assets, and authorized him to endeavor to consummate a rehabilitation or reinsurance plan. On September 25 the Commissioner presented a further petition for approval of the rehabilitation and reinsurance agreement, which recited his actions taken pursuant to the court's orders and to the plan of rehabilitation, and asked approval thereof. An order issued which directed all interested persons to show cause why the agreement, and what had been done pursuant to it, should not be approved and all the prior acts of the Commissioner ratified and confirmed, and fixed a hearing. At the hearing, which lasted from October 19 to December 4, many officers, stockholders and policyholders who had intervened, including the petitioners, were heard. Plans of rehabilitation presented by

some of them were considered; evidence was taken and argument was had. December 4 an order was entered approving the Commissioner's plan and agreement, ratifying the action he had taken, and authorizing him as conservator, and as liquidator, if he should be appointed as such, to carry out the rehabilitation agreement. The court retained jurisdiction to make further orders for the effectuation of the plan and agreement."

Defendant further introduced evidence tending to show that at the hearing (October 19 to December 4) that there were approximately five thousand non-cancellable policyholders represented, who had intervened under orders allowing them to appear "on behalf of themselves and other non-cancellable policyholders similarly situated." The substance of the points made by them against the rehabilitation agreement is: "That it violates the due process clause of the Federal Constitution; that it constitutes a taking of property in violation of the Federal Constitution; that the plan as proposed by the Insurance Commissioner was unfair and discriminatory as against the non-cancellable policyholders; and that the plan as proposed by the Commissioner was the result of a conspiracy and fraud on the part of the officers and directors of the old company to repudiate their obligation to the non-cancellable policyholders . . ." which are substantially the points now raised by the plaintiff in his reply to the answer of the defendant in the instant case.

In the order of 4 December, approving the rehabilitation and reinsurance agreement, it is adjudged, that notice of the hearing has been duly given in accordance with the order to show cause, that such notice constitutes sufficient notice of the hearing, and that all persons interested in the old company, its property and assets, had been given the right to be heard with respect not only to the rehabilitation agreement but also "upon all phases of these proceedings, and upon each, all and every the matters and things herein adjudicated." It is further adjudicated that all policyholders, creditors and stockholders of, and all other persons interested in the respondent corporation were by representation or otherwise, parties to the proceedings; that "they are, and each of them is, bound by all proceedings taken herein and more particularly by the terms of this order," and that all persons are forever barred from proceeding except in accordance with the rehabilitation agreement and plan embodied therein and the decrees in the proceeding.

The Supreme Court of California affirmed the order. *Carpenter v. Pacific Mutual Life Ins. Co.*, 10 Cal. (2d), 307, 74 Pac. (2d), 761.

The Supreme Court of the United States holds in effect that, as matters of procedure under and construction of State statutes are for the courts of the State, it is without jurisdiction to review the State court's decision of any such questions. But, granting that the method

of liquidation adopted by the Commissioner and approved by the court be authorized by the Insurance Code, the petitioners to the Supreme Court of the United States contended that that method denied them due process and impairs the obligation of their policy contracts. Because of these contentions the writ of *certiorari* was granted.

In opinion filed the Supreme Court of the United States, speaking with respect to these contentions, said: "One of the petitioners holds a life policy which, if he assents to the plan, will be replaced by a policy of the new company for the same amount. The others are holders of non-cancellable health and accident policies no liability under which has accrued. If they assent to the plan and accept the obligation of the new company in lieu of that of the old, they will receive insurance for only a percentage of the face value of their old policies. The alternative open to all is to dissent from the plan and to prove their claims for breach of their policy contracts against the liquidator of the old company. They insist this option is not available to them as no liquidator has been appointed. When they took their appeal to the State Supreme Court, there was pending an application for the appointment of the Commissioner as liquidator and no reason is assigned why action cannot be taken upon this petition pursuant to the plan. The Supreme Court has said: 'The proposal contemplates that in due course the Commissioner will be appointed liquidator of the old company, and in that capacity will receive, liquidate, and pay all claims against the old company from the old company's assets not transferred to the new company (including the new company's stock), and from certain moneys furnished to the liquidator by the new company as provided in the agreement.' The petitioners assert that the funds provided will be insufficient for the payment of their claims and others of like character, should they dissent from the plan. The order of the Superior Court recites that the plan makes adequate provision for each class of policyholders, for the creditors, and for the stockholders; that the plan is fair and equitable; that it does not discriminate unfairly or illegally in favor of any class of policyholders; that the intangible assets conserved by the plan are worth several million dollars and that if the old company were dissolved and its assets sold their value would be substantially less than the amount which will be realized from them under the plan.

"The record upon which the appeal was taken to the Supreme Court of the State, and which has been brought here by our writ, contains only the judgment roll. The evidence is not before us and the court below has held that, under the State law, the judge was not bound to make special findings. We must presume that there was substantial evidence to sustain the court's decree. On account of the state of the record the petitioners are unable to point to any evidence to sustain their conten-

tion that if they dissent they will not receive as much in liquidation of their claims for breach of their policy contracts as they would upon a sale of assets and distribution of the proceeds.

"The petitioners have no constitutional right to a particular form of remedy. They are not entitled, as against their fellows who prefer to come under the plan and accept its benefits, to force, at their own wish or whim, a liquidation which under the findings will not advantage them and may seriously injure those who accept the benefits of the plan. They are not bound, as were the dissenting creditors in *Doty v. Love,* 295 U. S., 64, to accept the obligation of the new company but are afforded an alternative whereby they will receive damages for breach of their contracts. They have failed to show that the plan takes their property without due process.

"It is not contended that a statutory scheme for the liquidation of an insolvent domestic corporation is *per se* an impairment of the obligation of the company's contracts. The argument is that the impairment of contract arises from the less favorable terms and conditions of the new non-cancellable policies which are to be substituted for the old ones, and, in the case of the life policies, by the substitution of a new company as contractor in place of the old, without the consent of the policyholder. This position is bottomed upon the theory that the policyholders are compelled to accept the new company as insurer on the terms set out in the rehabilitation agreement. As has been pointed out, they are not so compelled but are given the option of a liquidation which on this record appears as favorable to them as that which would result from the sale of the assets and pro rata distribution in solution of all resulting claims for breach of outstanding policies."

In the instant case the evidence tends to show that the Insurance Commissioner was appointed liquidator on 2 February, 1937, and is directed to wind up and liquidate the business of the respondent corporation.

Upon the decision of the Supreme Court of the United States affirming the judgment of the Supreme Court of California, it may fairly follow that plaintiff herein is bound by the order approving the rehabilitation and reinsurance agreement.

However, the Supreme Court of California, referring to the proceeding in that State, said: "Section 1057 makes the Commissioner in all proceedings under the provision of the Code the trustee for the benefit of all creditors and other interested parties."

Then, too, class suits are authorized by the Code of Civil Procedure of California, sec. 382, which provides, among other things: "When the question is one of a common or general interest of many persons, or when the parties are numerous and it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all."

"The rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest." *Smith v. Swormstedt,* 16 Howard, 288, 16 L. Ed., 942. This doctrine of virtual or class representation has been applied in numerous other cases, among those notably pertinent to the factual situation here, are: *Hartford Life Ins. Co. v. Ib.,* 237 U. S., 662, 59 L. Ed., 1165; *Hartford Life Ins. Co. v. Barber,* 245 U. S., 146, 62 L. Ed., 208; *Supreme Tribe v. Cauble,* 255 U. S., 365, 65 L. Ed., 673; *National Surety Corp. v. Nantz,* 90 S. W. (2d), 385; *Thrower v. Kistler,* 14 F. Supp., 217; *City of Detroit v. Detroit United Ry.,* 197 N. W., 697.

We therefore hold that on this record plaintiff, being of the class of non-cancellable policyholders, who appeared in the proceeding in the Superior Court of California "in behalf of themselves and other non-cancellable policyholders, similarly situated," is under the doctrine of virtual or class representation, bound by the orders and decrees entered in that proceeding, and is barred of right to prosecute this action.

The judgment below is

Affirmed.

A. C. EVERETT AND WIFE, ELLA S. EVERETT, v. CAROLINA MORTGAGE COMPANY AND CAROLINA DEBENTURE CORPORATION, INTERVENER.

(Filed 1 February, 1939.)

1. Execution § 15: Evidence § 9—

The burden is upon intervener claiming title to funds in the hands of a judgment debtor levied on by a creditor under execution to prove his title to such funds by the greater weight of the evidence.

2. Bills and Notes § 7b—

Possession of a note made to bearer is sufficient to place title in the holder, and actual possession is not necessary, it being sufficient if there has been constructive delivery, or possession for collection, even by the original holder or transferee, as agent of the real owner.

3. Fraudulent Conveyances § 1—

A corporation may not transfer all of its assets to other than a *bona fide* purchaser for value, without provision for the payments of its creditors.

4. Fraudulent Conveyances § 8—

A creditor beginning an action prior to the transfer of assets by defendant is entitled to attack the transfer as fraudulent as to him, although he does not obtain judgment against the defendant until after the transfer of the assets had been accomplished.

5. Fraudulent Conveyances § 4—

When a corporation receiving all the assets of another corporation has knowledge of debts of the transferring corporation, or of circumstances which should put it on inquiry as a matter of law, the transaction will be deemed void as to the receiving corporation, and a creditor may follow the funds into its hands.

6. Fraudulent Conveyances § 3—

Where a corporation transfers all its assets to another corporation for a grossly inadequate consideration, or no consideration at all, the transaction is fraudulent as to a creditor of the transferring corporation, and he may set aside the conveyance without showing actual fraud, regardless of the intent of the parties to the transfer.

7. Fraudulent Conveyances § 2—

When a transfer of assets by a debtor is in law or in fact fraudulent as to creditors, so as to evade the just claims of the creditors, the mode and devices by which the transfer is made may be ignored and the transaction declared void.

8. Fraudulent Conveyances § 9: Execution § 15—Held: Intervener failed to show that prior transfer to it of property by judgment debtor was valid as to judgment creditor.

Plaintiff obtained a judgment against defendant mortgage company for usury, and levy under execution was had on funds in the bank to the credit of the mortgage company, which funds were derived from the payment to it of a mortgage note. Intervener claimed the mortgage note belonged to it by transfer had prior to the rendition of the judgment, but subsequent to the institution of plaintiff's action. It appeared that defendant mortgage company being insolvent, its assets were transferred to two other corporations for the benefit of the secured creditors, bondholders and the surety for defendant mortgage company, under an agreement among this group of creditors for the liquidation of assets for their benefit, the intervener becoming the assignee of the mortgage note in question under the transfer, and claiming that defendant mortgage company was only its agent for the collection of the note. *Held:* The burden was on intervener to establish title to the funds levied on in the hands of the judgment debtor, and in the absence of evidence that the transfer of the assets of defendant mortgage company was supported by sufficient consideration, the transfer is void as to plaintiff judgment creditor, and an instruction that if the jury believed the evidence to find that intervener was not the owner and entitled to possession of the funds is without error.

APPEAL by intervener, Carolina Debenture Corporation, from *Phillips, J.*, at March Term, 1938, of RICHMOND. No error.

The plaintiffs instituted an action against the defendant Carolina Mortgage Company, on 11 July, 1935, to recover a penalty against this defendant for usury alleged to have been exacted, and at March Term, 1937, of Richmond County Superior Court, secured judgment against said defendant in the sum of $2,228.94, double the usurious interest

paid, together with costs of the action. From this judgment there was no appeal. On 15 April, 1937, plaintiffs caused execution to issue from Richmond County Superior Court, which was returned on 14 May, 1937, wholly unsatisfied. On 6 October, 1937, an *alias* execution was issued, which was levied on a deposit in the name of the defendant Carolina Mortgage Company in the Farmers Bank and Trust Company of Rockingham, amounting to $1,650.00. This was held in the name of the Carolina Mortgage Company on a draft drawn by it on Mrs. Maie Dennis, and was the proceeds of a note given by Mrs. Dennis for a loan obtained from the Carolina Mortgage Company.

The Carolina Debenture Corporation obtained an order of court, upon which it intervened, claiming the funds levied upon as its own.

The Maie Dennis note was secured by a deed of trust executed to Carolina Mortgage Company, trustee, to secure the same, and the note, made to bearer, was held by the Mortgage Company. The Mortgage Company issued a great number of bonds, pledging the notes and mortgages held by it upon its customers as collateral to secure them. These loans in a large amount were guaranteed by the Maryland Casualty Company.

The evidence tends to show that the Carolina Mortgage Company was unable to pay the bonds so issued, and became insolvent. The Maryland Casualty Company, finding itself embarrassed by its guaranty to pay the bonds, undertook to bring about a refinancing of the obligations of the Mortgage Company, and the procurement of a loan from the Reconstruction Finance Corporation to make such financing possible.

There were two plans finally offered to the holders of the bonds of the Mortgage Company, the evidence tending to show that one plan so adopted received about ten per cent acceptance by the creditor bondholders, and the other plan received about ninety per cent acceptance.

Under the latter plan, the bondholders were to receive $300.00 in cash and $700.00 in debentures, issued by the Carolina Debenture Corporation, for each $1,000.00 bond of the Mortgage Company. It is claimed by the defendants that the Maie Dennis note became the property of the Carolina Debenture Corporation on 28 May, 1936, as part of the program of refinancing, and that in turn it was one of a great number of mortgages made to the Carolina Mortgage Company which became pledged to the Reconstruction Finance Corporation for a loan.

The evidence tends to show that in addition to the Carolina Debenture Corporation, the Carolina Bond Corporation was organized to facilitate the refinancing under Plan No. 1. A committee was appointed by the Maryland Casualty Company and the bondholders, by which committee it was determined "which collateral was up" for options 1 and 2, which committee got information as to the various mortgages which were held,

and these were partitioned as collateral according to the information they received. As to this proceeding, E. C. Murphy testified:

"Those bonds were parceled out in Baltimore, I believe. The actual delivery of the bonds was in Baltimore. No, sir, it did not take place at the office of the bank in Raleigh. No, the notes and mortgages did not leave the bank in Raleigh in a bulk to go to Baltimore, to be parceled out. The partition was all agreed upon before the mortgages were removed from Raleigh, actually. The mortgages, securing the outstanding bonds, were removed from Raleigh in May, 1936, between May 20th and May 30th. I don't know about their being moved to Baltimore. I understand Mr. Le Master was here when the bonds were removed. I did not check the bonds out myself."

With regard to the course of title of the Maie Dennis note and mortgage through the various transactions by which the refinancing was accomplished, the defendants point out that the Carolina Mortgage Company entered into a trust agreement in 1936 with the Commercial National Bank of Raleigh (the predecessor in the trust of Security National Bank of Greensboro), whereby the said bank should act as trustee and hold the notes as security for the payment of the bonds to be issued by the Carolina Mortgage Company, and that it pledged the notes to the trustee in pursuance of this. It appears from the original agreement, dated 3 August, 1926, that the Maie Dennis note and mortgage was so assigned. Reference is further made to the refinancing plan, and especially to the debenture agreement under option 2, dated 1 December, 1933, executed by the Carolina Mortgage Company, Carolina Debenture Corporation, Carolina Bond Corporation, and Maryland Casualty Company, under which it was agreed to exchange the new issue of bonds for those held, transferring the collateral supporting the old bonds in security for the new, and special reference is made to this clause: "It being contemplated and intended that as soon as practicable collateral securing the exchanged bonds which may constitute assets of the corporation shall be substituted in place of any and all exchanged bonds as assets of the corporation."

With regard to the actual transfer of the Maie Dennis note, reference is made by the defendants to the testimony of E. C. Murphy (R., pp. 61, 62), as follows: "The new bonds were issued by Carolina Bond Corporation and the Debenture Corporation prior to the time the mortgages were removed from North Carolina; they were issued early in 1934, but the details were not completed until May, 1936."

Mr. J. M. Sink, Assistant Trust Officer of the Security National Bank of Greensboro (successor trustee), testified (R., p. 71):

"I do have the receipt issued to us by the Reconstruction Finance Corporation. It consists of fourteen hundred and some-odd papers of

the exhibits attached to these receipts. This receipt is dated May 23, 1936, the date on which the trust was actually closed out. On that date we closed out the Carolina Mortgage Company."

And on page 72: "Yes, we received that receipt and the paper writing you showed me, purporting to be receipt from the Reconstruction Finance Corporation, dated May 23, 1936, for 1,431 separate pieces or groups of collateral, is the receipt. . . . The schedule is attached to the receipt listing loan 1982, name of the mortgagor, Mrs. Maie Dennis, widow; mortgagee, Carolina Mortgage Company, trustee, dated July, 1926, balance eight notes, $2,000.00."

And on page 73: "Yes, we did deliver to the Reconstruction Finance Corporation the trust receipt of Carolina Mortgage Company attached to Exhibit N, which I have identified, the original of that. I was present. There was no written contract. The Maie Dennis paper was allocated. . . . We delivered the Maie Dennis papers to the Carolina Debenture Corporation and immediately received the Reconstruction Finance Corporation receipt."

E. C. Murphy testified (R., p. 49): "The Carolina Mortgage Company, prior to May, 1936, had received the Maie Dennis papers from the Security National Bank, trustee, for the purpose of collection or foreclosure. We executed a receipt for them to the Security National Bank, trustee. That is right, the papers did not pass to the Reconstruction Finance Corporation. The trust receipt passed."

The evidence tends to show that the Carolina Mortgage Company put up all the capital stock for the organization of the Carolina Bond Corporation used in Plan 1 of the refinancing, and also of the intervener, Carolina Debenture Corporation, used in Plan 2, with which this case is more concerned. It shows also that the principal offices of these two corporations were the same as those of the Carolina Mortgage Company. It discloses further that, in the process of refinancing, all of the assets of the Carolina Mortgage Company were transferred either to the one corporation or to the other, or to the Carcen Corporation, formed for the handling of the free assets of the Carolina Mortgage Company, leaving the Carolina Mortgage Company without assets. "This receipt is dated May 23, 1936, the date on which the trust was actually closed out. On that date we closed out the Carolina Mortgage Corporation." Testimony of E. C. Murphy (R., p. 71).

E. C. Murphy, witness for the intervener, further testified (R., p. 66): "There is no written conveyance from the Carolina Mortgage Company to the Carolina Debenture Corporation, covering this Maie Dennis note and mortgage, except these general agreements here in evidence." And J. P. Le Master, president of the corporation and witness for the intervener, testified (R., p. 77): "It was acquired by written contract." And

on page 80: "The written instrument which I hold is the instrument under which the Carolina Debenture Corporation claims ownership of the mortgage referred to in this case."

The intervener accounts for the possession of the Maie Dennis note in the hands of the Carolina Mortgage Company at the time of its collection and the deposit of the proceeds in the bank by introducing a written agreement by which the Carolina Mortgage Company undertook to "service," that is, in this instance, "collect" as agent for the owners, the notes and mortgages formerly belonging to them.

Upon this evidence the plaintiffs contended both in the court below and here: First, that no title to the Maie Dennis note passed to the Debenture Corporation, and that there is no evidence tending to show such a transaction; second, if it should appear that title to this item passed, then it is undisputed from the evidence that the Carolina Mortgage Company transferred all of its assets, or the greater part, to the Debenture Corporation, and that under the circumstances of the transfer the Debenture Corporation was held to a knowledge of the fact that this was done without reservation of any fund to pay creditors and was, therefore, a legal fraud and void as against the levy of plaintiffs upon the funds in the hands of the Carolina Mortgage Company, no matter by what pretext or device they held it; third, that the Carolina Debenture Corporation was at the time of the transaction a mere subsidiary corporation, in which the Mortgage Company held the entire stock, and the attempted transaction conveyed no title thereto such as to divest from the Carolina Mortgage Company the ownership of its assets, as against the claims of creditors; and, fourth, that the Carolina Debenture Corporation was created and intended as a mere fraudulent device, for the purpose of removing the assets of the Carolina Mortgage Company from reach of its creditors, and in furtherance of this fraud the property of the Mortgage Company was transferred to it, and the transaction is, therefore, void as to plaintiff creditors.

One issue was submitted to the jury: "Is the Carolina Debenture Corporation, intervener, the owner and entitled to the possession of the funds seized by the plaintiffs in this action?" Thereupon, the judge gave the following instruction to the jury: "Upon this issue, the court charges you, if you find all the facts to be as testified to by the witnesses in this case, and further find the facts to be as the evidence tends to show, you will answer this issue 'No.'"

To this instruction, the defendants excepted.

Jones & Jones for plaintiffs, appellees.

W. G. Mordecai and Varser, McIntyre & Henry for Carolina Debenture Corporation, appellant.

SEAWELL, J. The burden was upon the intervener to establish, by the greater weight of the evidence, its ownership of the funds levied upon by the plaintiffs. The plaintiffs say that the intervener has not carried this burden, contending that there is no evidence in the record of any delivery to the intervener of the Maie Dennis note, upon the proceeds of which levy was made.

The note was payable to bearer, therefore want of actual endorsement would not defeat the title of the holder. In some doubtful cases, delivery is largely a matter of intent, and the manner of the delivery is unimportant; even "retention of possession by the maker is not fatal to the valid delivery where there has been an intent to deliver and the maker holds the instrument as agent of the payee." 10 C. J., 520. And the want of actual physical delivery of the note by the person originally holding the same would not be fatal to the title if such person became the agent of the real owner for collection. 10 C. J., 520.

The evidence respecting delivery of the note, actual or constructive, need not be material to the consideration of the case, since it may be decided on an issue less involved. The evidence discloses that the Carolina Mortgage Company, at the time an insolvent concern, transferred all of its assets concurrently to the Carolina Bond Corporation, the Carolina Debenture Corporation—the intervener in this case—and the Carcen Company. The fact that the property so transferred consisted largely of equitable interests in mortgages and notes, which may have been of doubtful value, makes no difference to a discussion of the principles involved. One other transfer took place during the succession of transactions reviewed in this case—the transfer of $1,000.00, represented by the total stock of the Debenture Corporation, to the Maryland Casualty Company. The time relation between the latter transfer and other pertinent incidents in the case does not exactly appear, but this is not important to the result.

The principle that a corporation may not transfer all of its assets to other than a *bona fide* purchaser for value, without provision for the payment of its creditors, is very generally accepted. 13 Am. Jur., p. 1121, sections 1233, 1234; 7 R. C. L., p. 573, section 561; 14A C. J., p. 884, section 3064; *Darcy v. Brooklyn Ferry Co.*, 196 N. Y., 99, 89 N. E., 461; *McIver v. Hardware Co.*, 144 N. C., 478, and cases cited on p. 484, 57 S. E., 169; *Sweeney v. Heap O'Brien Mining Co. and Grand Haven Mining Co.*, 186 S. W. (Mo.), 793; *Kentucky Beaver Colliers, et al., v. Mellon and Smith*, 254 S. W. (Ky.), 421. This rule is modified and conditioned so as to show some differences in its application in various jurisdictions, but the main principle is the same. It may be considered as a proper extension of the "trust fund" doctrine, as recognized in this State. *McIver v. Hardware Co., supra.*

We consider that the plaintiffs in this action were entitled to the protection afforded by this principle of law as other creditors, since they had begun their action before the transfer of the assets of the defendant Carolina Mortgage Company had been accomplished, although the actual judgment was not obtained until after that date. *Avery v. Safety Cab & Storage Co.*, 80 P. (2nd Series), 1099.

Where the corporation receiving the assets of another corporation under the circumstances indicated had knowledge of the existence of debts of the transferring corporation, or of circumstances, which as a matter of law, should put it on inquiry, the transaction will be deemed void as to the receiving corporation, and a creditor may follow the funds into its hands. "Of course, a corporation holds its property subject to the payment of the corporate debts, and when a corporation sells or transfers its entire property to a purchaser, knowing the fact, the latter is chargeable with knowledge that the property is subject to the corporate debts and that equity will, in proper cases, allow the corporate creditors to follow the property into the hands of the purchaser, for satisfaction of their claims." 7 R. C. L., p. 573, section 561, and cases cited.

Whatever may be the difference in the principle announced in the various jurisdictions dealing with this question, where the sale and purchase of the assets were for a valuable consideration, and whatever the status of the purchasing corporation under such circumstances, and whatever the procedure required in cases where it may become necessary to show actual fraud in the transaction, such distinctions do not apply to instances where there was a grossly inadequate consideration, or no consideration at all. In such cases, regardless of the intention of the parties, the transaction amounts to a legal fraud upon creditors. It strips the corporation of its assets, to which the creditor has a right to resort for the payment of his debt, and substitutes therefor, without his consent, the naked liability of officers and directors who have violated their trust, and who are often financially irresponsible.

In the case at bar, the transfer of assets was made to the intervener—the Carolina Debenture Corporation—a corporation entirely owned by the defendant Carolina Mortgage Company and having substantially the same responsible officers. This by no means diminishes the propriety of applying the rule. *Avery v. Safety Cab & Storage Co., supra.* And the inference of notice, even of intimate knowledge of the condition of the parent corporation and of its inability to make a fair and equitable transfer of its property to its infant creation, seems unavoidable.

In order to maintain its title to the funds in dispute, the burden was upon the intervener not only to show that the item had been assigned to it and, at least, constructively delivered, but, also, we think, under the

circumstances of this case, in order to support the transfer, there should be some evidence of a valuable consideration. We do not find such evidence in the record, but, indeed, such inferences as we may draw from the evidence lead to a contrary view. The devices employed, the creation of these new corporations by the Carolina Mortgage Company, including the Carolina Debenture Corporation, seem to have been prompted by a desire to save the bondholders of the Mortgage Company, and particularly the guarantor—the Maryland Casualty Company—from substantial loss, while unsecured debts and other liabilities of the Mortgage Company were ignored. The interposition of the Debenture Corporation between the Mortgage Company and its unsecured creditors seems to serve no substantial purpose except to render the assets of the Mortgage Company unavailable to pay its unsecured debts.

The plan apparently did not regard an exchange of values as necessary. The Debenture Corporation merely acquired the assets of the Mortgage Company and participated in their distribution according to a schedule prepared by a committee of the Maryland Casualty Company and the bondholders. The whole transaction seems little more than the attempted taking, through corporate devices, of the entire property of the Mortgage Company by a preferred class of creditors, and a partition thereof amongst them, with no return to the Mortgage Company except a way out. This is not morally or legally satisfying to a creditor whose claim is ignored, and is a method of liquidation which stands somewhat opposed to the principles of law and equity, and is, needless to say, unauthorized.

It is sufficient to say that, on the face of the record, we cannot find evidence of that *quid pro quo* which might serve as a consideration and give to the transfer of its assets by the Mortgage Company to the Debenture Corporation the necessary quality of good faith to support the transaction, or to require a different procedure on the part of the prejudiced creditor to attack it.

If the Corporation has disposed of its property fraudulently, either in fact or in law, so as to evade the just claims of the creditor, and the property has gone into the hands of other than a *bona fide* purchaser, we may ignore the devices by which the assets were wrongfully divested from the Mortgage Company and by which they were returned to it as being void upon the above announced principles, and regard the proceeds of the Maie Dennis note, now in the hands of the Mortgage Company, as being there by original right of ownership, or we may regard the holder as being charged with the trust in favor of the creditor; and when the assets have been subjected to levy by a judgment creditor and the holder intervenes, and both are, therefore, parties to the proceeding, the Court will administer the equities and execute the trust by enforcing the levy.

In this case, the inferences to be drawn from the evidence are in such agreement that the court below was justified in the instruction given to the jury.

We have examined the exceptions to rejection of evidence, as well as other exceptions in the record not here mentioned, and find

No error.

STATE v. OLIN M. DAVIS.

(Filed 1 February, 1939.)

1. Criminal Law § 47—

Consolidation for trial of warrants against several defendants charging each of them, as principals, with the unlawful possession and transportation of intoxicating liquor, growing out of the same illegal act, is proper.

2. *Intoxicating Liquor* § 2—

The Turlington Act, sec. 2, ch. 1, Public Laws of 1923, is the law in North Carolina except to the extent that it is modified or repealed by the Alcoholic Beverage Control Acts, chs. 493, 418, Public Laws of 1935, and ch. 49, Public Laws of 1937.

3. Same—Person may not possess or transport more than one gallon of intoxicating liquor unless it is being delivered to county store.

Certain of the provisions of the Alcoholic Beverage Control Acts, especially the provisions relating to transportation, are to be given State-wide effect, and the control acts modify the Turlington Act in this respect only to the extent of permitting transportation in a sealed container of a quantity not in excess of one gallon of tax-paid liquor for personal use from out the State or from an Alcoholic Beverage Control Store, or transportation of whiskey to Alcoholic Beverage Control Stores, and hence it is still unlawful in this State for any person to possess or transport intoxicating liquor for any purpose other than those specified in the act or in a quantity in excess of one gallon, unless such liquor is in actual course of delivery to a County Store.

4. Intoxicating Liquor § 9d—Proof of transportation of large quantities of intoxicating liquor raises prima facie case.

Proof that defendant was transporting 203 cases of intoxicating liquor in this State is sufficient to take the case to the jury, the specific act of transportation being unlawful and no proof of a particular intent being necessary, since a person is presumed to intend the natural consequences of his act, but this *prima facie* case, without contradicting evidence, does not justify a directed verdict for the State, but is merely sufficient to take the case to the jury and subject defendant to the risk of an adverse verdict in the absence of evidence in rebuttal.

5. Criminal Law § 2—

Where a statute makes a specific act unlawful, proof of the commission of the act raises a *prima facie* case, since no proof of a particular intent

is necessary, the general necessary intent being presumed by virtue of the rule that a person is presumed to intend the natural consequences of his act.

6. Criminal Law § 52c—

The establishment of a *prima facie* case by the State does not warrant a directed verdict of guilty, but merely takes the case to the jury and subjects defendant to the risk of an adverse verdict in the absence of evidence in rebuttal.

7. Criminal Law § 28a—

Prima facie or presumptive evidence does not affect the burden of proof on the issue, which remains on the State, but shifts the burden of going forward with the evidence to defendant, or subjects him to the risk of nonpersuasion upon his failure to do so.

8. Intoxicating Liquor § 9b—

On a charge of illegal transportation of a large quantity of intoxicating liquor, the State is not required to prove that the transportation was not within the exceptions allowed by law, nor that the liquor was not being transported in interstate commerce, the exceptions being matters of defense.

9. Criminal Law § 28a—

The State has the burden of proving the *corpus delicti*, but when defendant relies upon some independent, distinct, substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself, the onus of proof as to such matter is upon defendant.

10. Intoxicating Liquor § 9c—

Unsigned papers purporting to be bills of laden, without evidence of their genuineness, and which were issued to a transportation company with which neither defendant nor his codefendants were connected, are without probative force that the intoxicating liquor was being transported in interstate commerce.

11. Intoxicating Liquor § 9g: Criminal Law § 54b—Mere inconsistency will not invalidate a verdict.

Defendant was charged with unlawful possession of intoxicating liquor for the purpose of sale and with unlawfully transporting liquor for the purpose of sale. The jury's verdict was guilty of unlawful transportation of intoxicating liquors and not guilty as to possession. *Held:* Mere inconsistency will not invalidate the verdict, and further, on this record the inconsistency is explained by evidence tending to show that defendant was driving the truck transporting the liquor for his codefendant.

12. Intoxicating Liquor §§ 7, 9f—

Mere transportation of 203 cases of intoxicating liquor is *prima facie* unlawful even though not for the purpose of sale, and an instruction that defendant must have been transporting same for the purpose of sale in order to be guilty, is favorable to defendant.

APPEAL by defendant from *Phillips, J.*, at July Term, 1938, of GUILFORD. No error.

Criminal prosecution charging that the defendant did unlawfully possess intoxicating liquors for the purpose of sale and unlawfully transport liquors for the purpose of sale.

Officers of Guilford County, having information that liquor was being brought into said county on a designated truck, procured a search warrant and proceeded to attempt to locate the truck. They first sighted it in Randolph County. After watching the truck and following its movements until it got into Guilford County they stopped it and found the defendant driving the same, accompanied by one Shaffer. The truck bore a Kentucky license tag and a Maryland license tag was found on the inside of the truck, and the defendant later admitted that he had changed the tags. Upon search being made, the officers discovered 203 cases of liquor on the inside of the truck. The defendant first said that he had the key to the truck and then claimed that the key was in Baltimore. While the officers were following the truck it stopped and they saw men at the rear. They found fresh hand prints on the back of the truck around the lock. The spare wheel and some automobile tools were on the inside.

There was evidence that some of the whiskey was manufactured in Kentucky and that part of the liquor came from each of four wholesale liquor companies in Baltimore; that the automobile was owned by one Williard under a trade name. Various sheets of paper were found on person of defendant, on which were listed the names of certain people who live in High Point. There were also found certain other papers purporting to be bills of lading.

Separate warrants were issued against this defendant, his companion, Shaffer, and one Williard, alleged to be the owner of the liquor. The jury returned the following verdict: "That the defendant O. M. Davis is guilty of the unlawful transportation of intoxicating liquors and not guilty as to possession." From judgment pronounced thereon this defendant appealed.

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

Walter Woodson and Walser & Wright for defendant, appellant.

BARNHILL, J. The brief of the defendant is not in compliance with Rule 28 of this Court and its arrangement is such that it is with difficulty that we identify the exceptions and assignments of error to which reference is made. The brief does not bring forward exception No. 1, which was addressed to the action of the court in consolidating the three cases for trial. These three defendants were charged with participating in the same offense as principals. The State relied upon substantially

the same set of facts as against each. The consolidation was proper and simply tended to prevent a multiplicity of trials involving the same facts. *S. v. Combs,* 200 N. C., 671, 158 S. E., 252.

The defendant in his brief seeks to present primarily two questions for decision: (1) Does the transportation by a truck driver of 203 cases of liquor upon which the Federal tax has been paid constitute a *prima facie* case of unlawful transportation? And (2), is there a fatal variance between the charge and the verdict?

The warrant in the instant case does not specify the statute violated, but charges sufficiently a violation of the criminal laws of North Carolina. *S. v. Moschoures, ante,* 321; *S. v. Lockey, ante,* 525. Accordingly, it is well to examine the present law regulating the possession and transportation of intoxicating liquors in this State to determine whether defendant's acts were unlawful.

Under ch. 1, Public Laws 1923, section 2, known as the Turlington Act, it is unlawful to manufacture, sell, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquors, except in specified instances enumerated in the statute. This is still the law in North Carolina except to the extent that it may be modified or repealed by the Alcoholic Beverage Control Acts of 1935, ch. 493 and ch. 418, Public Laws 1935, and of 1937, ch. 49, Public Laws 1937. It is necessary then to examine the 1937 act to determine to what extent and under what conditions it is not unlawful to transport liquors in North Carolina.

By the express terms of the Alcoholic Beverage Control Statute, ch. 49, Public Laws 1937, it becomes fully effective only in those counties where an election has been held and a majority of the voters voting in the election have expressed themselves in favor of the operation of liquor stores, and in those counties in which liquor stores are operated under the provisions of chapters 418 and 493, Public Laws 1935. In certain respects, however, the act is State-wide in its operation and effect. In the introductory section, the act states that its purpose is to "establish a system of control of the sale of alcoholic beverages in North Carolina, and to provide the administrative features of the same in such a manner as to insure, as far as possible, the proper administration of the sale of certain alcoholic beverages under a uniform system throughout the State."

In section 10 thereof County Liquor Boards are vested with the authority to control the importation, sale, and distribution of liquors within their respective counties and to import, transport, receive, and sell liquors therein. Section 13 makes it unlawful for any person to possess any liquor upon which the taxes imposed by the United States or the State have not been paid. This section provides for the forfeiture

of the liquor and any vehicle used in the transportation thereof. Possession without the tax stamp is made *prima facie* evidence of unlawful possession. In section 14, it is provided that 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 the act to or through a county in North Carolina not coming under the provisions of the act, subject to certain provisions therein specified. Section 15 makes the possession for sale or sale of illicit or county store liquor unlawful except when sold as provided by the act by duly authorized liquor stores. Under the provisions of section 22, it is unlawful for any person to purchase in, or to bring into, this State any alcoholic beverages from any source except from a County Store operated under the act, except that a person may purchase legally outside this State and bring into the same for his own personal use not more than one gallon. It is provided in the act that the transportation from a County Store, or from without the State, of not more than one gallon shall not be unlawful provided it is not transported for the purpose of sale and the seal or cap of the container has not been broken or opened. It is likewise provided that liquor being transported in the actual course of delivery to a County Store is not unlawful. Section 25 expressly provides that the Turlington Act shall be in full force and effect in the counties in which County Liquor Control Stores are not established, and in section 27 all laws and clauses of laws in conflict with the act are repealed only to the extent such acts may conflict therewith.

The expressed purpose looking to uniformity and the several provisions of the act make it apparent that certain provisions of the 1937 act are to be given State-wide effect. This is particularly true as to the transportation provisions with which the Turlington Act, ch. 1, Public Laws 1923, conflicts only in respect to liquor being transported to Alcoholic Beverage Control Stores, and whiskey purchased from a County Store and being transported in a sealed container in an amount not to exceed one gallon for personal use, and as to the transportation of a like quantity brought into the State in sealed packages and upon which the taxes have been paid. Hence, it is still unlawful in this State for any person to possess or transport intoxicating liquors for any purpose other than those specified in the act or in a quantity in excess of one gallon, unless such liquor is in actual course of delivery to a County Store. Therefore, ch. 1, Public Laws 1923, in so far as it deals with the transportation within the State of intoxicating liquors is not inconsistent with the 1937 act except in the indicated particulars and it is still in force. *S. v. Epps,* 213 N. C., 709; *S. v. Lockey, supra; S. v. Langley,* 209 N. C., 178. As the 203 cases of whiskey found in the defendant's possession were being transported in North Carolina and

exceeded by far the one gallon limit permitted for personal use, evidence that the defendant was transporting the whiskey within the State was sufficient to take the case to the jury, as this act is the precise act expressly prohibited by the Turlington Act as well as by the Alcoholic Beverage Control Act. This does not imply that upon the undisputed proof of the act of transporting liquor in excess of one gallon within the State that the trial judge could direct a verdict of guilty. It means that this proof alone is sufficient to take the case to the jury and that thereupon the defendant may either offer evidence in rebuttal, or he may, relying upon the weakness of the State's evidence, accept the risk of nonpersuasion. As said by *Ashe, J.*, in *S. v. Phifer*, 90 N. C., 721: "There is a presumption of law that every man intends the natural consequences of his acts, but this presumption has no other or greater effect than to establish a *prima facie* case," or as more clearly stated by *Merrimon, J.*, in *S. v. Barbee*, 92 N. C., 820: "The law presumes that every man intends to produce the consequences that naturally result from his acts and conduct. This presumption, however, is not conclusive; it is evidence only so far as to prove a *prima facie* case in respect to the intent."

The *prima facie* character of the evidence in the instant case is not derived from any statute giving such effect to the evidence; it arises by virtue of the rule, as stated above, that where a specific act is made unlawful but no proof of a particular intent is required by the statute, in such case the general necessary intent may be presumed, to the end that mere proof of the commission of the prohibited act constitutes a *prima facie* case that the defendant is guilty of the offense charged. "When an act is forbidden by law to be done, the intent to do the act is the criminal intent and the law presumes the intent from the commission of the act; but when an act becomes criminal only by reason of the intent, unless the intent is proved the offense is not proved, and this intent must be found by the jury as a fact from the evidence." *S. v. McDonald*, 133 N. C., 680, and the cases there cited and discussed. However, it must be noted that the effect of the application of this rule does not shift the burden of proof from the State to the defendant; the burden of proof does not shift in liquor cases. *S. v. Redditt*, 189 N. C., 176. *Prima facie*, or presumptive evidence, does not affect the burden of proof of the issue; it relates only to what may be called the burden of going forward with evidence, or more accurately, the risk of nonpersuasion by failing to go forward with further evidence. *S. v. Helms*, 181 N. C., 566, citing with approval *S. v. Barrett*, 138 N. C., 630; *S. v. Wilkerson*, 164 N. C., 437. It follows, therefore, that the court's charge as to the *prima facie* effect of the evidence cannot be held for error.

It was argued that the State failed to negative either by allegation or proof the possibility that defendant's transportation herein came within one of the exceptions in the law, which exceptions have already been noted. It was further argued that it was the duty of the State to negative at least by proof the possibility that the truck load of whiskey was in process of movement in interstate commerce and, therefore, protected by Federal law. It is insisted, therefore, that the charge of the court to the effect that the contention that the liquor was being transported in interstate commerce was a matter of defense is erroneous. It is a sufficient answer to these contentions to point out that it has long been settled in this State that although the burden of establishing the *corpus delicti* is upon the State, when defendant relies upon some independent, distinct, substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself, the *onus* of proof as to such matter is upon the defendant. *S. v. Arnold,* 35 N. C., 184; *S. v. McNair,* 93 N. C., 628; *S. v. Buchanan,* 130 N. C., 660; *S. v. Smith,* 157 N. C., 578. In discussing this phase of the law in *S. v. Connor,* 142 N. C., 700, *Hoke, J.,* says: "It is well established that when a statute creates a substantive criminal offense, the description of the same being complete and definite, and by a subsequent clause, either in the same or some other section, or by another statute, a certain case or class of cases is withdrawn or excepted from its provisions, these excepted cases need not be negatived in the indictment, nor is proof required to be made in the first instance on the part of the prosecution. . . . In such circumstances, a defendant charged with the crime who seeks protection by reason of the exception, has the burden of proving that he comes within the same. *S. v. Heaton,* 81 N. C., 543; *S. v. Goulden,* 134 N. C., 743." To the same effect are *S. v. Norman,* 13 N. C., 222; *S. v. Burton,* 138 N. C., 576; and *S. v. Johnson,* 188 N. C., 591; *S. v. Dowell,* 195 N. C., 523; *S. v. Hege,* 194 N. C., 526; *S. v. Foster,* 185 N. C., 674.

In this connection it may be well to note that the paper writing offered in evidence by the defendants purporting to be bills of lading have no probative force. The papers are unsigned and there was no evidence of their genuineness. Furthermore, the evidence discloses that they purported to be issued to a transportation company with which neither this defendant nor his codefendants had any connection. The only evidence that the liquor was being transported in interstate commerce was the evidence that the defendant said that he was transporting it from Baltimore to Kentucky. This was a self-serving declaration, which, no doubt, would have been excluded had the solicitor objected thereto.

The challenge of the verdict on the ground that it is inconsistent cannot be sustained. The apparent inconsistency may well be explained by

an examination of the record as a whole. The court charged the jury on the count as to possession, only as to possession for the purpose of sale, and the evidence indicates that this defendant was transporting for another. Seemingly, the jury was unwilling to convict the defendant of possession for the purpose of sale under these circumstances. In any event, a jury is not required to be consistent and mere inconsistency will not invalidate the verdict. *S. v. Sigmon,* 190 N. C., 684, in which it was said: "The offenses are designated in the statute separately and while the jury would have been fully justified in finding the defendant guilty on both counts under the evidence in this case, their failure to do so does not as a matter of law vitiate the verdict on the count of transporting. It goes without saying that the jury would have to find from the circumstantial evidence that defendant had in his possession liquors that he was transporting before they could convict him." See also, *S. v. Potter,* 185 N. C., 742; *S. v. Snipes,* 185 N. C., 743; *S. v. Davis,* 203 N. C., 47, as to cases involving the reconciliation of verdicts with the indictments.

The charge of the court on the count of transporting was favorable to the defendant in that it required the jury to find, before convicting, that transportation was for the purpose of sale, whereas the transportation of the quantity indicated was unlawful even though not for sale. *S. v. Sigmon, supra; S. v. Winston,* 194 N. C., 243. Nor does the defendant have just cause to complain because the jury charitably returned a verdict of not guilty upon the possession charge in the face of overwhelming evidence.

A careful consideration of the assignments of error leads us to the conclusion that in the trial below there was

No error.

SOUTHGATE JONES v. THE BANK OF CHAPEL HILL.

(Filed 1 February, 1939.)

1. Principal and Agent § 7—

Where plaintiff establishes the authority of the agent to make the contract sued on, either as being within the agent's apparent authority or by ratification, evidence of the alleged contract is competent as against the principal.

2. Principal and Agent §§ 8, 12: Banks and Banking § 6—Evidence held to show cashier's authority to make compromise settlement or ratification of same by the bank.

Plaintiff's evidence tended to show that he was indebted to defendant bank in a large sum, that he had financial reverses and could not meet

his obligations, and that he compromised his indebtedness to the bank by executing a new note in a smaller sum, and securing said new note with additional collateral, and that the bank agreed to return his old notes after the expiration of the four months period under the Bankruptcy Act. The evidence further disclosed that all negotiations were had with defendant's cashier, who held that position for some twenty years and who was the only active officer of the bank, that the negotiations and correspondence covered a period of years, and that the bank sold some of the collateral pledged for the new note and applied the proceeds thereto, placed the old notes in its reserve account with any amount collected to be credited to its reserve or profits account, and did not demand payment of the old notes for a period of years after the consummation of the transaction. *Held:* The evidence was sufficient to show that the contract of settlement was within the apparent scope of the cashier's authority, since the bank held him out as its only active executive officer for a long period of time and all the bank's business was generally transacted through him, and further, that the bank ratified said contract by accepting the benefits in selling the collateral pledged for the new note.

3. Principal and Agent § 8—

The principal is bound by acts of his agent which are within the apparent scope of the agent's authority, since third persons dealing with the agent are not chargeable with secret limitations on the agent's authority.

4. Principal and Agent § 12—

A principal may not ratify the beneficial parts of a contract made by his agent and repudiate the burdens, but by accepting the benefits he ratifies the entire contract and is estopped to deny his agent's authority.

5. Compromise and Settlement § 3—

Evidence that defendant bank agreed to accept a smaller note with additional collateral from an insolvent borrower in payment of old notes in a larger sum, without evidence to the contrary, *held* to support court's instruction that if jury believed the evidence to answer the issue of compromise and settlement in the affirmative.

APPEAL by defendant from *Bone, J.*, at April-May Civil Term, 1938, of DURHAM. No error.

The plaintiff on 12 January, 1933, was indebted to defendant in the sum of $16,700, evidenced by four promissory notes. The plaintiff had financial reverses and became involved to such an extent that he could not meet his obligations. He made a compromise settlement of his indebtedness with defendant for $6,800 and $3,800, new money. A note for $10,600, secured by deed of trust on certain real estate, was made to secure defendant, also other collateral was deposited with defendant. Plaintiff had paid said indebtedness down to $2,850.

The plaintiff alleges: "That the first intimation or suggestion that the plaintiff had that it was the purpose of the defendant bank to repudiate this agreement and settlement with the plaintiff entered into in

January, 1935, was on April 7, 1937, when the defendant bank wrote plaintiff to this effect, which letter was followed by another letter from the cashier of the bank dated April 14, 1937, stating that one of the old notes was long past due and the bank was expecting the plaintiff to pay the same, and this letter was written notwithstanding the many assurances on the part of the bank that the old notes would be cancelled and returned to the plaintiff as soon as it received said certificate from the bank's attorney; that no interest has been paid on any of said old notes since 1933, and since the compromise settlement of these notes in January, 1935, there has been no intimation or suggestion on the part of the defendant bank that any interest should be paid on said notes, and all of said old notes aggregating $16,700 were fully paid by the compromise settlement hereinbefore set forth. Wherefore, plaintiff prays the Court: (1) That upon payment to the defendant by the plaintiff of the sum of $2,850.00 that the defendant be required and directed to cancel and deliver to the plaintiff the said note of $2,850.00 which was due on May 1, 1937, together with all of the collateral security deposited therewith and more particularly described in the complaint. (2) That the defendant be required and directed to cancel and deliver to the plaintiff four notes aggregating $16,700.00 as well as the E. H. Meadows assignment."

The sole material issue submitted to the jury, which was answered, "Yes," is as follows: "Did the plaintiff enter into a compromise settlement of the four notes of the plaintiff held by the Bank, aggregating $16,700.00, in January, 1935, as alleged in the complaint?"

The court below charged the jury as follows: "The plaintiff has offered evidence tending to show that such a settlement was made. There is no evidence to the contrary. I therefore instruct you that if you believe all the evidence and find the facts to be as they tend to show, that you should answer the first issue, 'Yes.' Take the case, gentlemen."

To the above charge the defendant excepted and assigned error. 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.

S. C. Brawley and J. S. Patterson for plaintiff.
Fuller, Reade, Umstead & Fuller for defendant.

CLARKSON, J. The defendant at the close of plaintiff's evidence and at the conclusion of all the evidence, made motions in the court below for judgment as in case of nonsuit. C. S., 567. The motions were overruled and in this we can see no error.

The defendant excepted and assigned error, which cannot be sustained, to all the evidence relating to the alleged contract of settlement between the plaintiff and its cashier, M. E. Hogan, in reference to the compromise of the four notes totaling $16,700.00. M. E. Hogan was dead at the time of the trial. Hogan was cashier of the bank for twenty years and was the only active officer of its bank. The defendant had no other active officer of its bank. Plaintiff's dealing for years was solely and alone with Hogan. Many letters through a period of years were exchanged between plaintiff and Hogan, and many payments on the notes and renewals were made with Hogan. Defendant had certain collateral and sold same. It now has collateral of plaintiff—same was given to and deposited with the defendant Bank under the contract and agreement between the plaintiff and defendant Bank's cashier, which contract the defendant now seeks to repudiate. The attorney for the Bank testified that he remembered the time Mr. Hogan and plaintiff had him prepare the note for $10,600, secured by deed of trust, and Mr. Hogan had him to investigate the record and gave an opinion as to the title.

From the long course of dealings between plaintiff and defendant, the defendant knowing all of the facts relative to the contract and settlement by its conduct, has ratified same. Under the facts and circumstances of the case, we think the cashier of the defendant Bank had the authority to make the contract here involved because the Bank had held him out as its only active executive officer for a long period of time, and all the business plaintiff had with the Bank was generally transacted with said cashier. If the cashier did not have such authority, the Bank by its long silence and acquiescence, and by its receiving and using the benefits accruing to it has ratified said contract, and every part thereof, both good and bad, and it cannot now be heard to contend otherwise.

In Tiffany on Agency, ch. VIII, p. 180, it is held: "The principal is liable upon a contract duly made by his agent with a third person (1) When the agent acts within the scope of his actual authority; (2) When the contract, although unauthorized, has been ratified; (3) When the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his actual authority. 'Apparent authority,' as the term is used in the foregoing section, includes authority to do whatever is usual and necessary to carry into effect the principal power conferred upon the agent and to transact the business which he is employed to transact; and the principal cannot restrict his liability for acts of his agent within the scope of his apparent authority by limitations thereon of which the person dealing with the agent has no notice. (At p. 181) . . . The principal may be

estopped to deny that a person is his agent or that his agent has acted within the scope of his authority."

In 2 Amer. Jurisprudence, sec. 208, we find: "All acts of an agent in the discharge of his duties and within the scope of his authority, whether that authority is express, implied, or apparent, are obligatory upon the principal; no ratification or assent on the latter's part is necessary to give them validity. The binding effect of an agent's acts does not, however, necessarily depend upon the existence of authority in the agent at the time the act was done. It is fundamental that acts performed by an agent beyond the scope of his authority, and even acts performed by one who in point of fact is not an agent, but who assumes to act as an agent, may, if they could lawfully have been delegated, be ratified by the principal or by one in whose behalf they are assumed to be done. As applied to the law of agency, ratification is the affirmance by a person of a prior act which did not bind him, but which was done or professed to be done on his account, whereby the act is given effect as to some or all persons, as if originally authorized."

Hoke, J., in *Powell v. Lumber Co.*, 168 N. C., 632, at p. 635, speaking to the question, says: "A general agent is one who is authorized to act for his principal in all matters concerning a particular business or employment of a particular nature. Tiffany on Agency, p. 191. And it is the recognized rule that such an agent may usually bind his principal as to all acts within the scope of his agency, including not only the authority actually conferred, but such as is usually 'confided to an agent employed to transact the business which is given him to do,' and it is held that, as to third persons, this real and apparent authority is one and the same, and may not be restricted by special or private instructions of the principal unless the limitations sought to be placed upon it are known to such persons or the act or power in question is of such an unusual character as to put a man of reasonable business prudence upon inquiry as to the existence of the particular authority claimed (citing authorities). The power of an agent, then, to bind his principal may include not only the authority actually conferred, but the authority implied as usual and necessary to the proper performance of the work entrusted to him, and it may be further extended by reason of acts indicating authority which the principal has approved or knowingly or, at times, even negligently permitted the agent to do in the course of his employment," citing authorities. *Bobbitt Co. v. Land Co.*, 191 N. C., 323 (328); *Maxwell v. Distributing Co.*, 204 N. C., 309 (317-18); *Dixson v. Realty Co.*, 204 N. C., 521; *R. R. v. Lassiter & Co.*, 207 N. C., 408; *Belks Dept. Store v. Ins. Co.*, 208 N. C., 267 (271); *Grubb v. Motor Co.*, 209 N. C., 88.

The authorities cited in defendant's brief are distinguishable from the case at bar. The case of *Bank v. Lennon,* 170 N. C., 10, cited by defendant, quotes from the note to *Bank v. Forsyth,* 28 L. R. A., (N. S.), 501. The same note just below the part quoted in *Bank v. Forsyth,* is as follows: "Of course, if the bank ratifies the action of its officers, or fails to repudiate it within a reasonable time, then the bank will be liable, the same as any principal who ratifies or acquiesces in the acts of his agent." *Bank v. Grove,* 202 N. C., 143 (147).

The case of *Bank v. Forsyth, supra,* cites and quotes from the opinion of *Martin v. Webb,* U. S., 28 Law Ed., 49. The facts in that case are similar to the present. At p. 52, it is said: "It is willing to accept all the benefits resulting from the acts of its cashier, but endeavors to escape the burdens attached to it by the agreement of the parties. . . . To permit the Bank, under these circumstances, to dispute the binding force of the arrangement made by its cashier in reference to Kenney's indebtedness, including the cancellation of the old note and trust deeds and the acceptance of the new ones, would be a mockery of justice. . . . His authority may be by parol and collected from circumstances. It may be inferred from the general manner in which for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the Bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. Directors cannot, in justice to those who deal with the Bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than from time to time, to elect the officers of the Bank and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

It is universally held by all courts everywhere that where an agent exceeds his authority in making a contract, the principal cannot ratify and accept that part which is good and repudiate that part which is

bad, or "take the rose without the thorn." *Manly v. Beam*, 190 N. C., 659; *Trust Co. v. Lewis*, 200 N. C., 286 (287); *Bank v. Oil Co.*, 205 N. C., 778, are inapplicable to the facts in the present case.

Years passed by without any demand on plaintiff to pay these notes. They were not delivered originally to plaintiff after compromise was made, as defendant wanted to wait until the four months under the Bankruptcy Act expired (chapter 3, U. S. C. A., sec. 21). Thereafter repeated demands were made by plaintiff until the institution of this action. We see no error in the charge. In the minutes of the meeting, 2 April, 1935, is the following: "Upon motion by Hogan and seconded by Lloyd, the following loans were ordered to be charged to reserve account, and anything later collected on same to be credited to reserve or profits account. Southgate Jones, $6400.00." This language could not be so construed as negativing plaintiff's testimony. At least, it would indicate that the $6,400 was "Gone with the wind," to some extent corroborating plaintiff.

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

No error.

NANNIE LOWERY AND HUSBAND, ARAH EULON LOWERY (ORIGINAL PARTIES PLAINTIFF), AND H. G. DUPREE, ADMINISTRATOR OF THE ESTATE OF W. R. MEDLIN (ADDITIONAL PARTY PLAINTIFF), v. CHARLIE THOMAS WILSON AND WIFE, VIOLA D. WILSON; MYRTLE WILSON BOWLING AND HUSBAND, L. G. BOWLING; LENZY LEE WILSON AND WIFE, DENA W. WILSON; FRANCES LUCILLE WILSON, ANNIE BELLE WILSON HATTON AND HUSBAND, LEWIS HATTON; KATHERINE WILSON BLEDSOE AND HUSBAND, LEON BLEDSOE; LONNIE THOMAS WILSON, ERNEST LEE WILSON AND MARGIE WILSON, THE LAST THREE BEING MINORS UNDER 21 YEARS OF AGE; AND NELLIE I. WILSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF LONNIE THOMAS WILSON, DECEASED (ORIGINAL PARTIES DEFENDANT), AND PAUL C. WEST, GUARDIAN AD LITEM OF INFANT DEFENDANTS, LONNIE THOMAS WILSON, ERNEST LEE WILSON AND MARGIE WILSON (ADDITIONAL PARTY DEFENDANT), AND GARLAND C. NORRIS COMPANY, J. R. WIGGINS, ASSIGNEE OF THE CORPORATION COMMISSION OF THE STATE OF NORTH CAROLINA; SWIFT & COMPANY AND AMERICAN AGRICULTURAL CHEMICAL COMPANY (ADDITIONAL PARTIES DEFENDANT).

(Filed 1 February, 1939.)

1. Payment § 8: Mortgages § 12—Holder of note partially secured by mortgage may apply payment to unsecured portion as against mortgagor's creditors.

Plaintiffs were the holders of a note for $1,500, which was intended to be secured by mortgage in like sum, but, through mistake, the mortgage was executed to secure the sum of $15, and so recorded. Thereafter,

creditors of the mortgagor obtained judgments which were duly docketed. The mortgagor made payment on the note in a sum greatly in excess of $15. *Held:* The mortgage lien in the sum of $15 is prior to the lien of the later docketed judgments, and the holders of the note are entitled to apply payments on the note to the portion thereof not secured by the mortgage as against the judgment creditors.

2. Mortgages § 12: Deeds § 10b—Unregistered mortgage does not affect rights of purchasers or creditors for value from mortgagor.

No conveyance of land, by mortgage or deed, is effective to pass title from the mortgagor or grantor, as against creditors or purchasers for value, but from the registration thereof. Michie's N. C. Code, 3309, 3311, and creditors are entitled to the same protection under the statutes and stand in the same position as purchasers for value.

3. Same—

The registration act does not apply to parol trusts.

4. Same: Reformation of Instruments § 13—Mortgage may not be reformed as against purchasers and creditors for value of mortgagor.

A note for $1,500 was intended by the parties to be secured by mortgage in like sum, but through mistake the mortgage was executed to secure $15, and so recorded. Later, creditors of the mortgagor obtained judgments against him which were duly recorded. *Held:* Creditors and purchasers for value are entitled to rely on the record of the instrument as written and recorded, Michie's N. C. Code, 3309, 3311, and as to them the mortgagee is not entitled to reformation.

5. Limitation of Actions § 4—Whether cause of action for reformation of instrument for mistake was barred, as between the parties, held for jury.

Whether, as between the original parties or their privies, a cause of action for reformation of a mortgage for mistake in specifying the amount secured as $15 instead of $1,500, as intended, was instituted within three years from discovery of the facts, or the time they should have been discovered in the exercise of due diligence, *held* for jury in this case. Michie's N. C. Code, 441 (9).

APPEAL by plaintiffs from *Olive, Special Judge,* at Second May Civil Term, 1938, of WAKE. Reversed.

On 28 February, 1921, L. T. Wilson and wife, Nellie I. Wilson, executed and delivered to W. R. Medlin a note in the sum of $1500.00. At the same time they executed and delivered a mortgage deed to secure "Fifteen Dollars." On the outside of the printed form the figures are typed as "$1500.00." The note recited "secured by mortgage deed of even date herewith on Wake County land." The mortgage was intended to secure $1500.00, but, by mistake, it only secured $15.00.

The mortgage was recorded in the office of the register of deeds of Wake County in Book 366, page 107, and the record shows the consideration to be fifteen dollars instead of fifteen hundred dollars, the outside of the paper, of course, not being recorded.

On 2 July, 1926, W. R. Medlin transferred, sold and conveyed to Mrs. Nannie Lowery, the plaintiff herein, "all my right, title, interest and estate in the within note and mortgage, without recourse on me." W. R. Medlin and L. T. Wilson are deceased. Nannie Lowery is the daughter of W. R. Medlin. Nannie Lowery purchased the note and mortgage deed from her father for $1500.00. She kept the note and mortgage in a dresser drawer at her home. L. T. Wilson made various payments of interest and at one time a payment of $100.00 on the principal was made. The last payment was made on 29 February, 1936. The record does not disclose that the $15.00 was ever paid. After plaintiffs discovered the error and mistake in the mortgage deed, the plaintiffs instituted suit to foreclose the mortgage and asked that the mortgage be reformed to read "Fifteen Hundred Dollars" instead of "Fifteen Dollars." The judgment creditors of L. T. Wilson were made parties defendant, together with the administratrix and heirs of L. T. Wilson. Nellie I. Wilson, widow and administratrix of L. T. Wilson and the heirs of L. T. Wilson, filed no answer.

The prayer of plaintiffs is as follows: "(1) That the mortgage deed recorded in Book 366, at page 107, be reformed and corrected so as to give the amount secured by said mortgage deed as $1500.00 instead of $15.00; (2) That the plaintiffs have judgment against the defendant Nellie I. Wilson as an individual and as administratrix of the estate of Lonnie Thomas Wilson, deceased, in the sum of $1,395.50, with interest from March 1, 1936, until paid; (3) That the indebtedness be declared a first lien on the lands described in the said mortgage deed and that said lands be ordered sold and the proceeds applied to said indebtedness, and that a commissioner be appointed to make said sale; (4) That any of the parties to this action be permitted to bid at said sale; (5) For their costs, and for such other and further relief as they may be entitled to."

The judgment creditors filed answers setting up the defense: "After the execution and registration of the said mortgage deed the defendants, Garland C. Norris Company and The American Agricultural Chemical Company extended credit to the said L. T. Wilson, the said Garland C. Norris Company to the amount of $476.46, and The American Agricultural Chemical Company to the amount of $4,282.26. L. T. Wilson failed to meet the obligations so created, and on January 26, 1928, Garland C. Norris Company docketed a judgment in the Wake Superior Court against L. T. Wilson for the sum of $476.46, with interest on $400.00 from November 18, 1925, and interest on $76.46 from December 2, 1926; and on the 10th day of October, 1932, The American Agricultural Chemical Company docketed two judgments in the Superior Court of Wake County against L. T. Wilson, one in the sum of $3,-

032.26, with interest from July 15, 1931, and one for $1,250.00 with interest from July 15, 1931. This action was instituted on June 6, 1936, by the plaintiffs, who, after making the said judgment creditors parties, seek to reform and correct the mortgage deed upon the registration books 'so as to give the amount secured in said mortgage deed as $1500.00 instead of $15.00,' and to have said sum of $1500.00 to be declared a first lien upon the lands described in said mortgage deed superior to the judgment liens of the Garland C. Norris Company and The American Agricultural Chemical Company. The said defendants filed answers in which they deny that the plaintiff is entitled to reform and correct the record of the said mortgage deed so as to now impair or affect their right under their judgments, and further plead that the said plaintiff is barred by the statute of limitations upon the ground that the mistake complained of by the plaintiff should by the exercise of reasonable care and prudence have been discovered more than three years prior to the institution of the action on June 6, 1936."

At the close of plaintiffs' evidence, the defendants Garland C. Norris Company and The American Agricultural Chemical Company made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled the motions and defendants excepted. The motions were renewed by defendants at the conclusion of all the evidence and the court below granted the motions. Plaintiffs excepted, assigned error, and appealed to the Supreme Court.

Little & Wilson for plaintiffs.

William Y. Bickett and Yarborough & Yarborough for Garland C. Norris Company and The American Agricultural Chemical Co., defendants.

CLARKSON, J. We think the judgment of nonsuit should be reversed.

The first question for consideration: A mortgagor makes and executes a mortgage on certain land, which was intended to secure a note of $1500.00, but it only secured $15.00, and the mortgage was duly recorded. Thereafter Garland C. Norris Company and The American Agricultural Chemical Company obtained judgments against the mortgagor. How are the liens adjusted? Answer: The judgment creditors have a lien on the land subject to the $15.00 and interest. The owner of the $1500.00 note has the right to credit the payments made by the makers of the note and mortgage on the amount not secured by the mortgage as against the judgment creditors herein.

In *Baker v. Sharpe,* 205 N. C., 196 (197-8), it is said: "The principle of law is thus stated in *Stone v. Rich,* 160 N. C., 161 (163-4): 'There is no rule in the law better settled than the one in regard to the applica-

tion of payments: (1) A debtor owing two or more debts to the same creditor and making a payment, may, at the time, direct its application to any one of the debts. The right is lost if the particular application is not directed at the time of the payment. (2) If the debtor fails to make the application at the time of the payment, the right to apply it belongs to the creditor. (3) If neither debtor nor creditor makes it, the law will apply it to the unsecured debt or the one for which the creditor's security is most precarious, or, as sometimes expressed, according to its own view of the intrinsic justice and equity of the case,' citing numerous authorities. *Supply Co. v. Plumbing Co.*, 195 N. C., 629."

N. C. Code, 1935 (Michie), sec. 3311, in part, is as follows: "No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies." As regards deeds, etc., see sec. 3309, *supra*.

In *Whitehurst v. Garrett*, 196 N. C., 154 (157), we find: "It is said in *Door Co. v. Joyner*, 182 N. C., at p. 521: 'In the construction of our registration laws this Court has very insistently held that no notice, however full and formal, will supply the place of registration. *Dye v. Morrison*, 181 N. C., 309; *Fertilizer Co. v. Lane*, 173 N. C., 184; *Quinnerly v. Quinnerly*, 114 N. C., 145. . . . In this jurisdiction, under C. S., 3311, the registration of deeds of trust and mortgages on real and personal property have been held of prime importance. *Boyd v. Typewriter Co., supra* (190 N. C., at p. 799). It gives stability to business. When properly probated and registered, they are constructive notice to all the world. Creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, obtain no title as against a properly probated and registered conveyance, sufficiently describing the property." *Mills v. Kemp*, 196 N. C., 309; *Ellington v. Supply Co.*, 196 N. C., 784 (789).

No distinction is made in the statute or in the opinions of the court, construing and applying the statute, between creditors and purchasers for value. No conveyance of land is valid to pass any property from the donor or grantor, as against either creditors or purchasers for value, but from the registration thereof. As to a purchaser for value, who has recorded his deed, it has been held that a prior deed from the same grantor, unregistered, does not exist, as a conveyance or as color of title. The same is true as against the creditors. *Eaton v. Doub*, 190 N. C., 14 (19).

The registration act does not apply to parol trusts. *Roberts v. Massey*, 185 N. C., 164; *Spence v. Pottery Co.*, 185 N. C., 218.

In *Crossett v. McQueen,* 205 N. C., 48 (51), speaking to the subject, it is said: "The judgment overruling the demurrers of the appellants is affirmed on the authority of *Spence v. Pottery Co.,* 185 N. C., 218, 117 S. E., 32. The instant case cannot be distinguished from that case, except that in the instant case the declaration of trust is evidenced by writing, while in that case, the trust vested in parol. The declaration of trust is not a conveyance, or contract to convey, or lease of land, requiring registration as against creditors, by virtue of the provisions of C. S., 3309. The fact that it was not registered prior to the docketing of the judgment is immaterial."

The second question for decision: Can the mortgage be reformed and the record of the mortgage corrected so as to impair or affect the rights of the creditors, Garland C. Norris Company and the American Chemical Company, under their judgments? We think not. Our statutes, *supra,* have been construed strictly to aid and encourage registration. Creditors and purchasers for a valuable consideration can rely on the record of the instrument as written and recorded.

In *Wixon v. Wixon,* 75 Colo. Rep., p. 392 (232 Pac. Rep., 665), it is held: A recorded mortgage on real estate which contains an erroneous description of the land conveyed, has the effect only of an unrecorded mortgage, as to third persons. A mortgage containing an erroneous description may be reformed as to the mortgagor and mortgagee. A judgment lien on real estate is superior to that of a mortgage which does not properly describe the land affected. A purchase money mortgage containing a defective description of the land conveyed has no effect as to third persons so far as the property involved is concerned, until corrected, and is then effective only as of the time of correction. The lien of a judgment creditor stands upon the same footing as that of a purchaser in good faith, as against a mortgage containing an incorrect description. . . . A mortgage defectively describing the land included may be reformed as to the mortgagor, but not as to the holder of a judgment lien accruing against mortgagor subsequent to date of mortgage. The lien of a judgment, transcript of which is duly filed, is superior to the claim of a mortgagee, whose mortgage erroneously fails to describe the mortgaged land. Correction of a mortgage to make it correctly describe the land intended to be mortgaged cannot effect priority of a judgment lien acquired subsequent to execution of mortgage, but prior to the correction. The lien of a judgment creditor stands upon the precise footing as that of a purchaser in good faith, as against mortgage with incorrect description.

As between the parties we see no reason why the mortgage could not be reformed. The Statute of Limitations, C. S., 441, sub-sec. 9, is as follows: "For relief on the ground of fraud or mistake; the cause of

action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." The action is barred within three years from the discovery of the facts or from the time when they should have been discovered by the exercise of due care. We think the evidence in this case on this aspect makes it a question for the jury. Some of the defendants have filed no answer.

In the judgment of the court below is the following: "It is, therefore, further considered, adjudged and decreed that the liens of the judgments against L. T. Wilson set forth in the amended complaint herein are unaffected by the alleged cause of action of the plaintiffs for the reformation of the said mortgage deed and constitute liens upon the lands described in the amended complaint superior to any rights of the plaintiffs based upon said cause of action for the reformation of said mortgage deed."

We think the judgment above set forth is correct, as herein modified, viz.: the $15.00 secured by the mortgage and interest on same, which was properly recorded and notice to the creditors, will be and constitute a first lien and be paid before the creditors.

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

Reversed.

RUFUS L. PATTERSON, JOHN F. WILY AND J. LATHROP MOREHEAD, TRUSTEES U/W OF MRS. LUCY L. MOREHEAD, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, v. DURHAM HOSIERY MILLS, A. H. CARR, W. F. CARR, W. W. SLEDGE, T. L. BLAND, D. ST. PIERRE DUBOSE AND J. SPRUNT HILL, DIRECTORS.

(Filed 1 February, 1939.)

1. Injunctions §§ 11, 12—

Upon the hearing of an order to show cause why a temporary restraining order should not be continued to the hearing, the court has no jurisdiction to determine the cause on its merits, and the court's findings and conclusions are not *res adjudicata* as to the merits, even though at the final hearing the court hears the cause by consent.

2. Appeal and Error § 50—

Where an order continuing a temporary restraining order is affirmed on appeal by a divided Court, the decision is the law of the case only as to the continuance of the restraining order, the only matter presented for decision, and is not the law of the case as to whether the order should be made permanent on the final hearing on the merits.

3. Corporations § 16—Preferred stockholder has vested right to declaration of dividends out of appropriate funds when earned.

The holder of cumulative preferred stock upon which dividends are accrued for several years has a vested property right to the payment of the dividends by the corporation out of appropriate funds when earned, which the stockholder may enforce in equity, although such dividends are not a debt of the corporation until declared and although circumstances may postpone or prevent declaration of such dividends.

4. Same: Constitutional Law §§ 18, 21—Vested right to declaration of dividends on preferred stock may not be destroyed.

The right of a holder of cumulative preferred stock to have accrued dividends thereon declared by the corporation when earned is a vested property right which may not be divested without due process of law, and which may not be destroyed by legislative impairment of the contract out of which they arose, either directly or by authorizing the corporation to amend its charter.

5. Same—Charter provisions held not to waive cumulative preferred stockholder's right to declaration of accrued dividends.

The vested property right of a preferred stockholder to declaration of dividends when earned is subject to conditions arising out of the relation of the stockholder to other stockholders, to the corporation, and to its creditors, which might interfere with the fruition of the right to a declaration of dividends, but a charter provision requiring consent of three-fourths in interest of the preferred stockholders to the issuing of bonds or securities of prior or equal rank, is prospective in effect, and does not constitute a waiver of the right to the declaration of accrued, accumulated dividends, when earned, by permitting the interposing of new preferred stock by agreement of three-fourths of the preferred stockholders, nor does legislative authority to amend the charter extend to authority to defeat the vested right to the declaration of such dividends by amendment of the charter. C. S., 1131, 1156.

6. Injunctions § 2—Injunction will lie to restrain issuance of new stock defeating right to accrued cumulative dividends on preferred stock.

Defendant corporation proposed by charter amendment to alter its capital stock structure by purchase and exchange of new securities for its old cumulative preferred stock, and to issue common stock in satisfaction of accrued dividends on its old cumulative preferred stock. *Held:* Injunction will lie at the instance of a preferred stockholder to restrain such amendment which defeats the vested right to the declaration of accrued dividends on the old cumulative preferred stock by forcing the stockholder to accept therefor common stock or to stand by and have his stock displaced by new preferred stock, and plaintiff stockholder is not required to wait until dividends are about to be paid on the new preferred stock, since no immediate or certain right of action at law would be given by declaration of dividends on the new preferred stock, and since, if the amendment is merely unauthorized, it is *ultra vires* and subject to injunctive relief at the instance of a stockholder whose rights are endangered.

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

APPEAL by defendants from *Spears, J.*, at September, 1938, Term of DURHAM. Affirmed.

The plaintiffs, as trustees, are the holders and owners of 112 shares of six per cent cumulative preferred stock in the defendant corporation. This stock was issued under the provisions of the charter of the company containing the 1929 amendment, which is as follows:

"6. Without the consent of at least three-fourths in interest of the preferred stock issued and outstanding, under the provisions of this amendment to the charter of this corporation, given in person or by proxy at a meeting especially called for that purpose, this corporation shall not: (a) Increase the amount of such Preferred Stock, nor issue any stock having any priority or preference over, or equality with such Preferred Stock; (b) Create any mortgage or other lien upon any part of the property of this corporation. This provision shall not apply to nor shall it prevent the giving of purchase money mortgages, or other purchase money liens, on property that may hereafter be acquired by the corporation, or the acquisition of property subject to mortgages or liens thereon, nor to the pledging by this corporation as security for loans made to it in the regular and current conduct of its business, of notes, accounts receivable, or other liquid assets owned by this corporation."

These provisions of the certificate of incorporation were printed on the back of each certificate of the six per cent cumulative preferred stock and became a part thereof.

Prior to the proposed rearrangement of its capital structure in 1937, the defendant company had issued and outstanding three classes of stock, to wit: six per cent cumulative preferred stock; common Class A stock, and common Class B stock, all issued pursuant to its charter, as amended in 1929.

In 1937, the board of directors adopted a resolution recommending a plan for the rearrangement of the capital stock structure of the corporation to be embodied in an amendment to its certificate of incorporation. The proposed plan of rearrangement contained in the resolution of the board of directors provided that the company offer to purchase from the holders of the six per cent cumulative preferred stock of the company one-third of their stock at the price of $30.00 per share; that the company issue a new Class A six per cent cumulative preferred stock, and that this be distributed to the holders of the old six per cent cumulative preferred stock of the company, share for share, in exchange for their unsold stock; that the company also distribute to the holders of the old six per cent cumulative preferred stock two shares of its non-par value Class B stock for each share of the old preferred stock sold to the company in complete satisfaction of all dividends accrued and unpaid upon the old preferred stock.

At the meeting of the stockholders, called for the purpose 30 September, 1937, the resolution adopted by the board of directors was ratified by more than three-fourths in interest of the preferred stock issued and outstanding, as provided in the certificate of incorporation.

About 98% of the holders of the preferred stock entered into the proposed arrangement, but the plaintiffs and some others like situated declined to accede to the arrangement, on the ground that it violated their vested rights with reference to accrued and accumulated dividends on their preferred stock; and brought this action to enjoin the consummation of the plan and to have it declared null and void in so far as it might affect their aforesaid rights; asking that the declaration and payment of dividends on any class of stock prior to the payment of the said accrued and unpaid dividends be declared in violation of said property rights; that an order be entered directing the defendants to pay and otherwise discharge the unpaid dividends above mentioned before the declaration and/or payment of dividends of any other class of stock of defendant corporation; that the defendants be enjoined and restrained from declaring and paying dividends out of surplus or net profits of the corporation, or otherwise, to any class of stock existing at the time of the institution of the action or thereafter issued prior to the payment, discharge, and satisfaction of the accrued and unpaid dividends on the six per cent preferred stock of the plaintiffs and other nonassenting shareholders.

A restraining order was issued on 31 March, 1938, returnable on 15 April, 1938, which by consent was heard before Judge Spears on 16 April, 1938; whereupon, Judge Spears entered an order finding certain facts and continuing the restraining order theretofore issued until the final determination of the action. From this the defendants appealed, and at the Spring Term, 1938, of this Court, the Court being equally divided, judgment of the Superior Court stood affirmed without becoming a precedent and the questions of law sought to be presented were undecided.

The cause came on for a final hearing before Judge Marshall T. Spears, at the September Term, 1938, of Durham County court, and was heard by consent upon the motion of the plaintiffs to make the restraining order theretofore issued perpetual. The cause was heard by consent without the intervention of a jury, and Judge Spears, finding appropriate facts, entered judgment that "the restraining order heretofore issued in this cause be and it is hereby made permanent, and the defendants are permanently enjoined from declaring and/or paying dividends on any stock of the defendant corporation until the accrued

dividends on $38.50 per share of 112 shares of the six per cent preferred stock of the plaintiff trustees and on the shares of the intervening plaintiffs are paid."

From this the defendants appealed, assigning errors.

A. W. Kennon, Jr., and J. C. B. Ehringhaus for plaintiff trustees, appellees.

R. O. Everett for intervening appellees.

William W. Sledge and Fuller, Reade, Umstead & Fuller for defendants, appellants.

SEAWELL, J. 1. One phase of this case came before this Court for a hearing at the Spring Term, and is reported as *Patterson v. Hosiery Mills, ante,* 24. At that time there was a three-to-three division of the Court, and, under our practice, the judgment of the court below stood affirmed, without authority as precedent. The plaintiffs now contend that the judgment of the court below, upon the hearing of the order to show cause why the injunction should not be continued to the hearing, is the law of the case, *res adjudicata,* and determines the matter at the final hearing.

The hearing upon the order to show cause was simply upon the question whether the restraining order obtained by the plaintiffs should be continued to the hearing on the merits. That order was interlocutory, not final, and appeal to this Court was upon the ground that it disposed of a substantial right of the defendants with respect to the continuance of the injunction. C. S., 640.

The judge hearing the order to show cause why the injunction should not be continued to the hearing had no jurisdiction to hear and determine the controversy on the merits, and his findings of fact and conclusions of law were but instruments of decision in the matter before him. These findings and conclusions were not authoritative as "the law of the case" for any other purpose, and the judgment or order was not *res adjudicata* on the final hearing in the court below, and was not invested with that character by any action or nonaction by this Court on appeal. North Carolina Practice and Procedure, McIntosh, page 993, section 876.

2. As a convenient approach to the merits of the subject under consideration, we must first examine the nature and status of the right which the plaintiffs conceive to be invaded by the defendants in the proposed issue of new preferred stock. The plaintiffs contend that the accrued accumulated dividends on their stock constitute a vested property right, not adversely affected by any charter agreement heretofore made or entered into by them; and within the protection of the consti-

tutional provisions against the impairment of the obligation of a contract and the taking of property without due process of law.

Dividends on common stock are not segregated from the assets of the corporation, so as to become the property of the stockholder, or a debt recoverable by action at law, until declared. In the absence of statute or charter provision requiring distribution, they may be passed into the surplus, remain undivided profits, or be reinvested in the corporate enterprise, at the sound discretion of the directors. While the preferred stockholder is not a creditor of the corporation until the dividend is declared, his right to that dividend stands upon a somewhat different footing. While as a matter of law the right to receive dividends, even on preferred stock, is made to depend on the actual existence of earnings, he has, in appropriate cases, a remedy in equity to compel the payment of his dividends; and we think, meantime, the right to their equitable protection. Dividends are cumulative under plaintiffs' stock, and the right to receive them out of earnings does not abate because they were not promptly declared. The right of the plaintiffs to receive dividends at the expiration of stated periods during which they are earned, and the maturing of the dates upon which the premiums were due, created a definite obligation on the part of the corporation to pay such dividends, out of appropriate funds, of course, which must be considered a vested property right, although circumstances might intervene to postpone or prevent its enjoyment.

We think the plaintiffs have here a vested property right, of which they may not be divested without due process of law, and which may not be destroyed by legislative impairment of the contract out of which they arose.

3. Not suffering such a degradation of quality as would destroy their character as property, rights of this kind are subject to many conditions arising out of the relation of the stockholder to other stockholders, to the corporation itself, and to its creditors, which might interfere with the fruition of the contract; but an examination of the charter, with the cited statutes in mind, convinces us that the condition sought to be imposed by the proposed amendment to the charter was not in contemplation of the parties at the time the contractual relation was created by the purchase of plaintiffs' stock; and we find nothing in the articles of incorporation, as they stood at that time, to indicate that plaintiffs subjected themselves to an express or implied waiver, or consented in advance to an amendment which would practically destroy the right to the accumulated dividends.

Indeed, upon reading and analyzing the statutes relied on by defendants as authority for the corporate amendment—C. S., 1131 and 1156—and reading therewith the pertinent provisions of the charter, we find

nothing in either inconsistent with the view that they are intended to be prospective with respect to dividends to be earned upon the stock. Whether the law itself makes the amendment, or as now, confers the power of amendment to the corporation, it will not be construed to operate retrospectively to the detriment of rights already vested under the old charter. *Greer v. Asheville,* 114 N. C., 678, 19 S. E., 635; *Fenner v. Tucker,* 213 N. C., 419, 423, 196 S. E., 357. A contrary construction of the statute, giving authority to the retroactive provisions of the charter amendment under consideration, would do violence to the Constitution and would compel us to view the proposed action as the taking of property without due process of law.

We find the statement of the Court in *Keller v. Wilson and Company,* 190 Atl., 115 (1936), an appropriate expression on this subject, under a statute which is at least as liberal toward corporate reorganization as ours:

"Section 26 of the General Corporation Laws is the section authorizing amendments of corporate charters. It authorizes nothing more than it purports to authorize, the amendment of charters. The cancellation of cumulative dividends already accrued through passage of time is not an amendment of a charter. It is the destruction of a right in the nature of a debt, a matter not within the purview of the section. The cancellation of the right to such dividends is foreign to the design and purpose of the section."

If the proposed amendment to the charter were such as to offer reasonable protection to plaintiffs' vested right in a mere change of form which would not render it less secure, as, for example, the offer of income dividend notes as was done in *Ainsworth v. Southeastern Drug Corp.,* 95 Fed. (2d), 172, cited in defendants' brief, much of the legal objection might be removed. In fact, the position of the stockholder with reference to his accrued dividends would be actually improved, since dividends are not the debt of the corporation until declared; *Power Co. v. Mill Co.,* 154 N. C., 76, 69 S. E., 747; but we do not consider that the alternative offered plaintiffs is a free choice or that it preserves their right. They have the choice of accepting in exchange for their accumulated dividends shares of the not-so-attractive common stock, or of standing aloof and seeing their stock displaced by a new issue, upon which the corporation intends to pay dividends in contravention of the vested prior rights of the plaintiffs. Or, if the suggestion is that the plaintiffs must delay action and stand pat on their legal rights until the injury becomes more imminent and the objectionable dividends are about to be paid, rather than enjoin the issue of the stock, we may say that, even then, plaintiffs' action must rest in equity, since the directors do not intend to declare a dividend and thereby give the

plaintiffs the right of an action at law. The whole scheme, from its initiation to its consummation, must be considered together, and this action is not premature.

If the proposed amendment is merely unauthorized with respect to its retroactive effect on plaintiffs' accumulated dividends, the threatened action of the corporation is at least *ultra vires* and subject to injunctive relief in an action by the stockholders whose rights are endangered. Either premise leads to the conclusion that the action of the trial court should be sustained.

The judgment is

Affirmed.

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

MRS. MAGGIE HAMBY (MOTHER) v. COBB & HOMEWOOD, INC. (EMPLOYER) AND HARTFORD ACCIDENT & INDEMNITY COMPANY (CARRIER.)

(Filed 1 February, 1939.)

1. Master and Servant § 43—

When a deceased employee leaves no dependents, an award of compensation should be made to his next of kin, ch. 274, sec. 5, Public Laws of 1931, the employee's mother in this case, N. C. Code, 137 (6), and the evidence *is held* sufficient in this case to support the finding that the employee left no dependent or dependents.

2. Master and Servant § 55d—

The findings of fact of the Industrial Commission are conclusive on the courts when supported by any competent evidence.

APPEAL by defendants from *Spears, J.*, at 3 October, 1938, Civil Term of ORANGE. Affirmed.

This is an appeal by the defendants from the judgment of Spears, Judge, entered at the 3 October, 1938, Civil Term, of the Superior Court of Orange County, N. C. The judgment affirmed the award of the North Carolina Industrial Commission, which award affirmed the award of a hearing Commissioner, granting compensation to the plaintiff, mother of H. M. Hamby, for his death on 24 January, 1938, upon the ground that the said H. M. Hamby left no person or persons wholly or partially dependent upon him for support, and that his death was the result of an injury by accident arising out of and in the course of his employment. Defendants appealed to the Supreme Court.

Trivette & Holshouser, J. Allie Hayes, and T. R. Bryan for plaintiff.
George D. Taylor and R. M. Robinson for defendants.

PER CURIAM. We think the court below correct in its ruling. The General Assembly of 1931, ch. 274, sec. 5, amended the Compensation Act, as follows: "By striking out all of said section and by substituting therefor the following: "Section 40. If the deceased employee leaves no dependents the employer shall pay to the next of kin as herein defined the commuted amount provided for in section thirty-eight of this act for whole dependents etc. . . . For the purpose of this section the term 'next of kin' shall include only the father, mother, widow, child, brother or sister of the deceased." The father being dead, the mother was the next of kin. N. C. Code, 1935 (Michie), Article 16, "Distribution," sec. 137 (6).

We think the evidence clearly indicates that the deceased left no dependent or dependents and plaintiff, his mother, was the next of kin under the statute and entitled to the award.

It is so well settled in this jurisdiction, that we need not cite authorities, that if there is any sufficient competent evidence to support the findings of fact of the Industrial Commission they are conclusive on appeal. *Brooks v. Clement Co.*, 201 N. C., 768; *Scott v. Auman*, 209 N. C., 853.

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

Affirmed.

OWEN DOYLE v. MAGGIE WHITLEY.

(Filed 1 February, 1939.)

1. Agriculture § 7c—

In this action by a tenant to recover for breach of a half-share farming contract, defendant's demurrer *ore tenus* to the complaint and motion to nonsuit upon the evidence *held* properly overruled.

2. Same—

In an action by a tenant to recover for breach of a half-share farming contract, evidence of the value of crops raised by plaintiff on other land the following year is erroneously admitted on the question of damages.

APPEAL by defendant from *Harris, J.*, and a jury, at September Term, 1938, of FRANKLIN. New trial.

This is a civil action instituted in the Superior Court of Franklin County by summons issued 24 October, 1936, to recover damages as a result of an alleged breach of half-share farming contract by the defendant. The plaintiff alleges that on 13 December, 1935, the plaintiff and defendant entered into a half-share farming contract for the year 1936, under which contract plaintiff was to cultivate certain lands of the defendant in Johnston County as set forth in said complaint.

The complaint further alleges that the defendant breached said contract and that by reason of said breach the plaintiff was deprived of and wrongfully prevented from obtaining his just and lawful share of the crops grown and cultivated upon said land. That he had been humiliated and embarrassed, suffered great anxiety of body and mind, and been forced to undergo hardship and had suffered irreparable harm and damage in the sum of $1,500.00.

The defendant denied said contract and also denied that the plaintiff had suffered any damage, as alleged.

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

"1. Did the plaintiff and defendant enter into the contract, as alleged in the complaint? Ans.: 'Yes.'

"2. Did the defendant breach said contract? Ans.: 'Yes.'

"3. What damage, if any, is the plaintiff entitled to recover of the defendant? Ans.: '$175.00.'"

The court below rendered judgment on the verdict. Defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

W. L. Lumpkin, E. C. Bullock, and Hill Yarborough for plaintiff.

A. M. Noble and F. H. Brooks for defendant.

PER CURIAM. The demurrer *ore tenus* by defendant must be overruled. We think the complaint states facts sufficient to constitute a cause of action. N. C. Code, 1935 (Michie), sec. 511 (6).

The defendant introduced no evidence and at the close of plaintiff's evidence made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled this motion and in this we can see no error.

Plaintiff testified, in part: "I farmed with Mr. Q. S. Leonard in 1937. Q. How many acres of tobacco did you have in 1937? Ans.: 4.2 acres. Q. How much did it bring you? Ans.: $1,100.00 and some few dollars."

To the above questions and answers defendant excepted and assigned error. We think they must be sustained. Plaintiff was to work defendant's place in 1936. We think it was prejudicial to show what he made in 1937 on the other land, there being no evidence of similarity of conditions.

For the reasons given, there must be a

New trial.

J. F. RAYNOR v. C. H. SHEARIN.

(Filed 21 September, 1938.)

APPEAL by defendant from *Bone, J.*, at March Term, 1938, of NASH. Affirmed.

This is a civil action instituted by the plaintiff to recover damages for false arrest and malicious prosecution. Plaintiff resides in Nash County. His wife moved to Warren County and was living in a house belonging to the defendant. On or about 6 April, 1937, the plaintiff went to visit his wife, who is a sister of the defendant. L. L. Raynor, the son of the plaintiff, went to the defendant's home and told him that plaintiff was at Mrs. Raynor's house and that he wanted to get him away, that he was not misbehaving but that some of the children were afraid to go home. Thereupon, the defendant went to Warrenton, signed an affidavit and procured the issuance of a warrant thereon, charging the plaintiff with the crime of simple trespass. The defendant then went with the officer to make the arrest. Plaintiff was arrested and confined in jail about 9:00 p.m., and was brought to trial the next morning about 9:00 a.m. The magistrate, without a hearing, fixed bond and sent the case to the recorder's court as upon a preliminary hearing. The plaintiff on the same day gave bond and was discharged.

When the case came on for trial in the recorder's court of Warren County a *nol. pros.* with leave was entered. At the time of the issuance of the warrant the defendant knew that he had not forbidden the plaintiff to enter upon lands belonging to the defendant. There was evidence that the action of the defendant in procuring the arrest of the plaintiff was prompted by malice.

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

"1. Did the defendant cause the arrest and prosecution of the plaintiff? Answer: 'Yes.'

"2. If so, was same done without probable cause, as alleged in the complaint? Answer: 'Yes.'

"3. If so, was same done with malice, as alleged in the complaint? Answer: 'Yes.'

"4. Were the acts of the defendant in causing the arrest and prosecution of the plaintiff done with actual malice? Answer: 'Yes.'

"5. What amount of damages, if any, is plaintiff entitled to recover of the defendant? Answer: '$150.00.'"

There was a judgment on the verdict, to which the defendant excepted and appealed.

T. T. Thorne and J. L. Simmons for plaintiff, appellee.
Wilkinson and King and Kerr & Kerr for defendant, appellant.

PER CURIAM. The trial of this cause involved essentially the determination of issues of fact, which have been found by the jury adversely to the defendant. Defendant's exceptive assignments of error cannot be sustained. While the defendant contended that the plaintiff at the hearing on the criminal warrant waived preliminary hearing and thereby admitted probable cause, this was controverted by the plaintiff, and the conflicting evidence was submitted to the jury, which found adversely to the defendant on a charge which fully presented the matter to it. The judgment below is

Affirmed.

SADIE B. BRANTLEY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 21 September, 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 defendant from *Parker, J.*, at April Term, 1938, of EDGECOMBE.

Civil action to recover damages for alleged personal injury.

Plaintiff alleges actionable negligence and damage. Defendant denies liability. Former appeal reported in 211 N. C., 454, 190 S. E., 731.

From judgment upon adverse verdict defendant appeals to the Supreme Court, and assigns error.

Fountain & Fountain and H. H. Philips for plaintiff, appellee.
Gilliam & Bond, F. S. Spruill, Thos. W. Davis, and V. E. Phelps for defendant, appellant.

PER CURIAM. The Court being evenly divided in opinion, *Barnhill, J.*, not sitting, the judgment of the Superior Court is affirmed and stands, according to the uniform practice in appellate courts, as the decision of this case, without becoming a precedent. *Mfg. Co. v. Mfg. Co.*, 201 N. C., 823, 159 S. E., 411; *Seay v. Ins. Co.*, 208 N. C., 832, 179 S. E., 888; *Braswell v. Wilson*, 212 N. C., 833, 193 S. E., 20; *Seay v. Ins. Co.*, 213 N. C., 660, 197 S. E., 151; *Patterson v. Hosiery Mills, ante*, 24, 197 S. E., 597; *Ins. Co. v. Stinson, ante*, 97, 197 S. E., 751.

Affirmed.

T. L. EDGE AND WIFE, BESSIE EDGE, v. NORTH STATE FELDSPAR CORPORATION.

(Filed 28 September, 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 *Johnston, J.*, at January Term, 1938, of YANCEY. Affirmed.

Chas. Hutchins and Watson, Fouts & Watson for plaintiffs.

J. W. Ragland and G. D. Bailey for defendant.

PER CURIAM. The question involved: Did the court below commit error in sustaining the defendant's motion for judgment as in case of nonsuit at the close of plaintiffs' evidence?

The Court being evenly divided in opinion, *Schenck, J.*, not sitting, the judgment of the Superior Court is affirmed and stands as the decision of this action without becoming a precedent. *Ins. Co. v. Stinson ante*, 97.

The judgment of the court below is

Affirmed.

W. R. EVERETT v. R. W. SALSBURY AND P. L. SALSBURY.

(Filed 28 September, 1938.)

APPEAL by defendants from *Bone, J.*, and a jury, at March Term, 1938, of MARTIN. No error.

This is an action brought by plaintiff against defendants to recover damages "for the wrongful cutting and removal of timber" from plaintiff's land. The issues submitted to the jury and their answers thereto were as follows:

"1. Did the defendants trespass upon the lands of the plaintiff, as alleged in the complaint? Answer: 'Yes.'

"2. What damage, if any, is the plaintiff entitled to recover of the defendants? Answer: '$625.00.'"

The court below rendered judgment for plaintiff on the verdict. Defendants made several exceptions and assignments of error and appealed to the Supreme Court.

Elbert S. Peel for plaintiff.

B. A. Critcher for defendants.

PER CURIAM. At the close of plaintiff's evidence and at the close of all the evidence, the defendants made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below refused the motions and in this we can see no error. The charge of the court below is not in the record and the presumption is that the court below charged the law applicable to the facts. The jury decided the facts for plaintiff. We see no error in the record.

No error.

ELIZABETH M. HARRELL v. CARL GOERCH AND "THE STATE," A MAGAZINE.

(Filed 28 September, 1938.)

APPEAL by plaintiff from *Williams, J.*, at June Term, 1938, of HALIFAX.

Civil action for libel.

Decision on former appeal is reported in 209 N. C., 741, 184 S. E., 489.

The allegations and evidence are sufficiently stated there. A repetition of them is unnecessary here. On the retrial below the jury answered these issues in the affirmative: "(1) Did the defendant publish of and concerning the plaintiff the article as alleged in the complaint? (2) If so, was it true?" Other issues were not answered.

From judgment thereupon for defendants, plaintiff appealed to the Supreme Court, and assigns error.

Gulley & Gulley for plaintiff, appellant.
Bunn & Arendell for defendants, appellees.

PER CURIAM. The record on this appeal shows that the case has been properly submitted to the jury in accordance with the decision on former appeal. We have given careful consideration to all of plaintiff's assignments of error, and find

No error.

RUTH WATFORD HALL v. ALBERT HALL.

(Filed 28 September, 1938.)

APPEAL by defendant from *Burgwyn, Special Judge*, at April Term, 1938, of HERTFORD. Affirmed.

Plaintiff brought this action, under C. S., 1667, for her support and maintenance, alleging abandonment by her husband, the defendant.

Plaintiff testified that defendant had treated her with great cruelty, frequently abusing and beating her until finally plaintiff was compelled to leave her husband's home because of fear for her own safety and to seek refuge elsewhere, and that defendant had not provided for her a reasonable subsistence.

The defendant testified, denying the charges made by the plaintiff in her complaint and in her testimony. Defendant testified that his wife drank much, that he had never assaulted or cursed or abused her, that he did not tell her to leave, and that she left voluntarily for a different cause without fault of his.

During the trial, on cross-examination, the defendant was asked why he went to Newport News and attempted to obtain depositions derogatory to his wife's character. The defendant testified that he went over there and asked someone about her, and related what he had heard this man say. Defendant excepted to the action of the trial judge striking out the answer to the question.

The defendant excepted for that his Honor did not sufficiently instruct the jury as to what would constitute abandonment by the defendant; and there is a further exception that the Judge's charge in full did not comply with the requirements of C. S., 564.

E. R. Tyler and W. D. Boone for plaintiff, appellee.
E. L. Travis, C. W. Jones, and J. Carlton Cherry for defendant, appellant.

PER CURIAM. Upon the exceptions in this case, we do not find sufficient reason to disturb the result of the trial, and the judgment is, therefore,

Affirmed.

MAMIE HARRISON AND HUSBAND, ORLANDER HARRISON, v. J. H. BULLOCK.

(Filed 28 September, 1938.)

APPEAL by defendant from *Thompson, J.*, and a jury, at April Term, 1938, of BEAUFORT. No error.

This is an action brought by plaintiffs against defendant to remove cloud from title to a certain tract of land claimed by plaintiffs and that plaintiffs be adjudged the owners of same. The issues submitted to the jury and their answers thereto were as follows:

"1. Is Pine Island embraced within the boundaries of the land described in the complaint, which is Lot No. 9 in the division of the Chauncey land? Answer: 'Yes.'

"2. Are plaintiffs the owners and entitled to the possession of Pine Island, as alleged in the complaint? Answer: 'Yes.'

"3. If so, has the defendant cut and removed timber and trees from Pine Island? Answer: 'Yes.'

"4. What damage, if any, have plaintiffs sustained thereby? Answer: '$100.00.' "

The court below rendered judgment for plaintiffs on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

Carter & Carter for plaintiffs.
S. J. Everett and Grimes & Grimes for defendant.

PER CURIAM. The defendant, at the close of plaintiffs' evidence and at the close of all the evidence, made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no error.

On the other exceptions and assignments of error we can see no prejudicial or reversible error. The matter was mainly a question of fact for the jury. They have decided in favor of plaintiffs. The charge of the court below, of some 10 pages, was so clear and thorough, setting forth the law applicable to the facts, that defendant took no exception to any part of same.

In the judgment we find

No error.

COLUMBUS KNIGHT v. ARTHUR BRYANT ET AL.

(Filed 28 September, 1938.)

APPEAL by defendant from *Hamilton, Special Judge,* at June Term, 1938, of EDGECOMBE.

Civil action to recover damages for an alleged negligent injury.

Plaintiff, a pedestrian, was struck by defendant's automobile in the town of Princeville, 22 February, 1937, and injured. The case was tried upon the usual issues of negligence, contributory negligence and damages, and resulted in a verdict for the plaintiff, the damages being assessed at $400.

From judgment on the verdict, the defendant appeals, assigning errors.

George M. Fountain & Son for plaintiff, appellee.
H. H. Phillips for defendant, appellant.

PER CURIAM. On the hearing, the controversy narrowed itself to issues of fact, determinable alone by the jury. Exceptions directed to the exclusion of evidence, refusal to nonsuit, and failure to charge as required by C. S., 564, must all be resolved in favor of the validity of the trial.

We have discovered no reversible error on the record. The verdict and judgment will be upheld.

No error.

JOSHUA H. LEE, EMPLOYEE, v. S. S. TOLER & SON, EMPLOYER; AND FIDELITY & CASUALTY COMPANY OF NEW YORK, CARRIER.

(Filed 28 September, 1938.)

APPEAL by plaintiff from *Hamilton, Special Judge,* at June Term, 1938, of EDGECOMBE. Affirmed.

This was a proceeding under the North Carolina Workmen's Compensation Act. Plaintiff claimed compensation for injury by accident arising out of and in the course of his employment by defendant. The Industrial Commission found as a fact from all the evidence that plaintiff did not suffer an injury by accident arising out of and in the course of his regular employment resulting in the disability complained of. Upon appeal the award of the Industrial Commission was affirmed, and plaintiff appealed to this Court.

Chas. C. Pierce and J. L. Simmons for plaintiff, appellant.
Ruark & Ruark and Leon S. Harris for defendants, appellees.

PER CURIAM. There being evidence to support the finding and award of the Industrial Commission, the judgment is affirmed. *Lockey v. Cohen, Goldman & Co.,* 213 N. C., 356; *Valentine v. Grocery Co., post,* 828.

Affirmed.

A. W. PERRY v. D. PENDER GROCERY COMPANY.

(Filed 28 September, 1938.)

APPEAL by defendant from *Parker, J.,* and a jury, at March, 1938, Term of HALIFAX. Modified and affirmed.

This is an action brought by plaintiff against defendant for $3,000 damage "to his good name, fame, credit and reputation," as a result of an alleged defamatory publication.

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

"1. Did the defendant maliciously speak of and concerning the plaintiff, in the presence and hearing of another or others, in substance the words as alleged in the complaint? Answer: 'Yes.'

"2. If so, did said words by fair intendment and to the reasonable apprehension of the listeners, in view of the attendant circumstances, amount to a charge of larceny, as alleged in the complaint? Answer: 'Yes.'

"3. What compensatory damages, if any, is the plaintiff entitled to recover of the defendant? Answer: '$1,000.00.'

"4. What punitive damages, if any, is the plaintiff entitled to recover of the defendant? Answer: '$250.00.'"

The court below rendered judgment on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

Wade H. Dickens and Geo. C. Green for plaintiff.
Wm. C. Pender and Allsbrook & Benton for defendant.

PER CURIAM. The defendant offered no evidence. 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 refused the motion and in this we can see no error. The numerous exceptions and assignments of error made by defendant cannot be sustained, except to the charge on the fourth issue as to punitive damages. We do not think the evidence sufficient to sustain that issue and as to that issue and answer it is stricken from the record. We see no prejudicial or reversible error on the other issues, and as to them there is no error.

As herein set forth, the judgment in the court below is

Modified and affirmed.

GEORGE WILLIAM SMITH, BY HIS NEXT FRIEND, TOM C. SMITH, v. SHELL UNION OIL CORPORATION ET AL.

(Filed 28 September, 1938.)

APPEAL by defendants from *Johnston, J.*, at July Term, 1938, of BUNCOMBE.

Civil action to recover damages for alleged negligent injury.

The complaint alleges that plaintiff was injured by the negligence of the defendants in placing "an inherently dangerous explosive . . . containing a mixture of gasoline and kerosene . . . in a retail garage or filling station," without proper safeguards, which was ignited by a match and exploded, resulting in injury to the plaintiff.

A demurrer was interposed upon the ground that the complaint does not state facts sufficient to constitute a cause of action. Demurrer overruled in the general county court; ruling sustained on appeal to the Superior Court; defendants again appeal.

C. E. Blackstock and J. W. Haynes for plaintiff, appellee.
Heazel, Shuford & Hartshorn for defendants, appellants.

PER CURIAM. Without debating the matter, we agree with the courts below that the complaint is good as against a demurrer. See *Diamond v. Service Stores,* 211 N. C., 632, 191 S. E., 358; *Stone v. Texas Co.,* 180 N. C., 546, 105 S. E., 425; *Newton v. Texas Co., ibid.,* 561, 105 S. E., 433.

Affirmed.

STATE v. W. C. THORNE.

(Filed 28 September, 1938.)

APPEAL by defendant from *Bone, J.,* at February Term, 1938, of WILSON. Affirmed.

Upon appeal from a conviction in the mayor's court, this defendant was tried *de novo* in the Superior Court for a violation of an ordinance of the town of Elm City, reading as follows:

"The Board of Commissioners of the Town of Elm City do ordain:

"1. From and after the adoption and publication of this ordinance it shall be unlawful for any person to keep a store or place of business open on Sundays after 8 a.m., and every person convicted of the violation of this ordinance shall be fined $15.00 for the first offense and $25.00 for the second and all other offenses. Each Sunday's violation shall constitute a separate offense."

In support of the charge the State introduced the foregoing ordinance, and witnesses gave testimony tending to show that the defendant kept open and operated his store or place of business between the hours of eight and ten a.m., on Sunday, 24 October, 1937, as alleged in the warrant. The State further introduced evidence tending to show that the defendant had gas and oil pumps in front of his store or place of business, and that he sold gasoline, oils, and automobile accessories in connection with sale of other merchandise, such as bottled drinks, tobaccos, groceries and other merchandise, in and connected with his place of business on said Sunday, except during the hours of 10 a.m. to 12 noon, at which time he closed his place of business.

At the conclusion of the State's evidence the defendant moved for judgment as of nonsuit, which motion was overruled.

The defendant offered evidence tending to show that he operated a gasoline service station, and introduced a further ordinance of the town of Elm City, reading as follows:

"*The Board of Commissioners of the Town of Elm City do ordain:*

"1. From and after the adoption and publication of this ordinance it shall be unlawful for any gasoline service station, operating within the corporate limits of the town of Elm City, to remain open on Sunday between the hours of 10 a.m. and 12 o'clock noon, and every person convicted of the violation of this ordinance shall be fined $15.00 for the first offense and $25.00 for the second and all other offenses. Each Sunday violation shall constitute a separate offense."

The defendant also introduced in evidence his license to operate a service station and a metal tag furnished him by the State Department of Revenue, designating his place of business as North Carolina Service Station No. 22113.

At the conclusion of all the evidence the defendant renewed his motion for judgment as of nonsuit, which was overruled, and defendant excepted.

There was a verdict of guilty and the defendant was fined $15.00, from which judgment defendant appealed.

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

G. L. Parker and Troy T. Barnes for defendant.

PER CURIAM. The validity of the ordinances cited and quoted in the record not having been challenged, the evidence was sufficient to sustain the conviction, and the judgment is

Affirmed.

BERNARD'S TOBACCO WAREHOUSE, INC., v. T. E. WILLIS.

(Filed 28 September, 1938.)

APPEAL by plaintiff from *Alley, J.*, at March Term, 1938, of MADISON. Affirmed.

This is a civil action to recover balance alleged to be due for money loaned by plaintiff to the defendant. The plaintiff alleges, and offered evidence tending to show, that during the Tennessee tobacco season, 1936, it loaned to the defendant $4,226.88 to aid the defendant in pur-

chasing tobacco from farmers for resale in plaintiff's warehouses in Greenville, Tennessee, and that the defendant has repaid $2,371.84, leaving a balance due of $1,855.04. The defendant denied the contract as alleged by the plaintiff. He alleged, and offered evidence tending to show, that the plaintiff employed him to solicit farmers to sell their tobacco upon plaintiff's warehouse floor; that plaintiff from time to time advanced to him funds to be used in making loans to farmers so as to tie up their crops, to purchase options thereon, and at times to purchase the crop. He alleged, and offered evidence tending to show, that the difference between the amount advanced to him and the amount repaid was caused by losses on crops purchased by him as agent of the plaintiff at its insistence and direction. He also alleges by way of counterclaim that the amount of his salary was not agreed upon and that his services were reasonably worth the sum of $600.00.

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

"1. Did the plaintiff, from time to time, loan sums of money to the defendant aggregating the sum of $4,226.88, as alleged in the complaint? Ans.: 'Yes, loaned to him $500.00.'

"2. What amount, if any, is the plaintiff entitled to receive of the defendant by reason of such loans? Ans.: 'Yes, $500.00.'

"3. Did the plaintiff and the defendant enter into a contract under the terms of which the plaintiff agreed to pay to the defendant such sums as his services would be reasonably worth, for soliciting and inducing sales of tobacco to the plaintiff during the season of 1936 and 1937, as alleged in the answer? Ans.: 'Yes.'

"4. Did the defendant render such services as agreed? Ans.: 'Yes.'

"5. What amount, if any, is the defendant entitled to recover from the plaintiff by reason of such services? Ans.: '$200.00.' "

From judgment thereon that plaintiff recover the net sum of $300.00 plaintiff appealed.

Mack E. Ramsey, W. K. McLean, and Conway Maupin for plaintiff, appellant.

Roberts & Baley and John H. McElroy for defendant, appellee.

PER CURIAM. The conflicting evidence in this cause was submitted to the jury under a charge free from material error. The controverted issues of fact have been determined by the jury as required by law. We find no sufficient merit in the exceptive assignments of error to justify a new trial. The judgment below is

Affirmed.

FRANK BELMONT VALENTINE v. DAVID PENDER GROCERY COMPANY AND LIBERTY MUTUAL INSURANCE COMPANY.

(Filed 28 September, 1938.)

APPEAL from *Parker, J.*, at June Term, 1938, of WILSON. Affirmed.

This was a proceeding under the North Carolina Workmen's Compensation Act. Plaintiff claimed compensation for a personal injury by accident arising out of and in the course of his employment by defendant Grocery Company, resulting in hernia. The Industrial Commission found from the evidence that plaintiff did not sustain an injury by accident resulting in hernia, and denied compensation. Upon appeal to the Superior Court the findings and ruling of the Industrial Commission were affirmed. Plaintiff appealed to the Supreme Court.

S. L. Arrington for plaintiff, appellant.

Wm. H. Yarborough, Jr., and J. M. Broughton for defendants, appellees.

PER CURIAM. The findings of fact of the Industrial Commission on plaintiff's claim, being supported by evidence, are conclusive on appeal (*Lockey v. Cohen, Goldman & Co.*, 213 N. C., 356), and judgment is

Affirmed.

MRS. JOHN THOMAS JOHNSTON ET AL. v. HALIFAX PAPER COMPANY ET AL.

(Filed 12 October, 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 defendants from *Parker, J.*, at August Term, 1938, of HALIFAX.

Proceeding under Workmen's Compensation Act to determine liability of defendants to next of kin of John Thomas Johnston, deceased employee.

The Industrial Commission overruled the trial Commissioner and awarded compensation. This was affirmed on appeal to the Superior Court.

Defendants appeal, assigning as error the insufficiency of the evidence to support the award.

Gold, McAnally & Gold and Long & Crew for plaintiffs, appellees.
Sapp & Sapp for defendants, appellants.

PER CURIAM. One member of the Court, *Schenck, J.*, not sitting, and the remaining six being equally divided in opinion as to the sufficiency of the evidence to support the award, the judgment of the Superior Court is affirmed in accordance with the usual practice in such cases, and stands as the decision in the present case, without becoming a precedent. *Cole v. R. R.*, 211 N. C., 591, 191 S. E., 353.

Affirmed.

W. J. MUNDEN v. L. H. WINDHOLZ AND M. S. HAWKINS, RECEIVERS FOR NORFOLK SOUTHERN RAILROAD COMPANY, A CORPORATION.

(Filed 12 October, 1938.)

APPEAL by plaintiff from *Parker, J.*, at February Term, 1938, of PASQUOTANK. Affirmed.

This is an action brought by plaintiff against defendant for false arrest and imprisonment. The action was removed for trial to the U. S. District Court for the Eastern District of North Carolina. At the July Term, 1937, the following judgment was rendered by Judge Meekins:

"This cause coming now to be heard, and at the close of all the testimony the defendants renewed their motion for judgment as of nonsuit and the court intimated its willingness to grant said motion. Whereupon plaintiff asked leave of the court to take a voluntary nonsuit, and upon motion to that effect the same was allowed, and judgment of voluntary nonsuit is accordingly entered herein."

The action was brought thereafter in the Superior Court of North Carolina and to acquire jurisdiction the demand for damages was reduced to $2,500. The judgment of Parker, J., in the court below, in part, is as follows:

"That if this action is not *res adjudicata* that the plaintiff has not offered sufficient evidence to entitle him to go to the jury and that the case, in any event, if the plea of *res adjudicata* is not tenable, should be nonsuited, it is now, therefore, ordered and decreed by the court that the action be, and it hereby is dismissed and nonsuited, and the plaintiff is taxed with the costs."

J. Henry LeRoy and J. H. Hall for plaintiff.
J. Kenyon Wilson for defendant.

PER CURIAM. From a careful review of the evidence on the whole record, we do not think that the plaintiff has offered sufficient evidence to be submitted to a jury. The judgment of the court below is
Affirmed.

MRS. R. A. HALL v. WILLIE G. BOYKIN AND J. W. BOYETTE.

(Filed 12 October, 1938.)

APPEAL by defendant J. W. Boyette from *Harris, J.*, and a jury, at February-March Term, 1938, of JOHNSTON. Reversed.

The court charged the jury as follows: "Gentlemen of the jury, in the case which we have just tried I charge you this: That if you believe all the evidence and find the facts to be as testified to by all the witnesses you will answer the issue 'Yes.' The issue is: 'Is the plaintiff, Mrs. R. A. Hall, the holder as collateral security of the note and mortgage described in the pleadings?' I charge you if you believe all the evidence and find the facts to be as testified to by all the witnesses you will answer the issue 'Yes.' Take the case, and say how you find it." To which the defendant J. W. Boyette excepted, assigned error and appealed to the Supreme Court.

The issue submitted to the jury and their answer thereto is as follows: "1st. Is the plaintiff, Mrs. R. A. Hall, the holder as collateral security of the note and mortgage described in the pleadings? Answer: 'Yes.'"

The court below rendered judgment on the verdict.

Abell & Shepard for plaintiff.
Parker & Lee for defendant J. W. Boyette.

PER CURIAM. This action was here before—*Hall v. Boykin*, 211 N. C., 391. From a review of the evidence in the court below, we think there was sufficient competent evidence on the part of the defendant J. W. Boyette to be submitted to the jury on the issue.

The judgment of the court below is
Reversed.

STATE v. TED TERRELL.

(Filed 19 October, 1938.)

Appeal and Error § 38—

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by defendant from *Williams, J.*, at May Term, 1938, of WARREN. Affirmed.

This is a criminal action in which the defendant was tried under a bill of indictment charging him with the murder of one Andrew Knight. The defendant was first tried at the May Term, 1937, of Warren, and was convicted of murder in the second degree. On appeal to this Court a new trial was ordered. *S. v. Terrell,* 212 N. C., 145. When the cause again came on for trial in the court below the defendant was again convicted of murder in the second degree. From judgment pronounced thereon the defendant appealed.

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

Banzet & Banzet, John Kerr, Jr., and Yarborough & Yarborough for defendant, appellant.

PER CURIAM. The Court being evenly divided in opinion, *Schenck, J.*, not sitting, as to whether harmful error was committed in the trial of the defendant, the judgment of the Superior Court is affirmed and stands as the decision of this action without becoming a precedent.

Affirmed.

STATE v. FELTON BASS AND MARVIN BASS (CONSOLIDATED).

(Filed 19 October, 1938.)

APPEAL by defendants from *Hamilton, Special Judge,* at March, 1938, Term of HARNETT.

Criminal prosecution on indictment charging perjury.

The defendants are charged with falsely testifying as witnesses under oath in the trial of civil action in the Superior Court of Harnett County, wherein the Dunn Electric Company was plaintiff and Ammie Jones

was defendant, in which action plaintiff was seeking to recover damages for alleged breach of contract for the purchase of a Delco lighting plant.

The State offers testimony of Ammie Jones and others tending to show that at the trial of the civil action at May Term, 1937, the defendants herein falsely testified under oath in substance that, on 5 October, 1928, they, as employees of the Dunn Electric Company, built the concrete base for the lighting plant and wired the house and store of the defendant, when in fact the concrete base was built and the wiring was done by Jack Barnes when he installed a Fairbanks plant which Ammie Jones had purchased after he declined to take the Delco plant. The cost of building the concrete base and the wiring were set up as elements of damage. Defendants did not testify.

Verdict: Guilty, with recommendation of mercy.

Judgment: Two years confinement in the State's Prison.

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

R. L. Godwin for defendants, appellants.

PER CURIAM. The evidence appearing in the record on this appeal presents a question of fact for the jury. After careful consideration, we are unable to find error in the trial, and the judgment must stand.

No error.

ELLIS GOLDSTEIN v. LOUIS BAER AND WIFE, SADIE BAER.

(Filed 19 October, 1938.)

APPEAL by plaintiff from *Cowper, Special Judge,* at April Term, 1938, of HARNETT. Affirmed.

This is a civil action instituted by the plaintiff to compel a partnership accounting and to liquidate partnership assets. Sadie Baer is only a nominal party defendant. The cause was referred to Jeff D. Johnson, Jr., referee, who duly reported his findings of fact and conclusions of law. The plaintiff entered numerous exceptions to the report and duly tendered issues arising thereon and demanded a jury trial.

The plaintiff, defendant Louis Baer and one Warren in 1925 acquired a large tract of land in Harnett County for speculation and resale. As all of the land was not sold a large part of it was farmed for a number of years. There were deeds *inter partes* and mortgages given to third parties to secure money which it is not here necessary to recite. On 10 May, 1927, the plaintiff and his wife executed and delivered to Solly

Isaacs a deed with full covenants of warranty, conveying the interest of the plaintiff in said land to said Isaacs. Thereafter, Tract No. 7, which had been sold, was conveyed to the defendant and Mamie I. Goldstein, wife of the plaintiff. This tract was later conveyed to Louis Baer in a partitioning proceedings instituted by him against Mamie I. Goldstein. The Warren interest in said lands was conveyed to the defendant and Mamie I. Goldstein on 18 July, 1928. On 18 January, 1929, Louis Baer, Solly Isaacs and Mamie I. Goldstein executed a lease to said lands to N. M. Johnson. The names of Solly Isaacs and Mamie I. Goldstein were signed to said lease by the plaintiff as agent. All of said lands except Tract No. 7 acquired by the defendant in the proceedings for partition were foreclosed by the trustee in one of the deeds of trust and were conveyed on 14 March, 1931, to the defendant. Thereafter neither plaintiff nor his wife participated in any manner in the control or management of said property.

On the trial of this cause, the plaintiff, admitting that his deed to Solly Isaacs was knowingly executed in the form of a deed, undertook to show that there was an understanding between him and Isaacs that said deed should be held as security for amounts due Isaacs.

This action was instituted 23 May, 1935.

At the conclusion of all the evidence the court below, on renewal of the defendant's motion to nonsuit, entered judgment dismissing the action as of involuntary nonsuit. The plaintiff excepted and appealed.

R. L. Godwin and J. Faison Thomson for plaintiff, appellant.

J. R. Young, J. A. McLeod, and Robert H. Dye for defendants, appellees.

PER CURIAM. The uncontradicted testimony discloses that at the time of the institution of this action plaintiff had no interest in the lands and alleged partnership properties which are the subject matter of this suit. He had conveyed the same to his brother-in-law, Solly Isaacs, and had thereafter recognized and ratified the title of the grantee by signing a lease to the property in the name of the grantee. He cannot collaterally attach said deed in this action. Nor can he reform the same in a cause in which neither his wife nor the grantee is a party.

Even if the plaintiff be permitted to show title to the property in direct conflict with his own deed, he has waited more than four years since the partnership property was sold under foreclosure before bringing this action and he has offered no evidence which would repel the running of the statute of limitations.

We concur in the view of the court below that upon all the evidence the plaintiff has failed to establish a cause of action.

Affirmed.

BESSIE DUNLAP BLALOCK AND ETHEL DUNLAP BENNETT, EXECUTORS OF MARK SQUIRES, DECEASED, v. W. G. WHISNANT.

(Filed 2 November, 1938.)

APPEAL by plaintiff Mark Squires from *Rousseau, J.*, at May Term, 1938, of CALDWELL. Affirmed.

The plaintiff in this case entered a suit against the defendant for the recovery of $1,000, alleged to be due for legal services rendered the defendant.

The record discloses that the plaintiff was a practicing attorney at law, but, because of the fact that he had not been actively engaged in practice for some time, called on another attorney of his town and consulted with him with regard to the regularity and sufficiency of the papers drawn by plaintiff. Inasmuch as plaintiff did not desire to file complaint with summons, the usual request for extension of time to file complaint was made and signed by the attorney who had been called in, in the name of his firm. No compensation was paid for this service, and while the plaintiff was under the impression that the attorney was formally employed and would receive compensation out of recovery, the latter felt that he was signing the application for extension of time to file the pleading *pro forma*. Subsequently, having ascertained that the head of his firm was related to the defendant in the case, and, upon request of such partner that he withdraw from the case, he served notice upon the plaintiff and was, by order of the court, so permitted to withdraw. Subsequently, a petition for extension of time to file answer was filed and signed in the name of the legal firm to which the withdrawing attorney belonged.

Meantime, the plaintiff served notice that he would apply for a judgment by default, which he subsequently did, basing his right to the judgment on the fact that the time to file answer had expired and that the application for an extension of time on which the court acted was void on the ground that the attorneys could not, as a matter of legal ethics and as a matter of law, represent the defendant, because of former relation to the plaintiff as attorneys in the case.

The clerk of the court refused to sign the default judgment tendered by the plaintiff and upon an appeal to the Superior Court Judge Rousseau found facts exonerating the attorneys in the case from any violation of legal ethics or propriety, sustained the ruling of the clerk, and again denied the motion of plaintiff for judgment by default. From this judgment, plaintiff appealed.

Pending the appeal, the plaintiff died, and in the Supreme Court, upon suggestion of his death, Bessie Dunlap Blalock and Ethel Dunlap Bennett, executors of the will of deceased plaintiff, were substituted in his stead as plaintiffs in the cause.

L. H. Wall for plaintiffs, appellants.

L. M. Abernethy and Pritchett, Strickland & Farthing for defendant, appellee.

PER CURIAM. Upon a careful examination of all the record, the Court is of the opinion that the motion of plaintiff was properly refused, and the judgment is

Affirmed.

H. S. MORROW, ADMINISTRATOR OF ESTATE OF R. C. MORROW, v. STATE HIGHWAY AND PUBLIC WORKS COMMISSION, EMPLOYER, SELF-INSURER.

(Filed 2 November, 1938.)

APPEAL by plaintiff from *Warlick, J.*, at January Term, 1938, of IREDELL. Affirmed.

Proceeding for compensation under the North Carolina Workmen's Compensation Act.

The Industrial Commission found that plaintiff's intestate was employed by the State Highway and Public Works Commission in painting a bridge over Catawba River. While so engaged deceased dropped his paint brush into the water. Something was said about going into the water to recover the brush, and the foreman told the deceased not to do so. In violation of this instruction deceased pulled off his clothing, went into the river for the purpose of recovering the paint brush, and was drowned. The Industrial Commission found that the deceased had left the usual scope of his employment and was doing something contrary to the command of his foreman and superior, and concluded that the death of deceased did not arise out of the employment and denied compensation.

Upon appeal to the Superior Court the findings of fact and conclusions of law of the Industrial Commission were adopted and confirmed, and plaintiff appealed to the Supreme Court.

Raymer & Raymer for plaintiff.

Chas. Ross for defendant.

PER CURIAM. There was evidence to support the findings of fact by the Industrial Commission, and the conclusion of the Commission that the injury did not arise out of the employment was upheld by the Superior Court. In this we concur. The judgment below is

Affirmed.

MRS. MARGARET W. WRIGHT v. FOREST HILL COUNCIL No. 49, JUNIOR ORDER OF UNITED AMERICAN MECHANICS: BUFORD CRANFILL, J. A. SIMPSON, S. C. CASS, AND T. F. WHITTINGTON.

(Filed 2 November, 1938.)

APPEAL of defendants from *Warlick, J.*, at June Term, 1938, of CABARRUS. Affirmed.

The plaintiff, Mrs. Margaret W. Wright, widow of J. H. Wright, brought this action against Forest Hill Council No. 49, Junior Order of United American Mechanics, and codefendants, to recover $250.00 which she alleged was due her as a balance of the proceeds of an insurance policy, and death benefits, on the life of her husband, which she further alleges was received by all of the defendants and wrongfully appropriated to other uses. The evidence tended to show that the local Council received $1,000.00 on account of the death of Wright, which was deposited in the treasury of the Council, and $750.00 paid to Mrs. Wright.

When the insurance checks of the National Council came to the local Council, No. 49, the treasurer of that Council had to endorse them, and the councilor and recording secretary verified upon the checks that the person endorsing as treasurer was in fact treasurer of the Council. In this instance the check was endorsed by the defendant Cass, treasurer, Simpson, recording secretary, and Cranfill, councilor. After deposit, it became necessary for any withdrawal check to be drawn by the recording secretary and signed by the councilor and presented to and paid by the treasurer, either in cash or by drawing a check on the funds of the local Council.

The funds received on account of the death of Mr. Wright were commingled with the common funds of the local Council, and the balance of $250.00, which was not paid to Mrs. Wright, was paid to the National Council in order to keep up the dues of the local Council and keep it in good standing.

The evidence tends to show that none of the money was used by any of the Council's codefendants for his own benefit.

On the trial of the case a nonsuit was entered as to the defendant Whittington, and motion for judgment as of nonsuit overruled as to the other defendants. The trial resulted in a verdict and judgment for the plaintiff for $250.00 and interest, and defendants appealed.

H. S. Williams for plaintiff, appellee.
Hartsell & Hartsell for defendants, appellants.

PER CURIAM. We have carefully examined the record and the exceptions of the defendants and find no error. The judgment of the court below is therefore

Affirmed.

RUTH FOX ALLRED, EXECUTRIX OF MILLARD H. ALLRED, DECEASED, V. HIGH POINT, RANDLEMAN, ASHEBORO AND SOUTHERN RAILROAD, AND THE SOUTHERN RAILWAY COMPANY.

(Filed 2 November, 1938.)

APPEAL by defendants from *Warlick, J.*, at March Term, 1938, of RANDOLPH. Affirmed.

This is an action for actionable negligence, for death of plaintiff's testate, brought by plaintiff against the defendants, alleging damage. The complaint was duly verified and filed at the time summons was issued, and a copy thereof was served with the summons on each of the defendants. The defendants in apt time, before answering or demurring, and before any extension of time to plead was granted, moved before the clerk of the Superior Court, upon due notice to the plaintiff, to strike from the complaint certain allegations thereof, specifically designated in its motion to strike, reduced to writing and filed in the cause in accordance with the statute.

The clerk of the Superior Court, upon the hearing before him, denied said motion and refused the defendants any part of the relief demanded. The defendants, in apt time and upon due notice to the plaintiff, appealed to the judge of the Superior Court from the judgment of the clerk.

Upon such hearing his Honor, Wilson Warlick, Judge, granted a part and denied a part of the relief by said motion demanded, and entered the order as appears in the record. To the entry of said order the defendants excepted, assigned error and appealed to the Supreme Court. This constitutes the defendants' only exception and assignment of error.

Moser & Miller and J. A. Spence for plaintiff.
W. T. Joyner and H. M. Robins for defendants.

PER CURIAM. The court below, upon defendants' motion to strike certain allegations from the complaint, granted a part and denied a part of the relief demanded by said motion, Code 1935, sec. 537. We have heard the able arguments of the attorneys for the litigants, read the record and briefs, but see no error in the order of the court below.

Affirmed.

EMMA HENSON EDWARDS AND JAMES EVERETT HENSON v. ERNEST B. WHITEHEAD AND ELSIE WHITEHEAD, HIS WIFE.

(Filed 9 November, 1938.)

APPEAL by defendants from *Warlick, J.*, at March Term, 1938, of RANDOLPH. No error.

Action to recover damages for trespass on land. Upon issues submitted, the jury rendered the following verdict:

"1. Are the plaintiffs the owners in fee and entitled to the immediate possession of the lands embraced within the lines of Red A, Red B, Red C, Red D, and back along the Cheraw Road to Red A, as indicated on the map of the court survey in this case? Ans.: 'Yes.'

"2. Have the defendants unlawfully and willfully trespassed thereon by cutting and removing timber and trees and doing injury to the growing crop? Ans.: 'Yes.'

"3. What damages, if any, have the plaintiffs sustained by reason of such trespass? Ans.: '$65.00.'"

From judgment on the verdict, defendants appealed.

J. V. Wilson and H. M. Robins for plaintiffs.

J. G. Prevette for defendants.

PER CURIAM. There was sufficient evidence to warrant submission of the case to the jury upon all the issues raised by the pleadings. Appellants' assignments of error based upon exceptions to the charge to the jury cannot be sustained. They principally relate to statements of contentions not called to the court's attention at the time (*S. v. Herndon*, 211 N. C., 123, 189 S. E., 173). The exception to the ruling of the court in permitting certain witnesses to be sworn and tendered is without merit. This was a matter within the discretion of the trial judge. Issues of fact have been determined by the jury adversely to the defendants, and in the trial we find

No error.

MAXWELL POLANSKY v. T. O. PANGLE ET AL.

(Filed 9 November, 1938.)

APPEAL by movant, Maxwell Polansky, from *Johnston, J.*, at August Term, 1938, of BUNCOMBE.

Motion in receivership cause to abate purchase price of stock of goods for shortage in inventory, or to rescind sale.

Upon issues joined, the matter was tried before a jury at the March Term, 1938, general county court, and resulted in abatement of purchase price according to the shortage in quantity of amount sold as per inventory. On appeal to the Superior Court it was held that movant was not entitled to judgment for rescission, but the cause was remanded for error in computation. This error was corrected at the August Term of the general county court, and the movant again appealed, alleging error in computation and in the refusal to set aside the sale and to enter judgment of rescission.

The Superior Court overruled the first exception and held that the second was *res judicata*.

From this ruling, movant appeals, assigning errors.

Weaver & Miller for movant, appellant.
Lipscomb & Lipscomb and Lee & Lee for respondent, appellee.

PER CURIAM. The matter has been heard twice in the general county court and as many times in the Superior Court. No reversible error has been made to appear.

Affirmed.

HENRY SAWYER, ADMINISTRATOR OF J. L. SAWYER, AND CORA SAWYER, v. T. L. COX.

(Filed 9 November, 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 defendant from *Burgwyn, Special Judge,* at May Special Term, 1938, of RANDOLPH.

This was an action to recover damages for breach of contract for rental of a certain mill for grinding corn and other grains, and for amount due for board furnished.

From judgment that the plaintiff administrator recover nothing on the rental contract, and that the *feme* plaintiff recover of the defendant $775.00 on account of board furnished, the defendant appealed, assigning errors.

L. T. Hammond and J. A. Spence for plaintiff Cora Sawyer, appellee.
J. G. Prevette and Daniel L. Bell for defendant, appellant.

PER CURIAM. The Court being evenly divided in opinion, *Stacy, C. 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.*, 213 N. C., 800.

Affirmed.

E. C. SMITH AND WIFE, MAMIE J. SMITH, v. TURNAGE-WINSLOW COMPANY, INC., NOW J. E. WINSLOW COMPANY, INC.

(Filed 9 November, 1938.)

APPEAL by plaintiff from *Grady, J.*, at February Special Term, 1938, of PITT. Affirmed.

The court below rendered the following judgment:

"This cause coming on to be heard before his Honor, Henry A. Grady, Judge Presiding, and a jury, at the February Term, 1938, a Special Term of Pitt Superior Court, and being heard, and at the close of plaintiffs' testimony the defendant having moved for a judgment of nonsuit and to have the court to declare upon plaintiffs' evidence that defendant's mortgage is the first valid subsisting lien upon the property in controversy, paramount to any rights or claims of the plaintiffs.

"And it appearing to the court from the evidence introduced by the plaintiffs that at the time of the execution of the mortgage from Mary Paramore was seized in fee of the land in controversy and that her title was paramount to the trust deed from W. B. Paramore to A. W. Bailey, trustee, and that the lien of defendant's mortgage is paramount to any claim or interest of the plaintiffs, as appears from the record.

"It is now, therefore, considered, ordered, adjudged and decreed upon motion of Messrs. J. L. Evans and Albion Dunn, attorneys for the defendant, that defendant's mortgage, described in the pleadings be and the same is hereby declared to be valid and subsisting and a lien upon the land in controversy paramount to any claim, right or title of the plaintiffs; and it is further considered, ordered and adjudged that plaintiffs take nothing by their action, that same be dismissed and that the

restraining order heretofore issued herein be vacated and dissolved, and that the defendant recover of the plaintiffs and F. A. Elks, surety on the prosecution bond filed herein, the costs of the action to be taxed by the clerk. Henry A. Grady, Judge Presiding."

The plaintiffs' exceptions and assignments of error are as follows:

"1. Plaintiffs contend that his Honor erred in allowing the defendant's motion for nonsuit, for that there was evidence sufficient to be submitted to the jury on the issues raised by the pleadings, and for that the Supreme Court expressly held when this case was previously before it (*Smith v. Turnage-Winslow Co.*, Fall Term, 1937), that the case should be tried by a jury.

"2. For that there was no foundation or justification for his Honor's finding and judgment that 'defendant's mortgage is valid and subsisting and a lien upon the land in controversy, paramount to any claim, right or title of the plaintiffs.' "

Dink James for plaintiffs.

J. L. Evans and Albion Dunn for defendant.

PER CURIAM. At the close of plaintiffs' evidence the defendant made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The court below granted the motion and in this we can see no error.

The case was before this Court at Fall Term, 1937, *Smith v. Turnage-Winslow Co.*, 212 N. C., 310. *Connor, J.*, for a unanimous Court, wrote the law applicable to the facts. In that case the facts are fully set forth and there is no need to repeat them, except to say on the present record there are no issues to be submitted to a jury. We see no error in the court below declaring defendant's mortgage paramount to plaintiffs' title.

The judgment of the court below is

Affirmed.

EARL McRAE SMITH v. NEW AMSTERDAM CASUALTY COMPANY.

(Filed 23 November, 1938.)

APPEAL by plaintiff from *Olive, Special Judge,* at May Civil Term, 1938, of WAKE. Affirmed.

This is a civil action on an accident insurance policy issued by defendant to plaintiff on 2 October, 1937, upon the payment to defendant by

plaintiff of the first annual premium of $25.00, which, it is admitted, was actually paid, said policy being No. CA-88129. Plaintiff alleged that on 30 October, 1937, while said policy was in force and effect, he suffered an automobile accident, which resulted in the complete loss of his left eye, necessitating the amputation thereof. It is admitted by defendant that if plaintiff is entitled to recover any sum of money of defendant, he is entitled to recover the sum of $1,687.50 under the terms of said policy for the loss of his eye, for surgical attention, for hospital and nurse expenses, and for continuous disability.

Defendant admits the issuance and delivery of the policy and payment of the required premium, but denies liability for that plaintiff made false answers to material questions contained in the application for the policy sued on. Defendant, therefore, tenders into court the amount of the premium paid by plaintiff, with interest, and prays that plaintiff recover nothing by the action and that the policy be surrendered and canceled. From judgment of nonsuit at the close of all the evidence, plaintiff appealed.

Bunn & Arendell for plaintiff.
Thomas Creekmore and J. M. Broughton for defendant.

PER CURIAM. We think on the whole record that there were several false answers to material questions in the application for insurance ("Combination Accident Policy") made by plaintiff. There was no dispute on the record as to the falsity of these answers and as a matter of law we think they were material. On account of the language in the application, we do not think that there has been any waiver by defendant as to its right to refuse payment on account of the false answers to the material questions contained in the application for the policy sued on.

On this record we think the nonsuit was proper. We see no new or noval proposition of law. The judgment in the court below is

Affirmed.

WILLIAM H. LECHLER v. PRECISION GEAR & MACHINE COMPANY.

(Filed 23 November, 1938.)

APPEAL by defendant from *Olive, Special Judge,* at February Special Term, 1938, of MECKLENBURG.

Civil action to recover damages for breach of contract of employment.

Upon denial of liability and issues joined, there was a verdict and judgment for the plaintiff, from which the defendant appeals, assigning errors.

Henry L. Strickland for plaintiff, appellee.
William Winter and J. F. Flowers for defendant, appellant.

PER CURIAM. On controverted issues of fact, the jury has responded in favor of the plaintiff. A careful perusal of the record leaves us with the impression that the case has been tried in substantial conformity to the pertinent decisions on the subject and agreeably to the principles of law applicable. We have discovered no ruling or action on the part of the trial court which we apprehend should be held for reversible error. The exceptions to the charge are not sustained. The verdict and judgment will be upheld.

No error.

STATE v. MARY DAVIS.

(Filed 14 December, 1938.)

APPEAL by defendant from *Pless, J.*, at April Term, 1938, of GUILFORD. Affirmed.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Wettach for the State.
Gold, McAnally & Gold for defendant.

PER CURIAM. The defendant was convicted in the municipal court of the city of High Point of operating a lottery, 1 September, 1937, and the following judgment entered:

"Judgment: Be confined in the county jail for six months to be assigned to work in the workhouse, execution to issue at any time within three years and pay jury costs."

On 26 February, 1938, the sentence was ordered into effect by the judge of the municipal court and defendant put in custody to begin service of sentence. Upon appeal to the Superior Court, it was held that defendant's imprisonment was valid and legal, and thereupon defendant appealed to the Supreme Court.

The ruling of the court below is upheld under authority of *S. v. Vickers,* 184 N. C., 676, 114 S. E., 168; *S. v. McAfee,* 189 N. C., 322, 127 S. E., 208; and *S. v. Schlichter,* 194 N. C., 277, 139 S. E., 448.

Judgment affirmed.

STATE v. R. T. BRYANT.

(Filed 4 January, 1939.)

APPEAL by defendant from *Sink, J.*, at July Term, 1938, of FORSYTH. No error.

Criminal action in which defendant was tried under a bill of indictment charging him with the murder of one Glenn Riggs.

About midnight Saturday, 14 May, 1937, defendant and deceased were at a filling station near Winston-Salem. Several others were present at the time. The defendant had been drinking. The deceased suggested that the defendant chip in some money to buy a pint of whiskey. The defendant accused Riggs of trying to sponge off the crowd. Thereupon, words were exchanged, each man cursing the other. The defendant had his knife out; called deceased a foul name; appeared to be angry, and told deceased if he would come on the outside he would cut him up in little pieces. The proprietor of the station told them if they were going to fight they would have to get outside. He opened the door and told them to get out. The defendant went out first and the deceased went behind him. When the defendant got out and the deceased came by the door he opened his knife and jumped on Bryant's back and apparently cut him about his throat. Thereafter there was considerable scuffling between the two, during which the defendant stabbed or cut the deceased beneath the right armpit. The deceased bled profusely and died from loss of blood and internal hemorrhage.

On the same night prior to the killing Bryant had been seen under the influence of liquor at other places and heard to remark: "If anybody crosses my path I will cut his damn head off." At the time he had his knife open and said he had been whetting it. At another filling station after the attendant had refused to sell the defendant gas on credit the defendant, with his knife in his hand, seized the attendant by his clothes and said if he did not put the gas in the tank he would cut every damn button off his coat.

There was a verdict of "Guilty of manslaughter." From judgment pronounced thereon the defendant appealed.

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

Fred S. Hutchins and H. Bryce Parker for defendant, appellant.

PER CURIAM. The defendant relied upon the plea of self-defense and offered much evidence in support thereof, the substance of which is re-

cited in the opinion of this Court on the former appeal of this cause. *S. v. Bryant,* 213 N. C., 752. Likewise, testimony relied upon by the State not here given is also there detailed at some length. The defendant has been twice tried by a jury of his peers. Each time the jury has weighed his conduct and determined the credibility of the testimony relied upon by him to establish self-defense. In each case the jury has rejected the defendant's theory of the occurrence and has found him guilty of an unlawful killing. We fail to find in the exceptive assignments of error sufficient cause for awarding the defendant a third trial.

No error.

MRS. CORA TROLLINGER ET AL. v. CITY OF BURLINGTON,
and
MRS. ALICE M. MOORE v. CITY OF BURLINGTON.

(Filed 4 January, 1939.)

APPEAL by defendant from *Thompson, J.,* at May Term, 1938, of ALAMANCE. No error.

These were civil actions brought by Mrs. Cora Trollinger *et al.,* and Mrs. Alice M. Moore, against the city of Burlington, which actions were consolidated for trial by consent. They were instituted for the recovery of damages sustained by reason of the closing of Park Avenue, alleged to be a street in the city of Burlington, by the construction of an underpass under the tracks of the North Carolina Railroad, which lowered the grade of Church Street so as to make Park Avenue unusuable. Plaintiffs allege that they own valuable property on Park Avenue, to the use of which this street was necessary; that the closing of the street in the manner aforesaid has deprived them of its use and has greatly diminished the value of the property.

The defendant denied that Park Avenue had ever been or was at the time a public street of the city, and also denied the other material allegations of the complaint.

There was evidence on behalf of the plaintiffs to the effect that Park Avenue was a dirt street which had been regularly scraped and kept in repair by the city ever since the town of Burlington was known as "Company Shops," and for a long period before that time.

W. S. Shelton, a witness for the plaintiffs, testified that prior to the closing of South Park Avenue, in connection with the Church Street underpass, it had been opened as a public street for fifty years.

G. M. Brooks testified that he had been living in Burlington about forty years and knew Park Avenue in front of the Trollinger and Moore properties from Hoke Street and Church Street; that while working for the town about twenty-five or thirty years ago he had occasion to break up that street with a road machine, when they had teams to pull the scrapers and did not have tractors. Witness did not remember over what period of years he worked it for the town, but knew that he worked a side ditch next to the Moore and Trollinger properties and dug a ditch on the north side next to the railroad; that he worked this street, as well as the other dirt streets of the city, and had worked this street about the same as he did on other streets.

S. A. Steele testified that the city of Burlington had been working that part of South Park Avenue and had worked it for twenty or thirty years, keeping it in passable condition.

J. H. Freeland testified that he had been living in Burlington for about thirty years and was mayor of the city in 1911, 1912, and 1913; that he had known the road from Church Street to Hoke Street for about thirty-six years, and that the general public had been using it for that length of time; that during the time he was mayor the street was worked occasionally with a one-horse wagon, coal and cinders given to the town by the railroad being used to fill up the holes. Witness thought it got as much attention as any of the other streets of the city. The witness testified as to the Standard Oil Company oil tank, and as to a three-way contract, to which the city was a party, giving the Standard Oil Company permission to put a tank on the railroad right of way, between Mrs. Trollinger's land and the railroad. The privilege was obtained from the city on the recommendation of the Street Committee.

There was further evidence as to the value of the property before and after Park Avenue was closed, or partially closed, by the underpass.

The defendant offered testimony with regard to the value of the properties, and some further testimony with regard to the use of the area known as "Park Avenue" by the town of Burlington.

In this connection, Earl B. Horner testified that he had been mayor of Burlington for nineteen years; that he was familiar with the property line of the North Carolina Railroad right of way between Church Street and Hoke Street; that the city had tried to pave it at one time but the North Carolina Railroad Company denied the right of the city to improve the property, and stated that if the city laid a street along there they would tear it up if they wanted to lay tracks. As a result of the controversy the city did not endeavor to improve it in any way; that the city thought at one time it owned the property immediately adjoining Mrs. Moore's and Mrs. Trollinger's property for street purposes, but the North Carolina Railroad Company "convinced us we did not."

Exceptions were noted to the instructions to the jury and to the admission and rejection of evidence. At the conclusion of the plaintiffs' evidence, and again at the conclusion of all the evidence, defendant moved for judgment as of nonsuit, which was overruled. The jury answered the issues submitted to it in favor of the plaintiffs, and judgment in favor of the plaintiffs and against the defendant was rendered thereupon. From this the defendant appealed.

Allen & Madry and Brooks, McLendon & Holderness for plaintiffs, appellees.

Cooper, Curlee & Sanders for defendant, appellant.

PER CURIAM. Upon a thorough examination of the exceptions in the record, the Court is of the opinion that they disclose no reversible error. Since no new principles of law are involved in the case, an extended opinion seems to be unnecessary. We find

No error.

LEWIS SEGERS v. GATE CITY LIFE INSURANCE COMPANY.

(Filed 4 January, 1939.)

APPEAL by the defendant from *Hill, Special Judge,* at April Term, 1938, of FORSYTH. No error.

Action by the plaintiff beneficiary under policy of insurance upon the life of Willis Horton, deceased, in the sum of $240.00.

Upon issues submitted the jury returned the following verdict:

"1. Did the alleged insured, Willis Horton, apply for and obtain the issuance and delivery from the defendant Gate City Life Insurance Company of the policy sued on in this action, as alleged? Ans.: 'Yes.'

"2. If so, was said policy in full force and effect on the date of the death of said Willis Horton, as alleged? Ans.: 'Yes.'

"3. What amount, if any, is the defendant indebted to the plaintiff? Ans.: '$240.00, with interest at six per cent.' "

From judgment on the verdict defendant appealed.

Hoyle C. Ripple for plaintiff, appellee.

Ratcliff, Hudson & Ferrell and Spruill Thornton for defendant, appellant.

PER CURIAM. There was sufficient evidence to warrant the submission of the issues to the jury and the defendant's motion for judgment of nonsuit was properly overruled.

The defendant noted several exceptions to the judge's charge to the jury, but upon examination of these we find them without substantial merit. In the trial we find no material or prejudicial error sufficient to warrant the award of a new trial.

No error.

GRAHAM HARDEN ET AL. v. H. J. STOCKARD, SHERIFF, ET AL.

(Filed 4 January, 1939.)

APPEAL by plaintiffs from *Thompson, J.*, at June Term, 1938, of ALAMANCE.

Civil action to restrain sale under execution.

From judgment dissolving the temporary restraining order and dismissing the action, the plaintiffs appeal, assigning errors.

John J. Henderson for plaintiffs, appellants.

Huger S. King for defendants Stockard and Fertilizer Works, appellees.

PER CURIAM. The basis of the judgment is that the rights of all the parties, judgment creditor, mortgagees, and debtors, are to be determined according to what appears upon the public records of Alamance County. In this, there is no error. *Armstrong v. Price,* 203 N. C., 833, 167 S. E., 77; *Bank v. Sauls,* 183 N. C., 165, 110 S. E., 865; *Callahan v. Flack,* 205 N. C., 105, 170 S. E., 125.

Affirmed.

BELL SHOE STORES, INC., v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 4 January, 1939.)

APPEAL by defendant from *Phillips, J.*, at August Term, 1938, of GUILFORD.

Civil action by lessee to recover of lessor for damage to stock of goods "due to the negligence of the lessor" . . . or to "the failure on the part of the lessor to keep the roof and other parts of the building in proper repair," as provided in written lease.

Upon denial of liability and issues joined, there was a verdict and judgment for the plaintiff, from which the defendant appeals, assigning errors.

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

PER CURIAM. The action is one arising out of a written lease and a dispute between the parties as to the exact cause of the damage to plaintiff's stock of goods following a heavy rain on the night of 19 June, 1936. The jury has resolved the disputed matters of fact in favor of the plaintiff. We have discovered no ruling or action on the part of the trial court which we apprehend should be held for reversible error. The evidence was sufficient to carry the case to the jury. The verdict and judgment will be upheld.

No error.

J. J. CARROLL, TRADING AS MEBANE STORE COMPANY, v. WILLIAM ALSTON AND P. B. DILLARD.

(Filed 1 February, 1939.)

APPEAL by plaintiff from *Thompson, J.*, and a jury, at June Civil Term, 1938, of ORANGE. Error and remanded.

This is an action brought by plaintiff against defendants William Alston and P. B. Dillard. The plaintiff alleges: "That the defendant P. B. Dillard is now in the possession of the mules described in the mortgages of this plaintiff and on information and belief this plaintiff alleges that any claim which the said P. B. Dillard has on said mules is inferior to the claim of this plaintiff. And that the said defendant P. B. Dillard has given bond and under said bond still retains the possession of both mules."

The prayer of complaint is: "That he have and recover of the defendant William Alston (1) The sum of $214.77 with interest on $91.87 from November 1, 1935, until paid; with interest on $122.90 from November 1, 1936, until paid. (2) That the plaintiff be declared owner and entitled to the immediate possession of the two mules described in the chattel mortgages herein referred to and for an order directing a sale of said mules as provided by law and the proceeds derived from said sale be applied to satisfaction of plaintiff's judgment and the surplus, if any, be disposed of as provided by law. (3) For the costs of

this action as computed by the Clerk. (4) For such other and further relief as to the Court may seem just and proper."

The defendant P. B. Dillard alleges: "That he is the true, lawful and sole owner of the two mules hereinbefore described, and is entitled to the permanent possession thereof," etc. And "prays the Court (1) That he be declared the owner and entitled to retain the possession of the two mules hereinbefore referred to, and that any mortgages executed by the defendant William Alston to the plaintiff, in so far as they include the said mules, be declared null and void and of no effect. (2) That he recover the cost expended by him in this action. (3) For such other and further relief as he may be entitled to receive."

The issue submitted to the jury and their answer thereto, were as follows: "Is the plaintiff, J. J. Carroll, trading as Mebane Store Co., entitled to the immediate possession of the two mules described in the complaint? Answer: 'Yes.'"

The plaintiff tendered judgment upon the verdict, which the court refused to sign. Plaintiff excepted, assigned error and appealed to the Supreme Court.

Sam Gattis, Jr., and Bonner D. Sawyer for plaintiff.
Graham & Eskridge for defendant P. B. Dillard.

PER CURIAM. Upon petition and writ of *certiorari* duly ordered the record was amended so as to speak the truth and to strike out the phrase "and by consent of attorneys of plaintiff." The only exceptions and assignments of error are to the effect that the court refused to sign judgment tendered by plaintiff and signed the judgment shown in the record.

From the verdict of the jury and a careful review of the record, we think the court below should have signed the judgment tendered by plaintiff. *Winn v. Finch,* 171 N. C., 272 (276); C. S., 1241(2). The cause is remanded that the correct judgment be signed.

Error and remanded.

DISPOSITION OF APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

State v. Lawrence, 213 N. C., 674. Petition for *certiorari* denied.

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ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 10. Abatement and Survival of Actions in General.

The common law rule that a personal right of action dies with the person has been changed by statute so that causes of action, except in specified instances, C. S., 162, survive and are maintainable by or against the deceased person's personal representative, C. S., 159, 461. *Suskin v. Trust Co.*, 347.

Action for unliquidated damages for conversion of personal property survives against personal representative only and may not be maintained against trustees under his will. *Ibid.*

ACTIONS.

§ 4. Civil Action Based Upon Unlawful Act.

The statutes requiring licenses for operating trucks and trailers on the highways of this State are for revenue purposes and not for police regulation, and therefore the operation of motor vehicles without appropriate licenses subjects the operator to the penalty prescribed by statute, C. S., 2621 (13), but does not render the business itself illegal, and the allegations of the answer, if established, would not prevent plaintiff from maintaining the action to recover damages to his business. *Patterson v. R. R.*, 38.

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§ 8. Final Decree and Adoption.

An agreement to adopt a minor, made between the persons desiring to adopt the minor and the minor's parents, as the respective parties to the agreement, is not intended as an "Adoption of Minors" under ch. 2, Michie's Code. *Chambers v. Byers*, 373.

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§ 7e. Actions for Breach of Agricultural Tenancies.

In this action by a tenant to recover for breach of a half-share farming contract, defendant's demurrer *ore tenus* to the complaint and motion to nonsuit upon the evidence *held* properly overruled. *Doyle v. Whitley*, 814.

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§ 7. Prosecutions for Cruelty to Animals.

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APPEAL AND ERROR.

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§ 2. Judgments Appealable.

Whether the denial of a motion to strike out is appealable under C. S., 638, *quære*, since the same question may be presented by objections to the evidence and determined upon review of the final judgment. *Trust Co. v. Dunlop*, 196.

The Supreme Court, in its discretion, may determine an appeal on its merits even conceding that the appeal is premature, the rights of appellee not being prejudiced thereby. *Bright v. Hood, Comr.*, 410.

§ 3a. Parties Who May Appeal.

Letters of administration were issued to appellant upon affidavit of deceased's brother. Thereafter an administrator *c. t. a.* was appointed. No question of disqualification or default under C. S., 31, and no question of preferential right of nomination and substitution was involved, and no effort to impeach any acts of plaintiff as administrator was made. *Held:* The appointment of the administrator *c. t. a.* revokes the first letters of administration, and the revocation of the first letters separated plaintiff from all connection with the estate, and he is not the "party aggrieved" by the second order, C. S., 632, and no substantial right of his was thereby affected, C. S., 638, and his appeal therefrom is dismissed. *In re Estate of Suskin*, 219.

§ 6f. Objections and Exceptions to Charge.

The exception of the individual defendant to the charge on the ground that it failed to refer to him directly, but treated the cause as though it were solely against the corporate defendant, is not a "broadside" exception, since it refers to a definite distinguishable feature, sufficiently pointed out, running throughout the charge. *Robinson v. Transportation Co.*, 489.

Exceptions to statement of contentions will not be sustained when matter was not brought to court's attention in apt time. *Bryant v. Reedy*, 748.

APPEAL AND ERROR—*Continued.*

§ 6g. Parties Entitled to Complain and Take Exception.

Appellants may not complain of the charge relative to an issue answered in their favor. *Walter v. Winecoff*, 356.

Plaintiff assigned as error the court's refusal to submit an issue requested. Under the contract sued on plaintiff would not have been entitled to recover on the issue even had it been answered in the affirmative, and the party which would have been entitled to recover thereunder in the event of an affirmative answer did not appeal. *Held:* The alleged error was not prejudicial to plaintiff appellant. *Kluttz v. Allison*, 379.

§ 8. Theory of Trial.

An appeal will be determined in accordance with the theory of trial in the lower court. *Gorham v. Ins. Co.*, 526.

§ 12. Pauper Appeals.

There is no authority for granting an appeal *in forma pauperis* without proper, supporting affidavit, and an affidavit which fails to aver that appellant is advised by counsel learned in the law that there is error of law in the judgment appealed from, is fatally defective. C. S., 649. *Gilmore v. Ins. Co.*, 674.

§ 13. Powers of and Proceedings in Lower Court After Appeal.

When plaintiff appeals from judgment of the court allowing an amendment to the verification and alimony *pendente lite*, the case is no longer pending in the Superior Court, and it is without authority to enter a subsequent order, while the appeal is pending, allowing additional fees to counsel of defendant. *Ragan v. Ragan*, 36.

§ 19. Necessary Parts of Record.

Petition is necessary part of record proper upon appeal involving nonresident's right to removal. *Mason v. R. R.*, 21.

§ 24. Necessity of Exceptions to Support Assignments of Error.

Exceptions to the charge not set out in the statement of case on appeal will not be considered. Rule of Practice in the Supreme Court, No. 21. *Smith v. Supply Co.*, 406.

§ 29. Abandonment of Assignments by Failure to Discuss in Briefs.

Exceptions not brought forward in appellant's brief are deemed abandoned. Rule 28. *Carrier v. Bryant*, 191.

§ 31a. Dismissal of Pauper Appeals for Failure to Comply with Statutory Requirements.

The affidavit required in pauper appeals is jurisdictional, and when the affidavit is fatally defective the Supreme Court acquires no jurisdiction and the appeal must be dismissed. *Gilmore v. Ins. Co.*, 674.

§ 31e. Dismissal for That Question Sought to Be Presented Has Become Academic.

When order of disbarment entered by Supreme Court renders academic the question sought to be presented by the appeal in the disbarment proceedings instituted before the Trial Committee of the State Bar, the appeal will be dismissed. *In re Brittain*, 95.

§ 31f. Dismissal of Appeal for Insufficiency of Record.

Petition for removal is necessary part of record on appeal from failure to grant removal, and when it does not appear of record the appeal will be dismissed. *Mason v. R. R.*, 21.

APPEAL AND ERROR—*Continued.*

§ 31h. Dismissal for Want of Competent Parties.

Appellant *held* not party aggrieved and appeal is dismissed. *In re Estate of Suskin*, 219.

§ 37b. Review of Matters in Discretion of Court.

Taxing of cost *held* within discretion of court, and not reviewable. *Kluttz v. Allison*, 379.

§ 37d. Conclusiveness of Verdict of Jury.

The verdict of the jury is conclusive in the absence of error of law in the trial. *Stone v. Benson*, 280.

§ 37e. Conclusiveness of Findings of Fact.

The findings of fact of the court under agreement of the parties are as conclusive as the verdict of the jury. *Funeral Home v. Spencer*, 702.

§ 38. Presumptions and Burden of Showing Error.

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent. *Patterson v. Hosiery Mills*, 24; *Powell v. Veasey*, 25; *Ins. Co. v. Stinson*, 97; *Ins. Co. v. Stinson*, 98; *Brantley v. R. R.*, 817; *Edge v. Feldspar Corp.*, 818; *Johnson v. Paper Co.*, 828; *S. v. Terrell*, 831; *Sawyer v. Cox*, 839.

Where motion to strike out is addressed to court's discretion, it will not be presumed that court denied the motion for want of power. *Warren v. Land Bank*, 206.

The burden is on appellant to make error clearly appear, as the presumption is against him. *Scott v. Swift & Co.*, 580.

§ 39a. Harmless and Prejudicial Error in General.

A judgment will not be disturbed for harmless or immaterial error. *In re Appeal of Parker*, 51.

§ 39d. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

Error in admitting evidence that defendant's driver had been convicted of manslaughter growing out of the same collision for which damages in the civil action are sought, cannot be held harmless, since the evidence constitutes a challenge to the jury that they ratify and affirm the action of the jury in the criminal prosecution. *Morris v. Service Co.*, 562.

Exclusion of evidence *held* not prejudicial when same evidence is elicited on cross-examination. *Bryant v. Reedy*, 748.

§ 39e. Harmless and Prejudicial Error in Instructions or Remarks of Court.

Remarks of court tending to prejudice minds of jurors against party is reversible error, and may not be cured by subsequent remarks of court. *Thompson v. Angel*, 3.

The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial, even in the absence of a request for special instructions. *Spencer v. Brown*, 114.

An erroneous instruction on the measure of damages is not cured by the fact that the court may have laid down the correct rule in other portions of the charge, since it cannot be presumed that the jury was able to distinguish at which time the court was laying down the correct rule. *Rogers v. Construction Co.*, 269.

Failure to charge law of concurrent negligence *held* not cured by verdict that injury was not result of defendant's negligence. *Harvell v. Wilmington*, 608.

APPEAL AND ERROR § 39e—*Continued.*

Charge *held* without error when construed as a whole. *Bryant v. Reedy*, 748.

§ 40a. Review of Judgments on Findings of Fact.

A judgment entered on findings of fact will not be disturbed on an exception to an immaterial finding which has no substantial bearing upon the merits of the controversy. *In re Appeal of Parker*, 51.

§ 40b. Review of Orders on Motions to Strike Out.

Denial of motion to strike out *held* not prejudicial when no evidence in support of irrelevant allegations is admitted. *Warren v. Land Bank*, 206.

§ 40e. Review of Judgments on Motions to Nonsuit.

Upon appeal from judgment as of nonsuit the evidence will be considered in the light most favorable to plaintiff. *Covington v. James*, 71; *Morgan v. Spruill*, 255.

§ 40g. Review of Constitutional Question.

The Supreme Court will not venture advisory opinions on constitutional questions, and may not decide a constitutional question unless the question is properly presented. *S. v. Lueders*, 558.

The Supreme Court will not decide a constitutional question, even when properly presented, when the appeal may be properly determined on a question of less moment. *Ibid.*

§ 41. Questions Necessary to Determination of Appeal.

When a new trial is awarded on certain exceptions, other exceptions relating to matters which may not arise on the subsequent hearing need not be considered. *Henley v. Holt*, 384; *Robinson v. Transportation Co.*, 489; *Morris v. Service Co.*, 562; *Beck v. Bottling Co.*, 566.

Where it is determined on appeal that the judgment as of nonsuit was proper for want of sufficient evidence of negligence, it is not necessary to decide whether the conduct of plaintiffs constituted contributory negligence as a matter of law. *Johnson v. R. R.*, 484.

§ 49a. Law of the Case.

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed and becomes the law of the case without becoming a precedent for other cases. *Powell v. Veasey*, 25.

Decision that plaintiffs are not entitled to judgment on the pleadings but that issue of fact was raised for jury precludes judgment of nonsuit on subsequent hearing. *O'Briant v. Lee*, 723.

Where an order continuing a temporary restraining order is affirmed on appeal by a divided Court, the decision is the law of the case only as to the continuance of the restraining order, the only matter presented for decision, and is not the law of the case as to whether the order should be made permanent on the final hearing on the merits. *Patterson v. Hosiery Mills*, 806.

ARMY AND NAVY.

§ 4. Pensions and Benefits.

Congress has the unquestioned power to allow pensions and disability benefits to World War veterans, and to exempt such benefit payments from taxation and execution, but under the Federal Act of 1935, sec. 454-a, Title 38, U. S. C. A., such exemptions do not apply to *bona fide* investments made with the proceeds of such benefit payments. *Bryant v. Carrier*, 174.

ASSAULT.

§ 3. Pleadings.

Complaint alleging unprovoked, lascivious assault by customer in restaurant on plaintiff waitress *held* to state cause of action against the customer. *Sammons v. Fasul*, 576.

§ 8. Indictment.

A charge of assault with a deadly weapon with intent to kill, resulting in serious injury, is a charge of a felony, C. S., 4214, and defendant may not be put to answer thereon but by indictment. Art. I, sec. 12. *S. v. Clegg*, 675.

ASSIGNMENTS.

§ 1. Rights and Interests Assignable.

All ordinary business contracts are assignable unless assignment is expressly prohibited by statute or is in contravention of public policy. *Bank v. Jackson*, 582.

A contract for money to become due in the future may be assigned. *Ibid.*

§ 2. Consent and Acceptance.

Contract in this case *held* to preclude assignment of money to become due thereunder without approval of debtor. *Bank v. Jackson*, 582.

§ 7. Priorities.

Under facts of this case, second assignee, who first gave notice to debtor, *held* entitled to priority over first assignee. *Bank v. Jackson*, 582.

ASSISTANCE, WRIT OF.

§ 1. Nature and Grounds of Writ.

A writ of assistance issues from a court having equitable jurisdiction to enforce its decrees or orders conferring a clear right to the present possession or enjoyment of real property, and ordinarily it issues only on motion after due notice and against parties or persons bound by the terms of the decree. *Gower v. Clayton*, 309.

ATTORNEY AND CLIENT.

§ 10. Parties Liable for Fees, Lien and Collection.

While ordinarily a defendant has the right to employ counsel of his own choosing, when he contracts with the surety on a bond executed by them that the surety should be at liberty to employ an attorney of its own choosing and defend the suit, and that the principal should indemnify the surety for all expenses, including attorney's fees, the principal may not escape liability for fees of the attorney selected by the surety by giving notice to the surety before trial that he is ready and able to take care of the defense and would not reimburse the surety. *Casualty Co. v. Teer*, 29.

The court is without power to impose a lien on the land to secure an attorney's fee allowed by the court in the action involving title to the land, in the absence of agreement between the attorney and client, or intervention on the part of the attorney giving the client an opportunity to be heard on the attorney's claim. *Crutchfield v. Foster*, 551.

§ 12. Jurisdiction of Disbarment Proceedings and Procedure.

When on appeal to the Supreme Court in disbarment proceedings instituted before the Trial Committee of the State Bar, it appears that respondent has confessed his guilt in open court to four crimes, all involving moral turpitude, and nothing is offered in defense or by way of excuse, respondent will be disbarred by order of the Supreme Court upon motion of the Attorney-General without the necessity of deciding the questions sought to be presented by the appeal. *In re Brittain*, 95.

AUTOMOBILES.

III. Operation and Law of the Road
7. Pedestrians. Manheim v. Taxi Corp., 689.
9a. Attention to Road and Due Care in General. Farfour v. Fahad, 281.
9b. Distance between Vehicles Traveling in Same Direction. Smith v. Coach Co., 314.
9c. Safety Statutes in General. Marsh v. Byrd, 669.
10. Right Side of Highway. Farfour v. Fahad, 281; Smith v. Supply Co., 406; Robinson v. Transportation Co., 489; Guthrie v. Gocking, 513.
11. Passing Vehicles on Highway. Smith v. Coach Co., 314.
12a. Speed in General. Fleeman v. Coal Co., 117; Smith v. Coach Co., 314; Morris v. Johnson, 402; S. v. Crayton, 579.
12c. Intersections in General. Fleeman v. Coal Co., 117.
12e. Boulevards and Through Highways. Marsh v. Byrd, 669.
13. Stopping, Starting, and Turning. Smith v. Coach Co., 314.
14. Parking and Parking Lights. Cole v. Koonce, 188.
16. Loading and Number of Passengers. Roberson v. Taxi Service, 624.
18a. Negligence, Proximate Cause, and Last Chance. Farfour v. Fahad, 281.
18c. Contributory Negligence. Cole v. Koonce, 188; Smith v. Coach Co., 314; Roberson v. Taxi Service, 624; Manheim v. Taxi Corp., 689.
18e. Pleadings. Guthrie v. Gocking, 513.
18f. Evidence. Morris v. Service Co., 562.
18g. Sufficiency of Evidence and Nonsuit. Smith v. Coach Co., 314; Morris v. Johnson, 402; Smith v. Supply Co., 406; Robinson v. Transportation Co., 489; Marsh v. Byrd, 669; Manheim v. Taxi Corp., 689.
18h. Instructions. Spencer v. Brown, 114; Fleeman v. Coal Co., 117; Ogle v. Gibson, 127; Williams v. Hunt, 572.
IV. Guests and Passengers
19. Liability of Driver to Guest in General. Farfour v. Fahad, 281.
21. Parties Liable. Cunningham v. Haynes, 456; Harvell v. Wilmington, 608.
22. Actions by Guests. Farfour v. Fahad, 281; Cunningham v. Haynes, 456.
V. Liability of Owner for Driver's Negligence
24. On Doctrine of Respondeat Superior. Rothrock v. Robertson, 26; Frank v. McIntosh, 465; Robinson v. Transportation Co., 489.
25. Family Car Doctrine. Morris v. Johnson, 402.
VII. Criminal Responsibility
32c. Indictment and Warrant in Criminal Prosecutions. S. v. Johnson, 319; S. v. Crayton, 579.
32e. Sufficiency of Evidence and Nonsuit. S. v. Huggins, 568.
32h. Judgment and Sentence. S. v. Crews, 705.
33. Responsibility of Owner for Driver's Criminal Negligence. S. v. Spruill, 123.

§ 7. Pedestrians.

Plaintiff's evidence tended to show that he, a minor nine years of age, paused, looked up and down the street before attempting to cross the street at an intersection, saw no cars approaching, and had gone over half way across the street when he was struck by a taxi which was being driven at an excessive speed. Defendants' evidence was to the effect that plaintiff failed to pause, look or listen and ran headlong into the path of the approaching taxi. *Held:* The conflicting evidence raises questions of fact which were properly submitted to the jury on the issue of whether plaintiff used due care for his own safety in the light of his age, intelligence, and capacity. *Manheim v. Taxi Corp.*, 689.

§ 9a. Attention to Road and Due Care in General.

Evidence *held* insufficient to support inference that accident was result of sleepiness of driver. *Farfour v. Fahad*, 281.

§ 9b. Distance Between Vehicles Traveling in Same Direction.

Whether plaintiff failed to keep proper distance behind bus *held* for jury under the evidence. *Smith v. Coach Co.*, 314.

§ 9c. Safety Statutes and Ordinances in General.

Violation of ordinance and statute requiring vehicles to stop before entering through street intersection is negligence *per se*. *Marsh v. Byrd*, 669.

§ 10. Right Side of Highway.

Held: Evidence failed to show causal connection between failure to keep in right lane and the accident in suit. *Farfour v. Fahad*, 281.

Conflicting evidence as to whether toy wagon colliding with truck was on right side of highway *held* for jury. *Smith v. Supply Co.*, 406.

AUTOMOBILES—*Continued.*

Plaintiffs' evidence tended to show that the driver of the car in which they were riding was driving in a careful and prudent manner at a moderate rate of speed on the right of the center of the highway at the time of the collision in suit. *Held:* The evidence, considered in the light most favorable to plaintiffs, supports an inference that the truck involved in the collision was not being driven on its right of the center of the highway. *Robinson v. Transportation Co.*, 489.

When the driver of a car sees another car approaching from the opposite direction on the wrong side of the highway, he may assume that such other driver will turn to his right in time to avoid a collision, but when he sees, or should realize in the exercise of proper care and watchfulness, that such other driver is in a helpless condition or will be unable to avoid hitting his car, he must exercise increased exertion to avoid a collision. *Guthrie v. Gocking*, 513.

§ 11. Passing Vehicles on Highway.

Evidence that plaintiff started to pass defendant's bus going in the same direction, saw a car approaching from the opposite direction, and pulled her car back in line behind the bus, and thereafter struck the rear of the bus when it stopped without signal, *is held* not to show contributory negligence barring recovery as a matter of law for failure of plaintiff to ascertain she could not pass the bus in safety before attempting to do so, since the evidence does not show that such failure was a proximate cause of the injury. *Smith v. Coach Co.*, 314.

§ 12a. Speed in General.

Sec. 4, Art. 2, of the Motor Vehicle Act of 1927, was stricken out entirely by ch. 311, sec. 2, Public Laws of 1935, which later statute prescribed new speed regulations and provided that speeds in excess of the limits therein provided should be *prima facie* evidence that the speed is unlawful. *Fleeman v. Coal Co.*, 117.

Defendant moved to nonsuit for that plaintiff's evidence that she was traveling about 40 miles per hour established contributory negligence as a matter of law. *Held:* Such speed is neither negligence *per se* nor *prima facie* evidence of negligence, and whether it was negligent under the circumstances was a question for the jury. *Smith v. Coach Co.*, 314.

Evidence of speed in excess of the statutory limits is *prima facie* evidence that the speed is unlawful, and therefore constitutes *prima facie* evidence of negligence. Public Laws of 1935, ch. 311, sec. 2. *Morris v. Johnson*, 402.

Speed in excess of statutory maximum is merely *prima facie* evidence that speed is unlawful. *S. v. Crayton*, 579.

§ 12c. Intersections in General.

The twenty-five mile an hour limit prescribed for residential districts should not relieve the driver of a motor vehicle from the duty to decrease speed when approaching and crossing intersections, with further provision that local authorities might provide by ordinance for higher *prima facie* speeds between widely spaced intersections and upon through streets, provided signs are erected giving notice of the authorized speed. *Fleeman v. Coal Co.*, 117.

§ 12e. Boulevards and Through Highways.

Failure to stop before entering through street intersection *held* to take case to jury on question of proximate cause, the violation of the statute being negligence *per se*. *Marsh v. Byrd*, 669.

AUTOMOBILES—*Continued.*

§ 13. Stopping, Starting and Turning.

Evidence that driver failed to signal his intention to stop *held* sufficient for jury on issue of negligence. *Smith v. Coach Co.*, 314.

§ 14. Parking and Parking Lights.

Contributory negligence in striking truck parked on highway *held* for jury. *Cole v. Koonce*, 188.

§ 16. Loading and Number of Passengers.

The statute prohibiting the extension of any part of the load of a passenger vehicle beyond the line of the fenders on the left side of such vehicle, Public Laws of 1937, ch. 407, sec. 80 (b), imposes a duty for the safety of other vehicles on the highway, and is not conclusive on the question of contributory negligence of a passenger riding on the running board, with none of his body extending beyond the line of the fenders, who is injured by the negligent operation of another vehicle. *Roberson v. Taxi Service*, 624.

Riding on running board held not contributory negligence as matter of law in action against driver of other car. *Ibid.*

§ 18a. Negligence, Proximate Cause and Last Clear Chance.

There must be a causal connection between the violation of a safety statute and the injury in order for the negligence to be actionable. *Farfour v. Fahad*, 281.

§ 18c. Contributory Negligence.

Question of contributory negligence in striking truck parked on highway *held* for jury. *Cole v. Koonce*, 188.

Evidence *held* not to show contributory negligence as matter of law in plaintiff's failure to keep proper distance behind car traveling in same direction and in failing to see if plaintiff could pass car in safety. *Smith v. Coach Co.*, 314.

Riding on running board *held* not contributory negligence as matter of law in action for injury caused by another car. *Roberson v. Taxi Service*, 624.

Conflicting evidence as to whether minor used due care in crossing street *held* to raise issue for jury. *Manheim v. Taxi Corp.*, 689.

§ 18e. Pleadings.

Plaintiff alleged that defendant was negligent in failing to avoid collision with car approaching from opposite direction on wrong side of highway, resulting in injury to plaintiff, who was driving immediately back of defendant. *Held:* Defendant's demurrer was properly sustained, since ordinarily a driver may assume that a car approaching on the wrong side of the highway will be turned to the right in time to avoid a collision, and since the allegation that defendant driver should have seen that the driver of the third car was helpless or unconscious is a mere conclusion of the pleader unsupported by allegations of fact leading to that conclusion, and since it is not alleged that defendant driver might have turned either to the right or left in safety, or that such action would have saved plaintiff from injury. *Guthrie v. Gocking*, 513.

§ 18f. Evidence.

Conviction of criminal offense is irrelevant in civil action arising out of same accident. *Morris v. Service Co.*, 562.

§ 18g. Sufficiency of Evidence and Nonsuit.

Nonsuit on ground of contributory negligence of driver striking truck parked on highway *held* erroneous. *Cole v. Koonce*, 188.

AUTOMOBILES—*Continued.*

Evidence *held* not to show that plaintiff's failure to see if she could pass bus in safety was proximate cause of injury. *Smith v. Coach Co.*, 314.

Whether plaintiff failed to keep proper distance behind bus *held* for jury under the evidence. *Ibid.*

Defendant moved to nonsuit for that plaintiff's evidence that she was traveling about 40 miles per hour established contributory negligence as a matter of law. *Held:* Such speed is neither negligence *per se* nor *prima facie* evidence of negligence, and whether it was negligent under the circumstances was a question for the jury. *Ibid.*

Plaintiff's evidence tended to show that she was driving her automobile on the highway following a bus going in the same direction, that the bus driver suddenly stopped the bus without giving the signal required by C. S., 2621 (59). *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence notwithstanding evidence tending to show a sudden emergency making such stop imperative, and that the bus was equipped with signal lights that lighted when the brake was applied, such evidence being for the jury and not the court on defendant's motion to nonsuit. *Ibid.*

A *prima facie* showing of negligence in operating an automobile at a speed in excess of the statutory limits carries the case to the jury in the absence of evidence establishing contributory negligence as a matter of law. *Morris v. Johnson*, 402.

Plaintiff, a boy 14 years old, was injured when his small wagon and defendant's truck collided. Plaintiff's evidence tended to show that he was traveling on his right side of the street and was hit by the truck as it was being driven on its left side of the street as the driver was "cutting the corner" in driving into the street from an intersection. Plaintiff denied that he had admitted that the left front wheel of his wagon came off, causing his wagon to turn into the line of travel of the truck. Defendant offered evidence contradicting plaintiff's evidence on the material aspects. *Held:* Considering the evidence in the light most favorable to plaintiff, it is sufficient to be submitted to the jury. *Smith v. Supply Co.*, 406.

Evidence raising inference that driver was on wrong side of highway *held* sufficient on issue of negligence. *Robinson v. Transportation Co.*, 489.

Evidence of violation of statute and ordinance requiring car to stop before entering through street intersection *held* to take case to jury on question of proximate cause, the violations being negligence *per se*. *Marsh v. Byrd*, 669.

Evidence tending to show taxi was being driven at excessive speed along street and hit plaintiff pedestrian, who was crossing the street at an intersection, *held* sufficient to be submitted to the jury on the issue of negligence, and conflicting evidence as to plaintiff's failure to exercise due care in crossing street *held* to raise issue for jury on issue of contributory negligence. *Manheim v. Taxi Corp.*, 689.

§ 18h. Instructions in Actions to Recover for Negligent Operation.

Instruction on issue of contributory negligence *held* for error in failing to explain law arising upon evidence relating to violations of safety statutes relied on by defendant. *Spencer v. Brown*, 114.

Instruction that speed in excess of 15 miles per hour at obstructed intersection was negligence *per se held* error. *Fleeman v. Coal Co.*, 117.

Instruction *held* for error as requiring defendants to show absence of negligence in order to prevail on issue of contributory negligence. *Ogle v. Gibson*, 127.

AUTOMOBILES—*Continued.*

Where there is no evidence that the accident in suit occurred in a business district it is error for the court, in its instructions to the jury, to read the statutory speed restrictions applicable to business districts. *Williams v. Hunt*, 572.

§ 19. Liability of Driver to Guest in General.

In an action by a guest to recover for injuries sustained in an automobile accident occurring in the State of Virginia, liability of defendants, if any, must be determined by the laws of that State, which requires a showing of gross negligence in order for the guest to recover. *Farfour v. Fahad*, 281.

§ 21. Parties Liable.

Where drivers of both cars are guilty of negligence proximately causing collision, guest may recover from either or both. *Cunningham v. Haynes*, 456.

Where the negligence of the driver is not imputable to a guest in the car, the guest is entitled to recover of defendant if its negligence is the proximate cause of the injury or one of the proximate causes thereof, and the negligence of the driver will not exculpate defendant unless such negligence is the sole proximate cause of the injury. *Harvell v. Wilmington*, 608.

§ 22. Actions by Guests to Recover for Negligent Injuries.

While the courts of Virginia treat the difference between simple negligence and gross negligence as one of degree, and while ordinarily the evidence must be submitted to the jury upon proper instructions from the court as to the degree of negligence involved, the verdict of the jury is not conclusive, and the matter is not beyond review in the appellate court. *Farfour v. Fahad*, 281.

Evidence *held* insufficient to show gross negligence in this action by guest to recover for injuries under Virginia law. *Ibid.*

Complaint in this action by guest *held* to state joint negligence on part of both drivers involved in collision. *Cunningham v. Haynes*, 456.

§ 24. On Doctrine of Respondeat Superior.

Evidence that oil company leased a filling station with all necessary equipment for sale of products of the company, that the company had no control over or right to employ or discharge attendants at the station, and that an attendant caused the injury in suit while driving to the station with a car to be serviced in accordance with the orders of the lessee of the station, *is held* insufficient, in any aspect, to hold the oil company liable for the alleged negligence of the attendant on the doctrine of *respondeat superior*. *Rothrock v. Roberson*, 26.

Evidence that a minor purchased a truck upon deferred payments but that title thereto was taken in the father's name so the purchase contract could be executed, that upon the son's payment of the balance of the purchase price the father executed and acknowledged before a notary an assignment of the title, and that the accident in suit occurred thereafter while the son was hauling lumber from his father's land, that the purchaser of the lumber paid the father for the lumber and paid the son for the hauling, *is held* insufficient to be submitted to the jury on the issue of the father's liability under the doctrine of *respondeat superior*, since the evidence fails to show that at the time of and in respect to the collision the son was the agent or servant of the father or about his father's business. *Frank v. McIntosh*, 465.

Evidence tending to show that the driver of a truck was employed by the corporate defendant, and that at the time of the accident was returning after unloading the truck, is sufficient to support an inference that at the time the

driver was "about his master's business" and is sufficient to be submitted to the jury on the issue of *respondeat superior*. *Robinson v. Transportation Co.*, 489.

Plaintiffs sought to recover against the corporate defendant under the doctrine of *respondeat superior* upon evidence tending to show that the driver of the truck at the time of the collision was engaged in the scope of his employment. *Held:* The liability of the corporate defendant arising through the agency of the servant is a substantive feature of the case arising on the evidence, and is not a simple or self-explanatory principle of law, and the failure of the court to instruct the jury on this phase of the case constitutes reversible error. *Ibid.*

§ 25. Family Car Doctrine.

Evidence that title to a car was taken in the trade name of defendant's business, but that his wife and daughter habitually used the car, and did not customarily use any other car, and that at the time of the accident in suit defendant's daughter was driving the car with his consent, *is held* sufficient to be submitted to the jury on the issue of defendant's liability for the daughter's negligent driving under the family car doctrine. *Morris v. Johnson*, 402.

§ 32c. Indictment and Warrants in Criminal Prosecution.

Defendant was tried in the mayor's court of North Wilkesboro on charges of operating a motor vehicle while under the influence of intoxicating liquor and reckless driving. On appeal to the Superior Court, judgment was pronounced exceeding that permitted for the offense of reckless driving alone. *Held:* The mayor's court was without jurisdiction of the charge of operating a motor vehicle while under the influence of intoxicating liquor, and even conceding it had jurisdiction of the charge of reckless driving, the sentence exceeded that permitted for that offense, and the trial of defendant in the Superior Court upon the warrants, without a bill of indictment first being found and returned was a nullity. Ch. 144, Private Laws of 1913; C. S., 2621 (102). *S. v. Johnson*, 319.

Warrant charging that defendant exceeded statutory speed limit *held* insufficient to charge offense. *S. v. Crayton*, 579.

§ 32e. Sufficiency of Evidence and Nonsuit in Prosecutions for Culpable Negligence.

Held: The evidence permits the inference that the automobile was being operated by defendant recklessly and in willful or wanton disregard of the rights and safety of others, and in a manner likely to endanger the life of the deceased, and was properly submitted to the jury in this manslaughter prosecution on the issue of culpable negligence. *S. v. Huggins*, 568.

§ 32h. Judgment and Sentence.

On his plea of guilty of reckless driving, defendant was sentenced to twelve months in jail to be assigned to work on the public roads. Defendant's exception to the judgment must be sustained, and the case is remanded for sentence in accord with the statute which prescribes a maximum imprisonment of ninety days or a fine, or both. Section 60, ch. 148, Public Laws of 1927, N. C. Code, 2621 (102). *S. v. Crews*, 705.

§ 33. Responsibility of Owner for Driver's Criminal Negligence.

The evidence tended to show that the owner of a truck was riding therein in an intoxicated condition, and that the driver of the truck, with the owner's permission, was driving the truck for his own purposes. There was no evi-

AUTOMOBILES—*Continued.*

dence that the owner exercised any authority, direction or control over the operation of the truck, or that the driver was intoxicated or otherwise incompetent, or if he were, that the owner had knowledge thereof. *Held:* The evidence is insufficient to establish criminal responsibility on the part of the owner for alleged criminal negligence in the operation of the truck on the part of the driver resulting in the death of a third person. *S. v. Spruill*, 123.

The owner of a motor vehicle riding therein may not be held criminally responsible as an aider and abettor on a charge of manslaughter resulting from the operation of the vehicle by the driver when the driver is acquitted of all blame in the matter. *Ibid.*

BAILMENT.

(Deposit of securities for safe-keeping, see Banks and Banking § 7e.)

§ 6. Actions.

Where the jury finds that defendant is liable for certain chattels as bailee, and it appears that the specific chattels cannot be delivered, the trial court has discretionary power to retain the cause for trial on the issue of the value of the chattels at the time of the breach of the bailment. *Bright v. Hood, Comr.*, 410.

BANKRUPTCY.

§ 9. Debts Discharged.

Bankrupt has burden of proving that creditor's claim was included in schedule or that he had actual knowledge of proceedings. *Benner v. Phipps*, 14.

BANKS AND BANKING.

§ 6. Representation of Bank by Officers and Agents.

Evidence *held* to show cashier's authority to make compromise settlement or ratification of same by the bank. *Jones v. Bank*, 794.

§ 7e. Deposits for Safe-Keeping.

When bonds are delivered to a bank, and the bank gives receipts therefor respectively stipulating, first that the receipt must be surrendered when the bond therein described is delivered to the owner or his legal representative, and second, that the bond therein described was received for safe-keeping in the bank vault, the transaction constitutes a naked bailment, and does not create the relationship of debtor and creditor between the depositor and the bank, and in action to recover bonds, burden is on bank to establish defenses. *Bright v. Hood, Comr.*, 410.

§ 9b. Rights in Regard to Choses in Action Pledged as Security.

A borrower pledged as collateral for a note a life insurance policy. The note recited that the collateral was security for "this or any other liability or liabilities of mine or ours to said bank, due or to become due, or which may hereafter be contracted." The assignment of the life insurance policy provided that it was to secure "my debts, obligations, endorsements and liabilities to said bank." *Held:* The assignment of the policy was sufficiently broad to include the liability of the borrower as endorser on other notes held by the bank at the time of the assignment, and upon the exhaustion of the remedies against the maker of such other notes leaving a balance due thereon in a sum greater than the proceeds of the insurance policy, the bank is entitled to retain the whole of the proceeds of the policy as against the borrower's administrator. *Sellars v. Bank*, 300.

Pledgee may apply collateral pledged to payment of debt secured without instituting action. *Ibid.*

BANKS AND BANKING—*Continued.*

§ 16. Statutory Liability of Stockholders.

When statutory liability of stockholder is reduced to judgment it becomes fixed asset for benefit of creditors, which fixed liability Commissioner of Banks may sell in bulk. *Little v. Steele*, 343.

§ 18. Claims and Priorities.

Evidence of delivery of bonds to a bank for safekeeping, and the conflicting evidence as to the return of the bonds to the owner prior to insolvency of the bank, *held* properly submitted to the jury in plaintiffs' action to recover the bonds, the burden being on the receiver to establish defenses, since the transaction amounted to bailment, and claim was not barred by failure to institute suit in ninety days. *Bright v. Hood, Comr.*, 410.

§ 19. Liquidation by Sale of Assets in Bulk.

When the statutory, contingent liability of a stockholder has been reduced to judgment and thus made a fixed liability of the stockholder, the Commissioner of Banks may collect same in the manner which to him appears most advantageous to the creditors of the bank, and when the total assets of the bank are insufficient to pay creditors in full, the Commissioner of Banks may sell and assign the stock assessment judgment with the consent and approval of the Superior Court, Public Laws of 1927, ch. 113, subsec. 7, and apply the proceeds of sale to the payment of creditors of the bank, and when this has been done the assignee of the judgment obtains title thereto and the judgment continues in force as a lien on the real estate of the judgment debtor unaffected by the fact that the judgment was assigned in the sale in bulk of the assets remaining after substantial liquidation, or the fact that no specific value was placed on the stock assessment judgment. *Little v. Steele*, 343.

BASTARDS.

§ 3. Warrant and Indictment.

The warrant in a prosecution under ch. 228, Public Laws of 1933 (Michie's Code, 276 [a]), must allege that the failure or refusal of defendant to support his illegitimate child was willful, and where it does not do so, defendant's motion in arrest of judgment should be allowed. *S. v. McLamb*, 322.

§ 7. Limitation of Prosecutions.

A proceeding upon indictment charging defendant with willful neglect and refusal to support his illegitimate child, instituted more than three years after the birth of the child, is properly dismissed, ch. 228, Public Laws of 1933, sec. 3, and this result is not affected by the fact that defendant had admitted paternity of the child in a prior proceeding under C. S., 265-279, the limitation provided in sec. 3 of the Act of 1933 not being confined to proceedings to establish the paternity of the child. *S. v. Bradshaw*, 5.

BILLS AND NOTES.

§ 3. Consideration.

Cancellation of stock assessment judgment is valid consideration for notes executed to assignee of judgment. *Little v. Steele*, 343.

§ 8. Presumptions from Possession.

Possession of a note made to bearer is sufficient to place title in the holder, and actual possession is not necessary, it being sufficient if there has been constructive delivery, or possession for collection, even by the original holder or transferee, as agent of the real owner. *Everett v. Mortgage Co.*, 778.

BROKERS AND FACTORS.

§ 11. Right to Commissions Where Sale Not Completed.

Plaintiff broker gave a prospective purchaser an option on the land and the purchaser made payments thereunder to be applied on the purchase price, but finally failed to exercise the option. The broker was entitled under his contract with the vendors to commissions only after the vendors had received payments on the purchase price in a sum greatly in excess of the sums paid by the prospective purchaser. *Held:* Plaintiff broker is not entitled to recover any part of the sums paid by the prospective purchaser, and has no interest in the respective rights of the prospective purchaser and the vendors in regard to a check given by the prospective purchaser to the vendors in partial payment which was not cashed. *Kluttz v. Allison*, 379.

§ 12. Actions for Commissions.

In this action for damages for breach of a brokerage contract the issue as to the execution of the contract was answered in the affirmative by consent. Plaintiff contended that he secured a prospective purchaser and then found defendants had breached the contract by selling the land. Defendants contended that at the time the brokerage contract was executed they were negotiating for the sale to their purchaser and that plaintiff and defendants agreed that the brokerage contract should not be effective if defendants were able to consummate that sale. The court properly placed the burden of proof on the issue relating to the alleged condition precedent on defendants, stated the evidence relating thereto, and declared and explained the law arising thereon. *Held:* The controverted question was the existence of the alleged condition precedent, and not what constitutes a contract, and defendants' exception to the charge on the ground that it failed to define the word "contract" and failed to declare and explain the law arising on the evidence, C. S., 564, is without merit. *Walter v. Winecoff*, 356.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 3. For Mistake.

Mistake must be mutual in order to entitle party to rescission on that ground, and unilateral mistake is insufficient. *Cheek v. R. R.*, 152.

§ 4. For Fraud.

Evidence that vendor represented that land had enough standing timber to pay mortgage *held* not only too indefinite, but also an expression of opinion, and insufficient to entitle mortgagor to rescission. *Bericer v. Ins. Co.*, 554.

CARRIERS.

§ 5. Licensing.

Failure of carrier by truck to obtain proper licenses for trucks does not render the business illegal. *Patterson v. R. R.*, 39.

§ 10. Injury in Transitu.

The general rule that delivery of goods by a carrier in a damaged condition raises a rebuttable presumption of negligence on the part of the carrier is applicable to shipments of livestock with the modification that the carrier is not presumptively liable for injuries growing out of the natural propensities and innate viciousness of the animals in the absence of proof of negligence, and such presumption, being sufficient in itself to take the case to the jury, shifts the burden of going forward with the evidence upon the carrier. *Fuller v. R. R.*, 648.

Evidence *held* sufficient to overrule nonsuit in action to recover for injury to mules in transit. *Ibid.*

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 6a. After Acquired Property Subject to Mortgage Lien by Accession.

The doctrine of accession is inapplicable when the personal property placed upon the personal property mortgaged may be conveniently detached without injury to the property mortgaged, and tires placed upon an automobile do not become a part thereof by accession. *Silvertown Stores v. Caesar*, 85.

§ 6b. After Acquired Property Subject to Mortgage Lien by Terms of Contract.

The purchaser of an automobile executed a conditional sales contract to the seller, which contract provided that the lien should cover any equipment, repairs, replacements or accessories thereafter placed on the car. Thereafter the buyer purchased tires which were placed on the car, and executed a conditional sales contract on the tires and the automobile to secure the balance of the purchase price of the tires. Upon default, the seller of the car repossessed same, and the seller of the tires instituted claim and delivery proceedings for the tires alone. *Held:* The tires came into the hands of the buyer subject to the lien of the conditional sales agreement executed thereon, and the tire dealer's lien is not affected by the agreement relating to after-acquired property, and is superior to the lien of the automobile dealer, and the tire dealer is entitled to repossess the tires or to recover the value thereof from the automobile dealer, if delivery cannot be had. *Silvertown Stores v. Caesar*, 85.

COMPROMISE AND SETTLEMENT.

§ 3. Validity and Attack.

Evidence that defendant bank agreed to accept a smaller note with additional collateral from an insolvent borrower in payment of old notes in a larger sum, without evidence to the contrary, *held* to support court's instruction that if jury believed the evidence to answer the issue of compromise and settlement in the affirmative. *Jones v. Bank*, 794.

CONSTITUTIONAL LAW.

II. Construction of Constitution
3. General Rules for Construction. Sessions v. Columbus County, 634.
III. Governmental Branches and Powers
4a. Legislative Powers in General. S. v. Lueders, 558; Sessions v. Columbus County, 634.
4b. Taxing Power in General. Tobacco Co. v. Maxwell, 367; Twining v. Wilmington, 655.
4c. Delegation of Powers. Tobacco Co. v. Maxwell, 367.
6b. Power and Duty of Courts to Determine Constitutionality of Statutes. Tobacco Co. v. Maxwell, 367; S. v. Lueders, 558.
V. Civil Rights and Equal Protection of Laws
13. Equal Protection, Application and Enforcement of Laws. Tobacco Co. v. Maxwell, 367.
14a. Searches and Seizures. S. v. McGee, 184.
VI. Due Process of Law: Law of the Land
15a. Nature and Scope of Mandate. In re Appeal of Parker, 51; Patterson v. Hosiery Mills, 806.
18. Vested Rights. Patterson v. Hoisery Mills, 806.
VIII. Obligations of Contract
21. Substantive Provisions of Contractual Obligations. Patterson v. Hosiery Mills, 806.
22. Alteration of Remedies and Procedure. Building & Loan Assn. v. Jones, 30.
XI. Constitutional Guarantees of Persons Accused of Crime
26. Necessity of Indictment. S. v. Johnson, 319; S. v. Clegg, 675.
27. Right to Jury Trial. S. v. Lueders, 558.
28. Right to Confront Accusers. S. v. Meyers, 652.
32. Cruel and Unusual Punishment. S. v. Moschoures, 321.

§ 3. General Rules for Construction of Constitutional Provisions.

Reconciliation between germane constitutional provisions is a postulate of constitutional as well as statutory construction. *Sessions v. Columbus County*, 634.

CONSTITUTIONAL LAW—*Continued.*

§ 4a. Legislative Powers in General.

The Constitution is the supreme law, binding on, and unalterable by, the law-making body, and an act of the Legislature in conflict therewith is not merely impolitic but void. *S. v. Lueders*, 558; *Sessions v. Columbus County*, 634.

§ 4b. Taxing Power of General Assembly.

When the General Assembly has the power to levy a particular tax any collateral motives in levying the tax are not subject to judicial review. *Tobacco Co. v. Maxwell*, 367.

The General Assembly has wide discretion in selecting the objects of taxation, and in classifying business and trades for taxation and allocating to each its proper share of the expenses of Government. *Ibid.*

The amount of a tax levy is largely in the discretion of the General Assembly and the courts may determine that it is excessive as a matter of law only in exceptional and unusual cases, and the tax of $1,000 per county for dealers in scrap tobacco, imposed by ch. 414, Public Laws of 1937, *is held* not excessive as a matter of law. *Ibid.*

The people of the State, in their Constitution, may place what restrictions they please upon the creation of public debt, and in doing so, to distinguish between debts different in kind and necessity. *Twining v. Wilmington*, 655.

§ 4c. Delegation of Powers.

Statute imposing license tax on scrap tobacco dealers *held* not void as delegating taxing power to warehousemen. *Tobacco Co. v. Maxwell*, 367.

§ 6b. Power and Duty to Determine and Declare Constitutionality of Statutes.

The courts will not declare a statute unconstitutional unless it is clearly so. *Tobacco Co. v. Maxwell*, 367; *S. v. Lueders*, 558.

The courts may determine the constitutionality of a statute only in the exercise of the judicial power vested in them by the Constitution, but when a constitutional question is properly presented, the courts have the power and the duty to declare and enforce the supreme law and reject a legislative act in conflict therewith. *S. v. Lueders*, 558.

§ 13. Equal Protection, Application and Enforcement of Laws.

Statutes imposing license tax on scrap tobacco dealers *held* not discriminatory. *Tobacco Co. v. Maxwell*, 367.

§ 14a. Searches and Seizures.

Ch. 339, sec. 1½, Public Laws of 1937, does not render incompetent evidence obtained by unlawful search without warrant. *S. v. McGee*, 184.

§ 15a. Nature and Scope of Mandate Prohibiting Taking of Property Except by Due Process of Law.

Depreciation in value of property caused by operation of valid zoning ordinance is not a taking of property. *In re Appeal of Parker*, 51.

Right of preferred stockholder to accrued dividends may not be destroyed without due process of law. *Patterson v. Hosiery Mills*, 806.

§ 18. Vested Substantive Rights.

Vested right to declaration of dividends on preferred stock may not be destroyed. *Patterson v. Hosiery Mills*, 806.

§ 21. Substantive Provisions of Contractual Obligations.

The right of a holder of cumulative preferred stock to have accrued dividends thereon declared by the corporation when earned is a vested property

CONSTITUTIONAL LAW—*Continued.*

right which may not be divested without due process of law, and which may not be destroyed by legislative impairment of the contract out of which they arose, either directly or by authorizing the corporation to amend its charter. *Patterson v. Hosiery Mills*, 806.

§ 22. Alteration of Remedies and Procedure as Affecting Obligations of Contract.

Ch. 529, Public Laws of 1933, providing a one-year limitation for actions for deficiency judgments after foreclosure, protects all substantial rights of the parties and its application *held* not unconstitutional as impairing the obligations of the contract. *Building and Loan Assn. v. Jones*, 30.

§ 26. Necessity of Indictment.

Defendant was tried in the mayor's court of North Wilkesboro on charges of operating a motor vehicle while under the influence of intoxicating liquor and reckless driving. On appeal to the Superior Court, judgment was pronounced exceeding that permitted for the offense of reckless driving alone. *Held:* The mayor's court was without jurisdiction of the charge of operating a motor vehicle while under the influence of intoxicating liquor, and even conceding it had jurisdiction of the charge of reckless driving, the sentence exceeded that permitted for that offense, and the trial of defendant in the Superior Court upon the warrants, without a bill of indictment first being found and returned was a nullity. Ch. 144, Private Laws of 1913; C. S., 2621 (102). *S. v. Johnson*, 319.

A charge of assault with a deadly weapon with intent to kill, resulting in serious injury, is a charge of a felony, C. S., 4214, and defendant may not be put to answer thereon but by indictment. Art. I, sec. 12. *S. v. Clegg*, 675.

A warrant may not be amended so as to charge a different offense, and when a defendant is charged in a warrant with a felony, the Superior Court may not permit an amendment to the warrant so as to charge a misdemeanor, and put defendant to trial thereon over his objection without a bill of indictment, or waiver of bill for a misdemeanor. *Ibid.*

§ 27. Right to Jury Trial in Criminal Prosecutions.

Court may not render judgment on statement of facts agreed. *S. v. Lueders*, 558.

§ 28. Right to Confront Accusers.

Evidence admitted against one defendant only may not be considered against the other without giving him opportunity to cross-examine witnesses in regard thereto. *S. v. Myers*, 652.

§ 32. Cruel and Unusual Punishment.

A sentence of imprisonment for 18 months on the first count of unlawful possession of intoxicating liquors for the purpose of sale, and a like sentence on the second count of unlawful sale of intoxicating liquors, suspended for five years upon condition that defendant does not violate the criminal laws of the State, does not impinge the constitutional provision against cruel or unusual punishment. N. C. Constitution, Art. I, sec. 14. *S. v. Moschoures*, 321.

CONTEMPT OF COURT.

§ 2b. Willful Disobedience of Court Order.

Final decree was entered restraining a municipality from constructing "the proposed power plant and electric system" described in the complaint, or doing any act in furtherance thereof, the basis of the decree being that the

CONTEMPT OF COURT—*Continued.*

proposed plant was *ultra vires* the city. Thereafter the council of the city passed a resolution authorizing the construction of a power plant on the same site as originally proposed, and this contempt proceeding was instituted. Defendant alleged and the court found that the second proposed plant differed materially from the first in "purpose of construction, productive capacity, and important physical features." *Held:* The allegations and findings of dissimilarity between the two undertakings supports the action of the court in discharging the rule for contempt. *Williamson v. High Point*, 693.

§ 5. Hearings and Finding Upon Order to Show Cause.

Upon the hearing of an order to show cause why defendant should not be held in contempt for violation of a decree of court, the sole question before the court is whether the decree has been violated, and the court correctly disregards defendant's prayer for modification of the order. *Williamson v. High Point*, 693.

CONTRACTS.

§ 1. Nature and Essentials in General.

Persons *sui juris* may make any contract if it is not contrary to law or public policy. *Chambers v. Byers*, 373.

§ 6. Form and Requisites in General.

The terms of a contract must be sufficiently definite and complete to express with a reasonable degree of certainty the full intent of the parties, since neither the court nor the jury may make the agreement for them. *Holder v. Mortgage Co.*, 128.

§ 8. General Rules of Construction.

The intent of the parties as gathered from the language used, the subject matter and purpose of the agreement, is controlling in interpreting the contract. *Chambers v. Byers*, 373.

Pertinent public statutes in force at the time of the execution of a contract are controlling. *Spain v. Hines*, 432.

§ 19. Parties Who May Sue.

Minor may sue on contract to devise made with her parents by person desiring to adopt her. *Chambers v. Byers*, 373.

§ 22. Evidence in Actions on Contracts.

While prior negotiations are merged in the contract, evidence of prior negotiations may be competent to show the intent of the parties or the actual contract. *Henley v. Holt*, 384.

§ 23. Instructions in Actions on Contracts.

Held: The controverted question was the existence of the alleged condition precedent, and not what constitutes a contract, and defendants' exception to the charge on the ground that it failed to define the word "contract" and failed to declare and explain the law arising on the evidence, C. S., 564, is without merit. *Walter v. Winecoff*, 356.

CONVERSION.

§ 1. Nature and Essentials of Doctrine.

Equitable conversion is the change in property from real to personal, or from personal to real, the change not actually taking place, but being presumed by application of the maxim that equity regards that as done which ought to be done. *Seagle v. Harris*, 339.

CONVERSION—*Continued.*

§ 2. Circumstances Creating Conversion.

Direction in a will that the executor sell certain lands and use the proceeds of sale to pay debts of the estate, and divide the balance among testator's three children, are imperative directions constituting an equitable conversion of the property into personalty. *Seagle v. Harris*, 339.

§ 4. Reconversion.

When property is converted by will from realty to personalty for division among designated beneficiaries after payment of certain debts, all the beneficiaries must unite in order to constitute a reconversion by election, and such election must be expressly made or inferred from acts and conduct which manifest an unequivocal intention to do so, and the circumstances relied on by plaintiff beneficiary are held insufficient to justify a finding that defendant beneficiaries had joined in an election for a reconversion, and judgment of the trial court that plaintiff beneficiary was not entitled to hold one-third the land in question in severalty upon tender of her *pro rata* part of the debt, is without error. *Seagle v. Harris*, 339.

CORPORATIONS.

§ 16. Dividends.

The holder of cumulative preferred stock upon which dividends are accrued for several years has a vested property right to the payment of the dividends by the corporation out of appropriate funds when earned, which the stockholder may enforce in equity, although such dividends are not a debt of the corporation until declared and although circumstances may postpone or prevent declaration of such dividends. *Patterson v. Hosiery Mills*, 806.

The right of a holder of cumulative preferred stock to have accrued dividends thereon declared by the corporation when earned is a vested property right which may not be divested without due process of law, and which may not be destroyed by legislative impairment of the contract out of which they arose, either directly or by authorizing the corporation to amend its charter. *Ibid.*

Injunction will lie to restrain issuance of new stock defeating right to accrued cumulative dividends on preferred stock. *Ibid.*

(Service of process on, see Process § 7d.)

§ 25. Liability for Torts.

Evidence *held* for jury on issue of store corporation's liability for arrest of customer at instance of assistant manager. *Long v. Eagle Store Co.*, 146.

COSTS.

§ 2a. Successful Party.

Where it is determined on appeal to the Supreme Court that claimant is entitled to improvements claimed in partition proceedings, claimant is not to be taxed with the costs of trial in the Superior Court involving her claim. C. S., 1225. *Jenkins v. Strickland*, 441.

§ 2b. In Civil Action Against Several Defendants.

In an action by a broker on an alleged contract of sale and purchase, instituted against both the owners of the land and the prospective purchaser, the taxing of the costs is in the discretion of the trial court, C. S., 1243, which discretion is not reviewable. *Kluttz v. Allison*, 379.

§ 3. Costs in Particular Proceedings.

Costs may be taxed against successful petitioner in eminent domain proceedings. *Jervis v. Mars Hill*, 323.

COURTS.

§ 2a. Appeals from County, Municipal and Recorders' Courts.

Superior Court has discretionary power to reinstate appeal from county court upon motion aptly made. *West v. Woolworth Co.*, 214.

Upon appeal from municipal court upon charges of reckless driving and operating motor vehicle while under influence of liquor, Superior Court may not impose sentence for operating vehicle while under influence of intoxicants, since mayor's court had no jurisdiction of that offense, and defendant could not be tried for the felony without indictment. *S. v. Johnson*, 319.

§ 2c. Jurisdiction of Superior Courts on Appeal from Clerk.

The clerk appointed a referee to hear claims against the estate of a deceased under C. S., 99, and thereafter approved the report of the referee. On appeal, the Superior Court ruled that the clerk had no authority in the premises. *Held:* The unchallenged ruling vacated the supposed reference, and ended the matter, and the further ruling of the court that the referee's report was binding on other grounds is a nullity notwithstanding the broad jurisdiction of the Superior Court under C. S., 637. *In re Shutt*, 684.

§ 4. Terms of Court and Commission.

When a term of court begins the last part of June, the judge of the Superior Court assigned to that district for the Spring circuit has authority throughout the term of court, even though the term runs over into July. C. S., 1446, since any term which begins in June "falls" between January and June within the meaning of the statute. *West v. Woolworth Co.*, 214.

§ 7. Jurisdiction of County, Municipal, and Recorders' Courts.

Mayor's court *held* without jurisdiction of charge of operating motor vehicle under influence of intoxicating liquor. *S. v. Johnson*, 319.

§ 11. Conflict of Laws: Law of the Forum.

In action by guest to recover against driver for injuries resulting from accident occurring in Virginia the laws of that State govern the scope of the driver's liability. *Farfour v. Fahad*, 281.

§ 2. Intent.

Where a statute makes a specific act unlawful, proof of the commission of the act raises a *prima facie* case, since no proof of a particular intent is necessary, the general necessary intent being presumed by virtue of the rule that a person is presumed to intend the natural consequences of his act. *S. v. Davis*, 787.

CRIMINAL LAW.

I. Nature and Elements of Crimes
2. Intent. S. v. Davis, 787.

II. Capacity to Commit and Responsibility for Crime
5a. Insanity and Mental Incapacity in General. S. v. Bowser, 249.
5b. Mental Incapacity as Affected by Intoxicants or Drugs. S. v. Adams, 501. (As affecting ability to premeditate and deliberate see Homicide s 4c.)
5d. Instructions on Defense of Insanity. S. v. Bowser, 249.

III. Parties and Offenses
8b. Aiders and Abettors. S. v. Spruill, 123; S. v. Hall, 639; S. V. Myers, 652.
11. Felonies and Misdemeanors. S. v. Johnson, 319; S. v. Clegg, 675.

V. Arraignment and Pleas
17. Plea of Not Guilty. S. v. Williams, 682.

VI. Former Jeopardy
21. Time and Necessity for Plea. S. v. Lueders, 558.
23. *Same Offense.* S. v. *Midgett*, 107.

VII. Evidence in Criminal Prosecutions
28a. Presumptions and Burden of Proof. S. v. Davis, 787.
29a. Relevancy of Evidence in General. S. v. Hawkins, 326.
31b. Expert and Opinion Testimony as to Sanity. S. v. Hawkins, 326.
32a. Circumstancial Evidence. S. v. English, 564; S. v. Epps, 577.
33. Confessions. S. v. Hawkins, 326.
34c. Silence as Implied Admission of Guilt. S. v. Hawkins, 326.
41d. Impeaching Witness. S. v. Alverson, 685.
41f. Credibility of Defendant. S. v. Dee, 509.
43. Evidence Obtained by Unlawful Means. S. v. McGee, 184.

CRIMINAL LAW—*Continued.*

VIII. Trial of Criminal Cases
47. Consolidation of Prosecution for Trial. S. v. Davis, 787.
48b. Reception of Evidence Competent for Restricted Purpose. S. v. Hawkins, 326; S. v. Myers, 652.
50. Course of Trial, Remarks and Conduct of Court. S. v. Harvey, 9.
52a. Taking Case from Jury in General. S. v. Lueders, 558.
52b. Nonsuit. S. v. English, 564; S. v. Epps, 577.
52c. Directed Verdict and Peremptory Instructions. S. v. Williams, 682; S. v. Davis, 787.
53b. Applicability of Instructions to Counts and Evidence. S. v. Moore, 658.
53c. Instructions on Burden of Proof. S. v. Alston, 93.
53e. Expression of Opinion by Court. S. v. Bowser, 249.
53g. Objections and Exceptions to Statement of Contentions. S. v. Harvey, 9; S. v. Bowser, 249.
54b. Form, Sufficiency and Effect of Verdict. S. v. Davis, 787.
54e. Special Verdict. S. v. Lueders, 558.
IX. Motions after Verdict
56. Motions in Arrest of Judgment. S. v. McLamb, 322; S. v. Julian, 574; S. v. Crayton, 579.
57. Motions for New Trial for Misconduct of or Affecting Jury. S. v. Hawkins, 328.
58. Motions for New Trial for Newly Discovered Evidence. S. v. Linney, 35.
XII. Appeals in Criminal Cases
71. Pauper Appeals. S. v. Robinson, 365.
73d. "Case on Appeal." S. v. Miller, 317; S. v. Parnell, 467; S. v. Dee, 509; S. v. Stovall, 695.
77a. Necessary Parts of Record. S. v. McLamb, 322.
77c. Matters not Appearing of Record. S. v. Harvey, 9.
77d. Conclusiveness and Effect of Record. S. v. Dee, 509; S. v. DeJournette, 575; S. v. Harvey, 9.
77e. Correction of Record. S. v. Miller, 317; S. v. Dee, 509.
78b. Exceptions and Assignments of Error. S. v. Parnell, 467.
79. Briefs. S. v. Brice, 34; S. v. Robinson, 365.
80. Prosecution of Appeals and Dismissal. S. v. Brice, 34; S. v. Linney, 35; S. v. McLamb, 322; S. v. Parnell, 467; S. v. Stovall, 695.
81b. Presumptions and Burden of Showing Error. S. v. DeJournette, 575; S. v. Terrell, 831.
81c. Harmless and Prejudicial Error. S. v. Adams, 501; S. v. Dee, 509; S. v. Hall, 639; S. v. Alverson, 685.
81d. Questions Necessary to Determination of Appeal. S. v. Moore, 658.

§ 5a. Insanity and Mental Incapacity in General.

A plea of insanity is an affirmative defense which admits defendant's commission of the act but denies criminal responsibility therefor. *S. v. Bowser*, 249.

§ 5b. Mental Incapacity as Affected by Intoxicants or Drugs. (Incapacity to premeditate and deliberate, see Homicide.)

The instruction on the question of intoxication as a defense in precluding the formation of criminal intent comprising an essential element of the crime charged, *held* without error when construed as a whole. *S. v. Adams*, 501.

§ 5d. Instructions on Defense of Insanity.

Since a plea of insanity admits defendant's commission of the act, but denies criminal responsibility therefor, an instruction that if the jury should find that at the time defendant killed deceased, he was incapable of having a criminal intent, etc., will not be held for error as an expression of opinion as to whether defendant killed deceased. *S. v. Bowser*, 249.

§ 8b. Aiders and Abettors.

The owner of a motor vehicle riding therein may not be held criminally responsible as an aider and abettor on a charge of manslaughter resulting from the operation of the vehicle by the driver when the driver is acquitted of all blame in the matter. *S. v. Spruill*, 123.

Two defendants may be properly convicted of carnal knowledge of a female child between the ages of 12 and 16 years who had never before had sexual intercourse with any other person upon evidence showing that the defendant who first had intercourse was aided and abetted by the other in the preparation for the crime. *S. v. Hall*, 639.

Evidence *held* for jury on question of defendant's guilt as aider and abettor. *S. v. Myers*, 652.

CRIMINAL LAW—*Continued.*

§ 11. Felonies and Misdemeanors.

Charge of operating motor vehicle while under influence of intoxicants is a felony. *S. v. Johnson*, 319.

Charge of assault with deadly weapon with intent to kill, resulting in serious injury is a felony. *S. v. Clegg*, 675.

§ 17. Plea of Not Guilty.

Defendant pleaded "not guilty" and contended that if the crime were committed at all, it was committed by some person other than defendant, and that if committed by defendant he was insane at the time. *Held:* The plea put in issue the question of identity as well as that of sanity, and the introduction of evidence of insanity by defendant is not admission of the truth of the State's evidence. *S. v. Williams*, 682.

§ 21. Time and Necessity for Plea.

In the trial in the Superior Court, either originally or *de novo* upon appeal, it is necessary for defendant to enter a plea to the indictment or charge, since in the absence of a plea there is nothing for the jury to determine. *S. v. Lueders*, 558.

§ 23. Same Offense.

Acquittal on charge of reckless driving will not bar prosecution for manslaughter arising from same occurrence. *S. v. Midgett*, 107.

§ 28a. Presumptions and Burden of Proof.

Prima facie or presumptive evidence does not affect the burden of proof on the issue, which remains on the State, but shifts the burden of going forward with the evidence to defendant, or subjects him to the risk of nonpersuasion upon his failure to do so. *S. v. Davis*, 787.

The State has the burden of proving the *corpus deliciti*, but when defendant relies upon some independent, distinct, substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself, the onus of proof as to such matters is upon defendant. *Ibid.*

§ 29a. Relevancy of Evidence in General.

In criminal cases every circumstance that is calculated to throw any light upon the supposed crime is permissible. *S. v. Hawkins*, 326.

§ 31b. Expert and Opinion Evidence as to Sanity and Mental Capacity.

A witness who is a physician but not a psychiatrist, but who has talked with defendant and had an opportunity to observe him, may testify as to defendant's sanity. *S. v. Hawkins*, 326.

§ 32a. Circumstantial Evidence in General.

In order for circumstantial evidence to be sufficient to take the case to the jury, all the circumstances must be consistent with each other and with the hypothesis of guilt, and must exclude any reasonable hypothesis except that of guilt, and be inexplicable on the theory of innocence, considering the evidence in the light most favorable to the State. *S. v. English*, 564.

Circumstantial evidence of defendant's guilt of larceny and receiving *held* insufficient to be submitted to jury. *S. v. Epps*, 577.

§ 33. Confessions.

Voluntary confessions are competent against the party making them; involuntary confessions are not. *S. v. Hawkins*, 326.

Confessions otherwise competent are not rendered incompetent by the fact that at the time they are made defendant is under arrest. *Ibid.*

The competency of an alleged confession is for the judge. *Ibid.*

The State introduced evidence that the coroner told defendant after his arrest that "it looks like they have got you on the spot and the only way for you to get out of it is to plead insanity." To which defendant replied, "Well, I will never do it." The court admitted the testimony after it had heard evidence tending to show that defendant's statement was voluntary. *Held:* If the coroner's statement be interpreted as an accusation of guilt, the reply was not an admission, but if the reply be interpreted as a confession, the court in effect found that it was voluntary, and its ruling thereon is not error. *Ibid.*

§ 34c. Silence as Implied Admission of Guilt.

Evidence that shortly after his wife's death when her assailant was unknown, defendant remained silent when he was accused of having killed her by his twelve-year-old son while they were in a room across the hall from where her body lay, defendant having shown no emotion when viewing the body, *is held* competent as a circumstance to be considered by the jury, since the occasion was such as to call for a denial by defendant. *S. v. Hawkins*, 326.

§ 41d. Impeaching Witness.

While evidence elicited on cross-examination tending to impeach the character of witnesses, including defendants as witnesses in their own behalf, should be considered by the jury as a circumstance bearing upon the credibility of their testimony, an instruction that the law is that a person of good character is more apt to testify correctly than a person of bad character is error. *S. v. Alverson*, 685.

§ 41f. Credibility of Defendant.

Defendant testifying in own behalf is entitled to same credit as any other witness when jury finds him worthy of belief, and inadvertent instruction that his testimony should be given same credit as that of "any interested witness" is prejudicial error. *S. v. Dee*, 509.

§ 43. Evidence Obtained by Unlawful Means.

Our courts, under the common law rule, are required to determine only the competency of proffered evidence, and will not inquire into the collateral question of whether the evidence was obtained by lawful means unless expressly required to do so by statute, provided the accused is not compelled to do any act which incriminates himself, or a confession or admission is not extorted from him. *S. v. McGee*, 184.

Defendant's house was searched by officers without a search warrant, and a quantity of nontax-paid liquor was found on the premises. Defendant contended that the evidence obtained by the unlawful search of his premises was incompetent. *Held:* The provision of sec. 1½, ch. 339, Public Laws of 1937, that no facts discovered by reason of the issuance of an illegal warrant shall be competent, does not apply to evidence obtained by search without a warrant, the language of the statute being insufficient to require this conclusion, and the statute being in derogation of the common law rule. *Ibid.*

§ 47. Consolidation of Prosecutions for Trial.

Consolidation for trial of warrants against several defendants charging each of them, as principals, with the unlawful possession and transportation of intoxicating liquor, growing out of the same illegal act, is proper. *S. v. Davis*, 787.

§ 48b. Reception of Evidence Competent for Restricted Purpose.

The general admission of evidence competent for a restricted purpose will not be held for error in the absence of a request by defendant that its admis-

CRIMINAL LAW—*Continued.*

sion be restricted, and failure to charge specifically upon the nature of the evidence will not be ground for exception in the absence of a request for special instructions. *S. v. Hawkins*, 326.

Evidence admitted against one defendant only may not be considered against the other without giving him opportunity to cross-examine witnesses in regard thereto. *S. v. Myers*, 652.

§ 50. Course of Trial, Remarks and Conduct of Court.

The court must not express an opinion on the facts, directly or indirectly, by word or manner, either in the conduct and course of the trial or in the charge, C. S., 564, but exceptions to questions propounded by the court to witnesses in order to obtain a proper understanding and clarification of their testimony, or to bring out some facts overlooked, will not be sustained when it appears that the questions were not unfair and care was used not to influence the jury. *S. v. Harvey*, 9.

§ 52a. Taking Case from Jury in General.

A verdict may not be rendered on an agreed statement of facts in a criminal prosecution, the verdict not being a special verdict. *S. v. Lueders*, 558.

§ 52b. Nonsuit.

Sufficiency of circumstantial evidence to take case to the jury. *S. v. English*, 564.

Circumstantial evidence of guilt of larceny and receiving *held* insufficient for jury. *S. v. Epps*, 577.

§ 52c. Directed Verdict and Peremptory Instructions.

Under his plea of "not guilty," defendant interposed the defense that if the crime were committed at all, it was committed by some person other than defendant, and the defense that if committed by defendant he was insane at the time. Defendant introduced evidence of insanity. *Held:* The introduction of evidence of insanity did not admit the truth of the State's evidence on the question of identity, and a peremptory instruction to the effect that the jury should find defendant guilty unless they accepted his plea of insanity is error. *S. v. Williams*, 682.

The trial court may not direct a verdict for the prosecution in a criminal action when there is no admission or presumption calling for explanation or reply on the part of the defendant. *Ibid.*

The establishment of a *prima facie* case by the State does not warrant a directed verdict of guilty, but merely takes the case to the jury and subjects defendant to the risk of an adverse verdict in the absence of evidence in rebuttal. *S. v. Davis*, 787.

§ 53b. Applicability to Courts and Evidence.

Charge *held* for error in failing to charge law applicable to nonfelonious assault arising on the evidence. *S. v. Moore*, 658.

§ 53c. Instructions on Burden of Proof.

Charge *held* for error as placing burden on defendant to prove intoxication preventing premeditation and deliberation in homicide prosecution. *S. v. Alston*, 93.

§ 53e. Expression of Opinion by Court as to Weight and Credibility of Evidence.

The defense of insanity is an affirmative defense which admits defendant's commission of the act but denies criminal responsibility therefor, and therefore in a homicide prosecution in which defendant pleads insanity, an instruction that if the jury should find that at the time defendant killed

deceased, he was incapable of having a criminal intent, etc., will not be held for error as an expression of opinion by the court as to whether the evidence sufficiently showed defendant killed deceased. *S. v. Bowser*, 249.

§ 53g. Objections and Exceptions to Statement of Contentions.

When the court's statement of the contentions of the State is supported by the testimony, defendant's exception thereto on the ground that the language used unduly emphasized the State's evidence, will not be sustained when the matter was not called to the court's attention in apt time. *S. v. Harvey*, 9.

Objection to instructions on the ground of a misstatement of the evidence in stating a contention of the State will not be sustained when matter is not called to the court's attention at the time. *S. v. Bowser*, 249.

§ 54b. Form, Sufficiency and Effect of Verdict.

Mere inconsistency will not invalidate a verdict. *S. v. Davis*, 787.

§ 54c. Special Verdict.

Agreed statement of facts is not a special verdict so as to support conviction. *S. v. Lueders*, 558.

§ 56. Motions in Arrest of Judgment.

The warrant in a prosecution under ch. 228, Public Laws of 1933 (Michie's Code, 276 [a]), must allege that the failure or refusal of defendant to support his illegitimate child was willful, and where it does not do so, defendant's motion in arrest of judgment should be allowed. *S. v. McLamb*, 322.

When the statute under which defendant is charged fails to define a criminal offense, defendant's motion in arrest of judgment in the Supreme Court must be allowed. *S. v. Julian*, 574.

A warrant charging merely that defendant operated his automobile at a designated speed in excess of the maximum prescribed by statute and the applicable municipal ordinance, charges no criminal offense, and defendant's motion in arrest of judgment should be allowed, since under the provisions of the statutes such speed constitutes merely *prima facie* evidence that the speed is unlawful. Public Laws of 1935, ch. 311, sec 2 (a), (b), (g). *S. v. Crayton*, 579.

§ 57. Motions for New Trial for Misconduct of or Affecting Jury.

Defendant's motion in the Supreme Court to set aside the verdict of guilty of first degree murder, made on the ground that the jury saw a moving picture show depicting a murder mystery, is denied. *S. v. Hawkins*, 328.

§ 58. Motions for New Trial for Newly Discovered Evidence.

The trial court's finding from the affidavits filed that the motion for a new trial for newly discovered evidence was based upon hearsay evidence, *is held* correct in this case, and the motion was properly denied. *S. v. Linney*, 35.

§ 71. Pauper Appeals.

The statute, C. S., 4651, requires that in appeals *in forma pauperis* the statutory affidavit must be made by defendant and not by his attorneys, and the requirements of the statute are mandatory and not directory, and must be complied with in order to confer jurisdiction on the Supreme Court. *S. v. Robinson*, 365.

§ 73d. "Case on Appeal."

When the solicitor accepts service of case on appeal by defendant, and thereafter agrees that the statement as served should constitute the case on appeal, it becomes the case on appeal, C. S., 643, and, in connection with the record, may alone be considered in determining the rights of the parties. *S. v. Miller*, 317.

On this appeal from conviction of a capital crime, the "case on appeal" was served on the solicitor and then filed in the Supreme Court without agreement of the solicitor or settlement by the judge, before expiration of the time allowed for filing exceptions or countercase, C. S., 643, 644, and before the lapse of sufficient time for it to have been deemed approved under C. S., 643. *Held:* There was no proper case on appeal, but failure to have "case on appeal" does not perforce work a dismissal. *S. v. Parnell*, 467.

When the solicitor approves defendant's statement it becomes "case on appeal" and is not subject to correction. *S. v. Dee*, 509.

Appeal dismissed for failure to make out and serve statement of case on appeal. *S. v. Stovall*, 695.

§ 77a. Necessary Parts of Record.

The record should show the organization of the court and the jurisdiction thereof. *S. v. McLamb*, 322.

§ 77c. Matters Not Appearing of Record.

When the record does not affirmatively show either the absence or presence of defendant's arraignment and plea, the presumption is in favor of regularity, and defendant's objection thereto will not be sustained, certainly when case on appeal contains an affirmative statement by the judge that defendant's plea, in the time-honored form upon arraignment, was duly entered before the trial was begun. *S. v. Harvey*, 9.

§ 77d. Conclusiveness and Effect of Record.

The record imports verity, and the Supreme Court is bound thereby. *S. v. Dee*, 509.

The Supreme Court can judicially know only what appears from the record. *S. v. DeJournette*, 575.

Exception to statement of evidence *held* untenable, the record disclosing that the testimony was as stated by the court. *S. v. Harvey*, 9.

§ 77e. Correction of Record.

When the solicitor accepts service of case on appeal by defendant, and thereafter agrees that the statement as served should constitute the case on appeal, it becomes the case on appeal, C. S., 643, and, in connection with the record, may alone be considered in determining the rights of the parties, and motion by the State for *certiorari* to the end that the case on appeal may be corrected must be denied, the trial court being without authority to change the case on appeal fixed by agreement, even though regarded by him as erroneous. *S. v. Miller*, 317.

When the solicitor approves defendant's statement of the case it becomes the "case on appeal" and a part of the record, C. S., 643, and is not thereafter subject to correction, and the State's motion for *certiorari* for correction of the record may not be allowed even when supported by a letter of the trial court supporting the State's contention of a typographical error in the case on appeal, since the rights of the defendants have intervened. *S. v. Dee*, 509.

§ 78b. Exceptions and Assignments of Error.

Defendant is not entitled to consideration of assignments of error to the charge which are not supported by exceptions, but in capital cases the Supreme Court may nevertheless consider the assignments of error. *S. v. Parnell*, 467.

§ 79. Briefs.

The failure of defendant to file briefs works an abandonment of the assignments of error. *S. v. Brice*, 34.

CRIMINAL LAW—*Continued.*

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. Robinson*, 365.

§ 80. Prosecution of Appeals and Dismissal.

When defendant has filed no brief, the motion of the Attorney-General to dismiss will be allowed, Rules of Practice in the Supreme Court Nos. 27 and 28, but in a capital case, the motion will be allowed only when an examination of the record fails to disclose error. *S. v. Brice*, 34; *S. v. Linney*, 35; *S. v. Robinson*, 365.

While failure of the record to show the organization of the court or the jurisdiction thereof warrants dismissal of the appeal, where a serious question is presented the Supreme Court in its discretion may disallow the motion to dismiss. *S. v. McLamb*, 322.

The failure to have a "case on appeal" or proper assignments of error does not perforce work a dismissal of the appeal. *S. v. Parnell*, 467.

When defendant convicted of a capital crime fails to make out and serve his statement of case on appeal within the time allowed, the motion of the Attorney-General to docket and dismiss under Rule 17 will be allowed, and the judgment affirmed when the record is free from apparent error. *S. v. Stovall*, 695.

§ 81b. Presumptions and Burden of Showing Error.

When it cannot be determined from the record that the instructions excepted to are prejudicial, the record failing to show how the homicide occurred or what the evidence was, the exceptions cannot be sustained, appellant having failed to show reversible error. *S. v. DeJournette*, 575.

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. *S. v. Terrell*, 831.

§ 81c. Harmless and Prejudicial Error.

Inadvertent error in instructions which could not mislead the jury will not be held prejudicial error. *S. v. Adams*, 501.

Instruction that defendant's testimony should be given same credit as that of any interested witness is prejudicial error. *S. v. Dee*, 509.

Admission of evidence will not be held for error when evidence of same import is admitted without objection. *S. v. Adams*, 501.

On charges of rape and carnal knowledge of a female between the ages of 12 and 16 years, the State is not required to point out evidence of consent in order to sustain a conviction of the lesser crime, and such conviction upon sufficient evidence, even in the absence of evidence of consent, is favorable to defendants and they may not complain. *S. v. Hall*, 639.

An erroneous instruction as to the consideration the jury should give to evidence impeaching the character of witnesses is not cured by the fact that the charge referred as much to the testimony of the State's witnesses as to that of defendants, since there can be no "balancing of errors" between the State and the defendants. *S. v. Alverson*, 685.

Where evidence impeaching the character of witnesses is a material aspect of the case, an erroneous charge in respect thereto cannot be held harmless. *Ibid.*

§ 81d. Questions Necessary to Determination of Appeal.

When a new trial is awarded on certain exceptions, other exceptions relating to matters which may not recur on another trial need not be determined. *S. v. Moore*, 658.

DAMAGES.

§ 7. Grounds and Conditions Precedent to Recovery of Punitive Damages.

Insane person is not liable for punitive damages. *Bryant v. Carrier*, 191.

In this action for slander for words actionable *per se*, the charge of the court on the issue of punitive damages, instructing the jury that defendant must have had actual malice or a reckless or wanton indifference to plaintiff's rights in order to sustain an award of punitive damages, and that the award of punitive damages and the amount thereof was solely in the sound discretion of the jury subject to the limitation that they must not be excessively disproportionate to the circumstances of contumely and indignity present in the case, *held* without error. *Bryant v. Reedy*, 748.

§ 9. Award and Amount of Punitive Damages.

The awarding of punitive damages is in the discretion of the jury even though the evidence is sufficient to support an award, and an instruction that if the jury found that the assault complained of was committed under circumstances of oppression or rudeness, it would be the duty of the jury to award punitive damages, is error. *Robinson v. McAlhaney*, 180.

§ 11. Relevancy and Competency of Evidence on Issue of Punitive Damages.

Where defendant pleads insanity as bar to recovery of punitive damages, plaintiff is entitled to prove legal capacity. *Bryant v. Carrier*, 191.

Evidence of the reputed wealth of defendant is competent on the issue of punitive damages. *Bryant v. Reedy*, 748.

DECLARATORY JUDGMENT ACT.

§ 2a. Subject of Action.

When a *bona fide* dispute exists between an executor and the beneficiaries under the residuary clause of the will as to the validity of a charitable bequest therein, action for the determination of the legal effect of the bequest is properly instituted under the Declaratory Judgment Act, ch. 102, Public Laws of 1931. *Woodcock v. Trust Co.*, 224.

DEEDS.

§ 3. Acknowledgment.

Certificates of acknowledgment will be liberally construed and will be upheld if in substantial compliance with the statute. Michie's Code, 3323. *Freeman v. Morrison*, 240.

The word "acknowledgment," as used with respect to the execution of instruments, describes the act of personal appearance before a proper officer and there stating to him the fact of the execution of the instrument as a voluntary act. *Ibid.*

An acknowledgment taken by a notary public is presumed to be regular, and when the clerk certifies the instrument for registration his certificate implies that every requirement of law has been met, unless the instrument or the certificates themselves disclose a material omission. *Ibid.*

Acknowledgment in this case *held* sufficient to sustain probate and registration. *Ibid.*

§ 6. Deeds of Gift.

A voluntary deed is good as between the parties, even though executed for the fraudulent purpose, participated in by the grantee, of depriving a third person of a life estate created by a prior unregistered paper writing executed by the grantor. *Twitty v. Cochran*, 265.

DEEDS—*Continued.*

§ 10b. Creditors and Purchasers.

Where the verdict of the jury establishes that plaintiff's deed was voluntary and was executed fraudulently, in which fraud plaintiff participated, for the purpose of depriving defendant of her life estate in the land, theretofore created by paper writing executed by plaintiff's grantor, the Connor Act, C. S., 3309, does not apply, and defendant's rights are superior to those of plaintiff under the registered deed, even though the paper writing giving defendant a life estate was not registered, since the protection of the Connor Act extends only to creditors and purchasers for value. *Twitty v. Cochran*, 265.

No conveyance of land, by mortgage or deed, is effective to pass title from the mortgagor or grantor, as against creditors or purchasers for value, but from the registration thereof. Michie's N. C. Code, 3309, 3311, and creditors are entitled to the same protection under the statutes and stand in the same position as purchasers for value. *Lowery v. Wilson*, 800.

Where, through error, registered mortgage fails to secure full amount of note, mortgagee is not entitled to reformation as against creditors of mortgagor. *Lowery v. Wilson*, 800.

The registration act does not apply to parol trusts. *Ibid.*

§ 14b. Conditions Concurrent and Subsequent.

The right of the heirs of a grantor to reënter upon the land for breach of a condition subsequent will be deemed waived and lost by lapse of time when no action is taken for fifty-nine years after the supposed breach. *Bernard v. Bowen*, 121.

Facts *held* not to show abandonment of use of property for school purposes so as to work forfeiture of title for breach of condition subsequent. *Ibid.*

§ 16. Restrictive Covenants.

Findings *held* to show such fundamental change in character of property around *locus in quo* as to make restrictive covenants void. *Elrod v. Phillips*, 473.

Change in contiguous property may render restrictions inequitable even though there has been no change in use of property within development. *Ibid.*

DESCENT AND DISTRIBUTION.

§ 1. Nature of Titles by Descent and Property Which Descends.

Lapsed, void or refused devises pass under the residuary clause if there be one, and in the absence of a residuary clause they descend to the heirs at law as in case of intestacy. *Privott v. Graham*, 199; *Hill v. Colie*, 408.

§ 3. Heirs and Distributees in General.

The heirs at law of a deceased are to be determined as of the date of his death, and not as date of termination of defeasible fee. *Privott v. Graham*, 199.

§ 15. Right of Heirs to Sell or Mortgage Property.

Plaintiffs, children of testator, were the owners of the defeasible fee in the land in question under the residuary clause of the will, and were the heirs at law entitled to the reversion if the fee should be defeated. *Held:* Plaintiffs were the owners of the land either as devisees under the will or as heirs at law of testator, and their deed would convey a good, indefeasible fee to the *locus in quo*. *Privott v. Graham*, 199.

DIVORCE.

§ 5. Pleadings.

Allegations in the cross action for divorce *a mensa et thoro*, set up by defendant wife in the husband's action for divorce, *held* sufficient. C. S., 1660. *Ragan v. Ragan*, 36.

§ 11. Alimony Pendente Lite.

When the facts alleged in the answer are sufficient to support an order for alimony *pendente lite* and for counsel fees, C. S., 1666, it is sufficient for the court to find that the facts are as alleged in the answer. *Ragan v. Ragan*, 36.

On motion for alimony *pendente lite* and for counsel fees in an action instituted by a wife against her husband under C. S., 1666, or in her cross action in a suit instituted by her husband, whether she is entitled to alimony is a question of law upon the facts found, and the court must find the facts upon request. *Holloway v. Holloway*, 662.

On motion for alimony *pendente lite* and counsel fees made in an action instituted by the wife against her husband under C. S., 1667, the judge is not required to find the facts as a basis for an award of alimony unless the adultery of the wife is pleaded in bar, though the better practice is to do so. *Ibid.*

In an action for divorce instituted by the husband, the wife is entitled to an allowance for support *pendente lite* and counsel fees on her motion therefor under the common law without setting up a cross action, which right is given her as a matter of justice to enable her to defend her name and marital rights, and her right to such allowance will not be denied unless she answers and defends in bad faith. *Ibid.*

A finding that the wife has denied under oath the charge of adultery against her in the complaint in her husband's action for divorce, and that such denial is made in good faith; that the wife is unable financially to properly defend the action; and that the husband is financially able, *is held* sufficient to support an allowance of temporary support, expense money and counsel fees to the wife under the common law. *Ibid.*

On this motion for allowance to the wife for temporary support and counsel fees under the common law in the husband's action for divorce, the court found that the wife's denial of the charge of adultery was made in good faith and that she was financially unable to properly defend the action, and granted her motion, and refused to hear affidavits offered by the husband for the purpose of showing that she was guilty of adulterous conduct. *Held:* The husband's evidence related directly upon the question of good faith, and it was error for the court to enter the order without hearing and considering such evidence. *Ibid.*

DOWER.

§ 9. Waiver of Dower.

When a widow fails to dissent from the will of her husband in the manner and within the period allowed by the statute, testamentary provision for her in real property excludes her from dower, nothing else appearing. *Bell v. Thurston*, 231.

EJECTMENT.

§ 6a. Competency of Evidence in Summary Ejectment.

In summary ejectment tenant may show that landlord's title had terminated after tenancy was created. *Lassiter v. Stell*, 391.

§ 16. Verdict and Judgment.

Defendant claimed a life estate in the *locus in quo* under an unregistered paper writing. Plaintiff was the grantee in a registered deed subsequently

EJECTMENT—*Continued.*

executed by the same grantor. The jury found from the evidence under a correct charge that the deed was a voluntary conveyance executed for the purpose of depriving defendant of her life estate under the unregistered paper writing. *Held:* Upon the verdict defendant was entitled to judgment that plaintiff is not entitled to the possession of the *locus in quo* as against defendant, and is not entitled to recover rents therefor, and that the rights acquired by plaintiff under her deed are subordinate to the rights of defendant under the paper writing, and judgment declaring plaintiff's deed to be void and ordering it canceled of record, and adjudicating that defendant is entitled to a life estate in the land under her paper writing, is erroneous as exceeding the bounds authorized by the verdict. *Twitty v. Cochran*, 265.

ELECTION OF REMEDIES.

§ 2. Between Rescission of Instrument and Action Thereon.

A party may not sue to recover damages for breach of contract and at the same time recover damages for fraud inducing the execution of the instrument, and in this action instituted in the general county court to recover damages for breach of contract, the Superior Court on appeal correctly sustained defendant's exceptions to evidence and the charge of the court relating to plaintiff's allegations that defendant induced plaintiff to enter into the contract by reason of false and fraudulent representations. *Robinson v. McAlhaney*, 263.

ELECTIONS.

§ 7. Powers and Duties of State Board of Elections.

State Board of Elections is given supervision over primaries and elections and has duty to compel observance of election laws. *Burgin v. Board of Elections*, 140.

The courts will not undertake to control the State Board of Elections in the exercise of its supervisory duties so long as such supervision conforms to the rudiments of fair play and the relevant statutes. *Ibid.*

§ 16. Canvassing and Proclamation of Results.

When a county board of elections makes amended returns in accordance with instructions of the State Board of Elections, which admittedly acted in good faith in issuing its instructions, and the amended returns are regular on their face, they may not be impeached by affidavit of the chairman of the county board who participated in the meeting which passed upon and certified to the correctness of the amended returns. *Burgin v. Board of Elections*, 140.

When the State Board of Elections instructs certain county boards of elections to amend their respective returns in accordance with the State Board's rulings on protests challenging the validity of certain ballots, it is necessary for the county boards to hear the challenges and make the amended returns acting as a body in a duly assembled legal session, and action taken and amended returns made by two members of the county board of each county, respectively, without notice to the third member, are void as a matter of law. *Ibid.*

§ 17. Enjoining Canvass and Declaration of Results of Election or Primary.

In this action to restrain certification of candidate by State Board of Elections, validity of particular challenged votes *held* not presented for determination. *Burgin v. Board of Elections*, 140.

ELECTIONS—*Continued.*

A candidate is entitled to restrain the State Board of Elections from certifying his opposing candidate as the Democratic nominee until final returns have been received from all the county boards, each acting as a body in duly assembled legal session. *Ibid.*

A candidate is entitled to restrain the State Board of Elections from declaring his opponent the nominee in a primary until complete, legal and final returns from all the counties of the district have been made, filed and accepted, or as a matter of law ought to have been accepted, and the court should determine as a matter of law without the intervention of a jury whether such returns have been received, and whether upon such returns plaintiff is entitled to a writ of *mandamus* to compel the State Board to declare him the nominee, and enter judgment accordingly. *Burgin v. Board of Elections*, 324.

EMINENT DOMAIN.

§ 12. General and Special Benefits.

In awarding damages for relocation of highway, both special and general benefits should be allowed as offsets. *Bailey v. Highway Com.*, 278.

§ 24. Verdict, Judgment and Costs.

Where, in an action to recover damages for the taking of land for use as a sidewalk by defendant municipality, the jury finds plaintiff is entitled to recover nothing, the court may properly tax the costs against defendant. C. S., 1725. *Jervis v. Mars Hill*, 323.

§ 25. Time of Vesting of Title or Right.

While the value of lands taken in condemnation proceedings is fixed as of the date the petition is filed, title to the land does not pass until the award, as assessed by the commissioners, is paid into court after confirmation of the commissioners' report, since the statute, C. S., 1723, provides that title shall pass at that time, and since petitioner may withdraw at any time prior thereto, and in proceedings instituted by the United States, the Federal practice requires that the proceedings shall conform, as nearly as may be, to the law of the State in which they are brought. *Lumber Co. v. Graham County*, 167.

EQUITY.

§ 1a. "He Who Seeks Equity Must Do Equity."

Requires mortgagor seeking to restrain foreclosure on grounds of usury to tender principal with legal interest. *Hairston v. Keswick Corp.*, 678.

A junior mortgagee enjoining foreclosure under a prior mortgage on the same lands upon the plea of usury should tender the amount due plus interest at the legal rate, this being required of the mortgagor seeking the same relief under the maxim "He who seeks equity must do equity," and the maxim being equally applicable to the junior lienor and equity requiring that the same rule should be equally applicable to both. *Pinnix v. Casualty Co.*, 760.

§ 2. Laches.

Delay which will constitute laches depends on facts and circumstances of each particular case. *Teachey v. Gurley*, 288.

Under facts of this case, laches of plaintiffs *held* bar to recovery. *Ibid.*

Judgment creditor *held* without standing to claim that laches barred *cestuis* from asserting trust against judgment debtor. *Jackson v. Thompson*, 539.

Conceding that delivery of notes by the purchaser constituted an acceptance of the option and waived tender of the purchase price, the purchaser *is held* estopped by his laches in waiting more than ten years after the execution of the contract to demand specific performance. *Ritter v. Chandler*, 703.

EVIDENCE.

§ 6. Burden of Proof in General.

Ordinarily, the burden of proof is on the party asserting the affirmative of the issue. *Benner v. Phipps*, 14.

The burden is upon intervener claiming title to funds in hands of judgment debtor, levied on by creditor, to prove title thereto by the greater weight of the evidence. *Everett v. Mortgage Co.*, 778.

§ 19. Evidence Competent to Impeach Witness.

A person who has not testified may not be impeached by cross-examination. *Morris v. Service Co.*, 562.

§ 24. Relevancy and Materiality in General.

Evidence need not bear directly on the question in issue, but is competent if it shows the circumstances surrounding the parties necessary to an understanding of their conduct and motives and the reasonableness of their contentions. *Henley v. Holt*, 384.

§ 28. Circumstantial Evidence.

A fact may be proved by circumstantial evidence. *Sink v. Lexington*, 548.

§ 29. Evidence of Former Trial or Proceedings.

Appealing defendant's exception to testimony of its driver on examination by plaintiffs that he had been convicted of manslaughter in a prosecution growing out of the collision for which damages are sought in the civil action, is sustained, the evidence being irrelevant and immaterial. *Morris v. Service Co.*, 562.

§ 37. Best and Secondary.

A carbon copy of an alleged agreement offered as a duplicate original without proper identification and without adequate explanation of the failure to produce the original, is not properly in evidence. *Campbell v. Trust Co.*, 680.

§ 39. Parol and Extrinsic Evidence Affecting Writings in General. (Parol evidence is competent to establish resulting trust, see Trusts § 18d.)

Parol evidence is incompetent to establish essential element of contract required to be in writing. *Kluttz v. Allison*, 379.

While prior negotiations are merged in the contract, evidence of prior negotiations may be competent to show the intent of the parties or the actual contract. *Henley v. Holt*, 384.

Evidence *dehors* the instruments is competent in determining whether deed and contract to reconvey constitute equitable mortgage. *O'Briant v. Lee*, 723.

In action to establish equitable mortgage, existence of debt between the parties may be established by parol. *Ibid.*

§ 46. Scope and Subjects of Opinion Testimony by Nonexperts.

Where the sanity of defendant is in issue, it is competent for witnesses who have testified as to their opinion on the question, to state facts showing their knowledge of defendant and the basis for their opinion, and exception to the testimony of one such witness that he had arrested defendant for a misdemeanor, and of another witness that defendant had been tried in his court, *is held* not objectionable when properly confined by the trial court to the question of the witnesses' opportunity to observe defendant and to note his mental condition. *Bryant v. Carrier*, 191.

In an action to recover upon *quantum meruit* for personal services rendered deceased, it is competent for witnesses to testify from their knowledge of living conditions and observations of services of the character alleged to

EVIDENCE—*Continued.*

have been rendered deceased, as to the value of such services in the community. *Landreth v. Morris*, 619.

§ 56. Positive and Negative Evidence.

Negative evidence is admissible and carries some probative force for the consideration of the jury that the circumstance in dispute did not occur, but in order to be competent it must be made to appear that the witness would have seen or heard or known of the fact in dispute had it existed. *Johnson v. R. R.*, 484.

EXECUTION.

§ 3a. Exemption of Proceeds of War Risk Insurance from Execution.

Investments made with proceeds of War Risk Insurance are not exempt from execution. *Bryant v. Carrier*, 174.

§ 12. Title of Third Person as Against Judgment Creditor.

The lien of a judgment does not attach to land held by the judgment debtor under an unrecorded deed as a naked trustee or to which he has obtained bond for title with trust funds, nor may the judgment creditor contend that since he lent money for which the judgment was obtained in reliance on the debtor's interest in the land, he is therefore entitled to a lien under the principle of equifable levy, the relation of a judgment creditor to the property being insufficient to defeat the rights of the *cestuis que trustent*. *Jackson v. Thompson*, 539.

The burden is upon intervener claiming title to funds in the hands of a judgment debtor levied on by a creditor under execution to prove his title to such funds by the greater weight of the evidence, and evidence in this case tending to show that intervener was transferee of debtor in conveyance fraudulent as to creditors fails to show prior valid transfer to it. *Everett v. Mortgage Co.*, 778.

§ 14. Time Within Which Claim of Third Person May Be Asserted.

Judgment creditor *held* without standing to claim that laches barred *cestuis* from asserting trust against judgment debtor. *Jackson v. Thompson*, 539.

§ 17. Bids and Report of Sale.

In this controversy between the judgment debtor and the junior lienor, which bid in the property at the execution sale, as to the amount of the bid, *it is held*, the verdict of the jury upon competent evidence establishing the amount of the bid as contended for by the judgment debtor is conclusive, and the charge of the court in stating the character of evidence necessary to overcome the sheriff's report of sale *is held* not prejudicial upon the junior lienor's objection to the manner in which the facts relied on by the judgment debtor to overcome the report were stated, even though the instruction might have been more aptly given in different form. *Finance Co. v. Trust Co.*, 478.

In this controversy between the judgment debtor and the purchaser at the execution sale as to the amount of the bid, the form of the issue submitted *is held* not prejudicial, since it presented for the jury's determination the controverted amount of the bid, and the inclusion therein of matters relating to assumption of prior liens by the purchaser are deemed harmless surplusage. *Ibid.*

§ 20. Validity, Title and Rights of Purchaser.

Judgment was entered in an action involving realty which provided that the attorney responsible for the recovery of the land should have a lien thereon in a stipulated amount, and that if the sum were not paid the property should be advertised and sold as provided by law for foreclosure of other liens.

EXECUTION—*Continued.*

Thereafter, execution in the attorney's favor was issued on the judgment and the land bought at the execution sale by plaintiff. *Held:* Plaintiff's deed is a nullity, since the order imposing the lien in the attorney's favor was not only void, but the order, even if valid, did not authorize the clerk to issue execution thereon, and it further appearing that the sheriff undertook to sell in addition to the land described in the order another tract of land also. *Crutchfield v. Foster*, 551.

§ 21. Application of Proceeds of Sale.

The verdict of the jury established that the junior lienor purchasing the property at the execution sale bid an amount sufficient to pay the judgment and the senior liens. *Held:* The judgment debtor is entitled to have the surplus applied to the senior liens as a matter of law, and as to the judgment debtor any agreement between the junior and senior lienors as to the payment of the senior liens and the purchase of the prior judgment is immaterial. *Finance Co. v. Trust Co.*, 478.

EXECUTORS AND ADMINISTRATORS.

§ 4. Removal and Revocation of Letters.

The appointment of an administrator *c. t. a. ipso facto* revokes and supersedes letters of administration theretofore issued for the estate. *In re Estate of Suskin*, 219.

§ 10. Actions to Collect Assets.

When the action is instituted by the beneficiaries as executors and the jury finds that they were not the duly qualified executors of the estate, but the trial court submits issues relating to plaintiffs' right to maintain the action as beneficiaries under the will, the submission of such issues amounts to an amendment to that effect and is within the discretion of the trial court. *Bright v. Hood, Comr.*, 410.

§ 12b. Private Sale of Assets Under Authority of Will.

Finding of the court that the executor had not abused his discretion in sale of lands under direction of the will, upheld. *Scagle v. Harris*, 339.

The will in question provided that the estate, both real and personal, should "be held intact, if possible and advisable in the opinion of the executors," with provision for division of the income therefrom between testator's children in proportion to the number of grandchildren of whom they are the parents, with further provision for final distribution of the *corpus* of the estate when the youngest grandchild should attain the age of twenty-one. *Held:* Construing the will as a whole from its four corners, it did not empower the executors to sell either realty or personalty without sanction and approval of the court. *Hedrick v. Hedrick*, 692.

§ 12d. Protection of Assets of Estate.

Where an estate owns a judgment against lands subject to senior liens, the administrator may protect the interest of the estate by purchasing the property at the execution sale, and may bid more than the amount of the estate's judgment in purchasing the land, in its discretion within reasonable limits in the exercise of good faith, which transaction will be regarded as an investment of funds of the estate in the land and not as creating a debt of the estate, and only the beneficiaries of the estate may object thereto, and the administrator may not attack its own bid as being *ultra vires* in seeking to repudiate the transaction. *Finance Co. v. Trust Co.*, 479.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 13a. Nature and Grounds of Remedy to Sell Land to Make Assets.

When the personalty of the estate is insufficient to pay debts and charges of administration, the administrator, at any time after the granting of letters, may apply to the Superior Court for authority to sell real estate to make assets. C. S., 74. *Graham v. Floyd*, 77.

While an administrator is entitled to sell lands of the deceased to make assets to pay debts of the estate when the personalty is insufficient, Michie's Code, 74, when a person claims sole seizin under a contract to devise as against the heirs of intestate, such person is entitled to adjudication of her claim of sole seizin before a sale of the property to make assets is ordered, since she may elect to discharge the debts of the estate and the costs of administration to prevent a sale of the lands. *Chambers v. Byers*, 373.

§ 13b. Application, Parties, Procedure and Orders.

When it is made to appear to the court by petition and satisfactory proof that a private sale rather than a public sale of real estate to make assets will be to the advantage of the estate, the court may authorize such sale. C. S., 86. *Graham v. Floyd*, 77.

The heirs are necessary parties to a proceeding to sell realty to make assets to pay debts, and heirs under 14 years of age must be served as provided in C. S., 483 (2), and must defend by their general or testamentary guardian, if any, and if none, then by a guardian *ad litem*. *Ibid.*

The court may proceed to sign order for the sale of realty to make assets to pay debts after twenty days notice to the parties by service of the summons and complaint in the special proceeding, and after answer is filed by the guardian *ad litem* of minor heirs, C. S., 451, it being the duty of the guardian to file answer. C. S., 453. *Ibid.*

A creditor of the estate for the payment of whose claim the administrator files petition to sell realty to make assets, is not a proper person to be appointed guardian *ad litem* for the minor heirs. *Ibid.*

§ 13e. Validity and Attack.

The guardian *ad litem* of minor heirs in a proceeding to sell lands to make assets to pay debts of decedent may not purchase at the sale, directly or indirectly, and if he does so he becomes a constructive trustee for his ward. *Graham v. Floyd*, 77.

When the guardian *ad litem* for a minor heir in proceedings to sell lands to make assets, purchases the property at the sale, the sale is not void, but voidable only, and the minor heir may have the sale set aside as against the guardian or hold the guardian liable for the true value of the property as a constructive trustee, even in the absence of fraud. *Ibid.*

Fact that guardian *ad litem* for minor heir stands by and permits the property to be sold at a price far below true value, and purchases same in his individual capacity is evidence of fraud. *Graham v. Floyd*, 77.

§ 13f. Title of Purchaser.

A purchaser at a judicial sale, or his grantee, obtains good title in the absence of fraud or the knowledge of fraud, if the record shows jurisdiction of the court over the parties and subject matter, and the judgment on its face authorizes the sale, and record *held* sufficient to protect purchaser in absence of fraud on his part. *Graham v. Floyd*, 77.

§ 15a. Claims Against the Estate in General.

Assertion of right to retain insurance funds as assignee of policy is not claim against the estate. *Sellars v. Bank*, 300.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 15d. Claims for Personal Services Rendered.

The presumption that personal services rendered by a child to his parent are gratuitous arises from the relationship in a typical unbroken family, or one which has been reunited in the same relationships, and the presumption is necessarily affected by evidence that the respective moral and legal obligations of its members are different from that which gives rise to the rule. *Landreth v. Morris*, 619.

Evidence *held* insufficient to support presumption that services rendered by child to parent were gratuitous as matter of law. *Ibid.*

The presumption that services rendered by a child to his parent are gratuitous does not apply to the relationship between a father-in-law and daughter-in-law. *Ibid.*

§ 19. Actions Against the Estate.

Cause of action for unliquidated damages survives only against personal representative of tort-feasor, and may not be maintained against trustees under his will. *Suskin v. Trust Co.*, 347.

Deceased's widow filed claims with herself as administratrix of the estate, which claims she denied as administratrix solely as a matter of propriety. *Held:* No proper predicate for the determination of the claims was laid. *In re Shutt*, 684.

Unchallenged ruling that clerk was without jurisdiction *held* to terminate proceeding. *Ibid.*

§ 24. Distribution of Estate Under Agreement of Parties.

Decree approving family agreement for distribution of estate affirmed in this case. *Bohannon v. Trotman*, 706.

FALSE IMPRISONMENT.

§ 1. Nature and Essentials of Right of Action.

The fact that an arrest is made by officers of the law is no defense to an action for false arrest when the officers make the arrest at the instance of the individual defendant acting within the apparent scope of his employment by the corporate defendant. *Long v. Eagle Store Co.*, 146.

§ 2. Actions for False Imprisonment.

Evidence *held* for jury on question of whether assistant manager of store caused arrest of customer. *Long v. Eagle Store Co.*, 146.

FOOD.

§ 14. Pleadings.

The complaint in this action alleging injury to plaintiff resulting from deleterious substances in a soft drink which had been bottled by defendant, that defendant was negligent in regard thereto, and that deleterious substances had been found in other drinks bottled by defendant at about the same time, *is held* sufficient to state a cause of action. *Beck v. Bottling Co.*, 566.

§ 15. Evidence.

When plaintiff, in compliance with order of court, furnishes a bill of particulars as to other occasions when deleterious substances were found in drinks bottled by defendant, it is prejudicial error to admit over objection evidence of "other occurrences" at variance with the bill of particulars. *Beck v. Bottling Co.*, 566.

FORNICATION AND ADULTERY.

§ 2. Prosecutions.

The evidence appearing in the record on the charge of fornication and adultery that defendant and the woman in question were seen together in public places on numerous occasions, *is held* insufficient to overrule defendant's motion to nonsuit on the charge, C. S., 4343, it appearing from the case on appeal that other evidence relating to the charge was excluded on defendant's objection. *S. v. Miller*, 317.

FRAUD.

§ 1. Elements of Actionable Fraud.

The elements of actionable fraud are a definite and specific representation which is materially false, made with knowledge of its falsity or in culpable ignorance of its truth, and with intent that it should be relied on, and which is reasonably relied on by the other party to his deception and damage. *Bervier v. Ins. Co.*, 554.

The remedies for actionable fraud apply to contracts and sales of both real and personal property. *Ibid.*

§ 3. Part or Subsisting Fact.

A representation that timber on the lands conveyed was just about enough to pay the balance of the purchase price of the lands is not only indefinite, but is an expression of opinion, and does not constitute a misrepresentation in law. *Bervier v. Ins. Co.*, 554.

§ 11. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient to overrule nonsuit in this action for fraud upon allegations that defendant prevented plaintiff from entering an increase bid to save his land from sale under commissioner's deed to defendant by fraudulent misrepresentations that defendant would cancel a deed of trust on other lands of plaintiff, it being alleged that at the time defendant had already had the deed of trust foreclosed and had bid in the property at the sale. *Littlejohn v. Johnson*, 221.

Evidence of actionable fraud *held* insufficient to be submitted to the jury. *Bervier v. Ins. Co.*, 554.

FRAUDS, STATUTE OF.

§ 2a. Sufficiency of Writing.

Although a memorandum sufficient to take a contract of sale of realty out of the statute of frauds need not be formal and may consist of several papers properly connected together, it must embody the terms of the contract, the names of the parties, and a description of the land to be conveyed, at least with sufficient definiteness to be aided by parol. C. S., 988. *Smith v. Joyce*, 602.

Memoranda at auction sale and other papers *held* insufficient to take contract out of statute of frauds, there being no sufficient description of property or reference to instrument containing sufficient description. *Ibid.*

§ 2b. Signature of Party to Be Charged.

An auctioneer's authority to sign a memorandum of sale as agent of the purchaser is ordinarily limited to the time of sale, and his signature for the purchaser two or three days after the sale and after the purchaser had repudiated the sale, does not bind the purchaser. *Smith v. Joyce*, 602.

An attorney for the vendors at an auction sale, who is not employed by the auctioneer nor requested by him to act, but who is present, voluntarily gathering memoranda for use in preparing deeds, is not in law an agent of the purchaser for the purpose of signing a memorandum of sale. *Ibid.*

FRAUDS, STATUTE OF—*Continued.*

§ 5. Application: Original Promise.

Evidence in the record on this appeal *held* sufficient to support finding that contract of defendant's ward, entered into while competent and before appointment of guardian, to pay expenses for the funeral of the wife of a close friend, is an original promise which is not required to be in writing within the statute of frauds. C. S., 987. *Funeral Home v. Spencer*, 702.

§ 10. Contracts to Convey and Options.

Held: Upon the purchaser's plea of the statute of frauds, C. S., 988, parol evidence is incompetent to establish the purchaser's agreement to pay the purchase price, since this is an essential element of a contract of sale and purchase, and an essential element of a contract required to be in writing may not be established by parol. *Kluttz v. Allison*, 379.

§ 12. Parol Trusts.

Express trust may rest in parol. *Henley v. Holt*, 384.

Parol evidence is competent to establish resulting trust. *Jackson v. Thompson*, 539.

FRAUDULENT CONVEYANCES.

§ 1. Transfers Invalid in General.

A corporation may not transfer all of its assets to other than a *bona fide* purchaser for value, without provision for the payments of its creditors. *Everett v. Mortgage Co.*, 778.

§ 2. Nature and Form of Transfer.

When a transfer of assets by a debtor is in law or in fact fraudulent as to creditors, so as to evade the just claims of the creditors, the mode and devices by which the transfer is made may be ignored and the transaction declared void. *Everett v. Mortgage Co.*, 778.

§ 3. Consideration.

Where a corporation transfers all its assets to another corporation for a grossly inadequate consideration, or no consideration at all, the transaction is fraudulent as to a creditor of the transferring corporation, and he may set aside the conveyance without showing actual fraud, regardless of the intent of the parties to the transfer. *Everett v. Mortgage Co.*, 778.

§ 4. Knowledge and Intent of Grantee.

When a corporation receiving all the assets of another corporation has knowledge of debts of the transferring corporation, or of circumstances which should put it on inquiry as a matter of law, the transaction will be deemed void as to the receiving corporation, and a creditor may follow the funds into its hands. *Everett v. Mortgage Co.*, 778.

§ 8. Creditors Entitled to Attack Transfer.

A creditor beginning an action prior to the transfer of assets by defendant is entitled to attack the transfer as fraudulent as to him, although he does not obtain judgment against the defendant until after the transfer of the assets had been accomplished. *Everett v. Mortgage Co.*, 778.

HOMICIDE.

I. Homicide in General

2. Parties and Offenses. S. v. Myers, 652.

II. Murder in the First Degree

3. Definition. S. v. Bowser, 249; S. v. Hawkins, 326; S. v. Alston, 93.

4c. Premeditation and Deliberation. S. v. Alston, 93; S. v. Bowser, 249; S. v. Hawkins, 326.

IV. Manslaughter (In operation of automobiles see Automobiles)

7b. Involuntary Manslaughter. S. v. Head, 700.

HOMICIDE—*Continued.*

VII. Evidence in Homicide Prosecutions
16. Presumptions and Burden of Proof. S. v. Alston, 93; S. v. Bowser, 249; S. v. Hawkins, 326.
17. Relevancy and Competency of Evidence in General. S. v. Hawkins, 326.
20. Evidence of Motive and Malice. S. v. Bowser, 249; S. v. Hawkins, 326.
21. Evidence of Premeditation and Deliberation. S. v. Bowser, 249; S. v. Hawkins, 326.

VIII. Prosecutions
25. Sufficiency of Evidence and Nonsuit. S. v. Bowser, 249; S. v. Hawkins, 326; S. v. Myers, 652; S. v. Head, 700.
27b. Instructions on Presumptions and Burden of Proof. S. v. Alston, 93; S. v. Bowser, 249.
27c. Instructions on Question of Murder in First Degree. S. v. Hawkins, 326.
27f. Instructions on Question of Self-Defense. S. v. Moore, 658.

§ 2. Parties and Offenses.

Evidence that one defendant killed deceased while attempting to rob him, and that during the commission of the crime appealing defendant waited in an automobile a short distance off to speed his codefendant away when he had completed the robbery, is sufficient to overrule appealing defendant's motion to nonsuit in a prosecution for murder. *S. v. Myers*, 652.

§ 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. *S. v. Bowser*, 249; *S. v. Hawkins*, 326.

Premeditation and deliberation are essential elements of crime of first degree murder. *S. v. Alston*, 93.

§ 4c. Premeditation and Deliberation.

Premeditation and deliberation is an essential element of the crime of murder in the first degree, and a defendant may show as an affirmative defense to a charge of this degree of the crime, mental incapacity to premeditate and deliberate, including such incapacity brought about by drunkenness. *S. v. Alston*, 93; *S. v. Bowser*, 249; *S. v. Hawkins*, 326.

Premeditation means thought beforehand for some length of time, however short. *S. v. Bowser*, 249; *S. v. Hawkins*, 326.

Deliberation implies an intention to kill executed by defendant in a cool state of blood in furtherance of a fixed design. *Ibid.*

§ 7b. Involuntary Manslaughter.

A witness for the State testified to the effect that defendant pointed his gun at deceased, that the gun fired, inflicting the fatal injuries. Defendant testified that he raised his gun to unload same, that the gun went off for some unknown reason, and that he had no intention of shooting deceased. C. S., 4216, makes it unlawful to point any gun or pistol at any person, either in fun or otherwise, whether the gun be loaded or unloaded. *Held:* Considering the evidence in the light most favorable to the State, it is sufficient to take the case to the jury and sustain a verdict of involuntary manslaughter. *S. v. Head*, 700.

§ 16. Presumptions and Burden of Proof.

Defendant does not have burden of proving beyond reasonable doubt his defense of intoxication to first degree murder charge. *S. v. Alston*, 93.

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. Bowser*, 249; *S. v. Hawkins*, 326.

Premeditation and deliberation are not presumed from an intentional killing with a deadly weapon, but must be established beyond a reasonable doubt. *Ibid.*

§ 17. Relevancy and Competency of Evidence in General.

Defendant was charged with murdering his wife. The State offered evidence tending to show that defendant, over a period of years, had beaten and

mistreated his wife, and had had altercations with her brother over his treatment of her, and had threatened to kill her brother. *Held:* The remoteness of some of the facts testified to does not render the testimony incompetent but goes only to its weight, and the admission of the evidence generally will not be held for error in the absence of a request by defendant that the part of the evidence competent only as corroborating evidence be so restricted in its admission and in the court's charge. *S. v. Hawkins*, 326.

§ 20. Evidence of Motive and Malice.

Evidence of threats are competent to show malice. *S. v. Bowser*, 249; *S. v. Hawkins*, 326.

Threats, to be competent, must be given sufficient individuation; threats in this case *held* competent. *S. v. Bowser*, 249.

§ 21. Evidence of Premeditation and Deliberation.

Evidence of threats is competent upon the question of premeditation and deliberation. *S. v. Bowser*, 249; *S. v. Hawkins*, 326.

Threats, to be competent, must be given sufficient individuation; threats in this case *held* competent. *S. v. Bowser*, 249.

The conduct of defendant before and after, as well as at the time of, the homicide, and the manner of the killing are competent on the question of premeditation and deliberation. *S. v. Bowser*, 249; *S. v. Hawkins*, 326.

The State offered evidence that more than two years prior to the homicide defendant threatened to kill deceased, that a month prior thereto he made another threat, and testimony of a declaration of defendant's son, made after the homicide, that defendant had said he was going to kill her (deceased) and had done so. *Held:* The remoteness of the first alleged threat does not render it incompetent, since the remoteness goes to the weight of the evidence and not to its competency. *S. v. Hawkins*, 326.

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence that defendant made threats against deceased shortly before the homicide, that after he had killed his victim he was cool and collected and stated he had committed the act, and thereafter told officers he had killed her because he loved her, together with evidence of the peculiarly atrocious manner in which he cut her throat and killed her, *is held* sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree. *S. v. Bowser*, 249.

In this prosecution of defendant for the murder of his wife, evidence tending to show threats made by defendant against her life, of defendant's conduct before and after the homicide, and silence in the face of accusation of guilt under circumstances calling for a denial, and other evidence tending to identify defendant as the perpetrator of the crime, together with other circumstantial evidence of guilt, *is held* sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree. *S. v. Hawkins*, 326.

Evidence *held* sufficient for jury on question of defendant's guilt of murder in first degree as aider and abettor in commission of murder in attempt to rob. *S. v. Myers*, 652.

Evidence *held* sufficient to support verdict of involuntary manslaughter. *S. v. Head*, 700.

§ 27b. Instructions on Presumptions and Burden of Proof.

Defendant's defense to the charge of murder in the first degree that at the time he was mentally incapable, because of intoxication, of premeditation and

HOMICIDE—*Continued.*

deliberation, must be supported by his own evidence or that of the State, but he is not required to establish the defense beyond a reasonable doubt, and an instruction susceptible of the construction that the burden was on him to prove the defense beyond a reasonable doubt is reversible error. *S. v. Alston*, 93.

Where the court defines murder in the first degree and murder in the second degree and correctly places the burden of proof on the State, and defines reasonable doubt, failure to charge on the presumption of innocence will not be held for error. *S. v. Bowser*, 249.

§ 27c. Instructions on Question of Murder in First Degree.

The court's charge on defendant's contention that he was mentally incapable of premeditation and deliberation by reason of drunkenness, *held* without error, and the refusal of defendant's request for instructions on this aspect was proper. *S. v. Hawkins*, 326.

§ 27f. Instructions on Question of Self-Defense.

When presented by the evidence, it is error for the court to fail to charge the law of self-defense in case of nonfelonious assault, and defendant's exception to a charge solely on the law of self-defense in case of a felonious assault must be sustained. *S. v. Moore*, 658.

Charge *held* susceptible to construction that reasonableness of apprehension should be determined from facts as of time of trial. *Ibid.*

HOSPITALS.

§ 6. Duties and Liabilities of Charitable Hospitals to Patients.

Allegations that charitable hospital had liability insurance covering claims of patients for negligent injuries *held* properly stricken, since evidence thereof would be incompetent. *Duke v. Children's Com.*, 570.

HUSBAND AND WIFE.

§ 14. Conveyance, Lien and Encumbrance of Lands Held by Entireties.

Neither a judgment obtained by a third person against either spouse, nor a judgment obtained by one spouse against the other, is a lien on land held by them by entireties. *Keel v. Bailey*, 159.

Title to lands held by entireties vests in survivor, and lien of judgment against survivor attaches immediately and has priority over deed of trust executed by him subsequent to the docketing of the judgment. *Ibid.*

§ 37. Nature and Essentials of Right of Action.

Consent of wife is no defense to action for criminal conversation. *Bryant v. Carrier*, 191.

§ 39. Evidence in Actions for Criminal Conversation.

In this action for criminal conversation, the court excluded evidence of the general character and character for chastity of a woman with whom plaintiff was alleged to have had improper relations. *Held:* The exclusion of the evidence, even conceding its materiality, cannot be held prejudicial in view of the admission of other testimony to the same effect without objection. *Bryant v. Carrier*, 191.

§ 40. Sufficiency of Evidence and Nonsuit.

Evidence in this action for criminal conversation *held* sufficient to overrule defendant's motion to nonsuit. *Carrier v. Bryant*, 191.

HUSBAND AND WIFE—*Continued.*

§ 41. Instructions in Action for Criminal Conversation.

In an action for criminal conversation it is not error for the court to fail to instruct the jury that it was necessary for plaintiff to show that he and his wife were living together at the time, or, if separated, that the separation was due to no fault of plaintiff, in the absence of a prayer for special instructions. *Bryant v. Carrier*, 191.

The consent of the wife is no defense to an action for criminal conversation, and an instruction that the jury should answer the issue in plaintiff's favor if they should find from the greater weight of the evidence that at the times alleged plaintiff and his wife were lawfully married, and that at such times defendant had sexual intercourse with her, is not error. *Ibid.*

§ 43. Damages in Actions for Criminal Conversation.

In an action for criminal conversation, an instruction that the jury might award the present value of prospective damages if they found that plaintiff's injury and loss would continue in the future is not error when there is evidence supporting the instruction. *Carrier v. Bryant*, 191.

INDEMNITY.

§ 1. Nature and Requisites of Indemnity Contracts in General.

An agreement executed by a surety to the State, which is not executed by the official therein covered, agreeing to indemnify the State for loss of money or property through failure of the official to faithfully discharge his duties, is an indemnity agreement and not a bond. *Midgett v. Nelson*, 396.

§ 2d. Indemnity Contracts of Public Officers.

Indemnity contract of Assistant Fisheries Commissioner *held* not to cover liability for tort committed by him *colore officii*. *Midgett v. Nelson*, 396.

INDICTMENT AND WARRANT.

§ 8. Joinder and Severance of Counts.

A charge of rape and a charge of carnally knowing a female person between the ages of 12 and 16 years, C. S., 4209, may be properly joined in separate counts in one indictment, C. S., 4622, and it is not error for the trial court to refuse to make the State elect between the counts. *S. v. Hall*, 639.

§ 11. Definiteness and Sufficiency in General.

The use of "and/or" in a warrant disapproved. *S. v. Ingle*, 276.

§ 15. Amendment of Warrant or Indictment.

A warrant may not be amended so as to charge a different offense, and when a defendant is charged in a warrant with a felony, the Superior Court may not permit an amendment to the warrant so as to charge a misdemeanor, and put defendant to trial thereon over his objection without a bill of indictment, or waiver of bill for a misdemeanor. *S. v. Clegg*, 675.

§ 22. Sufficiency of Indictment to Support Conviction of Lesser Degree of Crime.

The offenses of rape and carnal knowledge of female between the ages of 12 and 16 are such that the jury may find defendants guilty of the lesser crime. C. S., 4640. *S. v. Hall*, 639.

INFANTS.

§ 13. Joinder of Infants and Service of Process.

The heirs are necessary parties to a proceeding to sell realty to make assets to pay debts, and heirs under 14 years of age must be served as provided in

INFANTS—*Continued.*

C. S., 483 (2), and must defend by their general or testamentary guardian, if any, and if none, then by a guardian *ad litem*. *Graham v. Floyd*, 77.

§ 12. Qualification and Appointment of Guardian.

A creditor of the estate for the payment of whose claim the administrator files petition to sell realty to make assets, is not a proper person to be appointed guardian *ad litem* for the minor heirs. *Graham v. Floyd*, 77.

§ 14. Duties and Liabilities of Guardian Ad Litem.

It is the duty of a guardian *ad litem* for minor heirs in a special proceeding to sell real estate to make assets, to file answer and to protect the interests of the heirs. *Graham v. Floyd*, 77.

The guardian *ad litem* of minor heirs in a proceeding to sell lands to make assets to pay debts of decedent may not purchase at the sale, directly or indirectly, and if he does so he becomes a constructive trustee for his ward. *Ibid.*

When the guardian *ad litem* for a minor heir in proceedings to sell lands to make assets, purchases the property at the sale, the sale is not void, but voidable only, and the minor heir may have the sale set aside as against the guardian or hold the guardian liable for the true value of the property as a constructive trustee, even in the absence of fraud. *Ibid.*

INJUNCTIONS.

§ 2. Inadequacy of Legal Remedy and Irreparable Injury.

Injunction will lie to restrain issuance of new stock defeating right to accrued cumulative dividends on preferred stock. *Patterson v. Hosiery Mills*, 806.

§ 11. Continuance, Modification and Dissolution of Temporary Orders.

Ordinarily, in a suit for a permanent injunction, the temporary order will be continued to the hearing when the evidence raises serious question as to the existence of facts, which, if established, would entitled plaintiff to the relief sought. *Bailey v. Bryson*, 212.

Upon the hearing of an order to show cause why a temporary restraining order should not be continued to the hearing, the court has no jurisdiction to determine the cause on its merits, and the court's findings and conclusions are not *res adjudicata* as to the merits, even though at the final hearing the court hears the cause by consent. *Patterson v. Hosiery Mills*, 806.

INNKEEPERS.

§ 4. Duties and Liabilities to Employees.

Complaint alleging unprovoked, lascivious assault by customer in restaurant on plaintiff waitress *held* not to state cause of action against defendant proprietor. *Sammons v. Fasul*, 576.

INSANE PERSONS.

§ 9c. Claims Arising Out of Management of Estate by Guardian.

Neither an order authorizing a guardian to expend certain sums for a certain purpose for the estate of the incompetent, nor an order, entered after the death of the guardian, permitting the transfer of claim for the amount so used by the guardian to a trustee for the benefit of the heirs of the guardian, gives the debt the quality of a judgment against the estate of the incompetent. *Draughon v. Warren*, 404.

INSANE PERSONS—*Continued.*

§ 13. Liability for Torts.

An insane person is liable civilly for compensatory damages for his torts, but not for punitive damages. *Bryant v. Carrier*, 191.

INSURANCE.

§ 13. Construction and Operation of Insurance Contracts in General.

An insurance contract must be construed as the parties have made it. *Sanderlin v. Ins. Co.*, 362.

A policy of insurance will be construed with regard to the main purposes of the contract to guarantee to the insurer the payment of premiums and to secure it against fraud and imposition, and to give insured the protection and benefits for which he pays, and separate clauses will be harmonized with these purposes if possible by any reasonable construction, and literal construction of procedural requirements will not be given when such construction would defeat a primary purpose of the contract and compliance therewith is made impossible through no fault of a party to the contract by a circumstance later transpiring which could not have been contemplated by the parties at the time the contract was executed. *Woodell v. Ins. Co.*, 496.

§ 31b. Avoidance or Forfeiture of Policies Issued Upon Medical Examination for Misrepresentation or Fraud.

Defendant insurer introduced evidence that at the time of the issuance of the policies in suit insured made written representation to the effect that she was not pregnant and that her menstruation was regular and normal, in reaffirming her representations to this effect made in her application, that insured's last menstruation period was over two months prior to the issuance of the policies, and that had insured disclosed the facts the policies would not have been issued by the insurer or by the re-insurer. The policies were issued after medical examination. *Held:* The evidence was sufficient to be submitted to the jury, and upon an affirmative finding that insured had made such misrepresentation, insurer is entitled to the cancellation of the policies, the representations being material as a matter of law. *Wells v. Ins. Co.*, 351.

§ 34b. Notice and Proof of Disability.

Mental incapacity to give notice required excuses failure to give notice of disability. *Woodell v. Ins. Co.*, 496.

§ 35a. Notice and Proof of Death.

The requirement of an accident policy for "immediate notice" of death of the insured, as well as the statutory requirement, C. S., 6479 (5), is not inflexible, but imposes the duty to exercise reasonable diligence to give the required notice, which should be measured by the beneficiary's ability and opportunity to act in the premises. *Gorham v. Ins. Co.*, 526.

Evidence *held* for jury on question of whether, under the circumstances, beneficiary acted with reasonable diligence to give notice. *Ibid.*

The provision of nonliability in an insurance policy upon failure of the beneficiary to give immediate notice of death and proof of loss within ninety days, is not one affecting the coverage of the policy, but is one of forfeiture which is not favored in the law. *Ibid.*

Denial of liability by insurer on grounds other than the failure to give notice and proof of loss constitutes a waiver of notice and proof of loss. *Ibid.*

Whether receipt of notice and proof of death by insurer through its agent obviates the necessity of notice and proof of death by the beneficiary, *quære*. *Ibid.*

INSURANCE—*Continued.*

§ 38. Construction of Accident and Health Policies as to Risks Covered and Evidence Thereof.

A "disease" may be defined as a "deviation from the healthy or normal condition of any of the functions or tissues of the body" or as "a morbid condition of the body." *McGregor v. Assurance Corp.*, 201.

Evidence that an X-ray disclosed that insured had impacted wisdom teeth, that they had given her no trouble, pain or illness, and might never have done so, but that insured voluntarily submitted to an operation for their removal, *is held* insufficient to show that insured suffered a disease within the meaning of the policy of health insurance issued by defendant, since it discloses that the disability resulted from the operation rather than the condition of the teeth. *Ibid.*

Plaintiff beneficiary's evidence tended to show that insured died as a result of an accident occurring when the door of the car in which he was riding came open and insured fell or was thrown out of the car. *Held:* The death was not by accident within the coverage of a policy providing for liability if insured should die by accident occurring by his being struck by an automobile, or by collision or accident to an automobile in which he was riding. *Sanderlin v. Ins. Co.*, 362.

Requirement of notice of death or loss is not one affecting coverage of policy, but is one of forfeiture which is not favored. *Gorham v. Ins. Co.*, 526.

Injury sustained when insured was run over by a passenger train *held* not covered by provision of accident policy providing indemnity for injuries sustained by accident while insured is traveling in a railroad passenger car as a passenger therein. *Gilmore v. Ins. Co.*, 674.

§ 39. Provisions Limiting Liability or Constituting Conditions Precedent Thereto.

The health policy sued on provided benefits in case insured should suffer disease commencing during the life of the policy and after it had been in force for thirty days. Insured's evidence disclosed that less than thirty days after the issuance of the policy her dentist discovered by means of X-rays that insured had fully developed, impacted wisdom teeth, and that more than thirty days after the issuance of the policy insured submitted to an operation for their removal. *Held:* Conceding that impacted wisdom teeth constitute a "disease" within the meaning of the policy, the evidence discloses that the condition existed long before the issuance of the policy and that insured knew of the condition less than thirty days after the issuance of the policy, and therefore the condition was not contracted during the life of the policy and after it had been in force for thirty days. *McGregor v. Assurance Corp.*, 201.

§ 48. Rights of Persons Injured as Against Liability Insurer.

Anyone for whose benefit an insurance policy is issued, covering the legal liability of the insured, as distinguished from a mere indemnity contract, may maintain an action directly against the insurer. *Distributing Co. v. Ins. Co.*, 596.

§ 50. Actions on Liability Policies.

When action nonsuited is instituted within time limit of policy, action instituted within one year thereafter is not barred. *Distributing Co. v. Ins. Co.*, 596.

Judgment against insured in action to which insurer is a party is conclusive on insurer. *Ibid.*

INTOXICATING LIQUOR.

§ 2. Construction and Operation of Control Statutes.

Order restraining election on liquor question is properly continued when petition does not affirmatively show that signers were qualified and did vote in last election for Governor. *Bailey v. Bryson*, 212.

The Turlington Act, sec. 1, ch. 1, Public Laws of 1923, is the law in North Carolina except to the extent that it is modified or repealed by the Alcoholic Beverage Control Acts, chs. 493, 418, Public Laws of 1935, and ch. 49, Public Laws of 1937. *S. v. Davis*, 787.

"A. B. C." Act does not repeal provisions of Turlington Act making possession illegal unless liquor is in sealed container and is less than gallon or unless it is being transported to "A. B. C." store. *S. v. Davis*, 787.

§ 4a. Possession in General.

Certain of the provisions of the Alcoholic Beverage Control Acts, especially the provisions relating to transportation, are to be given State-wide effect, and the control acts modify the Turlington Act in this respect only to the extent of permitting transportation in a sealed container of a quantity not in excess of one gallon of tax-paid liquor for personal use from out the State or from an Alcoholic Beverage Control Store, or transportation of whiskey to Alcoholic Beverage Control Stores, and hence it is still unlawful in this State for any person to possess or transport intoxicating liquor for any purpose other than those specified in the act or in a quantity in excess of one gallon, unless such liquor is in actual course of delivery to a County Store. *S. v. Davis*, 787.

Mere transportation of 203 cases of intoxicating liquor is *prima facie* unlawful even though not for the purpose of sale, and an instruction that defendant must have been transporting same for the purpose of sale in order to be guilty, is favorable to defendant. *Ibid.*

§ 4d. Presumptions from Possession.

In a prosecution for possession of intoxicating liquor in violation of the Alcoholic Beverage Control Act, 1937 Supplement to Michie's Code, 3411 (79), the fact of possession does not constitute *prima facie* evidence that the possession was for the purpose of sale, since the statute under which the warrant is drawn does not provide for such *prima facie* rule. *S. v. Lockey*, 525.

§ 9b. Burden of Proof.

On a charge of illegal transportation of a large quantity of intoxicating liquor, the State is not required to prove that the transportation was not within the exceptions allowed by law, nor that the liquor was not being transported in interstate commerce, the exceptions being matters of defense. *S. v. Davis*, 787.

§ 9c. Competency and Relevancy of Evidence.

Ch. 339, sec. 1½, Public Laws of 1937, does not render incompetent evidence obtained by unlawful search without warrant. *S. v. McGee*, 184.

Unsigned papers purporting to be bills of laden, without evidence of their genuineness, and which were issued to a transportation company with which neither defendant nor his codefendants were connected, are without probative force that the intoxicating liquor was being transported in interstate commerce. *S. v. Davis*, 787.

§ 9d. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Proof that defendant was transporting 203 cases of intoxicating liquor in this State is sufficient to take the case to the jury, the specific act of transportation being unlawful and no proof of a particular intent being necessary,

INTOXICATING LIQUOR—*Continued.*

since a person is presumed to intend the natural consequences of his act, but this *prima facie* case, without contradicting evidence, does not justify a directed verdict for the State, but is merely sufficient to take the case to the jury and subject defendant to the risk of an adverse verdict in the absence of evidence in rebuttal. *S. v. Davis*, 787.

Mere transportation of 203 cases of intoxicating liquor is *prima facie* unlawful even though not for the purpose of sale, and an instruction that defendant must have been transporting same for the purpose of sale in order to be guilty, is favorable to defendant. *Ibid.*

§ 9g. Verdict and Judgment.

A charge of unlawful possession of intoxicating liquors for the purpose of sale and a charge of unlawful sale of intoxicating liquors, C. S., 3411 (b), are distinct charges of separate offenses, and support separate sentences by the court on a general plea of guilty. *S. v. Moschoures*, 321.

Defendant was charged with unlawful possession of intoxicating liquor for the purpose of sale and with unlawfully transporting liquor for the purpose of sale. The jury's verdict was guilty of unlawful transportation of intoxicating liquors and not guilty as to possession. *Held:* Mere inconsistency will not invalidate the verdict, and further, on this record the inconsistency is explained by evidence tending to show that defendant was driving the truck transporting the liquor for his codefendant. *S. v. Davis*, 787.

JUDGES.

§ 2c. Terms and Commissions.

Judge holding courts for spring circuit has jurisdiction of entire term beginning in June and running into July. *West v. Woolworth Co.*, 214.

JUDGMENTS.

III. Judgments by Default
11. Time of Default and Rendition of Judgment. Heffner v. Ins. Co., 359.
VI. Judgments on Trial of Issues or Hearing of Motions
17b. Conformity to Verdict and Pleadings. Twitty v. Cochran, 265.
VII. Docketing and Lien
19b. Attachment of Lien of Judgment by Confession. Keel v. Bailey, 159.
19d. Docketing and Priorities. Keel v. Bailey, 159.
20. Land Upon Which Lien Attaches. Jackson v. Thompson, 539.
VIII. Validity and Attack
22b. Procedure: Direct and Collateral Attack. Groce v. Groce, 398.
22c. Pleadings in Actions to Set Aside. Hinton v. Whitehurst, 99; Stevens v. Cecil, 273.
22e. Motions to Set Aside for Surprise and Excusable Neglect. Draughon v. Warren, 404; Gorman v. Yorke, 524.
22h. Want of Jurisdiction. Graham v. Floyd, 77; Groce v. Groce, 398; Bohannon v. Trotman, 706.
22i. Attack for Error of Law. Hinton v. Whitehurst, 99.
X. Operation of Judgments as Bar to Subsequent Action
32. In General: Scope of Former Adjudication. Crawford v. Crawford, 614; Patterson v. Hosiery Mills, 806.
33a. Judgments as of Nonsuit. Cheek v. R. R., 152; Briley v. Roberson, 295.
34. Judgments of Other States. Taylor v. Ins. Co., 770.
XI. Assignment
36. Right to Assign. Little v. Steele, 343.
XIII. Payment Discharge and Cancellation
44. Cancellation and Discharge by Agreement. Keel v. Bailey, 159.

§ 11. Time of Default and Rendition of Judgment.

A motion to strike out is required to be made before answer or demurrer, and therefore when such motion is made within thirty days from the filing and service of summons and complaint, and notice of the motion is mailed to and received by plaintiff's attorney within that time, plaintiff is not entitled to judgment by default prior to the final determination of the motion, since defendants have thirty days after final determination of the motion in which to answer or demur. C. S., 509, 537. *Heffner v. Ins. Co.*, 359.

JUDGMENTS—*Continued.*

§ 17b. Conformity to Verdict and Pleadings.

Judgment in this case *held* for error in exceeding the bounds authorized by the verdict. *Twitty v. Cochran*, 265.

§ 19b. Attachment of Lien of Judgments by Confession.

A judgment by confession, like any other judgment, becomes a lien on the judgment debtor's real estate as of the date the judgment is docketed. C. S., 614, 623-625. *Keel v. Bailey*, 159.

§ 19d. Docketing and Priorities.

Title to lands held by entireties vests in survivor, and lien of judgment against survivor attaches immediately and has priority over deed executed by him subsequent to the docketing of the judgment. *Keel v. Bailey*, 159.

§ 20. Land Upon Which Lien Attaches.

Lien of judgment does not attach to lands held by judgment debtor as naked trustee under resulting trust. *Jackson v. Thompson*, 539.

§ 22b. Procedure: Direct and Collateral Attack.

A judgment entered upon a fatally defective service of summons by publication is void for want of jurisdiction, and defendants' motion in the cause to set same aside should be allowed. *Groce v. Groce*, 398.

§ 22c. Pleadings in Actions to Set Aside Judgments.

Whether a judgment is void presents a mixed question of law and fact, and a party seeking to set aside a judgment on the ground that it is void must allege facts upon which that conclusion is based so that the court may determine whether the facts alleged constitute a good cause of action. *Hinton v. Whitehurst*, 99.

Complaint *held* insufficient to state cause of action against corporate defendants in this action to set aside judgment. *Stevens v. Cecil*, 273.

§ 22e. Motions to Set Aside for Surprise and Excusable Neglect.

A finding, unexcepted to, and supported by evidence, that movants had failed to show a meritorious defense, supports judgment dismissing a motion to set aside an order on the ground of excusable neglect. *Draughon v. Warren*, 404.

Ordinarily, the act of neglect of a codefendant or the insurer of such codefendant should not be imputed to the defendant moving to set aside the judgment for surprise and excusable neglect, and should not be considered in determining whether movant had established excusable neglect. *Gorman v. Yorke*, 524.

§ 22h. Want of Jurisdiction.

A *prima facie* presumption of jurisdiction arises from the fact that a court having jurisdiction over the subject matter has acted. *Graham v. Floyd*, 77.

A judgment entered upon a fatally defective service of summons by publication is void for want of jurisdiction, and defendants' motion in the cause to set same aside should be allowed. *Groce v. Groce*, 398.

Court has jurisdiction to hear cause prior to expiration of time to file answer when right to file answer is waived. *Bohannon v. Trotman*, 706.

§ 22i. Attack for Error of Law.

Sole remedy for relief against erroneous judgment is by appeal. *Hinton v. Whitehurst*, 99.

§ 32. Operation of Judgments in General as Bar to Subsequent Action.

Held: The rights of plaintiff and defendant among themselves were brought directly in issue in the partition proceedings, and the petition and judgment

JUDGMENTS—*Continued.*

therein estops plaintiff from asserting the alleged parol trust. *Crawford v. Crawford*, 614.

Upon the hearing of an order to show cause why a temporary restraining order should not be continued to the hearing, the court has no jurisdiction to determine the cause on its merits, and the court's findings and conclusions are not *res adjudicata* as to the merits, even though at the final hearing the court hears the cause by consent. *Patterson v. Hosiery Mills*, 806.

§ 33a. Operation of Judgments as of Nonsuit as Bar to Subsequent Action. (Pending action as bar, see Abatement and Revival.)

Where judgment of nonsuit may be based on either one of two grounds, whether it is *res adjudicata* as to one of them, *quære*. *Cheek v. R. R.*, 152.

While C. S., 415, relating to the time of institution of an action in regard to the statute of limitations, provides that an action may be instituted within one year from judgment as of nonsuit, provided the original action was not brought *in forma pauperis*, a voluntary nonsuit will not bar a subsequent action even though the original action nonsuited was brought *in forma pauperis*. *Briley v. Roberson*, 295.

§ 34. Operation of Judgments of Other States as Bar to Action in This State.

Plaintiff *held* barred by judgment of State of California in action in which he appeared by class representation under its laws. *Taylor v. Ins. Co.*, 770.

§ 36. Right to Assign.

Commissioner of Banks may assign stock assessment judgment in sale of assets to pay creditors. *Little v. Steele*, 343.

§ 44. Cancellation by Agreement.

Judgment by confession was entered against a husband in favor of his wife. Thereafter the parties exchanged deeds in order to divide between them lands held by the entireties, which deeds contained no stipulation in regard to the judgment. *Held:* The deeds did not cancel the judgment. *Keel v. Bailey*, 159.

JUDICIAL SALES.

§ 3. Day of Sale.

Judicial sale not held on a Monday or on one of first three days of a term of court is void. *Bladen County v. Bruce*, 544.

§ 6. Validity and Attack.

Guardian *ad litem* for minor heir may not purchase at sale of lands to make assets, and if he does so minor heir may have sale set aside as to guardian or purchaser from him with notice, or hold guardian liable as constructive trustee. *Graham v. Floyd*, 77.

Where record shows judicial sale was had on day other than permitted by law, purchasers have notice, and sale is void. *Bladen v. Breece*, 544.

§ 7. Title and Rights of Purchaser.

A purchaser at a judicial sale, or his grantee, obtains good title in the absence of fraud or the knowledge of fraud, if the record shows jurisdiction of the court over the parties and subject matter, and the judgment on its face authorizes the sale. *Graham v. Floyd*, 77.

Record *held* to show jurisdiction of the court and order of sale sufficient to protect purchaser in absence of fraud or knowledge thereof. *Ibid.*

JURY.

§ 5. Right to Jury Trial in General.

In absence of waiver or agreement, court may not determine issues of fact raised by pleadings without intervention of jury. *McCullers v. Jones*, 464.

Case must be submitted to the jury even though plaintiff's evidence is sufficient to warrant directed verdict. *Campbell v. Trust Co.*, 680.

The right to trial by jury is a substantial right. *Ibid.*

LANDLORD AND TENANT.

§ 2. Form, Requisites and Validity of Leases in General.

Acknowledgment of lease in question *held* in substantial compliance with statute and sufficient to support registration charging purchaser with knowledge. *Freeman v. Morrison*, 240.

§ 3. Title of Landlord and Estoppel of Tenant.

The estoppel of a tenant to deny his landlord's title applies to the landlord's title as of the time the tenancy is created, and does not prevent the tenant from showing that after the tenancy was created the landlord's title had been surrendered, or had expired or been extinguished, and in an action in summary ejectment by a lessee against his sub-lessee, the sub-lessee is entitled to introduce evidence tending to show that prior to the institution of the action the lessee had surrendered his lease and that the sub-lessee's wife had leased the premises directly from the owner for the following year. *Lassiter v. Stell*, 391.

§ 25. Actions to Recover Rents.

A rental agent may not maintain a suit in ejectment or for the collection of rents, the owner being the real party in interest, C. S., 446, and this rule is not changed by C. S., 2367. *Ins. Co. v. Locker*, 1.

LARCENY.

§ 5. Presumptions and Burden of Proof.

The presumption of guilt from recent possession of stolen property does not apply to charge of larceny when the evidence tends to show merely that stolen property was found loaded on a truck belonging to defendant shortly after the crime. *S. v. English*, 564.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence tending to show that defendant's truck was used to haul away stolen pipe from the scene of the larceny and that the pipe was found on the truck shortly thereafter, that defendant waited several days after discovering the police had the truck in their possession without claiming it and without reporting its loss, and that defendant could not be found at home for several days after the truck had been seized, without evidence that defendant was in possession of the truck at the time the pipe was found loaded thereon, or on the previous night when the crime was committed, *is held* insufficient to be submitted to the jury on the charge of larceny. *S. v. English*, 564.

Circumstantial evidence of appealing defendants' guilt of larceny and receiving fertilizer of a certain brand *held* to raise only a strong suspicion of guilt, and was insufficient to be submitted to the jury. *S. v. Epps*, 577.

LIBEL AND SLANDER.

§ 2. Words Actionable Per Se.

Words charging innocent woman with incontinency are actionable *per se* permitting recovery for mental suffering. *Bryant v. Reedy*, 748.

LIBEL AND SLANDER—*Continued.*

§ 6. Notice and Retraction.

Letter written by plaintiff and received by defendant, containing demand for retraction of specified libel, is sufficient notice. *Roth v. News Co.*, 23.

§ 7. Privilege.

Admission of testimony of a police officer as to slanderous statements made to him by defendant *held* not error in the absence of a plea of privilege, especially in view of the fact that defendant denied making the statement and the overwhelming testimony of other witnesses as to slanderous remarks of the same nature made to them by defendant. *Bryant v. Reedy*, 748.

§ 9. Justification and Mitigation.

When the defendant in an action for slander denies the allegations of plaintiff as to the slander charges *in toto*, and tenders no issue as to justification or mitigation, the exclusion of evidence of justification and mitigation is not error, it being required that such evidence be supported by proper plea. N. C. Code, 542. *Bryant v. Reedy*, 748.

§ 12. Relevancy and Competency of Evidence.

It is not required that testimony be in exact words of allegations, it being sufficient if they are same in substance. *Bryant v. Reedy*, 748.

Testimony of mental suffering, humiliation and embarrassment is competent in action for words actionable *per se* without specific allegation thereof. *Ibid.*

§ 14. Instructions.

In this action for slander for words actionable *per se*, the court's charge on the issue of compensatory damages, defining implied malice, actual and compensatory damages, and properly placing the burden of proof on the issue on plaintiff, *held* without error. *Bryant v. Reedy*, 748.

§ 16. Damages.

Evidence of reputed wealth of defendant is competent on issue of punitive damages, and instruction of the court on issue of damages *held* without error. *Bryant v. Reedy*, 748.

LIMITATION OF ACTIONS.

§ 1. Nature, Validity and Construction of Statutes of Limitation in General.

Statutory limitation on actions for deficiency judgments *held* not to impair obligation of contract. *Building and Loan Assn. v. Jones*, 30.

The assertion of the right to retain proceeds of a policy of insurance as assignee of the policy, the funds then being in the hands of the person asserting such right, constitutes a defense to an action to recover the funds, and such defense is not barred by the three-year statute. *Sellars v. Bank*, 300.

§ 2a. Actions Barred in Ten Years.

Since an action to enforce a resulting or constructive trust is based upon a wrongful or tortious act, the ten-year statute of limitations applies. C. S., 445. *Teachey v. Gurley*, 288.

§ 2c. Actions Barred in Three Years.

An action against the surety on a guardianship bond is barred after three years from the breach complained of. C. S., 441 (6). *Copley v. Scarlett*, 31.

Since occurrences which constitute a breach of an express trust amount in effect, and usually in fact, to a breach of contract, a cause of action for such breach is barred at the expiration of three years from such breach. C. S., 441. *Teachey v. Gurley*, 288.

LIMITATION OF ACTIONS—*Continued.*

§ 3. Accrual of Right of Action.

The right of action against the surety on a guardianship bond for failure of the guardian to pay all sums due the ward upon her majority, accrues six months after the date of the ward's majority, C. S., 2188, and is barred three years thereafter. *Copley v. Scarlett*, 31.

No statute of limitation runs against an express trust until the trustee repudiates the trust with the knowledge of the *cestui*, or until demand and refusal or termination of the trust by death, or the trust is closed, since until one of these contingencies occurs no cause of action rests in the *cestui*. *Teachey v. Gurley*, 288.

An action to enforce a resulting or constructive trust is based on the original wrongful or tortious act of the person holding title, and the cause of action arises and the statute begins to run immediately the wrongful act is committed. *Ibid.*

§ 4. Fraud and Ignorance of Cause of Action.

Plaintiff, an old, feeble, illiterate Negro, instituted this action attacking a warranty deed executed by him on the ground that the grantees therein fraudulently procured the execution of the instrument, and that at the time plaintiff thought and intended to execute only a mortgage for the security of his debt. *Held:* Whether the cause of action was barred by the statute of limitations should have been submitted to the jury upon the evidence under the provisions of the statute that a cause of action for relief on the ground of fraud or mistake shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. C. S., 441 (9). *Briley v. Roberson*, 295.

Whether, as between the original parties or their privies, a cause of action for reformation of a mortgage for mistake in specifying the amount secured as $15 instead of $1,500, as intended, was instituted within three years from discovery of the facts, or the time they should have been discovered in the exercise of due diligence, *held* for jury in this case. Michie's N. C. Code, 441 (9). *Lowery v. Wilson*, 800.

§ 5. Notice and Demand.

Statute does not begin to run against action to enforce express trust until trustee repudiates the trust with knowledge of *cestui*, or until demand and refusal. *Teachey v. Gurley*, 288.

Cause of action for breach of express trust accrues upon the disavowal or repudiation of the trust. *Bright v. Hood, Comr.*, 410.

§ 7. Disabilities.

The fact that a person against whom a claim is asserted is an incompetent does not prevent the running of the statute of limitations when the incompetent has a guardian against whom the claim may be prosecuted. *Draughon v. Warren*, 404.

§ 10. Death and Administration.

A party asserting the right as assignee of an insurance policy to retain the proceeds thereof for obligations he contends were secured by the assignment is not barred by C. S., 100, from asserting such right after the lapse of more than six months as against the administrator of the deceased insured in the administrator's action to recover the funds, the defense not constituting a prosecution of a claim against the administrator which had been denied. *Sellars v. Bank*, 300.

LIMITATION OF ACTIONS—*Continued.*

§ 11a. Time of Institution of Action.

Suit was instituted by a rental agent in a justice's court to recover rent in arrears when defendant tenant vacated the premises. Upon appeal to the Superior Court, the owner was joined as additional party plaintiff, C. S., 547. *Held:* The owner was the real party in interest, C. S., 446, and as to him the amendment constituted a new cause of action against defendant, and his action does not relate back to the date of the institution of the original action, and the joinder being made more than three years after the due date of the rent, defendants' plea of the statute of limitations is good, and their motion to nonsuit should have been allowed. *Ins. Co. v. Locker*, 1.

§ 11b. Institution of Action After Nonsuit.

C. S., 415, providing that when an action instituted within the time prescribed is nonsuited, plaintiff may bring another action within one year after such nonsuit, applies to limitations generally, including a contractual limitation in a policy of liability insurance, and not solely to limitations which are strictly statutes of limitation. *Distributing Co. v. Ins. Co.*, 596.

Dismissal or nonsuit as to one defendant for misjoinder of parties and causes is a nonsuit within the provisions of C. S., 415, permitting plaintiff to institute another action within one year of nonsuit when the original action is instituted within the time prescribed. *Ibid.*

§ 12b. Part Payment as Affecting Bar of Parties Secondarily Liable.

The liability of the surety on a guardianship bond is secondary, and payment of interest or principal by the guardian does not affect the running of the statute of limitations in favor of the surety. *Copley v. Scarlett*, 31.

§ 18. Sufficiency of Evidence and Nonsuit.

Held: Taking the evidence in the light most favorable for plaintiffs, it tends to establish an express trust, and the three-year statute of limitations applies, C. S., 441, and it appearing that more than three years elapsed from the breach of the trust to the knowledge of the *cestui*, the action was proprely dismissed upon defendant's plea of the statute. *Teachey v. Gurley*, 288.

MANDAMUS.

§ 1. Nature and Grounds of Remedy in General.

Mandamus will lie against a board of county commissioners, as well as a board of county education, but the writ will lie only to compel the performance of an established legal duty at the instance of those having a clear legal right to demand performance. *Mears v. Board of Education*, 89.

The issuance of a writ of *mandamus* is no longer discretionary with the courts, but ordinarily must issue the writ when it is sought to enforce a clear legal right to which it is appropriate. *Casualty Co. v. Comrs. of Saluda*, 236.

§ 2a. To Compel Performance of Ministerial or Legal Duty.

Mandamus will lie to compel the performance of a legal duty only in accordance with the procedure therefor established by law. *Mears v. Board of Education*, 89.

Mandamus will not lie to compel performance of legal duty prior to time statutes require such duty to be performed. *Ibid.*

§ 2c. To Compel Levy of Tax.

Mandamus held not to lie to compel levy of tax for necessary school buildings prior to time statute requires commissioners to act in the matter. *Mears v. Board of Education*, 89.

MANDAMUS—*Continued.*

Ordinarily, *mandamus* will lie to compel municipality to levy taxes to pay valid judgment. *Casualty Co. v. Comrs. of Saluda*, 235.

When municipality has power to levy tax in excess of governmental needs, *mandamus* will lie to compel levy of tax to pay judgment on tax anticipation notes. *Ibid.*

§ 2d. Mandamus to Compel Certification of Candidate as Democratic Nominee.

A candidate is entitled to restrain the State Board of Elections from declaring his opponent the nominee in a primary until complete, legal and final returns from all the counties of the district have been made, filed and accepted, or as a matter of law ought to have been accepted, and the court should determine as a matter of law without the intervention of a jury whether such returns have been received, and whether upon such returns plaintiff is entitled to a writ of *mandamus* to compel the State Board to declare him the nominee, and enter judgment accordingly. *Burgin v. Board of Elections*, 324.

Petitions in the Supreme Court of opposing candidates, each seeking *mandamus* for the respective petitioner to compel the State Board of Elections to declare him the party nominee are dismissed, neither petitioner having shown on the uncontested facts a clear legal right to the writ. *Ibid.*

MASTER AND SERVANT.

III. Employer's Liability for Negligent Injuries to Employee

11. Nature and Extent of Liability in General. Kates v. Harrison, 151.

IV. Liability for Injury to Third Persons

21b. Course of Employment; Scope of Authority. Long v. Eagle Store Co., 146; Robinson v. McAlhaney, 180.

VII. Workmen's Compensation Act

38. Industries and Concerns Subject to the Act. Tscheiller v. Weaving Co., 449; Rape v. Huntersville, 505.

40a. Injuries Compensable in General. Tscheiller v. Weaving Co., 449; Plyler v. Country Club, 453.

40c. Hernia. Moore v. Sales Co., 424.

40d. Whether Injury Results from "Accident." Moore v. Sales Co., 424; Tscheiller v. Weaving Co., 449.

40e. Whether Accident "Arises Out of the Employment." Plyler v. Country Club, 453; Maley v. Furniture Co., 589.

40f. Whether Accident "Arises in the Course of the Employment." Tscheiller v. Weaving Co., 449; Davis v. Mecklenburg County, 469.

41a. Amount of Recovery. Early v. Basnight & Co., 103; Schrum v. Upholstering Co., 353.

42. Change of Condition and Review of Award by the Commission. Knight v. Body Co., 7; Murray v. Knitting Co., 437.

43. Persons Entitled to Payment of Award. Hamby v. Cobb & Homewood, Inc., 813.

44. Rights of Employer, Insurer and Injured Employee against Tort-Feasor. Rogers v. Construction Co., 269.

45c. Cancellation of Compensation Insurance Policies. Pettit v. Trailer Co., 335.

49. Jurisdiction of Industrial Commission and Superior Courts. Tscheiller v. Weaving Co., 449.

52a. Rules and Procedure in Hearings before Industrial Commission. Maley v. Furniture Co., 589.

52b. Hearings and Evidence before Industrial Commission. Plyler v. Country Club, 453; Maley v. Furniture Co., 589.

55d. Matters Reviewable. Knight v. Body Co., 7; Early v. Basnight & Co., 103; Hamby v. Cobb & Homewood, Inc., 813; Lee v. Toler & Son, 823; Valentine v. Grocery Co., 828; Moore v. Sales Co., 424; Plyler v. Country Club, 453; Davis v. Mecklenburg County, 469.

55g. Determination and Disposition of Cause. Gowens v. Alamance County, 18; Maley v. Furniture Co., 589.

§ 11. Nature and Extent of Master's Liability for Negligent Injury to Servant in General.

Plaintiff employee was employed to sell used parts from old automobiles. The evidence disclosed that plaintiff and two customers attempted to turn a car over to get some parts, instead of jacking the car up; that the customers turned the car loose when the door on the other side flew open and became an obstruction against turning the car over; that plaintiff could not hold the side of the car up alone, did not have room to get out of the way, and was

injured when struck by the car. There was no evidence that plaintiff was ordered to do the work in this way by a superior. *Held:* The evidence fails to show that the alleged injury was proximately caused by any negligent act or omission of duty attributable to defendant employer. *Kates v. Harrison*, 151.

§ 21b. Course of Employment; Scope of Authority.

When there is doubt as to the scope of the employee's authority, it must be resolved in favor of the injured third person and the question submitted to the jury, since the employer places the employee in position to do the wrongful act. *Long v. Eagle Store Co.*, 146.

In absence of ratification, master may be held liable for servant's tort only if committed in course of employment. *Robinson v. McAlhaney*, 180.

Under the evidence, whether employee was engaged in employment at the time and committed the tort in furtherance thereof, *held* for jury. *Ibid.*

§ 38. Industries and Concerns Subject to the Act.

Where it is alleged in the complaint that the corporate defendant employed several hundred employees, including plaintiff, it will be presumed that the parties have accepted the provisions of the Workmen's Compensation Act and are bound thereby. Sec. 4, ch. 120, Public Laws of 1929; Michie's Code, 8081 (k). *Tscheiller v. Weaving Co.*, 449.

The provisions of the Compensation Act relating to employers and employees covered by the act must be given a liberal interpretation. *Rape v. Huntersville*, 505.

Each municipal corporation is subject to Compensation Act, even though it employs less than five employees. *Ibid.*

§ 40a. Injuries Compensable in General.

The purpose of the Workmen's Compensation Act is not to absolve the employer from liability for negligence, but to render him liable for compensation for injuries by accident compensable thereunder regardless of whether the accident is caused by negligence or not. *Tscheiller v. Weaving Co.*, 449.

In order to support an award of compensation it must appear by competent evidence not only that the injury was received in the course of the employment but also that it arose out of the employment. *Plyler v. Country Club*, 453.

§ 40c. Hernia.

Evidence *held* sufficient to support finding that hernia occurred suddenly after the accident. *Moore v. Sales Co.*, 424.

§ 40d. Whether Injury Results from "Accident."

Evidence *held* sufficient to support findings that hernia resulted from "accident." *Moore v. Sales Co.*, 424.

An injury by accident resulting from the negligence of a fellow employee, occurring while the injured employee is engaged in his master's business and within the scope of his employment, is, as to the injured employee, an accident arising out of and in the course of his employment. *Tscheiller v. Weaving Co.*, 449.

§ 40e. Whether Accident "Arises Out of Employment."

Evidence that caddy died as result of blood-poisoning from injury to foot *held* insufficient to show that injury arose out of employment. *Plyler v. Country Club*, 453.

The evidence disclosed that the employee was employed to run a trim saw and handled rough plank which he fed to the saw, that he was seen in front

of his running saw with a freshly bleeding place on his arm, that the next day another witness saw him with a red inflamed place on his arm that had been cut or bruised, and that the employee died from blood poisoning resulting from cutting or bruising a pimple or early boil on his arm. *Held:* Taking into consideration, as matters of common knowledge, the dangerous character of the machine and the likelihood of such injury resulting from the occupation, the circumstantial evidence raises more than a conjecture as to the cause of the injury, and is sufficient to support the finding of the Industrial Commission that the injury resulted from an accident arising out of the employee's employment and in the performance of his duty. *Maley v. Furniture Co.*, 589.

§ 40f. Whether Accident "Arises in the Course of the Employment."

Where employer sells food and drink to employees for their refreshment, injury to employee from spoiled sandwich arises in the course of the employment. *Tschciller v. Weaving Co.*, 449.

The evidence tended to show that the deceased employee was a rural policeman with regular hours of work, but that he was subject to call for duty at any hour, and that he was fatally injured in an accident while going to police headquarters to report for duty prior to the beginning of his regular working day. *Held:* The evidence supports the finding of the Industrial Commission that the accident did not arise out of and in the course of his employment. *Davis v. Mecklenburg County*, 469.

§ 41a. Amount of Recovery for Injuries.

Where for exceptional reasons computation of "average weekly wage" by enumerated methods would be unfair, Compensation Commission may resort to other methods of computation. *Early v. Basnight & Co.*, 103.

Evidence *held* sufficient to support findings of fact constituting "exceptional reasons" as matter of law within meaning of N. C. Code, 8081 (i) (e). *Ibid.*

Employee is entitled to full compensation for loss of vision although prior to accident he had astigmatism. *Schrum v. Upholstering Co.*, 353.

§ 42. Change of Condition and Review of Award by the Commission.

Industrial Commission may review award for changed condition upon petition filed within year from last payment, even though such payment was lump-sum payment upon application of employee. *Knight v. Body Co.*, 7.

Commission has jurisdiction to review award and alter compensation only upon a "change in condition." *Murray v. Knitting Co.*, 437.

§ 43. Persons Entitled to Payment of Award.

When a deceased employee leaves no dependents, an award of compensation should be made to his next of kin, ch. 274, sec. 5, Public Laws of 1931, the employee's mother in this case, N. C. Code, 137 (6), and the evidence *is held* sufficient in this case to support the finding that the employee left no dependent or dependents. *Hamby v. Cobb & Homewood, Inc.*, 813.

§ 44. Rights of Employer, Insurer and Injured Employee Against Tort-Feasor.

Third person tort-feasor is liable only for amount sufficient to compensate employee for injury. *Rogers v. Construction Co.*, 269.

§ 45c. Cancellation of Compensation Insurance Policies.

Ten-day period required for cancellation of policy runs from receipt of notice of cancellation by mail. *Pettit v. Trailer Co.*, 335.

MASTER AND SERVANT—*Continued.*

§ 49. Jurisdiction of Industrial Commission and Superior Courts.

The rights and remedies granted to an employee who has accepted and is bound by the provisions of the Workmen's Compensation Act are exclusive of all other rights and remedies of such employee as against his employer, at common law or otherwise. Ch. 449, Public Laws of 1933; Michie's Code, 8081 (r). *Tscheiller v. Weaving Co.*, 449.

Complaint *held* to allege cause within jurisdiction of Industrial Commission, and demurrer was properly sustained. *Ibid.*

Employee may sue negligent fellow employee at common law. *Ibid.*

§ 52a. Rules and Procedure in Hearings Before Commission.

Procedure before the Industrial Commission need not necessarily conform strictly to judicial procedure in courts of law unless the statute so requies or the court of last resort shall consider such procedure indispensable to the preservation of the essentials of justice and the principles of due process of law, and procedure adopted by the Commission with respect to the reception and consideration of evidence will be given liberal treatment by the courts, since section 54 of the act empowers the Commission to make rules for carrying out the provisions of the act, and requires processes and procedure to be summary and simple. *Maley v. Furniture Co.*, 589.

§ 52b. Hearings and Evidence Before Industrial Commission.

Hearsay evidence is not competent to establish a material fact in a hearing before the Industrial Commission, and testimony of declarations of a caddy prior to his death to the effect that he was caddying at the time of the injury resulting in death, is incompetent as hearsay, there being no predicate laid for the admission of the evidence as being of a dying declaration. *Plyler v. Country Club*, 453.

In this case there was sufficient competent circumstantial evidence to support the finding of the Industrial Commission that the injury in suit arose out of and in the course of the deceased employee's employment. Hearsay evidence of declarations of the employee tending to show that the injury was received while he was engaged in the performance of his duties was admitted without timely objection. *Held:* The hearsay evidence may be accepted as some corroboration or explanation of the circumstantial evidence. *Maley v. Furniture Co.*, 589.

It is the duty of the hearing Commissioner, in the first instance, to hear evidence and find facts, and make or decline an award, and upon demand for a hearing before the Full Commission, to make a report of the proceedings to it, and the hearing before the Full Commission is not entirely *de novo*, and it is competent for the Full Commission to reconsider evidence taken before the hearing Commissioner without hearing the witnesses again *viva voce*. *Ibid.*

Objection to the admission of incompetent evidence should be made before the hearing Commissioner, and objection taken for the first time at the hearing before the Full Commission on appeal is too late. Sec. 59, ch. 120, Public Laws of 1929. *Ibid.*

§ 55d. Matters Reviewable.

When there is ample evidence to support a finding of a change in claimant's condition as contemplated by N. C. Code, 8081 (bbb), and evidence which would support a contrary finding, the finding of the Industrial Commission from the conflicting evidence is conclusive. *Knight v. Body Co.*, 7.

The findings of fact by the Industrial Commission, when supported by any competent evidence, are binding on both the Superior and Supreme Courts.

MASTER AND SERVANT—*Continued.*

Early v. Basnight & Co., 103; *Hamby v. Cobb & Homewood, Inc.*, 813; *Lee v. Toler*, 823; *Valentine v. Grocery Co.*, 828.

The Industrial Commission is charged with the duty and has sole jurisdiction to find the facts upon the evidence, and its findings are conclusive on the courts when supported by any competent evidence. *Moore v. Sales Co.*, 424.

When a conclusion of the Industrial Commission involves mixed questions of law and fact it will be presumed that the question of fact was found in accord with the conclusion, and where there is evidence to support such finding, the statement will be reviewed only in its legal aspect. *Ibid.*

A finding of the Industrial Commission is conclusive only when supported by competent evidence, and a finding based on evidence part of which is incompetent, and the remainder of which raises a mere conjecture or speculation as to the necessary facts, is insufficient to support an award. *Plyler v. Country Club*, 453.

The finding of the Industrial Commission that the accident in question did not arise out of and in the course of the employee's employment is conclusive on the courts unless no view of the facts found by the Commission is such conclusion warranted. *Davis v. Mecklenburg County*, 469.

§ 55g. Determination and Disposition of Cause.

The Industrial Commission found that deceased suffered an injury by accident arising out of and in the course of his employment as deputy sheriff, or jailer, or as deputy sheriff-jailer. Upon appeal to the Supreme Court, the cause is remanded for a definite finding by the Commission sufficient to support an award. *Gowens v. Alamance County*, 18.

The findings and award of the Industrial Commission will not be disturbed on appeal because of the admission of hearsay evidence if there is sufficient competent evidence to sustain the findings. *Maley v. Furniture Co.*, 589.

MONEY RECEIVED.

§ 1. Nature and Essentials of Right of Action.

An action to recover money paid under mistake of fact will lie only when money is paid under mistake of fact in the legal sense, which does not embrace complete ignorance of the facts or neglect to ascertain the facts after being put upon inquiry, but implies misinformation or unconscious forgetfulness or a wrong conclusion, and it must be made to appear further that the party receiving payment was thereby unjustly enriched and in equity and good conscience should repay the sum, and where money is paid voluntarily with knowledge of the facts, the party making the payment may not change his mind and recover it back. *Morgan v. Spruill*, 255.

§ 3. Pleadings and Evidence.

Evidence *held* insufficient to overrule nonsuit in this action to recover money paid under mistake of fact. *Morgan v. Spruill*, 255.

MONOPOLIES.

§ 3a. Rights and Remedies of Third Person.

Plaintiff, carrier by truck, instituted this action under C. S., 2574, against certain railroad companies to recover damages to his business alleged to have resulted from the unlawful conspiracy of defendants, C. S., 2563 (3). *Held:* The allegations in defendants' answers to the effect that the reduction of transportation rates complained of resulted in benefit to the public in reduced

MONOPOLIES—*Continued.*

retail prices on the products, and that plaintiff was operating his trucks on the highways of the State without obtaining appropriate licenses therefor, were properly stricken out on motion of plaintiff aptly made, C. S., 537, the matter alleged not constituting a defense to plaintiff's cause of action. *Patterson v. R. R.*, 38.

MORTGAGES.

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IV. Estates, Rights and Duties of Parties
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30g. Parties Who May Enjoin Foreclosure. Pinnix v. Casualty Co., 760.
31a. Limitations of Actions to Foreclose. Spain v. Hines, 432.
32a. Exercise of Power of Sale in General. Spain v. Hines, 432.
32e. Limitation on Exercise of Power of Sale. Spain v. Hines, 432.
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37. Disposition of Proceeds and Surplus. *Holder v. Mortgage Co.*, 128.
39e. Actions for Damages for Wrongful Foreclosure. Warren v. Land Bank, 206.
40. Agreements to Purchase at Sale for Benefit of Mortgagor. Henley v. Holt, 384.
42. Title of Purchaser. Spain v. Hines, 432.

§ 2a. Equitable Mortgages.

While a parol trust cannot be engrafted on a warranty deed in favor of the grantor therein in the absence of fraud, mistake, or undue influence, in this case instituted by an old, feeble and illiterate Negro of good character to have his warranty deed set aside or declared to be an equitable mortgage, the evidence of fraud *is held* sufficient to be submitted to the jury. *Briley v. Roberson*, 295.

Equity will declare absolute deed and contemporaneous contract to reconvey a mortgage when transaction is to secure debt. *O'Briant v. Lee*, 723.

In an action to have an absolute deed and a contemporaneous contract by the grantee to reconvey declared in equity a mortgage when it does not appear from the face of the instruments that the relation of debtor and creditor existed between the parties, parol and extrinsic evidence *dehors* the instrument tending to show the consideration for the deed, prior negotiations between the parties, continued possession by the grantor, and the conduct of the parties before, at, and after the execution of the instruments, is competent, not for the purpose of contradicting the writings, but to show the entire contract, such circumstances being competent in determining whether in fact the transaction was intended by the parties to secure a debt. *Ibid.*

In an action to have an absolute deed and a contract to reconvey declared an equitable mortgage, it is not necessary that it appear upon the face of the instrument that the grantor in the deed is personally obligated to pay the sum stated for the reconveyance or be obligated to redeem within the time stipulated, since the existence of the debt may be shown by parol from the nature, facts and circumstances of the transaction tending to establish this conclusion by fair and just implication. *Ibid.*

MORTGAGES—*Continued.*

§ 2b. Contracts to Lend Upon Mortgage Security.

Evidence *held* to support finding that alleged contract to make mortgage loan was too indefinite to be enforceable. *Holder v. Mortgage Co.*, 128.

§ 12. Registration, Lien and Priorities.

Consent judgment in favor of wife docketed prior to execution by husband of deed of trust on lands held by entireties *held* to have priority over deed of trust upon wife's death, and wife's administrator is entitled to collect judgment as against purchaser at foreclosure sale. *Keel v. Bailey*, 159.

Plaintiffs were the holders of a note for $1,500, which was intended to be secured by mortgage in like sum, but, through mistake, the mortgage was executed to secure the sum of $15, and so recorded. Thereafter, creditors of the mortgagor obtained judgments which were duly docketed. The mortgagor made payment on the note in a sum greatly in excess of $15. *Held:* The mortgage lien in the sum of $15 is prior to the lien of the later docketed judgments, and the holders of the note are entitled to apply payments on the note to the portion thereof not secured by the mortgage as against the judgment creditors, but mortgagor was not entitled to reformation as against creditors of mortgagor, since they were entitled to rely on record. *Lowery v. Wilson*, 800.

§ 15. Improvements.

Improvements placed on the land by a mortgagor become additional security for the debt, and the mortgage covers all improvements to which the mortgagor would have been entitled had the mortgage not been executed, but not those to which the mortgagor would not have been entitled. *Jenkins v. Strickland*, 441.

§ 17. Rights and Liabilities of Mortgagees and Cestuis.

Ordinarily, after default the holder of the indebtedness is entitled to possession of the property until the debt is paid or until foreclosure, subject to the duty of crediting the debt with a reasonable rental for the time he is in possession. *Kistler v. Development Co.*, 630.

§ 24. Transfer of Equity of Redemption to Mortgagee or Cestui Que Trust.

There is no presumption of fraud in transfer of equity of redemption by trustor to *cestui que trust*. *Murphy v. Taylor*, 393.

§ 27. Payment and Satisfaction.

Conflicting evidence on plaintiff's contention that the mortgage note in question was paid by defendant's retention of sums due plaintiff for services rendered and application of such sums to the note by agreement, *held* properly submitted to the jury and sufficient to sustain a verdict in plaintiff's favor. *Duke v. Scarboro*, 401.

Where, through error, mortgage fails to secure whole amount of note, mortgagee is entitled to apply payments on the note to the unsecured portion thereof as against creditors of mortgagor. *Lowery v. Wilson*, 800.

§ 30a. Right to Foreclose and Defenses in General. (Action for fraud in preventing trustor from increasing bid, see Fraud § 11, *Littlejohn v. Johnson*, 221.)

Right of holder of trust note to foreclosure may not be defeated by agreement of trustor with third person. *Holder v. Mortgage Co.*, 128.

§ 30b. Default in Payment of Principal or Interest.

While a mortgagee is entitled to foreclose same upon default in payment of an interest installment when due, when authorized by the instrument, not-

MORTGAGES—*Continued.*

withstanding that the notes secured are not due, the right to foreclose is contractual, and default must have occurred strictly within the terms of the instrument conferring the right to foreclose in order to entitle the mortgagee to pursue this remedy. *Worley v. Worley*, 311.

The first note secured by the mortgage in question provided that interest thereon should be due and payable annually, but the due date of the note was approximately 18 months from date of its execution. The mortgage provided that the mortgagee might foreclose upon default in payment of any part of the note or interest at maturity. *Held:* Regardless of whether interest on the note was payable under its terms a year from its date, the power of sale contained in the mortgage provided for foreclosure upon default at "maturity" of the note, and advertisement made more than a year after the execution of the instrument but prior to the maturity of the first note, is premature. *Ibid.*

§ 30d. Enjoining Foreclosure for Usury.

The equitable maxim that "He who seeks equity must do equity" requires that a mortgagor claiming that the mortgage debt is tainted with usury, and seeking to restrain foreclosure until the debt may be stripped of its usury, must first tender the amount legally due according to his own contentions, and a mere averment that he is ready, able and willing to pay the amount legally due is insufficient. *Hairston v. Keswick Corp.*, 678.

Junior lienor enjoining foreclosure of prior mortgage on ground of usury should tender amount due with legal interest. *Pinnix v. Casualty Co.*, 760.

When principal and legal interest are tendered, junior lienor is entitled to have debt stripped of usurious interest, but such suit is not for forfeiture of all interest and therefore limitation prescribed by C. S., 442 (3), does not apply. *Ibid.*

§ 30g. Parties Who May Enjoin Foreclosure.

A junior mortgagee is entitled to enjoin foreclosure under a prior mortgage on the same land until a *bona fide* controversy as to the amount due under the senior lien can be determined, but must tender principal with legal interest. *Pinnix v. Casualty Co.*, 760.

§ 31a. Limitation of Actions to Foreclose.

C. S., 437 (3), barring an action to foreclose a mortgage or deed of trust after the lapse of ten years from the maturity of, or the last payment on, the indebtedness when the mortgagee or trustor remains in possession, applies only to actions to foreclose, and the statute must be pleaded. *Spain v. Hines*, 432.

§ 32a. Exercise of Power of Sale in General.

Foreclosure by exercise of the power of sale is in derogation of the common law and is regarded with jealousy by the courts. *Spain v. Hines*, 432.

The execution of deed to the successful bidder at the sale is an essential element of foreclosure by exercise of the power of sale, and the right to convey is included in the power of sale, and the exercise of the power is not completed until deed is executed. *Ibid.*

§ 32e. Limitations on Exercise of Power of Sale.

C. S., 2589, barring the exercise of the power of sale contained in a mortgage or deed of trust after the lapse of ten years from the maturity of, or last payment on, the indebtedness when the mortgagor or trustor remains in possession, need not be pleaded, but constitutes a direct prohibition of the exercise of the power. *Spain v. Hines*, 432.

MORTGAGES—*Continued.*

C. S., 2589, must be construed in the light of its purpose to provide as complete a bar to the exercise of the power of sale as is provided by C. S., 437, against foreclosure by action, and the statute must be construed strictly against the exercise of the power and all doubt resolved in favor of the trustor. *Ibid.*

Since the execution of deed to the successful bidder is an essential step in foreclosure by exercise of the power of sale, the statute, C. S., 2589, bars the execution of the deed to the successful bidder or to his assignee after the expiration of the statutory period when the mortgagor or trustor remains in possession, notwithstanding that the auction sale may have been held prior to the bar of the statute. *Ibid.*

§ 35a. Right of Mortgagee or Trustee to Bid in Property.

Where sale is held by employee of *cestui* and property is bid in by another employee of *cestui*, sale is voidable. *Warren v. Land Bank*, 206.

§ 36. Deficiency and Personal Liability.

Statutory limitation of one year for actions for deficiency judgments *held* valid. *Building and Loan Assn. v. Jones*, 30.

Defense that property was worth debt at time it was bid in by *cestui* is available to guarantor on note. *Trust Co. v. Dunlop*, 196.

§ 37. Disposition of Proceeds and Surplus.

When a deed of trust provides that taxes and insurance premiums paid by the *cestui que trust* should be secured thereby, sums so advanced by the *cestui* may be recovered upon foreclosure and have priority over the lien of a second deed of trust, even though the second deed of trust is executed prior to the time the advancements are made. *Holder v. Mortgage Co.*, 128.

§ 39e. Actions for Damages for Wrongful Foreclosure.

In an action for damages for wrongful foreclosure, uncontradicted evidence that the sale was made by one employee of the *cestui que trust* and the property bid in by another employee of the *cestui*, and that the advertisement did not specify place of sale is sufficient to support the ruling of the court that he would instruct the jury that the sale was not a proper and valid foreclosure and that plaintiff trustors were entitled to the difference between the value of the land at that time and the amount bid. *Warren v. Land Bank*, 206.

Where a mortgagee establishes that the lands were advertised for sale under foreclosure prior to default giving the mortgagee the right to foreclose, he establishes a cause of action, and evidence of some loss and inconvenience resulting therefrom justifies the submission of the issue of damages to the jury, and the refusal of the trial court to set aside the verdict in his favor will not be held for error. *Ibid.*

§ 40. Agreements to Purchase at Sale for Benefit of Mortgagor.

Plaintiff mortgagor instituted this action alleging defendant, his former tenant, agreed to purchase at the foreclosure sale for plaintiff's benefit. *Held:* Evidence of prior negotiations and the conduct of the parties was competent to establish the alleged trust. *Henley v. Holt*, 384.

§ 42. Title of Purchaser.

Deed of the trustee, in which the last and highest bidder at the sale joins to convey his interest, even if construed as an assignment of the bid, conveys no title when executed after the bar of the ten-year statute, C. S., 2589. *Spain v. Hines*, 432.

MUNICIPAL CORPORATIONS.

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45b. Rights and Remedies of Creditors of Municipalities. Casualty Co. v. Comrs. of Saluda, 235.

§ 5. Powers of Municipal Corporations in General: Legislative Control and Supervision.

A municipal corporation is a creature of the Legislature, and it has only those powers granted in express terms and powers necessarily or fairly implied or incident to the powers expressly granted, and those powers which are essential and indispensable to, and not merely convenient for, the accomplishment of the declared objects of the corporation. *Madry v. Scotland Neck*, 461.

§ 11d. Civil Liability of Officers and Agents for Acts and Omissions.

Agents acting for a municipal corporation in negotiating and executing contract *held* not personally liable on the contract, even though the contract is *ultra vires* the municipality. *Jenkins v. Henderson*, 244.

§ 12. Exercise of Governmental and Corporate Powers in General.

The repairing and grading of its streets is a governmental function of a municipality, and it is not liable in damages resulting to property by reason of a change in grade of the street in front of the property. *Jenkins v. Henderson*, 244.

A municipality is not liable for torts committed by its officers and agents in the exercise of its police power or its judicial, discretionary, or legislative authority, in the absence of statutory provisions subjecting it to liability, but it may be held liable for torts committed by its officers and agents in the exercise of its corporate character. *Hodgin v. Charlotte*, 737.

Maintenance of traffic signals by municipality is in exercise of discretionary governmental function. *Ibid.*

The evidence disclosed that the individual defendant was employed in the traffic signal division of defendant municipality, that while driving a car used exclusively by his division of the city government, to repair a municipal traffic signal, in response to a call from the police department, he struck and injured plaintiff. *Held:* Defendant municipality's motion to nonsuit was properly granted, since its employee was engaged in the discharge of a duty necessarily incident to the governmental function of maintaining the traffic light, and plaintiff's contention that even though the installation and maintenance of a traffic light signal may be a governmental function, repairing the system is a proprietary or corporate function, is untenable. *Ibid.*

Evidence *held* to disclose that city employee was engaged solely in discharge of duty incident to governmental function of the city. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

§ 14. Defects or Obstructions in Streets or Sidewalks.

Nonsuit *held* proper as to defendant municipality in this action to recover for fall on sidewalk alleged to have been caused by the presence of oil thereon. *Stone v. Benson*, 280.

Plaintiff instituted this action to recover for injuries sustained in an automobile accident on a highway, alleging that the accident resulted from the negligent failure of defendant municipality to exercise due care to keep the highway in reasonably safe condition. The evidence disclosed that the accident occurred outside the town limits. There was no sufficient evidence to be submitted to the jury that defendant municipality maintained or worked the highway in question or had control or supervision of same. *Held:* Defendant's motion for judgment as in case of nonsuit was properly granted. *Spell v. Roseboro*, 364.

A city is under the same duty to maintain the terminus of a dead end street in a reasonably safe condition as it is to maintain any other portion of its streets. *Harvell v. Wilmington*, 608.

Evidence *held* sufficient on issue of city's negligence in manner of maintaining terminus of dead end street. *Ibid.*

A municipality is not an insurer of the safety of its streets and sidewalks, and may not be held negligent for slight inequalities or depressions or other immaterial obstructions constituting mere inconvenience to travel. *Watkins v. Raleigh*, 644.

A pedestrian is required to use due care for his own safety, the care required being commensurate with the danger or appearance thereof, and is guilty of contributory negligence in failing to see and avoid defects which are visible and obvious and discoverable in the exercise of due care. *Ibid.*

The evidence tended to show that plaintiff was injured when her foot caught in a hole in the finishing surface of the sidewalk, causing her to fall to her injury, that the accident occurred in the morning of a clear day, that there was sufficient space on either side of the hole for walking, and that although shadows were cast on the sidewalk by trees between the sidewalk and curb, she could have clearly seen the hole had she looked. *Held:* Defendant municipality's motion to nonsuit was properly granted, if not upon the question of negligence, then upon the ground of contributory negligence. *Ibid.*

§ 18a. Damages to Lands by Water Systems.

The male plaintiff testified to the effect that prior to the construction of defendant municipality's water system dam, his property was valuable farm land, that after the construction of the dam water backed up in a stream draining plaintiff's land so that it did not drain the land as before, resulting in the deposit of quantities of silt, and that his drainage ditches that were several feet deep where they emptied into the stream fill with water to about the top, and that the land had become wet and soggy and ruined for agricultural purposes. *Held:* The evidence is sufficient to be submitted to the jury on the question of defendant municipality's wrongful operation of the dam resulting in an invasion of plaintiffs' riparian right to have the stream flow past the land in its natural quantity and in its accustomed channel subject to the rights of other proprietors to a reasonable use of the water. *Sink v. Lexington*, 548.

§ 19b. Authority of Municipality to Execute Contracts.

Municipality may not contract to assume liability for damages resulting from change in street grade. *Jenkins v. Henderson*, 244.

Even within the exercise of its powers a municipality may not bind itself by contract which incurs a debt, except for necessary expenses, unless by a vote of the majority of its qualified voters. N. C. Constitution, Art. VII, sec. 7. *Madry v. Scotland Neck*, 461.

Municipality is without power to offer reward for apprehension or conviction of a felon. *Ibid.*

City may contract in regard to detail of administration of governmental power involving no governmental discretion. *Plant Food Co. v. Charlotte*, 518.

City may contract for a term of years for removal of sludge from its sewerage disposal plant. *Ibid.*

Under the contract in question it was agreed that plaintiff should remove sludge from the city's sewerage disposal plant and pay a stipulated sum per ton removed. *Held:* The contract related primarily to a service and not a sale of the sludge, and did not involve a sale of city property within the meaning of C. S., 2688, requiring sale of city property to be made by auction. *Ibid.*

§ 19c. Ratification and Estoppel.

The fact that the other party has expended money in reliance on a contract of a municipality cannot estop the city from pleading that the contract was *ultra vires*, and there can be no ratification of the contract except by the Legislature. *Jenkins v. Henderson*, 244.

A contract which is ultra vires a city is void, and the fact that the other party has performed his part of the contract does not preclude the city from pleading *ultra vires*. *Madry v. Scotland Neck*, 461.

§ 21. Assignment.

Contract with city for construction *held* not assignable to surety on contractor's bond without consent of city. *Bank v. Johnson*, 582.

§ 36. Nature and Extent of Police Power in General.

Increased congestion in cities, resulting in increased traffic and fire hazards, require progressively stricter regulations for the public welfare, and while esthetic considerations are not controlling, they may be given consideration in determining the reasonableness of a municipal ordinance. *In re Appeal of Parker*, 51.

§ 37. Zoning Ordinances and Building Permits.

A zoning ordinance will not be declared unconstitutional unless it is clearly arbitrary or irrational without substantial relation to the public health, morals, safety, or welfare, and any reasonable doubt will be resolved in favor of a valid exercise of the police power. *In re Appeal of Parker*, 51.

The burden rests upon petitioner to show the invalidity of a zoning ordinance attacked by him. *Ibid.*

Zoning ordinance will not be declared invalid because it works injustice in particular instance if its purpose is within police power. *Ibid.*

Zoning ordinance restricting walls around corner lots *held* not invalid as applied to petitioner's property. *Ibid.*

An ordinance which does not provide a comprehensive plan for the zoning of the municipality, but merely designates approximately one block as a "business section, Zone A," and prescribes certain restrictions therein, without provision for a hearing or appeal, or the appointment of a zoning commission or board of adjustment, does not comply with the provisions of ch. 250, Public Laws of 1923 (Consolidated Statutes, ch. 56, Art. 11 [c]), and the ordinance cannot be upheld under the act. *Shuford v. Waynesville*, 135.

It is not necessary to the validity of an ordinance regulating the establishment of gasoline filling stations in a municipality that it substantially comply

MUNICIPAL CORPORATIONS—*Continued.*

with the provisions of ch. 250, Public Laws of 1923 (Consolidated Statutes, ch. 56, Art. 11 [c]), since the regulation of filling stations comes within the State police power which has been conferred on municipalities by the general law. C. S., 2673, 2787. *Ibid.*

A municipal ordinance regulating the establishment of gasoline filling stations within the city limits must be impartial, fair and general, and apply alike to all within the designated area. *Ibid.*

A municipal ordinance forbidding the erection of gasoline filling stations within an area in which a gasoline filling station is already established and allowed to operate, is unlawful as discriminatory. *Ibid.*

§ 42. Levy and Collection of Taxes.

Levy made and reaffirmed by *de jure* officers *held* valid notwithstanding intervening acts of *de facto* officers. *Kennedy v. Wilkesboro*, 271.

§ 44. Bonds and Notes.

Held: Election was held under charter provisions requiring approval of majority of qualified voters, and issuance of bonds was properly restrained upon finding that majority of qualified voters did not approve issuance. *Surles v. Comrs. of Four Oaks*, 305.

§ 45b. Rights and Remedies of Creditors of Municipalities.

When municipality has power to levy tax in excess of governmental needs, *mandamus* will lie to compel levy of tax to pay judgment on tax anticipation notes. *Casualty Co. v. Comrs. of Saluda*, 235.

NEGLIGENCE.

I. Acts and Omissions Constituting Negligence
1. In General. Ellis v. Refining Co., 388.
3. Dangerous Substances and Instrumentalities. Smith v. Oil Corp., 824; Ellis v. Refining Co., 388.
4d. Liability to Invitees for Condition and Use of Lands and Buildings. Ellis v. Refining Co., 388.
4f. Fire Exits. Woods v. Hall, 16.

II. Proximate Cause
6. Concurrent Negligence. Cunningham v. Haynes, 456; Harvell v. Wilmington, 608.
7. Intervening Negligence. Cunningham v. Haynes, 456; Harvell v. Wilmington, 608.
9. Anticipation of Injury. Ellis v. Refining Co., 388; Roberson v. Taxi Service, 624.
10. Last Clear Chance. Sherlin v. R. R., 222.

III. Contributory Negligence
11. Contributory Negligence of Persons Injured in General. Manheim v. Taxi Corp, 689.
12. Contributory Negligence of Minors. Manheim v. Taxi Corp, 689.

IV. Actions
18. Competency and Relevancy of Evidence. Duke v. Children's Com., 570.
19b. Nonsuit for Contributory Negligence. Cole v. Koonce, 188; Manheim v. Taxi Corp, 689 Sherlin v. R. R., 222.
19c. Res Ipsa Loquitur. Covington v. James, 71.
20. Instructions. Spencer v. Brown, 114; Ogle v. Gibson, 127; Harvell v. Wilmington, 608.

§ 1. Acts or Omissions Constituting Negligence in General.

Actionable negligence is the failure to exercise that degree of care which an ordinarily prudent man, charged with like duty, would exercise under like circumstances, which proximately causes the injury in suit, but it must further appear that such negligent breach of duty was such that a man of ordinary prudence could have foreseen that such a result, or some similar injurious result, was probable under the facts as they then existed. *Ellis v. Refining Co.*, 388.

§ 3. Dangerous Substances and Instrumentalities.

The complaint alleged defendants placed gasoline and kerosene in filling station without proper safeguards, and that plaintiff was injured in explosion when mixture became ignited. *Held:* The complaint was sufficient as against demurrer. *Smith v. Oil Corp.*, 824.

NEGLIGENCE—*Continued.*

Keeping banana oil in storage room of filling station *held* not negligence supporting liability to customer. *Ellis v. Refining Co.*, 388.

§ 4d. Liability to Invitees for Condition and Use of Lands and Buildings.

Defendants *held* not under duty to customer to keep small store room free from inflammable substance, and further were not under duty to foresee that injury to customer might ensue. *Ellis v. Refining Co.*, 388.

§ 4f. Fire Exits.

Evidence *held* insufficient to show statutory duty on defendant owners to provide two exits from sleeping quarters. *Woods v. Hall*, 16.

§ 6. Concurrent Negligence.

When the negligence of two persons concurs in producing the injury, both are liable, jointly and severally. *Cunningham v. Haynes*, 456.

When defendant's negligence is one of the proximate causes of plaintiff's injury, defendant is liable notwithstanding negligence on the part of a third person, since negligence on the part of a third person must be the sole proximate cause of the injury in order to insulate defendant's negligence. *Harvell v. Wilmington*, 608.

§ 7. Intervening Negligence.

A guest injured in a collision between two automobiles is entitled to recover against either one or both drivers when both are guilty of negligence proximately causing the injury, and the negligence of one will not exonerate the other if his negligence contributes to the result in any degree. *Cunningham v. Haynes*, 456.

Negligence of third person must be sole proximate cause of injury in order to insulate defendant's negligence. *Harvell v. Wilmington*, 608.

§ 9. Anticipation of Injury.

In order to constitute actionable negligence it must appear that a man of ordinary prudence could have foreseen that the injury, or some like injurious result, was probable under the circumstances. *Ellis v. Refining Co.*, 388.

One of the elements of proximate cause is that the injury be one which, in the exercise of reasonable foresight, could have been anticipated as likely to occur under all the circumstances as they appeared and were known at the time. *Roberson v. Taxi Service*, 624.

§ 10. Last Clear Chance.

The evidence tended to show that a pedestrian was struck while running across a railroad trestle in front of a train, which had signaled its approach with its whistle, that the trestle was floored and surfaced with chats for a distance of three or four feet on either side of the ends of the crossties where a person could stand with safety while a train passed. There was no evidence that defendant's engineer knew of any defect in the pedestrian's hearing. *Held:* The engineer had the right to assume up to the last moment that the pedestrian would get off the track and avoid injury, and the doctrine of last clear chance is inapplicable. *Sherlin v. R. R.*, 222.

§ 11. Contributory Negligence of Persons Injured in General.

A person must exercise for his own safety that care which a reasonably prudent person would have exercised under the circumstances, which rule is constant, although the degree of care may vary with the exigencies of the occasion. *Manheim v. Taxi Corp.*, 689.

NEGLIGENCE—*Continued.*

§ 12. Contributory Negligence of Minors.

Whether a minor exercises due care for his own safety must be determined in the light of his intelligence, age, and capacity. *Manheim v. Taxi Corp.*, 689.

§ 18. Competency and Relevancy of Evidence.

In an action for negligent injury, evidence that defendant has liability insurance, or "has made arrangements to pay all judgments that might be rendered against it on account of negligence," is ordinarily incompetent. *Duke v. Children's Com.*, 570.

§ 19b. Nonsuit for Contributory Negligence.

A motion to nonsuit on the ground of contributory negligence should be granted only when but one inference may be drawn from the evidence by reasonable minds, considering the evidence in the light most favorable to plaintiff. *Cole v. Koonce*, 188; *Manheim v. Taxi Corp.*, 689.

Nonsuit for contributory negligence of intestate killed on railroad trestle *held* proper. *Sherlin v. R. R.*, 222.

§ 19c. Res Ipsa Loquitur.

Res ipsa loquitur may apply when matter is not highly technical and result is contrary to human experience. *Covington v. James*, 71.

§ 20. Instructions in Actions to Recover for Negligent Injury.

Instruction on issue of contributory negligence *held* for error in failing to explain law arising upon evidence relating to violations of safety statutes relied on by defendant. *Spencer v. Brown*, 114.

Instruction *held* for error as requiring defendants to show absence of negligence in order to prevail on issue of contributory negligence. *Ogle v. Gibson*, 127.

Charge *held* for error in failing to instruct jury in regard to concurrent negligence arising on the evidence. *Harrell v. Wilmington*, 608.

PARTIES.

§ 1. Necessary Parties Plaintiff.

An action must be maintained by the real party in interest; rental agent may not maintain action for collection of rents, since he is not real party in interest. *Ins. Co. v. Locker*, 1.

§ 9. Interveners.

Discretionary order refusing appellant's motion to be allowed to intervene after judgment had been rendered in the cause *held* fully justified by the record. *Mortgage Co. v. Mortgage Co.*, 698.

§ 10. Joinder of Additional Parties.

The trial court has discretionary power to allow joinder of new party plaintiff by amendment. *Ins. Co. v. Locker*, 1.

Trial court has discretionary power to allow amendment of parties which does not change cause of action. *Bright v. Hood, Comr.*, 410.

PARTITION.

§ 3. Improvements and Charges.

Upon general principles of equity, recognized even prior to the enactment of C. S., 699-710, a tenant in common making improvements is entitled to have allotted to her in an actual partition the part of the property improved, and its value assessed as if no improvements had been made. *Jenkins v. Strickland*, 441.

PARTITION—*Continued.*

Where tenant making improvements owns encumbered and unencumbered interests she is entitled to improvements as to unencumbered interest. *Ibid.*

§ 10. Operation and Effect of Partition.

While partition does not create title nor affect the rights of persons not parties thereto, it determines the respective rights of the parties as among themselves, and as among themselves it operates as an estoppel against an assertion of title at variance with the judgment therein. *Crawford v. Crawford*, 614.

PAYMENT.

§ 8. Application of Payment in Absence of Direction by Debtor.

Holder of note partially secured by mortgage may apply payment to unsecured portion as against mortgagor's creditors. *Lowery v. Wilson*, 800.

PENALTIES.

§ 1. Nature and Essentials of Right of Action to Recover Penalties.

Person convicted is not "party aggrieved" by service of warrant by constable of another township and may not recover penalty under statute providing such remedy to "aggrieved party." *James v. Denny*, 470.

PHYSICIANS AND SURGEONS.

§ 15a. Liability in Treatment of Patients in General.

A physician or surgeon is not a guarantor of the result of treatment. *Covington v. James*, 71.

§ 15c. Sufficiency of Evidence of Malpractice.

Evidence *held* sufficient to overrule nonsuit in this action against physician for malpractice. *Covington v. James*, 71.

The doctrine of *res ipsa loquitur* in malpractice cases is not limited to instances in which foreign substances are left in the body after an operation, but the doctrine may be applied when the original conditions are known and the matter does not fall within the range of highly scientific and technical knowledge, and a result is shown which is grotesquely contrary to all human experience. *Ibid.*

PLEADINGS.

I. Complaint
- 3a. Statement of Cause in General. Patterson v. R. R., 38; Hinton v. Whitehurst, 99.

II. Answer
- 6. Right to File Answer. Bohannon v. Trust Co., 706.
- 7. Traverse and Denial. Campbell v. Trust Co., 680.

IV. Demurrer
- 15. For Failure of Complaint to State Cause of Action. Cunningham v. Haynes, 456.
- 16. For Misjoinder of Parties and Causes. Sohmer v. Supply Co., 522.

V. Amendment
- 23. Amendment after Decision on Appeal. Ragan v. Ragan, 36.

VI. Issues, Proof and Variance
- 26b. Confinement of Evidence to Items Specified in Bill of Particulars. Beck v. Bottling Co., 566; Bryant v. Reedy, 748.

VII. Motions Relating To Pleadings
- 28. Judgment on the Pleadings. Campbell v. Trust Co., 680; Oldham v. Ross, 696.
- 29. Motions to Strike Out. Patterson v. R. R., 38; Trust Co. v. Dunlop, 196; Warren v. Land Bank, 206; Heffner v. Ins. Co., 359; Duke v. Children's Comm., 570.

§ 3a. Statement of Cause in General.

A party is entitled of right to put in his pleading a concise statement of his cause of action or defense, and nothing more. C. S., 506, 519. *Patterson v. R. R.*, 38.

PLEADINGS—*Continued.*

The complaint must contain a plain and concise statement of the facts constituting the cause of action, C. S., 506, and mere allegation of the conclusion which the pleader conceives should be drawn from the evidence he intends to offer is insufficient. *Hinton v. Whitehurst*, 99.

§ 6. Answer in General.

The right to file answer may be waived. *Bohannon v. Trust Co.*, 706.

§ 7. Traverse and Denial.

Allegations in the answer that defendant "denies that it has any knowledge or information thereof sufficient to form a belief" is not an admission of the facts alleged in the complaint, but puts plaintiff to proof. C. S., 519. *Campbell v. Trust Co.*, 680.

§ 15. For Failure of Complaint to State Cause of Action.

Upon demurrer, the complaint will be liberally construed in favor of the pleader. C. S., 535. *Cunningham v. Haynes*, 456.

§ 16. For Misjoinder of Parties and Causes.

Demurrer for misjoinder of parties and causes is properly overruled after allowance of amendment eliminating defect. *Sohmer v. Supply Co.*, 522.

§ 23. Amendment After Decision on Appeal.

The trial court has discretionary power to allow amendment to verification in a divorce action after remand of the case by the Supreme Court for correction of the record. *Ragan v. Ragan*, 36.

§ 26b. Confinement of Evidence to Items Specified in Bill of Particulars.

When a bill of particulars is ordered and furnished, the evidence offered at the trial must be confined to items therein specified. *Beck v. Bottling Co.*, 566.

Evidence in this action for slander *held* to be substantially the same as the allegations in the bill of particulars as to the slanderous charges made, and was competent. *Bryant v. Reedy*, 748.

§ 28. Judgment on the Pleadings.

When the facts are admitted, judgment may be rendered thereon by the court without the intervention of a jury, but when defendant denies the right of plaintiff to recover, judgment on the pleadings may not be rendered in favor of plaintiff, and denial of material allegations of the complaint upon information and belief is sufficient denial to put plaintiff to proof. *Campbell v. Trust Co.*, 680.

Ordinarily a motion for judgment on the pleadings is interposed by the party seeking affirmative relief, in which case it admits facts alleged in defense and challenges the sufficiency of such facts to constitute a defense. *Oldham v. Ross*, 696.

Judgment on the pleadings cannot be rendered against the party seeking affirmative relief when the allegations upon which the prayer for relief is based are denied, since such judgment must be based upon facts established by failure of specific denial or by specific admissions. *Ibid.*

§ 29. Motions to Strike Out. (Whether order on motion is appealable, see Appeal and Error § 2; review of orders on motion to strike, see Appeal and Error § 40b.)

A party is entitled, as a matter of right, to have irrelevant or redundant matter which is prejudicial to him, or scandalous, stricken from his opponent's pleading upon motion aptly made. *Patterson v. R. R.*, 38.

PLEADINGS—*Continued.*

Plaintiff is entitled to have allegations of the defense stricken out only when they contain no averment competent or necessary to the defense, while defendant is entitled to have them stand, even if prejudicial or scandalous, if they contain a valid defense, the test being whether the matter alleged is competent to be shown on the hearing. *Ibid.*

Allegations *held* properly stricken from the answer, the matter alleged not constituting a defense. *Ibid.*

On a motion to strike out, the test is whether the pleader would be entitled to introduce evidence in support of the allegations sought to be stricken. *Trust Co. v. Dunlop*, 196.

Motion to strike out *held* properly denied, since the matter alleged constitutes valid defense. *Ibid.*

A motion to strike out as a matter of right made after answer and on the day the case is calendared for trial, is properly denied for the reason that it is not made in apt time. C. S., 537. *Warren v. Land Bank*, 206.

Even though a motion to strike out is not made in apt time, the court has discretionary power to allow the motion during the term at which the case is calendared for trial. *Ibid.*

Plaintiff is not entitled to have notice of motion to strike out served on her by an officer, C. S., 914, especially so when reason for such service is rendered nugatory by a finding that notice was mailed to and received by plaintiff's attorneys within the time allowed. *Heffner v. Ins. Co.*, 359.

Motion to strike out allegations that defendant in action for negligent injury had liability insurance should have been allowed, since evidence thereof would be incompetent. *Duke v. Children's Com.*, 570.

PLEDGES.

§ 2. Construction and Operation.

Pledge of collateral *held* sufficiently broad to cover secondary liability of pledgor to bank. *Sellars v. Bank*, 300.

Pledgee may apply collateral pledged to payment of debt secured without instituting action. *Ibid.*

§ 3. Actions on Pledges.

The burden is on the party claiming under the assignor to show that the debts for the payment of which the collateral was pledged have been discharged and the collateral thus released. *Sellars v. Bank*, 300.

PLUMBING AND HEATING CONTRACTORS.

§ 2. Construction and Operation of Licensing Statute.

A journeyman plumber, contracting and agreeing with various persons to perform labor required to install certain plumbing at a stipulated lump sum price, and who does not maintain a fixed place of business or sell or contract to furnish materials, supplies or fixtures of any kind, and who fails to obtain a license from the State Board of Examiners of Plumbing and Heating Contractors, is not guilty of a misdemeanor under the provisions of sec. 10, ch. 52, Public Laws of 1931, since his occupation does not constitute carrying on the "business of plumbing and heating contracting" within the meaning of the penal provisions of the statute. *S. v. Ingle*, 276.

PRINCIPAL AND AGENT.

§ 8a. Liability of Principal on Contract Executed by Agent.

Evidence *held* to show cashier's authority to make compromise settlement or ratification of same by the bank. *Jones v. Bank*, 794.

PRINCIPAL AND AGENT—*Continued.*

The principal is bound by acts of his agent which are within the apparent scope of the agent's authority, since third persons dealing with the agent are not chargeable with secret limitations on the agent's authority. *Ibid.*

§ 8b. Liability of Agent to Third Person on Contract Executed for Principal.

Ordinarily, an agent is not liable on a contract signed for the principal, even though the contract is *ultra vires* the principal. *Jenkins v. Henderson*, 244.

§ 10. Wrongful Acts of Agent.

When there is doubt as to the scope of the employee's authority, it must be resolved in favor of the injured third person and the question submitted to the jury, since the employer places the employee in position to do the wrongful act. *Long v. Eagle Store Co.*, 146.

Evidence *held* for jury on question of authority of assistant manager to cause arrest of customer. *Ibid.*

§ 12. Ratification.

A principal may not ratify the beneficial parts of a contract made by his agent and repudiate the burdens, but by accepting the benefits he ratifies the entire contract and is estopped to deny his agent's authority. *Jones v. Bank*, 794.

§ 13a. Order of Proof and Necessity of Proof of Agency in Order to Render Proof of Contract Competent as to Principal.

Where plaintiff establishes the authority of the agent to make the contract sued on, either as being within the agent's apparent authority or by ratification, evidence of the alleged contract is competent as against the principal. *Jones v. Bank*, 794.

PRINCIPAL AND SURETY.

§ 1. Surety Contracts in General.

An agreement executed by a surety to the State, which is not executed by the official therein covered, agreeing to indemnify the State for loss of money or property through failure of the official to faithfully discharge his duties, is an indemnity agreement and not a bond. *Midgett v. Nelson*, 396.

§ 4. Statutory Provisions in Regard to Bonds.

The scope of the liability on an official bond or indemnity agreement is limited by the terms of the agreement executed, there being no provision of law incorporating therein statutory provisions relating to the bond of such official, the effect of C. S., 324, being to maintain the validity of the instrument as far as it goes, notwithstanding the penalty or condition may vary from those prescribed by law, and notwithstanding certain defects and irregularities in conferring the office and accepting the instrument. *Midgett v. Nelson*, 396.

PROCESS.

§ 5. Substituted Service on Nonresident Individuals.

In an action *quasi in rem* against a nonresident defendant it is necessary to a valid service of process by publication that the defendant have property in the State and that such property has been actually subjected to the control of the court by attachment. *Stevens v. Cecil*, 217.

No valid service of process by publication can be had against a nonresident defendant in an action *in personam*. *Ibid.*

PROCESS—*Continued.*

A sheriff's return that after due inquiry defendants "are said to be residents and citizens" of another State, and an averment in the complaint, used as an affidavit, that defendants were residents of such other State, is insufficient to support service of summons by publication, since notwithstanding such nonresidence defendants might be visitors in the State and amenable to process here, and it being required that it appear by proper averment that defendants "cannot, after due diligence, be found in the State," C. S., 484. *Groce v. Groce*, 398.

§ 6b. Service on Foreign Corporations by Service on Secretary of State.

Plaintiff's affidavits showing that the property of the nonresident defendant corporation in this State consisted of samples, order blanks and stationery furnished its soliciting agent, are insufficient to show that the corporate defendant had property in this State for the purpose of service of process on it by service on the Secretary of State under the provisions of C. S., 1137. *Plott v. Michael*, 665.

Plaintiff's affidavits tended to show that the nonresident defendant corporation employed a traveling soliciting agent who took orders in this State, which were forwarded to its home office in another state, there to be approved or rejected. *Held:* The contracts of sale were made in the state in which defendant maintained its home office, since the last act essential to a meeting of the minds was done therein, and the evidence fails to show that the defendant corporation was doing business in this State for the purpose of service of process on it by service on the Secretary of State under C. S., 1137. *Ibid.*

§ 6d. Service on "Local Agent."

Affidavits in this action by a resident plaintiff on a cause of action arising in this State, showed that service of process was had on the nonresident defendant corporation by service on its traveling soliciting agent in this State, that the agent was not authorized to, and actually did not, receive or collect money for the corporate defendant, that he was a subordinate employee taking orders for goods of the corporate defendant from persons designated by it, at fixed prices, with little discretion vested in him, and exercising no control or management over the corporate functions. *Held:* The agent was not a "local agent" for the purpose of service of summons within the meaning of C. S., 483 (1), and service upon him as agent of the corporate defendant was properly stricken out. *Plott v. Michael*, 665.

§ 12. Alias and Pluries Summons and Discontinuance.

When a party is not served with original summons, and process against her is not kept alive by *alias* and *pluries* summons as required by statute, C. S., 480, it works a discontinuance of the action as to her, and summons thereafter served constitutes a new action as of that date. C. S., 481. *Gower v. Clayton*, 309.

RAILROADS.

§ 7. Maintenance and Condition of Crossings and Underpasses.

Held: Evidence showed that railroad was not liable for condition existing at junction of dead end street and railroad property. *Harvell v. Wilmington*, 608.

§ 9. Accidents at Crossings.

In an action to recover for damages to an automobile resulting from a collision at a grade crossing, the railroad company's motion to nonsuit is properly allowed in the absence of evidence that plaintiff was the owner of the car. *Johnson v. R. R.*, 484.

RAILROADS—*Continued.*

Testimony of a witness that he did not hear the bell or whistle of a locomotive as it approached a grade crossing is some evidence that the proper warning was not given, provided it is made to appear that the witness was in a position to have heard the signal had it been given. *Ibid.*

Negative evidence that locomotive failed to give proper warnings *held* without probative force under circumstances of this case. *Ibid.*

Uncontradicted evidence that plaintiff saw the headlight of defendant's locomotive as it approached the crossing, mistook it for another automobile, and testimony by him that he nevertheless drove the automobile in front of the on-coming locomotive on a clear night, resulting in the injury in suit, *is held* to show contributory negligence barring recovery as a matter of law in plaintiff's failure to ascertain before driving on the crossing whether the headlight was that of a locomotive or a car, and defendant's motion to nonsuit should have been granted, even conceding that there may have been evidence of negligence on the part of the railroad company. *Swaim v. High Point*, 672.

§ 10. Injuries to Persons on or Near Tracks.

Evidence *held* to show contributory negligence as matter of law on part of pedestrian struck on trestle. *Sherlin v. R. R.*, 222.

The evidence tended to show that a pedestrian was struck while running across a railroad trestle in front of a train, which had signaled its approach with its whistle, that the trestle was floored and surfaced with chats for a distance of three or four feet on either side of the ends of the crossties where a person could stand with safety while a train passed. There was no evidence that defendant's engineer knew of any defect in the pedestrian's hearing. *Held:* The engineer had the right to assume up to the last moment that the pedestrian would get off the track and avoid injury, and the doctrine of last clear chance is inapplicable. *Ibid.*

RAPE.

§ 1. Obtaining Carnal Knowledge of Minors.

On charges of rape and carnal knowledge of a female between the ages of 12 and 16 years, the State is not required to point out evidence of consent in order to sustain a conviction of the lesser crime, and such conviction upon sufficient evidence, even in the absence of evidence of consent, is favorable to defendants and they may not complain. *S. v. Hall*, 639.

Two defendants may be properly convicted of carnal knowledge of a female child between the ages of 12 and 16 years who had never before had sexual intercourse with any other person upon evidence showing that the defendant who first had intercourse was aided and abetted by the other in the preparation for the crime. *Ibid.*

§ 5. "Attempts" to Commit Rape.

The offense defined by Michie's Code, 4205, is an assault on a female with intent to commit rape, the "intent" to commit this offense being inclusive of an "attempt" to commit it. *S. v. Adams*, 501.

§ 6. Indictment.

A charge of rape and a charge of carnally knowing a female person between the ages of 12 and 16 years, C. S., 4209, may be properly joined in separate counts in one indictment, C. S., 4622, and it is not error for the trial court to refuse to make the State elect between the counts. *S. v. Hall*, 639.

RAPE—*Continued.*

§ 7. Competency and Relevancy of Evidence.

In this prosecution for assault with intent to commit rape, defendant objected to the testimony of a witness that she heard prosecutrix tell the doctor that she had been "attacked and tried to be raped" by the defendant. *Held:* The admission of the evidence cannot be held prejudicial in view of the admission of evidence of the same import without objection and the plenary evidence that defendant attacked prosecutrix. *S. v. Adams*, 501.

§ 8. Sufficiency of Evidence and Nonsuit.

Evidence in this prosecution *held* sufficient to be submitted to the jury on the charge of rape. *S. v. Harvey*, 9.

Circumstantial evidence of defendant's felonious intent, viewed in the light most favorable to the State, *held* sufficient to be submitted to the jury in this prosecution for assault with intent to commit rape. *S. v. Trollinger*, 28.

The evidence in this prosecution of defendants for rape and for carnally knowing a female child over twelve years of age and under sixteen years of age, who had never before had sexual intercourse with any person, C. S., 4209, *is held* sufficient, considered in the light most favorable to the State, to be submitted to the jury and sustain the verdict of guilty as to both defendants on the second count, notwithstanding discrepancies in the testimony of the principal witnesses, a deaf and dumb girl testifying through an interpreter, her testimony on the main features of the case being clear, direct and consistent. *S. v. Hall*, 639.

State is not required to point out evidence of consent in order to sustain carnal knowledge of female child. *S. v. Hall*, 639.

§ 9. Instructions.

In this prosecution for assault with intent to commit rape, an inadvertent instruction that ordinarily the question of intent must not be left to the jury to determine from the facts and circumstances, *is held* not prejudicial in view of the correct instruction immediately following, and the fact that the court submitted the question of intent to he jury under correct instructions. *S. v. Adams*, 501.

§ 10. Verdict and Judgment.

The offenses of rape and carnal knowledge of a female between the ages of 12 and 16 are such that the jury may find defendants guilty of the lesser crime. C. S., 4640. *S. v. Hall*, 639.

RECEIVERS.

§ 14. Costs and Charges of Receivership.

Held: Under order confirming agreement of parties, rents collected by mortgagee were not chargeable with receivership costs. *Kistler v. Development Co.*, 630.

RECEIVING STOLEN GOODS.

§ 6. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence of appealing defendants' guilt of larceny and receiving fertilizer of a certain brand *held* to raise only a strong suspicion of guilt, and was insufficient to be submitted to the jury. *S. v. Epps*, 577.

REFERENCE.

§ 3. Pleas in Bar.

Pleas in bar must be determined in a cause before an order of reference may be made, and when notwithstanding such pleas a compulsory reference

REFERENCE—*Continued.*

is ordered, the Supreme Court on appeal need not consider the debated question of whether plaintiff waived jury trial upon his exceptions to the referee's report by failure to tender proper issues upon the exceptions, since such reference must be eventually set aside, and the order of reference is vacated and the cause remanded for further proceedings according to law. *Ward v. Seawell*, 279.

§ 9. Duties and Powers of Court Upon Appeal in Consent Reference in General.

Upon appeal upon exceptions duly filed to the referee's report in a consent reference, the court, under its supervisory power, and under C. S., 578, may affirm, amend, modify, set aside, make additional findings and confirm in whole or in part or disaffirm the report, provided there is competent evidence to support the findings approved or made by the court. *Holder v. Mortgage Co.*, 128.

REFORMATION OF INSTRUMENTS.

§ 13. Title, Rights and Remedies of Third Persons.

Mortgage may not be reformed as against purchasers and creditors for value of mortgagor. *Lowery v. Wilson*, 800.

REMOVAL OF CAUSES.

§ 4a. Determination of Whether Controversy Is Separable.

Upon petition for removal on the ground of separable controversies the complaint is determinative, and the petition must be denied if the complaint states a joint cause of action. *Tolley v. Lumber Co.*, 111.

Complaint in this case *held* to state a joint cause against railroad company and engineer by fireman injured in performance of his duties. *Ibid.*

§ 4b. Determination of Issue of Fraudulent Joinder.

A petition for removal on the ground of fraudulent joinder is properly denied when the petition amounts merely to a denial of the allegations of the complaint and does not allege facts leading to or compelling the conclusion, aside from the deductions of the pleader, that the joinder is fraudulent and made without right as a matter of law. *Tolley v. Lumber Co.*, 111.

§ 6. Proceedings in Superior Court After Motion.

When a cause is a proper one for removal, and adequate petition and bond are duly filed, no further orders substantially affecting the rights of the parties may be entered except the order of removal, and the court may not allow an amendment and stay hearing on the motion to remove. *Mason v. R. R.*, 21.

ROBBERY.

§ 1b. Robbery With Firearms.

Defendants threatening use of firearms must have possession of weapons in order to be guilty of "robbery with firearms." *S. v. Keller*, 447.

SCHOOLS.

§ 26. Form and Contents of Budget.

In order to provide new necessary school buildings it is required that the county board of education file a "capital outlay" budget in addition to the "operating" budget, and have same approved in accordance with the statutory procedure in June of the year in time for the inclusion of the necessary out-

SCHOOLS—*Continued.*

lay in the computation and levy of *ad valorem* taxes, ch. 394, Public Laws of 1937, and it is provided that the county commissioners shall be given reasonable time to investigate and provide the necessary funds, C. S., 5467, and that the board of education shall not be authorized to erect any building that is not in accordance with plans approved by the State Superintendent, nor invest more money therein than is made available for its erection, C. S., 5468. *Mears v. Board of Education*, 89.

An application for writ of *mandamus* against the board of county commissioners and the county board of education to compel the erection of necessary school buildings, is properly dismissed at the January Term of the Superior Court, since it may not then be determined that defendants will not pursue the proper statutory procedure at the proper time to provide the necessary buildings, but plaintiffs should not be precluded from renewing their application for the writ if circumstances should later appear to warrant the relief. *Ibid.*

SPECIFIC PERFORMANCE.

§ 1. Contracts Specifically Enforceable.

When a valid, written contract to devise is established, equity will enforce the contract in favor of the beneficiary by declaring the heirs at law trustees for her benefit and decreeing conveyance by them to her, and thus grant specific performance of the contract, and this remedy is not in conflict with the rule that a contract to make a will cannot be specifically enforced and that the courts cannot make a will. *Chambers v. Byers*, 373.

§ 3. Waiver and Defenses.

Long delay, accompanied by acts inconsistent with a purpose of performing a contract, will, if not waiver by the seller, preclude the buyer from specific performance of the contract. *Ritter v. Chandler*, 703.

STATE.

§ 4a. Lands Owned by State.

Title to tide-lands is in the State. *Ins. Co. v. Parmele*, 63.

§ 4b. Agencies Vested With Title and Conveyance of Lands.

The State Board of Education, as successor to all powers and trusts of the president and directors of the Literary Fund of North Carolina, N. C. Constitution, Art. IX, sec. 10, is vested with title to all public lands, including marsh lands, owned by said Fund at the time of the adoption of the said provision of the Constitution. *Ins. Co. v. Parmele*, 63.

The State Board of Education may sell and convey the fee in marsh lands which comprise one tract of marsh lands of more than 2,000 acres, C. S., 7621. *Ibid.*

The fact that marsh lands conveyed by the State Board of Education are thereafter filled in and reclaimed by the purchaser does not divest the title of the purchaser, C. S., 7540 (2), since the conveyance is of the fee and not an easement in the lands. *Ibid.*

The deed of the State Board of Education to the marsh lands in question *is held* good as against the State. Whether the purchaser's title is good as against the United States upon reclamation of the land in the construction of an inland waterway, C. S., 7583, is not decided. *Ibid.*

§ 4c. Entry and Grant.

Marsh lands of more than 2,000 acres are not subject to entry and grant. C. S., 7540 (3). *Ins. Co. v. Parmele*, 63.

STATUTES.

§ 3. Form and Contents: Vague and Contradictory Statutes.

Ch. 414, Public Laws of 1937, imposing a license tax on dealers in scrap tobacco, *is held* not vague or uncertain, and objection to its validity on that ground is untenable. *Tobacco Co. v. Maxwell*, 367.

§ 5a. General Rules of Construction.

If the meaning of a statute is in doubt, reference may be had to the title and context as legislative declarations of the purpose of the act. *S. v. Keller*, 447.

§ 5b. Construction in Regard to Constitutionality.

The presumption is in favor of the constitutionality of a statute, and a statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise. *Tobacco Co. v. Maxwell*, 367.

In considering the constitutionality of a statute, every presumption is to be indulged in favor of its validity. *S. v. Luedcrs*, 558.

When a statute is fairly susceptible of two constructions, one constitutional and the other not, the former will be adopted under the rule of favorable construction. *Ibid.*

Statutory requirements, in all events, must be made to square with the provisions of the organic law, or else disregarded. *Sessions v. Columbus County*, 634.

§ 8. Construction of Criminal Statute.

Penal provisions of a statute must be strictly construed. *S. v. Ingle*, 276.

Ch. 86, sec. 11, Public Laws of 1937, providing that "Any person, . . . not being duly licensed to engage in tile contracting in this State as provided for in this act, . . . shall be guilty of a misdemeanor," fails to define the acts prohibited, the doing of which should constitute a misdemeanor, and the fatal deficiency may not be supplied by judicial interpolation of words to constitute a criminal offense. *S. v. Julian*, 574.

TAXATION.

I. Constitutional Requirements and Restrictions
- 1. Uniform Rule and Discrimination. Tobacco Co. v. Maxwell, 367.
- 2a. Classification of Trades and Professions for License and Privilege Taxes. Tobacco Co. v. Maxwell, 367.
- 3a. Limitation on Tax Rate. Sessions v. Columbus County, 634.
- 3b. Limitation on Increase of Indebtedness. Royal v. Sampson County, 259; Sessions v. Columbus County, 634; Twining v. Wilmington, 655.
- 4. Necessary Expenses. Sessions v. Columbus County, 634; Twining v. Wilmington, 655.
- 8. Confiscatory Taxation. Tobacco Co. v. Maxwell, 367.

II. Definitions and Distinctions Between Kinds of Taxes
- 13. Property Taxes. Lumber Co. v. Graham County, 167.

V. Levy and Assessment of Taxes
- 27. Levy and Assessment of Franchise and Corporate Excess. Bus v. Maxwell, 12.

VI. Lien and Persons Liable
- 32a. Date of Attachment of Tax Liens on Personalty. Lumber Co. v. Graham County, 167.
- 32c. Vendor and Purchaser. Lumber Co. v. Graham County, 167.
- 32d. Eminent Domain. Lumber Co. v. Graham County, 167.

VIII. Actions to Determine Validity of Taxes or Issuance of Bonds
- 38a. Enjoining Issuance of Bonds. Surles v. Comrs. of Four Oaks, 305; Sessions v. Columbus County, 634.

IX. Sale of Property for Taxes
- 40c. Foreclosure of Tax Liens. Bladen County v. Breece, 544.
- 42. Tax Deeds and Titles. Gower v. Clayton, 309; Bladen County v. Breece, 544.

§ 1. Uniform Rule and Discrimination.

Public Laws of 1937, ch. 414, expressly provides that the license tax therein provided for should be paid by "every person, firm or corporation engaged in buying or selling scrap tobacco," and is, therefore, uniform and equal in its application. *Tobacco Co. v. Maxwell*, 367.

TAXATION—*Continued.*

§ 2a. Classification of Trades and Professions for License and Privilege Taxes.

Classification of scrap tobacco dealers for imposition of license taxes *held* reasonable. *Tobacco Co. v. Maxwell*, 367.

The General Assembly has wide discretion in selecting the objects of taxation, and in classifying business and trades for taxation and allocating to each its proper share of the expenses of Government. *Ibid.*

§ 3a. Limitation on Tax Rate.

A county may levy taxes for necessary expenses within the limitation fixed in Art. V, sec. 6, without a vote or special legislative approval. *Sessions v. Columbus County*, 634.

A county may levy taxes for necessary expenses in excess of the limitation fixed in Art. V, sec. 6, without a vote when the levy is also for a special purpose with the special approval of the Legislature. *Ibid.*

A county may not levy a tax for a purpose other than a necessary expense, whether special or general, either within or in excess of the limitation fixed by Art. V, sec. 6, except by a vote of the people under special legislative authority. Art. VII, sec. 7. *Ibid.*

§ 3b. Limitation on Increase of Indebtedness.

Debt retired by application of sinking fund is reduction of outstanding indebtedness within constitutional limitation. *Royal v. Sampson County*, 259.

Failure to complete refunding operation within fiscal year has no material bearing on constitutional limitation on increase of debt. *Ibid.*

Election on bond issue under Art. V, sec. 4, is required to be carried only by majority of voters voting thereon. *Sessions v. Columbus County*, 634; *Twining v. Wilmington*, 655.

A proposed bond issue which is not only in excess of the amount by which the county reduced its outstanding indebtedness during the prior fiscal year, but also for a purpose other than a necessary expense, must be approved not only by the majority of voters voting in the election under the provisions of Art. V, sec. 4, but also by a majority of the qualified voters of the county under the provisions of Art. VII, sec. 7, there being no conflict between the constitutional provisions, and both being applicable. *Ibid.*

§ 4. Necessary Expenses.

Bonds for expenses other than necessary expenses must be approved by a majority of the qualified voters of the taxing unit proposing to issue the bonds, and not merely a majority on the voters voting in the election. Art. VII, sec. 7. *Sessions v. Columbus County*, 634; *Twining v. Wilmington*, 655.

A county may levy taxes for necessary expenses within the limitation fixed in Art. V, sec. 6, without a vote or special legislative approval. *Sessions v. Columbus County*, 634.

A county may levy taxes for necessary expenses in excess of the limitation fixed in Art. V, sec. 6, without a vote when the levy is also for a special purpose with the special approval of the Legislature. *Ibid.*

A county may not levy a tax for a purpose other than a necessary expense, whether special or general, either within or in excess of the limitation fixed by Art. V, sec. 6, except by a vote of the people under special legislative authority. Art. VII, sec. 7. *Ibid.*

A proposed bond issue which is not only in excess of the amount by which the county reduced its outstanding indebtedness during the prior fiscal year, but also for a purpose other than a necessary expense, must be approved not only by the majority of voters voting in the election under the provisions of

TAXATION—*Continued.*

Art. V, sec. 4, but also by a majority of the qualified voters of the county under the provisions of Art. VII, sec. 7, there being no conflict between the constitutional provisions, and both being applicable. *Sessions v. Columbus County*, 634; *Twining v. Wilmington*, 655.

Finding and conclusion of trial court that hospital is not a necessary expense of defendant county affirmed on authority of *Palmer v. Haywood County*, 212 N. C., 284. *Sessions v. Columbus County*, 634.

Bonds for the purpose of building and equipping a municipal auditorium are not for a necessary municipal expense. *Twining v. Wilmington*, 655.

The finding of the court below that bonds for the purpose of acquiring lands and establishing public parks and playgrounds, and equipping same, are not for a necessary municipal expense, is approved. *Ibid.*

Bonds for the purpose of erecting and equipping a municipal building to be used in part as a public library, are not for a necessary municipal expense. *Ibid.*

The finding of the court below that bonds for the purpose of acquiring lands and erecting suitable buildings thereon for recreation and athletic purposes, are not for a necessary municipal expense, is approved. *Ibid.*

§ 8. Confiscatory Taxation.

The amount of a tax levy is largely in the discretion of the General Assembly and the courts may determine that it is excessive as a matter of law only in exceptional and unusual cases, and the tax of $1,000 per county for dealers in scrap tobacco, imposed by ch. 414, Public Laws of 1937, *is held* not excessive as a matter of law. *Tobacco Co. v. Maxwell*, 367.

§ 13. Property Taxes.

Tax on property is a visitational tax and not an excise tax for the privilege of owning property. *Lumber Co. v. Graham County*, 167.

§ 27. Levy and Assessment of Franchise and Corporate Excess.

Sec. 203 of the Revenue Act of 1933, N. C. Code, 7880 (111), imposing a franchise tax of six per cent of the total gross earnings on business therein enumerated, does not apply to the operation of buses for hire within a city, even though operated on definite routes, unless used in connection with or in substitution for a street railway. *Bus v. Maxwell*, 12.

§ 32a. Date of Attachment of Tax Liens on Personalty.

The lien for taxes attaches to realty on the first day of April of each year, the date on which land is required to be listed in the name of the owner. Ch. 291, Public Laws of 1937, secs. 701, 1401, 302. *Lumber Co. v. Graham County*, 167.

§ 32c. Vendor and Purchaser.

Giving of option with right of entry to Federal Government does not pass title, and owner is not relieved of liability for taxes when Government does not exercise option or acquire title prior to 1 April. *Lumber Co. v. Graham County*, 167.

§ 32d. Eminent Domain.

Title in condemnation proceedings *held* not to have passed prior to 1 April, and land was not relieved of taxation. *Lumber Co. v. Graham County*, 167.

§ 38a. Enjoining Issuance of Bonds.

Where a municipal bond issue is required to be approved by a majority of the qualified voters of the town, and upon the findings of the court it appears that a majority of the voters of the town did not vote for the issue, plaintiff

TAXATION—*Continued.*

is entitled to have the temporary order restraining the issuance of the bonds made permanent, even in the absence of a specific finding by the court that a majority of the qualified voters of the town failed to vote for the issuance of the bonds. *Surles v. Comrs. of Four Oaks*, 305.

The requirement of the County Finance Act, ch. 81, Public Laws of 1927, that actions to restrain issuance of bonds by counties must be instituted within 30 days of the first publication of notice of the adoption of the bond resolution, does not apply when the proposed bond issue contravenes the Constitution. *Sessions v. Columbus County*, 634.

§ 40c. Foreclosure of Tax Liens.

In an action to foreclose land for delinquent taxes, order was issued appointing a commissioner to sell the lands and directing the sale might be had "on any day except Sunday." The commissioner sold the land on a Tuesday of a week during which there was no term of the Superior Court in the county. *Held:* The sale was void as a matter of law. C. S., 690; Public Laws of 1931, ch. 23. *Bladen County v. Breece*, 544.

§ 42. Tax Deeds and Titles.

Where one of the tenants in common in lands conveys her interest therein prior to the institution of tax foreclosure suit against her by the service of summons, it would seem that the purchaser from the tenant is not bound by the judgment in the tax foreclosure suit, and the municipality foreclosing the taxes is not entitled to a writ of assistance for possession of the lands. *Gower v. Clayton*, 309.

Where record shows tax sale was had on day other than permitted by law, purchasers have notice, and sale is void. *Bladen County v. Breece*, 544.

TORTS.

§ 4. Determination of Whether Tort Is Joint or Several.

Complaint *held* to allege joint negligence of drivers proximately causing injury to guest. *Cunningham v. Haynes*, 456.

§ 8b. Setting Aside Release for Mistake.

A release from liability executed by plaintiff may be set aside for mutual mistake, but may not be set aside for unilateral mistake on the part of plaintiff or on the part of defendant, and an instruction that it might be avoided for mistake of either party is error. *Check v. R. R.*, 152.

TRESPASS TO TRY TITLE.

§ 3. Sufficiency of Evidence and Nonsuit.

Held: Plaintiff's evidence failed to show location of land under State grant with sufficient certainty, and defendant's motion to nonsuit should have been granted. *Parsons v. Lumber Co.*, 459.

TRIAL.

II. Order, Conduct and Course of Trial

5. In General. Bright v. Hood, Comr., 410.
6. Conduct and Remarks of Court. Thompson v. Angel, 3.
11. Consolidation of Actions for Trial. Robinson v. Transportation Co., 489.

IV. Province of Court and Jury

18. In General. McCullers v. Jones, 464; Campbell v. Trust Co., 680.
19. In Regard to Evidence. Campbell v. Trust Co., 680.

V. Nonsuit

22b. Consideration of Evidence on Motion to Nonsuit. Covington v. James, 71; *Gorham v. Ins. Co.*, 526; Farfour v. Fahad, 281; Briley v. Roberson, 295; Smith v. Coach Co., 314; Bright v. Hood, 410; Sellars v. Bank, 300; Robinson v. Transportation Co., 489; Crawford v. Crawford, 614.

24. Sufficiency of Evidence. Morris v. *Johnson*, 402; *Gorham v. Ins. Co.*, 526.

TRIAL—*Continued.*

25. Voluntary Nonsuit. Kluttz v. Allison, 379.

VI. Directed Verdict and Peremptory Instructions

27. In Favor of Plaintiff. Lithograph Corp. v. Clark, 400.

VII. Instructions

29a. Form, Requisites and Sufficiency in General. Walter v. Winecoff, 356.

29b. Statement of Evidence and Explanation of Law Arising Thereon. Spencer v. Brown, 114; Finance Co. v. Trust Co., 478; Robinson v. Transportation Co., 489; Williams v. Hunt, 572; Bryant v. Reedy, 748.

29c. Instruction as to Burden of Proof. Bryant v. Reedy, 748.

30. Conformity to Pleadings and Evidence. Robinson v. Transportation Co., 489; Williams v. Hunt, 572.

31. Expression of Opinion by the Court. Halsey v. Snell, 209.

32. Requests for Instructions. Bryant v. Carrier, 191.

33. Statement of Contentions and Objections Thereto. Bryant v. Reedy, 748; Edwards v. Whitehead, 838.

34. Objections and Exceptions. Bryant v. Reedy, 748.

36. Construction of Instructions and General Rules of Review. Bryant v. Reedy, 748.

VIII. Issues and Verdict

37. Form and Sufficiency of Issue. Finance Co. v. Trust, 478.

XI. Trial by Court

52. Agreements and Waiver of Jury Trial. McCullers v. Jones, 464.

§ 5. Course and Procedure in General.

Where the jury finds that defendant is liable for certain chattels as bailee, and it appears that the specific chattels cannot be delivered, the trial court has discretionary power to retain the cause for trial on the issue of the value of the chattels at the time of the breach of the bailment. *Bright v. Hood, Comr.*, 410.

§ 6. Conduct and Remarks of Court.

A remark of the court during the conduct of the trial and in the hearing of the jury, to the effect that the very law upon which defendants predicated their defense was a bad law, is prejudicial error which may not be cured by a later statement that the court's personal disagreement with the law did not render it any the less effective as the law of the land to be respected and obeyed by the court and the jury, and a new trial is awarded on defendant's appeal. *Thompson v. Angel*, 3.

§ 11. Consolidation of Actions for Trial.

Court may consolidate several actions by different plaintiffs against same defendants when they involve same transaction and defense. *Robinson v. Transportation Co.*, 489.

§ 18. Province of Court and Jury in General.

Where the parties do not waive trial by jury, nor consent that the court find the facts, it is error for the court to enter judgment without the aid of the jury on the controverted issues of fact raised by the pleadings. *McCullers v. Jones*, 464.

Case must be submitted to jury upon issues raised by denial of knowledge or information as to truth of material allegations of complaint, even though evidence is sufficient to warrant directed verdict for plaintiff. *Campbell v. Trust Co.*, 680.

§ 19. Province of Court and Jury in Regard to Evidence.

The competency and admissibility of the evidence is for the court to determine; the weight of the testimony and the credibility of the witness is for the jury. *Campbell v. Trust Co.*, 680.

§ 22b. Consideration of Evidence on Motion to Nonsuit.

Upon motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff and assumed to be true. *Covington v. James*, 71.

On motion to nonsuit, the plaintiff is entitled to the benefit of every fact and inference of fact pertaining to the issues involved, which may be reasonably deduced from the evidence. *Gorham v. Ins. Co.*, 526.

The fact that defendant fails to object to the admission of certain evidence which might be relevant in these connections, does not preclude the court from determining its irrelevancy in passing upon the probative value of the evidence. *Farfour v. Fahad*, 281.

Upon a motion to nonsuit, the evidence tending to support plaintiff's cause of action is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567. *Briley v. Roberson*, 295; *Smith v. Coach Co.*, 314; *Bright v. Hood, Comr.*, 410.

Defendant's evidence, which does not contradict or impeach plaintiff's evidence, but serves only to amplify and explain it, is properly considered on defendant's motion to nonsuit. *Sellars v. Bank*, 300.

On a motion to nonsuit, only the evidence favorable to plaintiffs is to be considered. *Robinson v. Transportation Co.*, 489.

In an action to establish a parol trust, defendant's evidence of the record in subsequent partition proceedings between the parties is properly considered upon defendant's motion to nonsuit on the ground of estoppel, since defendant's evidence is not in conflict with plaintiff's evidence, but is in explanation thereof. *Crawford v. Crawford*, 614.

§ 24. Sufficiency of Evidence.

Ordinarily, a *prima facie* showing carries the case to the jury for it to say whether or not the necessary facts have been established. *Morris v. Johnson*, 402.

If the evidence is conflicting, or if diverse inferences may reasonably be drawn therefrom, some favorable to plaintiff and others favorable to defendant, the case should be submitted to the jury. *Gorham v. Ins. Co.*, 526.

§ 25. Voluntary Nonsuit.

Plaintiff broker instituted this action on an alleged contract of sale and purchase. Defendant purchaser filed a cross-action alleging fraud inducing him to sign the writing. Upon judgment as of nonsuit on plaintiff's cause of action, defendant purchaser was permitted to take a voluntary nonsuit on his cross action. *Held:* The voluntary nonsuit on the cross action was tantamount to a withdrawal of the charges of fraud and misrepresentation, and plaintiff's contention that he was entitled to have the issue of fraud tried by the jury is untenable. *Kluttz v. Allison*, 379.

§ 27. Directed Verdict in Favor of Plaintiff.

It is error for the court to direct a verdict in plaintiff's favor on conflicting evidence, since if diverse inferences may reasonably be drawn from the evidence, some favorable to plaintiffs and others favorable to defendant, the cause should be submitted to the jury. *Lithograph Corp. v. Clark*, 400.

§ 29a. Form, Requisites and Sufficiency of Instructions in General.

Instructions *held* sufficiently full in view of admissions and contentions of parties. *Walter v. Winecoff*, 356.

§ 29b. Statement of Evidence and Explanation of Law Arising Thereon.

The trial court is required to state in a plain and correct manner the evidence given in the case and to declare and explain the law on every substantive and essential feature of the case arising on the evidence. C. S., 564. *Spencer v. Brown*, 114.

When the manner in which the court states the evidence is not prejudicial, the instruction will not be held for error even though the instruction might have been more aptly given in different form. *Finance Co. v. Trust Co.*, 478.

TRIAL—*Continued.*

Instruction *held* for error in failing to explain doctrine of *respondeat superior* arising upon the evidence. *Robinson v. Transportation Co.*, 489.

Whether a given statute is applicable to the controversy is a question of law for the court, and an instruction that the applicability of the statute was a matter for the jury is error, it being the function of the court to tell the jury what facts must exist to make the statute applicable as a matter of law. *Williams v. Hunt*, 572.

The charge of the court, after stating the evidence, in the manner in which the jury was instructed that the recollection of the evidence was for them *held* without error. *Bryant v. Reedy*, 748.

§ 29c. Instructions as to Burden of Proof.

The charge of the court on the burden of proof and the illustration of same by analogy to a scale *held* without error. *Bryant v. Reedy*, 748.

§ 30. Conformity to Pleadings and Evidence.

Instruction *held* for error in failing to refer to individual defendant and treating cause as solely against corporate defendant. *Robinson v. Transportation Co.*, 489.

Where there is no evidence that the accident in suit occurred in a business district it is error for the court, in its instructions to the jury, to read the statutory speed restrictions applicable to business districts. *Williams v. Hunt*, 572.

§ 31. Expression of Opinion by the Court in the Charge.

Plaintiff introduced testimony of several witnesses tending to establish the contract sued on. In its charge, the court named only two of plaintiff's witnesses and instructed the jury that if they believed the testimony of these two witnesses, and found by the greater weight of the evidence the facts to be as they had testified, to answer the issue in plaintiff's favor, *is held* prejudicial as amounting to an intimation that the jury might disregard the testimony of the rest of plaintiff's witnesses, or that such evidence was without significance. *Halsey v. Snell*, 209.

§ 32. Requests for Instructions.

A party desiring specific instructions on a particular phase of the law applicable to the evidence should aptly tender request therefor. *Bryant v. Carrier*, 191.

§ 33. Statement of Contentions and Objections Thereto.

Exceptions to the statement of contentions in the charge will not be sustained when appellant failed to bring the matter to the court's attention at the time. *Bryant v. Reedy*, 748; *Edwards v. Whitehead*, 838.

§ 34. Objections and Exceptions.

Inadvertent misstatement of the testimony of witnesses must be brought to the court's attention at the time so that the true evidence may be given the jury. *Bryant v. Reedy*, 748.

§ 36. Construction of Instructions and General Rules of Review.

Exceptions to disconnected portions of the charge will not be sustained when the charge is free from error when construed contextually as a whole. *Bryant v. Reedy*, 748.

§ 37. Form and Sufficiency of Issues.

In this controversy between the judgment debtor and the purchaser at the execution sale as to the amount of the bid, the form of the issue submitted

TRIAL—*Continued.*

is held not prejudicial, since it presented for the jury's determination the controverted amount of the bid, and the inclusion therein of matters relating to assumption of prior liens by the purchaser are deemed harmless surplusage. *Finance Co. v. Trust Co.*, 478.

§ 52. Agreements and Waiver of Jury Trial.

Where the parties do not waive trial by jury, nor consent that the court find the facts, it is error for the court to enter judgment without the aid of the jury on the controverted issues of fact raised by the pleadings. *McCullers v. Jones*, 464.

TRUSTS.

§ 1a. Creation of Express Trusts in General. (Limitation of actions to enforce, see Limitation of Actions § 3.)

Express trusts are created by contract, express or implied. *Teachey v. Gurley*, 288.

§ 1d. Creation of Charitable Trusts.

A charitable trust may be created for almost any purpose that tends to promote the well-being of social man unless forbidden by law or public policy, and the protection of animals is a permissive objective of a charitable trust. *Woodcock v. Trust Co.*, 224.

Indefiniteness of the beneficiaries is a characteristic of charitable trusts, and designation of the purpose of the trust to benefit members of a class, with power in the trustees to select individuals of that class as specific beneficiaries is sufficient, but the purpose of the trust must be sufficiently definite and complete to be administered. *Ibid.*

The doctrine of *cy pres* has no application in this State, and while the courts will seek to effectuate the intent of the donor of a charitable trust if his purpose is expressed with sufficient certainty, they will not undertake to substitute a similar trust for one that fails. *Ibid.*

Charitable trust which leaves funds in uncontrolled discretion of trustees' donees *held* void for uncertainty. *Ibid.*

§ 7. Actions to Establish Express Trust Resting in Parol.

Plaintiff mortgagor instituted this action alleging defendant, his former tenant, agreed to purchase at the foreclosure sale for plaintiff's benefit. *Held:* Evidence of prior negotiations and the conduct of the parties was competent to establish the alleged trust. *Henley v. Holt*, 384.

§ 8g. Construction and Operation of Charitable Trusts.

The English statute of charitable uses, 43 Elizabeth, ch. 4, prevailed in this State until superseded by C. S., 4033, and equities raised by charitable bequests have been administered by our courts, independent of the statute, in accord with applicable principles of equity. *Woodcock v. Trust Co.*, 224.

§ 15. Acts or Transactions Creating Resulting or Constructive Trusts.

A resulting trust is created when one person's money is invested in land and the conveyance taken in another's name. *Teachey v. Gurley*, 288; *Jackson v. Thompson*, 538.

A constructive trust arises when land is acquired through fraud, or when, though acquired originally without fraud, it is against equity that it should be retained by him who holds it. *Teachey v. Gurley*, 288.

Resulting and constructive trusts arise independent of any contract and no trust or confidence is present, but the trust relation is imposed by equity in order to work out the remedy. *Ibid.*

TRUSTS—*Continued.*

Grantor may engraft constructive trust upon his warranty deed upon a showing of fraud. *Briley v. Roberson*, 295.

Equity will enforce contract to devise by declaring heirs at law trustees for benefit of beneficiary under the contract. *Chambers v. Byers*, 373.

Where third persons wrongfully interfere with the fixed intent of testator to devise and bequeath property for plaintiff's benefit, and induce testator to alter such fixed intent and leave plaintiff nothing, plaintiff may impress the estate with a trust in his favor, even as against innocent beneficiaries of testator, since such beneficiaries, though innocent, would not have received the property but for the wrongful act of the third persons, and therefore receive the property under the obligation of restitution. *Bohannon v. Trotman*, 706.

§ 16. Right to Damages or Right to Follow Trust Property.

Action *held* for unliquidated damages for wrongful conversion of personalty, and not for recovery of the *res*, and action survived only against personal representative of deceased tort-feasor and could not be maintained against trustees under his will. *Suskin v. Trust Co.*, 347.

The lien of a judgment does not attach to land held by the judgment debtor under an unrecorded deed as a naked trustee or to which he has obtained bond for title with trust funds, nor may the judgment creditor contend that since he lent money for which the judgment was obtained in reliance on the debtor's interest in the land, he is therefore entitled to a lien under the principle of equitable levy, the relation of a judgment creditor to the property being insufficient to defeat the rights of the *cestuis que trustent*. *Jackson v. Thompson*, 539.

The purchase of land with money belonging to others creates a resulting trust for their benefit, entitling them to follow the funds into the land. *Ibid.*

Plaintiff may establish resulting trust on property of estate for act of third persons in wrongfully inducing testator not to devise property to plaintiff, even against innocent beneficiaries. *Bohannon v. Trotman*, 706.

§ 18d. Competency and Relevancy of Evidence in Actions to Establish Resulting Trusts.

Parol evidence is competent to establish a resulting trust. *Jackson v. Thompson*, 539.

USURY.

§ 1. Construction and Operation of Usury Statutes in General.

A note otherwise valid is not rendered void either as to principal or interest by the taint of usury, but is subject only to the penalties and forfeitures of the statute, one of which is the forfeiture of all interest when usury is properly pleaded and proven. C. S., 2306. *Pinnix v. Casualty Co.*, 760.

§ 9a. Limitations.

Since a junior lienor seeking to enjoin foreclosure under a prior mortgage on the same land until a *bona fide* controversy as to the amount due under the prior debt is settled, is not entitled to invoke the forfeiture of all interest, but is required to tender the principal of the debt plus legal interest, a decree continuing the injunction to the final hearing is not error notwithstanding defendants' plea of the two-year statute of limitations for the forfeiture of interest, N. C. Code, 442 (3), even if it be conceded that an action for forfeiture of the interest is barred by the statute. *Pinnix v. Casualty Co.*, 760.

§ 9b. Pleadings.

Usury must be pleaded. *Pinnix v. Casualty Co.*, 760.

VENDOR AND PURCHASER.

§ 5a. Construction and Operation of Options in General.

Giving of option with right of entry in purchaser for certain purposes does not pass title. *Lumber Co. v. Graham County*, 167.

§ 5c. Distinction Between Option and Contract of Sale.

Agreement *held* an option and not a contract of sale and purchase of real estate. *Kluttz v. Allison*, 379.

§ 6. Time of Conveyance.

Where an option does not specify the time within which the right to buy may be exercised, the right must be exercised within a reasonable time. *Ritter v. Chandler*, 703.

§ 23. Specific Performance.

Conceding that delivery of notes by the purchaser constituted an acceptance of the option and waived tender of the purchase price, the purchaser *is held* estopped by his laches in waiting more than ten years after the execution of the contract to demand specific performance. *Ritter v. Chandler*, 703.

§ 29. Rights of Parties as to Liens, Encumbrances and Prior Conveyances.

Voluntary deed executed fraudulently to defeat prior unregistered conveyance of life estate *held* void, the grantee in the deed to the fee having participated in the fraud. *Twitty v. Cochran*, 265.

§ 30. Rights of Parties in Regard to Leases of the Property.

A purchaser takes title subject to a lease recorded prior to the registration of his deed. In this case the lease was recorded ten minutes prior to the registration of the deed. *Freeman v. Morrison*, 240.

VENUE.

§ 1d. Residence of Corporations for Purpose of Venue.

The residence of a domesticated corporation for the purpose of determining proper venue is the county in which its principal place of business is located. C. S., 466. *Nutt Corp. v. R. R.*, 19.

Plaintiff, a domesticated corporation, instituted action against several railroad companies in a county other than its residence. There was no finding nor request to find that the cause of action arose outside the county of plaintiff's residence. *Held:* Defendants' motion to remove to the county of plaintiff's residence should have been allowed. *Ibid.*

WATERS AND WATER COURSES.

§ 6. Dams and Ponded Water.

The male plaintiff testified to the effect that prior to the construction of defendant municipality's water system dam, his property was valuable farm land, that after the construction of the dam water backed up in a stream draining plaintiff's land so that it did not drain the land as before, resulting in the deposit of quantities of silt, and that his drainage ditches that were several feet deep where they emptied into the stream fill with water to about the top, and that the land had become wet and soggy and ruined for agricultural purposes. *Held:* The evidence is sufficient to be submitted to the jury on the question of defendant municipality's wrongful operation of the dam resulting in an invasion of plaintiff's riparian right to have the stream flow past the land in its natural quantity and in its accustomed channel subject

WATERS AND WATER COURSES—*Continued.*

to the rights of other proprietors to a reasonable use of the water. *Sink v. Lexington*, 548.

§ 13. Determination of Whether Waters Are Navigable.

The common law rule that streams are navigable only as far as tide-water does not obtain in this State, our rule being that waters are navigable if they are, or may be, used for commerce of substantial and permanent character. *Ins. Co. v. Parmele*, 63.

Waters covering marsh lands at high tide so that boats drawing up to 20 inches may navigate same, but receding at low tide below the land, are not navigable waters. *Ibid.*

§ 15a. Title to Land Under Navigable Water and Contiguous Thereto.

Title to tide-lands is in the State. *Ins. Co. v. Parmele*, 63.

Marsh lands of more than 2,000 acres are not subject to entry and grant. C. S., 7540 (3). *Ibid.*

The State Board of Education, as successor to all powers and trusts of the president and directors of the Literary Fund of North Carolina, N. C. Constitution, Art. IX, sec. 10, is vested with title to all public lands, including marsh lands, owned by said Fund at the time of the adoption of the said provision of the Constitution. *Ibid.*

§ 15b. Conveyance of Land Under Navigable Water and Contiguous Thereto.

The State Board of Education may sell and convey the fee in mash lands which comprise one tract of marsh lands of more than 2,000 acres. C. S., 7621. *Ins. Co. v. Parmele*, 63.

The fact that marsh lands conveyed by the State Board of Education are thereafter filled in and reclaimed by the purchaser does not divest the title of the purchaser, C. S., 7540 (2), since the conveyance is of the fee and not an easement in the lands. *Ibid.*

The deed of the State Board of Education to the marsh lands in question *is held* good as against the State. Whether the purchaser's title is good as against the United States upon reclamation of the land in the construction of an inland waterway, C. S., 7583, is not decided. *Ibid.*

WILLS.

I. Nature and Requisites of Testamentary Disposition of Property in General

3. Testamentary Intent. Chambers v. Byers, 373.

II. Contracts to Devise

4. Requisites and Validity of Contracts to Devise. Chambers v. Byers, 373.
5. Actions on Contract to Devise. Halsey v. Snell, 209.
6. Measure of Damages and Recovery. Chambers v. Byers, 373.

VIII. Caveat Proceedings

28. Costs and Attorneys' Fees. In re Will of Slade, 361.

IX. Construction and Operation of Wills

31. General Rules of Construction. Bell v. Thompson, 231.
33b. Rule in Shelley's Case. Matthews v. Matthews, 204.
33c. Vested and Contingent Remainders and Defeasible Fees. Privott v. Graham, 199.
33g. Destruction of Particular Estate and Vesting of Remainder. Privott v. Graham, 199.
33h. Charitable Trusts. Woodcock v. Trust Co., 224.
34. Designation and Devisees and Legatees and their Respective Shares. Matthews v. Matthews, 204.
35a. Restraint on Alienation. Douglass v. Stevens, 688.
38. Residuary Clauses. Bell v. Thompson, 231.
39. Actions to Construe Wills. Woodcock v. Trust Co., 224.

X. Rights and Liabilities of Devisees and Legatees and Surviving Wife

40. Right of Wife to Dissent and Effect thereof. Bell v. Thompson, 231.
42. Lapsed, Void and Refused Legacies. Privott v. Graham, 199; Hill v. Colie, 408.
46. Nature of Title and Rights of Devisees. Privott v. Graham, 199; Seagle v. Harris, 339; Bright v. Hood, 410.
47. Right of Action against Third Person for Wrongfully Inducing Testator Not to Devise or Bequeath. Bohannon v. Trotman, 706.

WILLS—*Continued.*

§ 3. Testamentary Intent.

An agreement to adopt a minor and make her his heir, made between the person desiring to adopt the minor and the minor's parents, as the respective parties to the agreement, indicates that the instrument is not intended as a will. Michie's Code, 4131. *Chambers v. Byers*, 373.

§ 4. Requisites and Validity of Contracts to Devise.

Intestate made a written agreement with the parents of a minor to adopt the minor and make her his sole heir in consideration of the parents agreeing to the adoption and agreeing not to induce the minor to leave his lawful custody. The adoption was never made, but the minor lived with intestate and his wife as their child, and there was no evidence of repudiation of the contract, but only that intestate failed to fulfill it by executing a will. *Held:* The agreement being in writing, the statute of frauds does not apply, C. S., 988, and the contract to devise is valid and may be enforced by the minor upon her majority as the third person beneficiary. *Chambers v. Byers*, 373.

§ 5. Actions on Contracts to Devise.

Where plaintiff introduces competent evidence that defendant's testate promised to bequeath plaintiff a certain sum of money in consideration of plaintiff's forbearing to sue for injuries received in intestate's logging mill, evidence that the financial worth of testate at the time of the alleged contract was little more than the amount plaintiff claimed testate promised to bequeath him, is irrelevant. *Halsey v. Snell*, 209.

§ 6. Measure of Damages and Recovery.

When a valid, written contract to devise is established, equity will enforce the contract in favor of the beneficiary by declaring the heirs at law trustees for her benefit and decreeing conveyance by them to her, and thus grant specific performance of the contract, and this remedy is not in conflict with the rule that a contract to make a will cannot be specifically enforced and that the courts cannot make a will. *Chambers v. Byers*, 373.

§ 28. Costs and Attorneys' Fees.

Even though judgment is entered in favor of propounders, the trial court may tax the costs, including an allowance to counsel representing caveators, against the estate upon finding that the filing of the caveat was apt and proper and done in good faith. C. S., 1244; Public Laws of 1937, ch. 143, sec. 1. *In re Will of Slade*, 361.

§ 31. General Rules of Construction of Wills.

In construing a will, the testator's intent, as gathered from the entire instrument, should be given effect, and every part and clause considered and harmonized, provided the result is not inconsistent with the general intent. *Bell v. Thompson*, 231.

When the language of testator is not ambiguous, no evidence outside the instrument is competent in determining its intent, and the fact that the instrument contains misspelling, improper capitalization and punctuation and grammatical errors does not take it out of the rule when the testator's intent clearly appears therefrom. *Ibid.*

When a word is used in one part of the will in a certain sense, the same meaning will be given the word in construing other parts of the instrument. *Ibid.*

§ 33b. Rule in Shelley's Case.

Ordinarily, the rule in *Shelley's case* applies when the term "heirs" or "heirs of his body" is used in its technical sense of heirs *qua* heirs as an entire class

WILLS—*Continued.*

or denomination of persons and not merely as *descriptio personarum* of individuals embraced within the class. *Matthews v. Matthews*, 204.

§ 33c. Vested and Contingent Remainders and Defeasible Fees.

A devise in the residuary clause to testator's widow for life, with remainder over to testator's children with further provision that if any child should die leaving no issue who shall attain the age of twenty-one, the share of such deceased child should go to his living brothers and sisters, does not pass the indefeasible fee to testator's children, since all the children might die without issue attaining the age of twenty-one, in which event the testator would die intestate as to the reversion after the defeasance of the fee. *Privott v. Graham*, 199.

§ 33g. Destruction of Particular Estate and Vesting of Remainder.

The heirs at law of a deceased are to be determined as of the date of his death, and not as of date of termination of defeasible fee. *Privott v. Graham*, 199.

§ 33h. Charitable Trust.

Charitable trust to prevent cruelty to animals *held* void for uncertainty in leaving funds in uncontrolled discretion of trustees' donees. *Woodcock v. Trust Co.*, 224.

§ 34. Designation of Devisees and Legatees and Their Respective Shares.

The term "bodily heirs" when used as *descriptio personarum* is broader than the term "children," and means lineal descendants, including grandchildren and other lineal descendants. *Matthews v. Matthews*, 204.

Testator devised the lands in question to his son for the term of his natural life and after his death to his "bodily heirs, if any survive him, and should he die without issue, I will and desire that said land revert back to my heirs at law." Testator's son died leaving him surviving two children and a child of a deceased child. *Held:* If the devise conveyed a defeasible fee to testator's son under the rule in *Shelley's case*, then the contingency upon which the fee was to be defeated did not happen, and the devisee's grandchild is entitled to one-third thereof as a representative of her parent, or if the devise created a life estate only in the first taker, then the terms of the limitation over are sufficiently broad to include the first taker's grandchild as his lineal descendant, and she is entitled to a one-third interest therein with her uncles, sons of the first taker. *Ibid.*

§ 35a. Restraint on Alienation.

A devise of a vested remainder in fee in named beneficiaries with the condition that "they shall in no wise either sell or mortgage said property for a period of not less than 50 years" gives the beneficiaries immediate power of alienation upon obtaining deed from the life tenant, an absolute restraint on alienation, for any length of time, annexed to a grant or devise in fee, being void. *Douglass v. Stevens*, 688.

§ 38. Residuary Clauses.

Clause *held* to refer to personalty only, and was not residuary clause devising land not specifically devised. *Bell v. Thurston*, 231.

§ 39. Actions to Construe Wills.

When a *bona fide* dispute exists between an executor and the beneficiaries under the residuary clause of the will as to the validity of a charitable bequest therein, action for the determination of the legal effect of the bequest is properly instituted under the Declaratory Judgment Act, ch. 102, Public Laws of 1931. *Woodcock v. Trust Co.*, 224.

WILLS—*Continued.*

§ 40. Right of Wife to Dissent and Effect Thereof.

When a widow fails to dissent from the will of her husband in the manner and within the period allowed by the statute, testamentary provision for her in real property excludes her from dower, nothing else appearing. *Bell v. Thurston*, 231.

§ 42. Lapsed, Void and Refused Legacies.

Lapsed, void or refused devises pass under the residuary clause if there be one, and in the absence of a residuary clause they descend to the heirs at law as in case of intestacy. *Privott v. Graham*, 199; *Hill v. Colie*, 408.

A legacy of "household furniture and tangible property in, around and about or used in connection" with testator's residence is defeated by testator's sale and abandonment of his residence and his failure to establish any other residence. *Hill v. Colie*, 408.

A devise of real property is defeated by testator's sale of all his real property prior to his death. *Ibid.*

§ 46. Nature of Title and Rights of Devisees.

Plaintiffs, children of testator, were the owners of the defeasible fee in the land in question under the residuary clause of the will, and were the heirs at law entitled to the reversion if the fee should be defeated. *Held:* Plaintiffs were the owners of the land either as devisees under the will or as heirs at law of testator, and their deed would convey a good, indefeasible fee to the *locus in quo*. *Privott v. Graham*, 199.

Direction in a will that the executor sell certain lands and use the proceeds of sale to pay debts of the estate, and divide the balance among testator's three children, are imperative directions constituting an equitable conversion of the property into personalty. *Scagle v. Harris*, 339.

All beneficiaries must unite in electing a reconversion. *Ibid.*

Beneficiaries under the residuary clause of a will may maintain an action to recover chattels passing to them under the residuary clause. *Bright v. Hood, Comr.*, 410.

§ 47. Right of Action Against Third Person for Wrongfully Inducing Testator Not to Devise or Bequeath.

Where third persons wrongfully prevent testator from devising property for plaintiff's benefit, plaintiff may impress the estate with a trust even as against innocent beneficiaries. *Bohannon v. Trotman*, 706.

CONSOLIDATED STATUTES AND MICHIE'S CODE CONSTRUED.

SEC.

74. When personalty is insufficient, administrator may apply for authority to sell realty at any time. *Graham v. Floyd*, 77. Person claiming sole seizin has right to determination of issue before sale to make assets. *Chambers v. Byers*, 373.

86. Court may authorize private sale of realty to make assets upon proper petition and proof that such will be advantageous to estate. *Graham v. Floyd*, 77.

99. Disapproval of claim in her own favor by widow in her capacity as administratrix solely on ground propriety lays no proper basis for adjudication under this section. *In re Shutt*, 684.

100. Assertion of right to retain insurance funds as assignee of policy is not a claim against the estate of insured. *Sellars v. Bank*, 300.

137 (6). Mother of deceased employee leaving no dependents *held* entitled to award under the facts. *Hamby v. Cobb & Homewood, Inc.*, 813.

162, 159, 461. Common law rule that personal right of action does not survive has been changed by statute so that such actions, except those specified, survive against personal representative. *Suskin v. Trust Co.*, 347.

182, *et seq.* Agreement to adopt minor is not an "adoption." *Chambers v. Byers*, 373.

218 (c). When statutory liability of stockholder is reduced to judgment it becomes fixed asset for benefit of creditors and may be sold with other assets in bulk by commissioner. *Little v. Steele*, 343. Claim against insolvent bank for securities deposited for safekeeping is based upon express trust, and claimant is not a "creditor" or "claimant" within the meaning of the statute, and the statute has no application thereto. *Bright v. Hood, Comr.*, 410.

276 (a). Warrant must allege that refusal to support illegitimate child was willful. *S. v. McLamb*, 322.

324. Liabilities of obligors on official bonds and indemnity contracts is not enlarged by the statute. *Midgett v. Nelson*, 396.

415. Voluntary nonsuit will not bar subsequent action even though brought *in forma pauperis*. *Briley v. Roberson*, 295. Applies to limitations generally, including contractual limitations in policy of insurance. *Distributing Co. v. Ins. Co.*, 596. Dismissal for misjoinder of parties is nonsuit within provisions of statute. *Ibid.*

437 (a). Does not impair contractual obligations and is valid. *Building & Loan Assn. v. Jones*, 30.

437 (3). Applies only to actions to foreclose and not to exercise of power of sale, and statute must be pleaded. *Spain v. Hines*, 432.

441 (4). Action for breach of express trust is barred in three years. *Teachey v. Gurley*, 288. Cause of action for breach of express trust accrues upon the disavowal or repudiation of the trust. *Bright v. Hood, Comr.*, 410.

441 (6). Action against surety on guardianship bond is barred after three years from breach complained of. *Copley v. Scarlett*, 31.

441 (9). Whether cause of action for reformation of instrument for mistake was barred as between the original parties *held* for jury. *Low-*

CONSOLIDATED STATUTES—*Continued.*

SEC.

cry v. Wilson, 800. Whether action was instituted within three years from discovery of alleged fraud *held* for jury. *Briley v. Roberson*, 295.

442 (3). Is inapplicable in suit to restrain foreclosure upon tender of debt with legal interest. *Pinnix v. Casualty Co.*, 760.

445. Cause of action to enforce resulting trust is barred in ten years. *Teachey v. Gurley*, 288.

446. Rental agent is not real party in interest in action for rents, and may not maintain action, and this rule is not changed by C. S., 2367. *Ins. Co. v. Locker*, 1.

451. Court may sign order for sale of realty to make assets after 20 days from service of summons and complaint and filing of answer by guardian *ad litem* for minor heirs. *Graham v. Floyd*, 77.

453. It is duty of guardian *ad litem* of minor heirs in proceedings to sell lands to make assets to file answer. *Graham v. Floyd*, 77.

466. Residence of domesticated corporation for purpose of venue is the county in which its principal place of business is located. *Nutt Corp. v. R. R.*, 19.

468. Action instituted by domesticated corporation in county other than its residence should have been removed thereto on motion aptly made, there being no finding that the cause of action arose in county other than its residence. *Nutt Corp. v. R. R.*, 19.

480, 481. When original summons is not kept alive by *alias* and *pluries* summons, it works discontinuance. *Gower v. Clayton*, 309.

483 (1). Affidavits *held* insufficient to show that person upon whom process was served was "local agent." *Plott v. Michael*, 665.

483 (2). Heirs under 14 must be served under this statute in proceedings to sell lands to make assets. *Graham v. Floyd*, 77.

484. Averment that defendants are nonresidents is insufficient to support service by publication. *Groce v. Groce*, 398.

506. Complaint must contain concise statement of facts constituting cause of action, and mere allegation of the conclusion which the pleader conceives should be drawn from the evidence he intends to introduce is insufficient. *Hinton v. Whitehurst*, 99.

506, 519. Party is entitled to put in his pleading a concise statement of his cause of action or defense, and nothing more. *Patterson v. R. R.*, 38.

509, 537. Defendant has thirty days from determination of motion to strike out in which to answer or demur. *Heffner v. Ins. Co.*, 359.

519. Denial in language of this statute is not an admission, but puts plaintiff to proof. *Campbell v. Trust Co.*, 680.

535. Complaint will be liberally construed upon demurrer. *Cunningham v. Haynes*, 456; *Sohmer v. Supply Co.*, 522.

537. Motion to strike out as matter of right is made too late after answer is filed and on day case is calendared for trial, but court may consider the motion in its discretion. *Warren v. Land Bank*, 206. Allegations that defendant carried liability insurance should have been stricken out on motion. *Duke v. Children's Com.*, 570. *Held:* Motion to strike allegations from answer should have been allowed, the matter not constituting a defense. *Patterson v. R. R.*, 38.

CONSOLIDATED STATUTES—*Continued.*

SEC.

542. Evidence of justification or mitigation of libel must be supported by proper plea. *Bryant v. Reedy*, 748.

547. Where real party in interest is joined, the action is a new action as to him, and cause does not relate back so as to prevent bar of statute. *Ins. Co. v. Locker*, 1.

564. Charge *held* for error in failing to instruct jury in regard to concurrent negligence arising on the evidence. *Harvell v. Wilmington*, 608. When controverted question is existence of condition precedent and not the existence of the contract, failure of charge to define contract will not be held for error. *Walter v. Winecoff*, 356. Instruction on issue of contributory negligence *held* for error in failing to explain law arising upon evidence relating to violations of safety statutes relied on by defendant. *Spencer v. Brown*, 114. Instruction *held* for error in failing to refer to individual defendant and treating cause as solely against defendant. *Robinson v. Transportation Co.*, 489. Instruction *held* for error in failing to explain doctrine of *respondeat superior* arising upon the evidence. *Ibid.* Prohibition of statute applies to remarks of court during examination of witness. *S. v. Harvey*, 9.

567. On motion to nonsuit evidence tending to support plaintiff's claim is to be considered in light most favorable to him. *Briley v. Roberson*, 295; *Bright v. Hood, Comr.*, 410.

578. Court may affirm, amend, modify, or set aside finding or make additional findings in consent reference, providing there is supporting evidence. *Holder v. Mortgage Co.*, 128.

614, 623-625. Judgment by confession, like any other judgment, becomes lien on judgment debtor's real estate as of the date the judgment is docketed. *Keel v. Bailey*, 159.

632, 638. Where administrator *c. t. a.* is appointed, the appointment revokes prior letters of administration, C. S., 31, and separates him from all connection with the estate so that he is not party aggrieved thereby and may not appeal. *In re Estate of Suskin*, 219.

637. When Superior Court rules that clerk had no authority in the premises in proceedings for adjudication of claim against estate under C. S., 99, the ruling ends the matter and the Superior Court has no further jurisdiction notwithstanding the broad provisions of this statute. *In re Shutt*, 684.

643. When solicitor approves defendant's statement it becomes "case on appeal" and is not thereafter subject to correction. *S. v. Dee*, 509. When solicitor accepts service of statement of case on appeal and thereafter agrees that statement should constitute "case on appeal," it becomes so, and with record, may alone be considered. *S. v. Miller*, 317.

643, 644. Since the life of defendant was at stake, the Supreme Court considered the "case on appeal" as "deemed approved" although it was filed in Supreme Court without agreement prior to expiration of time allowed for filing exceptions or countercase. *S. v. Parnell*, 467.

649. Affidavit which fails to aver that appellant is advised by counsel learned in the law that there is error of law in the judgment appealed from, is fatally defective. *Gilmore v. Ins. Co.*, 674.

CONSOLIDATED STATUTES—*Continued.*

SEC.

690. Judicial sale not held on a Monday or on one of first three days of term of court is void, and where record discloses that sale was had on day other than those allowed, purchaser has notice. *Bladen County v. Breece*, 544.

699-710. Tenant making improvements is entitled to have allotted to her the part of the property improved. *Jenkins v. Strickland*, 441.

867. As amended by ch. 349, Public Laws of 1933. Ordinarily, *mandamus* will lie to compel municipality to levy tax to pay valid judgment. *Casualty Co. v. Comrs. of Saluda*, 235.

914. Receipt of notice of motion to strike out by mail renders service of notice by officer nugatory. *Heffner v. Ins. Co.*, 359.

922. Ten-day period for cancellation of compensation insurance policy runs from receipt of notice of cancellation by mail. *Pettit v. Trailer Co.*, 335.

987. Evidence *held* to support finding that promise was original undertaking not coming within the statute. *Funeral Home v. Spencer*, 702.

988. Sufficiency of memorandum to take contract of sale of realty at auction sale out of statute of frauds. *Smith v. Joyce*, 602. Parol evidence is incompetent to establish essential element of contract required to be in writing. *Kluttz v. Allison*, 379.

1131, 1156. Right to amend charter does not include right to amend so as to defeat preferred stockholder's right to declaration of accrued dividends. *Patterson v. Hosiery Mills*, 806.

1137. Affidavits *held* insufficient to show that nonresident corporation had "property" in this State or was "doing business" here for purpose of service of process under this section. *Plott v. Michael*, 665.

1225. When it is determined on appeal that claimant is entitled to improvements claimed in partition, claimant is not to be taxed with Superior Court costs. *Jenkins v. Strickland*, 441.

1243. In action against several defendants, the taxing of the costs is in the discretion of the court. *Kluttz v. Allison*, 379.

1244. Court may tax costs against estate in unsuccessful caveat proceedings. *In re Will of Slade*, 361.

1446. Judge holding courts for Spring Circuit has jurisdiction of entire term beginning in June and running into July. *West v. Woolworth Co.*, 214.

1608 (cc). Superior Court has discretionary power to reinstate appeal from county court upon motion aptly made. *West v. Woolworth Co.*, 214.

1660. Allegations *held* sufficient to support cross-action by wife for divorce *a mensa et thoro*. *Ragan v. Ragan*, 36.

1666. Whether wife is entitled to alimony under this section is question of law on the facts and the court must find the facts. *Holloway v. Holloway*, 662. Where facts alleged in answer are sufficient, court need only find that facts are as therein alleged. *Ragan v. Ragan*, 36.

1667. In motion for alimony *pendente lite* in action instituted under this section court is not required to find facts unless adultery of wife is pleaded as a bar. *Holloway v. Holloway*, 662.

CONSOLIDATED STATUTES—*Continued.*

SEC.

1723. Title passes in condemnation proceedings when award is paid into court after confirmation of commissioner's report. *Lumber Co. v. Graham County*, 167.

1725. Costs may properly be taxed against defendant municipality even though jury finds plaintiff is not entitled to recover for taking of land for sidewalk. *Jervis v. Mars Hill*, 323.

1799. Defendant testifying in own behalf is entitled to same credit as any other witness when jury finds him worthy of belief. *S. v. Dee*, 509.

1870. Indemnity contract of Assistant Fisheries Commissioner, which was not conditioned as required by statute, *held* not to cover liability for tort committed by him *colore officii*. *Midgett v. Nelson*, 396.

2188. Right of action against guardian for failure to pay all sums due accrues six months after date of ward's majority. *Copley v. Scarlett*, 31.

2306. Usury does not render note void, but only subjects it to the penalties prescribed by statute. *Pinnix v. Casualty Co.*, 760. Junior mortgagee enjoining foreclosure for usury must tender debt plus legal interest. *Ibid.*

2365. In summary ejectment tenant may show that landlord's title had terminated after tenancy was created. *Lassiter v. Stell*, 391.

2429. Letter written by plaintiff and received by defendant, containing demand for retraction of specified libel, *held* sufficient, C. S., 914, not being applicable. *Roth v. News Co.*, 23.

2432. Words charging innocent woman with incontinency are actionable *per se*, and it is sufficient if evidence is in substantial conformity with words alleged in bill of particulars. *Bryant v. Reedy*, 748.

2574. Allegations that agreement to lower rates resulted in lower prices to public, that plaintiff trucker had failed to obtain licenses for his trucks, *held* properly stricken out, the matters not constituting a defense. *Patterson v. R. R.*, 38.

2589. Statute must be construed strictly and need not be pleaded, and each essential step in exercise of power of sale, including execution of deed to last and highest bidder, must be completed before the expiration of the ten-year period. *Spain v. Hines*, 432.

2593 (d). Defense that property was worth debt at time it was bid in by *cestui* is available to guarantor on note. *Trust Co. v. Dunlop*, 196.

2621 (13). Failure of carrier by truck to obtain required licenses subjects him to penalty prescribed, but does not render his business illegal. *Patterson v. R. R.*, 38.

2621 (53). Evidence raising inference that driver was on wrong side of highway *held* sufficient on issue of negligence. *Robinson v. Transportation Co.*, 489.

2621 (57). Whether plaintiff failed to keep a proper distance behind vehicle going in same direction *held* for jury. *Smith v. Coach Co.*, 314.

2621 (59). Evidence that driver failed to signal his intention to stop *held* sufficient for jury on issue of negligence. *Smith v. Coach Co.*, 314.

2621 (102). Sentence for reckless driving *held* for error in exceeding maximum sentence fixed by the statute. *S. v. Crews*, 705. Mayor's court *held* without jurisdiction of charge of operating motor vehicle under influence of intoxicating liquor. *S. v. Johnson*, 319.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2673, 2787. Municipalities have been given police power to regulate filling stations, but ordinances must not be discriminatory. *Shuford v. Waynesville*, 135.

2688. Contract for removal of sludge is not "sale" within statute. *Plant Food Co. v. Charlotte*, 518.

2776 (r), *et seq.* Ordinance *held* not in substantial compliance with statutory requirements, and was not promulgated in conformity therewith. *Shuford v. Waynesville*, 135. Municipal ordinance regulating filling stations need not comply therewith, since municipalities have power to regulate them within police power conferred by general law, C. S., 2673, 2787. *Ibid.*

2787 (11) (31). Maintenance of traffic signals by municipality is governmental function, and municipality is not liable for negligent injury inflicted by employee in discharge of duties relating thereto. *Hodges v. Charlotte*, 737.

2948 (1). Election was held under charter provisions requiring approval of majority of qualified voters. *Surles v. Comrs. of Four Oaks*, 305.

3101, 3103. Defense that property was worth debt at time it was bid in by *cestui* is available to guarantor on note in payee's action thereon for deficiency judgment. *Trust Co. v. Dunlop*, 196.

3309. Connor Act extends protection only to creditors and purchasers for value, and not to grantee in fraudulent conveyance with knowledge *Twitty v. Cochran*, 265.

3309, 3311. When through mistake deed of trust does not secure full amount of note, it may not be reformed as against creditors or purchasers for value from trustor. *Lowery v. Wilson*, 800.

3323. Certificates of acknowledgment will be upheld if in substantial compliance with statute. *Freeman v. Morrison*, 240.

3411. Charge of unlawful possession for purpose of sale and charge of unlawful sale are separate offenses and support separate sentences on general plea of guilty. *S. v. Moschoures*, 321.

3411 (79). In prosecution under the act, there is no presumption that possession is for purpose of sale. *S. v. Lockey*, 525.

4033. Superseded English statute of charitable uses, but our courts of equity have administered charitable trusts independent of the statute. *Woodcock v. Trust Co.*, 224.

4096. When widow fails to dissent from will in manner and within time prescribed by statute, testamentary provision for her in real property excludes her from dower. *Bell v. Thurston*, 230.

4131. Agreement to adopt minor and make her his heir indicates that instrument was not intended as a will. *Chambers v. Byers*, 373.

4200. Intentional killing of human being with deadly weapon implies malice, and, nothing else appearing, constitutes murder in second degree. *S. v. Hawkins*, 326.

4209. When two defendants aid and abet each other in the commission of the crime, both may be convicted as principals on charge of carnal knowledge. *S. v. Hall*, 639. Charge of carnal knowledge and rape may be properly joined in indictment, and State is not required to elect between the charges. *Ibid.*

CONSOLIDATED STATUTES—*Continued.*

SEC.

4214. Charge of assault with deadly weapon with intent to kill, resulting in serious injury, is a charge of felony. *S. v. Clegg*, 675.

4216. Evidence that defendant pointed gun at deceased *held* to preclude nonsuit in prosecution for involuntary manslaughter. *S. v. Head*, 700.

4267 (a). Defendants threatening use of firearms must have possession of weapons in order to be guilty of "robbery with firearms." *S. v. Keller*, 447.

4343. Record evidence *held* insufficient to overrule nonsuit on charge of fornication and adultery. *S. v. Miller*, 317.

4651. Affidavit in pauper appeal must be made by defendant and not by his attorneys. *S. v. Robinson*, 365.

5467, 5468. *Mandamus* will not lie to compel levy of tax for necessary school facilities prior to time statute requires commissioners to perform such duty. *Mears v. Board of Education*, 89.

5923. State Board of Elections is given supervision over primaries and elections and has duty to compel observance of election laws. *Burgin v. Board of Elections*, 140.

6081. Evidence *held* insufficient to show statutory duty on defendant owner to provide two exits from sleeping quarters. *Woods v. Hall*, 16.

6479 (5). Provision for immediate notice of death requires exercise of reasonable diligence under the circumstances. *Gorham v. Ins. Co.*, 526.

7540 (2). Fact that marsh lands conveyed by State Board of Education are thereafter filled in by purchaser does not divest purchaser's title. *Ins. Co. v. Parmele*, 63.

7540 (3). Tide-lands constituting one continuous tract of marsh lands of more than 2,000 acres are not subject to entry and grant. *Ins. Co. v. Parmele*, 63.

7621. State Board of Education may sell marsh lands comprising contiguous tract of more than 2,000 acres. *Ins. Co. v. Parmele*, 63.

7880 (111). Does not apply to operation of buses for hire within a city. *Bus v. Maxwell*, 12.

8081 (bbb). Industrial Commission may review award for changed condition upon petition filed within year from last payment. *Knight v. Body Co.*, 7. Commission has jurisdiction to review award and alter compensation only upon finding of "change of condition." *Murray v. Knitting Co.*, 437.

8081 (i), (a). Each municipal corporation is subject to Compensation Act, even though it employs less than five employees. *Rape v. Huntersville*, 505.

8081 (i), (e). Where for exceptional reasons computation of "average weekly wage" by enumerated methods would be unfair, Commission may resort to other methods of computation. *Early v. Basnight & Co.*, 103, and evidence *held* sufficient to support finding of "exceptional reasons." *Ibid.*

8081 (k). When employee employs more than five employees it will be presumed that parties have accepted provisions of Compensation Act. *Tscheiller v. Weaving Co.*, 449.

CONSOLIDATED STATUTES—*Continued.*

SEC.

8081 (mm), (q), (t). Employee is entitled to full compensation for loss of vision although prior to accident he had astigmatism. *Schrum v. Upholstering Co.*, 353.

8081 (r). Third person tort-feasor is liable only for amount sufficient to compensate employee for injury. *Rogers v. Construction Co.*, 269. Rights and remedies under Compensation Act exclude common law remedies as between employer and employee. *Tscheiller v. Weaving Co.*, 449.

CONSTITUTION, SECTIONS OF, CONSTRUED.

ART.

I, sec. 12. Charge of assault with deadly weapon with intent to kill, resulting in serious injury, is charge of felony requiring indictment. *S. v. Clegg*, 675.

I, sec. 14. Sentence on both charges of illegal possession of intoxicating liquor for purpose of sale and illegal sale *held* not cruel and unusual punishment. *S. v. Moschoures*, 321.

V, sec. 4. Debt retired by application of sinking fund is reduction of outstanding indebtedness within constitutional limitation, and failure to complete refunding operation within fiscal year has no bearing on question. *Royal v. Sampson County*, 259. Election under this section is required to be carried only by majority of those voting therein. *Sessions v. Columbus County*, 634; *Twining v. Wilmington*, 655. But in apposite cases, Art. VII, sec. 7, is also binding. *Ibid.*

V, sec. 6. County may levy taxes for necessary expenses within this limitation without a vote or special legislative approval, and for necessary expenses in excess of the limitation without a vote for special purpose with special legislative approval; but for purposes other than necessary expenses vote is required regardless of whether tax is within or in excess of the limitation. *Sessions v. Columbus County*, 634.

VII, sec. 7. Municipality may not bind itself by contract creating a debt except for necessary expenses, even within exercise of its powers, unless question is approved by majority of its qualified voters. *Madry v. Scotland Neck*, 461. Election under this section must be approved by majority of qualified voters, and this section is binding in apposite cases in addition to Art. V, sec. 4; bonds for other than necessary expenses must be submitted to vote under this section. *Twining v. Wilmington*, 655; *Sessions v. Columbus County*, 634.

IX, sec. 10. State Board of Education is vested with title to State Lands. *Ins. Co. v. Parmele*, 63.